COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

REPORT ON MEASURES TO ADDRESS COMPANY LAW ISSUES ARISING BY REASON OF THE COVID-19 PANDEMIC

JUNE 2020

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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 D02 TD30

25 June 2020

Dear Minister,

I am pleased to present to you a Special Report of the Company Law Review Group (CLRG) on proposals to deal with company law issues arising by reason of the Covid-19 pandemic.

In my letter to you of 31 March 2020 delivering the Review Group's Annual Report for 2019, I noted that the most pressing issue facing the country was the Covid-19 pandemic. The pandemic and its economic effects continue to present enormous challenges to people generally and to the conduct of business on a human and economic front.

On its own initiative and further to the CLRG's interaction with your officials, a number of proposals originated and received by Review Group and the Department have been considered in depth by two CLRG Committees, the Corporate Governance Committee and the Corporate Insolvency Committee. The conclusions arrived at by the Committees have been formally adopted by the Review Group, subject to some reservations in relation to specific issues on the part of some Group members, which, where applicable, are noted in the Report.

I would like to express my sincere thanks to fellow Review Group members, and in particular to Professor Irene Lynch Fannon, Chairperson of the CLRG Corporate Insolvency Committee and Salvador Nash, Chairperson of the CLRG Corporate Governance Committee for their work done to formulate what I believe are a measured and appropriate set of practical proposals to deal with the most immediate company law issues to fall out from the pandemic. I would also like to thank the Department of Business, Enterprise and Innovation for their support, in particular, Secretary to the Group, Ms. Tara Keane.

Yours sincerely,

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Paul Egan
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("**CLRG**") is a statutory advisory 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 trade unions), regulators (implementation and enforcement bodies) and representatives from Government departments including the Department of Business, Enterprise and Innovation ("**the Department**" or "**DBEI**") and the Revenue Commissioners. 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 advise the Minister" on matters concerning company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

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

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation of Lobbying Act 2015 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 D02 PW01
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 membership of the Company Law Review Group at 31 December 2019 is provided below.

Paul Egan	Chairperson (Mason Hayes & Curran)
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking and Payments Federation Ireland
Ciara O'Leary	Irish Funds Industry Association (Maples and Calder)
David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank
Emma Doherty	Ministerial Nominee (Matheson)
Gillian Leeson	Euronext Dublin
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace)
Ian Drennan	Director of Corporate Enforcement
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
James Finn	The Courts Service
Jeanette Doonan	Revenue Commissioners
John Loughlin	CCAB-I (PWC)
John Maher	Ministerial Nominee (DBEI)
Kathryn Maybury	Small Firms Association (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Maureen O'Sullivan	Ministerial Nominee (Companies Registration Office)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)
Ralph MacDarby	Institute of Directors in Ireland
Richard Curran	Ministerial Nominee (LK Shields)
Rosemary Hickey	Office of the Attorney General

Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DBEI)
Vincent Madigan	Ministerial Nominee

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 most recent work programme began in June 2018 and ran 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. The work programme for June 2020 to May 2022 is at present being formulated but the statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2018-2020

The Review Group's Work Programme under which this Report was prepared was as follows:

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.

   This Report is delivered in fulfilment of the Review Group's mandate under this heading.

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 item to the Work Programme

On 5 December 2018, the Minister wrote to the Chairperson requesting that the CLRG examine the regulation of receivers under specific terms of reference. This additional item was formally adopted as part of the CLRG's work programme 10 December 2018 and a special report delivered to the Minister in May 2019.

3.4 Decision-making process of the Company Law Review Group

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

3.5 Committees of the Company Law Review Group

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

4. Company law measures related to the Covid-19 Pandemic

` 4.1 Introduction

4.1.1 Company law issues created by the Covid-19 pandemic

As the Covid-19 pandemic spread throughout Ireland, it became apparent that a number of issues would arise under the Companies Act 2014.

- Company law requires, subject to exceptions, that companies hold annual general meetings each year. Other general meetings of companies can be convened for specific purposes. The practical and legal restrictions on meetings have meant that many such meetings have not been able to be conducted in the usual manner.
- The separate locations and social distancing of company directors and other officers has rendered it at best difficult and at worst impossible for companies to execute documents requiring more than one signature, notably those executed under seal.
- The closing of the public offices of the Registrar of Companies and the apprehension that filing requirements would be rendered impossible created a concern that companies, and their directors would be unavoidably out of compliance with requirements to deliver documents for registration to the Companies Registration Office.
- In the same way that companies have general meetings of members, meetings of creditors are required before and during the winding up of companies, most notably the creditors' meeting before the commencement of a creditors' voluntary winding up. The guidelines and regulations on social distancing have similarly affected the ability to conduct these meetings in the usual way.
- The economic slow-down and cashflow impact on companies has exposed a considerable number of, otherwise viable, companies to a greater risk of the commencement of procedures leading to a winding up, particularly where the debts outstanding are relatively modest.
- Where a company is trading during the pandemic with the benefit of forbearance of its creditors, concerns have been expressed by and to Review Group members that trading in good faith in anticipation of a satisfactory exit from the pandemic, which ultimately proves to be ill-founded, could create a consequent risk to directors of restriction as a director or the imposition of personal liability for reckless trading. To a significant extent these fears will have been allayed by the statement issued by the ODCE on 4 June 2020 entitled "Covid-19 and the insolvency-related functions of the ODCE".[1]
- Whilst the examinership procedure of company rescue has been effective in preserving many enterprises that might otherwise have been wound up, the cost of an examinership as well as certain of the procedures have been identified as disincentives to its use. While most of the issues regarding examinership have been adjudged to be medium term issues not appropriate for amendment without proper considered review, the Group recognised that the normal time limits associated with examinership could present difficulties in the context of Covid-19.

[1] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html

4.1.2 Activity of the Review Group

The Review Group began its consideration of the company law issues after what is now the Emergency Measures in the Public Interest (COVID-19) Act 2020 was introduced as a Bill in March 2020. Shortly after its enactment, a series of outline company law proposals were submitted to the Department by the Chairperson, although these proposals had not been considered in detail or approved by the Review Group. Subsequently those proposals, as well as a number of other issues raised with the Department were referred back to the Review Group's Corporate Insolvency Committee and Corporate Governance Committee for a fuller consideration. The Committees met, by electronic means, 4 and 4 times respectively and their proposals and this Report were approved, subject, where noted in some instances, to the reservations and/or dissenting views of the Director of Corporate Enforcement and Irish Congress of Trade Unions, by a meeting of the full Review Group, held by electronic means on 24 June 2020.

4.1.3 Companies Registration Office

Against a background of quickly developing circumstances and the dislocation of personnel, the Registrar of Companies has organised a matrix of effective solutions that has enabled companies and their directors to be in compliance with their filing obligations. Accordingly, this Report does not contain proposals with respect to Companies Registration Office procedures.

4.1.4 Draft Heads of a Companies (Covid-19) (Amendment) Bill 2020

The Review Group's conclusions and recommendations, subject to the above-mentioned reservations and dissenting views, are crystallised in:

- the draft Heads of a Companies (Covid-19) (Amendment) Bill 2020 set out in Appendix 2; and
- the draft Heads of Statutory Instrument: Companies Act 2014 (General Meetings) Regulations 2020 set out in Appendix 3.
- The draft Heads of Statutory Instrument: Companies Act 2014 (Creditors' Meetings) Regulations set out in Appendix 4.

Although the draft legislative provisions have been drafted in some detail to cover the various issues that, in the view of the Review Group, arise and need to be addressed, it is recognised that the complexity of certain of the issues will require the drafting to be looked at in further detail by the Office of Parliamentary Counsel to ensure they fit harmoniously into the 2014 Act and without creating any unintended consequences.

The Central Bank of Ireland has requested that the implementation of this Report's recommendations, including regarding extension of time to hold annual general meetings ("**AGMs**"), is effected in such a way as does not relieve entities authorised and/or regulated by it from their obligations that they may have under the laws for which it is competent authority, such as obligations which require timely reporting of information laid before AGMs.[2]

An outline of the reasoning and, in certain cases, open points for further consideration are set out in the succeeding sections of this Report.

[2] The reasoning for this is explained in further detail in the Explanatory Note to Head 4 in Appendix 2.

4.2. Duration of potential company law measures

The Emergency Provisions in the Public Interest (Covid-19) Act 2020 has two different definitions of "emergency period" for the purposes of the legislation referred to in it:

- It is 3 months from 27 March 2020, subject to being extended, for the purposes of measures pursuant to the Residential Tenancies Act 2004.
- For the purposes of the Redundancy Payments Act 1967 and Civil Registration Act 2004 it is the period beginning on 13 March 2020 and ending on 31 May 2020.

The Review Group recommends that a period – referred to in its proposals as "the interim period" should run until 31 December 2020 subject to the power of the Minister, subject to conditions, to extend the period for one or more of the proposed legal provisions.[3] The primary "interim period" running to the end of 2020 has the advantage of simplicity and ease of understanding and it is particularly relevant to the issue of annual general meetings, which must take place in each calendar year.

The conditions required to be satisfied before the Minister might exercise the power to extend the period are first that the Minister consults with the Minister for Health and secondly takes into account any legal or practical restrictions in the State on travel or meetings.

The effect of an extension would be to enable the continuance of certain of one or more of the "interim provisions", i.e. those provisions of company law that are proposed to apply during the interim period. It would not however enable a deferral of a company's 2020 annual general meeting beyond 31 December 2020, the issue that is now addressed. Consideration should also be given to distinguishing between matters which are essentially procedural in nature, such as the conduct of AGMs and creditors' meetings, and those which have to do with protection, for example, proceedings under reckless trading and an extension to the period of protection in examinership. It may be that the Minister determines that the latter should not be subject to an extended interim period.

The Review Group also note that the pace at which the economy is opening has accelerated and may obviate the necessity to extend the interim provision in respect of certain measures.

4.3. General meetings

4.3.1 Requirement to have an AGM

The Companies Act 2014 requires, by way of default requirement, that all companies must have their first annual general meeting ("AGM") within 18 months of incorporation and once in every year thereafter with no more than 15 months elapsing between AGMs.[4] The financial statements to be presented to the AGM must be made up to a balance sheet date no more than 9 months before the AGM.[5] General meetings are convened for other reasons, usually by the directors but the Companies Act enables general meetings to be convened by members in particular instances.[6] The pandemic,

[3] The Review Group note that there is a variety of "interim provisions provided for in other jurisdictions which the Department may wish to take into account. In the case of Germany, the period runs from 23rd March to September 30th by a decree of the Federal Government. In New Zealand, the period for "safe harbour" legislation is six months from 3rd April 2020. Other EU Member States such as Slovenia and Latvia have similar periods to Germany.

[4] Section 175.

[5] Section 341(2).

[6] Section 178.

with the accompanying regulations and guidelines on assembly and travel, has rendered it close to impossible for companies to convene general meetings in the normal fashion. In that regard, many public companies have limited personal attendance while enabling electronic participation in the meeting, working around votes by show of hands by instead conducting all votes on a poll with proxy votes only.

Additionally, during the pandemic, the High Court refused, on the balance of convenience, to prevent Grafton Group PLC from proceeding with its Annual General Meeting where its shareholders were encouraged not to attend and had no ability to participate during the meeting.

4.3.2 Exemptions and the *Duomatic* principle

The Companies Act does provide for private limited companies and single-member companies to avoid the requirement to hold annual general meetings, where the members entitled to attend and vote at general meetings sign a written resolution to note and approve the matters ordinarily attended to at an AGM. [7] Quite apart from this provision, "[t]he unanimous agreement of members, whether express or implied from their acts or omissions, can have the same consequences as if the members had passed a formal resolution to that effect." [8] This is what is often called the "Duomatic principle" after the English case of *Re Duomatic Ltd*[9] although as Dr Thomas B Courtney points out, the principles in that case were settled in Irish law 15 years prior to that case in the Irish case of *Buchanan Ltd and another v McVey* [10], in which the court stated:

> "If all the corporators agree to a certain course then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two pre-requisites: *Re Express Engineering Works Ltd* [1920] 1 Ch 466, *Parker and Cooper Ltd v Reading* [1926] 1 Ch 975. 231
>
> The two necessary pre-requisites are (1) that the transaction to which the corporators agree should be intra vires the company; (2) that the transaction should be honest: P*arker and Cooper Ltd v Reading* [1926] 1 Ch 975."[11]

4.3.3 Virtual meetings

The Act also provides that a general meeting may be held in 2 or more venues at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate. [12] However, the Act also requires that a notice of general meeting must "specify ... the place … of the meeting"[13] and does not have provisions explicitly enabling a company to stipulate which venue a member should attend.

Accordingly, for companies that cannot navigate their circumstances so as to avail of the written AGM procedure or a bilocated or multi-located AGM, compliance with the law presents a challenge in light of restrictions on travel and assembly. There is also the practical issue of hotels and similar venues that have conventionally been used by companies for general meetings becoming

[7] Sections 175(3), 196(2).

[8] Thomas B Courtney *The Law of Companies,* 4th Ed 14.114.

[9] [1969] 2 Ch 365.

[10] [1954] IR 89.

[11] Courtney, 14.114.

[12] Section 176(4).

[13] Section 181(5)(a).

unavailable as a result of their closing down and not reopening, or reopening with attendance limits that would preclude their use.

The Review Group has chosen not to state a position on whether the current law precludes virtual general meetings without a physical venue, not least on account of the above-mentioned *Duomatic* principle. However, the Review Group is of the opinion, and so recommends, that the law should be clarified to provide for explicit provisions to deal with virtual general meetings. Although the Review Group has deliberately limited its considerations to the "interim period" – to the end of 2020 (subject to possible extension), it sees some advantage in clarifying the law in the case of virtual meetings generally.

4.3.4 A defence where an AGM cannot proceed

The Review Group gave consideration to providing a defence to companies where their annual general meeting did not take place during the pandemic. However, after extensive reflection and discussion, the Review Group, in light of its mandate in particular "to enhance corporate governance and encourage commercial probity"[14], is firmly of the opinion that, while there might be arguments in favour of such a defence, it should be "meetings-as-usual" but facilitated by legal provisions that remove any apparent anomalies or impediments. At the beginning of 2020, it will have been a minority who knew of, let alone used the various virtual meeting platforms such as Zoom, Webex, and Microsoft Teams etc. The experience of the Review Group and its Committees and of Review Group members in their own businesses, practices and organisations, has indicated that on line meetings have in a certain sense become the new normal.

4.3.5 Mode of enactment of proposal

The Review Group also gave consideration as to whether the provisions to clarify virtual meetings should be spelled out in an amendment to the 2014 Act or contained in Ministerial regulations. Again, after extensive reflection and discussion, it has concluded that Ministerial regulations, founded on an enabling provision giving an outline of their scope, provides the best solution, in particular as the detail of the Ministerial regulations take into account the views of stakeholders and an enabling provision would provide an opportunity for swift amendment should there be a need.[15]

The draft Statutory Instrument aims to address the principal issues surrounding a virtual meeting:

- the content of the notice of the general meeting;

- the minimum capabilities of the electronic platform used for the general meeting;

- quorum; and

- voting.

As a default, the platform should enable two-way audio-visual communication between members and the "top table", with the option for members to connect by audio only. However, in the case of those few companies where the numbers in attendance would outstrip the capacity of audio-visual platforms commonly available, it is proposed that member communication be facilitated by

[14] Companies Act 2014 s. 959(2).

[15] This is similar to the approach taken in section 239 of the Companies Act 1990 and the Companies Act 1990 (Uncertificated) Securities Regulations 1996 (SI 68/1996), which together provide that title to securities may be evidenced otherwise than by a certificate and transferred without a written instrument, which Regulations, as amended, continue in force under the Companies Act 2014.

audience response software where attendees participate by sending questions and comments by typed message rather than orally.

4.3.6 Extension of time for 2020 AGM

Whilst the Review Group did not conduct a formal survey of companies for this purpose, the consistent report of CLRG members was that a significant number of companies were delaying their AGMs in anticipation of either the lifting of the lockdown or a change in the law or both. The Review Group notes also the EU Council Regulation 2020/699 on temporary measures concerning the general meetings of European companies (SE) and of European Cooperative Societies (SCE)[16] enabling AGMs to be held up until the end of 2020 and not within the timeframe that would otherwise apply. It therefore recommends that such an extension be allowed to companies formed under Irish law also.

4.3.7 Provision for cancellation and rescheduling of meetings

The Review Group proposes that a general meeting, once convened, can be cancelled and rescheduled ahead of the date of the meeting without a requirement for a quasi-meeting to occur at which a formal adjournment would take place. In a number of cases known to the Review Group, meetings have proceeded solely for the purpose of formal adjournments, in some cases with company representatives standing outside locked venues, going through the formalities to allow for such adjournments.

4.3.8 Dividend resolutions

The cashflow difficulties caused by the pandemic has resulted in a number of companies withdrawing dividend resolutions that would have been indicated in the relevant financial statements or formally notified in notices of AGM. The Review Group proposes a provision that will explicitly enable companies to withdraw dividend resolutions or to reduce the dividend proposed if they change their view after the notice of AGM has been issued.

4.3.9 Restricted Meetings

The Review Group also debated at length whether it was necessary to introduce provisions to permit restricted access general meetings during the pandemic. However, the Review Group is of the opinion that clarifying the law in respect to virtual meetings in conjunction with the ability to cancel a general meeting removes the need for such provisions.

4.4. Documents under seal

The Review Group proposes that documents to be executed under seal may consist of several separate documents with the seal on one, and signatures on another or others. This is to deal with situations where a company's directors or registered person and company seal will be in separate locations and unable to meet in person. There are work-arounds available, such as the appointment by the company of an attorney under power of attorney. However, the formalities involved in executing a power of attorney can themselves create an issue if, as often is the case, notwithstanding section 15(2) of the Power of Attorney Act 1996 [17] which states that this is not

[16] OJ 27.05.2020 L165 p 25. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.165.01.0025.01.ENG&toc=OJ:L:2020:165:TOC

[17] Powers of Attorney Act 1996, s. 15: (1) Where an instrument creating a power of attorney is signed by direction of the donor it shall be signed in the presence of the donor and of another person who shall attest the instrument as witness. (2) A power of attorney is not required to be made under seal. (3) This section is

necessary, the counterparty to the company demands that the power of attorney is itself executed under seal by reason of section 15(3) of that Act as well as the opinion that is held by some commentators that, for a deed to be executed by an attorney, the power of attorney itself must be executed under seal.[18]

4.5. Financial threshold for initiating a winding up

4.5.1 Current position under the Act

Section 569 of the Companies Act sets out the circumstances in which a company may be wound up by the court. Section 569(1)(d) provides that the court may wind up a company where it is unable to pay its debts. Under s. 570 a company is deemed to be unable to pay its debts if, inter alia, a creditor, who is owed a sum exceeding €10,000 serves a demand for payment and the company does not satisfy this demand within 21 days and similarly where two or more creditors owed a sum exceeding €20,000 issue a demand for payment and this demand is not met.

The impact COVID-19 has had on the normal operation of business will mean that companies which would be viable, but for the Government restrictions on movement and public gatherings, might now find themselves unable to pay their debts in the short term. In light of this, submissions were made to the Department expressing concerns that companies could be wound up over relatively small unpaid debts. In this context, it was proposed that a temporary increase should be made to the financial threshold for initiating a winding from €10,000 to €50,000 in respect of single creditors and €20,000 to €100,000 in the aggregate. It was also suggested that the period to pay a debt on foot of a statutory demand should be extended from 21 days to 6 months. It was suggested that this would allow many companies the breathing space required to trade through the crisis and retain employees.

4.5.2 Impact on other creditors

Throughout the Corporate Insolvency Committee's deliberations, it was highlighted that any amendment in this regard must be considered within the context of the potential impact on creditors. It was pointed out that these creditors are often other companies and any proposed amendment must be sufficiently balanced so as not to unduly interfere with their access to liquidity. The Committee were cognisant that increasing the threshold significantly or extending payment deadlines unduly could in fact have the opposite effect to that intended and could ultimately push other companies towards insolvency by restricting their cashflow. Equally, consideration must be given to employees.

4.5.3 Conclusions

Accordingly, the Review Group recommends that a temporary limited increase in the threshold for applications to wind up companies was warranted in the interest of both preserving employment and protecting the economy post-crisis. In balancing the interests of competing parties in this regard, an increase from €10,000 for single creditors and €20,000 in the aggregate to €50,000 in both instances was considered most appropriate. However, the Review Group does not consider that an extension in the period of 21 days to discharge a statutory demand is warranted.

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without prejudice to any requirement in or under any other enactment as to the witnessing of powers of attorney or as to the execution of instruments by bodies corporate.

[18] "Does the Companies Act 2014 really remove the need for a company seal?" James Byrne. *Commercial Law Practitioner* 2015, 22(8), 196-198

It must be noted that the provisions of s. 570(a) and (b) are cross referenced in a number of other provisions in the Companies Act 2014, for example ss. 610 and 818 which refer to reckless trading and restriction of directors respectively. The intention of this proposal is to limit the amendment of s. 570(a) and (b) for the purposes of s. 569 (1)(d) only.

4.6. Convening of creditors meetings during the interim period

4.6.1 Requirement to hold a creditors meeting

There are various provisions in Parts 9, 10 and 11 of the Companies Act 2014 which regulate various processes requiring a creditors' meeting to take place. The structure of the Companies Act is such that in each relevant Chapter of these Parts the provisions are stated to apply to that process only, save to the extent a provision provides otherwise. Thus s. 585 states that the following provisions apply to creditors' voluntary windings up only, subject to the rider just mentioned. The Committee wish to provide for a general provision applicable to creditors' meetings generally and so it is proposed to clearly state that the proposed s. 688A applies to all creditors' meetings.

As with general meetings, described earlier in the report, government restrictions on public gatherings and travel have made it difficult for such meetings to be convened in the normal fashion. In response to this, submissions were made to the Department proposing that the Companies Act be amended to allow for any such meeting to be conducted by electronic means.

4.6.2 Creditors' meetings to be held and conducted by electronic means.

The Review Group considers it a pragmatic and sensible proposal to provide for creditors' meetings to be held by electronic means while preserving all of the other rules which apply to these meetings, in particular ensuring that creditors receive proper notice of any meetings and are afforded a reasonable means of participating fully in such meetings. This is a position which has been adopted in respect of AGMs[19] and creditors' meetings[20] in other jurisdictions and a number of accountancy bodies have already issued guidance to insolvency practitioners on how to conduct meetings in this manner.

4.6.3 Mode of enactment of the proposal

The Corporate Insolvency Committee debated at length as to the most appropriate way to enact the proposed amendment. Consideration was first given to a specific or general principle based approach. Subsequently, discussions centred on the language and formula of construction being developed to deal with AGMs and the issue of primary versus secondary legislation.

The Committee initially considered specifying all provisions of the Companies Act which deal with creditors' meetings and outlining an amendment in respect of each. However, upon deeper analysis it became evident that this posed a significant risk that certain sections might be unintentionally missed. The Committee gave particular weight to High Court jurisprudence which outlines that where specific provisions in an Act are referenced, this has the effect of excluding those not referenced from the scope of the provision[21].

[19] UK, Germany, Australia

[20] Australia already provides for virtual creditors' meetings in R75 – 30 of the Insolvency Practice Rules (Corporations Rules)

[21] "*Expressio unius est exclusio alterius*" – this maxim of statutory interpretation roughly translates to that which is omitted is understood to have been excluded. It has wide application and has been utilised by the courts to interpret constitutions, treaties, wills and contracts as well as statute.

This led the Committee to adopt a principle that insofar as possible meetings would be held in accordance with the provisions of the Companies Act generally and that only where necessary specific detail would be addressed, for example regarding how notice should be served or how documentation normally presented at a creditors' meeting would be dealt with.

In considering whether the amendment should be provided by way of primary or secondary legislation the Committee examined the construction of the recommendation in relation to AGMs which, as outlined earlier in this report, provides for an enabling provision for virtual meetings in the Companies Act with the detail of such meetings to be dealt with by way of regulation. Given the Committee's broad, principle based approach to creditors' meetings it was considered appropriate to effect the amendment in a similar manner. The proposed legal provisions mirror those proposed for general meetings.

Accordingly, the Review Group recommends that virtual creditors' meetings be enabled in the Companies Act and to provide for any specific detail to be dealt with by regulation. It was also noted that the regulation-making power was particularly important in the context of the evolving nature of the pandemic to ensure the Minister can respond in a timely fashion to any operational issues arising.

4.6.4 Mandatory vs permissive provision

The Corporate Insolvency Committee considered whether virtual meetings should be mandatory during the interim period or whether the provision should be permissive and provide for the option of virtual meetings. The underlying objective of the Committee in this regard was to ensure that creditors' have a fair and genuine opportunity to participate fully in the meeting. The Review Group recommends that provision be made for the option of virtual meetings. However, where a physical meeting is held there should be a mandatory obligation to facilitate virtual participation.

4.7. Continuing to trade during the COVID-19 outbreak

4.7.1 Current position under the Act

Section 610 of the Companies Act provides that a director or an officer of a company, which is in the course of being wound up or in the course of examinership proceedings, may be found personally liable for the company's debts in circumstances where it is considered by the court that he or she knowingly carried out any business of the company in a reckless manner.

The economic effect of COVID-19 and the associated Government shut down of business has significantly impacted the liquidity of companies and has given rise to concerns, amongst business and directors' representative groups, that directors may find themselves being held personally liable for the debts of the company by trying to trade, in good faith, through the crisis.

Applications to have personal liability imposed on directors on foot of the section can be made by liquidators, an examiner, a receiver, a creditor or a contributory of the company concerned. In practice however, such applications are very rarely litigated. In the absence of any material levels of litigation on the issue, some anecdotal evidence was advanced that threats of such applications are made somewhat more frequently, i.e., in an effort to force payment or part-payment of outstanding debts.

The Office of the Director of Corporate Enforcement (ODCE), which considers an amendment to be unnecessary, expressed the view that concerns of this nature are more matters of misperception in that the existing jurisprudence clearly demonstrates that the Courts give appropriate consideration and weight to relevant facts and circumstances – such as, in the instant case, the impacts of the

pandemic. The ODCE is, therefore, of the view that honest and responsible directors have little, if anything, to fear from the existing provisions.

Additionally, there are differing assessments within the legal community about whether or not availing of the Government's Temporary Wage Subsidy Scheme amounted to a declaration of insolvency. It was noted that the Revenue Commissioners, who have been charged with administering the Scheme, have publicly stated that they would not consider any application to the scheme as being a declaration of insolvency. Under the Scheme the Government undertakes to pay a portion of the worker's salary provided that the employer keeps the employee on the company's books rather than laying them off. In order to qualify for the Scheme a business must demonstrate that its turnover has reduced by at least 25% and that it is unable to pay normal wages and outgoings as they fall due. It is this point which gave rise to some concerns in respect of reckless trading under the Companies Act.

In response to these concerns, submissions were made to the Department seeking legislative amendment to explicitly provide that a director will not be considered to have traded recklessly by reason only of trading during the COVID-19 outbreak. Detailed below is a comprehensive consideration of the Committee's deliberations in respect of same.

4.7.2 Directors' duties

The amendment that is proposed at section 4.7.5 must first be considered within the context of directors' duties. Where a business is solvent and trading as normal, the company's directors owe their fiduciary duties[22] to the company. Where a company is at risk of insolvency, directors also have a duty to have regard to the interests of creditors as described in case law but not as yet codified in Ireland.[23].

However, the Review Group acknowledges that the Irish Courts have demonstrated an appreciation for entrepreneurial risk and the bar for a finding of reckless trading, and consequential imposition of personal liability on the directors concerned, is therefore quite high. In particular, the Courts have afforded some latitude for a continuation of trading for a short period in certain circumstances. The extension of any such latitude by the Courts would generally be contingent upon (i) there having been a reasonable prospect that the company would be able to trade out of its difficulties within a relatively short timeframe; and (ii) the directors having acted in good faith and having acted honestly and responsibly in all other respects. While case law in the area is limited to 3 reported cases, some examples of relevant case law are outlined in the following section.

Where it is clear that the company cannot survive, it is argued that there exists a duty at common law to put the company into creditors' voluntary liquidation and to preserve the company's assets so they can be applied *pro tanto* in discharge of its liabilities.

4.7.3 Case law

In the case of *Hefferon Kearns Ltd*[24] the High Court interpreted 'reckless' to mean gross carelessness and held that for an officer to be held liable for reckless trading he must have been party to the carrying on of the business in a manner which he knew involved a serious and obvious risk of loss or

[22] One of the more far-reaching reforms introduced in the Companies Act 2014 was the codification of the duties of directors which are set out in section 228 of the Act.

[23] The CLRG's Report on the Protection of Employees and Unsecured Creditors recommended that a director's duty to creditors be codified in the Companies Act 2014. It should also be noted that the Preventative Restructuring Directive sets out codified directors' duties as a company approaches insolvency.

[24] *Hefferon Kearns Limited (No. 2)* [1993] 3 IR 191

damage to others and yet ignored that risk because he did not really care whether such others suffered loss or damage or because of a selfish desire to keep his own company alive.

The Court also remarked in this case that:

> *"[it]* would not be in the interests of the community that whenever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and close down the business. Many businesses which might well have survived by continuing to trade coupled with remedial measures could be lost to the community*"*.

These comments have particular relevance to businesses which now find themselves in a precarious financial situation by virtue only of the current crisis.

In re *Appleyard Motors Ltd*[25]. a director who had been found by the High Court to be personally liable for reckless trading, successfully appealed to the Court of Appeal. In deciding whether or not to accede to an application to hold a director personally liable, the Court will require knowledge that the actions of the directors *would* in fact cause loss to creditors – and not that they *might* do so – having regard to the general knowledge, skill and experience that may reasonably be expected of a person in the position of the director. The Court of Appeal held that the loss to the creditors must have been foreseeable to a high degree of certainty.

However, the prevailing view of the Review Group is that the limited jurisprudence in the area would be of little comfort to the average company director and may be inclined to make more conservative decisions about trading through the pandemic on the basis of their fiduciary duties, in particular when approaching insolvency. In addition, the Committee were informed that the threat of a reckless trading action being brought by an aggrieved creditor against directors of a company was sometimes used in negotiations behind the scenes.

The ODCE, supported by the Irish Congress of Trade Unions (ICTU) and some other members, holds the view that any such concerns do not appear to be based on a realistic assessment of the provision having regard to the high threshold established by the Courts.

4.7.4 Temporary Wage Subsidy Scheme

The Corporate Insolvency Committee examined specific concerns arising from a companies' participation in the Government's Temporary Wage Subsidy Scheme. The Committee had the benefit of having amongst its membership a representative from the Revenue Commissioners participating in its deliberations who could reflect the Commissioners' policy position on the matter. Guidance issued by the Revenue Commissioners explicitly states that participation in the scheme does not, in the Commissioners' assessment, amount to a declaration of insolvency:

> "The declaration by the employer is not a declaration of insolvency. The declaration is simply a declaration which states that, based on reasonable projections, there will be, as a result of disruption to the business caused or to be caused by the COVID-19 pandemic, a decline of at least 25% in the future turnover of, or customer orders for, the business for the duration of the pandemic and that as a result the employer cannot pay normal wages and outgoings fully but nonetheless wants to retain its employees on the payroll."[26]

[25] *Toomey Leasing Group Ltd. v Sedgwick & Ors* [2016] IECA 280

[26] https://www.revenue.ie/en/corporate/communications/documents/guidance-on-employer-eligibility-and-supporting-proofs.pdf

The scheme has been widely promoted across Government, including by the Minister for Business, Enterprise & Innovation, Heather Humphreys, T.D., who has actively encouraged companies to engage with the Revenue Commissioners and apply for the scheme. The Committee took the view that participation in a Government funded scheme designed to aid business to trade through the crisis must be considered reasonable behaviour by a director. Indeed, it could be argued that not availing of the scheme runs counter to section 228(1) of the Companies Act which provides that a director has a duty to act in good faith in what he or she believes to be in the best interest of the company.

4.7.5 Conclusions

As noted above certain members of the Committee, including those from the ODCE and ICTU, are of the opinion that a legislative amendment is not necessary in that the matter is adequately addressed by the relevant jurisprudence and the application of the provisions of section 610(8) of the Companies Act 2014. [27]. This subsection provides that where it is demonstrated that a person has acted honestly and responsibly, the Court may, having regard to all the circumstances of the case, relieve the person either wholly or in part, from personal liability on such terms as it may think fit.

The statement issued by the ODCE on 4 June 2020 would also appear to be relevant in this context. In its statement, the ODCE outlined, *inter alia,* its view of the range of considerations that could reasonably be expected to be taken into account in determining whether a company director had acted honesty and responsibly. The ODCE's views are informed by its assessment of the relevant jurisprudence, particularly in respect of restriction applications. It seems reasonable to anticipate that the Courts may have regard to similar considerations in determining whether directors have acted honestly and responsibly in the context of the application of section 610.

For the reasons detailed above, the ODCE does not support the recommendation for legislative amendment. The ODCE holds the view that the proposal could remove an important remedy for inappropriate and reckless behaviour by some company directors whose actions could have devastating impacts on their creditors.

Notwithstanding the foregoing views, the Review Group on a majority basis, recommends that there should be a legislative amendment in order to convey a message to the business community that a continuation of trade in good faith without fear of personal liability, in circumstances where they have acted in an honest and responsible manner, is fundamental for economic recovery. It is also considered appropriate in terms of recognising the unique situation that directors were put in whereby business decisions were largely taken out of their hands by a government mandated lock down.

4.8. Applications for restriction orders

4.8.1 Current position under the Act

Section 820 of the Companies Act provides that the Director of Corporate Enforcement, a liquidator or receiver of an insolvent company can make an application to the High Court for the restriction of a director. In practice, the vast majority of such applications are made by liquidators following the submission of reports to the ODCE and the ODCE determining if the liquidator should be required to make such an application. Furthermore, most restrictions now arise on foot of voluntary undertakings given to the ODCE in accordance with section 852, i.e., without the directors concerned having to engage in High Court litigation.

[28] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html.

In conjunction with concerns raised in respect of reckless trading, employer representatives and legal practitioners also highlighted a concern that directors might find themselves subject to restriction orders by virtue of trading during the Covid-19 crisis. Submissions were made to the Department proposing an amendment to the Act to ensure that directors of companies which decide to trade during this time would not be subject to restriction proceedings solely on that basis.

The ODCE does not consider that there is any appreciable increase in the risk of a director facing restriction proceedings in the circumstances outlined in the submissions. Specifically, the ODCE has indicated that it would generally not consider directors to have acted dishonestly or irresponsibly in circumstances where the company has become insolvent as a consequence of events largely, and genuinely, outside the directors' control. The ODCE further confirms that this has been its policy position as adopted throughout the period of almost 20 years that the ODCE has been adjudicating upon liquidators' reports. It is the actions taken, or not taken, by the directors in response to financial difficulties being faced by the company that will inform the assessment as to whether directors should face a restriction application (or undertaking as the case may be). In the course of the Corporate Committee's deliberations on 4 June 2020, the ODCE issued its Statement entitled "Covid-19 and the insolvency-related functions of the ODCE".[28]

Furthermore, even in the event that the ODCE decided not to grant relief to a liquidator (i.e., required the liquidator to make a restriction application to the Court), the matter would then fall to be determined by the High Court which, as evidenced by the jurisprudence, has clearly, and consistently, demonstrated a willingness to take account of all relevant facts and circumstances, including where appropriate external factors.

4.8.2 Legislation versus guidance

Much of the Corporate Insolvency Committee's debate focused on whether a legislative amendment or comprehensive guidance from an appropriate State body such as the Director of Corporate Enforcement was the most satisfactory manner in which to address the concerns expressed in respect of this issue.

It appeared that a significant amount of concern arose in respect of the perceived link between accessing the government's Temporary Wage Subsidy Scheme and a declaration of insolvency. The Committee noted that it was difficult to conclude that anybody would seek to apply for restriction solely on the grounds that a person has applied for financial assistance from a government emergency scheme (which obviously means that it is public policy that people should avail of the scheme). In fact, it would seem more credible to suggest that a failure to apply could, in certain circumstances, be considered an act of irresponsibility by a director of a company which met the eligibility criteria for the scheme.

On the other hand, there was also an acceptance that legislation spoke to the world at large. Furthermore, as described above s. 820 of the Companies Act 2014 provides for applications for restriction to be made by a liquidator, receiver or the Director of Corporate Enforcement. Therefore, it is possible that regardless of guidance provided for by the ODCE and the position taken by the ODCE, applications could be made by others without engagement with the ODCE (although such applications are extremely rare). These observations are distinct from the fact that under s. 683 a liquidator is obliged to apply for a restriction order unless relieved from the obligation to do so by the ODCE.[29] The decision of the Court of Appeal (Kelly P. Irvine and Hogan JJ. Concurring) in *Re*

[28] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html.

Walfab Engineering Ltd[30] does offer some limited guidance on the extent to which the Courts may take into account external contributing factors. In an application made by the ODCE on foot of section 160(2)(h), Companies Act, 1990, for the disqualification of the directors of the company, the High Court had noted, inter alia, that the actions of the directors in this case had taken place post 2008 in what was described as a 'financial maelstrom' and were excused in that context.

This decision was appealed by the ODCE and on appeal overturned by the Court of Appeal. In his judgement, Kelly J stated:

> "For my part, I cannot agree that the factors identified by the trial judge can be regarded as relevant to the exercise of his discretion. The whole thrust of the legislative provision is to ensure that all directors of all companies comply with their obligations. It matters not that they be directors of family companies, or be at the helm of large or quoted enterprises. Neither do the qualifications of the directors or the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company."

4.8.3 Conclusions

Some practitioners on the Corporate Insolvency Committee and the Review Group were of the view that an amendment to the Companies Act was necessary in terms of providing legal certainty in respect of the matter. However, the prevailing view of the Review Group is that the comprehensive Statement issued by the ODCE on 4 June 2020 sufficiently addresses the concerns raised and does not therefore recommend a legislative amendment. In addition, a distinction can be drawn between the reckless trading regime, which can be initiated by a creditor[31] and the restriction regime, which cannot.[32]

Notwithstanding that the Review Group is not in favour of an amendment, for information, a draft provision which had been under consideration by the Corporate Insolvency Committee is set out in Appendix 5 of this Report to assist the Minister should circumstances arise at some point in the future where the matter is revisited.

4.9. Examinership (extension)

4.9.1 Current position under the Act

Examinership is a system of court protection under the Companies Act 2014 for companies experiencing financial difficulties but which have a reasonable prospect of survival as a going concern. The legislative provisions relating to examinership were first introduced in 1990 by the accelerated enactment of the Companies (Amendment) Act, 1990. The purpose of examinership as envisioned by the Oireachtas and as established in case law , for example as stated by Clarke J in *Re Traffic Group Ltd and Companies Acts* (2007) where the court observed (reflecting earlier judicial statements) that:

> "…the principal focus of the legislation is to enable in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community".

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[31] Companies Act 2014 s. 610(1).

[32] Companies Act 2014 s. 820(1).

Part 10 of the Companies Act 2014 sets out the law governing the operation of examinerships in Irish companies. In the case of small companies, the Part allows for the examinership to be run under the supervision of the Circuit Court, rather than the High Court. This particular provision was made on foot of a recommendation made by the CLRG in its 2012 Report - Report on proposals to reduce the cost of rescuing viable small private companies.[33] This amendment was designed to reduce costs.

Section 520(4) provides a considerable array of protection to a company in examinership, including:

a) No proceedings/resolutions for winding up may commence/passed.

b) No receiver may be appointed to the company.

c) No legal actions can be initiated against the company without the consent of the examiner.

d) No action for recovery or goods under retention of title or hire purchase can take place

e) No action for oppression under s212 can be taken.

Under s520 the period of the examiner's appointment is for 70 days which can be extended by the court to 100 days and further in exceptional circumstances. Under the protection of the Court the company is afforded a period to continue trading. During this time the examiner will attempt to devise a scheme of arrangement that is considered to be capable of facilitating the survival of the business. This will include the formulation of proposals in relation to a range of factors such as restructuring, sale of assets, attraction of new investors and/or write down of outstanding liabilities. If the Examiner succeeds in formulating a scheme of arrangement, it is then considered by the company's creditors and if approved by them, put to the court. If the court approves the scheme, its proposals become binding.

In light of the current events the focus of the examinership legislation remains very relevant in the context of preserving businesses and jobs. Concerns have been raised with the Department that COVID-19 has substantially impacted insolvency practitioners' ability to complete the process within the timeframe available and it has been proposed that the period of protection afforded to companies during examinership should be extended.

4.9.2 Balancing of interests

The Corporate Insolvency Committee examined the proposal within the context of striking a fair balance between the sometimes, competing interests of stakeholders involved. In principle it was accepted that allowing companies some additional breathing space to restructure was warranted to take account of the particular difficulties associated with the current pandemic. However, members acknowledged the benefits of the present time limits in terms of having a process that required a resolution of the financial issues of the company. Currently, the entire process must be concluded within 100 days, extendable by the court to give its decision. The speed of these processes results in several key benefits, including lower administrative costs, limiting the effects of the associated stay on creditors and a smaller delay for investors hoping to reinvest their assets. Particular concern was raised in respect of the potential knock-on effect to other creditors which can include other companies.

Equally, insolvency practitioners highlighted the practical difficulties of convening meetings with creditors in light of the restrictions on public gatherings as well as seeking investment in circumstances where it is difficult, for example, for investors to do their due diligence in examining

[33] http://www.clrg.org/publications/clrg-report-on-proposals-to-reduce-the-cost-of-rescuing-small-private-companies-2012.pdf

premises etc. It was highlighted that practitioners at times discount using examinership for large scale restructuring as the time limits are too restrictive to complete the work required. However, this was a general point and not confined to COVID-19 and was therefore not considered any further

4.9.3 Conclusions

On balance, the Review Group considers that an additional 50 days to complete an Examinership during the current pandemic would be appropriate where the Examiner can satisfy the Court that there were exceptional circumstances arising due to the pandemic that are precluding him/her from concluding the examinership within the existing time limits. This is considered an appropriate response to protect employment and viable enterprises.

The proposal will amend section 534, providing that the Court may extend the period by not more than 50 further days in addition to the current provision in s. 534(3) allowing for a 30-day extension. This additional extension will be linked to exceptional circumstances and provided only by way of court application.

The extension is purely recommended to deal with the instant pandemic and should not be taken as an indication that a more general extension is supported by the Committee. Any general amendments to the examinership process would require significant research and must be considered more thoroughly in the context of the Preventative Restructuring Directive.[34]

4.10 Further consideration of examinership and business rescue

4.10.1 Additional measures and/or reform

In addition to this proposed amendment to the current examinership legislation, the Review Group is cognisant of two further types of submissions made to it and to the Department regarding the challenges faced by businesses and the possibilities presented by the Examinership legislation to provide a rescue framework for businesses in distress following COVID-19 shutdown. The first type of proposal included additional measures to streamline the existing legislation as it is currently used. The second type of proposal suggested an overhaul of examinership legislation to more appropriately address the needs of small and medium enterprises in this context.

4.10.2 The Preventive Restructuring Directive

In reviewing the proposals it received, the Corporate Insolvency Committee has been cognisant of the provisions contained in the EU Preventive Restructuring Directive). Irish legislation will have to address any aspects of the examinership process which do not reflect requirements in the Directive.

For example, as the Committee considered the extension of the period described in section 4.9.3 above it was aware that implementation of certain options in the Directive would allow for, though not require, a longer stay (protection from enforcement by creditors) than is currently allowed under examinership. However, under Article 6(4), the maximum period of the initial stay can be no longer than 4 months (circa 120 days). This can be extended in the circumstances set out in Article 6(7), but the total duration cannot exceed 12 months (Article 6(8). The Committee was of the opinion that any extension to the period of protection in examinership must in any event be within the timeframes outlined in the Directive.

[34] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172, 26.6.2019, p. 18–55.

Prior to the issues which have arisen in the context of COVID 19 the Committee had begun its deliberations regarding implementation of the Directive which is due to be transposed by 17 July 2021 (with the possibility of an extension of 1 year for Member States that encounter particular difficulty see Article 34-92).

In this context it must be noted that in general the Irish examinership process complies with many aspects of the Directive and is in fact a leader in this area in Europe.[35]

4.10.3 Streamlining of examinership

The Irish Society of Insolvency Practitioners made a suite of proposals outlining ways in which it felt the examinership process could be streamlined. While the Committee considered that there was merit in considering these proposals, it ultimately sought to focus itself in this Report only on measures required in the immediate term to address the most significant impacts of the crisis. These proposals will be examined as part of a second stage of work of the Committee.

4.10.4 Rescue scheme for the SME sector

The Irish SME Association made a comprehensive submission to the Department in respect of rescue for SMEs and micro-enterprises. It highlighted concerns with the cost associated with the existing examinership framework and other barriers to access to the process for smaller businesses.

The Review Group considers that there is a need to examine corporate rescue structures suitable for smaller companies and to consider the development of a simplified process for such companies. However, it has not been possible to conduct such an examination in the timeframe available for delivering this Report. The Review Group plans that this issue be examined as part of a second phase of work to deal with medium-term stabilisation measures required to aid economic recovery and that the issue be given priority status in light of the significant challenges facing the sector at this time.

4.10.5 Further consideration in relation to a rescue framework for the SME sector.

Accordingly, the Corporate Insolvency Committee will embark on devising a proposed corporate rescue structure more suitable to the SME sector than examinership. To this end it is cognisant of a number of matters described in the following section.

4.10.6 The context for a new legislative framework for SMES.

The first is that the CLRG has previously considered the suitability of Examinership to the SME sector and issued the above-mentioned report in 2012. One of the recommendations emanating from that Report was enacted in the Companies (Miscellaneous Provisions) Act 2013 which was subsequently subsumed into the Companies Act 2014. This provided that applications for examinership for small companies could be made to the Circuit Court. However, this has not led to a significant uptake in small companies availing of examinership.

The second is the relative success of the examinership process for bigger restructurings and the increasing international interest in examinerships in light of the enactment of the Preventive Restructuring Directive mentioned above. There is certainly a European interest in restructuring and there was a view that adjustment of examinership would not be appropriate in that context. There is recognition amongst practitioners that the examinership legislation is running successfully for a

[35] See generally surveys of European countries by the JCOERE research project based at University College Cork. Ireland, the Netherlands and England and Wales (prior to Brexit) are regarded as European leaders in the field of restructuring. www.ucc.ie/en/jcoere. There are presentations by Barry Cahir at INSOL Europe-Copenhagen 2019 and by Judge Michael Quinn on this and by the Chief Justice.

certain type of company and that this has withstood scrutiny internationally, which is an important consideration in the context of Brexit.

The third, is that a rescue framework more suited to the small and medium enterprise sector should be a standalone process independent from the examinership process, although perhaps mirroring some elements of the examinership legislation and the 30 years of practical experience since its first enactment in 1990. Elements of the examinership process are recognised as being central to a successful rescue framework, namely the granting of a stay or moratorium, support for negotiation with creditors and, where necessary, equity holders, through the introduction of cram down provisions which might include cross class cram down provisions, and a final approval of a restructuring agreement through an official body. These core elements are included in the EU Preventive Restructuring Directive.

The fourth is the scheme of arrangement provisions in Part 9, the equivalent of which in the UK Companies Act 2006 has led to considerable restructuring success in England and Wales.[36]

4.10.7 Conclusion

With these elements in mind, the Review Group concludes that the design of a new legislative framework suitable to the SME sector with considerable focus on reducing court engagement and costs is of utmost importance.

The Corporate Insolvency Committee will initiate this process in the short term bearing in mind the CLRG report of 2012.

4.11 Previous recommendations of the CLRG

The Review Group affirms the recommendations made in two of its previous reports:

- the 2017 Report on the Protection of Employees and Unsecured Creditors[37]; and
- the 2018 Report on the UNCITRAL Model Law on Cross-border Insolvency[38].

In the case of the former, the CLRG made several recommendations designed to further enhance the protections afforded to employees and unsecured creditors in the Companies Act and recommends that consideration be given to implementing their outstanding recommendations in the context of further insolvency law changes in the short term. The Review Group also notes that the recommendations of the Duffy Cahill Report[39] which concern the protection of creditors in the context of insolvency, while not a report of the CLRG, will be of relevance to any revision of the law.

[36] See further Courtney (Eds) Bloomsbury's Professional Guide to the Companies Act 2014 Chapters 7 and 8. See also Payne J: Schemes of Arrangement: Theory, Structure and Operation (CUP, 2014) for a treatment of the English legislation and its success in recent years.

[37] https://dbei.gov.ie/en/Publications/Publication-files/CLRG-Report-on-the-Protection-of-Employees-and-Unsecured-Creditors.pdf

[38] http://www.clrg.org/publications/clrg-uncitral-model-law-on-cross-border-insolvency-recommendations.pdf

[39] "Expert examination and review of laws on the protection of employee interests when assets are separated from the operating entity" presented by Nessa Cahill B.L. and Kevin Duffy, Chairman of the Labour Court, 11th March 2016. https://dbei.gov.ie/en/Publications/Publication-files/Duffy-Cahill-Report.pdf.

Appendix 1 – Committees of the Review Group

Corporate Insolvency Committee June 2020

Irene Lynch Fannon	Chairperson, Ministerial Nominee (University College Cork)
Bernice Evoy	Banking Payments Federation Ireland
Conor O'Mahony	The Office of the Director of Corporate Enforcement
David Hegarty	The Office of the Director of Corporate Enforcement
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eamonn Richardson	KPMG
Emma Roche-Cagney	Office of the Attorney General
James Finn	The Courts Service
Jane Dollard	Department of Business Enterprise and Innovation
Jill Callanan	LK Shields
Jim Luby	CCAB-I
Kieran Wallace	KPMG
Marie Daly	IBEC
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	ISME
Paddy Purtill	Revenue Commissioners
Paul McHenry	CRO
Ralph MacDarby	Institute of Directors Ireland
Rosemary Hickey	Office of the Attorney General
Ruairi Rynn	William Fry
Tanya Holly	Department of Business Enterprise and Innovation
Tony O'Grady	Matheson
Vincent Madigan	Ministerial Nominee

Appendix 1 – Membership of the Corporate Insolvency and Corporate Governance Committees of the Company Law Review Group

Corporate Governance Committee June 2020

Salvador Nash	Chairperson, The Chartered Governance Institute (KPMG)
Barry Conway	Ministerial Nominee (William Fry)
Teodora Corcoran	The Department of Business, Enterprise and Innovation
Richard Curran	Ministerial Nominee (LK Shields)
Máire Cunningham	Ministerial Nominee (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
David McFadden	Ministerial Nominee (Companies Registration Office)
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Small Firms Association (KomSec)
Ralph MacDarby	Institute of Directors Ireland
Jacqueline O'Callaghan	The Revenue Commissioners
Conor O'Mahony	The Office of the Director of Corporate Enforcement
Gillian O'Shaughnessy	Ministerial Nominee (Byrne Wallace)

Appendix 2: Draft Heads of

The Companies (Covid-19) (Amendment) Bill 2020

Proposed amendments to the Companies Act 2014
to address difficulties during the Covid-19 outbreak

	Inserts in Act	**Subject matter**	**Key objective**
1.		Citation and commencement	-
2.	2A	Interim period	Act to operate until 31 December 2020; Minister may extend up to 30 June 2021.
3.	43A.	Sealing by companies during the interim period	Document can have a company's seal and signatures on separate sheets
4.	175A.	General meetings during the interim period	Extends the time for the 2020 AGM, permits virtual meetings, rescheduling of meetings and variation or withdrawal of dividend resolutions
5	1103(a)	PLC general meetings during the interim period	Amends the notice provisions for virtual general meetings for PLCs
6	587A	Financial threshold for initiating a winding up	Increase the amount at which a creditor can issue a statutory demand.
7	688A	Convening of creditors' meetings during the interim period.	Provides for creditors' meetings by technological means
8	610A	Continuing to trade during the Covid-19 outbreak	Provides that a director will not be considered to have traded recklessly by reason only of trading during the COVID-19 outbreak, provided they have otherwise acted honestly and responsibly
9	534A	Power of the Court to extend the period within which an examiner must present his/her report to the Court.	in exceptional circumstances, to enable a Court to give an examiner with additional time within which to formulate a rescue plan, bringing the total process from 100 to 150 days

HEAD 1 - Citation and commencement

Provide that:

(1) This Act may be cited as the Companies (Covid-19 Amendment) Act 2020.

(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision or with respect to any particular type of company and different days may be so appointed for different purposes or different provisions.

Explanatory note:

This Head is a standard provision.

Since the enactment of the Companies Act 2014, the policy has been to maintain that simple citation rather than to create a new family of Companies Acts. Therefore, this General Scheme is prepared with the intention that the final Act will be integrated into the Companies Act 2014, without the need to change that citation.

HEAD 2

Provide for the insertion of the following new section 2A into the Companies Act 2014:

2A. Interim period

(1) *Defined expressions*

In this Act –

"**Covid-19**" has the meaning ascribed to it by the Emergency Measures in the Public Interest (Covid-19) Act 2020;

"**interim period**" means the period commencing on the date of commencement of this section and expiring on 31 December 2020, as may be extended under subsection (2);

"**interim provision**" means any provision of this Act expressed:

(i) to be operative during the interim period; or

(ii) to relate to things done or omitted to be done during the interim period;

"**interim regulation**" means any regulation made under an interim provision.

(2) *Potential extension of interim period*

(a) The Minister may from time to time, after consulting with the Minister for Health and taking into account any legal or practical restrictions in the State on travel or meetings arising from the prevalence or threat of Covid-19, by regulations, for the purposes of one or more interim provisions, extend the interim period to expire on any date or dates no later than 30 June 2021.

(b) Such regulations may provide for different interim periods for different interim provisions.

(3) *Ministerial Regulations effective when signed by Minister*

Every interim regulation shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the interim regulation is passed by either House within the next 21 days on which that House has sat after the interim regulation is laid before it, the interim regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Explanatory Note:

This section defines the period during which the amending provisions are to apply as "the interim period" with consequent definitions of "interim provision" and "interim regulation" being measures and regulations that apply during that period.

HEAD 3

Provide for the insertion of the following new subsection 43A into the Companies Act 2014

43A. Sealing by companies during the interim period

(1) This section shall remain in operation during the interim period.

(2) Notwithstanding any provision in a company's constitution, any instrument to which its common seal (as provided by section 43) or official seal (as provided by section 44) is to be affixed may consist of any number of counterparts with each of the common seal or official seal, as the case may be, and one or more of the signatures of the different signatories on separate counterparts, each of which when executed and delivered shall constitute an original, all such counterparts together constituting one and the same instrument.

Explanatory note:

With the dislocation of the management of companies, e.g. with the company seal in one location and the directors, secretary and registered persons in other locations, this head is aimed at enabling documents under seal to be executed in different counterparts, with the aggregate of the documents to be considered to be the one instrument.

HEAD 4

Provide for the insertion of the following new section 175A into the Companies Act 2014

175A. General meetings convened and held during the interim period

(1) *Section to apply only until end of interim period*

This section shall remain in operation during the interim period.

(2) *Extension of time for AGM to the end of 2020*

Notwithstanding subsections (1) and (2) of section 175 and subsection (2) of section 341 or any provision of its constitution, a company need not hold an annual general meeting within the period required under this Act or the company's constitution, provided that the meeting is held by 31 December 2020 at the latest.

(3) *General meetings may be conducted by electronic means*

(a) In this subsection, "general meeting" shall mean any of the following:

(i) an annual or extraordinary general meeting of a company;

(ii) a general meeting of holders of shares in a company of a particular class;

(iii) a scheme meeting, as defined by section 449.

(b) A general meeting, during the interim period, whether or not authorised by its constitution and notwithstanding any provision in its constitution to the contrary, shall not be required to be held at a physical venue or venues but may be fully conducted by electronic means provided all those entitled to attend have a reasonable opportunity to participate.

(c) Subsection (5) of section 181 shall apply to general meetings to be held by electronic means, with the substitution in paragraph (a) of that subsection of "the methodology of participation" for "the place".

(d) A general meeting held by electronic means, other than a meeting convened by a member or members under subsections (2) or (5) of section 178, shall be deemed, for the purpose of this Act only, to take place in the place that the directors decide.

(e) The Minister may by regulations make further provision for the convening and conduct of, quorum at, access to and participation in general meetings to be held by electronic means.

(4) *Change of location and date of general meetings*

(a) Notwithstanding any provision to the contrary in a company's constitution:

(i) a general meeting (to include any rescheduled meeting) may be cancelled;

(ii) the venue or venues of a general meeting (to include any rescheduled meeting) or the means of holding and participating in such general meeting by electronic means may be changed;

(iii) a general meeting (to include any rescheduled meeting) may be changed from a physical meeting to a meeting held by electronic means and vice versa;

in each case by or under the authority of the directors of the company at any time up to 3 business days prior to the time scheduled for commencement of the meeting, if considered necessary by the directors for public health reasons arising from Covid-19.

(b) Save where all the members of a company agree in writing, notice of the matter referred to in paragraph (a) shall be given in the same way as the meeting was first notified to members provided that where that is not possible or practicable, notice shall be given:

(i) where the company has a website, by notice on that website;

(ii) by email to all members for whom the company has email addresses; and

(ii) by notice in a national newspaper.

(c) Where any notice of a matter referred to in paragraph (a) specifies:

(i) a rescheduled date, time and place for the meeting;

(ii) electronic means or changed electronic means for participation in the meeting; or

(iii) record date (within the meaning of paragraph (d)) being the time and date for determining a member's eligibility to participate in the meeting;

section 181 is disapplied to the extent necessary to give effect to this subsection.

(d) In paragraph (d) the "record date" shall be:

(i) save where subparagraph (ii) applies, the commencement of the meeting;

(ii) the time specified by the company in accordance with regulation 14 of the Companies Act, 1990 (Uncertificated Securities) Regulations 1996 (SI 68 of 1996).

(5) *Withdrawal or amendment of dividend resolutions*

Where:

(a) the directors of a company have recommended the declaration of a dividend at a general meeting of the company; and

(b) subsequent to convening the general meeting the directors form the opinion, due to the actual or perceived consequences of Covid-19 on the affairs of the company, that the dividend ought to be cancelled or reduced to a particular amount; and

(c) save where all the members of a company agree in writing, notice of the formation of that opinion and consequent proposed cancellation or reduction is given no later than 3 business days before the general meeting in the manner provided in paragraph (c) of subsection (4);

notwithstanding any provision to the contrary in the constitution of the company, the directors may withdraw the resolution to approve a dividend or as the case may be, put an amended resolution to the meeting to approve a dividend less than that originally proposed, in which event a voting instruction to approve the originally proposed dividend shall be exercised in favour of the amended resolution.

Explanatory note:

Subsection (1) states that this is to apply during the interim period only.

Subsection (2) disapplies the requirement for the first AGM to take place within 18 months and for no more than 15 months must elapse between AGMs and provides that the 2020 AGM can be held up to the end of 2020. It also disapplies the requirement that the financial statements to be laid before the meeting are made up to a date no earlier than 9 months before the date of the AGM.

This is aligned with Article 1 of the Council Regulation 2020/699 on temporary measures concerning the general meetings of European companies (SE) and of European Cooperative Societies (SCE) adopted on 25 May 2020: "Where, in accordance with Article 54(1) of Regulation (EC) No 2157/2001, a general meeting of an SE is to be held in 2020, the SE may, by way of derogation from that provision, hold the meeting within 12 months of the end of the financial year, provided that the meeting is held by 31 December 2020." (OJ 27.05.2020 L165 p 25).

Subsection (3) explicitly enables companies to hold general meetings by electronic means and empowers the Minister to make regulations to give further effect to this provision.

Subsection (4) permits the cancellation, rescheduling and relocation of general meetings. In light of the closing down of venues and the uncertainty surrounding venues, it enables companies to cancel and reschedule meeting without the need to have a formal technical meeting to adjourn to another date.

Subsection (5) permits a company's directors to withdraw a dividend resolution or to reduce the dividend proposed to be declared by resolution at a general meeting, due to a change of opinion on their part following the issue of the notice of general meeting.

Note regarding entities authorised and /or regulated by the Central Bank of Ireland:

The Central Bank of Ireland has requested that the implementation of this provision is effected in such a way as does not relieve entities authorised and/or regulated by it from their obligations that they may have under the laws for which it is competent authority, such as obligations which require timely reporting of information laid before AGMs.

Regulation 58(1) of the European Union (Insurance and Reinsurance) Regulations 2015 (SI 485/2015) (Solvency II Regulations) requires an insurance undertaking or reinsurance undertaking to forward to the Bank "each year" 2 copies of the financial statements and reports "laid before its annual general meeting". Thus an extension of time for AGMs without adjusting for this requirement may create a risk that such an undertaking would fail to provide this information to the Central Bank if for whatever reason an AGM were not held within the year. See also European Communities (Life Assurance) Framework Regulations, 1994 (SI 360/1994), Regulation 17; European Communities (Non-Life Insurance Accounts) Regulations, 1995 (SI 202/1995), Regulation 7.

In addition, there are a number of requirements of financial services law which require the preparation of annual audited financial reports and their delivery to the Central Bank without reference to the annual general meeting. For example, under Regulation 4 of the Transparency (Directive 2004/109/EC) Regulations 2007, an issuer whose securities are admitted to a regulated market must make public its annual audited financial report at the latest 4 months after the end of each financial year and ensure that it remains publicly available for at least 10 years. Although this proposal is not intended to impact upon these requirements, it is highlighted for the benefit of Parliamentary Counsel when drafting the legislation.

HEAD 5

Provide for modified provisions for public limited companies

Section 1103 of the Companies Act 2014 is amended as follows:

(2) Notice of a general meeting shall set out—

(a) when and where the meeting is to take place and the proposed agenda for the meeting, and if fully conducted by electronic means, the means of holding and participating in the meeting;

Explanatory note:

This head is intended to modify section 1103 of the Companies Act to provide that a notice for a general meeting being conducted by fully electronic means must outline how the meeting shall be held and how members can participate.

Head 6

Provide for the insertion of the following new section 570A into the Companies Act 2014

570A. Circumstances in which company deemed to be unable to pay its debts during the interim period and consequential matters

(1) *Section to apply only until end of interim period*

This section shall be operative during the interim period.

(2) *Disapplication of €10,000 and €20,000 thresholds*

For the purposes of section 569(1)(d) paragraphs (a) and (b) of section 570 shall not apply during the interim period and will be substituted by the following section 570A(3). Paragraphs (c) and (d) of section 570 shall continue to apply.

(3) *€50,000 threshold*

For the purposes of this Act, a company shall be deemed to be unable to pay its debt if:

(a) one or more creditors, by assignment or otherwise, to whom, in aggregate, the company is indebted in a sum exceeding €50,000 then due, have served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and

(b) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of each of the creditors.

Explanatory Note:

This increases the debt threshold for the commencement of a winding up by the Court under section 569(1)(d) from an individual debt of €10,000 or aggregate debts of €20,000 to €50,000.

In general section 570 defines a range of circumstances where a company is deemed to be unable to pay its debts. This definition is cross referenced in other sections of the Companies Act 2014, for example section 509(3)(c) – power of court to appoint an examiner; 610(4)(a) – liability for fraudulent and reckless trading; and section 818(2)(a) and (b) – definition of insolvency relating to restriction of directors of insolvent companies.

The changes proposed by section 570A relate only to the threshold amounts in at which a creditor(s) can make demands for the purposes of section 569(1)(d) – where a company can be wound up by the court.

Head 7

Provide for the insertion of the following new section 688A into Chapter 13 of Part 11 of the Companies Act 2014

688A. Convening of creditors' meetings virtually and by electronic means during the interim period.

(1) *Section to apply only until end of interim period*

This section shall be operative during the interim period.

(2) *Creditors' meetings may be conducted by electronic means*

(a) In this subsection, "creditors' meeting" shall mean any meeting of creditors convened under any provision of Parts 9, 10 or 11 that is held during the interim period.

(b) A creditors' meeting, notwithstanding any provision to the contrary in this or other enactment, shall not be required to be held at a physical venue or venues but may be fully conducted by electronic means provided all those entitled to attend have a reasonable opportunity to participate.

(c) Where a physical meeting is held, members must be afforded the opportunity to participate by electronic means.

(d) Without prejudice to the terms of this provision, creditors' meetings shall in all other respects be conducted in accordance with the provisions of this Act, with due regard to the requirements therein being practicably adjusted to the holding and conduct of meetings by electronic means.

(e) The Minister may by regulations make further provision for the convening and conduct of, quorum at, access to and participation in creditors' meetings to be held by electronic means.

Explanatory Note:

This head is intended to facilitate the virtual holding of creditors' meetings in voluntary and other liquidations, examinerships, statutory schemes of arrangement under Part 9 of the Act and other insolvency processes. The different types of meetings were too numerous to mention specifically, hence the reference to meetings in Parts 9, 10 and 11.

The structure of the Companies Act 2014 is such that in each Chapter of a Part of the Act referring to a particular insolvency process, for example Chapter 4 of Part 11 on creditors' voluntary winding up, the provisions are stated to apply to the particular process 'save to the extent that the provision expressly provides otherwise'. Thus, for example in Chapter 4 of Part 11 s. 585 makes this statement regarding the following provisions which includes s. 587 which therefore applies to creditors' meetings in a creditors' voluntary winding up only.

It was decided to move this provision to *before* s. 689 in Chapter 13 of Part 11 of the Companies Act 2014 on the grounds that this would be the most appropriate home for the section. However, as this Chapter refers exclusively to *General rules as to meetings of members, contributories and creditors*

of company in liquidation. It does not refer to examinerships under Part 10 or Schemes under Part 9 and therefore, the statement in s. 688A(2)(a) (i) is still necessary.

The provisions as to the conduct of meetings mirror those proposed for general meetings during the interim period. However, some differences are necessary, for example publication on the company's website of information was not deemed appropriate and issued as to change of venue and dividends also were not relevant. Some specific principles needed to be addressed differently regarding documentation and identification of creditors. Because the notice of creditors' meetings must also be advertised in newspapers (see for example s. 587(6), the issue of providing access details is to be addressed in the regulations.

A second principle is that the provision should not be mandatory but permissive with due regard for facilitation of creditors who wish to participate virtually at a meeting which was being held physically, hence section 688A(2)(c).

A third principle is to reiterate that all of the relevant provisions of the Companies Act 2014 as applicable to the holding of creditors' meetings generally continue to apply, hence section 688A(d).

Head 8

Provide for the insertion of the following new section 610A into the Companies Act 2014

610A. Continuing to trade during the Covid-19 outbreak

Where:

(a) a director or officer of a company is party to a decision of a company:

(i) to continue to trade for any time during the interim period in honest and reasonable anticipation of the termination or abatement of the adverse effects of the Covid-19 outbreak and the related restrictions on travel and meetings; or

(ii) to apply for support under Part 7 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 or other government support; and

(b) it is appears to the Court that:

(i) the director or officer has otherwise behaved in an honest and responsible manner; and that

(ii) the company was not, as at 1 March 2020, unable to pay its debts as they fell due;

neither such continuance nor such application shall of itself support any allegation or be construed such that the director has been knowingly a party to the carrying on of any business of the company in a reckless manner.

Explanatory note:

The intention of this head is to provide relief to directors whose companies trade on during the Covid-19 outbreak, subject to the director otherwise acting honestly and responsibly and the company being solvent on 1 March 2020

Head 9

Provide for the insertion of the following new section 534A into the Companies Act 2014

534A Power of the Court to extend the period in which the examiner can present a report to the Court

(1) This section shall be operative during the interim period.

(2) This section shall apply to companies under the protection of the Court under Part 10 following the commencement of this section.

(3) Where, on the application of the examiner, the court is satisfied that the examiner would be unable to report in accordance with the provisions of section 534 and within the period described under subsections (2) and (3) of section 520 or within the extended period provided for in section 534(3), the court may, in exceptional circumstances, allow for an extension of the period in which an examiner may submit his or her report by an additional 50 days, with the consequent extension of the periods provided in subsections (2) and (3) of section 520.

(4) The exceptional circumstances referred to in subsection (3) may concern, but shall not be limited to, procedures to implement the provision of new finance to the company.

Explanatory note:

Under s. 520(2) the period of protection by the court runs to 70 days.

Under s. 534(2)(b) it is envisaged that the examiner would report to the court in 35 days after his or her appointment. However, s. 534(3) acknowledges that a longer period can be given by the court which mirrors the 70 day protection period and goes on to allow for the 70 day period to be extended by an additional 30 days where the court is satisfied that the examiner would be unable to report within the 70 day period mentioned in s. 520(2) but that he or she could report if the period was extended by 'not more than 30 days'.

This head is designed to enable the examiner of companies that go into examinership during the interim period to have a longer period in which to make a report to the court under s. 534 in exceptional circumstances. Currently the examiner has up to 70 days to present a report to the court under the operation of s. 520(2) but 534(3) allows for an extension of that period by 30 days on application to the court. It is proposed to provide for the possibility of an additional extension of 50 days (i.e. 80 days in total) to be granted by the court in exceptional circumstances. Accordingly the maximum period of examinership may, in exceptional circumstances, extend from 100 days (70 plus 30) to 150 days (70 plus 30 plus 50).

Appendix 3: Draft Heads of

Companies Act 2014 (General Meetings) Regulations 2020

I, [Minister], Minister for Business, Enterprise and Innovation, in exercise of the powers conferred on me by section 2A and 175A(3) of the Companies Act 2014 (No. 38 of 2014) hereby make the following regulations:

1. *Title and commencement*

(1) These Regulations may be cited as the Companies Act 2014 (General Meetings) Regulations 2020.

(2) These Regulations shall come into operation on [--] June 2020.

2. *Interpretation*

In these Regulations—

"**the Act of 2014**" means the Companies Act 2014;

"**attendee**" means, in relation to a company, a person entitled to attend a general meeting who is a member, a proxy appointed by a member, an authorised person appointed as provided by section 185 of the Act by a member of the company that is a body corporate, the auditor of the company and any other person entitled to attend a general meeting of the company;

"**company**" means the company convening the general meeting;

"**general meeting**" means a meeting convened by electronic means as provided by section 175A(3) of the Act of 2014.

3. *Notice of general meeting*

The notice of a general meeting shall include:

(a) details of the electronic platform to be used to hold the meeting;

(b) details of any relevant website, access software and access telephone details;

(c) if access to the meeting is to be restricted to those attendees entitled to attend who communicate their prior intention to attend, that fact, and the time by and manner in which such intention must be received by the company;

(d) any requirements or restrictions which a company puts in place in order to identify those who plan to attend;

(e) the procedure for attendees to communicate questions and comments during the meeting; and

(f) the procedure to be adopted for voting on resolutions proposed to be passed at the meeting.

4. *Electronic platform for general meeting*

(1) A general meeting shall be held by common access to an electronic platform which:

(a) enables real time transmission of the meeting; and

(b) provides attendees the opportunity to participate by audio and audio-visual means or any other electronic technology that provides attendees as a whole with a reasonable opportunity to participate in the meeting.

(2) A company shall ensure that such technology enables attendees participating in the meeting:

(a) to hear what is said by the chairperson of the meeting and by any person introduced by the chairperson;

(b) to the extent entitled under the constitution of the company, during the meeting to speak and to submit questions and comments orally to the chairperson;

(c) a mechanism for casting votes, whether before, or during, the meeting;

provided that where, by reason of the large number of attendees proposing to attend the meeting the electronic platform will not enable those in attendance to submit questions orally, provision shall be made to enable questions to be submitted by audience response software, text messaging or similar messaging applications.

(3) A company shall ensure, as far as practicable, that such participation by attendees at a meeting:

(a) guarantees the security of any electronic communication by the attendee;

(b) minimises the risk of data corruption and unauthorised access;

(c) provides certainty as to the source of the electronic communication;

and, in the case of any failure or disruption of such means, that failure or disruption is remedied as soon as practicable,

provided that the company shall not be responsible for any technological failure or disruption relating to the equipment used by an attendee that prevents or interferes with the attendee's participation at the meeting.

(4) Any temporary disruption to the meeting caused by any technical failure shall not invalidate the meeting or the proceedings held thereat.

5. *Attendance at the general meeting*

(1) Each member and proxy appointed by a member shall be counted in the quorum where they participate in a general meeting.

(2) A company may restrict access to the meeting to those attendees who communicate their intention to attend the meeting no later than the time stated in section 183(6) of the Act of 2014.

(3) The holding of a general meeting may be made subject only to such requirements as are necessary to ensure the identification of those taking part in the meeting, to the extent that such requirements are proportionate to the achievement of those objectives.

(4) Attendees shall not permit a person not entitled to attend to participate, listen or view the proceedings of a meeting unless authorised by the Chairperson.

6. *Voting on resolutions proposed*

(1) Where a company has included notice of intention to require voting on a poll on all resolutions in the notice of the meeting:

(a) all resolutions at the general meeting shall be conducted by a poll;

(b) subsections (1), (2), (3) and (7) of section 189 shall not apply.

(2) Where a general meeting is conducted by audio visual means, a vote on a resolution by a show of hands may be conducted by the Chairperson, where he or she is satisfied that the Chairperson can identify and see all persons entitled to vote and can correctly discern their votes for or against the resolution.

(3) Where an attendee is participating in a meeting by audio or by text-based audience participation software, that attendee may communicate his or her vote on a resolution being taken on a show of hands by that audio or software, provided the Chairperson is satisfied as to the identity of the attendee and their entitlement to vote.

GIVEN under my Official Seal,

[--] June 2020

[Minister],

Minister for Business, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to make further provision for the convening and conduct of, access to and participation in general meetings to be held by electronic means by reason of the Covid-19 outbreak.

Appendix 4: Draft Heads of

Companies Act 2014 (Creditors Meetings) Regulations 2020

I, [Minister], Minister for Business, Enterprise and Innovation, in exercise of the powers conferred on me by section 2A and 688A(2)(e) of the Companies Act 2014 (No. 38 of 2014) hereby make the following regulations:

1. *Title and commencement*

(1) These Regulations may be cited as the Companies Act 2014 (Creditors' Meetings) Regulations 2020.

(2) These Regulations shall come into operation on [--] June 2020.

2. *Interpretation*

In these Regulations—

"**the Act of 2014**" means the Companies Act 2014;

"**attendee**" means, in relation to a company, a person entitled to attend a creditors meeting;

"**company**" means the company convening the creditors' meeting;

"**creditors meeting**" means a meeting convened by electronic means as provided by section 688A(2)(a) of the Act of 2014.

3. *Notice of creditors' meeting*

(1) Notice of the creditors' meeting and other documents normally distributed at the creditors' meeting shall be given:

(a) by post; and

(b) by electronic mail to all creditors for whom the company has email addresses,

and shall state clearly that the meeting is being convened under the terms of this provision.

(2) The notice of a creditors meeting shall include:

(a) details of the electronic platform to be used to hold the meeting;

(b) details of any relevant website, access software and access telephone details;

(c) if access to the meeting is to be restricted to those attendees entitled to attend who communicate their prior intention to attend, that fact, and the time by and manner in which such intention must be received by the company;

(d) any requirements or restrictions which a company puts in place in order to identify those who plan to attend;

(e) the procedure for attendees to communicate questions and comments during the meeting; and

(f) the procedure to be adopted for voting on resolutions proposed to be passed at the meeting.

(3) Information referred to in (2) shall not be included in any advertisement of any notice of a meeting in daily newspapers, where this required under the provisions of this Act.

4. *Electronic platform for creditors' meeting*

(1) A creditors' meeting shall be held by common access to an electronic platform which:

(a) enables real time transmission of the meeting; and

(b) provides attendees the opportunity to participate by audio and audio-visual means or any other electronic technology that provides attendees as a whole with a reasonable opportunity to participate in the meeting.

(2) A company shall ensure that such technology enables attendees participating in the meeting:

(a) to hear what is said by the chairperson of the meeting and by any person introduced by the chairperson;

(b) to the extent entitled under the constitution of the company, during the meeting to speak and to submit questions and comments orally to the chairperson;

(c) a mechanism for casting votes, whether before, or during, the meeting;

provided that where, by reason of the large number of attendees proposing to attend the meeting the electronic platform will not enable those in attendance to submit questions orally, provision shall be made to enable questions to be submitted by audience response software, text messaging or similar messaging applications.

(3) A company shall ensure, as far as practicable, that such participation by attendees at a meeting:

(a) guarantees the security of any electronic communication by the attendee;

(b) minimises the risk of data corruption and unauthorised access;

(c) provides certainty as to the source of the electronic communication;

and, in the case of any failure or disruption of such means, that failure or disruption is remedied as soon as practicable,

provided that the company shall not be responsible for any technological failure or disruption relating to the equipment used by an attendee that prevents or interferes with the attendee's participation at the meeting.

(4) Any temporary disruption to the meeting caused by any technical failure shall not invalidate the meeting or the proceedings held thereat.

5. *Attendance at the creditors' meeting*

(1) Each creditor and proxy appointed by a creditor shall be counted in the quorum where they participate in a creditors' meeting.

(2) A company may restrict access to the meeting to those attendees who communicate their intention to attend the meeting no later than the time stated in section 183(6) of the Act of 2014.

(3) The holding of a creditors' meeting may be made subject only to such requirements as are necessary to ensure the identification of those taking part in the meeting, to the extent that such requirements are proportionate to the achievement of those objectives.

(4) Attendees shall not permit a person not entitled to attend to participate, listen or view the proceedings of a meeting unless authorised by the Chairperson.

6. *Voting on resolutions proposed*

(1) Where a creditors' meeting is conducted by audio visual means, a vote on a resolution by a show of hands may be conducted by the Chairperson, where he or she is satisfied that the Chairperson can identify and see all persons entitled to vote and can correctly discern their votes for or against the resolution.

(2) Where an attendee is participating in a meeting by audio or by text-based audience participation software, that attendee may communicate his or her vote on a resolution being taken on a show of hands by that audio or software, provided the Chairperson is satisfied as to the identity of the attendee and their entitlement to vote.

GIVEN under my Official Seal,

[--] June 2020

[Minister],

Minister for Business, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to make further provision for the convening and conduct of, access to and participation in creditors' meetings to be held by electronic means by reason of the Covid-19 outbreak.

Appendix 5:

Draft Provision amending Restriction of Directors Procedure

819 A Restriction orders on insolvency arising from COVID 19.-

(1) No order shall be made under section 819 by reason only of the director (including a de facto director or shadow director) being party to a decision of a company:

(a) to continue to trade for any time during the interim period where this decision is made honestly and responsibly in anticipation of the termination or abatement of the adverse effects of the Covid-19 outbreak and the related social and economic restrictions; or

(b) to apply for support under Part 7 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, or any other similar government measure and

where the Court is satisfied that:

(i) the director has otherwise acted honestly and responsibly in relation to the conduct of the affairs of the company; and

(ii) that the company was as at 1 March 2020, able to pay its debts as they fell due;

(2) Subsection (1) will apply to the operation of the restriction undertaking provisions as outlined in section 852 and to the deliberations of the Director under subsections (2) and (3) of section 850.

Explanatory note:

This draft provision is not the subject of a recommendation of the Review Group. It is provided as pro forma text of a provision that might be considered in the event that the issue discussed at section 4.8 of this Report were reopened.

The intention of the provision would be to provide reliefs and assurances in relation to restriction of directors where their companies trade on during the Covid-19 outbreak.