

80th Plenary Meeting of the Company Law Review Group

Date: Tuesday 28th March 2017

Time: 09:30am – 11:30am

Venue: National Emergency Coordination Centre (NECC),
Agriculture House, Kildare Street, Dublin 2.

Chairperson: Dr Thomas B. Courtney.

Attendance: Deirdre-Ann Barr, Sinead Boyle, Jonathan Buttimore, Barry Cahir, Eleanor Daly, Marie Daly (by phone conference), Jeanette Doonan, Ian Drennan, Gráinne Duggan, Paul Egan, Bernice Evoy, Mark Fielding, Michael Halpenny, Brian Hutchinson, William Johnston, Brian Kelliher, Gillian Leeson, John Loughlin, Ralph MacDarby, David McFadden, Vincent Madigan, Kathryn Maybury, Salvador Nash, Kevin O’Connell, Deirdre O’Higgins, Lynn O’Sullivan, Maureen O’Sullivan, Andrew Whitty.

Secretary: Síona Ryan.

In attendance: Tara Coogan, Helen Curley, Sabha Greene, Brendan Nagle, Cathal Sheridan.

Observers: Simon Halpin, Darren Lynch, Brian Menton.

Apologies: Irene Lynch Fannon, Eadaoin Rock, Noel Rubotham.

The Chair welcomed Andrew Whitty from the Central Bank attending on behalf of Eadaoin Rock.

Agenda:

1. Minutes & Matters arising

The minutes of the meeting of 1st December 2016 were circulated on 22nd December 2016 and again on 7th March 2017. There were no changes proposed and the minutes were adopted.

2. Transposition of the 4th Money Laundering Directive

- Update from Mr. Cathal Sheridan and Mr. Brendan Nagle,
Department of Finance

The Department of Finance provided an overview of the transposition of the 4th Anti-Money Laundering Directive to date. Mr. Sheridan outlined the key parts of the Directive such as its scope, the key definitions, the overall approach to risk assessment, customer due diligence and beneficial ownership.

The main focus of the update was on beneficial ownership of Irish companies and other bodies corporate. The Department of Finance explained the background to why it introduced the requirement for companies to hold accurate and current information on their beneficial owners in advance of the rest of the relevant Articles; namely it was important that companies are provided with an opportunity to gather their beneficial ownership / control information in advance of a 4th Anti-Money Laundering Directive requirement (article 30) to submit such information to a central beneficial ownership register. After noting that the S.I. had been enacted without any lead in time, the Chairperson cautioned against the criminalisation of acts or omissions without giving users of company law adequate notice. The Department's response was that regulation 4(2) of the S.I. had been carefully drafted to recognise variances in the complexity of companies' ownership structures to permit relevant entities to take "all reasonable steps" to gather their beneficial ownership data.

The Department of Finance confirmed that there was ongoing work both from a legal and operational perspective in putting together the central register for companies. The question of access to the register is still under review. The Directive provides that, aside from competent authorities and obliged entities, only those who can demonstrate a legitimate interest should have access to this information. However, at EU level in the context of negotiations of the amending proposal to the 4th Anti-Money Laundering Directive, there is much debate about whether "legitimate interest" should be defined at EU level or at national level. This ongoing debate may have some impact on what decisions are made in relation to who can have access in the short-term to this centralised register. The Department of Finance indicated that it would provide the Company Law Review Group with a draft of the regulations for any comments, however a very short turnaround would be required.

A query was raised seeking an indication of what was expected in asking entities to take "reasonable steps" to identify beneficial owners. It was confirmed that all necessary steps should be taken to identify the beneficial owners of an entity. However, in cases where the ownership of the company is extremely diluted and no natural person has been identified as beneficial owner, then the senior management may be deemed to be beneficial owners and should be entered in a company's beneficial ownership register. This scenario is likely to crop up frequently for the funds industry, for example. The Department official said that there is a misconception that a shareholder will not be registered purely by virtue of the fact that he or she falls below the minimum threshold. In such circumstances, it may be necessary to look to the shareholders' agreement to see if that gives further clarity on the actual control over an entity.

It was noted that the Department of Finance was continuing to work on a separate S.I. for express trusts in order to transpose Article 31(1) and that it has been sent to AGO for drafting. It is modelled on the equivalent companies SI. In response to an enquiry as to how the two transposing S.I.s would relate to each other where shares in a company are held in trust, it was confirmed that where shares are held by a trustee who is a natural person, the

particulars of the trustee should be entered in the register in accordance with the existing S.I. and that beneficial ownership of the trust would then fall to be disclosed in accordance with the S.I. yet to be enacted. It was confirmed that while the instruments will not directly “talk” to each other, they will be set-up in such a way that they will assist banks in bottoming out on precisely who the beneficial owner of a company is. It was then suggested that corporates are also required to obtain information on beneficial owners, and unlike banks which are extremely well-resourced, many small companies may find the obligations under both instruments to be quite burdensome which should be taken into consideration. It was subsequently confirmed to the secretariat that it is not the case that all corporate entities need to conduct beneficial ownership analysis on their customers; such obligation only arises for persons (including companies) ‘designated’ under Criminal Justice (Money Laundering & Terrorist Financing) Acts 2010-2013 (section 24).

The issue of discretionary trusts was raised, and it was confirmed that in most cases involving discretionary trusts, it is unlikely that the beneficiaries will need to be identified. Finally, the Department indicated that there could be no certainty as to when the amending proposal to the 4th Anti-Money Laundering Directive will be finalised, as particularly on beneficial ownership there are a range of different opinions on the extent of public access.

That Chair thanked Mr. Sheridan and Mr. Nagle for their attendance at the meeting which he said was very informative on a topic of great interest to all users of and advisors on company law.

3. Update on accounting and audit legislation

- Update from Ms. Sabha Greene, Department of Jobs, Enterprise & Innovation

Companies (Accounting) Bill 2016

The third iteration of the Regulatory Impact Assessment (RIA) for the Companies (Accounting) Bill was published on the DJEI website earlier this month. The RIA was updated with respect to what were sections 76 and 78 (now sections 78 and 80). These are the sections obliging certain types of unlimited company to file financial statements.

The Companies (Accounting) Bill 2016 went through Report Stage in Dáil Eireann last Wednesday, the 22nd of March. The Minister tabled 31 amendments, all of which were agreed. The main amendments relate to:

- The extension to the period for IAASA to authorise a person as a liquidator.
- A sunrise clause for unlimited holding companies with limited subsidiaries to file financial statements (1 January 2022).
- A change to section 14 (early application) to ensure no gap between period for electing to comply and start of mandatory compliance.
- A clarification that the application process to the Minister for an extension to adapt to displaying name (UCs) is closed.
- Several technical amendments.

The Opposition tabled four amendments, but none were accepted. The latest version of the Bill is now available on the Oireachtas website.

The Second Stage is scheduled in the Seanad for Tuesday April 4 2017, with a provisional date for Committee stage of Wednesday April 12 2017. Enactment is likely in May 2017 at the earliest.

Statutory Audits Bill

The General Scheme of the Companies (Statutory Audits) Bill was brought to Government and the Heads were published in February 2017. There has since been a private briefing session of the Joint Oireachtas Committee on Jobs, Enterprise and Innovation to discuss the Heads with DJEI officials. The Joint Oireachtas Committee on Jobs, Enterprise and Innovation has decided not to conduct pre-legislative scrutiny.

Drafting is ongoing with the Office of the Parliamentary Counsel on the Bill and publication of the Bill is projected for Q3 2017.

There have also been two new Regulations on Audit signed into law on the 7th March 2017. These are –

- Third Country Auditors and Audit Entities Equivalence, Transitional Period and Fees (Amendment) Regulations (S.I. 67 of 2017) (This also amends S.I. 312 of 2016 to clarify the position of a group auditor)
- Adequacy of Competent Authorities of certain Third Countries regarding transfer of relevant Audit Papers (S.I. 68 of 2107)

Reaction to the Heads of the Audit Bill has focussed on 2 issues that are not connected with audit. Firstly, the proposal that a court ordered extension to an annual return date will result in the loss of the audit exemption. The second issue is the proposal to extend the deadline for filing financial statements according to US GAAP.

Companies (Amendment) Bill 2017

Section 279 of the Companies Act 2014 permits certain companies to file their financial statements according to the US accounting standards (US GAAP). However, there is a deadline of 31 December 2020 on that facility. The Government agreed in January to extend the period for a further 10 years, to end 2030. It also decided to close off that facility to new entrants. The intention was to give effect to this policy in the forthcoming Statutory Audits Bill. Deputy Niall Collins tabled an amendment to the Companies (Accounting) Bill last week on this issue and there have been other representations to the Minister, along the same lines. Accordingly, the Minister has decided to bring this provision forward and to introduce a Bill in the Oireachtas. It is intended to bring a short Bill to Government next Tuesday, April 4 2017, devoted to amending section 279. Given that there appears to be some cross party support, a swift enactment is desired.

A query related to the effective date of the mandatory provisions contained in the Companies (Accounting) Bill and the financial year to which it applies was raised and Ms. Greene confirmed that these matters will be addressed in the Commencement Order. The Chair thanked Ms Greene for her attendance and informative presentation.

4. Update on Pending Shareholder Rights Directive

- Update from Ms. Tara Coogan, Department of Jobs, Enterprise & Innovation

Ms. Coogan confirmed that the pending Shareholder Rights Directive has been approved by the European Parliament and European Council. The Directive will be adopted as a Roman I point at the meeting of Coreper II on Wednesday 29th March 2017 and it could be on the list for either the Foreign Affairs Council or Agri Council next week as an A point, after which time the Jurist Linguists will take the file for their work, which will take some weeks, and it should be published in the Official Journal shortly thereafter.

The Directive will encourage transparent and active engagement by shareholders of listed companies through a revision of the existing Shareholders' Rights Directive (2007/36/EC). The new Directive establishes specific requirements to encourage shareholder engagement in the long term and increase transparency.

Remuneration of directors

Shareholders will have the right to vote on the remuneration policy of the directors of their company. Under the new rules, remuneration policy should contribute to the overall business strategy, long-term interests and sustainability of the company and should not be linked to short-term objectives. In particular, in order to prevent the circumvention of the requirements laid down by this Directive by the company, to avoid any conflicts of interests and to ensure loyalty of the directors to the company, it is necessary to provide for the disclosure and the publication of the remuneration awarded or due to individual directors not only from the company itself, but also from any undertaking belonging to the same group. Directors' performance should be assessed on the basis of both financial and non-financial performance criteria. Remuneration policy will also have to be publicly disclosed without delay after the vote by the shareholders at the general meeting.

Identification of shareholders

Companies will be able to identify their shareholders and to obtain information on shareholder identity from any intermediary in the chain that holds the information. The aim is to facilitate the exercise of shareholder rights and the engagement with the company.

Facilitation of exercise of shareholders' rights

Intermediaries will have to facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings. They will also have the obligation to deliver to shareholders in a standardised and timely manner, all information from the company that will enable the appropriate exercise of their rights. Furthermore, they will

have to publicly disclose any charges related to the new rules. The Directive intends to capture third country intermediaries also.

Transparency for institutional investors, asset managers and proxy advisors

The new requirements will help institutional investors and asset managers to be more transparent as regards their approach to shareholder engagement. They will have to either develop and publicly disclose a policy on shareholder engagement or explain why they have chosen not to do so. This policy will describe how they integrate shareholder engagement in their investment strategy and the engagement activities they carry out. It will also include policies to manage actual or potential conflicts of interests, in particular in a situation where the institutional investors or asset managers or their affiliated undertakings have significant business relationship with the investee company.

Many institutional investors and asset managers use the services of proxy advisors who provide research, advice and recommendations how to vote in general meetings of listed companies. While proxy advisors play an important role in corporate governance by contributing to reduction of costs of analysis related to company information, they may also have an important influence on voting behaviour of investors. In view of their importance, proxy advisors will be subject to transparency requirements and will be subject to a code of conduct.

Ms. Coogan also noted that the Directive will provide the Commission with certain implementing powers to ensure:

- 1) uniform conditions for the implementation of the provisions on shareholder identification;
- 2) transmission of information; and
- 3) facilitation of the exercise of shareholder rights, implementing powers should be conferred on the Commission.

DJEI intends to hold a consultation on the Directive. It is intended to transpose the Directive as soon as possible. Depending on the outcome of the consultation process, Ireland may exercise some of the Member State options available.

Following questions from members, Ms. Coogan confirmed that electronic communications are featured in the Directive, that it has yet to be determined whether the Directive will be transposed by primary legislation, statutory instrument or both and that there is a 24 month transposition period.

The Chair thanked Ms. Coogan for her attendance and informative presentation.

5. Ad-Hoc Committee on Protections for employees and unsecured creditors (Item 4 of the Work Programme)

- Update from Ad-Hoc Committee Chair Mr. Vincent Madigan

Mr. Madigan outlined that during the course of thirteen meetings between February 2016 and March 2017, a detailed examination of relevant provisions of the Companies Act 2014

has been undertaken by the ad-hoc committee. A draft report is in preparation arising from the examination of these provisions in the Companies Act 2014, submissions from committee members and proposals for consideration presented during these meetings. Mr. Madigan confirmed that the report is expected to be finalised shortly and is intended for presentation at the next plenary meeting for discussion, approval and potential adoption by the Company Law Review Group.

The Chair thanked Mr Madigan and all of the members of the committee for their work to date and wished them well in finalising their report.

6. Sub-committee on Compliance and Enforcement and the Report on the Enforcement of Company Law (Item 3 of the Work Programme)

- Update from Sub-committee Chair Mr. Ian Drennan

Arising from the discussions and submissions from members of the CLRG related to the document on the enforcement of company law, the Chair had tasked the sub-committee on Compliance and Enforcement at the last plenary meeting to reflect on the issues raised in the discussion document and to develop recommendations for presentation to CLRG Plenary.

Mr. Drennan confirmed that the subcommittee on Compliance and Enforcement has met three times to date and is progressing in its examination of the issues set out in the discussion document, but that there is some way to go yet as many of the issues have cross application. He confirmed the intention to agree recommendations with a view to presenting a draft report on the enforcement of company law in due course for discussion, approval and potential adoption by the Company Law Review Group.

The Chair thanked Mr. Drennan and all of the members of the committee for their work to date and wished them well in finalising their report.

7. Sub-committee on Shares and Share Capital

- Update from Sub-committee Chair Mr. Paul Egan

The subcommittee chaired by Mr. Paul Egan met seven times from September 2016 to February 2017 to review 24 separate proposals related to shares and share capital. A submission was prepared by the subcommittee setting out the rationale and consideration for each proposal concluding with the subcommittee's recommendation on whether each proposal should be adopted. The submission was presented for approval and potential adoption by the CLRG.

Mr. Egan detailed each of the proposed recommendations which were unanimously adopted, subject to some minor textual changes to individual recommendations, and were agreed for inclusion as appendix B in the CLRG Annual Report 2016 (see item 8 below).

The Chair thanked Mr. Egan and all of the members of the committee for the efficiency in bringing a comprehensive report on very technical matters to the plenary.

8. CLRG Annual Report 2016

The secretary presented a short overview of the draft Company Law Review Group Annual Report 2016. The Company Law Review Group is required under section 962 of the Companies Act 2014, to make a report to the Minister no later than three months after the end of each year. The report sets out the current work programme for the period of June 2016 – May 2018 and includes an overview of the progress made on the work programme to date, broken down by subcommittee. Arising from the work of the subcommittee on shares and share capital, the recommendations adopted under item 7 above were approved for inclusions as appendix B.

The Chair indicated that, in his letter to the Minister in the Report, he had emphasised the necessity of respecting the structure and architecture of the Act in any amending legislation. The Company Law Review Group Annual Report 2016 was adopted.

9. Draft submission to the Law Reform Commission's Issues Paper on Accessibility, Consolidation and Online Publication of Legislation

On 14th December 2016, the secretariat circulated a request for observations on the Law Reform Commission's Issue Paper on Accessibility, Consolidation and Online Publication of Legislation. The Issues Paper reviewed a range of issues concerning the accessibility and coherence of legislation in Ireland. In particular, the Commission examined how legislation is currently made available publicly and how this could be improved. Based on the observations received, the secretariat drafted a response from the Company Law Review Group which was presented for discussion and potential adoption.

The submission outlined:

- The importance for ease of access to up to date legislation for citizens;
- The positive impact of the Law Reform Commissions compilation of "revised" acts;
- Concern that a "statute specific approach" would narrow focus from legislative instruments to be read alongside primary acts;
- The recommendation for the co-location of enactments which should be read as one for the Law Reform Commission's ongoing project.

The secretary confirmed that a later submission date had been agreed with the Law Reform Commission for the end of March to facilitate adoption of the submission at Plenary. The submission was adopted.

A discussion ensued regarding citation provisions in the Companies (Accounting) Bill and other proposed amendments to the Companies Act 2014. It was confirmed that the collective citation will remain the Companies Act 2014 only. It is not necessary in the

Companies (Accounting) Amendment Bill to include a provision that it be read with the 2014 Act as the Bill amends provisions in the Companies Act 2014 without standalone provisions.

10. AOB

European Commission proposal for a Directive on Insolvency, Restructuring and Second Chance

Ms. Deirdre O'Higgins gave an update on the current European Commission proposal for a Directive on Insolvency, Restructuring and Second Chance. The proposal relates to corporate insolvency and entities subject to personal insolvency/bankruptcy legislation in Ireland. The Directive was brought to the attention of CLRG Members at the previous plenary meeting in December. Since then a national public consultation was held inviting interested parties to share their views on the EU proposals. This was hosted on the websites of both the Department of Jobs, Enterprise and Innovation and the Department of Justice and Equality on 9th December 2016 and it ran until 31st January 2017. Four responses were received as part of this formal process. Two further holding responses were received indicating they would comment as soon as they had concluded reviewing the EU proposals. In addition, the Department of Jobs, Enterprise and Innovation received other comments which were not part of the public consultation. Ms. O'Higgins confirmed that the formal public consultation is now closed, the Departments will remain open to hearing views, though these are more influential if they are received in good time before the issues in question receive their first reading at EU working party negotiations.

Under the terms of the EU Treaties, national parliaments are entitled to examine whether any new EU proposals meet the principle of subsidiarity. The Oireachtas Joint Committee on Justice and Equality conducted a formal review of the proposal and decided to object on this basis. The Committee wrote to the European Council in early March and it is understood that the European Commission is due to respond to Ireland on this matter shortly.

The Maltese Presidency has included this dossier amongst its priorities for their presidency and scheduled eight meetings during the first six months of 2017. The negotiations at EU Working Party have commenced and four of these have taken place to date with slow progress on the issues being explored and we are currently examining article 6 of 36. The key issue to date is to examine how to provide for harmonisation of this new area of law without interfering with national procedures that are already tested and working well. The lack of entry test/viability test into a restructuring process has been a cause of concern for a number of Member States.

The proposals and draft Directive were discussed by the CLRG subcommittee on Corporate Insolvency on 25th January 2016. Further engagement with the subcommittee on this matter is envisaged as examination of the proposals progress.

The Chair thanked Ms. O'Higgins for her update.

Corporate Governance subcommittee

The Corporate Governance subcommittee, chaired by Ralph MacDarby met on 23rd March to commence its scrutiny of relevant submissions referred to the CLRG by the Department of Jobs, Enterprise and Innovation and work on these matters is ongoing. The subcommittee will also consider the other Codes of best practice in corporate governance as recommended and/or required by relevant Regulators. The representation on the committee by members in areas specifically relevant to corporate governance was welcomed and it was hoped that the committee will have its submission ready for consideration at the next plenary meeting of the Company Law Review Group.

The Chair thanked Mr. MacDarby and all of the members of the committee for their work to date.

Corporate Insolvency subcommittee

The Corporate Insolvency subcommittee, chaired by Mr. Barry Cahir has begun a renewed examination of the UNCITRAL Model Law on Cross-Border Insolvency given its potential importance for post-Brexit cross border insolvencies. The subcommittee, with participation by representatives from the Department of Justice and Equality and the Insolvency Service of Ireland, has also begun an initial consideration of the European Proposal for a Directive on Insolvency, Restructuring and Second Chance at the request of the Department of Jobs, Enterprise and Innovation. The subcommittee will progress the review of winding up over the course of the work programme of the CLRG 2016-2018. Mr. Cahir noted that the majority of members of the subcommittee are involved in the related work of the ad-hoc committee under item 5 above.

The Chair thanked Mr. Cahir and all of the members of the committee for their work to date.

The meeting then concluded.