

76th Plenary Meeting of the Company Law Review Group

Minutes

Date: Friday 13th November 2015

Time: 09:30 – 11:30

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

Chairperson: Dr Thomas B Courtney.

Attendance: Deirdre-Ann Barr, Jonathan Buttimore, Eleanor Daly, Stephen Dowling, , Paul Egan, Bernice Evoy, Helen Hall, Brian Hutchinson, William Johnston, Gillian Leeson, Harry Lester, John Loughlin, Ralph MacDarby, Vincent Madigan, Kathryn Maybury, Deirdre O’Higgins, Conor O’Mahony, Lynn O’Sullivan, Paddy Purtill, Nora Rice, Eadaoin Rock, Jon Rock.

Secretary: Síona Ryan.

In attendance: Elaine Cassidy, Sabha Greene.

Observers: Lisa Maher, Anthony Thuillier.

Apologies: Barry Cahir, Marie Daly, Mark Fielding, Michael Halpenny, Brian Kelliher, Noel Rubotham.

The Chairperson opened the meeting and welcomed Lynn O’Sullivan to the Company Law Review Group, as she has succeeded Marion Berry as Legal Advisor in the Department of Jobs, Enterprise and Innovation (“the Department”) and has been nominated by the Minister to serve on the Company Law Review Group (CLRG). He also welcomed Helen Hall of IAASA and Paddy Purtill, a temporary nominee from the Revenue Commissioners.

1. Minutes & Matters arising

The minutes of the meeting on 8th July 2015 were recirculated on 29th October and no requests for amendment were received by the secretariat. The Minutes were adopted.

Under matters arising, the Chairperson noted that the Explanatory Memorandum to the Companies Act 2014 had been published and is available on the Department’s website www.enterprise.gov.ie .

The Chairperson indicated that any reports or observations on the functioning of the Companies Act 2014 could be reported and opened the floor on this matter to CLRG Members. The following matters were raised:

- A query to the Department regarding the cut off time for the delivery of forms of proxy to a company before for general meetings.
- It was indicated that the Law Society intends to present a submission to the Department of Jobs, Enterprise and Innovation in relation to Unlimited Companies redemption of Share Capital.
- Concern was expressed was regarding the lack of certainty surrounding the exemption on the use of the suffix UC for unlimited companies, which is due to become a requirement at the end of the transitional period. It was suggested that clarity on the matter would be welcomed as soon as possible.
- It was observed that the SAP process is functioning well in relation to group reorganisations.
- In relation to Directors' Compliance Statements, a variety of views have been observed with some concern noted from some directors in relation to meeting the requirements. It was suggested that this arises from a misunderstanding of what is required by a Directors' Compliance Statement.
- It was noted that there was an additional disclosure requirement for financial statements in the Companies Act 2014 in relation to employment costs which is unique to Ireland. The Department noted this observation and suggested a submission on the matter would be appropriate if the provision is subject to concerns.

The Department welcomed this feedback from CLRG Members and suggested that all observations are welcome especially those from representative bodies. The Chairperson suggested that more observations of this nature will come to light as companies continue to engage with the new requirements. The Chairperson thanked all who offered feedback and thanked the Companies Registration Office in particular for the sterling work in relation to the implementation of the new Companies Act 2014.

2. Progress on Companies (Accounting) Bill 2015 and transposition of the EU Audit Reform

Sabha Greene of the Department provided an update on the progress in relation to the Companies (Accounting) Bill and transposition of the EU Audit Reform.

The Companies (Accounting) Bill will transpose the EU Accounting Directive (2013/34/EU) into Irish law which will apply to accounting periods beginning on or after 1st January 2016. The Heads of Bill went to the Parliamentary Counsel in February and a second set of Heads was submitted in June, the outline of these Heads was presented by Ms. Greene to the CLRG at the meeting of 8th July. The Department is continuing its work with the Parliamentary

Counsel to draft the Heads into a Bill as quickly as possible but a precise date for publication is unclear at this stage.

It is likely that the legislation will not be in place on 1st January 2016. As such, the Department is considering how / whether it can have the Act apply to those financial years that begin on or soon after 1st January 2016 even should the Bill be enacted after that date.

Efforts are ongoing to transpose the EU Audit Directive (Directive 2014/56/EU) and to make provision for the EU Audit Regulation (Regulation 537/14). The EU Audit reform package comprises 2 instruments, a Directive and a Regulation. The main changes include –

- The introduction of mandatory tendering for and rotation of audit engagements for some undertakings
- The introduction of restrictions on the non-audit services that an auditor may provide to certain clients
- The introduction of new rules on audit committees (e.g. membership)
- Changes to the regulation and oversight of auditors

The Directive provides the rules that apply generally to statutory audits, while the Regulation adds more stringent provisions for public interest entities (banks, insurers and listed entities). It is some of these more stringent provisions, such as rotation and the treatment of non-audit services that have attracted the most attention. On rotation, the general principal is that “public interest entities” must rotate their auditor at least every 10 years. It is open to Member States to provide for a shorter period or to provide for a second period of up to 10 years as long as the audit is put out to tender after that first 10 year period. On non-audit services, there is a “black list” of services that an auditor cannot provide to its PIE client and there is a cap on the amount of fees that a PIE can pay to its auditor for those services (up to 70%). Again there are some options here for Member States.

The Regulation is due to be transposed into Irish law by the same date on which the Regulation applies directly, which is 17 June 2016. As things stand, audit regulation is mostly contained in S.I. 220 of 2010 with some elements in the Companies Act 2014. The plan is to introduce new primary legislation using S.I. 220 as a template, and by replacing it with a Statutory Audits Act. Where necessary, the Companies Act 2014 will be amended for matters such as appointment and dismissal of auditors.

It is intended to publish the Heads of Bill later in November, subject to Government approval. All going well with the drafting process, the Department intends to publish a Bill in March 2016 and to work towards enactment as soon after that as possible. It is also anticipated that the Joint Oireachtas Committee on Jobs, Enterprise and Innovation will conduct a pre-legislative scrutiny process on the Heads of the Bill. If so, that is likely to take place between publication and end January and could last approximately 8 weeks.

The following matters arose in the ensuing discussion:

- Queries were raised in relation to decisions on the optional measures for Member States in the Audit Directive. It was confirmed that the Government's position on these matters will be evident when the Bill is published.
- Proposals for amendments to the Companies (Accounting) Bill and the Companies Act 2014 were discussed and the Department confirmed that only amendments which are urgent or critically important are being considered so as not to impede the progress of the Accounting Bill. It was, however, suggested that there would be the forthcoming statutory audits bill and future companies bills which could accommodate potential amendments which are neither urgent nor critically important. The Department confirmed that there will be some amendments to the Companies Act 2014 that meet the criteria of urgent or critically important and will be included in the Companies (Accounting) Bill.
- A query regarding the possibility of grandfathering arrangements for certain company structures established prior to the Directive being transposed was raised and noted by the Department.
- The possibility of using a Statutory Instrument to meet the requirements of the Directive before enactment was mooted and the suggestion was recorded by the Department.

The Chairperson thanked Sabha Greene for outlining these proposals to the CLRG and Ms. Greene left the meeting.

3. Report on the evaluation of representation of a company before the Courts (Item 3 of the Work Programme)

The chair of the subcommittee on the Review of the Rules governing Legal Representation of Companies before the Courts, Brian Hutchinson, confirmed that the report, in its second reading, was being presented with a view to formal adoption of the report and its recommendations by the CLRG.

Brian Hutchinson outlined the principal changes made since the report was discussed at the last plenary meeting. These included:

- a deeper explanation of challenges to the courts system that the representation of companies by unqualified persons could pose arising from a substantial change in the current policy;
- the cautious use by the Courts of their discretion and that statutory provision could be made in this regard;
- the removal of the word 'rare' from 'rare and exceptional circumstances' for court discretion;
- minor corrections and citations.

There was some comment in relation to the wording in the draft report related to a possible relaxation of the rule for certain proceedings or courts under section 6.3. The Chairperson of the subcommittee undertook to rephrase this section of report in light of the observations made.

The draft report was approved and adopted subject to this amendment. The Chairperson of the Company Law Review Group thanked Brian Hutchinson and the members of subcommittee on the Review of the Rules governing Legal Representation of Companies before the Courts for their time and efforts in working on this item (item 3) of the CLRG Work Programme.

4. Report of the Ad-Hoc Committee Reviewing the Implications of the Supreme Court Judgment (09.07.15) in the Belgard Motors Case (Item 7 of the Work Programme)

The Chairperson outlined the background to this agenda item to the meeting of a request from Richard Bruton, T.D., Minister for Jobs, Enterprise and Innovation on 14th July 2015 regarding the Supreme Court judgment of the 9th July 2015¹. The Minister asked the Company Law Review Group *“to examine the judgment (the ‘Belgard Motors case’) and its implications for the priority of payments to creditors in company liquidation and to recommend what, if any, changes should be made to the Companies Act 2014, particularly having regard to paragraphs 91 – 98 of the judgment”*.

An ad-hoc committee was convened comprising of the chairs of both the CLRG subcommittee on Charges and Registration (William Johnston), and the CLRG subcommittee on Corporate Insolvency (Barry Cahir), along with members of these subcommittees who volunteered to participate on the ad-hoc committee.

William Johnston gave a brief overview of the circumstances leading to the Supreme Court judgment and the main findings of the report by the ad-hoc committee and its recommendation for consideration by the Company Law Review Group. Two papers had been circulated, the draft report and an accompanying note for information on securities and priority.

The following matters were raised in the ensuing discussion:

- That the note for information should be incorporated into the final document for submission to the Minister.
- That draft Heads are usually suggested by the CLRG to accompany any policy change that it proposes and that the Heads could be included in the report.

¹<http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/8bdc10fdc70b564480257e7e003deb10?OpenDocument>

- That a reference to section 440 to include receivers, should be inserted alongside section 621 in the proposed recommendation of the report.
- Some proposals for changes to speculative language to be removed.
- Whether it was appropriate to include as part of the recommendation that priority of payments would be added to the Work Programme of the CLRG in 2016 in light of the clearly defined remit of the request set out in the letter from Minister Bruton to the Chair of the CLRG.
- Whether mention should be made in the report of the Public Accounts Committee Report on Loss of Fiduciary Taxes arising from abuse of Limited Liability.

Subject to amendments made arising from the points above, the report and its recommendation was adopted by the CLRG. The Department confirmed that it is intended to include the proposed amendment to the Companies Act 2014 in the forthcoming Companies (Accounting) Bill and this was generally welcomed by the CLRG. The Chairperson thanked William Johnston (and Barry Cahir in absentia), as well as the ad-hoc committee members and the secretariat on the clear and decisive work which had been carried out in a short period of time.

5. Subcommittees of the Company Law Review Group

The chairperson provided an overview of the background to the formation of subcommittees and their intended functioning in relation to the Work Programme of the CLRG.

The members of the CLRG had previously been asked to express interest in serving on subcommittees of the CLRG. A list of membership of these committees was circulated at the last plenary meeting. The intention is that these subcommittees will be convened to meet, as the need arises, in relation to items on the Work Programme, issues arising from the implementation of the Companies Act 2014 or events such as the recent Supreme Court judgement which required a recommendation from the CLRG.

Minister Bruton has publicly confirmed that he has tasked the Company Law Review Group with looking at proposals in relation to receivers, examinerships, winding-up and strike-off and restoration as part of its work programme for 2014-2016. The Corporate Insolvency subgroup is to convening for the first time on 24th November and will begin this process.

CLRG Members were asked to make the Department aware of any issues that may require exploration by a subcommittee of the CLRG.

The chair of the Shares and Share Capital subcommittee, Paul Egan, signalled his intention to call a meeting of this group before Christmas in relation to issue relating to share capital.

The Chairperson suggested that given the Department's limited resources to provide secretarial services to subcommittees, any subcommittee so minded can, in the absence of a

Department facilitated meeting, exchange information and observations by email allowing preliminary work to be done in advance which would not require a formal meeting with work of the subcommittees ongoing in the background.

6. AOB

The Chairperson raised the matter of the recent amendment of the Companies Act 2014 by Statutory Instrument 289 of 2015 sponsored by the Department of Finance. There was general consternation at the manner in which the architecture of the Act was not respected in this amendment whereby provisions relating to Public Limited Companies which should be in Part 17 of the Act were inserted into Part 4. The CLRG called on the Department to take any necessary steps to avoid a reoccurrence of similar amendments to the Act in future.

There was a query raised related to the restatement of insider dealing and market manipulation law and existing anomalies in relation to where a company is incorporated. It was suggested that these could potentially be removed from the Companies Act 2014 in the future and that there should be liaison with the Department of Finance in this matter as well as regarding the amendment to the transparency directive due in the coming weeks.

The Chairperson thanked the members for attending and, there being no further business, closed the meeting.