COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2018

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

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

29 March 2019

Dear Minister,

It is my pleasure to present to you the Annual Report of the Company Law Review Group (CLRG). The Report outlines the progress on the work programme of the CLRG for 2018-2020 to date. Since its reconstitution in June 2018, the CLRG has delivered on substantive items of its work programme, with reports submitted and published in Q4 and Q1 2019.

As Chairperson, I am acutely aware of the significant responsibility the CLRG holds in advising you in the best interest of the public. In December 2018, the CLRG formally adopted its Code of Practice, reflecting the standard of ethics and transparency expected of all members.

The CLRG submitted its Report on the '*UNCITRAL Model Law on Cross-Border Insolvency*' to the Department for consideration in December 2018. The report examines and makes recommendations as to whether or not it is desirable in Irish Company Law to adopt the Model Law. Given the uncertainty that Brexit brings, and the hugely important trading relationship we have with the United Kingdom, the group prioritised this item of work. It is my belief that the Model Law provides a cross-border insolvency administration which is functional and adaptable and gives security to companies to which EU Regulation does not apply. Special credit is due to Barry Cahir, who chaired the Committee that produced the Report.

In March 2019, the Review Group's Corporate Insolvency Committee's Report on the '*Regulation of Receivers'* was submitted for consideration in response to your letter of 5 December 2018, requesting the Review Group to examine and recommend ways in which company law might be potentially amended to ensure the better governance and regulation of receivers. The extensive deliberations that form the Report's conclusions were conducted by the Corporate Insolvency Committee chaired by Mr. Barry Cahir, whom I would again like to sincerely thank, along with the Committee members who undertook a wide-ranging review of the issue. Recommendations for legislative change are proposed in the report which could potentially alleviate some of the difficulties highlighted by the *Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach*, improving both transparency and accountability in relation to the work of receivers.

It is of the utmost importance to the CLRG that the group is not seen as passive but is rather an activist body, fulfilling its duty to monitor, review and advise on all matters relating to Company Law.

In this context, In February 2019, the Review Group's Statutory Committee made a submission to the Department of Business, Enterprise and Innovation's public consultation on the *'Limited Partnerships Act 1907'*. I must acknowledge the work of the Committee in preparing a comprehensive and balanced submission within a very limited timeframe.

In addition to the reports and submission, the Review Group's Part 23 Committee has begun work on considering the company law issues that will arise on the implementation, post-Brexit, of EU Central Securities Depositories Regulation 909/2014. At present, it is envisaged that the CREST system for recording share ownership and transfer will be discontinued 24 months following Brexit and replaced by an intermediated system more similar to that used in Continental civil law jurisdictions. That raises a number of issues which may require amendments to the Companies Act.

The work of the CLRG is ongoing and it will continue to advise you on how it considers it best to update and improve company law, ensuring that the Companies Act 2014 is operating as envisaged. I look forward to working together to guarantee that Ireland continues to be seen as a leading place to conduct business.

I would like to express my sincere thanks to fellow Review Group members, both present and those who left the Group in 2018, for all their input into the work of the Group. I would also like to thank the Department of Business, Enterprise and Innovation for their support, the Secretariat, particularly new CLRG Secretary, Ms. Tara Keane, and Ms. Síona Ryan who finished in the role late last year. Ms. Ryan was instrumental in progressing the work of the Group over 3 years and we wish her well in her new role.

Finally, I would like to pay particular tribute to my predecessor, Dr Thomas B Courtney, who presided over and drove forward a prodigious amount of work during his 18 years as the first Chair of the Company Law Review Group. Under his leadership, the Review Group produced 16 Annual Reports, 8 special reports as well as the General Scheme of the Companies Bill, which became the Companies Act 2014. That Act reformed, updated and consolidated the law in an unprecedented way, all for the common good, streamlining corporate procedures for the vast majority of companies in Ireland. Tom has made a unique contribution to the development of our company law and has set a very high bar for those of us who follow. We are greatly in his debt.

Yours sincerely,

Paul Egan
Chairperson
Company Law Review Group

1. Introduction to the Annual Report 2018

1.1 The Company Law Review Group

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

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

1.2 The Role of the CLRG

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

1.3 Policy Development

The CLRG presents its recommendations on matters in its work programme to the Minister. The Minister reviews the recommendations of the CLRG and decides the policy direction to be adopted.

1.4 Contact information

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

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

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

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The Minister appointed current members of the CLRG in June 2018, and their term of office runs to 31 May 2022.

Paul Egan	Chairperson (Mason Hayes and Curran)
Sinead Boyle	Irish Auditing and Accounting Supervisory Authority (IAASA)
Barry Cahir	Irish Society of Insolvency Practitioners (Beauchamps)
Barry Conway	Ministerial Nominee (William Fry)
Máire Cunningham	Law Society of Ireland (Beauchamps)
Helen Curley	Ministerial Nominee (DBEI)
Richard Curran	Ministerial Nominee (LK Shields)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
Jeanette Doonan	Revenue Commissioners
Ian Drennan	Director of Corporate Enforcement
Bernice Evoy	Banking and Payments Federation Ireland
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General (in succession to Una McEvoy)
Tanya Holly	Ministerial Nominee (DBEI)
Shelley Horan	Bar Council of Ireland
Gillian Leeson	Euronext Ireland
John Loughlin	CCAB-I (PWC)
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Small Firms Association (KomSec)
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)

Una McEvoy	Office of the Attorney General (replaced by Rosemary Hickey)
David McFadden	Ministerial Nominee (Companies Registration Office)
Salvador Nash	Institute of Chartered Secretaries and Administrators (KPMG)
Ciara O'Leary	Irish Funds Industry Association (Maples and Calder)
Kevin O'Neill	The Courts Service
Gillian O'Shaughnessy	Ministerial Nominee (Byrne Wallace)
Maureen O'Sullivan	Registrar of Companies
Eadaoin Rock	Central Bank of Ireland

The members below served on the Group until June 2018.

Dr. Thomas Courtney	Former Chairperson
Deirdre-Ann Barr	Ministerial Nominee (Matheson)
Jonathan Buttimore	Office of the Attorney General
Eleanor Daly	Law Society of Ireland
Grainne Duggan	Bar Council of Ireland
Mark Fielding	Irish Small and Medium Enterprises Association
Brian Hutchinson	Ministerial Nominee (University College Dublin)
William Johnston	Ministerial Nominee (Arthur Cox)
Brian Kelliher	Irish Funds Industry Association
Deirdre O'Higgins	Ministerial Nominee (DBEI)
Lynn O'Sullivan	Ministerial Nominee (DBEI, Legal Advisor)
Noel Rubotham	Courts Services

2.2 Code of Practice

In December 2018, the CLRG adopted its 'Code of Practice'. The purpose of the Code is to ensure the Group is operating within a comprehensive and robust corporate governance framework. It sets out terms of office for membership, the decision-making process of the Group, as well as the legislative requirements and standards that all CLRG members are expected to adhere to as members of a statutory advisory body.

The Code reflects the unique position of the CLRG in advising the Minister. Members do not serve on the CLRG to represent the views of their nominating bodies, but rather to use their technical expertise and professional experience to advise the Minister on matters pertaining to company law in the public interest. In discharging this duty, it is essential that the Group be seen as leaders in the area of transparency and ethics, for this reason, the Code offers guidelines for members who may find themselves in a position whereby they experience a conflict of interest.

The Code may also assist members of the public in understanding the purpose and role of the Group in the wider development of policy in relation to company law.

A copy of the Code is set out in Appendix A2.

3. The Work Programme

3.1 Introduction to the Work Programme

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

3.2 Company Law Review Group Work Programme 2018-2020

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

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

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

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

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

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

3.3 Additional Work Programme item

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

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

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

If a receiver is a receiver/manager should there be a requirement for the receiver to supply information to the borrower and potentially other creditors, particularly preferential creditors, on the progress of the receivership.

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

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

(4) Any other recommendations the CLRG consider appropriate.

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

3.4 Plenary Meetings of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications. Two CLRG Plenary Meetings were held in 2018 on 17 September and 10 December.

3.5 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. The Committees co-opt further members to assist their deliberations. CLRG members volunteer to serve on Committees which are relevant to their interests and area of expertise. There are 5 subcommittees and their membership is set out in Appendix A1.

3.6 Statutory Committee (Item 1)

The Statutory Committee was reconvened in September 2018 for the purposes of review of companies' legislation that is enacted without prior review by the full Review Group, to report and advise on company law matters where there is a limited time available to compose a report or submission, and to consider potential amendments to the Companies Act in light of case law and submissions received.

In early 2019 the Committee made a submission in response to the Department of Business, Enterprise and innovation's Public Consultation on the Limited Partnerships Act 1907. Given the interconnection of company law and the law relating to limited liability partnerships, as well as previous consideration by the Review Group of the law relating to limited partnerships, the Subcommittee concluded that it would be of benefit to the Department to have a broad analysis by those with technical expertise, at their disposal. A copy of the submission is set out in Appendix A3.

The Committee will continue to meet on matters arising as appropriate.

3.7 Corporate Enforcement Committee (Item 2)

A discussion document on the enforcement of company law was compiled previously to present an overview of issues related to the compliance with, and enforcement of company law in Ireland for discussion by the CLRG.

Given the significant report published by the Law Reform Commission, it has been necessary to review and amend this work to reflect areas of overlap and various other issues.

The Committee will continue to progress its work with a view to presenting a report for consideration and formal adoption by the CLRG.

3.8 Corporate Insolvency Committee (Item 3, 4 & 5 and additional item)

The Work Programme of the CLRG has placed a strong emphasis on the area of insolvency, and the Committee met on 7 occasions throughout the course of 2018 and 5 times during 2019.

The Committee completed the *Report on UNCITRAL Model Law on Cross-Border Insolvency*. The recommendations contained within the report intend to make a clear case as to why the Model Law should be adopted in Ireland. The report was formally adopted by the CLRG on the 10th December 2018. The report was submitted to the Minister for consideration and subsequently published on the CLRG website. A copy of the report is set out in Appendix A4.

In preparation for this report, an extensive review of cross-border corporate insolvency law in Ireland and the position in other common law jurisdictions was undertaken. Each article of the Model Law was examined from a practical stand point, with a view to establishing the ways in which its' adoption may impact our company law framework along with the various stakeholders involved, from insolvency practitioners to unsecured creditors. In total, the Group reviewed 32 articles, making a recommendation on each.

Adoption of the Model Law will provide business with an increased level of certainty when operating in Ireland. It is hoped that by providing an internationally recognised framework for cross-border insolvency we could also further improve conditions for continued foreign direct investment. Equally, within the context of Brexit, and given the hugely significant trading relationship we have with our immediate neighbour, it is of vital importance that we have a cross-border insolvency administration which is functional and adaptable.

The Committee has delivered its report on the additional item, the regulation of receivers.

3.9 Corporate Governance Committee (Item 6)

The Committee has been tasked with reviewing the operation of the Summary Approval Procedure. The CLRG in the General Scheme of the Companies Consolidation and Reform Bill Pillar A recommended that the old 'whitewash' procedures deployed by the previous acts should be replaced with a single, stream-lined, validation procedure.

This recommendation was implemented as a 'summary approval procedure' found in Chapter 7 of Part 4 of the Companies Act 2014.

The Chapter sets out the 'restricted activities' which can be validated via the Summary Approval Procedure. These are:

a) Giving of financial assistance by the company for the acquisition of the company's own shares;

b) Reduction of company capital;

c) Variation of company capital on reorganisation;

d) Pre-acquisition profits and losses being treated in a holding company's financial statements as profits available for distribution;

e) Making of loans to directors and connected persons

f) Domestic merger;

g) Commencement of members' voluntary winding up.

An initial discussion document has been prepared by the Secretariat. The Committee will meet in 2019 with a view to developing a report which can be presented to the CLRG Plenary for deliberation and adoption.

3.10 Part 23 Committee

The Chairperson convened the Part 23 Committee in December 2018 to consider proposals in the area of share transfer that will affect public companies. Following Brexit, the CREST system of facilitating the recording of ownership and effecting transfers of shares will become unavailable to Irish companies. The Committee will generate feedback on the alternative system being proposed, highlighting any issues arising under the Act and advising the Minister accordingly.

In February 2018, members of the Committee made a submission on the transposition into Irish law of EU Shareholders Rights Directive 2017-828, which submission was adopted by the Review Group at its meeting on 17 September 2018. A copy of the submission is set out in Appendix A5.

Appendix A1 Committees of the Review Group

(a) Statutory Committee 2018

Paul Egan	Chairperson
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Ministerial Nominee (Small Firms Association)
Moya Moore	Office of the Attorney General
Máire Cunningham	Law Society of Ireland
Rosemary Hickey	Office of the Attorney General
David McFadden	Ministerial Nominee (CRO)
Moya Moore	Co-opted to the Committee (Office of the Attorney General)
Maureen O'Sullivan	Registrar of Companies

(b) Corporate Enforcement Committee 2018

Ian Drennan	Chairperson
Sinead Boyle	Irish Auditing and Accounting Supervisory Authority (IAASA)
Eadaoin Collins	Department of Business, Enterprise & Innovation
Barry Conway	Ministerial Nominee (William Fry)
Máire Daly	Irish Business and Employers' Confederation (IBEC)
Sabha Greene	Ministerial Nominee (DBEI)
Michael Halpenny	Irish Congress of Trade Unions
Shelley Horan	Bar Council of Ireland
Mary Hughes	Revenue Commissioners
Rosemary Hickey	Office of the Attorney General
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
Vincent Madigan	Ministerial Nominee

Kathryn Maybury	Small Firms Association (KomSec)
Ralph McDarby	Institute of Directors in Ireland
Salvador Nash	Institute of Chartered Secretaries and Administrators (KPMG)

(c) Corporate Insolvency Committee 2018

Barry Cahir	Chairperson
Helen Curley	Ministerial Nominee (DBEI)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
John Loughlin	CCAB-I (PWC)
Vincent Madigan	Ministerial Nominee
Kevin O'Neill	The Courts Service
Paddy Purtill	Revenue Commissioners

(d) Corporate Governance Committee 2018

Ralph MacDarby	Chairperson
Barry Conway	Ministerial Nominee (William Fry)
Richard Curran	Ministerial Nominee (LK Shields)
Helen Curley	Ministerial Nominee (DBEI)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
Aisling MacArdle	Irish Stock Exchange
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Small Firms Association (KomSec)
Salvador Nash	Institute of Chartered Secretaries and Administrators (KPMG)
Eadaoin Rock	Central Bank of Ireland

Paul Walsh	Revenue Commissioners
Therese Walsh	Ministerial Nominee (DBEI)

(e) Part 23 Committee 2018

Paul Egan	Chairperson
Tanya Holly	Ministerial Nominee (DBEI)
Gillian Leeson	Ministerial Nominee (William Fry)

COMPANY LAW REVIEW GROUP

CODE OF PRACTICE

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1. The Company Law Review Group

1.1. The Company Law Review Group

The Company Law Review Group (CLRG) is a statutory advisory expert body charged with advising the Minister for Business, Enterprise & Innovation ("the Minister") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014 (see Appendix 1).

1.2 Membership

The members of the CLRG are appointed by the Minister in accordance with section 960 of the Companies Act 2014. 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 unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation. The current membership of the CLRG can be found at www.clrg.org/About-Us/Members/. There are currently 30 members, including the Chairperson.

The majority of the membership is made-up of nominees of bodies with a close interest in the development of company law (see table below). Ministerial nominees to the CLRG are appointed by the Minister arising from a call for expressions of interest which is open to all interested parties.

No	Nominating Body
1.	The Companies Registration Office (CRO)
2.	The Central Bank
3.	The Courts Service
4.	Banking and Payments Federation Ireland
5.	The Bar Council
6.	The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
7.	Euronext Dublin (Irish Stock Exchange)
8.	Irish Auditing and Accountancy Supervisory Authority (IAASA)
9.	Irish Business and Employers' Confederation (IBEC)
10.	Institute of Chartered Secretaries and Administrators (ICSA)

11.	Irish Congress of Trade Unions (ICTU)
12.	Institute of Directors in Ireland
13.	Irish Funds Industry Association
14.	Irish Society of Insolvency Practitioners
15.	The Irish Small and Medium Enterprises Association (ISME)
16.	Office of the Attorney General
17.	Office of the Director of Corporate Enforcement (ODCE)
18.	The Law Society
19.	The Revenue Commissioners
20.	The Small Firms Association

1.3 Chairperson

The Chairperson of the CLRG is appointed by the Minister from the membership of the CLRG as per Section 960(2) of the Companies Act 2014. The position of Chairperson is open to all interested parties. The Minister seeks an expression of interest from suitability qualified individuals with a strong track record in relation to company law.

1.4 Remuneration

The members of the CLRG give their services voluntarily. The Chairperson receives an honorarium, which currently stands at € 8,978 per annum. It should be noted that in line with the 'One Person One Salary' principle, no public servant is entitled to receive remuneration if appointed as Chairperson, save for situations that are provided for in statute.

1.5 Term of Office

The Chairperson and all members are appointed for a four-year term. Since a change in appointments to the CLRG in 2018, members can now serve up to two terms in office, if reappointed. The limit of two terms does not apply to officeholders in a public body appointed to the CLRG in that capacity. The Chairperson can usually serve only two terms in office, subject to reappointment, up to an absolute maximum of ten years membership of the CLRG.

1.6 Work Programme

The Minister approves a work programme in consultation with the CLRG at least once in every two years under section 961 of the Companies Act 2014. The work programme contains specific matters on which the Minister would like the CLRG's considered opinion and contributes to the goal of continuing to refine and modernise Irish company law. The current CLRG work programme can be found on the CLRG website at: http://www.clrg.org/Work-Programme/.

1.7 Publications

The CLRG publishes its recommendations to the Minister either in its annual reports or thematically in stand-alone publications. CLRG publications can be found on the CLRG website at: www.clrg.org/publications/.

1.8 Policy Development

The CLRG presents its recommendations on matters in its work programme to the Minister. The Minister reviews the recommendations of the CLRG and decides any policy to be adopted.

1.9 Secretariat

The Secretariat to the CLRG is provided by the Department of Business, Enterprise and Innovation. Contact may be made either through the website www.clrg.org or by email to: clrg@dbei.gov.ie.

2. Code of Practice for the Company Law Review Group

2.1 Code of Practice

The purpose of the Code of Practice is to set out the role and function of the CLRG and its members as well the legislative requirements and standards that all CLRG members adhere to. The Code may also assist members of the public in understanding the purpose and role of the CLRG in the wider development of policy in relation to company law.

2.2 CLRG Function

Established to monitor, review and give advice to the Minister on company law matters, the Company Law Review Group's function is set out in section 959 of the Companies Act 2014.

Section 959

(1) The Review Group shall monitor, review and advise the Minister on matters concerning—
   - (a) the implementation of this Act,
   - (b) the amendment of this Act,
   - (c) where subsequent enactments amend this Act, the consolidation of those enactments and this Act or the preparation of a restatement under the Statute Law (Restatement) Act 2002 in respect of them,
   - (d) the introduction of new legislation relating to the operation of companies and commercial practices in Ireland,
   - (e) the Rules of the Superior Courts and judgments of courts relating to companies,
   - (f) issues arising from the State's membership of the European Union in so far as they affect the operation of this Act,
   - (g) international developments in company law in so far as they provide lessons for improved State practice, and
   - (h) other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

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

2.3 CLRG Members

Members of the CLRG contribute their expert knowledge and experience to assist the Minister in the ongoing development and refinement of company law. Members engage with the work programme of the CLRG and contribute to CLRG reports for the Minister's consideration.

In discharging their duties, CLRG members are required to:

1. Actively participate in the work of the CLRG and diligently fulfil their duties and responsibilities.
2. Act honestly, responsibly and in accordance with this Code of Practice.
3. Familiarise themselves with the standards and duties imposed on them by law.

4. Declare interests and avoid conflicts of interest.
    a. A member who finds themselves in conflict or potential conflict of interest in relation to a matter on the agenda at a meeting of the Group or any Committee must declare the interest to the Chair and Secretariat at the earliest possible opportunity. The Chair will ask each member to declare any conflict or potential conflict of interest at the beginning of every meeting.
    b. A member must declare when he/she is articulating the views of his/her nominating body in discussions at the CLRG or any Committee. In such event, these views will be attributed to the relevant nominating body in any subsequent report and or minutes.
5. Act in the public interest when participating in the CLRG.
6. Respect the confidentiality of CLRG deliberations and members must not disclose information or use information gained during their membership of the CLRG for any other purpose.

A member may resign their membership at any time by delivering a letter, addressed to the Minister which will take effect from the date of receipt.

2.4 CLRG Chairperson

The Chairperson has additional duties such as being responsible for leadership of the CLRG and progressing the work programme assigned by the Minister. In meetings, the Chairperson is the moderator and promotes a culture of open discussion and respect.

In discharging his/her duties, the CLRG Chairperson is required to:

1. Ensure the smooth and effective operation of the CLRG. The Chairperson, with the assistance of the Secretariat, convenes CLRG meetings, maintains the agenda and ensures that meetings are conducted efficiently.
2. Facilitate and encourage open discussion and participation from members while remaining impartial.
3. Task individual Committees with developing items on the work programme for consideration at CLRG plenary meetings.
4. Present all CLRG reports and publications adopted by the CLRG to the Minister for consideration.
5. Ensure, with the assistance of the Secretariat, that the operation of the CLRG complies with its commitments under the Transparency Code of the Regulation of Lobbying Act 2015, and that this is reflected in the annual report of the CLRG.

2.5 CLRG Secretariat

The Secretariat supports the work of the CLRG including the administrative aspects of meetings and assists with the preparation of relevant documentation while attending to all other governance related matters. The Secretariat supports the Chair in progressing the CLRG work programme.

In discharging its duties, the Secretariat will:

1. Assist the CLRG in achieving its objectives and ensure the smooth and efficient running of the CLRG on a day-to-day basis.
2. In conjunction with the CLRG Chairperson and CLRG Committee Chairs, prepare and circulate relevant documentation for meetings.
3. Record the proceedings at plenary meetings and prepare draft minutes for adoption by CLRG members.
4. Ensure that the CLRG complies with its statutory commitments under the Companies Act 2014 and other relevant legislation.

2.6 CLRG Plenary Meetings

Plenary meetings of the CLRG are generally held three or four times a year to review progress on the work programme, consider draft reports, and discuss any relevant developments in company law. A quorum of 15 members is required for plenary meetings.

Should a member of a nominating body be unable to attend a CLRG meeting, a member can arrange for an alternative representative to deputise for him/her by prior arrangement with the Secretariat. The Chairperson is precluded from authorising a deputy under section 962(6) and should the Chairperson be unavailable, members may elect one of themselves as Chairperson for any meeting where the Chairperson is not present (section 962(5)).

Minutes of each plenary meeting are prepared and circulated by the Secretariat and presented for approval at the next plenary meeting. To facilitate open debate and robust discussion, minutes of plenary meetings record what was discussed but do not identify the interventions of individual CLRG members. Members who wish to have views or a position attributed to them can do so by request.

Under the requirements of the Transparency Code of the Regulation on Lobbying Act 2015 (see 2.9 below), the agenda and adopted minutes of all CLRG plenary meetings are published on the CLRG website.

2.7 CLRG Decision Making

Voting

The CLRG generally operates by consensus. Where consensus cannot be achieved, a decision can be carried by simple majority vote of all members present as long as there is a quorum at the meeting. In the event of a tie, the decision shall fall to the CLRG Chairperson.

The outcome of a vote will be recorded but how individual members voted will not be minuted. A member may request that his/her vote be disclosed. Only members present at a meeting may vote. Alternate members may vote in the place of the member they substitute for. Members may not vote by proxy.

Written procedure

When appropriate, written procedure may be used to propose the adoption of a matter by the CLRG. For example, written procedure may be used to approve amendments to reports as well as for the approval of an annual report, work programme or other relevant matter.

2.8 CLRG Committees

The CLRG has Committees which meet, as the need arises, in relation to items on the work programme which have been delegated to the Committee by the CLRG Chair. CLRG members are encouraged to volunteer to serve on those Committees which are relevant to their specific interests and expertise. The Committee prepares a report which is presented to the CLRG at plenary meetings for consideration. A Committee report can be amended at CLRG plenary meetings prior to adoption by the CLRG.

Each Committee has a Chair ('Committee Chair'), who is selected by simple majority vote by Committee members at the first meeting of that Committee for each CLRG term of office.

In discharging his/her duties, the Committee Chair is required to:

1. Ensure the smooth and effective operation of the Committee. The Committee Chair, with the assistance of the Secretariat, convenes Committee meetings and ensures that meetings are conducted efficiently.
2. Facilitate and encourage open discussion and participation from members while remaining impartial.
3. Present updates on the work of the Committee to the CLRG at plenary meetings including draft reports and recommendation for potential adoption.

2.9 Regulation of Lobbying Act 2015

Members should familiarise themselves with the relevant aspects of the Regulation of Lobbying Act 2015. The Regulation of Lobbying Act 2015 requires persons who communicate with a 'designated public official' about a 'relevant matter' to register and record these communications. It is the duty of each member to ensure they are compliant.

The CLRG members can include persons who come under the definition of designated public officials. 'Relevant matter' includes the development of any public policy or the amendment of any law. The Act provides an exemption which can apply to the routine work of the CLRG, under the Transparency Code.

Communications with designated officials on a relevant matter not covered under the Transparency Code is considered as lobbying. As such it is the duty of any CLRG member to register with the Standards in Public Office Commission (SIPO) and declare any such communications on a continuing basis, every three months.

Transparency Code

The Transparency Code sets out certain criteria that the CLRG must adhere to for exemption under the Regulation of Lobbying Act 2015. These criteria include publishing the names of CLRG members and the organisations they are affiliated with in a prominent place on the CLRG website, the terms of reference of the CLRG, as well as the agenda and adopted minutes of CLRG meetings.

Further information on the Regulation of Lobbying Act 2015 and the Transparency Code is available in Appendix 2.

2.10 CLRG Members Declaration

CLRG members and the CLRG Chairperson are required to sign this declaration and return it to the CLRG Secretariat.

Declaration

I, ______________________________________ have read the CLRG Code of Practice and agree to uphold the duties and responsibilities therein.

____

Signature

____

Print name

____

Date

Appendix 1 Companies Act 2014 – Company Law Review Group

Company Law Review Group
Section 958

(1) The Company Law Review Group, established by section 67 of the Company Law Enforcement Act 2001, shall continue in being.
(2) That Group is referred to in this Chapter as the "Review Group".

Functions of Review Group
Section 959

(3) The Review Group shall monitor, review and advise the Minister on matters concerning—
    (i) the implementation of this Act,
    (j) the amendment of this Act,
    (k) where subsequent enactments amend this Act, the consolidation of those enactments and this Act or the preparation of a restatement under the Statute Law (Restatement) Act 2002 in respect of them,
    (l) the introduction of new legislation relating to the operation of companies and commercial practices in Ireland,
    (m) the Rules of the Superior Courts and judgments of courts relating to companies,
    (n) issues arising from the State's membership of the European Union in so far as they affect the operation of this Act,
    (o) international developments in company law in so far as they provide lessons for improved State practice, and
    (p) other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.
(4) In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of this Act, enhance corporate governance and encourage commercial probity.

Membership of Review Group
Section 960.

(1) The Review Group shall consist of the persons appointed by the Minister to be members of it.
(2) The Minister shall appoint a member of the Review Group to be its chairperson.
(3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Public Expenditure and Reform, may determine.
(4) A member of the Review Group may at any time resign his or her membership by letter addressed to the Minister.
(5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.
(6) Any appointment of a person as a member of the Review Group, or of a member of it as chairperson, made before the commencement of this section shall continue in being in accordance with its terms.

Meetings and business of Review Group
Section 961.

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

(2) A work programme determined by the Minister under section 70(1) of the Company Law Enforcement Act 2001 before the commencement of this section shall, for the unexpired portion of the period to which it relates, continue to be undertaken by the Review Group.

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

(4) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may regulate the procedure of those meetings (including by the establishment of subcommittees and fixing a quorum) as it considers appropriate.

(5) The members shall elect one of themselves as chairperson for any meeting from which the chairperson of the Review Group is absent.

(6) A member of the Review Group, but not the chairperson, may nominate a deputy to attend in his or her place any meeting that the member is unable to attend.

Annual report and provision of information to Minister
Section 962.

(1) Not later than 3 months after the end of each year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall ensure that copies of the report are laid before each House of the Oireachtas within 2 months after the date of receipt of the report.

(2) The report shall include information in such form and regarding such matters as the Minister may direct.

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

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

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

Appendix 2 Regulation of Lobbying Act 2015 and the Transparency Code

Obligations

CLRG members must register as lobbyists if they meet the following criteria:

i) they are communicating either directly or indirectly with a 'Designated Public Official', *and*;
ii) that communication is about "a relevant matter", *and*;
iii) that communication is not specifically exempted, *and*;
iv) the member is one of the following:
   a) a third party being paid to communicate on behalf of a client, and said client is an employer of more than 10 full-time employees or is a representative body or an advocacy body which has at least one full-time employee);
   b) an employer with more than 10 employees where the communications are made on their behalf;
   c) a representative body with at least one employee communicating on behalf of its members and the communication is made by a paid employee or office holder of the body;
   d) an advocacy body with at least one employee that exists primarily to take up particular issues and a paid employee or office holder of the body is communicating on such issues;
   e) any person communicating about the development or zoning of land.

Anyone who meets each of these criteria must register as a lobbyist with the Standards in Public Office Commission.

It is, at all times, the duty of individual CLRG members to ascertain whether they meet these criteria and what steps must be taken as a consequence. For the avoidance of doubt, members who register as lobbyists under the Regulation of Lobbying Act 2015 are still eligible to be members and continue to be eligible as members of the CLRG.

Relevance of obligations to the CLRG

The following observations may be made regarding each of the criteria listed above. These observations do not purport to be a legal interpretation and shall not, in any way, detract or unencumber members from their duty to ensure they comply with the Regulation of Lobbying Act 2015.

The person communicating is[1]:

a) A third party being paid to communicate on behalf of a client (where the client is an employer of more than 10 full-time employees or is a representative body or an advocacy body which has at least one full-time employee);

[1] Sections 5(1) – (3)

b) An employer with more than 10 employees where the communications are made on your behalf;
c) A representative body with at least one employee communicating on behalf of its members and the communication is made by a paid employee or office holder of the body;
d) An advocacy body with at least one employee that exists primarily to take up particular issues and a paid employee or office holder of the body is communicating on such issues;
e) Any person communicating about the development or zoning of land.

Each member must ascertain whether any relevant matter is communicated to a person who comes under this definition. Each member must proactively engage with their duties and take such steps to comply with the requirements of the Act.

The person communicating "communicate[s] directly or indirectly with a designated public official."

"Designated Public Officials" are defined[2] as:-

i) Ministers and Ministers of State;
ii) TDs and Senators;
iii) MEPs for constituencies in this State;
iv) Members of local authorities
v) Special Advisers;
vi) Secretaries General and Assistant Secretaries in the Civil Service;
vii) Chief Executive Officers and Directors of Services in Local Authorities;
viii) Any person designated as such pursuant to a Ministerial Order.

The communication is about a "relevant matter"

A "relevant matter" is defined[3] as:

a) the initiation, development or modification of any public policy or of any public programme;
b) the preparation or amendment of any law (including secondary legislation such as statutory instruments and bye-laws); or
c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds;

other than the implementation of any such policy programme, enactment or award or any matter of a technical nature.

Certain Communications are specifically exempted[4].

"Relevant matters" cover a very wide range of issues and communications. However, the Act outlines certain types of communication about relevant matters which will be exempted from the lobbying restrictions.

Communications on relevant matters which do not fall within those 'specifically exempted' may be required to be reported to the Standards in Public Office Commission. Members should be aware

[2] Section 6(1)
[3] Section 5(9)
[4] Section 5(5)

that communications which do not pertain to the work programme of the CLRG, which is agreed on a biennial basis with the Minister, are not specifically exempted. It is the duty of each member to report any such communications which are not 'specifically exempted'.

The following exemption is the most relevant to the CLRG:

Communication between:

i) members of a relevant body appointed by a Minister, or by a public service body, for the purpose of reviewing, assessing or analysing any issue of public policy with a view to reporting to the Minister or public service body; and
ii) the communication solely pertains to the work of the body in (i); and
iii) the body and its members are compliant with the Transparency Code.[5]

The CLRG is a relevant body per (i) above, and communications between members, the Minister or any designated public official - insofar as they solely pertain to the work of the CLRG - would be specifically exempt. However, this is subject to the CLRG and its members being compliant with the Transparency Code. Failing to meet any of the three criteria set out above will mean the communication will not be "specifically exempted".

The Transparency Code[6]

The Code specifies that information must be published in a prominent place on a public body's website setting out the following information:

1) Name of Chair along with details of their employing organisation (if any);
2) Names of members together with details of their employing organisation (if any);
3) Whether any non-public servant members were previously designated public officials;
4) Terms of Reference of the Group;
5) Agenda of each meeting;
6) Minutes of each meeting;
7) Expected timeframe for the group to conclude its work;
8) What the reporting arrangements of the group are.

Any change in the required information should be notified to the Secretariat immediately.

[5] Section 5(6)(a)
[6] Section 5(7)

THE STATUTORY COMMITTEE OF
THE COMPANY LAW REVIEW GROUP

SUBMISSION

TO THE MINISTER FOR BUSINESS, ENTERPRISE AND INNOVATION
IN RESPONSE TO THE CONSULTATION PAPER OF JANUARY 2019
ON THE REVIEW OF THE LIMITED PARTNERSHIPS ACT 1907

DATED 28 FEBRUARY 2019

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INTRODUCTION

This submission

This submission is made by the Statutory Committee of the Company Law Review Group.

The Company Law Review Group has established a number of committees for the more efficient discharge of its statutory mandate. The Statutory Committee has been formed primarily for the purposes of review of companies legislation that is enacted without prior review by the full Review Group but also to report and advise on company law matters where there is a limited time available to compose a report or submission, as in this case.

Following the publication of the consultation by the Department in January 2019, invitations to join the Statutory Committee for the purpose of this submission were issued to all members of the Review Group. The composition of the Committee is set out in Appendix 1.

In view of the interconnection of company law and the law relating to limited liability partnerships, as well as previous consideration by the Review Group of the law relating to limited partnerships, both detailed in Appendix 2, the Committee has concluded that it is within its mandate to make this submission.

The Committee has prepared this submission after four Committee meetings as well as publication of advanced drafts of the submission to the full Review Group. Although we believe that we have captured a consensus among members of the Review Group, we would welcome the opportunity to make further submissions in relation to limited partnerships following further deliberation and in the light of other submissions that may be received by the Department and any Departmental response to submissions received.

The Company Law Review Group

The Company Law Review Group was established by section 67 of the Company Law Enforcement Act 2001 and is now regulated by Chapter 4 of Part 15 (Functions of Registrar and of Regulatory and Advisory Bodies) of the Companies Act 2014.

Section 959 of the 2014 Act sets out the Review Group's functions:

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

(a) the implementation of [the 2014] Act,

(b) the amendment of [the 2014] Act,

(c) where subsequent enactments amend [the 2014] Act, the consolidation of those enactments and [the 2014] Act or the preparation of a restatement under the Statute Law (Restatement) Act 2002 in respect of them,

(d) the introduction of new legislation relating to the operation of companies and commercial practices in Ireland,

(e) the Rules of the Superior Courts and judgments of courts relating to companies,

(f) issues arising from the State's membership of the European Union in so far as they affect the operation of [the 2014] Act,

(g) international developments in company law in so far as they provide lessons for improved State practice, and

(h) other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

(2) In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of [the 2014] Act, enhance corporate governance and encourage commercial probity.

Limited partnerships legislation

For convenience of reference, the texts of the Limited Partnerships Act 1907 and the Limited Partnerships Rules are set out in Appendix 3 and Appendix 4 respectively.

Terms used in this submission

"1907 Act" or "Limited Partnerships Act" – Limited Partnerships Act 1907

"2014 Act" or "Companies Act" – Companies Act 2014

"Registrar" – Registrar of Companies.

General provisions of the Limited Partnerships Act 1907

Question 1.

What are the benefits of limited partnerships for the Irish economy?

The Committee is of the opinion that limited partnerships formed under the 1907 Act continue to have tangible economic benefits for the Irish economy. They are widely used as a vehicle for substantial investment in Irish industry and infrastructure.

In particular, members of the Committee pointed to their use in the following circumstances:

- Most venture capital funds operating in Ireland are structured as limited partnerships, with Enterprise Ireland and the Ireland Strategic Investment Fund (ISIF) having invested significant amounts in such structures in partnership with the private sector. The cumulative total that has been invested in companies under the four venture capital initiatives undertaken by Enterprise Ireland in partnership with the private sector to 2017 exceeds €1billion.[1] It is believed that most of these funds have been structured through limited partnerships.

  The Irish Venture Capital Association in its 2019 pre-budget submission highlighted statistics as to investments in Irish enterprises by venture capital funds:

  > *"Since 2008, in excess of 1,450 Irish SMEs raised venture capital of €3.6bn. These funds were raised almost exclusively from Irish venture capital fund managers who during this period:*
  > - *Supported the creation of over 20,000 jobs.*
  > - *Attracted over €1.6bn of capital into Ireland.*
  > - *Geared up the State's investment through the Seed & Venture Capital Programme by almost 16 times."*[2]

  It is noteworthy that a specific change was made to the law in 2004 to increase the maximum number of partners from 20 to 50 in a limited partnership *"which is formed for the purpose of, and whose main business consists of, the provision of investment and loan*

[1] Enterprise Ireland Seed and Venture Capital 2017 Report. https://www.enterprise-ireland.com/en/Publications/Reports-Published-Strategies/Seed-and-Venture-Capital-Reports/2017-Seed-and-Venture-Capital-Report.pdf

[2] https://www.ivca.ie/wp-content/uploads/2018/09/IVCA_PBS_2018-1.pdf.

finance and ancillary facilities and services to persons engaged in industrial or commercial activities." [3]

- In addition to venture capital funds, private investment consortia, where corporate investors participate in an investment in a property or company or industry sector, frequently use limited partnerships as investment vehicles, also benefiting from the higher allowable number of partners.

- Stallion syndicates, in which the original owner of a stallion standing in Ireland will be a general partner with investors holding their shares via participations in a limited partnership, are frequently formed as limited partnerships. Like in the case of venture capital funds, a specific change was made to the law in 1988 to increase the maximum number of partners from 20 to 50 in a limited partnership *"which is formed for the purpose of carrying on or promoting the business of thoroughbred horse breeding"*.[4] A further change was made in the Companies Act 2014 with removed the upper limit of 50 partners in such limited partnerships.[5]

- Family investments are often structured through limited partnerships, where a senior family member will be the general partner and junior family members the limited partners. The economic benefits of the investment are held by the family generally, but one individual maintains sole managerial control.

Question 2.

Given developments in the law governing business activity since 1907 is there a continued need for limited partnerships? Please set out any reasons or evidence for your opinion.

The continued need for limited partnerships is evident from the continuous take-up of limited partnerships, particularly in the sectors referred to in the response to Question 1.

There are three particular benefits of limited partnerships reported by Committee members:

- As limited partnerships do not have corporate status, the income of the partnership cannot be warehoused in it: it is the direct income of the partners.

[3] Companies (Amendment) Act, 1982 (Section 13 (2)) Order, 2004 (S.I. No. 506/2004), article 2.
[4] Companies (Amendment) Act, 1982 (Section 13 (2)) Order, 1988 (S.I. No. 54/1988), article 2, now re-enacted in the Companies Act 2014, section 1435(1)(c)(iv).
[5] Companies Act 2014, section 1435(1)(c)(iii).

- The transparency of limited partnerships means that the partnership itself is not taxed on the partnership's profits and gains: those are the profits and gains of the individual partners who are individually accountable for their own taxation.
- Limited partners have liability limited to their contribution to the partnership's capital.

Applications for registration of limited partnerships

Question 3.

Please set out your views on the possible reasons why there has been an increase in limited partnership registrations since the end of 2015.

Statistics provided by the Companies Registration Office illustrate the significant increase in Limited Partnership registrations over the past decade.

Year	New Registrations	Number on the Register
2010	40	868
2011	33	901
2012	32	933
2013	45	978
2014	71	1,049
2015	87	1,136
2016	466	1,602
2017	676	2,278
2018	337	2,615

The bulk of the new registrations have taken place in the last three years. The CRO has noted that the vast majority of them have come from a small group of presenters. In most cases, the partners being registered do not appear to have a connection to the State and are based in British overseas territories such as the Cayman Islands, the Seychelles, Belize and countries in Eastern Europe.

The Committee has no direct evidence as to the actual reasons for the increase in registrations. That said, it appears that the increase in limited partnership registrations does not appear to have been matched with a corresponding increase in venture capital funds, investment consortia or stallion syndicates.

The Committee has also noted the commentary on a comparable issue of a surge of limited partnership registrations in Scotland in *Twomey on Partnership*:

> *"Following reports that limited partnerships registered in Scotland were being used as vehicles for criminal activity (such as money laundering, organised crime and tax evasion), and in light of the comparatively significant increase in the number of limited partnerships being registered in Scotland when compared with England, Wales and Northern Ireland, the Department for Business, Energy and Industrial Skills published a 'Review of Limited Partnership Law: call for evidence' in January 2017, which closed in March 2017. In that call for evidence, views and evidence were sought as to why registrations of limited partnerships in Scotland had increased, the economic uses of limited partnerships, the characteristics of limited partnerships that might enable criminal activity, and other related matters. Following that call for evidence, the Department published a consultation (Limited Partnerships: Reform of Limited Partnership Law) on 30 April 2018, outlining that while evidence provided in response to its January 2017 call for evidence had shown an ongoing need for limited partnerships as business entities, evidence had also been provided of suspected criminal activity involving limited partnerships registered in Scotland."* [6]

A number of Committee members speculated that the uplift may in some cases be attributable to the following:

- non-EEA individuals seeking, as limited partners, to obtain paperwork indicating an economic connection with Ireland, for example for immigration purposes;
- the low fee for registration and no minimum capitalisation rules, which allow presenters to register cheaply (€2.50) and receive a certificate from the Registrar at very little cost;
- the fact that, unlike the readily accessible register of companies and company documentation, the register of limited partnerships and filed documents are not readily available on line to members of the public. Although there are plans for the register to go on

[6] Michael Twomey, *Twomey on Partnership,* 2nd Edition, 2019 at page 847.

line during 2019, the register currently exists in paper form only with a list of the numbers/name published on the CRO website.[7] By remaining as a paper register, it is less easy for members of the public to ascertain which persons are involved in the limited partnership requiring them at present to search in the public office of the CRO;

- their possible use in non-filing structures, for the reasons outlined in the response to Question 8.

Question 4.

Please set out your views on whether limited partnerships should be required to use the term "Limited Partnership" in the business name.

The Committee recommends that all limited partnerships should be required to use the term "limited partnership" or "LP" or their Irish language equivalents in their registered name.

In response to Question 11 below, the Committee recommends the discontinuance of duplicative registration of a limited partnership's registered name as a registered business name also under the Registration of Business Names Act 1963. It remains open to limited partnerships to register a business name or names omitting the term "limited partnership" or abbreviation "LP" or their Irish language equivalents.[8]

The recommendation is consistent with the Review Group's previous proposals, now adopted and enacted in the Companies Act 2014, requiring unlimited companies to identify themselves by the addition of "unlimited company" or "UC" or their Irish language equivalents at the end of their names.[9]

The Committee notes that the 2014 Act, as originally enacted, provided a power to the Minister to exempt unlimited companies from this requirement[10] and considered whether such power be given to the Minister to exempt existing limited partnerships from a requirement to use the term "limited partnership" or "LP" or their Irish language equivalents in their registered name along the lines of what was permitted under that Companies Act provision. However, the Committee concluded that

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[7] https://www.cro.ie/Publications/LTD-Partnerships.

[8] A provision requiring this was introduced in the UK in 2009, by the insertion of a section 8B of the 1907 Act by the Legislative Reform (Limited Partnerships) Order 2009.

[9] Companies Act 2014, sections 1228(2), 1237

[10] Section 1237(5): If special circumstances exist which render it, in the opinion of the Minister, expedient that such an exemption should be granted, the Minister may, subject to such conditions as he or she may think fit to impose and specifies in the exemption, grant, in writing, an exemption from the obligation imposed by subsection (1). Repealed by the Companies (Accounting) Act 2017, section 3(j).

transitional arrangements similar to those for unlimited companies[11] should be adequate and appropriate, in order to give existing limited partnerships a limited period of time to change their name.

The principal place of business

Question 5.

Please set out your views on whether limited partnerships should be required to maintain a principal place of business and a registered office in the State.

The 1907 Act provides that a limited partnership must state on registration its principal place of business. It does not require a registered office. The place of business must be in the State on registration[12] but need not remain in the State once registered. This permits limited partnerships to change their address to foreign countries without redress or removal from the Irish register.

In the case of companies, the comparable requirement on incorporation is to furnish, inter alia, particulars of:

- the address of the company's registered office; and
- the place (whether in the State or not) where the central administration of the company will normally be carried on.[13]

In the case of Irish branches of a non-Irish company, the comparable requirement on registration in Ireland is to furnish, inter alia:

- the address of the branch;
- in the case of an EEA company, the place of registration of the company and the number under which it is registered;[14]
- in the case of a non-EEA company, if the law of the state in which the non-Irish company is incorporated requires entry in a register, the place of registration of the company and the number under which it is registered. [15]

[11] Companies Act 2014, section 1247.
[12] 1907 Act, section 8.
[13] Companies Act 2014, section 22(2)(d), (e).
[14] Companies Act 2014, section 1302(2) (c), (e)

The Committee gave detailed consideration as to whether limited partnerships should be limited to having a principal place of business either in the State or in the EEA. On the face of it, a requirement that the principal place of business be and remain in the State would appear to contravene EU rules on freedom of establishment, explored in the *Cartesio*[16] and other cases. As to requiring a place of business in the EEA, although there were no statistics to hand, there were cases known to members of the Committee of the principal place of business of a limited partnership being outside the EEA, for example, in the United States. The Committee also noted that with companies, there is no requirement for their initial principal place of business to be in the State. Accordingly the Committee concluded that a broad prohibition of non-EEA principal places of business was not in the public interest. This conclusion would appear to have added force following the United Kingdom's pending exit from the EU and, at the time of composition of this submission, most likely the EEA also.

The Committee recommends that all limited partnerships should be required to identify on registration and, on an ongoing basis, to notify the following to the CRO:

- a registered office in the State; and
- the place (whether in the State or not) where the central management and administration of the partnership will normally be carried on.

Question 6.

Please set out your views on whether limited partnerships should be required to make an annual return to the Registrar similar to obligations on companies.

The Committee recommends that limited partnerships should be required to make an annual return to the Registrar similar to the obligations of European Economic Interest Groupings. Regulation 19(1) of the European Communities (European Economic Interest Groupings) Regulations 1989[17] requires the delivery of an annual return (Form IG 8) to the Companies Registration Office no later than 1 July in any year.

This requirement to deliver an EEIG-type annual return should be separate and distinct from any requirement on the part of the limited partnership to deliver financial statements. .

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[15] Companies Act 2014, section 1304(2)(a).
[16] Case C-210/06. Cartesio Oktató és Szolgáltató bt: Reference for a preliminary ruling from the Szegedi Ítélőtáb. European Court Reports 2008 I-09641 (ECLI identifier: ECLI:EU:C:2008:723).
[17] S.I. No. 191/1989,

Question 7.

Please set out your views on how the annual return should be made and who should be responsible for making it.

The Committee recommends as follows:

- A limited partnership's annual return should be in a form to be specified by the Minister, in the same way as the Minister specifies under the Companies Act 2014.

- It should be delivered each year to the Companies Registration Office within 14 days of a date from 1 January to 30 June chosen by the general partners of the limited partnership.

- It should be signed by a general partner or, where the general partner is a body corporate, a director of that general partner.

- The information should include:

    - the names and addresses of all partners, stating who are general and who are limited partners;

    - the registered office;

    - the place (whether in the State or not) where the central management and administration of the partnership is carried on;

    - the capital of the limited partnership; and

    - the financial year-end of the limited partnership.[18]

- Failure to file the return should not give rise to a loss of limited liability for the limited partners but should be enforced by late filing fees and criminal sanctions against the general partner or partners and, in the event of the general partner being a body corporate, officers of such a body corporate, in much the same way as both a company and its officers are liable to sanction for non-compliance with the law requiring the filing of an annual return.[19]

[18] Consequential provisions regulating the change of financial year-end, akin to those regulating the change of annual return date found in the Companies Act 2014, section 346 will also be required.
[19] Companies Act 2014, section 343(11).

Filing financial accounts

Question 8.

Please set out your views on whether all limited partnerships should be required to file financial statements.

Prior to the enactment of the Companies Act, 2014, the legislation governing the filing of financial statements of limited partnerships, general partnerships and unlimited companies was the European Communities (Accounts) Regulations, 1993[20], which transposed EC Directive 90/605/EEC.[21] The 1993 Regulations facilitated non-filing structures whereby unlimited companies ostensibly within the scope of the Regulations were able to avoid the requirement to file financial statements.

The current EU measure governing financial statements for these entities is Directive 2103/34/EU. [22]

The Companies (Accounting) Act, 2017 amended the Companies Act 2014 in order to transpose Directive 2013/34/EU on the filing of financial statements for unlimited companies, the effect of which being that the vast majority of unlimited companies, unless owned by an individual, must file financial statements with the Registrar.

The 1993 Regulations continue in force, but now only apply to partnerships, whether general or limited. Where all the partners of a general partnership or all the general partners of a limited partnership are limited liability entities, those partnerships must file their annual financial statements as though they were limited companies. It is reasonable to assume that the non-filing structures that worked for unlimited companies under the 1993 Regulations could, and indeed do, apply to limited partnerships, i.e. those limited partnerships where the general partner is an unlimited company which is ultimately owned by individuals that are protected from the liabilities of the partnership.

In accordance with the principle of Directive 2013/34/EU, as transposed to unlimited companies by the 2017 amendments to the Companies Act, 2014, limited partnerships should be required to file

[20] SI 396/1993.

[21] Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives.

[22] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC

financial statements if the ultimate individual owners of the general partner are protected from the liabilities of the partnership.

There is one practical issue for those limited partnerships which under the 1993 Regulations must file financial statements. The application of the law requires that two signatories sign the filed financial statements. Where there is only one general partner, it means that a limited partner is requested to sign, with a consequent concern on the part of such limited partner that the signing of the accounts might be construed as participation in management, which would impose unlimited liability for the partnership's debts and obligations. The Committee recommends that, in such cases, the signature of (or of a signatory on behalf of) the sole general partner should be sufficient.

Removing limited partnerships from the register

Question 9.

What are your views on giving the Registrar powers to remove and strike off limited partnerships from the register?

Whereas the striking off of a company means the dissolution of a legal entity, with a consequent vesting in the State of any remaining assets of the company, the striking off of a limited partnership would not dissolve the partnership, which would continue to exist and be regulated by the Partnership Act 1890. And whereas the liquidation and dissolution of a limited company does not impose liability on shareholders, the de-registration of a limited partnership would impose liability on limited partners for all partnership debts and obligations, without limitation on amount.

For these fundamental reasons, the Committee has concluded that it is not appropriate for limited partnerships to be subject to strike off in the same way as companies are liable to be struck off the register.

Question 10.

What factors do you think should be considered in removing or striking-off limited partnerships from the register?

The Committee notes that the UK government's proposals to reform UK limited partnership law stopped short of recommending the ability to strike off limited partnerships, save where the limited

partnership has been dissolved or where the Registrar concludes that they are not carrying on business.[23] The Committee has therefore concluded that the appropriate way to deal with limited partnerships that appear to have ceased to operate is as follows:

- Where
  - (a) a limited partnership has not filed the proposed annual return on or before 14 July in any year; or
  - (b) a limited partnership required to file financial statements does not do so within 11 months of its financial year-end;

  it should be noted on the register of limited partnerships as "non-compliant".
- Where:
  - (a) for three successive years, a limited partnership has not filed the proposed annual return to the Registrar; and
  - (b) the Registrar has, in each of those three years, given notice by registered post to all registered partners of the limited partnership, both general and limited, at their address recorded in returns to the Registrar:
    - that the proposed annual return has not been delivered to the registrar for one, two or three, as the case may be, successive years;
    - that it is the duty of the general partners to procure the delivery of the annual return to the Registrar;
    - that any limited partner is authorised to deliver the outstanding annual returns by reference to its actual knowledge, without obligation on its part to make enquiries of any person, such action being deemed not to be participation in the management of the limited partnership;

  such limited partnership should be noted on the register of limited partnerships as "presumed dissolved".
- Limited partnerships should be capable of remedying their "non-compliant" or "presumed dissolved" status, by the filing of outstanding returns by any partner and, in the case of a limited partner, without obligation on the limited partner's part to make enquiries of any person, such action being deemed not to be participation in the management of the limited partnership. Any late filing should be upon payment of a robust late filing fee, reflecting the principle that compliant limited partnerships ought not to be subsidising the costs of the Registrar in dealing with non-compliant limited partnerships.

[23] UK government response to its consultation on reform of limited partnership law, Department of Business, Energy and Industrial Strategy, December 2018, paragraph 35.

In addition, the Committee gave detailed consideration as to whether limited partnerships, of which the only limited partner was an Irish limited company, which company had been dissolved[24], should be automatically struck off the register. In light of a dissolved company's legal right to reinstatement on the register, the Committee decided not to recommend a prescribed procedure for automatic strike-off of such limited partnerships. The Committee does however recommend that further consideration be given to a procedure to facilitate the strike off of such limited partnerships, following an extended period of notice to all registered partners, for example, one year, which would give the general partner adequate time to seek reinstatement to the register of companies.

Other comments on limited partnership law

Question 11.

Please provide any other comments you wish to inform the development and direction of policy on limited partnership law.

(a) **New Act**

In light of the passage of time since the enactment of the 1907 Act, the Committee recommends the repeal of the 1907 Act and the enactment of a new Limited Partnerships Act, rather than effecting a patchwork of amendments to the 1907 Act. Before such repeal and re-enactment, a more thorough review should be conducted of the responses to consultations received by the Department.

As the UK and Ireland share the same substantive law on limited partnerships, the work done by the English and Scottish Law Commission,[25] as well as the recent proposals of the UK Department for Business, Energy and Industrial Strategy[26] should be considered, as well as any law that may emerge in the UK from that workstream.

[24] E.g. by being struck off for failure to file its annual returns.

[25] Joint Consultation Paper (Law Commission 161 Scottish Law Commission 118) on the Limited Partnership Act 1907, September 2001; Joint Report (Law Commission 283 Scottish Law Commission 192) on partnership law, November 2003.

[26] UK government response to its consultation on reform of limited partnership law, Department of Business, Energy and Industrial Strategy, December 2018.

(b) **Individual responsible for compliance with the Limited Partnerships Act**

Where at least one general partner of a limited partnership is an individual, there is therefore an individual who is primarily accountable for the filing of information with the Registrar under the 1907 Act.

Where the general partner is a company, the 1907 Act does not contain provisions akin to those found in the Companies Act, which impose obligations on individuals:

- Section 223(1) of the 2014 Act provides: "It is the duty of each director of a company to ensure that this Act is complied with by the company". Several other provisions impose liability on officers in default for failure to file particular documents.[27]
- Sections 1302(5) and 1302(1) of the 2014 Act respectively require EEA companies and non-EEA companies that establish a branch in Ireland to notify information to the Registrar, including "the name and addresses of some one or more persons resident in the State who is or are (i) authorised to accept service of documents required to be served on the EEA company, and (ii) authorised to ensure compliance with the provisions of this Part [of the 2014 Act]".

The Committee recommends that a provision be enacted comparable to section 343(11) of the Companies At 2014 such that where a document, including the proposed new annual return, is not filed, the general partner and, if the general partner is a body corporate, any officer of that body corporate in default, should be liable to criminal sanction.

(c) **Fees**

The fees for formation of a limited partnership and for inspection of filed documents remain at a nominal level. Apart from an alignment of the fees with round sum amounts on the introduction of the Euro[28] the fees have not been updated since 1907.

The Committee recommends that fees for formation of a limited partnership and charges for inspection and copies of filed documents be increased to levels comparable with those for companies.

[27] E.g. section 343(11) which imposes penalties on officers in default for failure to file an annual return.
[28] Limited Partnership Regulations 2001 (S.I. No. 570/2001), regulation 3.

(d) **Public display of limited partnership name**

There is no requirement for the display of the name of the limited partnership either inside or outside the principal place of business. Section 49 of the Companies Act 2014, requires the display of the company name where it business is carried on and at its registered office. Section 8 of the Registration of Business Names Act 1963 requires the display of the certificate of registration at the principal place of business. There is no requirement for limited partnerships to comply with a similar law.

The Committee recommends that there be a requirement for the limited partnership name to be displayed at its registered office in the State.

(e) **Undesirable Names**

Both the Companies Act 2014[29] and the Registration of Business Names Act 1963[30] allow the Registrar to refuse registration of a name. The Limited Partnerships Act does not restrict the use of particular names.

The Committee recommends that the Registrar be empowered to refuse registration of a limited partnership name in the same way as he or she can do with company and business names.

(f) **Minimum figure for capital contributions by partners**

The Act does not specify a minimum amount that can be contributed to create a limited partnership. As it stands one cent is enough for the creation and registration of a limited partnership. While the Committee does not rule out a minimum capital requirement as a potential disincentive to the formation of limited partnerships other than for bona fide commercial purposes, it is sceptical as to the practical effect of such a requirement. For example, in order to be effective, any such requirement would require to be drafted so as to ensure that one such limited partnership, so capitalised, could not itself be the provider of minimum capitalisation to another such limited partnership.

(g) **Minors as partners**

Minors can act as partners as there is nothing in general partnership law to prevent this.

[29] Section 26.
[30] Section 14.

In the same way as a company director must be of age, the Committee recommends that the minimum age for an individual to be a general partner should be 18.

(h) **Loss of limited liability for failure by general partner to make returns**

As highlighted in *Twomey on Partnership*[31] there is a predominant body of opinion to the effect that a limited partner can lose his or her limited liability due to the failure of the general partner to make particular returns.

The Committee recommends that this be clarified such that failure to make returns should, as it is at present, be subject to criminal sanction of the general partner but that it should not lead to loss of limited liability for the limited partners.

(i) **Identity of partners**

At present, those registering a limited partner are presented with few regulatory hurdles to register their partnership. The information requirements are set out in section 8 of the 1907 Act.

The Companies Registration Office has adopted procedures with a view to establishing the identity and bona fides of those registering a limited partnership:

- Where the general partner is a non-EEA national who intends to come to Ireland to establish a business, that general partner will require the permission of the Minister for Justice and Equality to do so. Evidence of the permission of the Minister must be submitted along with the form.

- Where the general partner or limited partner is a company, but is not registered on the Irish register, the form must be accompanied by:

    - a certified copy (and where required authenticated copy) of the Charter, Statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company (in the original language);

    - a copy of the certificate of incorporation of the company;

    - a copy of any certificates of incorporation of any name changes of the company;

[31] Michael Twomey, *Twomey on Partnership,* 2nd Edition 2019, page 872, para 28.72.

- o if the documents above are not written in Irish or English language a certified translation.

The Committee does not propose any change to these procedures and notes that the application of the 4th Anti-Money-Laundering Directive[32] and the pending transposition of the 5th Anti-Money Laundering Directive[33] will have a bearing on the information required to be produced by those forming limited partnerships. The Committee observes that the views of the Department of Justice and Equality and the Revenue Commissioners will be relevant.

(j) **Duplication of information under the Registration of Business Names Act**

Practically all limited partnerships' names do not consist solely of the names of the partners, thereby triggering a requirement for the limited partnership to register a business name under the Registration of Business Names Act 1963, delivering information largely similar to that required to be filed under the 1907 Act. In the case of limited liability partnerships of legal practitioners, the 1963 Act, this registration requirement is disapplied[34], in light of the separate registration and disclosure requirements applicable to those partnerships.

The Committee recommends that the requirement for a limited partnership to register under the Registration of Business Names Act 1963 in respect of its full partnership name should be discontinued.

[32] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, transposed by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018

[33] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, in respect of which a General of a Scheme of a Bill (Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019) to transpose was published on 3 January 2019.

[34] Legal Services Regulation Act 2015, section 13.

APPENDIX 1

MEMBERSHIP OF THE COMPANY LAW REVIEW GROUP STATUTORY COMMITTEE

Paul Egan (Chairperson)	Ministerial appointee
Máire Cunningham	Nominee of the Law Society of Ireland
Rosemary Hickey	Nominee of the Office of the Attorney General
David McFadden	Companies Registration Office Ministerial Nominee
Vincent Madigan	Ministerial appointee
Kathryn Maybury	Nominee of the Small Firms Association
Moya Moore	Co-opted to the Committee Office of the Attorney General
Maureen O'Sullivan	Ministerial appointee Registrar of Companies
Secretary	Tara Keane

APPENDIX 2

(I) COMPANY LAW AND THE LAW RELATED TO LIMITED PARTNERSHIPS

(II) PREVIOUS CONSIDERATION OF LIMITED PARTNERSHIP LAW BY THE COMPANY LAW REVIEW GROUP

(I) Company law and the law related to limited partnerships

The Companies 2014 and the Limited Partnerships Act 1907 are interconnected generally and by specific provisions in those respective Acts. The Review Group must also be consulted by the Minister for Business, Enterprise and Innovation where he or she proposes to make a particular order concerning partnerships (including limited partnerships) under the 2014 Act.

Section 15 of the 1907 Act, as adapted by the Adaptation of Enactments Act 1922, provides that the Registrar of Companies is to be the registrar of limited partnerships.

Section 887(9) of the 2014 Act provides that any act required or authorised by the 1907 Act to be done to or by the Registrar, the registrar of joint stock companies or a person referred to in the enactment as “the registrar”, as the case may be, may be done to or by a registrar or assistant registrar appointed under subsection (3), a person continued in office by virtue of subsection (5) or any other person so authorised by the Minister.

Section 1435 of the 2014 Act makes provisions concerning limited partnerships. It prohibits, subject to exceptions, partnerships with more than 20 members.

(1) No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business (other than the business of banking), that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless—

(a) it is registered as a company under [the 2014] Act;

(b) it is formed in pursuance of some other statute; or

(c) it is a partnership formed for the purpose of—

(i) carrying on practice as accountants in a case where each partner is a statutory auditor;

(ii) carrying on practice as solicitors in a case where each partner is a solicitor;

(iii) carrying on or promoting the business of thoroughbred horse breeding, being a partnership to which, subject to subsection (5), the Limited Partnerships Act 1907 relates; or

(iv) the provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities, being a partnership—

(I) that consists of not more than 50 persons; and

(II) to which, subject to subsection (5), the Limited Partnerships Act 1907 relates.

(2) Subject to subsection (3), the Minister may by order declare that the prohibition in subsection (1) shall not apply to a partnership that is of a description, and that has been or is formed for a purpose, specified in the order.

(3) The Minister shall not make an order under subsection (2) unless, after consultation with the Company Law Review Group, the Minister is satisfied that the public interest will not be adversely affected by the discontinuance, in consequence of the order, of the prohibition in subsection (1) in relation to the partnerships concerned.

(4) This section shall not apply to an investment limited partnership within the meaning of the Investment Limited Partnerships Act 1994.

(5) The provisions of section 4(2) of the Limited Partnerships Act 1907 shall not apply to a partnership specified in subsection (1)(c) nor to a partnership specified in an order made under subsection (2).

(II) Previous consideration of limited partnership law by the Company Law Review Group

2007 Report of the Company Law Review Group

Following a Law Society of Ireland submission to Government on the issue of Limited Liability Partnerships ('LLPs'), the then Minister asked the Review Group to examine the issue of LLPs as part of its 2007 Work Programme. Chapter 3 of the 2007 Report outlined the principal features of the law of partnership as it was then in force in Ireland and the problems which the law was perceived to cause for certain types of business organisation in Ireland. It addressed whether those problems were real and substantial and concluded that they were so.

It explored how the introduction of LLP legislation might address these problems, citing examples of LLP legislation in other jurisdictions. It addressed the types of safeguard which might need to be put in place to protect clients/customers, and third parties generally, in their dealings with LLPs. It then considered whether the problems raised by current partnership law could be resolved by other means, without the need to amend the law of partnership.

The Review Group conclusions were these:

- LLP legislation was deserving of further consideration, as the issues which led to the introduction of LLP legislation in other jurisdictions were equally relevant in Ireland.
- The main impetus for reform of partnership law in this area was from the professions and further examination of the issue was required, giving due weight and attention to any contrary views which might be expressed by other interested parties, including clients and customers of professional service providers.
- Consideration should be given to all or any competing solutions to the professional liability problem which might render an LLP solution unnecessary or inappropriate.
- The final decision on whether LLPs should be introduced, and on the shape and form which LLP legislation should take, could only be reached after a full consultation process involving all of those affected by the issues arising.

With that objective in mind, the Review Group engaged in a public consultation with a series of questions based around the several issues which it identified as key:

- Does Ireland need a new approach to address the issue of unlimited liability in business partnership arrangements?

- What are the pros and cons of introducing the LLP model, e.g. based on the US, Canadian or UK models?
- What are the pros and cons of other forms of limiting liability, either contractually or through company incorporation?
- In the case of LLP status, what safeguards should be introduced to protect the interests of clients and creditors, including financial disclosure?
- Are there any other issues regarding LLPs which need to be brought to the attention of the Review Group?

2009 Report of the Company Law Review Group

The 2009 Report reported the results of the consultation process, having elicited the views and comments of, among others, the Law Society of Ireland and the Consultative Committee of Accountancy Bodies – Ireland, Veterinary Ireland and the Irish Dental Association. The Review Group concluded that there was not a strong tide of opinion running in favour of introducing LLPs generally and that only the accountants and the solicitors were truly zealous supporters of the LLP concept. The Review Group concluded that it was beyond its remit to give extensive consideration to the regulation of these professions and the public interest concerns which would need to be addressed in proposing any changes.

The Review Group therefore concluded by recommending that consideration be given by the Departments of Enterprise, Trade and Employment and Justice, Equality and Law Reform to the establishment of an inter-departmental committee comprised of representatives of both Departments (including the CLRG, IAASA and the Courts Service) to consider whether accountants and solicitors should be permitted to form LLPs or, in the case of solicitors and accountants, companies (the Review Group having already recommended that auditors should be permitted to incorporate). [35]

[35] Part 8 of the Legal Services Regulation Act 2015, introduced as a Bill in 2011, now provides for limited liability partnerships for solicitors and/or barristers.

APPENDIX 3

LIMITED PARTNERSHIPS ACT 1907

CHAPTER XXIV.

An Act to establish Limited Partnerships. [28th August 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Short title.

This Act may be cited for all purposes as the Limited Partnerships Act, 1907.

2. Commencement of Act.

This Act shall come into operation on the first day of January one thousand nine hundred and eight.

3. Interpretation of terms.

In the construction of this Act the following words and expressions shall have the meanings respectively assigned to them in this section, unless there be something in the subject or context repugnant to such construction:—

"Firm," "firm name," and **"business"** have the same meanings as in the Partnership Act, 1890 (53 & 54 Vict. c. 39):

"General partner" shall mean any partner who is not a limited partner as defined by this Act.

4. Definition and constitution of limited partnership.

(1) From and after the commencement of this Act limited partnerships may be formed in the manner and subject to the conditions by this Act provided.

(2) A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called general partners, who

shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.[36]

(3) A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back.

(4) A body corporate may be a limited partner.

5. Registration of limited partnership required.

Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner.

6. Modifications of general law in case of limited partnerships.

(1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:[37]

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[36] Companies Act 2014 section 1435. (1) No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business (other than the business of banking), that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless—

(a) it is registered as a company under this Act;

(b) it is formed in pursuance of some other statute; or

(c) it is a partnership formed for the purpose of—

(i) carrying on practice as accountants in a case where each partner is a statutory auditor;

(ii) carrying on practice as solicitors in a case where each partner is a solicitor;

(iii) carrying on or promoting the business of thoroughbred horse breeding, being a partnership to which, subject to subsection (5), the Limited Partnerships Act 1907 relates; or

(iv) the provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities, being a partnership—(I) that consists of not more than 50 persons; and

(II) to which, subject to subsection (5), the Limited Partnerships Act 1907 relates.

(5) The provisions of section 4 (2) of the Limited Partnerships Act 1907 shall not apply to a partnership specified in subsection (1)(c) nor to a partnership specified in an order made under subsection (2).

[37] European Communities (Accounts) Regulations, 1993 (S.I. No 396/1993) reg. 8(2): The compliance by a limited partner with Regulations 16 (2) (b) and 22 (1) shall not constitute taking part in the management of the partnership business for the purposes of section 6 (1) of the Limited Partnerships Act, 1907.

Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

(2) A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner shall not be a ground for dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realised.

(3) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the court otherwise orders.

(4) Applications to the court to wind up a limited partnership shall be by petition under the Companies Acts, 1862 to 1900, and the provisions of those Acts relating to the winding-up of companies by the court and of the rules made thereunder (including provisions as to fees) shall, subject to such modifications (if any) as the Lord Chancellor, with the concurrence of the President of the Board of Trade, may by rules provide, apply to the winding-up by the court of limited partnerships, with the substitution of general partners for directors.[38]

(5) Subject to any agreement expressed or implied between the partners—

(a) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;

(b) A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(c) The other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt;

(d) A person may be introduced as a partner without the consent of the existing limited partners;

(e) A limited partner shall not be entitled to dissolve the partnership by notice.

[38] Subsection (4) repealed by the Companies (Consolidation) Act 1908, section 286 and Sixth Schedule Part. I.

7. Law as to private partnerships to apply where not excluded by this Act.

Subject to the provisions of this Act, the Partnership Act, 1890 (53 & 54 Vict. c. 39), and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships.

8. Manner and particulars of registration.

The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom in which the principal place of business of the limited partnership is situated or proposed to be situated a statement signed by the partners containing the following particulars:—

(a) The firm name;

(b) The general nature of the business;

(c) The principal place of business;

(d) The full name of each of the partners;

(e) The term, if any, for which the partnership is entered into, and the date of its commencement;

(f) A statement that the partnership is limited, and the description of every limited partner as such;

(g) The sum contributed by each limited partner, and whether paid in cash or how otherwise.

9. Registration of changes in partnerships.

(1) If during the continuance of a limited partnership any change is made or occurs in—

(a) the firm name,

(b) the general nature of the business,

(c) the principal place of business,

(d) the partners or the name of any partner,

(e) the term or character of the partnership,

(f) the sum contributed by any limited partner,

(g) the liability of any partner by reason of his becoming a limited instead of a general partner or a general instead of a limited partner,

a statement, signed by the firm, specifying the nature of the change shall within seven days be sent by post or delivered to the registrar at the register office in that part of the United Kingdom in which the partnership is registered.

(2) If default is made in compliance with the requirements of this section each of the general partners shall, on conviction under the Summary Jurisdiction Acts, be liable to a fine not exceeding [a Class E Fine][39] for each day during which the default continues.

10. Advertisement in [Irish Oifigiúil][40] of statement of general partner becoming a limited partner and of assignment of share of limited partner.

(1) Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in [Irish Oifigiúil], and until notice of the arrangement or transaction is so advertised the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect.

(2) For the purposes of this section, the expression **"the Gazette"** means—

In the case of a limited partnership registered in England, the London Gazette;

In the case of a limited partnership registered in Scotland, the Edinburgh Gazette;[41]

In the case of a limited partnership registered in Ireland, the [Irish Oifigiúil].

11. Ad valorem stamp duty on contributions by limited partners.

The statement of the amount contributed by a limited partner, and a statement of any increase in that amount, sent to the registrar for registration under this Act, shall be charged

[39] Fines Act 2010, section 8(2), now €500.

[40] Adaptation of Enactments Act 1922, section 4: Every mention of or reference to the Dublin Gazette contained in any British Statute shall, as respects the doing or not doing of any act, matter or thing in Saorstát Éireann after the 6th day of December, 1922, be construed and take effect as a mention of or reference to the official gazette called Iris Oifigiúil.

[41] Spent.

with an ad valorem stamp duty of [one pound][42] *for every one hundred pounds, and any fraction of one hundred pounds over any multiple of one hundred pounds, of the amount so contributed, or of the increase of that amount, as the case may be; and, in default of payment of stamp duty thereon as herein required, the duty with interest thereon at the rate of five per cent. per annum from the date of delivery of such statement shall be a joint and several debt to His Majesty, recoverable from the partners, or any of them, in the said statements named, or, in the case of an increase, from all or any of the said partners whose discontinuance in the firm shall not, before the date of delivery of such statement of increase, have been duly notified to the registrar*.[43]

12. Making false returns to be misdemeanor.

Every one commits a misdemeanor, and shall be liable to imprisonment with hard labour for a term not exceeding two years, who makes, signs, sends, or delivers for the purpose of registration under this Act any false statement known by him to be false.[44]

13. Registrar to file statement and issue certificate of registration.

On receiving any statement made in pursuance of this Act the registrar shall cause the same to be filed, and he shall send by post to the firm from whom such statement shall have been received a certificate of the registration thereof.

14. Register and index to be kept.

At each of the register offices herein-after referred to the registrar shall keep, in proper books to be provided for the purpose, a register and an index of all the limited partnerships registered as aforesaid, and of all the statements registered in relation to such partnerships.

15. Registrar of joint stock companies to be registrar under Act.

The registrar of joint stock companies shall be the registrar of limited partnerships, and the several offices for the registration of joint stock companies in London, Edinburgh, and Dublin

[42] One pound inserted in place of “five shillings” by the Finance Act 1920 s 39.

[43] Repealed by the Finance Act 1973, section 96 and Schedule. 11.

[44] Repealed by the Perjury Act 1911 section. 17 and Schedule but section 18 of that Act provides that the Act shall not extend to Scotland or Ireland.

shall be the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated.[45]

16. Inspection of statements registered.

(1) Any person may inspect the statements filed by the registrar in the register offices aforesaid, and there shall be paid for such inspection such fees as may be appointed by the [Minister for Jobs, Enterprise and Innovation][46], not exceeding one shilling for each inspection; and any person may require a certificate of the registration of any limited partnership, or a copy of or extract from any registered statement, to be certified by the registrar, and there shall be paid for such certificate of registration, certified copy, or extract such fees as the [Minister] may appoint, not exceeding two shillings for the certificate of registration, and not exceeding sixpence for each folio of seventy-two words, or in Scotland for each sheet of two hundred words.

(2) A certificate of registration, or a copy of or extract from any statement registered under this Act, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars (whom it shall not be necessary to prove to be the registrar or assistant registrar) shall, in all legal proceedings, civil or criminal, and in all cases whatsoever be received in evidence.

17. Power to [Minister] to make rules.

The [Minister] may make rules (but as to fees with the concurrence of the [Minister for Finance][47]) concerning any of the following matters:—

(a) The fees to be paid to the registrar under this Act, so that they do not exceed in the case of the original registration of a limited partnership the sum of two pounds, and in any other case the sum of five shillings;

[45] Companies Act 2014, section 887(9) Any act required or authorised by (a) this Act, (b) the Limited Partnerships Act 1907, or (c) the Registration of Business Names Act 1963, to be done to or by the Registrar [of Companies], the registrar of joint stock companies or a person referred to in the enactment as "the registrar", as the case may be, may be done to or by a registrar or assistant registrar appointed under subsection (3) [of section 887], a person continued in office by virtue of subsection (5) [of section 887] or any other person so authorised by the Minister.

[46] The functions of the Board of Trade were transferred to the Minister for Industry and Commerce by the Ministers and Secretaries Act 1924 s.1(vii) and Schedule, Sixth Part, the name of that Minister's portfolio being changed by further orders under that Act.

[47] The functions of the Treasury were transferred to the Minister for Finance by the Ministers and Secretaries Act 1924 s.1(ii) and Schedule, First Part.

(b) The duties or additional duties to be performed by the registrar for the purposes of this Act;

(c) The performance by assistant registrars and other officers of acts by this Act required to be done by the registrar;

(d) The forms to be used for the purposes of this Act;

(e) Generally the conduct and regulation of registration under this Act and any matters incidental thereto.

APPENDIX 4

THE LIMITED PARTNERSHIPS RULES, 1907

Statutory Rules and Orders, 1907, No. 1020, dated December 17, 1907,
and made under section 17 of the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24).

1. "The Act" means the Limited Partnerships Act, 1907.

2. Whenever any act is by the Act directed to be done to or by the registrar such act shall be done in England to or by the Registrar of Joint Stock Companies or in his absence to or by such person as the Board of Trade may for the time being authorise; in Scotland to or by the existing Registrar of Joint Stock Companies in Scotland ; and in Ireland to or by the existing Assistant Registrar of Joint Stock Companies for Ireland or by such person as the Board of Trade may for the time being authorise in Scotland or Ireland in the absence of the registrar ; but in the event of the Board of Trade altering the constitution of the existing Joint Stock Companies Registry Office such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the principal place of business of the limited partnership to be registered as the Board of Trade may appoint.

3. [The fees to be paid to the Registrar under the Act shall be as follows:

   (a) on the original registration of a limited partnership the sum of €2.50,

   (b) on the registration of a statement of any change within the meaning of section 9(1) of the Act occurring during the continuance of a limited partnership the sum of 30 cent,

   (c) by any person inspecting the statements filed by the Registrar in the Register Office the sum of 5 cent for each inspection,

   (d) by any person requiring a Certificate of the registration of any limited partnership or a certified copy of or extract from any registered statement the sum of 10 cent for

each certificate and for such certified copy or extract the sum of 6 cent for each folio of seventy-two words.][48]

4. The forms in the appendix hereto with such variations as the circumstances of each case may require shall be the forms to be used for the purposes of the Act

[48] Rule 3 substituted by the Limited Partnership Regulations 2001 (S.I. No. 570/2001), regulation 3, with effect from 1 January 2002.

APPENDIX [TO THE LIMITED PARTNERSHIPS RULES, 1907]

Forms to be used for the purposes of the Act

No. of Certificate **Form No. L.P. 1.**

LIMITED PARTNERSHIPS ACT, 1907

Application for Registration of a Limited Partnership

[A [€2.50] fee stamp must be impressed

We, the undersigned, being the partners of the firm
hereby apply for registration as a limited partnership, and for that purpose supply the following particulars, pursuant to sect. 8 of the Limited Partnerships Act, 1907:_

The firm name }

The general nature of the business }

The principal place of business }

The term, if any, for which the partnership is entered into, and the date of its commencement } Term (if any) years
If no definite term, the conditions of existence of the partnership }

Date of Commencement

The Partnership is Limited

Presented or forwarded for filing by

Full name and Address of each of the Partners.	Amount contributed by each Limited Partner, and whether paid in cash, or how otherwise
General partners Limited partners.	

Signatures of/ all the partners }

Date

No. of Certificate **Form No. L.P. 2.**

LIMITED PARTNERSHIPS ACT, 1907

Notice of Change in the Limited Partnership

[A [€2.50] fee stamp must be impressed

(*)————

Notice is hereby given, pursuant to section 9 of the Limited Partnerships Act, 1907, that the changes below have occurred in this limited partnership

(a)	Change in the firm name	Previous name New name
(b)	Change in the general nature of the business	General nature of business as previously carried on General nature of business as now carried on
(c)	Change in the principal place of business	Previous place of business New place of business
(d)	Change in the partners or the name of any partner	

.

Presented or forwarded for filing by

(*) Here insert name of firm or partnership.

(e)	Change in the term or character of the partnership	Previous term (if any), but, if no definite term, then the conditions under which the partnership was constituted	
		New term (if any), but, if no definite term, then the conditions under which the partnership is now constituted	
(e)	Change in the sum contributed by any limited partner		
(f)	Change in the liability of any partner by reason of his becoming a limited instead of a general partner, or a general instead of a limited partner		

Signature of firm

Date

No. of Certificate **Form No. L.P. 3.**

LIMITED PARTNERSHIPS ACT, 1907

(*)————

Statement of the Capital contributed by Limited Partners made pursuant to section 11 of the Limited Partnerships Act, 1907

The amounts contributed in cash or otherwise by the limited partners of the firm
(†) are as follows:-

Names and Addresses of Limited Partners	Amounts contributed in cash or otherwise. (If otherwise than in cash, that fact with particulars must be stated

Signature of a general partner

Date

Presented or forwarded for registration by

(*) Here insert name of firm or limited partnership.

(†) Here insert name of firm or limited partnership.

No. of Certificate **Form No. L.P. 4.**

LIMITED PARTNERSHIPS ACT, 1907

(*)————

Statement of Increase of Capital contributed in cash, or otherwise, by limited partners, pursuant to section 11 of the Limited Partnerships Act, 1907.

The capital of the limited partnership (†) has been increased by the addition thereto of sums contributed, in cash or otherwise, by the limited partners, as follows: -

Names of Limited Partners	Increase or additional sum now contributed. (If otherwise than in cash, that fact, with particulars must be stated.)	Total amount contributed. (If otherwise than in cash, that fact, with particulars must be stated.)

Signature of a general partner

Date

Presented or forwarded for registration by

(*) Here insert name of firm or limited partnership.

(†) Here insert name of firm or limited partnership.

No.

CERTIFICATE OF REGISTRATION OF A LIMITED PARTNERSHIP

I hereby certify, that the firm having lodged a statement of particulars pursuant to section 8 of the Limited Partnerships Act, 1907, is this day registered as a limited partnership.

Given under my hand at Dublin this day of one thousand nine hundred and

Fee stamps £

Stamp duty on capital £

Registrar of Limited Partnerships.

PURSUANT TO SECTION 10 OF THE LIMITED PARTNERSHIPS ACT, 1907

Notice is hereby given that under an arrangement entered into on the day of . 19 , ceases to be a general partner and becomes a limited partner in the firm of carrying on business as at

Dated this day of

Signature

Witness to the signature of

(Name)

(Address)

PURSUANT TO SECTION 10 OF THE LIMITED PARTNERSHIPS ACT, 1907

Notice is hereby given that under an arrangement entered into on the day of . 19 , of the firm of carrying on business as at has assigned his share as a limited partner in the above-named firm to

Dated this day of

Signature

Witness to the signature of

(Name)

(Address)

COMPANY LAW REVIEW GROUP

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

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Chairperson's Letter to the Minister

Dear Minister,

I am pleased to submit for your consideration the Company Law Review Group's *Report on UNCITRAL Model Law on Cross-Border Insolvency*. The recommendations contained within the report intend to make a clear case as to why the Model Law should be adopted in Ireland. The report was conducted as part of the Review Group's 2018-2020 work programme and was formally adopted by the Review Group on 10th December 2018.

In preparation for this report, an extensive review of cross-border corporate insolvency law in Ireland and the position in other common law jurisdictions was undertaken. Each article of the Model Law was analysed from a practical standpoint, with a view to establishing the ways in which its adoption may impact our company law framework along with the various stakeholders involved, from insolvency practitioners to unsecured creditors, with the Review Group making a recommendation on each of its 32 articles.

The deliberations which led to the conclusions of this report, were conducted over the past 18 months, during which there were 7 meetings of a working committee [1] chaired by Mr. Barry Cahir. I would like to thank Barry not only for his systematic approach to the task, but also for sharing his technical expertise. I thank the committee members who worked diligently to provide a clear and comprehensive report. I must also acknowledge the work of the secretariat and legal researchers who provided essential support to the committee and Review Group.

Adoption of the Model Law will provide business with an increased level of certainty when operating in Ireland. I believe that by providing an internationally recognised framework for cross-border insolvency we can further improve conditions for continued foreign direct investment. Equally, within the context of Brexit, and given the hugely significant trading relationship we have with our immediate neighbour, it is of vital importance that we have a cross-border insolvency procedure that is functional and adaptable.

Finally, I would like to take this opportunity on behalf of the newly convened Review Group to say that we look forward to working with you and your officials in the Department of Business, Enterprise and Innovation in continuing to update and improve company law.
Yours sincerely,

Paul Egan
Chairperson

[1] The current members of the Insolvency sub-committee are set out at Appendix 1

Executive Summary

The purpose of this report is to examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law").

The Model Law offers a procedural structure within which a diversity of national laws can exist with an emphasis on recognition of foreign insolvency proceedings and co-operation between stakeholders in affected jurisdictions. It does not provide for any substantive choice-of-law rules. Instead it utilises ancillary proceedings to assist foreign insolvency proceedings.

The question of whether this State should adopt the Model Law has assumed a more pronounced impetus following the Brexit referendum in the United Kingdom. Post Brexit, companies in the United Kingdom may no longer be subject to Regulation (EU) 2015/848 of the European Parliament and of the Council ("the EU Regulation"). Ireland's significant trading relationship with its immediate neighbour implies a need for a system of cross-border insolvency administration which is usable, functional and adaptable. Moreover, Ireland has other significant trading partners such as the United States, who would welcome the certainty of a familiar construct within which to administer cross-border insolvencies. The benefit of an enhanced system of cross-border insolvency could further improve conditions for continued foreign direct investment.

The main focus of the UNCITRAL Model Law relates to situations where parties in insolvency proceedings in other countries seek assistance from the Irish courts. For the most part insolvency proceedings relating to Irish incorporated and registered companies will continue to be governed by the provisions of the Companies Act 2014.

It is submitted that the adoption of the Model Law in Ireland would provide companies to which the EU Regulation does not apply, and their creditors, greater certainty and predictability as to how cross-border insolvencies are treated in this jurisdiction.[2]

The Model Law is designed to apply to corporate and personal insolvencies. It is noted that in this jurisdiction (like many common law jurisdictions) that personal insolvency comes under the remit of the Department of Justice and Equality. While the Group is satisfied that the Model Law could be applied only to corporate insolvencies it is desirable to achieve a coherence between personal and corporate insolvency in terms of the Model Law.

[2] See also Appendix 2 for an outline on the principles of modified universalism.

Chapter 1. Introduction

1.1 The Company Law Review Group

The Company Law Review Group (the "Review Group" or the "CLRG") was established by section 67 of the Company Law Enforcement Act 2001 to advise the Minister for Business, Enterprise and Innovation (the "Minister") on changes required in companies' legislation with specific regard to promoting enterprise, facilitating commerce, simplifying legislation, enhancing corporate governance and encouraging commercial probity. In the period since its establishment, the Review Group has been involved in advising the Minister, culminating in a major transformation in the Irish company law regime.

Most significantly, the Companies Act 2014 was signed into law on 23 December 2014 and commenced on 1st June 2015. This Act, which is the largest substantive Act in the history of the State, modernises the Irish company law code and consolidates 17 Acts and 15 Statutory Instruments, dating from 1963 to 2013, into a single coherent piece of legislation.

The drive to modernise Irish company law is part of a long-standing commitment by the State to policies which seek to open up the economy to the opportunities afforded by free trade, international capital mobility, EU membership and globalisation. The pursuit of these policies has helped transform Ireland's economy from one grounded in a small, protected and domestic industrial base to one which now consists of a highly productive and innovative industrial sector, together with a sophisticated and internationally-traded services sector.[3] A transparent and effective company law code forms part of the foundation of a modern, commercially-focused economy.

1.2 CLRG Work Programme 2018-2020

The Minister, following consultation with the CLRG, determines the programme of work to be undertaken by the Review Group, on a two-year cycle. This document will address item 5 of the Work Programme, which requests that the CLRG:

> *"Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the Model Law on Cross-border Insolvency".*

1.3 Cross-border Insolvency

Cross-border insolvency law assists in determining:

(a) which court has jurisdiction over a cross-border insolvency case,
(b) which substantive insolvency law applies to the case, and
(c) whether the judgment opening an insolvency proceeding rendered by a foreign court should be recognised and, if so, whether the effects of this proceeding under foreign law should be extended to the assets located in the jurisdiction recognising the foreign judgment.

[3] Department of Finance, *Economic Impact of the Foreign-Owned Sector in Ireland* (October 2014), p.5.

There are two broad approaches that countries have adopted in designing laws and mechanisms to guide cross-border insolvency administrations: the universal approach and the territorial approach.

The universal approach assumes that one insolvency proceeding will be universally recognised by the jurisdictions in which the entity has assets or carries on business. All the assets of the insolvent company will be administered by the court or the administrator of, the lead insolvency process, which is typically determined by the place of incorporation. All creditors seeking to claim in the winding up submit claims to that court or administrator. When assets of the insolvent company are located in foreign countries, the court has the power to apply for assistance from the courts of those countries.

The territorial approach assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor in that jurisdiction and that separate proceedings for each country under that country's laws will be undertaken. No recognition is given to proceedings in course or completed in other jurisdictions.

A major disadvantage of the territorial approach to cross-border insolvency is that separate insolvency proceedings are undertaken in each jurisdiction where the debtor's assets are located with the cost of such proceedings being borne ultimately by creditors. The cost and time involved in numerous proceedings encourages inefficiencies and duplication of work.

1.4 The UNCITRAL Model Law

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted the text of a model law on cross-border insolvency ("the Model Law") designed to assist States 'to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency'.[4]

The Model Law offers a framework for domestic legislation, open for adoption by States individually, enabling insolvency proceedings in respect of corporate or natural legal persons having cross-border aspects (principally, where the insolvent entity has assets in more than one State or where that entity is indebted to a creditor from another State) to be administered more efficiently, effectively and fairly.

The purpose of the Model Law, as stated in its Preamble, is expressed as being "to promote the objectives of:

(a) co-operation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) protection and maximization of the value of the debtor's assets; and

[4] UNCITRAL 30th Session, May 12–30 1997: Official Records of the General Assembly of The United Nations, 52nd Session, Supplement no 17 (A152/17), Part II, paras 12–225 and Annex 1.

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." [5]

The Model Law is supplemented by a Guide to the Enactment and Interpretation of the Model Law on Cross-Border Insolvency[6] ("the Enactment Guide") which also acts as an aid to interpretation of the Model Law's provisions. In the Enactment Guide, UNCITRAL notes the increasing number of cross-border insolvencies resulting from global expansion of trade and investment and points to several factors necessitating greater conformity between individual jurisdictions in their approach to administration of such insolvencies. It suggests that individual national insolvency regimes "have by and large not kept pace with the trend, and ... are often ill-equipped to deal with cases of a cross-border nature", resulting in "inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment."[7]

UNCITRAL identifies cross-border fraud by insolvent debtors (e.g. concealment of assets or their transfer to foreign jurisdictions) as a problem which is increasing both in frequency and magnitude. It notes that a limited number of countries have laws governing cross-border insolvency which are well suited to the needs of international trade and investment and asserts that existing principles and remedies such as; the doctrine of comity by courts in common law jurisdictions, orders recognising and assisting foreign insolvency administrators and proceedings (*exequatur*), and reliance on legislation for enforcement of foreign judgements and requests by foreign courts to a national court for judicial assistance (letters rogatory) "do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial co-operation, recognition of foreign insolvency proceedings and access for foreign representatives to courts".[8]

The lack of communication and coordination among courts and administrators from the jurisdictions affected renders it more likely that assets could potentially be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions, which reduces the ability of creditors to receive payment and the possibility of rescuing financially viable undertakings and securing jobs.[9]

The Model Law can be adapted to deal with corporate insolvencies within a group context and this is considered further at Appendix 3, however, group insolvencies are not the focus of the current Model Law and therefore this topic is beyond the scope of consideration for adoption at this time.

[5] UNCITRAL Model Law on Cross-Border Insolvency, Preamble at page 3.
[6] 1997 - UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment.
[7] The Enactment Guide at para 5, pp 20-21.
[8] Par. 16 of the Guide.
[9] Par. 17 of the Guide.

1.5 Context for the potential adoption of UNCITRAL Model Law on Cross-Border Insolvency in Ireland

Trade and commerce have become increasingly international and the number of debtors with assets held in or transitioning through several different jurisdictions has increased. When an insolvency situation arises in such companies, the lead insolvency representative may wish to collect those overseas assets in order to distribute the proceeds among the creditors in accordance with the discernible relevant principles. Accordingly, international insolvencies can give rise to unique challenges and issues surrounding jurisdiction and choice of law.

The Model Law is purely procedural, it does not create any new rights. It simply provides courts which are dealing with applicable cross-border insolvencies with an agreed court procedure for the recognition of a foreign main proceeding, an automatic stay consequent upon recognition, and the discretion for the court to grant additional reliefs.

The question of whether this State should adopt the Model Law has assumed a more pronounced impetus following the Brexit referendum in the United Kingdom. Post Brexit, companies in the United Kingdom will no longer be subject to EU Regulation. Ireland's significant trading relationship with its immediate neighbour implies a need for a system of cross-border insolvency administration which is usable, functional and adaptable. Moreover, Ireland has other significant trading partners such as the United States, who would likely welcome the certainty of a familiar construct within which to administer cross-border (non-EU) insolvencies.[10]

1.6 The Scope and Application of the Model Law in an Irish Context

Ireland, like most common law countries, maintains a clear separation between its corporate insolvency and personal insolvency frameworks,[11] with the former being governed by the 2014 Act, while the provisions in respect of the latter are contained in the Bankruptcy Act 1988[12] and, more recently, the Personal Insolvency Act 2012.[13]

Given that the notion of what constitutes insolvency varies from jurisdiction to jurisdiction, the Model Law does not prescribe a definition for "insolvency", reference is made instead to the different types of collective proceedings commenced with respect to debtors who are in severe financial distress or insolvent. The Model Law is designed to deal with proceedings aimed at liquidating or reorganising the debtor.

[10] A list of those countries which have enacted the model law are at Appendix 4.

[11] This dichotomy can be traced back to the development of insolvency law in England and Wales whereby the provisions governing personal insolvency law and corporate insolvency were, prior to the Insolvency Act 1986, retained in separate legislation with bankruptcy and windings up being administered by separate courts pursuant to different procedures rules. See generally Keay, *Insolvency Law: Corporate and Personal* (3rd Ed., Lexis Nexis, 2012) at p. 10.

[12] Bankruptcy can be defined as a process in which the property of an individual who is unable or unwilling to pay his or her debts (a "debtor") is transferred to a trustee to be sold and, after payment of costs, expenses, fees and certain debts given priority, distributed among those to whom he/she owes money (the "creditors").

[13] A further distinction lies in the fact that the Minister for Justice has responsibility for personal insolvency, whereas the Minister for Business, Enterprise and Innovation is competent in the area of corporate insolvency.

While the Model Law is designed to apply to corporate and personal insolvencies, we believe it is possible, should it be necessary, to introduce it solely in respect of corporate insolvency. The EU Insolvency Regulation is equally applicable to personal and corporate debtors. While it would be desirable that the Model Law would mirror the EU insolvency regime in its scope and application, the responsibility for personal insolvency resides with the Minister for Justice and as such is outside the remit of the Company Law Review Group. [14] It is the remit of the Company Law Review Group to review matters solely as they pertain to Company Law. Accordingly, for the purposes of this report, any recommendation on the application of the Model Law will relate to entities governed by the Companies Act 2014.

In addition, certain entities should be excluded from the scope of the Model Law. Those entities which should be excluded include credit institutions and insurance undertakings, both of which are subject to special insolvency regimes. These entities and their potential grounds for exclusion have been considered further in Appendix 5 of this report. Special insolvency rules have traditionally been applied to such entities both to protect the interests of deposit holders and insurance claimants, and in recognition of the importance of such entities to the functioning of the economy. The Group has identified those entities which have been excluded from the EU insolvency regime[15] and notes that there could be merit in echoing these exclusions in the Model Law, should it be adopted. Ultimately, the decision in respect of which entities could be excluded would require consultation with the Minister for Finance and other relevant regulatory authorities.

1.7 General Approach

Chapter 2 of this report will outline the various statutory insolvency mechanisms in use in Ireland along with the operation of the EU Regulation. It also deals with the current common law position in relation to the provision of assistance to foreign courts. Chapter 3 will address each of the 32 Articles contained in the Model Law in turn, considering the implications for Irish law of their adoption. Chapter 4 contains the conclusions and recommendations of the CLRG, including the cases for and against the adoption of the Model Law, the treatment of local preferential creditors and practical considerations in the event of adoption.

This report is informed by and includes input from a series of papers prepared and revised by Noel Rubotham (an officer of the Courts Service and former CLRG member) in the initial deliberations by the CLRG on the potential adoption of the Model Law in the Irish context. The CLRG wishes to acknowledge and thank Noel Rubotham for his dedication and research on this matter.

[14] The following jurisdictions have implemented the Model Law either with an implicit, or explicit incorporation of personal insolvency or no explicit disapplication of the Model Law to personal insolvency: Australia, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Great Britain, Greece, Japan, Mauritius, Mexico, New Zealand, Poland, Romania, Serbia, South Africa, South Korea, the United States of America. Part XIII of the Canadian Bankruptcy and Insolvency Act 1983 (Cross Border Insolvencies) applied explicitly to both.

[15] See para 3.3 in respect of Article 1.

Chapter 2. Cross-border Corporate Insolvency Law in Ireland

2.1 Introduction

The main purpose of this report is to assess the merits of incorporation of the Model Law into Irish law and to address the issues which would arise in the event that the Group was disposed to recommending such incorporation. Currently, insolvency law in Ireland is governed by several sources of law. The primary source of corporate insolvency law is the Companies Act 2014. The 2014 Act provides that the High Court has jurisdiction to wind up any company formed and registered under Irish law[16] and any unregistered company[17], which latter category includes a company incorporated outside the State which has been carrying on business in the State and ceases to carry on business in the State.[18]

2.2 Section 1417, Companies Act 2014

Section 1417 of the Companies Act 2014[19] states that orders "made for or in the course of winding up" of a company incorporated outside the State[20] by the courts of a country recognised by an order of the Minister under that section, may be enforced by the High Court "in the same manner in all respects as if the order had been made by the High Court". [21] An order under section 1417 may not be made in respect of other EU Member States save Denmark - the only Member State which has not subscribed to the EU Regulation. Only one Ministerial order was made in respect of the predecessor to section 1417, section 250 of the Companies Act 1963, which recognised Northern Ireland and Great Britain for the purposes of the section.[22] That recognition was subsequently revoked by the 2002 Regulations[23] given that the EU Regulation applies to the United Kingdom.

2.3 Applicable EU Insolvency Law

The proper functioning of the internal market requires (1) that cross-border insolvency proceedings should operate efficiently and effectively and (2) the avoidance of incentives for parties to transfer assets or judicial proceedings from one Member State to another in an attempt to obtain a more favourable legal position. This practice is also known as forum shopping. Regulation (EC) No 1346/2000 ("the EC Insolvency Regulation") was adopted in order

[16] Section 564(1), Companies Act 2014 and definition of "company" in section 2 of that Act.
[17] For the meaning of "unregistered company" see section 1326, Companies Act 2014.
[18] Section 1328(6) Companies Act 2014: a winding up order may be made in such a case even though the company has been dissolved or otherwise ceased to exist as a company under the laws of the country under which it was incorporated.
[19] Which substantially re-enacts section 250 of the Companies Act 1963 as amended by the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333/2002), Regulation 3(d) of which inserted a new subsection (4) in that section providing that section 250 does not apply in relation to an order made by a court of a member state of the European Communities other than the State and Denmark.".
[20] Section 1417(1) – please note that this section does not include Examinership.
[21] Section 1417(1).
[22] Companies (Recognition of Countries) Order 1964 (S.I. No. 42 of 1964). That Order also prescribes those jurisdictions for the purposes of prescribed for the purposes of sections 388 (Proof of incorporation of companies incorporated outside the State) and 389 (Proof of certificates as to incorporation) of the Companies Act, 1963.
[23] Regulation 13 of the 2002 Regulations.

to achieve this objective and comes within the scope of judicial co-operation in civil matters within the meaning of Article 81 of the Treaty on European Union and the Treaty on the Functioning of the European Union.[24]

In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it was deemed necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in an EU law measure which is binding and directly applicable in Member States.[25]

2.3.1 Regulation (EU) 2015/848 of the European Parliament and of the Council

Where the applicable insolvency proceedings were opened after the 26th June 2017, the recognition of and co-operation with insolvency proceedings[26] originating in other Member States of the EU (apart from Denmark), is governed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("the EU Insolvency Regulation"). Acts committed by a debtor before that date shall continue to be governed by the EC Insolvency Regulation.

The formerly applicable European Communities (Corporate Insolvency) Regulations 2002 (S.I. 333 of 2002) ("the 2002 Regulations") were revoked by the 2014 Act, which now reflects their contents in Part 11.

Scope

The EU Insolvency Regulation applies to proceedings where the centre of the debtor's main interests is located in the European Union[27] and governs collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.[28] In the context of Irish corporate insolvency law this includes: compulsory winding up by the court; creditors' voluntary winding up (with confirmation of a court) and examinership.[29] Members' voluntary windings-up, schemes of arrangement and receiverships are not included.[30]

The EU Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.[31] Separate EU legislation in the form of Council Directives governs the effects within the EU of the reorganisation and winding up of credit institutions[32] and insurance undertakings,[33] and extends to all EU Member States and EEA countries. Other directives ensure legal enforceability of

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[24] Consolidated Versions of the Treaty of the European Union and the Treaty of the Functioning of the European Union.
[25] Preamble to Regulation (EU) 2015/848.
[26] Whether proceedings in respect of corporations or natural legal persons.
[27] Recital 25 of the EU Insolvency Regulation.
[28] Article 1(1).
[29] Annex A of the EU Insolvency Regulation.
[30] Section 437(1) of the Companies Act 2014 gives a receiver of the property of a company power to do, in the State and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which s(he) was appointed; however, this is not applicable to the operation of the Model Law which is insolvency-based.
[31] Article 1(2).
[32] Council Directive 2001/24/EC.
[33] Council Directive 2001/17/EC.

transfer orders, netting agreements and related collateral securities[34] and of financial collateral arrangements[35] and protect these from the effects of a local insolvency. This principle is reflected in the exceptions to the choice of law rules of the EU Insolvency Regulation mentioned below.

Jurisdictional rules

The EU Insolvency Regulation introduces uniform rules as to jurisdiction for the opening of insolvency proceedings affected in the Member States concerned which displace their national jurisdictional rules.[36] These rules rest on the concepts of "the centre of a debtor's main interests" (COMI), "main" insolvency proceedings, "territorial" insolvency proceedings "secondary" insolvency proceedings.[37]

Recital 28 of the EU Insolvency Regulation states that "when determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests."

Main insolvency proceedings may be opened in the Member State where COMI is located. These proceedings have universal scope and aim at encompassing all the debtor's assets,[38] and any insolvency proceedings opened subsequently in another Member State are called secondary proceedings.[39] Secondary proceedings may be opened in a Member State other than where COMI is located only if the debtor has an establishment[40] within the territory of that Member State, in which event the effects of those proceedings are restricted to the assets of the debtor situated in that Member State's territory.[41]

Choice of law rules

The EU Insolvency Regulation also establishes uniform choice of law rules determining which Member State's law shall govern the various aspects of insolvency proceedings within the Regulation's scope.[42] In general, the law applicable to insolvency proceedings and their effects is that of the Member State where proceedings are opened, and this covers matters such as who may be the subject of insolvency proceedings, what assets are captured by the proceedings and how they are to be treated, the respective powers of the debtor and liquidator, the effects of the proceedings on transactions, claims admissible and the manner of their proof.[43]

There are various exceptions to this general rule and they concern such matters as rights in rem[44] of third parties to assets located in a Member State other than that in which the proceedings

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[34] Council Directive 98/26/EC on settlement finality in payment and securities settlement systems.
[35] Council Directive 2002/47/EC on financial collateral arrangements.
[36] Article 3.
[37] Article 3.
[38] Recital 23.
[39] In *Eurofood*, the European Court of Justice held that any challenge to the jurisdiction of a court opening proceedings as main proceedings must be made to that court (par. 44 of the judgment).
[40] Viz. "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods": Article 2(h).
[41] Article 3(2).
[42] Articles 4 to 15.
[43] Article 7.
[44] Rights in rem refer to rights over specific things, usually real property.

were opened,[45] rights based on reservation of title to assets located in such a Member State,[46] contracts affecting immoveable property, [47] rights and obligations of the parties to a payment or settlement system or to a financial market (the applicable law being the law of the Member State applicable to that system or market)[48] and employment contracts.[49]

Recognition and enforcement of insolvency proceedings

Orders opening insolvency proceedings made by a court in the Member State where COMI is located and orders made by that court in the course of or in terminating such proceedings[50] must be recognised in all the other Member States from the time they come into effect.[51] Generally, such orders will, without further formalities, produce the same effects in any other Member State as in the Member State of COMI as long as no secondary proceedings are opened in the other Member State.[52]

A Member State may refuse to recognise insolvency proceedings opened in another Member State or enforce orders made in such proceedings where the effects of recognition or enforcement “would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.”[53]

A temporary administrator, such as a provisional liquidator, appointed in the Member State where COMI is located may request any measures in another Member State to secure and preserve assets in that State pending opening of the main proceedings.[54]

Co-Operation and Communication

Where main and secondary proceedings are being conducted concurrently, the liquidators in each proceeding are obliged to communicate information to each other - immediately, in the case of information relevant to the other proceedings - and cooperate with each other.[55] They, as well as individual creditors,[56] may lodge claims in the other proceedings on behalf of the creditors in their proceedings[57] and may participate in the other proceedings as a creditor might do.[58]

The EU Insolvency Regulation makes provision to ensure that creditors in other Member States are informed of the opening of insolvency proceedings and are facilitated in lodging claims. [59]

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[45] Article 8.
[46] Article 10.
[47] Article 8.
[48] Article 12.
[49] Article 13.
[50] Article 19.
[51] Article 19.
[52] Article 20.
[53] Article 33.
[54] Article 52.
[55] Article 43.
[56] Article 45(1).
[57] Article 45(2).
[58] Article 45(3).
[59] Articles 53 to 55.

Chapter V – Insolvency Proceedings of Members of a Group of Companies

Chapter V of the EU Insolvency Regulation addresses insolvency proceedings of members of a group of companies. Group coordination proceedings may be requested of any court having jurisdiction over the insolvency proceedings of a group member, by an insolvency practitioner appointed in insolvency proceedings opened in relation to a group member and in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.[60]

2.4 The Position at Common law

Ireland has a common law legal system which has evolved from court judgments over centuries. Precedent as a source of law is the main characteristic feature of a common law system. It involves the citing of a judgment or decision of a court of law as an authority to justify a decision in a case involving a similar set of facts. Currently Ireland and the United Kingdom, (and Cyprus and Malta to an extent) are the only EU countries operating under a common law legal system.

The recognition and assistance of foreign insolvency proceedings not subject to the EU Insolvency Regulation or section 1417 of the Companies Act 2014 (those originating in Denmark and all non-EU States) remains governed by the common law rules of private international law in this area.

2.4.1. The ongoing Development of the Common Law in Ireland

For many years, there was a scarcity of relevant modern Irish case law. However, a number of recent cases have shed light on the common law entitlement of a court to recognise insolvency proceedings in another jurisdiction.

The first of these cases was the decision of the Supreme Court on the 23rd February 2012 in *Re Flightlease (Ireland) Limited (In Voluntary Liquidation),*[61] where the company's liquidators had asked the court to determine whether an order made by a Swiss court in a Swiss liquidation would be enforceable against the Irish company. The order would require the return of moneys paid to the Irish company at a disadvantage to creditors. The nature of that order was that it was an order *in personam*. Applying the common law rules, the court held that such an order would only be enforceable if the Irish company was present or carrying on business in Switzerland when the proceedings were instituted and had submitted to the jurisdiction of the Swiss courts. As neither of these factors were present the court ruled it would be inappropriate for the Irish court to recognise any judgment on the relevant matter in the Swiss liquidation proceedings.

In coming to its determination, Finnegan J stated.

> *"In the area of conflicts of law it is desirable to await development of a broad consensus before developing the common law and it has not been suggested that such a consensus exists among common law jurisdictions. It is in any event desirable that such a significant change in the common law should be by legislation as appears to be the case in the*

[60] Article 61(1), (2).

[61] Re Flightlease (Ireland) Limited (In Voluntary Liquidation [2012] 1 IR 722.

> *United Kingdom. It is suggested by commentators that the common law in the United Kingdom is developing so that it will approximate with Council Regulation (E.C.) No. 1346/2000. For such a change to occur in this jurisdiction it is desirable that it should occur by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law".*

However, delivering a separate judgment in which he concurred with Finnegan J, O'Donnell J noted that in the absence of an international agreement and domestic legislation, the courts should seek to retain a prospect of further development of the common law in this area.[62]

In *Fairfield Sentry Limited (in liquidation) & Anor. v Citco Bank Nederland and Ors,*[63] a judgment of the High Court delivered some days after *Flightlease,*[64] and wherein *Flightlease* is not referenced, Finlay-Geoghegan J was satisfied, notwithstanding the paucity of authority, that, at common law, inherent jurisdiction to recognise orders of foreign courts existed. She stated:

> *"…pursuant to common law in Ireland, the court has an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU courts) for the winding up of companies and the appointment of liquidators."*[65]

The Court noted however that 'the common law is undeveloped in relation to any further assistance to be given to foreign liquidators.'[66]

In *Re Mount Capital Fund Limited (in liquidation) & Ors,*[67] Laffoy J noted the Court had to consider whether the decision in *Fairfield* was reconcilable with the Supreme court's decision in *Flightlease.*

At issue was an application by joint liquidators for recognition of the liquidation of two companies based in the British Virgin Islands. The joint liquidators also sought orders that the High Court and its officers act in aid of the Eastern Caribbean Supreme Court in the High Court of Justice in the British Virgin Islands in granting the liquidators liberty to apply for an order under section 245 of the Companies Act 1963 to obtain books and records of the companies from certain entities in Ireland. The liquidators argued that there was equivalence between the provisions of the Act of 1963 and the Insolvency Act 2003 of the British Virgin Islands, and that the court had inherent jurisdiction pursuant to common law to grant the orders sought. Laffoy J considered that both judgments were reconcilable:

> *"I am satisfied that the ratio decidendi*[68] *of [Flightlease]…is limited to the situation in which it is sought to enforce at common law "liability to pay a sum" on foot of a judgment made by a foreign court in liquidation proceedings being conducted in this jurisdiction in*

[62] At para. 82.
[63] [2012] 1 IEHC 81.
[64] on the 28th February 2012.
[65] *Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland and Ors*. [2012] 1 IEHC 81, para.23.
[66] At para. 111.
[67] [2012] 2 I.R. 486.
[68] Lit. "the reason for the decision".

> *accordance with Irish law. I am of the view that it does not preclude this court from giving recognition to orders of the type made by the High Court of Justice of the British Virgin Islands in relation to the companies."*

In *Re Sean Dunne, (a Bankrupt),* [69] it was claimed that the Official Assignee in Ireland had no jurisdiction to deal with the assets of the bankrupt where there had been a prior foreign bankruptcy order. In the Supreme Court, Laffoy J commented[70] that:

> *"… there have been a number of recent decisions of the High Court in this jurisdiction which recognise that at common law an inherent jurisdiction exists, deriving from the underlying principle of universality of insolvency proceedings, by virtue of which the courts in this jurisdiction can give recognition to insolvency proceedings in a foreign jurisdiction and act in aid of the court in that jurisdiction: In Re Drumm (a bankrupt) [2010] IEHC 546; Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland and Ors. [2012] 1 IEHC 81; and In Re Mount Capital Fund Limited (in liquidation) & Ors. [2012] 2 I.R. 486. However, if the High Court had jurisdiction to adjudge the Appellant a bankrupt on the petition of the Petitioner, and assuming the Petitioner established compliance with the criteria necessary to give it entitlement to such an order, there is absolutely no basis in law on which the High Court could abstain from exercising its jurisdiction on the ground that, instead of exercising its entitlement, the Petitioner should have attempted to persuade the Chapter 7 Trustee to pursue the order in aid route."*

The Supreme Court cited with approval the statement of the Privy Council in *Singularis*[71] in support of the view that "this Court can only act within the limits of its own statutory and common law powers."

In *A.A.-v-B.A.,*[72] Charleton J in the Supreme Court cited the *Sean Dunne* case with approval and noted that:

> *"In this jurisdiction we have an official trustee tasked with the independent and fair discharge of the collection and distribution of all of the estate of a bankrupt. He fulfils that task in exemplary fashion. His authority, exercised under that of the High Court, is not to be automatically ceded merely because a foreign power has been persuaded to take up a jurisdiction where it may be virtually all of the relevant assets in reality lie outside the boundaries of that court system. Were such an alienation of authority possible, the clear risk would be that some systems might be more favourable to debtors than others or even that there might be a system enabling the return of assets to a bankrupt notwithstanding that the estate in bankruptcy is insufficient to meet liabilities. Such possibilities would caution against unthinkingly adopting such a principle."* [73]

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[69] [2015] IESC 42.
[70] At para. 63, Denham CJ & Charleton J concurring.
[71] This decision is considered further in Appendix 6.
[72] [2015] IESC 102.
[73] Ibid at page 13.

It is, as yet, unclear what the long-term effect of the *Sean Dunne* decision will be in the context of the development of the common law power of recognition and assistance. The particular facts of the *Sean Dunne* case involved an individual whose primary assets and creditors were in Ireland and who held very few assets in the United States.

The emphasis placed by the Supreme Court on the constraints on development of a cross-border assistance facility for insolvency proceedings at common law, and the lack of clarity as to the parameters of the assistance available to foreign liquidators, serve to underline the uncertainty and lack of predictability which reliance on the common law for a solution in this area would entail. Some elements of the position at common law in Australia and the United Kingdom are set out further in Appendix 6.

2.5 Interplay between Irish, EU and UNCITRAL Law[74]

The EU Insolvency Regulation will prevail in relation to insolvencies within the EU. The Model Law would only apply to the extent the Regulation does not apply. If adopted the hierarchical order would be:

1) The EU Insolvency Regulation;
2) Relevant Irish statutes governing the insolvency of companies e.g. Companies Act 2014;
3) The common law conflict of law rules relating to the recognition of foreign judgements in insolvency proceedings insofar as it is not displaced by the Model Law legislation.

In the event of the adoption of the Model Law, it would fit into the second of the above three categories.

A practical view

What implications would the adoption of the Model Law have for the commencement of insolvency proceedings in multiple jurisdictions involving a company which has an activity based in Ireland?

By way of example, a fictitious United States registered company, 'U.S. Inc.' makes an application for recognition in the Irish courts of the American Chapter 11 bankruptcy[75] proceedings. The present approach of the Irish courts to the recognition of the insolvency processes is determined on a case-by-case basis in accordance with conflict-of-law rules. So, whereas the common law dictates that Irish courts have an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU Courts) for the winding up of companies and the appointment of liquidators, the decision would still be subject to the interpretation of a court, as opposed to being determined by the process set out in the Model Law. On the other hand, were Ireland to adopt the Model Law, the Chapter 11 bankruptcy proceedings would be recognised subject to the fulfilment of the necessary conditions under the Model Law.

[74] In the event of adoption of the Model Law.

[75] This chapter of the United States Bankruptcy Code generally provides for reorganisation, usually involving a corporation or partnership. A chapter 11 debtor usually proposes a plan of reorganisation to keep its business alive and pay creditors over time. People in business or individuals can also seek relief in chapter 11.

Jurisdiction and choice of law

The Model Law, unlike the EU Insolvency Regulation, does not seek to displace existing national rules or to displace existing choice of law rules (i.e. which law should apply to the insolvency process or issues ancillary thereto). These remain the prerogative of the enacting State.

The Model Law yields to an enacting state's obligations under any multi-lateral or bilateral treaties or agreements.[76] Thus, enactment of the Model Law would not lead to conflict with the application of the EU Insolvency Regulation under Irish law.

The Model Law is suitable for incorporation into the existing laws of any country. A key principle of the Model Law is that it is not based upon reciprocity between states. Rather, it provides a mechanism which, when incorporated into the domestic law of the enacting State, enables recognition to be given to foreign insolvencies and relief and assistance to foreign officeholders. Enacting States are free to adopt the Model Law in its entirety, or to expand, adapt, or modify it.

[76] Article 3, which provides: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

Chapter 3. Examination of the Model Law

3.1 Introduction

The Model Law is designed to assist States to supplement their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging co-operation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.

For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Model Law is stated to apply in cases where:

(a) assistance is sought in the enacting State by a foreign court or a foreign representative in connection with a foreign proceeding;

(b) assistance is sought in a foreign State in connection with a domestic insolvency proceeding (i.e. one under the insolvency law of the enacting State);

(c) a foreign proceeding and a domestic insolvency proceeding concerning the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign State have an interest in initiating or participating in a domestic insolvency proceeding.[77]

This report seeks to outline the likely effect of the Model Law, if adopted, on the status of foreign insolvency proceedings and representatives under Irish law. However, as (b) indicates, the Model Law also seeks to facilitate local insolvency representatives requiring assistance abroad. Article 5 permits local insolvency representatives designated under the law of the enacting State to act in a foreign State on behalf of an insolvency proceeding originating in the enacting State.

This chapter will review each of the 32 articles contained in the Model Law, and consider the implications for Irish law of the adoption of each of them. While many of the articles would not require significant or any alteration in terms of their potential incorporation into Irish law, certain of them, particularly those which relate to the comparative treatment of statutorily protected creditors in Ireland and abroad, will bear more in-depth analysis. (articles 13, 21 & 22).

To assist with the potential drafting process should the Minister choose to adopt the Model Law, under each individual article, a recommendation has been made to adopt the article as it is drafted or to adopt with certain modifications so as to tailor the text for its inclusion into Irish law.

3.2. Preamble

Preamble

[77] Article 1(1).

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Co-operation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Insolvency

Given that the notion of what constitutes insolvency varies from jurisdiction to jurisdiction, the Model Law does not prescribe a definition for "insolvency". The Model Law deals with proceedings aimed at liquidating or reorganizing the financially distressed debtor as a commercial entity

The definition of insolvency in the context of the Companies Act, 2014 is generally accepted as being that a company is unable to pay its debts[78] as they fall due.

The definition of 'insolvent' pursuant to the Personal Insolvency Act, 2012, in relation to a debtor, shall be construed as meaning that the debtor is unable to pay his or her debts in full as they fall due.[79]

In relation to the definition of "insolvency proceedings" it is noteworthy that the Enactment Guide states as follows at paragraph 50: -

> *50. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to proceedings regardless of whether they involve a natural or a legal person as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.*[80]

Irish 'Insolvency proceedings' from the perspective of the EU Insolvency Regulation means the following types of proceedings in the Irish context: -

(i) Compulsory winding-up by the court,

[78] cf. CA '14 s 569(1)(d).
[79] Personal Insolvency Act, 2012 at s 2(1).
[80] The Guide at para 50, p33.

(ii) Bankruptcy,
(iii) The administration in bankruptcy of the estate of persons dying insolvent,
(iv) Winding-up in bankruptcy of partnerships,
(v) Creditors' voluntary winding-up (with confirmation of a court),
(vi) Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution,
(vii) Examinership,
(viii) Debt Relief Notice,
(ix) Debt Settlement Arrangement,
(x) Personal Insolvency Arrangement.

At section 2(1), the Companies Act 2014 defines "insolvency proceedings" as meaning *insolvency proceedings opened under Article 3 of the EU Insolvency Regulation in a Member State, other than the State and Denmark, where the proceedings relate to a body corporate*.

Recommendation

As the term 'insolvency proceedings' has a wide meaning and not a 'narrow technical meaning' it is the view of the Group that this preamble, in so far as it applies to company law, could be reflected, in the heads of a Bill or explanatory memorandum. However, it is not typical for an Irish legislative instrument to have a preamble.

3.3 Chapter I. General Provisions

Article 1

Article 1. Scope of application

1. This Law applies where:

(a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*][81];

or

(c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 1 of the Model Law outlines the types of issue that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: -

(a) inward-bound requests for recognition of a foreign proceeding;
(b) outward-bound requests from a court or insolvency representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State;
(c) coordination of proceedings taking place concurrently in two or more States; and
(d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.[82]

For the purposes of this report, the Model Law has been limited in its application to corporate bodies and, accordingly, Article 1 is only to be applied in respect of proceedings under the Companies Act 2014.

Article 1(2): The exclusion at Article 1(2) is similar to that which exists in Article 1.2 of the EU Insolvency Regulation, which states as follows: -

> *…*
>
> *2. This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:*

[81] Define 'Irish Insolvency Laws' throughout as Part 9, Chapter 1; Part 10; Part 11; Part 22, Chapter 3; and Part 25, Chapter 5 of the Companies Act 2014.
[82] Paragraph 53 of the Guide to Enactment and Interpretation at page 35.

(a) insurance undertakings;

(b) credit institutions;

(c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or

(d) collective investment undertakings.

The enacting State may exclude enterprises (e.g. banks or insurance companies) which under its law are subject to a special insolvency regime.[83]

By way of comparison, as mentioned above[84] the EU Insolvency Regulation has no application to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.[85]

Recommendation

It is the view of the Group that article 1(1) should be adopted and modified to allow for the inclusion of Irish Insolvency Law as defined (see footnote to Article 1(1)).

It is the view of the Group that section 1(2) should be adopted. The Group suggests that the exclusion of certain undertakings from the scope of the Model Law would mirror the exclusions provided for in the Insolvency Regulation subject to consultation with the Minister of Finance and the Central Bank.

Article 2

Article 2. Definitions

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

[83] Article 2(2).

[84] At para 2.3.1.

[85] Sections 1419 to 1428.of the Companies Act 2014.

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 2 of the Model Law defines the terms specific to cross-border scenarios. The Enactment Guide gives the following guidance in relation to definitions: -

> *"Since the Model Law will be embedded in the national law, Article 2 only needs to define the terms specific to cross-border scenarios. [T]o the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the enacting law."*[86]

The centre of main Interests

The following excerpt from the Enactment Guide outlines the circumstances in which foreign proceedings will be considered "main proceedings". The formulation is almost identical to that contained in the EU Insolvency Regulation.

> *81. A foreign proceeding is deemed to be the "main proceeding" if it has been commenced in the State where "the debtor has the centre of its main interests". This corresponds to the formulation in Article 3 of the EC Regulation thus building on the emerging harmonization as regards the notion of a "main proceeding". The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.*[87]

Where is the centre of main interests?

The phrase centre of main interests is not defined in this section of the model law but see Article 16(3). The concept is very familiar in Irish Law, being derived from the EU Regulation and the EU Insolvency Regulations.

The term "collective" is well known in Irish Law and distinguishes a formal insolvency regime (under which the debtor's assets are realised for the benefit of all creditors) from private proceedings against a debtor, in which a single creditor acts for its own benefit, such as receivership.[88]

The EU Insolvency Regulation defines 'establishment' at recital (10) as meaning

> *'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets';*

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[86] The Enactment Guide at para 62, p38.

[87] The Enactment Guide, para 81 at p43.

[88] *Williams v Simpson (No 5)* [2010] NZHC 1786 at [5].

The principal difference therefore between the treatment of the 'Establishment' definition by the EU Insolvency Regulation as compared with the Model Law definition is the time delimitation element contained in the former.

The definitions of "foreign main proceeding" and "foreign non-main proceeding" correspond substantially to the concepts of main and territorial/secondary proceedings in the EU Insolvency Regulation.

Recommendation
It is the view of the Group that this article should be adopted as drafted.

Article 3

Article 3. International obligations of this State
To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 3 expresses the principle of supremacy of international obligations of the enacting State over internal law.[89]

This is a reference to the status of the Model Law as such, which would be subordinate to the terms and provisions of the EU Insolvency Regulation, for example.

Ireland's implementation of Article 3 should confirm the supremacy of EU law – namely, the EU Insolvency Regulation but it is suggested that EU Insolvency Regulation is specified.

Recommendation
Adopt Article 3 with the following modification: -
"To the extent that this Law conflicts with the European Insolvency Regulation or an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the European Insolvency Regulation, treaty or agreement prevail."

Article 4

Article 4. [Competent court or authority][90]
The functions referred to in this Law relating to recognition of foreign proceedings and co-operation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State].*

[89] The Enactment Guide, paragraph 91, page 48.
[90] A state where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials of bodies might wish to include in article 4 or elsewhere in chapter I the following provision:
Nothing in this Law affects the provisions in force in the State governing the authority of *[insert the title of the government-appointed person or body].*

Article 4 specifies the relevant courts and/or authorities who would carry out the functions of the Model Law in the areas of recognition of foreign proceedings and co-operation with foreign courts.

It is recommended that the High Court should, in view of its current jurisdiction in relation to insolvency, be designated as the competent court for the purpose of discharging the relevant functions under the Model Law, such as the recognition of foreign proceedings and co-operation with foreign courts.

Recommendation

It is the view of the Group that this article should be adopted, specifying the inclusion of 'the High Court' as the competent court.

Article 5

Article 5. Authorization of [insert title of person/body administering reorganization or liquidation per law of enacting State] to act in a foreign State
A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

The person or body administering a reorganisation or liquidation under the law of the enacting State could be separately defined (for example as "Irish Insolvency Officeholder") and will include liquidators, provisional liquidators and examiners. Liquidators to include court appointed liquidators and liquidators appointed through creditors' voluntary liquidation.[91]

Recommendation

It is the view of the Group that this article should be adopted and modified to include references to newly defined Irish Insolvency Officeholder.

Article 6

Article 6. Public policy exception
Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

In relation to Article 6 the following commentary of André J. Berends in his work on the Model Law, discusses the usefulness of Article 6: -

[91] From an Irish perspective, the fact that both the United Kingdom and the United States have already adopted the Model Law means that an Irish representative will be able to gain assistance in these jurisdictions.

> *"Article 6 contains a public policy exception: the court need not render a decision that is contrary to the public policy of its State. One may ask whether this article is really necessary. Even if it had not been included in the Model Law, in my view, no court would feel obliged to render a decision that is contrary to the public policy of its State. Additionally, these kinds of articles seem to be more appropriate in a treaty than in a Model Law. However, the value of this article may be that it encourages States to enact the Model Law. During the session of the Commission, some observed that this article should be interpreted in a restrictive sense. I agree wholeheartedly and believe that public policy should be confined to fundamental principles of law".*[92]

Recommendation
Adopt as drafted.

Article 7

> **Article 7. Additional assistance under other laws**
>
> Nothing in this Law limits the power of a court or a *[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]* to provide additional assistance to a foreign representative under other laws of this State.

The approach adopted by Article 7 ensures that the Model Law of the enacting State, the EU Insolvency Regulation, and the common law operate in parallel. Common law assistance is necessarily subordinate to legislative policy such as that evinced in the Model Law. The common law may supplement the Model Law, but not trump it.[93]

Recommendation
It is the view of the Group that this article should be adopted as amended in the following terms:

Nothing in this Law limits the power of a court or an Irish Insolvency Officeholder to provide additional assistance to a foreign representative under other laws (to include constitutional law, statute law and common law) of this State.

Article 8

> **Article 8. Interpretation**
>
> In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

As the Model Law is not a treaty and does not create binding international obligations, its operation depends exclusively on how it is enacted and interpreted locally. The common thread uniting all national enactments is Article 8 of the Model Law. In *Rubin v Eurofinance*, the UK High Court attached importance to Article 8 when interpreting the British Model Law: "[A]rticle 8

[92] *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview* – Berends, André J., (1998) 6 Tulane J Int Law 309

[93] Adapted from Chan Ho, Ibid at p183; *Re Stanford International Bank* [2009] EWHC 1441 (Ch); [2009] BPIR 1157 at [104]-[105]. But see *Schmitt v. Deichmann* [2012] EWHC 62 (Ch).

provides that in interpreting the [British Model] Law, regard is to be had to its international origin and to the need to promote uniformity in its application. Both these considerations would be disregarded if the court were to adopt a parochial interpretation of 'debtor' and as a result refuse to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction."[94]

Recommendation
It is the view of the Group that this article should be adopted as drafted.

Article 9

Article 9. Right of direct access
A foreign representative is entitled to apply directly to a court in this State.

Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, intending to thus free the representative from having to meet formal requirements such as licenses or consular action.[95]

It should be noted that direct access in practice means an application to court using a barrister, instructed by a solicitor who in turn is instructed by the foreign representative.

Recommendation
It is the view of the Group that this article should be adopted as drafted.

Article 10

Article 10. Limited jurisdiction
The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 10 makes clear that the mere making of an application under the aegis of the Model Law would not submit the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the Irish courts for any purpose other than the application.

Recommendation
It is the view of the Group that this article should be adopted as drafted.

Article 11

Article 11. Application by a foreign representative to commence a proceeding under [*identify laws of the enacting State relating to insolvency*]

[94] [2009] EWHC 2129 (Ch); [2010] 1 All ER (Comm) 81 at [40]; ibid at p186.
[95] The Enactment Guide at para 108, p55.

A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met.

Article 11 ensures that a foreign representative can file an application for the opening of an Irish Insolvency Proceeding, as outlined in the following quote from Berends work on the Model Law:-

> *"The UNCITRAL Working Group undertook lengthy discussions about whether a foreign representative who is appointed in a foreign non-main proceeding should be able to apply for an insolvency proceeding, or whether this right should be reserved to a foreign representative of a main proceeding. The solution adopted was that the Model Law should not distinguish between a foreign main representative and a foreign non-main representative. If the foreign representative is appointed in a proceeding opened in a country where the debtor maintains the centre of its main interests, he can ask for the opening of an insolvency proceeding in the enacting State, provided that the other conditions for commencing such a proceeding are met. In other words, a foreign main representative can apply for the opening of a non-main proceeding in the enacting State."*[96]

Recommendation

It is the view of the Group that this article should be adopted to include the definition of 'Irish Insolvency Law'.

Article 12

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency]

The intent in this article is reflected in all jurisdictions that have adopted the Model Law.[97]

The term 'participate' above is not defined in order not to restrict its breadth and flexibility. Commentators observe that the foreign representative's right to participate in British insolvency proceedings is not limited to intervention in court proceedings, but includes the entire insolvency process: *[T]he drafters [of the Model Law] intended 'participate' to mean the making of petitions, requests or submissions concerning issues such as protection, realisation or distribution of assets, or co-operation and coordination with the foreign proceeding*[98].

[96] Berends, Ibid at page 340.
[97] Chan Ho, Ibid at page 9.
[98] Ibid at p188; Andre J Berends "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" (1998) 6 Tul J Int'l & Comp L 309, 342.

Recommendation

It is the view of the Group that this article should be adopted and modified to include the definition of Irish Insolvency Law.

Article 13

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify the laws of the enacting State in relation to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred payment claim) has a rank lower than the general non-preference claims].[99]

Article 13(1) embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated less favourably than local creditors.[100]

Article 13 Paragraph 2 clarifies that the principle of non-discrimination enshrined in paragraph 1 does not disturb the provisions on the ranking of claims in insolvency proceedings. We do not currently have legislative provisions assigning special ranking to foreign creditors. As such, it is the view of the Group that this article should be adopted to include definition of Irish Insolvency Law and without the exception in paragraph 2.

Recommendation

It is the view of the Group that this article should be adopted to include definition of Irish Insolvency Law and without the exception in paragraph 2.

Article 14

Article 14. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

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[99] The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13:
"2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred payment claim) has a rank lower than the general non-preference claims*]."

[100] The Enactment Guide at para 118, p60.

1. Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) Indicate a reasonable time period for filing claims and specify the place for their filing;

(b) Indicate whether secured creditors need to file their secured claims;

and

(c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Recommendation

It is the view of the Group that this article should be adopted as drafted inserting the definition of the Irish Insolvency Law.

Article 15

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, we believe it is desirable not to encumber the process with additional procedural requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple,

expeditious structure to be used by a foreign representative to obtain recognition.[101] In implementing the Model Law in Ireland Article 15.3 could be extended to include all proceedings in being and not just foreign proceedings.

Recommendation

It is the view of the Group that this article should be adopted with the inclusion in 15(3) of the phrase "and proceedings under Irish Insolvency Law" after the phrase 'foreign proceedings'.

Article 16

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, the debtor's registered office, [or habitual residence in the case of an individual], is presumed to be the centre of the debtor's main interests.

Article 16 establishes presumptions that facilitate swift action. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.[102]

The third paragraph seeks to avoid lengthy discussions about what constitutes the debtor's centre of main interests and in this regard closely resembles the EC Regulation.[103]

Recommendation

It is the view of the Group that this article should be adopted as drafted in so far as it applies to company law.

Article 17

Article 17. Decision to recognise a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognised if:

(a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4.

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[101] The Enactment Guide at paragraph 127.

[102] The Enactment Guide, para 137 at page 68.

[103] Berends, ibid at pp353-4.

> 2. The foreign proceeding shall be recognised:
>
> (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
>
> (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
>
> 3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
>
> 4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 17 mandates that, once the necessary criteria have been satisfied, a foreign proceeding shall be recognised as a foreign main proceeding or non-main proceeding. The local court is obliged to determine the recognition application promptly. Article 17 has been implemented in all jurisdictions.[104]

The provisions of article 17.1(c) were considered by the Group. While the requirements for an application for recognition set out in Article 15 are all compulsory, the highlighting of only paragraph 2 of article 15 in article 17.1(c) may give rise to confusion. The United Kingdom have provided in its equivalent article that "the application meets the requirements of paragraphs 2 and 3 of article 15".

Recommendation
It is the view of the Group that this article should be adopted with a minor amendment to Article 17.1(c) deleting the words 'paragraph 2 of' so that it would simply read: "The application meets the requirements of article 15; and".

Article 18

> **Article 18. Subsequent information**
>
> From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:
>
> (a) Any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
>
> (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

In the event that a substantive change in the status of either the recognised foreign proceeding or the foreign representative should occur after the application for recognition of the foreign proceeding, the foreign representative is obliged to inform the court of that change.

Recommendation
It is the view of the Group that this article should be adopted as drafted.

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[104] Look Chan Ho, Ibid at page 10.

Article 19

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice*.]

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Interim relief pending recognition

Pending the determination of an application for recognition of a foreign representative, Article 19(1) gives the court discretion where "urgently needed to protect the assets of the debtor or the interests of the creditors," to grant interim relief. The court may decline to grant such relief where to do so would interfere with the conduct of a foreign main proceeding.[105]

Relief referred to under the preceding two paragraph headings may only be granted or denied where the court is satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[106] Such relief may also be granted on terms,[107] and may be modified or discharged by the court at the request of the foreign representative or a person affected (e.g. a local claimant) or on its own initiative.[108]

Recommendation

It is the view of the Group that this article should be adopted as drafted with an insertion that the court may direct that notice of the application be given to any relevant parties and the mode of notice to be given.

Article 20

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

[105] Article 19(4).
[106] Article 22(1).
[107] Article 22(2).
[108] Article 22(3).

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article*].

3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

Whereas the relief provided for by Articles 19 and 21 is discretionary, the effects provided for by Article 20 are not because they flow directly from the recognition of the foreign main proceeding. Another difference between discretionary relief under Articles 19 and 21 and the effects under Article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects only flow from recognition of foreign main proceedings.[109]

It should be noted, however, that the first three effects outlined above do not automatically apply where a local insolvency proceeding has already been instituted prior to the application for recognition of the foreign main proceedings.[110] If the application for recognition comes after the opening of the local proceeding, the three effects concerned must be modified or terminated if inconsistent with the local proceeding.[111]

Article 20 provides for the automatic consequences of recognition of a foreign main proceeding. One automatic consequence of recognition is a form of moratorium (or stay) on proceedings against the debtor and execution against debtor's assets. Article 20, paragraph 2 enables the recording or mirroring of exceptions or limitations on the moratorium. It is important to note that the foreign proceedings could be reorganisation proceedings or liquidation proceedings. In order to consider whether any limitations or modifications should be recorded, the relevant provisions of other legislation which give effect to equivalent moratorium should be noted as follows:

> Section 520 of the Companies Act 2014 sets out the effect of a petition to appoint an examiner on creditors and others which includes a prohibition on secured lenders realising their security, (except with the consent of the Examiner) and otherwise except by leave of the Court, on such terms as the Court may impose (see Section 520, sub-section 5).
>
> In a liquidation, Section 606 of the Companies Act 2014 sets out a restriction on the rights of creditors to execute an attachment in the case of a company being wound up.

[109] The Enactment Guide at para 176, page 83.
[110] Article 29(a)(ii).
[111] Article 29(b)(ii).

Sub-section 4 of Section 606 provides that the restriction is capable of being set aside by the Court on such terms as the Court thinks fit.

Section 678 of the Companies Act 2014 precludes any action or proceeding from being initiated or advanced against a company in liquidation, except by leave of the Court and subject to such terms as the Court may impose.

Looking beyond the Companies Act, EIR Recast (the Recast European Insolvency Regulation — Regulation EU2015/848) is concerned primarily with choice of law and jurisdiction in relation to Insolvency proceedings. As such, for the purpose of defining limitations on a moratorium, it is not directly comparable. However, it specifies certain exclusions in relation to the opening of proceedings, for example:

Article 8 - the opening of Insolvency proceedings does not affect the rights in rem of the third parties in respect of assets situated within the territory of another member state at the time of opening proceedings;

Article 9 - opening proceedings doesn't affect the rights of creditors to demand the set-off of their claim;

Article 20 - any restriction of creditor rights in particular a stay or discharge shall produce effects in the territory of another member state, only in the case of those creditors who have given their consent.

Article 46 - Obliges the court which opens secondary proceedings to stay the realisation of assets on request of the Insolvency practitioners in the main Insolvency proceedings.

In November 2016, the European Commission published a proposal for a directive of the European Parliament and of the Council on Preventative Restructuring Frameworks ("the Proposed Directive"). The Proposed Directive does propose a level of harmonisation among member states in respect of a preventative restructuring. Furthermore, it is modelled on Chapter 11 of the US Bankruptcy code and, as such, there are a large number of similarities between what is proposed and Examinership. Article 6 sets out provisions in relation to a stay, which could be summarised as follows:

1. *Member States shall ensure that debtors can benefit from the stay;*
2. *Members States shall ensure that a stay may be ordered in respect of all types of creditors, including secured and preferential creditors;*
3. *The stay does not apply to workers extant claims;*
4. *The stay shall be limited to a maximum period of not more than 4 months;*
5. *Member States may enable judicial or administrative authorities to extend or vary the terms of the stay;*
6. *Further extensions to the stay depend on progress being made on a restructuring plan and the continuation of the stay not unfairly prejudicing the rights of any parties;*
7. *The total duration of the stay shall not exceed 12 months;*
8. *Judicial or administrative authorities may lift the stay at the request of the insolvency practitioner or if it becomes clear that a critical mass of creditors do not support the continuation of negotiations.*

The stay envisioned by the Proposed Directive is similar to the stay achieved on the filing of the petition for Examinership. As such, the suggestion above (using the phrase on such terms as the Court deems fit) would appear to be consistent with the thrust of the Proposed Directive.

The approach to Article 20 of the Model law in the UK has been that the stay is stated to be given the same scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act. The UK legislation provides that the stay in particular does not affect any right that would be exercisable in a winding-up such as:

(a) to take steps to enforce security;
(b) to take steps to repossess goods under a hire purchase agreement;
(c) rights of set off.

The UK provision also contains a general carve-out permitting the Court, on the application of the foreign representative or a person affected, to modify or terminate a stay and suspension.

Based on all of that analysis, Article 20 paragraph 2 could read as follows:

"The scope, and the modification or termination, of the stay and suspension referred to in paragraph one of this article is subject to the Court, on application of the foreign representative or any affected party, modifying or terminating such stay and suspension on such terms as the Court thinks fit."

Recommendation

It is the view of the Group that this article should be adopted as drafted with an insertion at article 20(2) to the effect that the stay is subject to such terms as the court deems fit.

Article 21

Article 21. Relief that may be granted upon recognition of a foreign proceeding
1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
(b) Staying execution against the debtor’s assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
(e) Entrusting the administration or realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court;
(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 21 outlines the discretionary reliefs available upon recognition of a main or non-main foreign proceeding, where necessary to protect the assets of the debtor or the interests of the creditors.

Significantly, the court, on recognising a foreign proceeding and being satisfied that "the interests of creditors in this State are adequately protected", may entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court.[112]

Protection of preferential creditors

The protection provided by the Model Law for the entitlements of creditors who enjoy preferential status pursuant to Irish law, should be welcomed by creditors including the Revenue Commissioners.

Insofar as receivers and debenture holders are concerned, it may be deemed appropriate to specify here or elsewhere that secured rights and rights in rem are not affected (in a similar fashion to Article 8 of the EU Insolvency Regulation). Note also in this regard that Article 32 carves outs rights in rem in relation to payment in concurrent proceedings.

A significant case arose under this article in 2014 in Australia: *Akers as joint foreign representative v. Deputy Commissioner of Taxation,* the Federal Court of Australia. [113] The court took steps to protect the Australian tax authorities and held that the model law is qualified by the capacity to modify and terminate the effects of recognition granted under Article 17 of the Model Law, and qualified by the obligation under Article 21.2 to protect local creditors.

A more detailed treatment of the Akers case is contained in the Appendix 6 to this report.

In adapting the Model Law into Irish law, provision could be made for the granting of adequate protection to the interests of preferential creditors in this State, within the meaning of Article 21(2). Article 21(2) and Article 22 currently grant such protection for all creditors, however, specifying preferential creditors would strengthen the position.

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[112] Article 12(2).

Recommendation

It is the view of the Group that this article should be adopted with specific reference in paragraph two (2) to preferential creditors.

Article 22

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 22 seeks to balance the relief to be granted to a foreign representative and the interests of the persons who may be affected by that relief.[114]

At the discussion stage of the Model Law, the suggestion was made to introduce an article dealing with the interests of local creditors. The proposal was rejected because it is difficult to define the notion of "local creditors". Moreover, it would be contrary to the philosophy of the Model Law to place local creditors in a better position than other creditors just because they are local. Local creditors can be individuals or large multinational businesses with local branches.

In many instances, the affected creditors will be local creditors. This will inevitably lead to a strategic and legislative temptation to limit and focus the protection of Article 22 on local creditors. It is suggested that to specifically define the local creditors (and establish criteria according to which they would receive special treatment) would not only demonstrate the difficulty of drafting a suitable text, but also show that there is no justification for discriminating against creditors on the basis of criteria such as place of business or nationality.[115]

Recommendation

It is the view of the Group that this article should be adopted with specific reference in paragraph 1 to preferential creditors.

Article 23

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].

[114] The Enactment Guide, para 196 at page 90.

[115] Adapted from the Enactment Guide, para 198 page 90.

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

The types of actions referred to above would include proceedings to set aside unfairly preferential or fraudulent transactions pursuant to sections 602, 603, 604 and 608 of the Companies Act 2014. Potential difficulties with this article could include the inevitable differences between jurisdictions in terms of prescribed time periods referable to the opening of insolvency. It is suggested the device or formula adopted in Article 11 is reflected here, as in, ensuring that "the conditions for commencing such a proceeding are otherwise met".

Recommendation

It is the view of the Group that this article should be adopted as drafted with appropriate insertions setting out the avoidance and antecedent transaction provisions in the 2014 Act on the proviso that "conditions for commencing such a proceeding are otherwise met".

Article 24

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

Article 24 allows for the intervention by a foreign representative in proceedings in the enacting State, subject to compliance with the local law of the State. The article does not distinguish between a representative of a proceeding recognised as a foreign main proceeding and a representative of a proceeding recognised as a foreign non-main proceeding.[116] The practical impact of the article may be limited because most proceedings should have been stayed under Article 20(1)(a) or 21(1)(a).[117]

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 25

Article 25. Co-operation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*].

[116] Berends, Ibid at page 378.
[117] Look Chan Ho, Ibid at page 239.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 25 seeks to facilitate co-operation on the part of the court of the enacting State, with foreign courts or foreign representatives, whether directly or indirectly. It also stipulates that direct communication with foreign courts and representatives is allowed, thereby stripping out another potential layer of procedural delay in execution.

The text in square brackets at Article 25 of the Model law suggests that the insertion should be either the Examiner or the Liquidator. That would seem to be unnecessarily limited given that the Irish Courts may be dealing with an inward application for recognition and assistance and they may not necessarily be dealing with a Liquidator or Examiner appointed in this jurisdiction.

In the UK, they have inserted the phrase "British Insolvency Office Holder" which is defined and which could be a private office holder or the Official Receiver. It is noted also that Article 27 of the Model law suggests the appointment of a person to act at the direction of the Court as a means of implementing the co-operation referred to in Article 25. While the original European Insolvency Regulation ("EIR") (1346/2000) did not provide for Court-to-Court communications, EIR Recast (Regulation EU (2015/848)) does. Specifically, Article 57 provides:

"that a Court shall co-operate with any other Court before which a request to open insolvency proceedings is pending "to the extent that such co-operation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the Court may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them."

It is suggested that this approach could be adopted into Article 25 and that the 'gap' could be filled with "*liquidator, examiner or such other person appointed under Article 27*".

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to inserting the phrase ‘liquidator, examiner or such other person appointed under Article 27’’ where indicated.

Article 26

Article 26. Co-operation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

In a similar spirit to Article 25, Article 26 mandates co-operation between the Irish Insolvency Officeholder and foreign courts or representatives. It also facilitates direct communication, for the same reasons as Article 25.

Recommendation

It is the view of the Group that this article should be adopted as drafted with the insertion of Irish Insolvency Officeholder.

Article 27

Article 27. Forms of co-operation

Co-operation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) *[The enacting State may wish to list additional forms or examples of co-operation].*

Article 27 gives examples of the methods of "appropriate means" of co-operation.

Recommendation

It is the view of the Group that this article should be adopted as drafted.

Article 28

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement co-operation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Articles 28 and 29 clarify that, notwithstanding the recognition of a foreign main proceeding, a local proceeding may be commenced in relation to the same debtor as long as the debtor retains assets within the State.

> *"The position taken in article 28 is in substance the same as the position taken in a number of States. In some States, however, for the court to have jurisdiction to commence a local insolvency proceeding, the mere presence of assets in the State is not sufficient. For such jurisdiction to exist, the debtor must be engaged in an economic activity in the State (to use the terminology of the Model Law, the debtor must have an "establishment" in the State, as defined in article 2, subparagraph (f)). In article 28, the less restrictive solution was chosen in a context where the debtor is already involved in a foreign main proceeding. While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that, if the debtor has no assets in the State, there is no jurisdiction for commencing an insolvency proceeding".*[118]

The enacting State may prefer to adopt a more restrictive solution, whereby local proceedings could only be initiated if the debtor had an establishment in the State. The reasoning for this might be that when assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including the local creditors. By specifying the relief to be granted to the foreign main proceeding and cooperating with the foreign court and representative, the court in the enacting State would have ample opportunity to ensure the administration of the local assets in such a manner as would assure the protection of local interests.[119]

It would not, therefore, be contrary to the philosophy of the Model Law to enact the Article with the words *"only if the debtor has assets in this State"* replaced with *"only if the debtor has an establishment in this State".*[120]

Recommendation
It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

Article 29

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek co-operation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

[118] The Enactment Guide, para 225 at page 100.
[119] The Enactment Guide, para 226 at page 101.
[120] Ibid at para 226, page 101.

(ii) If the foreign proceeding is recognised in this State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

(c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 29 regulates situations where a foreign proceeding and a local insolvency proceeding are taking place concurrently. The provisions on co-operation (which have previously been discussed) apply but a distinction is made depending on whether the application for recognition of the foreign proceeding post-dates or precedes the commencement of the local proceedings.

Where the application for recognition post-dates the local proceeding, the discretionary relief mentioned above[121] as being available under Articles 19 and 21 to assist the foreign proceedings must be consistent with the local proceeding[122] and the automatic stays on actions and suspension of rights to dispose of assets arising on recognition of foreign main proceedings[123] do not apply.[124]

Where the application for recognition precedes the local proceeding, the discretionary relief available must be reviewed by the court and modified or terminated if inconsistent with the local proceeding[125] and the automatic stays on actions and suspension of rights to dispose of assets arising on recognition of foreign main proceedings[126] must be modified or terminated if inconsistent with the local proceeding.[127]

Consideration should be given to the use of language which adopts the existing powers contained in respect of liquidation and examinership and simply extends the High Court's jurisdiction to make such orders in a manner which gives effect to the Model Law.

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

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[121] At page 16.
[122] Article 29(a)(i).
[123] See page 15 above.
[124] Article 29(a)(ii).
[125] Article 29(b)(i).
[126] See page 15 above.
[127] Article 29(b)(ii).

Article 30

Article 30. Coordination of more than one foreign proceeding
In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek co-operation and coordination under articles 25, 26 and 27, and the following shall apply:
(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
(b) If a foreign main proceeding is recognised after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 30 seeks to coordinate assistance between two or more concurrent foreign insolvency proceedings and ensures that any discretionary relief granted under Articles 19 and 21 on recognition of a foreign non-main proceeding must be consistent with any prior recognised foreign main proceeding and, where a foreign main proceeding is recognised subsequently, the relief granted must be modified if inconsistent therewith.

Recommendation
It is the view of the Group that this article should be adopted as drafted.

Article 31

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding
In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.

Some jurisdictions require proof of the insolvency of a debtor as a prerequisite to the commencement of insolvency proceedings, with Ireland included amongst those. It is suggested in the Enactment Guide that this rule may be helpful in legal systems which require proof of insolvency prior to the commencement of insolvency proceedings, because if proof were itself required as opposed to the use of the presumption, more time and resources would be consumed. The use of the word 'proof' in Article 31 denotes a rebuttable presumption.[128]

[128] Chan Ho, Ibid at page 244.

Recommendation

It is the view of the Group that this article should be adopted as drafted with the insertion of 'and/or unable to pay its debts as they fall due' after 'insolvent' and the inserted definition of Irish Insolvency Law.

Article 32

Article 32. Rule of payment in concurrent proceedings
Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State*
relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Article 32 codifies the "hotchpot rule" - stated also in Article 20(2) of the EU Insolvency Regulation, which means that a creditor who has received part payment in a foreign insolvency proceeding, may not receive a payment for the same claim in a local proceeding regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Recommendation

It is the view of the Group that this article should be adopted as drafted subject to insertion of definition of Irish Insolvency Law.

Chapter 4. Conclusions and Recommendation of the Group

In the previous chapters of this report we have analysed the current state of the law on cross-border insolvency and considered how the Model Law could be adopted into Irish law. The following chapter sets out some matters for consideration and, in the view of the Group, some of the benefits of adopting the Model Law. In addition, the chapter takes a thematic look at some of the practical questions raised in the article by article analysis in Chapter 3.

4.1 The case for adoption

The globalising of trade and investment

The importance of adequate provision in national insolvency laws to facilitate the conduct of insolvency proceedings having cross-border incidents and enabling co-operation and coordination across jurisdictions between such proceedings originating in different jurisdictions has been recognised both at international and national levels.

The IMF drew attention to the difficulties posed by diversity of national arrangements in this area, noting that this "creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises." [129] Both the IMF[130] and the World Bank have supported the Model Law as an effective regime to address the problems posed as a result.

In its "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems"[131], the World Bank listed the required elements of a national insolvency law and concluded: "The most effective and expeditious way to achieve these objectives is enacting the Model Law…"

The Working Group on International Financial Crises established by the G-22 group of countries in the wake of the Asian economic crisis of 1998 recommended wider use of the Model Law on Cross-Border Insolvency or similar mechanisms, having noted the capacity of such regimes to "facilitate more orderly workouts as well as allow countries to be better prepared for the increased incidence of cross-border insolvencies stemming from the expansion of global trade and investment."[132]

Ireland's open, dynamic corporate environment, which features many global business groups with complex structures, would benefit significantly from the incorporation of the Model Law into its legislation.

Legal certainty

The object of co-operation between courts in the context of transnational insolvency is the minimising of risks – such as uncertainty about ability to enforce legal rights, additional complexity and enforcement costs and unfamiliarity with foreign legal process - and transaction costs, so as to reduce the burden on transnational trade and investment.[133]

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[129] "Orderly & Effective Insolvency Procedures", Legal Department, International Monetary Fund 1999, Chapter 6.

[130] Ibid.

[131] World Bank, April 2001.

[132] Report of the Working Group on International Financial Crises, IMF, October 1998.

[133] Chief Justice Spigelman of New South Wales: "Cross-Border Insolvency: Co-Operation or Conflict?" Address to INSOL International Annual Regional Conference Shanghai, 16 September 2008, pages 2-4.

In evaluating the merits of adopting the Model Law, the New Zealand Law Commission noted: "Predictability of outcome on any given factual base is an important policy objective in commercial law. With predictability of outcome there is less need for legal argument and, in that way, the overall costs of litigation are reduced. At present, when cross-border insolvency issues arise, the insolvency administrator's advisors assess both the ease with which an application for assistance may be made and the way in which courts in particular states are likely to respond to requests for aid" [134] and contended that the Model Law "enhances predictability of outcome in identifying the initial processes to be followed to seek assistance and in establishing mechanisms for recognition of judgments of overseas courts."[135]

This argument is amplified in the case of Ireland. Apart from cases under the ambit of the EU Regulation, the recognition, assistance and coordination of foreign insolvency proceedings is currently governed by common law principles which have yet to be elaborated authoritatively by the courts here. Predictability of outcome, combined with certainty, can only be beneficial to a State which depends significantly on foreign direct investment.

Fair treatment of local and foreign creditors

The securing of fairness in the administration of insolvencies for creditors and other interested parties irrespective of origin is a stated object of the Model Law, and has been cited as a key argument for its adoption by several jurisdictions.[136] In its consultation paper on adoption of the Model Law in Great Britain, the Insolvency Service noted:

> *"Implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors worldwide and will provide an example to other States in terms of our readiness to engage in a genuinely two-way process of co-operation in international insolvency matters. Over time, when other States implement the Model Law, GB officeholders will progressively enjoy the same benefits abroad, in terms of reduced administrative costs incurred in recovering assets from overseas, thereby increasing funds available for distribution to creditors."*[137]

To the extent that other countries adopt the Model Law, Ireland can legitimately expect to derive the same benefits in terms of fairness, bilateral engagement, co-operation and ultimately, savings in time and costs arising from the adoption of the Model Law.

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[134] "Cross-Border Insolvency", Report No. 52, New Zealand Law Commission, 1999, par. 101.
[135] Ibid., par. 103.
[136] See, e.g. New Zealand Law Commission, op. cit. pars. 101 – 103; Sarra, "Crossing the Finish Line: The Potential Impact on Business Rescue of Adoption of new Cross-Border Insolvency Provisions", Office of the Superintendent of Bankruptcy, Canada, (2007), page 2.
[137] Consultation Paper "Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain" Consultation Paper, Insolvency Service, August 2005.

4.2 The case against adoption

Ceding of control to another jurisdiction

The Model Law may not establish a universalist approach to the recognition of insolvency proceedings, but it does shift the emphasis towards such an approach[138]. Such an emphasis could be perceived as ceding a degree of control in a liquidation to the insolvency laws and machinery of a foreign jurisdiction. This in turn could lead to different or less favourable outcomes for domestic stakeholders, for example in the treatment of preferential debt or employee creditors. The Group notes that with the inclusion of appropriate safeguards these concerns can be resolved. In particular, the 'adequate protection' provisions contained in Article 21, 22 and 23 of the Model Law and recommends the inclusion of express provisions in respect of preferential creditors in those articles to ensure their current position in Irish law is not adversely impacted by the inclusion of the Model Law.

Reciprocity

The recognition of foreign insolvency proceedings or regimes is often conditioned by national laws upon reciprocity of treatment by the insolvency regime of the country of origin of the proceedings. In Ireland, the recognition and assistance originally available in bankruptcy matters to the courts in the United Kingdom, the Isle of Man and the Channel Islands under section 142 of the Bankruptcy Act 1988 may be extended by order of the Government to other jurisdictions only where the Government are satisfied that reciprocal facilities to that effect will be afforded by that jurisdiction.

There is no requirement of reciprocity in the UNCITRAL Model Law and the Guide to Enactment makes clear that it is not envisaged that a foreign proceeding would be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State.

The unwillingness of many countries to offer recognition to foreign proceedings without reciprocity and national law provisions favouring local creditors have been cited as significant limitations on general acceptance of the UNCITRAL insolvency regime, and it has been observed: "in many nations, the Model Law has no realistic chance of adoption unless the executive retains a right to specify the nations to which it applies." [139]However, certain states have chosen to enact the Model Law and made reciprocity a condition of recognition.[140]

To date legislation based on the Model Law has been adopted in 43 States in a total of 45 jurisdictions.[141] The clear majority of these states have not required reciprocity to be a pre-condition of recognition. These include some of the leading common law jurisdictions, such as the U.S., Great Britain, Australia and New Zealand.[142]

Capacity and integrity of foreign insolvency regimes

As discussed above, the entrusting by the court of assets to a foreign insolvency representative for distribution as envisaged by the Model Law, presents risks for local creditors and other

[138] New Zealand Law Commission, op. cit. par. 105.

[139] Spigelman, op. cit., pages 8 -12.

[140] In its approach to incorporation, Mexico, Argentina and Romania have conditioned the operation of the Model Law on reciprocity.

[141] For a full list of adopting countries please see Appendix 3.

interests where the capacity or integrity of the foreign insolvency machinery, or the competence or integrity of the foreign representative are open to question. While this should not be an issue in the case of developed jurisdictions, legitimate concerns may arise in the case of less developed jurisdictions.

The Model Law does offer some safeguards in such an eventuality. Reference has already been made to Articles 21(2) and 22(2) and (3) in the context of the issue of reciprocity. As the Guide to Enactment states, citing Article 6 mentioned earlier, the Model Law "preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used." Thus, concerns on matters such as the observance of the rule of law in a foreign jurisdiction, the transparency or functioning of its insolvency process, or the probity of insolvency functionaries - where justified - could, it is submitted, be invoked by an affected party in resisting, or seeking imposition of conditions on recognition of the foreign proceedings.

4.3 Conclusions as to the merits of adoption

The Group is convinced of the merits of adopting the Model Law. Adoption would equip Ireland with a cross-border insolvency regime conforming to standards approved by international institutions such as the IMF and World Bank, the major common law jurisdictions, especially those outside the EU, and leading commentators and professional bodies.[143] Any potential risks relating to recognition of the status of insolvency proceedings in specific foreign jurisdictions can be adequately mitigated by use of the safeguards contained in the Model Law and by tailoring its provisions in the enacting legislation.

4.4 Considerations arising should the Model Law be adopted

In the event that a decision is taken to incorporate the Model Law into Irish law, there are several possibilities that can be considered in relation to the manner and terms of such incorporation. The following comments address what are judged to be the most significant issues.

4.4.1. Should the Model Law replace section 1417 of the Companies Act, 2014, or be available as an alternative to that provision?

In the United Kingdom, a decision was made to retain the existing statutory regime on cross-border co-operation, using section 426 of the Insolvency Act 1986. That section is more extensive in its effect than its Irish counterpart, section 1417 of the Companies Act, 2014.

Section 426(5) provides that a request made by a court of a foreign jurisdiction designated for the purpose is

> *"authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court*[144] *in*

[143] See "Cross-Border Insolvency: Promoting international co-operation and coordination" (2002) Australian Government Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8), page 12.

[144] Emphasis added.

> *relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."*

Section 1417(1), on the other hand, provides that

> *"Any order made by a court of any state recognised for the purposes of this section and made for, or in the course of, winding up a company may be enforced by the High Court in the same manner in all respects as if the order has been made by the High Court."*[145]

The retention of section 426 alongside the Model Law gives a foreign insolvency representative in a jurisdiction designated for the purposes of section 426 an option to choose whether to use the Model Law or section 426 when seeking assistance from a British court. However, it also gives rise to the possibility of concurrent applications under the two regimes from foreign representatives in different jurisdictions dealing with the same debtor. In the event, no amendment to section 426 was considered necessary to regulate such a situation.[146]

4.4.2 Application of the Model Law to bankruptcy

The Model Law may apply both to insolvencies of corporate and natural legal persons. In considering the issues involved in applying the Model Law to natural legal persons, the Australian Government analysis noted:

> *"it is arguable that failure to include personal bankruptcy within the scope of the provisions is undesirable because, as Australia has experienced, there are individuals that enter personal bankruptcy in the aftermath of corporate failures and the facilities provided by the Model Law to trace assets across jurisdictions would be very useful in those circumstances."*[147]

In light of the remit of the CLRG, the implications of adoption of the Model Law have been addressed solely as they affect company law. However, should a decision be made to include personal insolvency in the adoption of the Model Law into Irish law, it is suggested that adopting as similar an approach as possible for both corporate and individual insolvency would be beneficial. This would be in line with the uniform approach adopted by the EU Insolvency Regulation to corporate and personal insolvencies. While it would be desirable that the Model Law would mirror the EU insolvency regime in its scope and application, the responsibility for personal insolvency resides with the Minister for Justice and as such is outside the remit of the Company Law Review Group. Nevertheless, it is pertinent that many jurisdictions, including the

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[145] Companies Act, 2014 at section 1417(1).

[146] In New Zealand, the Model Law replaced existing statutory provisions enabling assistance to foreign insolvencies. In Australia, it is provided[146] that if the Model Law as applied is inconsistent with the existing provision on co-operation between courts[146], "the Model Law or the provision of this Act prevails, and the provision has no effect to the extent of the inconsistency."

[147] "Cross-Border Insolvency: Promoting international co-operation and coordination", op.cit., page 25.

major common law jurisdictions, have adopted the Model Law for both corporate and personal insolvency.[148]

4.5 Debt Adjustment and Schemes

The Model Law is already evolving and reform is inevitable. If adopted, it will be necessary to review and revise the model from time to time. UNCITRAL is already reviewing a model to apply to corporate groups and has recently published a complimentary Model Law on recognition and enforcement of insolvency related judgments.

The Model Law is also undergoing a review in several jurisdictions in terms of debt adjustment schemes as distinct from insolvency proceedings. The Group's recommendation on the Model Law adopts the standard concept that a foreign proceeding must be a proceeding under a law relating to insolvency.

In this context there are two primary types of schemes. The first are schemes ancillary to what is obviously and insolvency process, such as Examinership schemes. The second are schemes which are not considered to be ancillary to an insolvency process (although they may in fact be aimed at avoiding or preventing an insolvency) such as schemes under Part 9 Chapter 1 of the Companies Act 2014.

Chapter 15 of the US Bankruptcy Code[149]and Singapore's adoption of the Model Law take a broader approach that defines a 'foreign insolvency proceeding' to also include proceedings under a law relating to "the adjustment of debt".

It has been commented on positively that the inclusion of 'adjustment of debt' in the definition has been critical in providing the basis for US bankruptcy courts to apply the Model Law to recognise of the use of UK schemes of arrangement to restructure New York governed debt. As against that, there is also a view emerging, albeit for slightly different reasons, to the effect that US Courts may no longer recognise a UK (or other similar) scheme of arrangement that is not ancillary to or does not arise out of an insolvency proceeding.[150]

In the EU context, it is clear that the EU Regulations apply to Examinership proceedings because they are specifically referenced in its schedule. To the extent that there is any doubt about recognition of Examinership schemes under the EU Regulations (as opposed merely to the

[148] The following jurisdictions have implemented the Model Law either with an implicit incorporation of personal insolvency or no explicit disapplication of the Model Law to personal insolvency: Australia, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Great Britain, Greece, Japan, Mauritius, Mexico, New Zealand, Poland, Romania, Serbia, South Africa, South Korea, the United States of America.

[149] 11 USC § 101(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation

[150] The Thing about Schemes in the Scheme of Things: Recognition of Schemes of Arrangement under Chapter 15 of the U.S. Bankruptcy Code, David L. Lawton and Shannon B. Wolf, Bracewell LLP, INSOL International Technical Series Issue No. 38.

opening of the proceeding), this is addressed directly in Article 32 which provides explicitly that "…compositions approved by that court, shall also be recognised with no further formalities".

It is notable in this regard that in July of this year, UNCITRAL adopted a Model Law on Recognition and Enforcement of Insolvency-Related Judgments. This is intended to supplement the Model Law on Cross-Border Insolvency and is aimed specifically at judgments that arise "as a consequence of or is materially associated with an insolvency proceeding" and does not include "a judgment commencing an insolvency proceeding". In any applicable jurisdiction, this text should remove any doubt about recognition of a court sanctioned scheme under a law relating to insolvency, as opposed merely to recognition of the opening of the insolvency proceeding.

The Group considered making a recommendation to define 'foreign insolvency proceeding' to also include proceedings under a law relating to "the adjustment of debt" and/or judgments that arise "as a consequence of or … materially associated with an insolvency proceeding" and concluded that the consideration by the Group should be recorded in this report.

4.6 Recommendation on the Adoption of the Model Law

Arising from the examination and deliberations of the Group, the decision has been made to recommend the adoption of the Model Law to the Review Group. The proposed modifications to the Model Law text which can be found in Chapter 3 seek to resolve any potential concerns in respect of the treatment of local creditors and preferential creditors. In particular, the Group notes the 'adequate protection' provisions in Articles 21,22 and 23 which allow courts to consider how local creditors will be treated as a result of the recognition of any proceedings. In addition, the public policy provision under Article 6 of the Model Law will be of assistance to the courts in interpreting the Model law in a manner which is compatible with the domestic statutory protections which preferential creditors have under Irish law.

Appendices

Appendix 1: Membership of the CLRG Corporate Insolvency Subcommittee

Barry Cahir	Chairperson
Jonathan Buttimore	Office of the Attorney General
Helen Curley	Department of Business, Enterprise & Innovation
Gráinne Duggan	Bar Council of Ireland
Michael Halpenny	Irish Congress of Trade Unions
Rosemary Hickey	Office of the Attorney General
Irene Lynch Fannon	Ministerial nominee
John Loughlin	CCAB-I
Vincent Madigan	Ministerial nominee
Conor O'Mahony	Office of the Director of Corporate Enforcement
Kevin O'Neill	The Courts Service
Paddy Purtill	The Revenue Commissioners
Noel Rubotham	The Courts Service

Secretariat: Síona Ryan

Tara Keane

Legal Researcher: Robert A. Bourke, BL

Appendix 2: Modified Universalism

The underlying principle of modern cross-border insolvency, which (as discussed further below) has been followed in Ireland and many other common law jurisdictions, is that of universalism. This is the principle that the assets of a debtor should be collected and distributed on a worldwide basis in a single insolvency proceeding. The application of universalism is modified to permit the domestic court to evaluate foreign law before deferring to a foreign main insolvency proceeding. In so deferring, the domestic court will actively assist the foreign insolvency proceeding, by doing whatever it could have done had the liquidation been carried out domestically:

> *"[T]he underlying principle of universality is… given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England…"*[151]

A key component of modified universalism is the recognition that the authority of a company's agents is determined by the law of the company's incorporation and that the authority of a liquidator appointed under the law of the place of incorporation to get in and distribute the company's worldwide assets should be recognised whenever possible:

> *"the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act, then his authority should be recognised here"*[152]

Modified universalism has experienced renewed prominence in recent times because of two well-documented decisions: firstly, the decision of the Privy Council in *Cambridge Gas v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

The limits of the assistance that can be offered by a court was clarified in the recent decision of *Singularis Holdings Ltd v Pricewaterhouse Coopers.*[153] In *Singularis* the Privy Council considered whether a Bermudian court had a common law power of assistance to apply domestic legislation to an overseas liquidation as if it were a Bermudian winding-up based on the principle of modified universalism as developed in *Cambridge Gas*. The Privy Council in *Singularis* restated the principle as a common law power to assist foreign winding-up proceedings by requiring the provision of information where assistance was:

- necessary for the performance of the office-holder's functions and
- consistent with the substantive law and public policy of the assisting court; and
- provided the examinee's costs were met.

It was not a proper use of the common law power of assistance to make good a limitation on the powers of a foreign court under its own law. In *Singularis* the Privy Council addressed how in the absence of any specific statutory provisions the courts should rely on the common law and consider whether there is an inherent power at common law grant the relief sought:

[151] per Lord Hoffman, *Cambridge Gas Transport Corporation v Navigator Holdings plc Creditors Committee* [2007] 1 AC 508, 518).
[152] Dicey, Morris & Collins (15th ed), paras 30–102.
[153] [2014] UKPC 36.

"In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so."[154]

[154] *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36 at para.19.

Appendix 3: The Treatment of Groups

The focus of the Model Law is on individual debtors, be they corporate or natural legal persons. An UNCITRAL Working Group is currently preparing a new Part 3 to the UNCITRAL Legislative Guide on Insolvency of 2004, which will regulate the position of both domestic and international enterprise groups[155] in insolvency. The UNCITRAL Legislative Guide on Insolvency is a template for domestic insolvency legislation recommended for incorporation by States in their own jurisdictions, which largely reflects the principles and procedure of the Anglo-American model of insolvency legislation that Ireland administers. At its session in November 2016, the UNCITRAL Working Group noted that the interpretation of those parts of the Model Law on coordination and co-operation might be expanded to apply to enterprise groups - which have evidenced specific problems in this area. Draft recommendations on a number of those issues have been prepared. These include: -

a) identifying the centre of main interests (COMI) of an enterprise group;
b) providing post commencement finance to insolvent enterprise groups;
c) providing for a court remedy for pooling of assets of groups in cases of fraud or intermingling;
d) co-operation between the court seised of insolvency proceedings concerning a member of an enterprise group and foreign courts or foreign representatives, to facilitate coordination of those proceedings and proceedings commenced in other States with respect to that enterprise group;
e) co-operation between the insolvency representative and foreign courts or foreign representatives for the same purpose;
f) direct communication between the court and foreign courts or foreign representatives.

The recommendations are not intended to substitute for adoption of the Model Law. The proposed addition to the Legislative Guide when implemented, would address how the articles of the Model Law might apply to an international enterprise group and if not, what additional provisions might be required to facilitate coordination of proceedings concerning enterprise groups.

Part three of the UNCITRAL Legislative Guide on Insolvency Law relates to the treatment of Enterprise Groups in insolvency and canvasses the various issues arising.

The lack of guidance relating to insolvency of Enterprise Groups

Much of the existing commentary in domestic law regarding the insolvency of enterprise groups concentrates on when it is appropriate to consolidate insolvency estates. What is lacking is: -

(a) guidance on how the insolvency of enterprise groups should be addressed more comprehensively and;
(b) whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

[155] "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership; "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law.

Integration and interdependence

How is the treatment of insolvency groups affected by the extent to which the group in question is economically and organizationally integrated? How does that level of integration affect treatment of the group in insolvency, and in particular to what extent should a highly-integrated group be treated differently from a group where individual members retain a high degree of independence?

In some cases, such as where the structure of a group is diverse and involves unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole arising from the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts.

One group, one application

Some laws permit limited exceptions which facilitate a single application to encompass other group members where, for example: -

(a) all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members;
(b) the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership;
(c) or consideration of the group as a single entity has special legal relevance, especially in the context of reorganisation plans.

The benefits of group applications

Legislating for joint applications for the commencement of insolvency proceedings could improve efficiency and reduce costs. These benefits would be crystallised by facilitating the coordinated consideration of group applications by the court, without affecting the separate identity of each of those group members or removing the need for each to individually satisfy the applicable commencement standard. This requirement would also enlighten the court to the existence of a group, particularly if the application was accompanied by information substantiating its existence and the relationship between the relevant group members. Where proceedings were subsequently instituted on the basis of that joint application, there may be an advantage of establishing a common commencement date for each insolvent group member. This common date could simplify compliance with deadlines and the calculation of the 'suspect period' for avoidance purposes.

Single or parallel applications

Where compliant with legislation and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications could be made at the same time in respect of each of the group members. The latter approach may be appropriate where the group members are located in different jurisdictions or where other circumstances of the case, such as the need to coordinate multiple proceedings, suggest that a single application would not be practical. In any event, it is desirable that the insolvency law facilitate a coordinated judicial consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

The Companies Act, 2014

The Companies Act provides for the contribution by related companies to the debts of companies being wound up (section 599) and the pooling of assets of related companies (section 600). The availability of this provision in Irish law provides a practical and applicable solution for potential cross-border insolvencies in group structures.

Appendix 4: The Status of Enactment of the UNCITRAL Model Law

Legislation based on the Model Law has been adopted in 43 States in a total of 45 jurisdictions:

Australia	2008
Benin	2015
Burkina Faso	2015
Cameroon	2015
Canada	2005
Central African Republic	2015
Chad	2015
Chile	2013
Colombia	2006
Comoros	2015
Congo	2015
Côte d'Ivoire	2015
Democratic Republic of the Congo	2015
Dominican Republic	2015
Equatorial Guinea	2015
Gabon	2015
Greece	2010
Guinea	2015
Guinea-Bissau	2015
Japan	2000
Kenya	2015
Malawi	2015
Mali	2015
Mauritius	2009
Mexico	2000
Montenegro	2002
New Zealand	2006
Niger	2015
Philippines	2010
Poland	2003
Republic of Korea	2006
Romania	2002
Senegal	2015
Serbia	2004
Seychelles	2013
Singapore	2017
Slovenia	2007
South Africa	2000
Togo	2015
Uganda	2011
United Kingdom of Great Britain and Northern Ireland	
British Virgin Islands	2003
Gibraltar	2014
Great Britain	2006
United States of America	2005
Vanuatu	2013

Appendix 5: Entities for potential exclusion from the ambit of the Model Law

(a) Credit institutions, as referred to in Regulation 4 of the European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004.

(b) Designated and formerly designated credit institutions within the meaning of the Assets Covered Securities Act 2001 insofar as they may not fall within the preceding category.

(c) Insurance undertakings as defined in Regulation 2 of the European Communities (Reorganisation and Winding-up of Insurance Undertakings) Regulations 2003.

(d) Investment business firms within the meaning of the Investment Intermediaries Act 1995 and investment firms within the meaning of the Investor Compensation Act 1998 insofar as they do not fall within another excluded category.

(e) "investment firms" or "regulated markets" within the meaning of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. 60 of 2007) or any associated or related undertakings within the meaning of those Regulations;

(f) A company that is an undertaking for collective investment in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (S.I. No. 352 of 2011) or the management company or trustee of such an undertaking.

(g) An investment company within the meaning of Part XIII of the Companies Act, 1990.

(h) A company that is a management company or trustee of a unit trust scheme within the meaning of the Unit Trusts Act, 1990.

(i) A company that is a general partner or custodian of an investment limited partnership within the meaning of the Investment Limited Partnerships Act, 1994.

(j) A company that is a management company or custodian of a common contractual fund within the meaning of Part 2 of the Investment Funds, Companies and Miscellaneous Previsions Act 2005.

(k) Any relief, modification or relief already granted, or providing any co-operation or coordination arising from application of the Model Law if and to the extent that such would be prohibited by (a) the Netting of Financial Contracts Act 1995 or similar domestic legislation and (b) the Irish legislation implementing the EU directives on.

(l) settlement finality in payment and securities settlement systems and on financial collateral arrangements.

(m) Such other categories of debtor on transaction as the Minister may by order designate.

Appendix 6: Analysis of the common law position

The approach at common law in England to recognition of foreign insolvency proceedings has been described by a leading commentator as being "in a state of arrested development for most of the [twentieth] century".[156] This has been attributed to the fact that section 426 of the Insolvency Act 1986 - the more comprehensive statutory counterpart in England and Wales of section 250 of the 1963 Act - and the EU Insolvency Regulation covered most instances of cross-border insolvency arising,[157] a contention reinforced since the incorporation into English law of the Model Law with effect from the 4th April 2006.[158]

The principal rule at common law on the effect of a foreign winding up order is stated:

> *"The authority of a liquidator appointed under the law of the place of incorporation is recognised in England."*[159]

The rationale for this is based on an analogy with the approach in bankruptcy law:

> *"Just as the country of an individual's domicile has been traditionally regarded by our law as the "natural" forum for proceedings having a bearing upon that person's civil status and capacity, including bankruptcy proceedings, so in the case of companies the importance attached to the law of the country of incorporation in determining the essential qualities concerning the company's birth, life and also its demise ensures that the English recognition rule looks primarily to the courts of that country to supply the forum for winding up".*[160]

Recognition of the liquidation of a foreign company in its place of incorporation may be refused where: the foreign proceedings are not final; those proceedings are in breach of natural justice (for example, where a company has not been served with notice of the proceedings); those proceedings are contrary to public policy; or recognition would conflict with the provisions of any other provision of the law of the jurisdiction in which recognition is sought.[161]

Various other situations may require consideration of the issue of recognition of a foreign insolvency. Where the foreign liquidation originates in a jurisdiction other than that of incorporation, there is "considerable uncertainty", and a paucity of case law, as to the basis on which recognition may be afforded.[162] However, it would seem that the "place of incorporation" rule aforementioned is not exhaustive as to the circumstances in which a foreign liquidator's authority will be recognised at common law, and it has been suggested that (a) a liquidator appointed in a country other than the place of incorporation may be recognised in England if

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[156] Fletcher: "Insolvency in Private International Law" 1st Ed. (OUP, 1999), at p. 93.

[157] See comments of Lord Hoffman in *Cambridge Gas Transport Corporation v. The Official Committee of Unsecured Creditors (of Navigator Holdings PLC and Others* at par. 18 of the Judicial Committee's judgment.

[158] The Model Law was adopted into English law by the Cross-Border Insolvency Regulations 2006.

[159] Dicey and Morris, "The Conflict of Laws", 13th Ed., rule 158, page 1141.

[160] Fletcher, op. cit., page 166.

[161] Wood, "Principles of International Insolvency" (Sweet & Maxwell, 1995), p. 250, citing *Re Alfred Shaw & Co* (1897) 8 QW 93 and *Macauley v Guaranty Trust Co of New York* (1927) 44 TLR 99.

[162] Fletcher, op. cit., page 167.

that appointment is recognised under the law of the place of incorporation[163] and "more speculatively" (b) a liquidator's appointment under the law of the country where the company carries on business[164] or has its central management and control[165] may be recognised.

It has been further suggested[166] that, in view of the rule giving primacy to the law of the "place of incorporation", recognition of a foreign liquidation in respect of a company already in liquidation in England would be confined to treatment of the foreign liquidation as ancillary to the English liquidation, and that ancillary status would likewise be afforded in England to a foreign liquidation where the latter was concurrent to another foreign liquidation originating in the place of incorporation.

The Australian Position

Akers as joint foreign representative v. Deputy Commissioner of Taxation[167]

Background to the case

The dispute arose because the liquidators of Saad Investments Company Limited (in official liquidation), who had previously been recognised as foreign representatives in Australia, sought to remit Saad's Australian assets to the Cayman Islands, which was the centre of Saad's main interests and central location of Saad's winding up.

The Deputy Commissioner of Taxation opposed remission because, as a foreign revenue creditor, he could not be admitted to proof in the Cayman Islands under its local law. The ATO sought orders from the Federal Court of Australia for "adequate protection" under Article 22 of the Model Law. Justice Rares made orders permitting the ATO to use its enforcement powers to recover its tax debt from Saad's Australian assets. Any recoveries were to be capped at the equivalent of the amount the ATO would have received had it been able to prove as a creditor in the Cayman Islands.

Liquidator's appeal

Saad's liquidators appealed that decision, arguing that the orders undermined the universalist intent of the Model Law by promoting a territorialist outcome. They argued that under the Model Law, one insolvency proceeding should be universally recognised in its centre of main interests and all assets of the insolvent company and all creditors' claims should be administered in and according to the law of that centre of main interests.

Responding to the ATO's claims of unfairness arising from its inability to prove in the Cayman Islands, the liquidators argued that this was the consequence of accepted international legal principles, also applicable in Australia, that see foreign revenue creditors rejected from proving (see *Government of India v Taylor* [1995] 1 All ER 292). Similarly, the Foreign Judgments Act 1991 (Cth) excludes judgments relating to taxes, fines, penalties and similar charges.

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[163] Dicey and Morris, op. cit., page 1142, and Fletcher, op. cit., page 168.
[164] Dicey and Morris, op. cit., page 1142, and Fletcher, op. cit., page 169.
[165] Fletcher, op. cit., page 169 and Smart, "Cross-Border Insolvency", 1st Ed. (Tottel) pp. 104-112.
[166] Fletcher, op. cit., pages 167 to 168.
[167] [2014] FCAFC 57

The decision

The Full Federal Court of Australia rejected the liquidators' argument confirming the earlier decision to grant leave to the ATO to take enforcement action against Saad's Australian assets.

While accepting the universalist intent of the Model Law, the Court held that its universalism is qualified by the capacity to modify and terminate the effects of recognition granted under Article 17 of the Model Law, and qualified by the obligation under Article 21.2 to protect local creditors.

The Court stated that "the universalism that underpins the Model Law and the Cross-Border Insolvency Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised."

The reasons advanced by the Court expressed concern with the ATO's inability to prove as a creditor in the Cayman Islands and considered that a fair outcome was one where creditors worldwide received equal treatment. It did not accept that the outcome for which the liquidators contended properly reflected the objective of the Model Law to achieve fairness.

The decision reduces certainty about the operation of the Model Law by making a decision favouring a local creditor who considers that its position is disadvantaged in the forum of the main liquidation. [168]

[168] Atkins, Scott, "First Appellate Decision on Model Law Reduces Certainty, May 2014.

Legislation Referenced

The UNCITRAL Model Law on Cross-border Insolvency*

The Central Bank Act, 1971

The Companies' Creditors Arrangement Act, 1985*

The Bankruptcy Act, 1988

The Companies Act, 1990

The Netting of Financial Contracts Act, 1995

The Investment Intermediaries Act, 1995

The Investor Compensation Act, 1998

The European Communities (Finality of Settlement in Payment and Securities Settlement Systems) Regulations, 1998 (S.I. No. 539 of 1998)

The Insolvency Act, 2000*

The Investment Funds, Companies and Miscellaneous Provisions Act, 2000

The Asset Covered Securities Act, 2001

The Council Directive 2001/17/EC*

The Council Directive 2001/24/EC*

The European Communities (Corporate Insolvency) Regulations 2002 (S.I. 333 of 2002) *

The European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (S.I. No. 211 of 2003) *

The European Communities (Reorganisation and Winding-up of Insurance Undertakings) * Regulations 2003

The European Communities (Reorganisation and Winding-up of Credit Institutions) Regulations 2004*

The Cross-Border Insolvency Regulations, 2006*

The European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007) *

Regulation 5, European Communities (Mutual Assistance for the Recovery of Claims relating to Certain Levies, Duties, Taxes and Other Measures) (Amendment) Regulations 2007 (S.I. No. 249 of 2007)

The Cross-Border Insolvency Act 2008*

The Arbitration Act, 2010

The European Communities (Settlement Finality) Regulations 2010 (S.I. No. 624 of 2010)

The European Communities (Financial Collateral Arrangements) Regulations 2010 (S.I. No. 626 of 2010)

The Personal Insolvency Act, 2012

The Companies Act, 2014

Regulation (EU) 2015/848 of the European Parliament and of the Council*

The Treaty on European Union and the Treaty on the Functioning of the European Union, 2016*

*Denotes legislation from other jurisdictions

Glossary of Terms

Term	Meaning
CLRG	Company Law Review Group
EC	European Commission
EU	European Union
The EC Insolvency Regulation	Council Regulation (EC) No 1346/2000
The EU Insolvency Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council
1963 Act	Companies Act, 1963
2014 Act	Companies Act, 2014
The Minister	The Minister for Business, Enterprise & Innovation
UNCITRAL	United Nations Commission on International Trade Law
1988 Act	The Bankruptcy Act, 1988
2012 Act	The Personal Insolvency Act, 2012
COMI	Centre of Main Interests
The Enactment Guide	Guide to the Enactment and Interpretation of the Model Law on Cross-border Insolvency

COMPANY LAW REVIEW GROUP

SUBMISSION ON MEMBER STATE OPTIONS

IN DIRECTIVE (EU) 2017 / 828

FEBRUARY 2018,

ADOPTED AS REVIEW GROUP SUBMISSION, SEPTEMBER 2018

Directive (EU) 2017 / 828 Member State Options

The text of each Article with Member State options from Directive (EU) 2017/828[3] of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC[4] as regards the encouragement of long-term shareholder engagement are inserted in the table that follows. The options in each Article are shown in ***bold italicised text.***

Please include your response in the space underneath the relevant option, to set out/explain your views on each. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding, please indicate whether you are responding as an individual or representing the views of an organisation.

Contact Details	
Name(s):	Ad hoc working group of the Company Law Review Group (**CLRG**), Paul Egan (Mason Hayes & Curran), Gillian Leeson (Irish Stock Exchange) **Note:** This submission has not been approved by the CLRG to be a formal CLRG submission.
Organisation:	Company Law Review Group
Email Address:	c/o pegan@mhc.ie
Telephone Number:	01 614 5021

[3] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0828&from=EN
[4] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0036&from=en

ARTICLE 3A
Identification of shareholders

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

Question: Should Ireland avail of this option? If so, should the percentage holding be set at 0.5% or lower? If lower, what percentage do you suggest? Please give reasons for your answers.
Response: No. A company should be entitled at any time to ascertain the ownership of any of its shares. Quoted companies, as a matter of course regularly engage their registrars to conduct enquiries as to the beneficial ownership of shares, using either the statutory provisions in sections 1062 et seq. of the Companies Act 2014 or bespoke provisions in the company's articles of association. If Ireland were to avail of this option, it would set a lower standard for disclosure for listed PLCs than for non-listed PLCs.

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

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

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

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

Question: Article 3a (3) subparagraphs two and three provide for Member State options. Do you consider either or both should be implemented? Please explain your reasons.

Response: Yes. Listed companies should be able to ascertain the true ownership of the company's shares. There should be no impediment to the process. Anything which accelerates the transmission of information to the company is therefore to be welcomed.

4. The personal data of shareholders shall be processed pursuant to this Article in order to enable the company to identify its existing shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company.

Without prejudice to any longer storage period laid down by any sector-specific Union legislative act, Member States shall ensure that companies and intermediaries do not store the personal data of shareholders transmitted to them in accordance with this Article for the purpose specified in this Article for longer than 12 months after they have become aware that the person concerned has ceased to be a shareholder.

Member States may provide by law for processing of the personal data of shareholders for other purposes.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer. If your answer is in the affirmative, please specify "the other purposes" you consider the personal data of shareholders should be used for**.**
Response: Yes. It is necessary for personal data to be retained beyond the 12 months in order to deal with: **- investigations of insider dealing and market manipulation;** **- unclaimed dividends** **- disposal of shares of untraced shareholders.**

(The remaining paragraphs of this Article do not contain Member State options and are not reproduced here.)

ARTICLE 3C
Facilitation of the exercise of shareholder rights

1. Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings, ***which shall comprise at least one of the following:***

(a) the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;

(b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

Question: Should (a) or (b) or both be available to intermediaries. Please explain your reasoning.
Response: Both of the above should be provided by law but a listed company should then be entitled to choose between one or other or both of the above options. Different shareholding structures will apply in different companies and companies should be entitled to choose which is appropriate and fairest for their circumstances.

2. Member States shall ensure that when votes are cast electronically an electronic confirmation of receipt of the votes is sent to the person that casts the vote.

Member States shall ensure that after the general meeting the shareholder or a third party nominated by the shareholder can obtain, at least upon request, confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them. ***Member States may establish a deadline for requesting such confirmation. Such a deadline shall not be longer than three months from the date of the vote.***

Where the intermediary receives confirmation as referred to in the first or second subparagraph, it shall transmit it without delay to the shareholder or a third party nominated by the shareholder. Where there is more than one intermediary in the chain of intermediaries the confirmation shall be transmitted between intermediaries without delay, unless the confirmation can be directly transmitted to the shareholder or a third party nominated by the shareholder.

Question: Should Ireland provide for a deadline that is shorter than three months? If so, please explain the reasons for tour answer.
Response: No. Electronic voting procedures already generally in place ensure that the shareholder that casts a vote, that fact is confirmed to the person who casts the vote. There is no particular reason for a shareholder to be denied the opportunity to seek that confirmation where it has not come through as a matter of course.

The remaining paragraph of the Article is not reproduced here as it relates to powers of the Commission to adopt Implementing Acts.

ARTICLE 3D
Non-discrimination, proportionality and transparency of costs

1. Member States shall require intermediaries to disclose publicly any applicable charges for services provided for under this Chapter separately for each service.

2. Member States shall ensure that any charges levied by an intermediary on shareholders, companies and other intermediaries shall be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. Any differences between the charges levied between domestic and cross-border exercise of rights shall be permitted only where duly justified and where they reflect the variation in actual costs incurred for delivering the services.

*3. **Member States may prohibit intermediaries from charging fees for the services provided for under this Chapter.***

Question: Should Ireland avail of the option to prohibit the charging of fees**?** Although it is mandatory for Member States to ensure that costs are non- discriminatory and proportionate, your views on how best this might be achieved would be welcome. Please also provide examples of the cost differences in the delivery of services that may arise between domestic and cross-border exercises of rights?
Response(s): No. That would be a change to long accepted and non-controversial market practice. **Market competition operates as a matter of practice in keeping charges proportionate and non-discriminatory.**

ARTICLE 3G Engagement policy

1. Member States shall ensure that institutional investors and asset managers either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements.

(a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. The policy shall describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement.

(b) Institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors. They shall publicly disclose how they have cast votes in the general meetings of companies in which they hold shares. Such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company.

2. The information referred to in paragraph 1 shall be available free of charge on the institutional investor's or asset manager's website. ***Member States may provide for the information to be published, free of charge, by other means that are easily accessible online.***

Where an asset manager implements the engagement policy, including voting, on behalf of an institutional investor, the institutional investor shall make a reference as to where such voting information has been published by the asset manager.

Question: What 'other online means' apart, from the institutional investor's or asset manager's website, might be appropriate? Please provide specific examples**.**
Response: This option should not be taken up. As the information is available free of charge on the institutional investor's or asset manager's website, then both investors and potential investors will have access to it. It should be at the discretion of the institutional investor or asset managers whether this info is available elsewhere.

ARTICLE 3H

Investment strategy of institutional investors and arrangements with asset managers

1. Member States shall ensure that institutional investors publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

2. Member States shall ensure that where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor publicly discloses the following information regarding its arrangement with the asset manager:

(a) how the arrangement with the asset manager incentivises the asset manager to align its investment strategy and decisions with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities;

(b) how that arrangement incentivises the asset manager to make investment decisions based on assessments about medium to long-term financial and non-financial performance of the investee company and to engage with investee companies in order to improve their performance in the medium to long-term;

(c) how the method and time horizon of the evaluation of the asset manager's performance and the remuneration for asset management services are in line with the profile and duration of the liabilities of the institutional investor, in particular long-term liabilities, and take absolute long-term performance into account;

(d) how the institutional investor monitors portfolio turnover costs incurred by the asset manager and how it defines and monitors a targeted portfolio turnover or turnover range;

(e) the duration of the arrangement with the asset manager.

Where the arrangement with the asset manager does not contain one or more of such elements, the institutional investor shall give a clear and reasoned explanation why this is the case.

3. The information referred to in paragraphs 1 and 2 of this Article shall be available, free of charge, on the institutional investor's website and shall be updated annually unless there is no material change. ***Member States may provide for that information to be available, free of charge, through other means that are easily accessible online.***

Member States shall ensure that institutional investors regulated by Directive 2009/138/EC are allowed to include this information in their report on solvency and financial condition referred to in Article 51 of that Directive.

Question: What 'other online means' might be appropriate? Please provide specific examples**.**
Response: This option should not be taken up. As the information is available free of charge on the institutional investor's or asset manager's website, then both investors and potential investors will have access to it. It should be at the discretion of the institutional investor or asset managers whether this info is available elsewhere.

ARTICL3I
Transparency of asset managers

1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Such disclosure shall include reporting on the key material medium to long-term risks associated with the investments, on portfolio composition, turnover and turnover costs, on the use of proxy advisors for the purpose of engagement activities and their policy on securities lending and how it is applied to fulfil its engagement activities if applicable, particularly at the time of the general meeting of the investee companies. Such disclosure shall also include information on whether and, if so, how, they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, and on whether and, if so, which conflicts of interests have arisen in connection with engagements activities and how the asset managers have dealt with them.

2. ***Member States may provide for the information in paragraph 1 to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC[5] or***

[5] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of

in Article 22 of Directive 2011/61/EU[6], or periodic communications referred to in Article 25(6) of Directive 2014/65/EU.[7]

Where the information disclosed pursuant to paragraph 1 is already publicly available, the asset manager is not required to provide the information to the institutional investor directly.

Question: Do you consider there is a benefit to linking the information to be disclosed with the referenced annual report publications and periodic communications? If so, please explain the reason for your answer?
Response: Although taking this option may provide a more defined point of reference for this information than if it is dissipated into separate communications, asset managers and clients should determine the most appropriate method of disclosure by the managers to their clients.

3. ***Member States may where the asset manager does not manage the assets on a discretionary client-by-client basis, require that the information disclosed pursuant to paragraph 1 also be provided to other investors of the same fund at least upon request.***

Question: Do you consider this option should be implemented, and if so, please explain the reasons for your answer**.**
Response: No, this option should not be taken up. This could significantly increase the reporting requirements on UCITS and AIF funds, and may be considered irrelevant and inappropriate for these types of funds. The governance requirements for these types of funds are adequately regulated by the relevant legislation referenced above. Any further requirements would place a significant additional burden on fund managers with little additional benefit for investors.

ARTICLE 9A
Right to vote on the remuneration policy

1. Member States shall ensure that companies establish a remuneration policy as regards directors and that shareholders have the right to vote on the remuneration policy at the general meeting.

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laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[6] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

[7] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

2. Member States shall ensure that the vote by the shareholders at the general meeting on the remuneration policy is binding. Companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been approved by the general meeting.

Where no remuneration policy has been approved and the general meeting does not approve the proposed policy, the company may continue to pay remuneration to its directors in accordance with its existing practices and shall submit a revised policy for approval at the following general meeting.

Where an approved remuneration policy exists and the general meeting does not approve the proposed new policy, the company shall continue to pay remuneration to its directors in accordance with the existing approved policy and shall submit a revised policy for approval at the following general meeting.

3. ***However, Member States may provide for the vote at the general meeting on the remuneration policy to be advisory. In that case, companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such a vote at the general meeting. Where the general meeting rejects the proposed remuneration policy, the company shall submit a revised policy to a vote at the following general meeting.***

Question: Do you consider the vote should be binding or advisory? Please explain the reasons for your answer and give examples to support the position.
Response: This Article provides for remuneration to be in accordance with a shareholder-approved remuneration policy. Where an AGM does not have a binding vote on the remuneration policy, then it either has nothing on the agenda (and the existing binding policy continues to apply) or it has an advisory vote (again with the existing binding policy applying). Accordingly there is no harm in there being an advisory vote where the existing binding policy continues to apply. **A number of Irish companies have already approved a remuneration policy, notably those with a London Official Listing. That will have been done so as to be consistent with UK law, which is as rigorous as the new law. Where such a company that has recently received shareholder approval of its remuneration policy, the company should be able to continue to apply that policy until the approval timeframe elapses, without the obligation to re-subject the remuneration policy to a vote specifically as a result of the transposition of the revised Directive.**

4. ***Member States may allow companies, in exceptional circumstances, to temporarily derogate from the remuneration policy, provided that the policy includes the procedural conditions under which the derogation can be applied and specifies the elements of the policy from which a derogation is possible.***

Exceptional circumstances as referred to in the first subparagraph shall cover only situations in which the derogation from the remuneration policy is necessary to serve

the long-term interests and sustainability of the company as a whole or to assure its viability.

Question: Do you consider this option should be implemented, and if so, please explain the reasons for your answer. Please give examples of what you consider 'exceptional circumstances'?
Response: Yes. A company may require at short notice to engage a new senior executive at a rate or structure of remuneration which is outside the policy. Companies should retain the ability to do this without a requirement to submit the new pay package to a general meeting: the relevant executive may well refuse to join the company (e.g. from a current position) where the question of his or her remuneration cannot be agreed without a general meeting.

The remaining paragraphs of this Article do not contain Member State options.

<u>ARTICLE 9B</u>
Information to be provided in and right to vote on the remuneration report

1. Member States shall ensure that the company draws up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration, including all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors, in accordance with the remuneration policy referred to in Article 9a.

Where applicable, the remuneration report shall contain the following information
regarding each individual director's remuneration:

(a) the total remuneration split out by component, the relative proportion of fixed and variable remuneration, an explanation how the total remuneration complies with the adopted remuneration policy, including how it contributes to the long-term performance of the company, and information on how the performance criteria were applied;

(b) the annual change of remuneration, of the performance of the company, and of average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison;

(c) any remuneration from any undertaking belonging to the same group as defined in point (11) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council;

(d) the number of shares and share options granted or offered, and the main conditions for the exercise of the rights including the exercise price and date and any change thereof;

(e) information on the use of the possibility to reclaim variable remuneration;

(f) information on any deviations from the procedure for the implementation of the remuneration policy referred to in Article 9a(6) and on any derogations applied in accordance with Article 9a(4), including the explanation of the nature of the exceptional circumstances and the indication of the specific elements derogated from.

2. Member States shall ensure that companies do not include in the remuneration report special categories of personal data of individual directors within the meaning of Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council or personal data which refer to the family situation of individual directors.

3. Companies shall process the personal data of directors included in the remuneration report pursuant to this Article for the purpose of increasing corporate transparency as regards directors' remuneration with the view to enhancing directors' accountability and shareholder oversight over directors' remuneration.

Without prejudice to any longer period laid down by any sector-specific Union legislative act, Member States shall ensure that companies no longer make publicly available pursuant to paragraph 5 of this Article the personal data of directors included in the remuneration report in accordance with this Article after 10 years from the publication of the remuneration report.

Member States may provide by law for processing of the personal data of directors for other purposes.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer. If your answer is in the affirmative, please specify "the other purposes" you consider the personal data of directors should be used for.
Response: No. We would observe that third party repositories of such information appear not to be bound by the Directive, e.g. archives of newspapers that will have reported the information published by the company.

4. Member States shall ensure that the annual general meeting has the right to hold an advisory vote on the remuneration report of the most recent financial year. The company shall explain in the following remuneration report how the vote by the general meeting has been taken into account.

However, for small and medium-sized companies as defined, respectively, in Article 3(2) and (3) of Directive 2013/34/EU, Member States may provide, as an alternative to a vote, for the remuneration report of the most recent financial year to be submitted for discussion in the annual general meeting as a separate item of the agenda. The company shall explain in the following remuneration report how the discussion in the general meeting has been taken into account.

Question: Do you consider this option for SMEs should be implemented, and if so, please explain the reasons for your answer.

Response: No. There should be consistency in corporate reporting by listed companies.

The remaining paragraphs of this Article do not contain Member State options.

ARTICLE 9C
Transparency and approval of related party transactions

1. Member States shall define material transactions for the purposes of this Article, taking into account:

(a) the influence that the information about the transaction may have on the economic decisions of shareholders of the company;

(b) the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders.

When defining material transactions Member States shall set one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company or take into account the nature of transaction and the position of the related party.

Member States may adopt different materiality definitions for the application of paragraph 4 than those for the application of paragraphs 2 and 3 and may differentiate the definitions according to the company size.

Questions: What is your understanding of 'material transaction'? What quantitative ratios may be appropriate to set? Should different ratios be applied for the purposes of paragraph 4 below? Should definitions be differentiated by company size? Please give reasons for your answer(s).
Response(s): Material transactions are those requiring shareholder approval as "Class 1" transactions under the Irish Listing Rules. There should be no deviation whatsoever as between the types and size of transactions or the ratios applicable so as to avoid a dilution and divergence of rules as currently apply.

2. Member States shall ensure that companies publicly announce material transactions with related parties at the latest at the time of the conclusion of the transaction. The announcement shall contain at least information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders.

3. ***Member States may provide for the public announcement referred to in paragraph 2 to be accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders, and explaining the assumptions it is based upon together with the methods used.***

The report shall be produced by one of the following:

(a) an independent third party;

(b) the administrative or supervisory body of the company;

(c) the audit committee or any committee the majority of which is composed of independent directors.

Member States shall ensure that the related parties do not take part in the preparation of the report.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer**.**
Response: No, this option should not be taken up as it is important to ensure alignment with the Irish Listing Rules which do not require such an additional report.

4. Member States shall ensure that material transactions with related parties are approved by the general meeting or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders.

Member States may provide for shareholders in the general meeting to have the right to vote on material transactions with related parties which have been approved by the administrative or supervisory body of the company.

Where the related party transaction involves a director or a shareholder, the director or shareholder shall not take part in the approval or the vote.

Member States may allow the shareholder who is a related party to take part in the vote provided that national law ensures appropriate safeguards which apply before or during the voting process to protect the interests of the company and of the shareholders who are not a related party, including minority shareholders, by preventing the related party from approving the transaction despite the opposing opinion of the majority of the shareholders who are not a related party or despite the opposing opinion of the majority of the independent directors.

Question: Do you consider either or both these options should be implemented? Please explain the reasons for your answer**.**
Response: Yes to the first option, in such a way as to ensure alignment of the law with the Irish Listing Rules. No to the second option, again so as to ensure alignment of the law with the Irish Listing Rules.

5. Paragraphs 2, 3 and 4 shall not apply to transactions entered into in the ordinary course of business and concluded on normal market terms. For such transactions the administrative or supervisory body of the company shall establish an internal procedure to periodically assess whether these conditions are fulfilled. The related parties shall not take part in that assessment.

However, Member States may provide for companies to apply the requirements in paragraph 2, 3 or 4 to transactions entered into in the ordinary course of business and concluded on normal market terms.

Question: Do you consider this option should be implemented? Please explain the reasons for your answer.
Response: No, this option should not be taken up. Transactions undertaken in the ordinary course of business should not be subjected to the rigours of related party transaction rules. The current Listing Rules requirements for listed companies provide appropriate tried-and-tested classifications of what constitutes a transaction in the ordinary course of business. This balances the need for investor protection with the business requirements of listed companies. Consideration should be given to allow transactions not caught by the Listing Rules to be exempt from the requirement for a shareholder vote under section 238 of the Companies Act 2014,

6. ***Member States may exclude, or may allow companies to exclude, from the requirements in paragraphs 2, 3 and 4:***

(a) transactions entered into between the company and its subsidiaries provided that they are wholly owned or that no other related party of the company has an interest in the subsidiary undertaking or that national law provides for adequate protection of interests of the company, of the subsidiary and of their shareholders who are not a related party, including minority shareholders in such transactions;

(b) clearly defined types of transactions for which national law requires approval by the general meeting, provided that fair treatment of all shareholders and the interests of the company and of the shareholders who are not a related party, including minority

shareholders, are specifically addressed and adequately protected in such provisions of law;

(c) transactions regarding remuneration of directors, or certain elements of remuneration of directors, awarded or due in accordance with Article 9a;

(d) transactions entered into by credit institutions on the basis of measures, aiming at safeguarding their stability, adopted by the competent authority in charge of the prudential supervision within the meaning of Union law;

(e) transactions offered to all shareholders on the same terms where equal treatment of all shareholders and protection of the interests of the company is ensured.

Question: Should any or all the above transactions be excluded from the transparency requirements? Please give reasons for your answer. Please identify areas in national law that would result in the duplication of reporting requirements. Please provide specific examples.
Response: Yes, to the extent that it would be consistent with and fully aligned with the Irish Listing Rules.

7. Member States shall ensure that companies publicly announce material transactions concluded between the related party of the company and that company's subsidiary. ***Member States may also provide that the announcement is accompanied by a report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders and explaining the assumptions it is based upon together with the methods used. The exemptions provided in paragraph 5 and 6 shall also apply to the transactions specified in this paragraph.***

Question: Do you consider there is added value in the publication of a report? Please explain the reasons for your answer.

Response:

The remaining paragraphs of this Article do not contain Member State options.

General Observations regarding Directive (EU) 2017 /828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long term shareholder engagement e.g. difficulty with legal interpretation, practical operability issues and any other aspect of the Directive that you may wish to raise. Please be as comprehensive as possible.
1) The Directive should be transposed in such a way as makes as few changes to shareholder-friendly provisions as exist in Irish company law already.

2) The Directive should be transposed in such a way as is consistent with the Irish Listing Rules. The Listing Rules' provisions as to information concerning material and related party transactions have preceded the proposed new law and are accepted without controversy by companies and investors. There is no need to diverge from those provisions.
3) The data retention provisions of the Directive should be transposed in such a way as does not result in information currently available being removed from the public record, whether it be the Companies Registration Office, the websites of listed companies or newspaper archives.

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