

**86th Plenary Meeting of the Company Law Review Group**

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| **Date:**  | 7th October 2019 |
| **Time:**  | 10:00am – 12:00pm |
| **Venue:**  | Buswells Hotel, Kildare Street, Dublin 2. |

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| **Present:****In attendance:** | Paul Egan (Chairperson) Michael Buckley (on behalf of Eadaoin Rock), Barry Cahir, Barry Conway, Máire Cunningham, Helen Curley, Richard Curran, Marie Daly, Jeanette Doonan, Ian Drennan, Bernice Evoy, Rosemary Hickey, Gillian Leeson, John Loughlin, Irene Lynch-Fannon, Ralph MacDarby, Neil McDonnell, David McFadden, Salvador Nash, Gillian O’Shaughnessy, Maureen O’Sullivan, Breda Power, Kevin Prendergast.Tara Keane (Secretariat), Emma Geraghty (DBEI) and Sarah Flood (DBEI). |
| **Apologies:** | Emma Doherty, Michael Halpenny, Tanya Holly, Shelley Horan, Vincent Madigan, Kathryn Maybury, Eadaoin Rock. |

**Agenda**

1. **Minutes & Matters arising**

**Minutes:**

The minutes of the 85th plenary meeting of 13th May 2019 were adopted.

**Matters arising:**

There were no matters arising from the minutes.

1. **Corporate Governance Committee update**

**Overview of the Report on the Summary Approval Procedure:**

The Chairperson of the Corporate Governance Committee, Mr. Ralph MacDarby provided the following overview:

The Summary Approval Procedure (SAP) was a new and significant feature of the *Companies Act 2014*. The SAP (found in Part 4 of the Act) implemented the recommendations contained in the [*First Report of the Company Law Review Group*](http://www.clrg.org/Publications/) that a streamlined validation procedure, for the carrying out of certain transactions, be introduced, with minor variations depending on the transactions. It replaced the procedures contained in sections 60(2) to 60(11) and section 256 of the *Companies Act 1963* and section 34 of the *Companies Act 1990.*

Given that the SAP has now been in operation for a number of years, the Minister included its review as part of our work programme to ensure that it is operating as intended.

The Committee generally reported that the SAP was functioning well, however, there were a small number of technical and important issues which required our consideration;

1. The registration of a transfer of property effected by merger via the SAP;
2. Inspection of documents in domestic mergers effected by SAP;
3. The timing of domestic mergers; and
4. The transfer of charges in mergers done via the SAP.

While the Committee have come up with what I believe are practical solutions to most of the issues I have mentioned, you will note that we did reach out to the wider Review Group in relation to the transfer of charges in mergers done by way of SAP as we felt more specialist expertise was required.

The Report was put to the floor and adopted pending a minor amendment.

**Update on upcoming work programme:**

The Committee Chairperson also gave an update on an additional item of work referred to the Committee by the Review Group’s Chairperson. The Committee will examine a number of miscellaneous issues arising under the Act and make a submission to the Minister with recommendations for legislative change as appropriate.

**Committee Chairperson:**

Mr. Ralph MacDarby informed the Review Group that he would be stepping down from his role as Chairperson. The Review Group thanked him for his commitment and dedication to the role. A new chairperson will be elected at the next meeting of the Corporate Governance Committee and members were reminded to send their expressions of interest to the Secretariat.

1. **EU Measures and European Commission Proposals with relevance to company law**

Ms. Helen Curley provided the following overview of EU Measures and European Commission Proposals with relevance to company law-

**Directive (EU) 2019/1023 on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt**

The Directive was adopted on 20th June 2019 and must be transposed, in the main, by 17 July 2021, although there is provision for an extension of one year for Member States encountering particular difficulties in implementation.

The Directive seeks to harmonise aspects of national insolvency laws – both for companies and for individuals. It is focused on specific areas of insolvency law – ‘early restructuring’ opportunities (for businesses in financial difficulties) and ensuring a ‘second chance’ for ‘honest entrepreneurs’ who become insolvent without any fraud or malpractice.

 Many Member States maintain a very restrictive approach to distressed businesses – making no provision for early restructuring to avoid company insolvency or refusing discharge to an insolvent individual until most or all of the debt was repaid, even for honest business failures and irrespective of capacity to pay. The Directive provides new legal tools to rescue viable businesses and entrepreneurs and to enhance the rescue culture in the EU based on the principle of second chance.

Ireland already has a preventive restructuring framework in its examinership law. The Department is currently is currently mapping the adopted Directive against the Companies Act 2014 and is considering hat amendments might be necessary. It is intended to launch a consultation on transposition before the end of the year.

**Directive (EU) 2019/1151 as regards the use of digital tools and processes in company law**

The proposal for a directive on digital tools was adopted on the 20 June 2019. The objective of the proposal is to propose new company law rules to provide a wider range of digital solutions to companies within the Single Market.

**Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement**

The deadline for transposition of Directive (EU) 2017/828 (Shareholders’ Rights’ Directive) was 10 June 2019.

The Department continues to engage closely with the Office of Parliamentary Counsel to finalise the transposition and it is hoped that matters can be concluded speedily.

Any questions or queries in relation to proposed legislation or European proposals can be emailed to clrg@dbei.gov.ie.

1. **Pending Bills**

Ms. Helen Curley gave the following overview of pending bills-

**Companies (Corporate Enforcement Authority) Bill**

The General Scheme of this Bill was approved by Government and published on 4th December 2018. The main features of the Bill were agreed as part of the Government’s decision to adopt its package of ‘Measures to Enhance Ireland’s Corporate, Economic and Regulatory Framework’ (subtitled ‘Ireland combating “white collar crime”) (published November 2017).

The General Scheme provides for the establishment of The Corporate Enforcement Authority with all the same functions and powers that the Director of Corporate Enforcement has with some modifications to reflect a new commission structure. Head 9 (Membership of the Authority) provides for up to 3 full time Commissioners and is designed to give the Authority the flexibility to structure itself to meet the differing demands of its remit, which includes investigation, prosecution, supervision, and advocacy, and along clear lines of responsibility. Head 11 (Staff of the Authority) gives the Authority the ability to appoint its own staff. The General Scheme also provides for new investigative tools, notably new search and entry powers to enhance the Authority’s ability to gather evidence that is help electronically.  Parts 3, 4 and 5 make amendments to the Companies Act 2014 to give effect to certain recommendations of the CLRG in relation to share capital, corporate governance and unsecured creditors.

The Joint Oireachtas Committee on Business, Enterprise and Innovation is currently undertaking Pre-Legislative Scrutiny on the Bill and officials from the Department briefed the Committee on the 5th February 2019. The Director of Corporate Enforcement appeared before the Committee on the 19th February 2019. The Chair of the CLRG and Vincent Madigan appeared before the Committee on the 2nd April 2019 as did representatives from the Law Reform Commission. A date for the Minister’s appearance has still to be confirmed. The Joint Committee decided to seek the Director’s views in relation to the use by it of the power of direction pursuant to section 83 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 to compel him to provide it with a submission relating to the Fitzpatrick trial, and wrote to him accordingly in April. The Director responded that in light of the protections afforded under the 2013 Act, the Joint Committee would receive his full co-operation if it issued him with a direction to provide the submission. The Joint Committee has stated that it would proceed with seeking the necessary approvals. The outcome of this is awaited.

A drafter from the Office of the Parliamentary Counsel has been assigned and has worked with the Department to complete a draft of the Bill for publication. Publication of which will depend on the outcome of pre-legislative scrutiny.

**Tax Appeals and Prospectus Regulation Bill 2019**

The Prospectus Regulation (EU) 2017/1129 harmonises requirements for the drafting,

approval and distribution of the prospectus to be published when securities are offered to

the public or admitted to trading on a regulated market in a Member State.

While EU regulations have direct effect, some elements can require EU Member States to

make domestic legislative provisions. In this regard, the Prospectus Regulation was part

transposed into Irish law via the European Union (Prospectus) Regulations 2019, S.I. 380,

on 19th July.

A number of national measures have been introduced or are in the pipeline in order to situate the Prospectus Regulation rules within the Irish legal and regulatory landscape:

* The Minister for Finance has commenced the [European Union (Prospectus) Regulations 2019 (SI 380/2019)](http://www.irishstatutebook.ie/eli/2019/si/380/made/en/pdf), which replace the preceding prospectus regulations issued under the PD regime. These regulations deal with those matters left to the discretion of member states, such as the powers of the Central Bank as the national competent authority, enforcement and fees.
* The Central Bank, as the regulator for securities markets in Ireland, has also issued updated the preceding Prospectus Rules, along with the Transparency Rules and Market Abuse Rules, and consolidated all of its primary market requirements in the [Central Bank (Investment Market Conduct) Rules (SI No 366 of 2019)](https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/securities-markets/prospectus-regulation/regulatory-requirements-guidance/s-i-no-366-of-2019-%28update%29.pdf?sfvrsn=2) and has published updated [Guidance on Prospectus Regulatory Framework](https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/securities-markets/prospectus-regulation/regulatory-requirements-guidance/guidance-on-prospectus-regulatory-framework.pdf?sfvrsn=4).
* Finally, the [Finance (Tax Appeals and Prospectus Regulation) Bill 2019](https://data.oireachtas.ie/ie/oireachtas/bill/2019/45/eng/initiated/b4519d.pdf) is currently being considered by the Houses of the Oireachtas. The bill proposes to update references to the PD regime in the Companies Act 2014 and align them with the Prospectus Regulation. It would also transpose Article 11 of the Prospectus Regulation which restricts civil liability in certain circumstances in the security offering, and increase the local offer threshold, currently €5 million, which would exempt offers of securities up to a total consideration of €8 million from the requirement to publish a prospectus.

**General Scheme of the Migration of Participating Securities Bill 2019**

Minister for Finance and Public Expenditure and Reform, Paschal Donohoe and Minister for Business, Enterprise and Innovation, Heather Humphreys obtained Government agreement on 18th July to draft legislation that could facilitate the longer-term transition of the Irish securities market from its current settlement system based in London to the industry selected settlement system operated by Euroclear Bank, Belgium. The outline of the future Migration of Participating Securities Bill was published at a preliminary stage so as to facilitate market participants engagement in this complex process.

This legislative measure is a part of the longer-term response to the direct impact of the decision of the United Kingdom to leave the European Union. Brexit means that the Irish market will no longer be able to access the current UK settlement system called CREST. After considering a number of alternative options to replace CREST, the Irish market selected Euroclear Bank as its preferred long-term settlement solution. The migration of securities from CREST to the new system must be completed and be fully operational by March 2021.

In the event of a “Hard Brexit”, the European Commission has adopted a temporary and conditional equivalence decision for UK based Central Securities Depositories (CSDs). This equivalence decision for UK based CSDs expires at the end of March 2021.

This equivalence decision along with the amendments to Ireland’s Settlement Finality Framework introduced in Part 7 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019, have resolved the short-term implications for Irish equities and Exchanged Traded Funds (ETFs) listed on the Dublin and London stock markets in a “Hard Brexit” scenario. The proposed legislation seeks to support the Irish market as it moves to its longer-term solution of ensuring settlement continues within the EU as is required.

The Part 23 Committee wrote to the Michael McGrath, Secretary General of the Department of Finance, outlining its support for the General Scheme of the Bill. The Committee will generate feedback on the alternative system being proposed and consider any subsequent company law amendments which may be necessary.

1. **Part 23 Committee update**

The Committee Chairperson, Mr. Paul Egan provided the group with an overview of the Committee’s work and the current status of the Migration of Participating Securities Bill 2019 as follows:

**Position on the Migration of Participating Securities Bill 2019**

The Committee are supportive of the General Scheme of Migration of Participating Securities Bill 2019. Consideration was given to submitting a report to the Minister on the Bill, however, after careful debate it was determined that any such report might delay the Bill. Given the tight timeframe, and huge significance of this Bill to the Irish market, it was decided that the Committee would report on any company law amendments arising from the Bill separately.

The Committee wrote to the Assistant Secretary General of the Department of Finance outlining this position.

**Euroclear working groups’ activity**

The Chairperson provided an overview as to the continuing work of the Euroclear working groups’ activity.

1. **Enforcement of Committee update**

Mr. Ian Drennan gave an overview of the work to date done by the Committee and next steps as follows:

Whilst it is my intention to convene a meeting of the Committee in the near future, there are a number of matters that are likely to have a bearing on its deliberations, *viz*:

* Companies (Corporate Enforcement Authority) Bill 2018 (ongoing);
* associated issues that the ODCE is in discussion with the Department in respect of (ongoing);
* the Oireachtas Business, Enterprise & Innovation Committee’s pre-legislative scrutiny of the Companies (Corporate Enforcement Authority) Bill 2018 (ongoing);
	+ ODCE representatives have appeared before the Committee;
	+ Committee wishes to obtain a Submission from me on issues associated with *DPP v FitzPatrick* and, for reasons that aren’t necessary to go into here, has indicated its intention to seek powers of compellability in to that end – ODCE has no issue with that proposed course of action and, if compelled to do so, has no issue with providing the Submission to the Committee;
* Group charged with reviewing Ireland’s Anti-Fraud & Anti-Corruption arrangements, which is chaired by former DPP, Mr. James Hamilton (ongoing). ODCE is a member of that Group;
* Law Reform Commission Report on Regulatory Powers & Corporate Offences.

Whereas the Enforcement Committee can continue to deliberate, it is unlikely that it will be in a position to conclude its work until such time as the more significant of the foregoing have reached a conclusion as some have a direct bearing on the enforcement of company law.

1. **Insolvency Committee update**

The Secretariat provided a brief update as follows:

A research paper is being prepared by the Secretariat and legal researcher on

Winding up and the Regulation of Liquidators. It is envisioned that this paper will form the

basis of the Committee’s Report. The paper will be circulated to the Committee once

finalised.

1. **Statutory Committee update**

Mr. Paul Egan provided the following update:

The Statutory Committee prepared a response to the Department’s Public Consultation on

the Registration of Business names Act 1963. The Committee will continue to be convened

as and when short term responses to proposed legislative amendments are required.

1. **Register of Beneficial Ownership**

Mr Paul Egan outlined that correspondence was issued to the Department in relation to the

Register of Beneficial Ownership outlining the following concerns;

1. Legal basis for a form BEN2;
2. Effect of non-filing of form BEN2; and
3. Requirement for a statutory declaration.

Discussion was opened to the floor so as to illicit the views of members so as to

ascertain a common position for the Review Group. It was agreed to keep the matter under

review.

1. **AOB**

There were no matters signalled under AOB.

The meeting then ended.