

78th Plenary Meeting of the Company Law Review Group

Date: Wednesday 14th September 2016

Time: 9:30am – 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, Barry Cahir, Eleanor Daly, Marie Daly, Jeanette Doonan, Ian Drennan, Gráinne Duggan, Paul Egan, Bernice Evoy, Mark Fielding, Michael Halpenny, Brian Hutchinson, William Johnston, Brian Kelliher, Gillian Leeson, Irene Lynch Fannon, David McFadden, Vincent Madigan, Kathryn Maybury, Salvador Nash, Kevin O’Connell, Maureen O’Sullivan, Kevin Prendergast, Eadaoin Rock.

Secretary: Síona Ryan.

In attendance: Tara Coogan, Helen Curley, Sabha Greene, Orla O’Brien, Breda Power.

Observers: Simon Halpin, Deirdre Hosford, Ciaran McLoughlin, Lisa Maher.

Apologies: Jonathan Buttimore, John Loughlin, Ralph MacDarby, Deirdre O’Higgins, Lynn O’Sullivan, Noel Rubotham.

The Chair welcomed Gráinne Duggan of the Bar Council, Irene Lynch Fannon, University College Cork, David McFadden, Legal Advisor, CRO and Salvador Nash of the ICSA as new members of the Company Law Review Group for the term 2016-2018.

1. Minutes & Matters arising

The minutes of the meeting of 9th March 2016 were circulated on 21st March 2016. No requests for amendment were received by the secretariat. The minutes were agreed and adopted.

2. Companies (Accounting) Bill 2016 and the EU (Statutory Audits) Regulations 2016 (SI 312 of 2016)

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

Companies (Accounting) Bill 2016

Ms. Greene confirmed that the Companies (Accounting) Bill 2016 was published on the 5th August last containing 92 sections and 6 schedules. The main purpose of the Bill is to

transpose the EU Accounting Directive of 2013 (2013/34/EU). The Bill amends Part 6 (Financial Statements, Annual Return and Audit) of the Companies Act 2014. It also adds a new Part 26 on Payments to Governments, which transposes the stand-alone Chapter 10 of the Accounting Directive. The Bill also includes some provisions designed to address issues that have come to light since the enactment of the 2014 Act, many brought to the attention of the Department by Members of the Company Law Review Group. Ms. Greene expressed thanks on behalf of the Department for these communications.

The main features of the Bill: –

- Removes or simplifies many of the financial reporting obligations on small companies.
- Introduces a new category of “micro company” and these will only have to file very simplified financial statements with minimal disclosures.
- Increases the thresholds for small and medium sized companies, with the result that more companies will qualify for audit exemption, for example.
- Obliges medium sized groups to prepare group accounts and removes the facility to prepare abridged financial statements.
- Introduces country by country reporting of payments to governments for large and PIE undertakings in the mining and logging industries.
- Obliges companies that are registered as unlimited but have de facto limited liability to file financial statements.

Non-transposition provisions (i.e. arising from Companies Act 2014) include:

- Section 7 clarifying that securities admitted to trading legally before the Companies Act 2014 can continue to be listed.
- Sections 60 and 61 address the anomaly that a company could lose the audit exemption for not annexing financial statements to its first annual return even though they are not required.
- Section 67 allowing IAASA to attach terms and conditions to authorisation of a liquidator under the grandfathering provisions.

With the publication of the Bill, Ms. Greene confirmed that any issues arising will be reviewed by the Department and thanked CLRG Members who had already been in touch with the Department in this regard. It is expected that there will be some Committee Stage amendments, but any proposals for further amendments should be limited to technical or essential matters as it is a Government priority to enact the Bill as soon as possible. There was some discussion on the issues that might be considered for inclusion in the Bill.

The Department is seeking introduction of the Bill to the Houses of the Oireachtas as soon as possible in conjunction with the Chief Whip’s Office. Once the date becomes known, this will be communicated to Members through the secretariat of the CLRG. The Department is committed to progressing rapidly towards enactment, depending on the availability of Parliamentary time.

EU (Statutory Audits) Regulations 2016 (S.I. 312 of 2016)

The Statutory Audits Regulations repeal and replace 2010 Regulations (S.I. 220 of 2010) and transpose the EU Audits Directive (2014/56/EU). They also give effect to the EU Audits Regulation (537/2014). The Regulations make changes to the obligations on auditors and on public interest entities and reform the system of public oversight of audit. The Regulations came into effect on 17 June 2016, which was the deadline for transposition of the Directive and the date on which the EU Regulation came into force in Ireland. The Regulations amend sections concerning audit in Part 6 and sections concerning IAASA and the 6 recognised accountancy bodies in Part 15 (Functions of Registrar and of Regulatory and Advisory Bodies) of the Companies Act 2014.

The main features are:

- Change to public oversight, with IAASA as the single competent authority with overall responsibility. The recognised accountancy bodies continue to perform some of the oversight tasks, such as approval and continuing education. They will also maintain a role in quality assurance, investigations and discipline with respect to auditors of entities that are not public interest entities. When it comes to the quality assurance of audits of public interest entities, IAASA will now conduct inspections and any investigations and discipline arising from that.
- IAASA is also now the body charged with adopting auditing and ethical standards for Ireland.
- Public interest entities themselves will have stricter rules governing the appointment and engagement of their auditors. There are new obligations on audit committees and the entities will be required to appoint a new auditor at least every 10 years.
- There are also new statutory obligations on auditors that are designed to enhance independence.

Ms. Greene confirmed that the Department also intends to introduce a Statutory Audits Bill, as while the Regulations meet all the transposition obligations, there were some options in the EU Directive and Regulation that could not be introduced in secondary legislation, and the Bill will be the vehicle for their introduction. It is intended to have the Heads submitted to Government before the end of the year and the Department will also seek permission to publish the Heads of the Bill.

3. Market Abuse Regulations 2016

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

Ms. Coogan informed the meeting that the Department of Finance issued new Market Abuse Regulations (SI No 349 of 2016) on 3 July 2016 pursuant to EU legislation ((EU) 596/2014). These regulations revoke the Market Abuse Regulations 2003 and extend the scope of the previous law to include other markets, such as multilateral trading facilities (MTFs). It is the Department's understanding that the Minister for Finance is currently making certain changes in the Finance (Certain European Union and Intergovernmental Obligations) Bill

2016 to Part 23 of the 2014 Act to ensure that serious Market Abuse Offences under the new regime can attract, on conviction on indictment, the maximum penalties of 10 years of imprisonment or a fine of €10,000,000, or both. The Bill is due to go before the Seanad on return of the Houses of the Oireachtas.

Technical aspects contained in the Market Abuse Regulations were raised by Members of the CLRG along with the lack of consultation and publication of draft Regulations by the Department of Finance during the transposition process. The sequence for the transposition of the Market Abuse regime was set out as follows:

- Thursday (30 June 2016) the Regulations were made by statutory instrument;
- Sunday (3rd July 2016) the new regime came into effect;
- Monday (4th July 2016) the Central Bank published its rules;
- Thursday (7th July 2016) amendments were put through to a Finance Bill to fix the transposition of the Market Abuse regime.

It was suggested that the lack of opportunity for consultation meant that issues with the legislation could have been avoided, such as the civil right of action for insider dealing and market manipulation being repealed. The stated intention of the Department of Jobs, Enterprise and Innovation to seek permission to publish the heads of the Statutory Audits Bill was commended as it would afford CLRG members an opportunity to submit any necessary considerations prior to the enactment of the legislation.

A query was also raised in relation to the timescale for the repeal of the insider dealing provisions in Part 5 of the Companies Act 1990. It has resulted in the scenario of existing parallel obligations in two legal regimes currently in place for the Irish Stock Exchange when carrying out an investigation. Ms. Coogan confirmed that the Department has examined this issue and that the provisions in Part 5 are likely to be repealed shortly.

The manner of the amendment of the Companies Act 2014 by the Department of Finance in the European Union (Bank Recovery and Resolution) Regulations 2015 (S.I. 289 of 2015) was discussed. The lack of respect for the carefully planned architecture of the Act was criticised whereby provisions relating to Public Limited Companies which should be in Part 17 of the Act were inserted into Part 4. The Department confirmed that it would be engaging further with the Department of Finance on this matter to avoid a reoccurrence of similar amendments to the Act in future and that it would also raise the need for prior consultation on proposed amendments that were raised in relation to the Market Abuse Regulations.

4. Work Programme of the Company Law Review Group 2016-2018

- Discussion on the approach of the CLRG to the Work Programme

The Minister for Jobs, Enterprise and Innovation 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 Chair gave an overview of the proposed work programme to the meeting and it was subsequently adopted.

5. Discussion Document on the Enforcement of Company Law (Item 3 of the Work Programme)

- First presentation for general discussion

The Secretary presented a Discussion Document on the Enforcement of Company Law to the meeting for its first consideration. The document was compiled by the secretariat including legal research by Simon Halpin and Anthony Thuillier building on previous work from the CLRG Chair and Associates at Arthur Cox. The document presents an overview of issues related to the compliance with and enforcement of company law in Ireland for discussion by the Company Law Review Group.

The document explores the following topics in turn:

- The current role, function and powers of the compliance and enforcement bodies of company law in Ireland.
- Whether there is a need for harmonisation of legislative language for the imposition of criminal sanctions on directors.
- The necessity of a potential criminal offence for reckless trading and the role of the common law offence of conspiracy.
- The potential for greater use of administrative sanctions in company law offences.
- The suitability of deferred prosecution agreements, plea bargaining and immunity for use in relation to company law offences.
- The trial of company law offences: jurisdiction, juries and procedural issues.

The Secretary suggested that the document includes areas which could be viewed as wider in application than company law alone. A review of the regulation and enforcement of corporate offences by the Law Reform Commission is ongoing as part of the 4th programme of Law Reform. The Law Reform Commission had sought the views of interested parties on many of the issues explored in this draft Review Group report. Should the CLRG wish to discuss and form a view on these matters, for submission to the Minister, the Secretary suggested that the ensuing report from the CLRG could be an appropriate vehicle for lending the imprimatur of the CLRG to the wider discussion while fulfilling item 3 on the work programme 2016-2018 of the Review Group as directed by the Minister.

Arising from the deliberations of the CLRG, it is intended that the Discussion Document can be amended to form the report and presented for formal adoption by the CLRG, and then presented to the Minister and subsequently published.

The Secretary informed the meeting that the Law Reform Commission has indicated to the secretariat that it intends to hold a public conference for its Regulatory Enforcement and Corporate Offences project which will take place on the 3rd November 2016, in St George's Hall, Dublin Castle.

The Discussion Document was well received by CLRG Members and it was suggested that while it contains some provocative questions, that these are set out in a balanced and well researched manner. Arising from the ensuing debate, it was agreed to send any suggestions for minor textual amendments directly to the secretariat. More substantive submissions in response to the questions contained in the Discussion Document are to be submitted to the secretariat by 5th October 2016. These submissions will then be examined by a group of interested members to establish whether consensus can be achieved and recommendations will then be brought to CLRG Plenary.

The matter of the use of automatic disqualification of Directors as a mitigating factor in pleas was raised for consideration. It was determined that this is a discrete issue and not within the scope of the report but the Department confirmed that it is aware of the matter.

6. Ad-Hoc Committee on Protections for employees and unsecured creditors (Item 2 of the Work Programme)

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

The Chair of the Ad-Hoc Committee reminded the CLRG of the request from Minister Bruton on 14th January 2016, to examine and recommend ways in which company law could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. This request arose in the context of the liquidation of Clerys but the CLRG were asked to look at a broader perspective. The Ad-Hoc Committee was convened and met for the first time on the 4th February 2016, comprising members of the Company Law Review Group and officials from relevant government departments. The Ad-Hoc Committee has met nine times to date. The next meeting of the Ad-Hoc Committee is scheduled for 28th September at 9.30am.

The Ad-Hoc Committee is conducting an in-depth review of the provisions contained in the Companies Act 2014 to establish whether there should be any recommendations for change or indeed if the provisions continue to be fit for purpose. Extensive discussion and debate has taken place on the provisions of the Act and this work is progressing. Long debates have ensued and as yet no final decisions have been made. Mr. Madigan noted that the participation of the Department of Social Protection and lately Professor Irene Lynch Fannon have brought interesting perspectives to the work of the group. It is intended that the deliberations at the Ad-Hoc Committee will determine the views that exists and will form the basis for a comprehensive report for discussion at CLRG Plenary and that the rationale for the proposed recommendations therein would be apparent.

Separately Ministers Bruton and Nash also appointed two experts to examine the legal protections for workers, particularly where operations and assets may be moved to separate legal entities as part of a restructuring. The experts Nessa Cahill and Kevin Duffy submitted their report, as scheduled, on 11 March 2016 and the report provides a comprehensive analysis of the current body of employment law and company law and considers whether the existing provisions could be used to address the type of issues which gave rise to the

examination. The Ad-Hoc Committee met with Kevin Duffy and Nessa Cahill on 7th July to have an exchange of views on the published report and discuss any interface and areas of common interest in the respective tasks of each party.

The Chair thanked the Chair and the members of the Ad-Hoc Committee for their ongoing efforts in examining the depth and breadth of the matters set out in Minister Bruton's request.

7. Lobbying of Company Law Review Group Members

- Clarification of role and responsibilities of CLRG Members

The Secretary reminded Members that the Company Law Review Group is a statutory advisory expert body charged with advising the Minister for Jobs, Enterprise & Innovation on the review and development of company law in Ireland. Details of the names and affiliations of the membership of the Company Law Review Group are in the public domain and available on the CLRG website www.clrg.org in line with good practice and fulfilling the requirements of the transparency code under the Regulation of Lobbying Act 2015. As this information is in the public realm, and given the profile of the members of the committee, accessing contact information for CLRG members through public and/or professional websites can be quite simple.

It has come to the attention of the secretariat that individual members of the CLRG have been approached regarding ongoing matters that are under review both in this Department and in relation to wider government policies. The Secretary informed Members that there is no requirement to engage with individuals or indeed bodies corporate and that would be appropriate to direct any such representations to the Minister's Office (minister@djei.ie), where the matters concerned will be looked after through the existing structures.

8. Convening a meeting of the Committee on Shares and Share Capital

- Chair of Committee, Mr. Paul Egan

The Chair of the CLRG Committee on Shares and Share Capital stated his intention to arrange for the first meeting of the Committee on Shares and Share Capital. He pointed to the introduction in the Companies Act 2014 of a number of welcome changes to the law of share capital such as the removal of compulsory authorised share capital in private companies, ability to reduce share capital by summary approval procedure and the ability to vary par value of shares. As much of this new law had come from the second full report of the CLRG, published in 2004, which was then given expression in the 2007 General Scheme and 2011 soft copy of the Bill, he suggested that given the passage of time and, even in the absence of issues, that is now time for a fresh look.

Mr. Egan noted that some issues have arisen such as where the law appears to have created anomalies with respect to particular companies and where the law has not followed the

prior recommendations of the CLRG as well as some simple ambiguities. He stated that the aim of the Committee would be to sense-test all of the issues raised, to assess whether they merit attention and remedy, and, if so, to provide suggested drafting fixes, for inclusion in a future Companies Bill.

The Committee would also strive to provide clarity where any ambiguity exists. For example, there were two issues raised shortly after the Act became law that have proven not to be an issue – whether directors’ declarations for summary approval procedures could be separate documents (they can) and whether pre 1 June 2015 share allotment authorities survived (they do). If these were still items of controversy, the Committee might address them. Mr. Egan stated his aim to have the first meeting within the next 10 days to two weeks with a view to setting the agenda and addressing current issues by year end.

The input from the Law Society Business Law Committee was raised and it was confirmed that it will continue to discuss and collate issues which will be submitted to the Department in the future.

9. AOB

The Chair of the Committee on Corporate Insolvency Mr. Barry Cahir, noted the focus in the CLRG Work Programme on Insolvency and that there was a strong overlap in the membership of the Ad-Hoc Committee and the Corporate Insolvency Committee. He confirmed the intention of the Corporate Insolvency Committee to look at UNICITRAL in light of Brexit.

Chairs of subcommittees were asked to circulate agenda items to all CLRG members.

The Chair thanked Members for their contributions and stated a further Plenary Meeting will be held in the coming months to discuss the future Report on the Enforcement of Company Law. The meeting then concluded.