Report of the Company Law Review Group

2009

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Chairman’s Letter and Membership of the Company Law Review Group to the Minister

Dear Minister,

It is my pleasure to present to you the report of the Company Law Review Group for 2009.

This Report addresses a number of wide ranging issues in company law. Of particular importance are the modernisation issues considered in relation to distributions by companies and requirements concerning share capital, the extension of the audit exemption to companies limited by guarantee and to dormant subsidiaries in a corporate group. It is hoped that if our recommendations on these matters are accepted by you and the Government that these will be included in the forthcoming Companies Bill.

Company law and corporate governance have been receiving significant public and political attention
in the last 18 months. No company law code can, however, guarantee that individuals will not act recklessly or that businesses will not fail. Indeed, the Companies Acts are essentially a facilitative framework; they facilitate doing business through a legal person, provide members with limited liability, provide a framework for the ownership and management of companies and the relationship between the owners and the managers. In considering what provisions should be included in the Companies Acts, the Review Group has sought to distinguish the law relating to the workings of companies from the law relating to the activities of companies (or partnerships, sole traders, foreign companies etc). The former is the legitimate concern of the Companies Acts. The latter i.e. the regulation of activities that persons (including companies) can engage in are not properly the subject of the Companies Acts.

Sometimes people look to company law to provide solutions where there have been failures in the regulation of activities that some companies have engaged in. Company law does not and cannot, however, provide answers to failures in banking, charities or property management. I believe that when the recommendations of the Review Group are enacted, that Ireland will have a state of the art company law code which will provide a modern and efficient vehicle for business and other groups who want to operate through a legal entity.

It is understood that the new Bill is unlikely to be published before the end of 2011 and although it is disappointing that the process is taking so long, it is, I believe more important that it is done properly. The Bill is likely to be the largest single enactment in the history of the State and whilst company law in Ireland is no less complex than it is in the United Kingdom the reality is that the State’s resources are fewer and have been stretched even further by the work needed on two Companies Bills prepared in 2009 as well as a significant number of complex legislative enactments addressing the crisis in Irish banking.

The priority which you have given in the new work programme for the Review Group to assist in the finalisation of the Bill ahead of addressing new issues is most welcome. Important and all as new matters may be, the priority has to be the publication of the new Companies Bill. The Review Group is committed to seeing this process through and we look forward to working with your Department in refining the heads of Bill and assisting in the drafting process in every way we can.

I would like to thank you Minister for your consistent support and encouragement to the Review Group and also to acknowledge the tremendous commitment, courtesy and professionalism of the people in the Department of Enterprise Trade and Innovation. The Review Group has been fortunate once again in Mr John P Kelly's appointment as secretary to the group and I am indebted to him and to the others in the secretariat for assisting me and the other members of the Review Group.

Yours sincerely,

Dr Thomas B Courtney
Chairperson

Members of the Company Law Review Group

1. Dr. Thomas B. Courtney, Chair, Arthur Cox
2. Paul Appleby, Office of the Director of Corporate Enforcement
3. Deirdre-Ann Barr, Matheson, Ormsby, Prentice
4. Jonathan Buttimore, Office of the Attorney General
5. Daryl Byrne, Irish Stock Exchange
6. Jim Byrne, Revenue Commissioners
7. Marie Daly, IBEC
8. Ian Drennan, Irish Auditing and Accounting Supervisory Authority
9. Paul Egan, The Minister
10. Paul Farrell (replaced by Helen Dixon in November 2009), Registrar of Companies
11. Mark Fielding, Irish Small and Medium Enterprises
12. Michael Halpenny, SIPTU
13. Tanya Holly, Department of Enterprise, Trade and Employment
14. William Johnston, Arthur Cox
15. Lyndon MacCann S.C., Bar Council
16. Ralph MacDarby, Institute of Directors
17. Vincent Madigan, Department of Enterprise, Trade and Employment
18. Brian O’Kane (replaced by Kathryn Maybury in November 2009), Small Firms Association
19. George Treacy, Financial Regulator
20. Conall O’Halloran, Chartered Accountants Ireland
21. Mike Percival, Irish Banking Federation
22. Mark Pery Knox Gore, Law Society of Ireland

23. Nora Rice, Companies Registration Office

24. Noel Rubotham, Courts Service

25. Jon Rock, Institute of Chartered Secretaries and Administrators

26. Patricia Taylor, William Fry Solicitors

Functions of the CLRG

Part 7, Company Law Enforcement Act, 2001

Section 67
Establishment of CLRG
There is hereby established a body to be known as the CLRG.

Section 68

Functions of the Review Group

(1) The Review Group shall monitor, review and advise the Minister on matters concerning—

(a) The implementation of the Companies Acts,
(b) The amendment of the Companies Acts,
(c) The consolidation of the Companies Acts,
(d) The introduction of new legislation relating to the operation of companies and commercial practices in Ireland,
(e) The Rules of the Superior Courts and case law judgements insofar as they relate to the Companies Acts,
(f) The approach to issues arising from the State's membership of the European Union, insofar as they affect the operation of the Companies Acts,
(g) International developments in company law, insofar as they may provide lessons for improved State practice, and
(h) Other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

(2) In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity.

Section 69

Membership of Review Group

(1) The Review Group shall consist of such and so many persons as the Minister from time to time appoints to be members of the Review Group.
(2) The Minister shall from time to time appoint a member of the Review Group to be its chairperson.
(3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.
(4) A member of the Review Group may at any time resign his or her membership of the Review Group by letter addressed to the Minister.
(5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

Section 70

Meetings and business of Review Group

(1) The Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period.

(2) Notwithstanding Subsection (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

(3) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may make such arrangements for the conduct of its meetings and business (including by the establishment of sub-committees and the fixing of a quorum for a meeting) as it considers appropriate.

(4) In the absence of the chairperson from a meeting of the Review Group, the members present shall elect one of their numbers to be chairperson for that meeting.

(5) A member of the Review Group, other than the chairperson, who is unable to attend a meeting of the Review Group, may nominate a deputy to attend in his or her place.

Section 71

Annual Report and provision of information to Minister

(1) No later than 3 months after the end of each calendar year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

(2) A report under Subsection (1) shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—

(a) concerning the functions or activities of the Review Group, or
(b) referred by the Minister to the Review Group for its advice.

Work Programme for the years 2008-2009

	Item
1	Provide ongoing advice to the Department of Enterprise, Trade and Employment on EU proposals relating to the European Private Company (EPC).
2	Generally advise the Department of Enterprise, Trade and Employment on queries raised by the Parliamentary Draftsman arising from the drafting of the new Companies Bill, as requested by the Department.
3	Examine the need for powers to permit the Registrar of Companies to rectify entries made in the register of companies.
4	Examine the need for provisions regarding the re-use of CRO information.
5	Consider the need for limited liability partnerships (LLPs).
6	Re-examine the provisions regarding distributions and share capital.
7	Consider the extension of the audit exemption regime to small companies limited by guarantee which are formed, for example, to run clubs/community organisations etc.
8	Further consider the extension of the audit exemption regime to dormant subsidiaries.
9	Consider the need to include provisions like those found in sections 116 and 117 of the UK Companies Act 2006 into Head 38 of Chapter 5, Part A4 of the General Scheme of the Companies Consolidation and Reform Bill. (This emanates from a submission from Bank of Ireland about the improper use of company registers of members by telemarketing companies. The UK changed their legislation taking this into account.)
10	Examine section 376 of the Companies Act 1963 as amended by section 13 of the Companies (Amendment) Act 1982, and in particular, examine the removal of the limit restricting size of partnerships to twenty members.

	Item
11	Review the optional elements under the Second Directive 2006/68/EC (Capital Maintenance).
12	Rented accommodation used as registered offices causing problems for landlords.
13	Advise the Department of Enterprise, Trade and Employment on the various requirements on auditors to report under criminal justice legislation, under company law and, in particular, Recommendations arising out of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Advise the Department on the possibility of streamlining the various obligations.
14	Consideration of the adoption, in Irish company law, of the UNCITRAL Model Law on Cross-Border Insolvency.
15	To examine specific provisions under the Companies Acts and to review if, in practice, their application is consistent with the underlying policy objectives of the legislation, including improved compliance. Namely: • Abuse of Strike-off provisions; • Late-filing penalties, and, in particular, the loss of exemption from the need to conduct a statutory audit; • With reference to a small, select number of offences, consider whether there is proportionality between the seriousness of the offence (and the likelihood of malpractice) and its enforcement and whether offences under the Companies Acts should be subject to civil or criminal action, or both.

Chapter 1: Update on the Companies Consolidation and Reform Bill

1.1 Company Law Review Group

The Company Law Review Group was established under the 2001 Act to advise the Minister on changes required in companies' legislation and more specifically, to promote enterprise, simplify legislation and enhance corporate governance. The Review Group consists of business representatives, company law practitioners, IBEC, ICTU and Government Agencies, including Revenue Commissioners, Office of the Director of Corporate Enforcement and the Irish Auditing and Accounting Supervisory Authority (IAASA).

1.2 Companies Consolidation and Reform Bill

The major activity of the Review Group since its establishment has been the drafting of the heads of a Bill to modernise and consolidate company law. The Group presented the General Scheme of the Companies Consolidation and Reform Bill[1] to the Minister for Enterprise, Trade and Employment in March 2007.

The General Scheme of the Companies Consolidation and Reform Bill was a massive undertaking (it runs to nearly 1,300 heads) which was the culmination of the first seven years, including three reports, of the Review Group's work. As well as the consolidation of the existing fifteen Companies Acts since 1963 and numerous statutory instruments into one piece of legislation, the General Scheme modernises and simplifies the company law regime in Ireland.

An important aspect of the General Scheme is that it modernises the law to reflect modern business practice. The proposed new regime will revolve around the 'private company limited by shares', which represents 90% of businesses operating through a company structure in Ireland today. (Previous legislation was based on the public limited company model.) The provisions (see para 1.3 below) relating to the new model company are now wholly integrated and, as a result, will be more easily accessible to company officers and practitioners.

What are the benefits for Ireland? Ireland's reputation as a competitive location for business investment is enhanced as it sends a strong message that Irish company law is modern, with simplified procedures for establishing and operating a company, while maintaining a strong compliance and enforcement regime. This consolidation and modernisation is timely as other common-law jurisdictions, such as the UK, Hong Kong, Canada and New Zealand have also reformed their companies' codes.

1.3 Key Provisions of the General Scheme of the Bill

The key features of the new 'private company model' provided for in the General Scheme are:

1. It will have a one-document Constitution, which will replace the Memorandum and Articles of Association.
2. It will not be required to have an 'objects' clause in its Constitution (i.e., limiting it to certain types of activities), which is seen as unnecessarily restrictive.

[1] See www.clrg.org

3. The new company type will be required to have just one Director (currently two). But the Company Secretary cannot be the same person as the sole Director.
4. In general, it may have between 1 and 99 members.
5. It will be limited by shares and must have a share capital.
6. Members can waive the holding of an AGM (but if 10% of the membership request an EGM it must be held). All decisions of the company must be recorded.
7. For specific activities (e.g. loans for Directors), currently restricted by law, the new Bill provides that Directors may do so by undertaking a 'validation procedure' to the effect that the company is solvent. A Director may be held personally liable, without limit, for any subsequent debts of the company.
8. The company will be eligible for audit exemption up to a higher threshold. (Exemption from audit removes the need for companies to engage an independent, external auditor to carry out a statutory audit of a company.).

The net effect of these proposed changes will be to ease the regulatory burden attaching to the establishment and operation of private companies in Ireland. It will be easier for companies to undertake business activities and operate on a daily basis, subject to certain safeguards. The full duties of Company Directors and Company Secretaries in complying with the law are clearly set out. Also, the powers of the enforcement agencies, which have been strengthened in recent years, have been maintained and brought together clearly in the General Scheme.

The Bill will have two main divisions referred to in the General Scheme as Pillar A and Pillar B. Pillar A sets out the law applicable to the private company limited by shares and contain 15 Parts (circa 850 sections of law or 2/3rds of the Bill). Every company law provision which a user or advisor to a private company needs to know will be contained in Pillar A.

Pillar B (circa 400 sections) will contain the law applicable to every other company type: the PLC, a new type of private company called a Designated Activity Company (DAC), guarantee companies, unlimited companies, unregistered companies, external companies and investment companies. The law applicable to those companies will be set out by reference to Pillar A, but with carve-outs and additions.

1.4 Current Position

Currently, all the parts of Pillar A have been drafted by the Office of the Parliamentary Counsel. Officials from the Department of Enterprise have actively engaged with the OPC to discuss issues arising from these provisions.

Pillar A is expected to be completed by the end of 2010. It is expected that the full Bill will be completed towards the Autumn of 2011.

Chapter 2: Registration Issues

2.1 Powers of the Registrar of Companies to rectify incorrect entries made in the Register of Companies

2.1.1 Introduction

The Company Law Review Group considered this issue in its 2007 Report and the Minister agreed to have the matter extended into its 2008-2009 Work Programme.

It occurs from time to time that companies lodge forms that become registered in the Companies Registration Office, but which are subsequently found by the company to have inadvertently contained incorrect information.

It would seem appropriate to have a straightforward mechanism to correct the register. Currently only limited provision exists, as provided by section 122(5) of the 1963 Act.

2.1.2 Position set out in the 2007 Report

The Review Group was of the view that it was crucial to business that the register of charges provides certainty. Allowing alterations to that register without proper consideration could prove very injurious to third parties, especially creditors, and the reputation of Ireland as a place to do business.

The Review Group also considered that if there was discretion vested in the Registrar to reject applications for any reason, consideration had to be given to an appeal to the Court against any decision. In principle, the Review Group was of the opinion that there should be a mechanism to facilitate factual, straightforward amendments to the register that are required to be made as a result of genuine and inadvertent clerical mistakes.

However, it was agreed that the provision of such a mechanism raised the fundamental question of the role and purpose of the register. Two major issues that remain to be addressed are whether the mechanism should be confined to corrections of limited, specified data and whether the Registrar should be permitted to refuse applications for rectification which he considers to be dubious or suspect.

2.1.3 Current Views of the Companies Registration Office

The Companies Registration Office considers that although it would be desirable to have a simple mechanism to correct clerical errors on the register, significant issues arise as set out in terms of the role of the Registry and the practicalities of being able to distinguish between cases of wrong-doing versus simple error.

An adjudication role for the Registrar as to whether or not registered submissions ought to be amended/removed would be quasi-judicial in nature and the CRO would foresee significant practical difficulties in terms of administering same, particularly in cases where shareholders and/or directors of a company are in dispute leading to conflicting filings with CRO in relation to that company. It would not appear to be the case that any further evidence has been adduced of such a system of rectification leading to successful results in any other jurisdiction. Accordingly, the current CRO system of permitting filing and placement on the register of a replacement submission (with the original submission remaining on the register) appears to be, on balance, the most optimal situation.

2.1.4 The Review Group's Consideration of the Issue

The Review Group acknowledges the risks that the CRO has raised in relation to wrong-doers attempting to mislead the public by filing incorrect information e.g. filing a form to show that a person was not a director of a company etc. The Review Group was, however, strongly influenced by the fact that the register is not determinative of rights: it records and registers events that have happened in companies, the validity and effectiveness of which does not turn on their being registered. The real problem for companies which make genuine mistakes in filings is that subsequent filings can be rejected where the correct information is in conflict with the information filed in error. So, a subsequently filed annual return can be rejected by the CRO because it conflicts with information contained in a form previously filed in error and unless the company obtains a High Court order, the company is likely to be struck-off the register to its detriment and that of its shareholders and creditors.

2.1.5 Recommendation

The Review Group recommends that companies should be permitted to rectify inaccurate or incorrect particulars which have been delivered to the CRO and that this should be permitted by allowing companies to file a form rectifying any information previously filed incorrectly subject to the following safeguards:

1. The only mistakes capable of being corrected should be those resulting from the erroneous completion of the original prescribed form resulting from the mistaken transcription of information from an original document which contained that information.

2. The rectification procedure should not be available in the case of filings where substantive rights result from the filing e.g. the delivery of a C1 pursuant to section 99 of the Companies Act 1963 is required if the charge to which is relates is not to be void.

3. The original legal or accounting document which was incorrectly transcribed (or an extract thereof) must accompany the prescribed form rectifying the error.

4. The originally filed information should not be removed from the register but retained and publicly available for inspection by anyone.

5. The form notifying the error should contain a certificate signed by all of the directors and the company's solicitor or auditor which attests the existence and

validity of the original document, the particulars of which were mis-transcribed into the originally filed prescribed form.

6. It should be an offence to file a rectifying form which does not comply with the foregoing requirements which should be a Category 2 offence, carrying a maximum term of imprisonment of 5 years and a significant fine for conviction on indictment.

While the foregoing sets out the terms in which the necessary changes might be considered, some fine-tuning of the detail involving consultation between the CRO and stakeholders would be necessary before the final shape of an appropriate head could be finalised.

2.2 Examine the need for provisions regarding the re-use of CRO information

2.2.1 Background

The issue of re-use of information in the Companies Registration Office was previously considered by the Company Law Review Group in its 2007 Report. In its conclusion, the Review Group acknowledged that certain concerns such as identity theft and data protection issues had arisen and that more work was needed before a recommendation could be made. At the request of the Review Group, the Minister agreed to have the matter extended into its 2008-2009 Work Programme

2.2.2 Introduction

The Companies Registration Office stores data electronically in two Parts. Part 1 has been in existence since 1985 and is the database containing all the information on companies that is stored in data fields and thereby amenable to analysis, such as names, addresses, officers' names and addresses and details of charges. Included in Part 2 are images of all documents filed since 1990 and all other documents on all live companies, as well as images of scanned documents that are filed. Extracts from this database can be purchased in bulk, pursuant to a licence agreement.

2.2.3 Current Position

The provision and use of data, maintained at the CRO, is subject to legislation. Section 370 of the 1963 Act provides that any person may (a) inspect the documents kept by the Registrar, on payment of such fee as may be fixed by the Minister and (b) require an extract of any such document on payment of such fee as the Minister may fix.

With regard to copyright, rights in databases have been created by the Database Directive and by the Copyright and Related Rights Act 2000. The Database Directive creates a sui generis right in databases. The CRO is currently trying to ascertain how Section 334 of the Copyright and Related Acts 2000, which deals with the information open to public inspection or on a statutory register, applies to the re-use of CRO data, particularly in the context of supply to their bulk data customers. Article 13 of the Directive however, leaves it open to Member States to make their own provisions in respect of public documents.

2.2.4 Conclusion and Recommendation

The CRO is seeking legal advice to revise the Licence Agreements for customers to whom the CRO sells bulk data from the register. Central to these discussions will be an examination of the issues presenting around personal data and the re-use of such data. The issue as to whether there is a requirement for legislation as to the re-use of CRO data will also be clarified. The Review Group can revisit this matter on a future work programme if requested to do so by the Minister.

2.3 Requirement for persons seeking to inspect companies' registers of members to show a legitimate purpose

2.3.1 Background

The Review Group was asked by the Minister to consider the inclusion of provisions in the General Scheme of the Companies Consolidation and Reform Bill equivalent to those found in sections 116 and 117 of the UK Companies Act 2006. These provisions require an applicant for a copy of the register of a company to indicate the purpose for which it would be used, and allows the company to apply to Court for an order directing the non-disclosure of the register if it is sought for an "improper" purpose. These provisions were prompted following the realisation that persons were engaged in becoming members of companies to permit them the statutory right to obtain particulars of the other members of those companies for purposes not originally intended by the legislature.

2.3.2 The UK Position

Section 116 of the UK Companies Act 2006 reads: -

116 Rights to inspect and require copies

(1) The register and the index of members' names must be open to the inspection—
(a) of any member of the company without charge, and
(b) of any other person on payment of such fee as may be prescribed.

(2) Any person may require a copy of a company's register of members, or of any part of it, on payment of such fee as may be prescribed.

(3) A person seeking to exercise either of the rights conferred by this section must make a request to the company to that effect.

(4) The request must contain the following information—
(a) in the case of an individual, his name and address;
(b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation;
(c) the purpose for which the information is to be used; and
(d) whether the information will be disclosed to any other person, and if so—
(i) where that person is an individual, his name and address,
(ii) where that person is an organisation, the name and address of an individual responsible for receiving the information on itsbehalf, and
(iii) the purpose for which the information is to be used by that person.

The UK CLR recommended that information in a company's register of members should be made available only for certain specified purposes. Section 116 of the UK Act modifies the rights of inspection and to be provided with copies of the register of members and its index. Subsections (3) and (4), which are new, require those seeking to inspect or to be provided with a copy of the register of members to provide their names and addresses, the purpose for which the information will be used, and, if the access is sought on behalf of others, similar information for them.

Section 117 of the UK Companies Act 2006 reads: -

117 Register of members: response to request for inspection or copy

(1) Where a company receives a request under section 116 (register of members: right to inspect and require copy), it must within five working days either—
(a) comply with the request, or
(b) apply to the court.

(2) If it applies to the court it must notify the person making the request.

(3) If on an application under this section the court is satisfied that the inspection or copy is not sought for a proper purpose—
(a) it shall direct the company not to comply with the request, and
(b) it may further order that the company's costs (in Scotland, expenses) on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application.

(4) If the court makes such a direction and it appears to the court that the company is or may be subject to other requests made for a similar purpose (whether made by the same person or different persons), it may direct that the company is not to comply with any such request.
The order must contain such provision as appears to the court appropriate to identify the requests to which it applies.

(5) If on an application under this section the court does not direct the company not to comply with the request, the company must comply with the request immediately upon the court giving its decision or, as the case may be, the proceedings being discontinued.

Section 117 of the UK Act provides a procedure by which the company can refer the matter to the court if it thinks that the request may not be for a proper purpose. It replaces the 10-day deadline for compliance with a request with a 5-day period within which the company must either comply with the request or apply to the court for relief from the obligation. If the company opts for the latter, then subsections (3), (4) and (5) apply. Under subsection (3), if the court is satisfied that the access to the register of members is not sought for a proper purpose, it will relieve the company of the obligation to comply with the request and may order that the person who made the request pay the company's costs. Under subsection (4), the court may also direct the company not to comply with other requests made for similar purposes. If the court does not make an order under subsection (3), or the proceedings are discontinued, then, under subsection (5), the company must immediately comply with the request.

2.3.3 The Review Group's consideration of the issues

The Review Group considered that section 116(1) of the UK Companies Act 2006 which entitles members of all companies to inspect their companies' registers of members and also to obtain copies of those registers on request, was open to the same potential abuse as was found to exist in the United Kingdom. The Review Group believes that the risk is most acute in public limited companies (PLCs) and mindful that it was important for the State that our Companies Acts support companies which decide to register in Ireland, was mindful not to leave Irish listed PLCs at a disadvantage to those of our neighbour. The Review Group was, however, minded to distinguish PLCs from other types of company e.g. private companies and public unlimited and limited by guarantee companies, where it was thought only appropriate that members should have an unfettered right to ascertain the particulars of their fellow members which are listed in the register of members.

2.3.4 Conclusion and Recommendation

The Review Group was minded to amend Irish law in line with the recent changes in the United Kingdom in the nature of provisions analogous to sections 116 and 117 of the UK Companies Act 2006. The Review Group was conscious, however, that changes to the law relating to the inspection of the register of members would, in isolation, not provide a complete answer to the matter since companies would continue to be obliged to file this information which would appear on the public register. Accordingly, no recommendation is being made on this point until the outcome of the review by the CRO on the reuse of information referred to in paragraph 2.2.4.

2.4 Rented accommodation used as registered offices causing problems for landlords

2.4.1 Introduction

The Company Law Review Group was asked by the Minister to consider a proposal by a landlord that the Companies Acts be amended to prevent tenants of residential property from using the address of a property as a company's registered office without the prior written consent of the owner to that usage.

2.4.2 Background

A submission was received by the CLRG which proposed that the forms for registration of a company and the submission of its annual return be amended to ensure that the company has the owner's prior written consent for the use of rented premises as the registered office. The submission came from a landlord who owns a number of properties that are let for residential use, the addresses of which have been used without the landlord's consent as registered offices by companies that have no connection with the properties.

2.4.3 Issues arising

1. An unworkable requirement of retrospective approval

The proposal to amend Form A1 (application for incorporation) and Form B2 (change of address of registered office) to require the prior written consent from the owner of the premises where the registered office is located would necessitate legislative provisions, and a Forms Order giving effect to same. The proposal implies that, in the absence of the owner's prior written consent, the CRO ought not to accept and register Forms A1 and B2 and enter on the public register the registered office address that has been notified by a company. As CRO will not know whether or not a particular premises is rented, the owner's consent would have to be supplied by companies in respect of each and every Form A1 and B2.

As Form B2 is an after-the-event notification of change of registered office, the proposed change, if implemented, would introduce an unworkable requirement of retrospective approval by the Registrar of a registered office to which the company had already moved.

A further concern is that electronic filing of B2 Forms (which is free of charge and hence widely availed of by companies) would cease if it were to become a requirement that the company attach the owner's prior written consent to the Form B2. At present, the vast majority of Forms B2 are electronically filed by companies, which frees up CRO staff resources to tackle other work. CRO is reluctant to endorse any proposal that would adversely impact on the uptake of electronic filing of statutory notifications.

There would also be a significant resource issue in terms of additional checks having to be carried out by CRO in respect of every application for incorporation and every notification of change of registered office (approximately 39,000 applications in total per annum). In practical terms, a requirement that CRO verify that the consent of the owner of the premises notified as being the company's registered office had been obtained by the company would be an onerous task.

2. Delays in processing forms

Processing of Forms A1 and Forms B2 would be greatly delayed if the CRO was required to vet all applications for incorporation and notifications of change of registered office to ensure that the consent of the owner of premises concerned to the use by the company concerned of the registered office notified to CRO accompanied those forms. At present, notifications of change of registered office are generally processed within one week of receipt by CRO. This period would greatly increase if owner's consent were to be required to accompany such notifications. The period within which a company could be incorporated would also be significantly increased if the additional requirement of owner's consent to the use of the premises where the registered office is located were to be introduced. These increased processing periods would be to the detriment both of companies and the public who rely on the public register being as up-to-date as possible in terms of company addresses.

3. Difficulties could arise for companies in obtaining the owner's written consent.

Companies generally do not have a freehold interest in the premises they utilise as their registered office. Frequently, a sublease will be involved, which means that there will be no contractual relationship between the company, as tenant in occupation, and the owner of the freehold. Furthermore, in many cases, a company will elect to have as its registered office the business address of its accountants or solicitors, which firm may well be in occupation as a tenant. Again in this instance, the landlord of the premises will not have a contractual relationship with the companies which have nominated their agent's business address as their registered office. In these circumstances a requirement that the company furnish the consent of the "owner" would be administratively unworkable.

4. How is the term "owner" to be legally defined?

Where the company occupies premises on foot of a lease, is the "owner" of the premises the company's immediate landlord, or the landlord's landlord or the ultimate owner of the freehold, where there is a sub-lease situation?

In addition, it would be impractical for the Companies Registration Office to check freeholds, leaseholds (in particular long leases) and subleases, or Land Registry or Registry of Deeds so as to establish the identity of the "owner" of the premises where the registered office of a company is located. Verification procedures by the CRO as to the ultimate owner/landlord of a particular premises would be a very lengthy/costly administrative burden and would lack certainty. Furthermore, the absence of verification, where consent of the person said to be the owner was to be accepted at face value and in good faith by CRO, could render the provision totally ineffective in practice.

5. Enforcement issues

Enforcement of this proposal would be problematic and expensive. In particular, it would not be clear from the registered records that a breach had taken place and this would require ODCE in each and every case to obtain evidence from the landlord of such breach.

6. Broader issues

This submission raises other issues, namely the difficulty in serving papers on the company; difficulty in notifying the company that an order has been made against it (e.g. disclosure order under s.102 of CA 1990); and annoyance to the actual occupier of the premises. However, it is not proposed to treat these at this stage.

It seems that a partial solution to the difficulty outlined by the landlord in the submission would be for a landlord to prohibit the use of his/her property as a registered office of a company by means of a clause in the lease. The breach would then be a matter of contract law between the landlord and the tenant. However, a difficulty would still arise for the landlord where the company has no connection whatsoever with the property, despite the property being notified to CRO as its "registered office".

Another solution in such cases would be that the landlord/creditor/any other concerned parties could notify the ODCE and the CRO that the particular company is not receiving correspondence at its registered office/has no connection with its registered office address. It would then be an enforcement/compliance matter for these bodies to follow up with the directors of these companies (breach of section 242 Companies Act 1990, ODCE; breach of section 113 Companies Act 1963, ODCE/CRO).

It is not unknown for tenants (whether natural or legal persons) of rented property to vacate the property without notifying their creditors and without leaving a forwarding address. There is undoubted annoyance in having to deal with correspondence in respect of former tenants or of those who never had any connection with the premises, but tenants' obligations are specific to them and these obligations do not attach to the property or the landlord. It is open to the landlord to return correspondence addressed to former tenants or unknown third parties to sender.

The irritation of receiving unwanted post must be balanced with the administrative costs that would flow from a requirement to establish proof of ownership of a premises to be used as a registered office of a company and the agreement of the owner to the use of those premises as a company's registered office. These costs would fall not only on the CRO (and hence on companies through increased filing fees in respect of the A1 and B2) but also on the company directly as the administrative cost of proving the owner's title and securing approval in each individual case would run to millions of Euro per year.

2.4.4 Conclusion

In summary, the arguments against an amendment to the Companies Acts are:

1. In terms of notification of change of registered office, the proposal would introduce an unworkable requirement of retrospective approval by the Registrar of a registered office to which the company has already moved. At present, the Acts allow companies a period of 14 days after implementing a change in registered office to notify the Registrar.

2. The time scales for incorporating companies and registering notifications of change of registered office would greatly increase, to the detriment of all companies and the general public, if owner's consent were to be required to accompany such applications to CRO.

3. Difficulties could arise in practice for companies in obtaining the owner's written consent since companies rarely have a freehold interest in the premises they utilise as their registered office, and may occupy under a sub-lease or else it is their agent who is a tenant of a landlord with whom the company has no connection or relationship.

4. Even if the term "owner" were to be defined in law it would still be very difficult to establish with certainty whether the owner, whose consent has been obtained, is the company's immediate landlord or the landlord's landlord or the ultimate owner of the freehold.

5. Enforcement of this proposal would be problematic and expensive.

2.4.5 Recommendation

For the reasons set out above, the Review Group does not recommend any change in the law.

Chapter 3: Partnership Law

3.1 Consider the need for limited liability partnerships (LLPs)

3.2 Introduction

The Company Law Review Group was asked by the Minister for Trade and Commerce to examine the issue of limited liability partnerships ("LLPs") and the current limitation on the number of partners in partnerships.

In the report of the Company Law Review Group 2007, the Review Group outlined the problems which current partnership law is perceived to cause for certain types of business organisations in Ireland. It explored how the introduction of LLP legislation could address these problems, citing examples of LLP legislation in other jurisdictions. It was the view of the Review Group that LLP legislation was deserving of further consideration, as the issues which had led to the introduction of LLP legislation in other jurisdictions were also relevant in Ireland. However, the Review Group believed that due weight and attention should also be given to any contrary views which might be expressed by interested parties, including clients and customers of professional service providers. Consideration should also be given to all or any competing solutions to the professional liability problem which might render the LLP solution unnecessary or inappropriate.

The Review Group came to the conclusion that the final decision on whether LLPs should be introduced, and the shape and form which LLP legislation should take, could only be reached after a full consultation process involving all of those affected by the issues arising.

With that objective in mind, the Review Group engaged in a public consultation based around the following key issues:-

- Does Ireland need a new approach to address the issue of unlimited liability in business partnership arrangements?

- What are the pros and cons of introducing the LLP model, e.g. based on the US, Canadian or UK models?

- What are the pros and cons of other forms of limitation of liability, whether by means of contract or through company incorporation?

- If LLPs were introduced, what safeguards should be brought in to protect the interests of clients and creditors?

- Are there any other issues regarding LLPs which need to be brought to the attention of the Review Group?

The Review Group also sought comments on the desirability of removing the size limit on partnerships.

3.3 Submissions

The Review Group formulated a series of questions to inform the public consultation process. The submissions received by the Review Group are considered below.

Question 1 – Does the availability of insurance not meet concerns about the unlimited personal liability of partners in a general partnership?

A number of respondents stated that there is limited capacity in the insurance market. Not all layers of liability may be fully insurable and a number of insurance providers have exited the professional indemnity insurance market in recent years. Many of the large global accounting firms operate captive insurance vehicles which in effect amount to a form of self-insurance.

Question 2 – If policies of insurance are inadequate to meet concerns about unlimited personal liability, what are the specific reasons for this? Is insurance prohibitively expensive?

Some respondents indicated that auditing firms are considered to be an uninsurable risk by virtue of the very significant claims which were successfully made against a number of the large global networks, particularly in the late 1980s. Insurance companies made significant losses on providing insurance to accounting firms in this period and so have exited the market since then. It was claimed that auditors will almost inevitably be in some way associated with large corporate failure and therefore the risk of multi-billion dollar claims against auditing firms effectively renders them uninsurable.

It was also claimed that insurance can be prohibitively expensive or simply unavoidable for solicitors carrying out higher risk work. The increased volume and magnitude of business transactions results in potential exposure for Irish solicitors considerably greater than the insurance cover which can be obtained.

Question 3 – Is insurance more of an issue for professional service firm ("PSF") partnerships than for non-PSF partnerships?

The point was made that where insurance cover does not cover a claim, partners' personal assets can be put at risk. In a PSF partnership it is possible that this could arise due to the actions of partners over whom they have no control or of whom they have little knowledge, particularly in large firms. Non-PSF partnerships are in a similar position in respect of exposure to liability. However, unlike PSF partnerships, such as solicitors and accountants, there is no regulatory bar on non-PSF partnerships operating as companies. They can choose to operate under the protection of a limited liability company thereby reducing their exposure. For that reason, insurance cover would appear to be a more pressing issue for PSF partnerships.

Question 4 – If given a choice, would partners in a professional service firm ("PSF") partnership choose to form a company as a vehicle for carrying on their profession instead of practising through a partnership?

There seemed to be a consistent thread running through the submissions received – namely, that the reasons for choosing the partnership model differ from case to case. The benefits of a general partnership to date have included tax transparency, flexibility of entry and exit, privacy (as no financial disclosure is currently required under the general law of partnership), flexibility of injecting and removing capital, ease of management and lesser administrative restrictions than those which are applied in the case of limited liability companies. It was pointed out that the current restriction in Section 187 of the Companies Act 1990, which prohibits a body corporate acting as auditor to an Irish company, will be removed when the provisions of the revised Eighth Directive are incorporated into Irish law. One respondent said it was not possible to forecast to what extent auditors would migrate to limited liability company status when it becomes possible for auditors to do auditing business through such an entity. Incorporation would not address the core issue as far as liability risk was concerned. In the respondent's view, that issue could only be addressed through a statutory cap on liability.

Question 5 – Is there a substantial risk that partners in a PSF partnership could lose their personal assets as a result of a claim not covered (or insufficiently covered) by insurance?

A number of respondents involved in or representing the accountancy and solicitors professions replied that the partners in a PSF partnership could lose their personal assets as a result of a claim which could be well in excess of the level of available insurance. Under the current arrangements for many firms the availability of insurance was quite limited and the level of cover available to any one firm would also be dependent on claims made against the insurance fund by other firms in the same network. In the event of very big claims being settled against firms in the global network, it was quite likely that there would be insufficient funds to cover other claims and therefore the personal assets of all partners were exposed.

As a result of Section 44 of the Civil Law (Miscellaneous Provisions) Act 2008 it was now possible for a solicitor to contract with a client to limit his/her liability to that client, but not below the minimum insurance cover that a solicitor is generally required to carry (this minimum insurance amount currently stands at €2,500,000). However, the practical effect of this new provision remained to be tested, as it was open for a client to decline to accept the limitation of liability or switch to a solicitor who has a higher liability limit or none at all.

Question 6 – Should LLP legislation in Ireland provide for (a) partial shield protection (i.e. protection against the negligence of a partner), (b) full shield protection (i.e. protection against the negligence of a partner and against the contractual debts of the partnership), or (c) separate legal personality of the LLP?

Responses to this question were mixed. Some respondents preferred separate legal personality along the lines of the UK model, while others preferred US-style full shield protection. No one expressed a clear preference for partial shield protection, though one respondent suggested that any new legislation should "at a minimum" provide for partial shield protection.

One firm expressed the view that partial shield protection would be a small measure of reform and would be unlikely to cause auditors to migrate to it. The risk of a corporate collapse causing the demise of one of the so called "Big 4" audit firms was, in the view of this respondent, reason enough for bringing in full shield protection.

Question 7 – *Should the LLP privilege be available to all forms of business or should it be limited to certain professions?*

The responses were almost evenly divided between those who favoured availability of LLP status to all forms of business and those who felt it should be limited to certain regulated professions.

Question 8 – *Should the safeguards against misuse of the LLP be contained in primary legislation or in the rules of the bodies charged with oversight of the relevant professions?*

The preponderance of opinion on this point lay in favour of putting the safeguards against use of the LLP structure in the primary legislation. The point was made that if such safeguards are contained in the rules of the bodies charged with the oversight of the relevant professions there is a risk that each body may apply the safeguards differently and this may result in the LLPs in certain professions being more heavily regulated than LLPs in other professions. However, it would still be open to regulatory bodies to impose additional regulations on its own member firms.

Question 9 – *Should LLPs be required to undergo registration on a public register? With whom should the LLP be required to register?*

The majority view was that a system of public registration should be put in place and that the Companies Registration Office was the obvious choice as registrar.

Question 10 - *Should LLPs be required to make financial disclosure similar to limited companies?*

Most respondents practising in the accounting and legal professions felt that there should be no financial disclosure requirement. However, three international accounting firms made submissions to the effect that some level of financial disclosure should be required. One such firm suggested that disclosure should be required in the form of an audited balance sheet but that there was no justification for extending the disclosure requirement to the profit and loss account and details of partner income. The Revenue Commissioners and the ODCE were in favour of mandatory financial disclosure.

Question 11 - *Can the problem of unlimited personal liability in partnerships be addressed by other means, without resort to a new LLP structure? Are contractual limits on liability or statutory caps on liability a viable alternative to the introduction of LLPs?*

Most respondents from the accountancy and legal professions argued that contractual limits on liability were not a viable alternative. As one respondent noted, "*while it is* *clear that solicitors can now limit their liability by contract, this only goes so far. In some cases it may not be possible to negotiate adequate limits on liability or the contractual limits may not be fully effective."* It was noted that contractual caps on auditor liability have been introduced in the UK following changes made by the Companies Act 2006. However, two of the respondents were sceptical about whether listed companies would agree to have limits placed on their auditors' liability.

There was some support among accountancy firms for the idea of a statutory cap on liability as an alternative to the introduction of LLPs.

Question 12 - Is the introduction of LLPs of interest to the financial services industry in Ireland?

Respondents either declined to comment or said that they believed that it would be of interest to the financial services industry, but without providing any support or evidence for this belief.

Question 13 - Does Ireland need a new approach to address the issue of unlimited liability in partnerships?

It was argued, in submissions made on behalf of the legal and accountancy professions, that the imposition of unlimited liability on partners in Irish partnerships puts them at a distinct competitive disadvantage to their European and North American counterparts. One respondent stated "*the work and size of partnerships in the twenty-first century means that the imposition of unlimited liability on partners in law firms, and in particular on innocent partners for the negligent acts committed by another partner, is no longer justifiable."* In the view of another respondent, partial shield protection would be a positive development at a minimum.

In another submission, it was argued that the concept of unlimited personal liability for business activity is outdated and does not properly account for the risk/reward element involved in professional services work in particular. With the major economic advances in Ireland over the last two decades it is quite conceivable that professionals would be asked to provide services relating to transactions that are valued at a multiple of their insurance cover. At the same time as maintaining expensive insurance cover they are being asked to put their personal assets at risk. The limited liability partnership model has been introduced with relative ease and success in a number of jurisdictions. The concerns over tax abuse of the mechanism could be dealt with by restricting the LLP structure to professional service firms. Anti-avoidance measures similar to those which were introduced in the past in relation to non-resident Irish companies could be contained in the legislation.

Question 14 - Is the general limit restricting the size of partnerships to twenty members a constraint on using partnerships as a business model and should it be removed or is it only a constraint in relation to certain sectoral activities and should it thus be removed only in certain specific instances?

In general, the submissions made on behalf of the legal and accountancy professions favoured the removal of the twenty-partner limit. As one respondent noted, "*it may* *be therefore that the limit of twenty be removed for only certain sectors where there is an identified business need, but that it remains in place for trading/investing partnerships, where members of the public becoming partners may not be fully aware of their potential liabilities for the debts of other partners. Therefore, we believe there is an urgent need to deal with this issue for certain professional services firms, as the current restriction imposes significant administrative difficulties on existing partnerships which was probably unintended and which in any event may not serve any useful purpose."*

It is worth recalling at this point the requirement to which the removal of the 20-partner limit for accountants is subject. Under Section 13(1) of the Companies (Amendment) Act, 1982 the 20-partner limit does not apply to partnerships of accountants provided that each partner is a person qualified to act as auditor of a company. The 20-partner limit is not removed if the partnership consists partly of persons qualified to act as auditor and partly of persons who are not so qualified. This requirement that a partnership of more than 20 accountants must consist entirely of persons qualified to act as auditors is seen as an obstacle to the development of multidisciplinary and international partnerships of accountants.

No submissions were made in response to Question 14 by or on behalf of professions other than the solicitors and accountants. The Department of Agriculture commented that in its view the effect of the size limit is sectoral only and might be lifted in specific instances only. The Revenue Commissioners expressed the view that should the 20-partner limit be removed, it would not be removed generally but rather removed in the context of partnerships engaged in the provision of professional services. The Review Group were inclined towards accepting this view in the absence of any compelling justification for the complete removal of the limit.

Question 15 - Are there any other issues regarding LLPs which ought to be brought to the attention of the Company Law Review Group?

One respondent favoured the introduction of partial shield protection for all partnerships as this would put professionals in partnerships on a similar footing to sole practitioners in terms of liability and therefore is justifiable on public policy grounds.

The Revenue Commissioners noted that the introduction of sweeping changes to legal structures could create unforeseen opportunities for large-scale tax avoidance. They suggested that this point should be noted and given due consideration before any conclusion is reached. The Revenue also commented that a safeguard similar to that contained in Sections 43 and 44 of the Companies (Amendment) (No. 2) Act 1999 might be put in place. This might include a requirement either that the LLP provides evidence that it has a real and continuous link with an economic activity in Ireland or alternatively that a set minimum number or proportion of the partners are resident in Ireland (or, perhaps, this should be amended to "resident in a member state of the EEA" to ensure compatibility with the EC Treaty and to conform with the Companies (Amendment) Act 2009).

The comment was also made that if LLPs similar to those used in the United Kingdom are introduced, there will need to be an amendment to tax legislation to facilitate conversion. A number of respondents suggested that the tax impact of changing from a partnership to an LLP should be neutral.

3.4 Conclusions

This consultation process elicited the views and comments of, among others, the Law Society of Ireland and the Consultative Committee of Accountancy Bodies – Ireland, as well as of a number of accountancy firms. Veterinary Ireland and the Irish Dental Association also provided some comments. However, in overall terms, the process was remarkable for the absence of any response from professions or businesses other than the four professions already mentioned. In the Review Group's opinion, the response to the questionnaire does not suggest that there is a strong tide of opinion running in favour of introducing LLPs.

Perhaps it is fair to say that only the accountants and the solicitors have been truly zealous supporters of the LLP concept. The consultation on LLPs confirms this impression. However, the core issue of liability and risk in Questions 1 to 5 (inclusive) and Question 11 produced a set of mixed responses from within the accountancy profession: while nearly all of these respondents were agreed that the insurance market in Ireland is inadequate to cover the risks attendant upon unlimited joint and several liability of partners under current law, they were far from unanimous in their views as to how the problem should be tackled. It is apparent that some accountancy firms support the idea of a statutory cap on liability as an alternative to LLP status, though it is unclear whether this is their preferred solution. Some other respondents did not refer to a statutory cap on liability at all in their submissions. Some respondents referred to the removal of the ban on incorporation of statutory auditors but did not indicate whether this would be a viable alternative to LLPs.

The Review Group has in its 2007 Report (see chapter 5: Audit and Financial Issues) examined the issue of auditor liability in considerable depth. Under Section 200 of the 1963 Act statutory auditors are prohibited from exempting themselves, limiting their liability or obtaining an indemnity from the company whose financial statements are being audited. The Review Group noted that Irish auditors are significantly more exposed to the risk of "catastrophic losses" than their counterparts in other EU Member States where some form of limited liability is available. The introduction of LLP legislation was considered, and while it was recognised that such legislation would protect the assets of innocent partners, it was felt that it did not address the public policy issue of continuity of supply of audit services in the event of the collapse of one of the major accounting firms. The Review Group recommended the removal of the ban on incorporation of auditors and the introduction of a statutory cap on auditors' liability.

Regarding the likely impact of Section 44 of the Civil Law (Miscellaneous Provisions) Act 2008 which allows solicitors to limit their liability by contract, some respondents argued that attempts by solicitors to limit their liability by contract will drive their clients into the arms of other law firms which choose not to limit their liability in this way and that this will distort the market for legal services. It was also suggested that Section 44 may be found to be in conflict with consumer protection laws. In our view it would be premature to draw any conclusions about the effectiveness of legislation which has been in force only since 20th July 2008.

Both the accounting and legal professions are subject to a complex web of regulation and an issue such as limitation of liability may overlap with other regulatory issues affecting them. The Review Group feels that it is beyond its remit to give extensive consideration to the regulation of these professions and the public interest concerns which would need to be addressed in proposing any changes. The Review Group recommends that an interdepartmental working group be established for the purpose of considering whether LLPs should be introduced as a means of enabling accountants and solicitors to limit their liability. Such an interdepartmental group could include representatives of the Department of Enterprise, Trade & Employment, the Department of Justice, the Company Law Review Group and the Courts Service.

The Review Group is not convinced that a case has been made for the complete removal of the twenty-partner limit. Again, there does not appear to be a strong groundswell of opinion favouring its removal. As has been the case hitherto, the limit can be removed in the case of partnerships trading in certain business sectors where the burden of the restriction outweighs the benefits.

3.5 Recommendation

The Review Group recommends that consideration be given by the Departments of Enterprise, Trade and Employment and Justice, Equality and Law Reform to the establishment of an inter-departmental committee comprised of representatives of both Departments (including the CLRG, IAASA and the Courts Service) to consider whether accountants and solicitors should be permitted to form LLPs or, in the case of solicitors and accountants, companies (the Review Group having already recommended that auditors should be permitted to incorporate) and to consider further the appropriateness of a removal of the twenty-partner limit having regard to the Review Group's view that in the absence of a compelling justification, the limit should only be removed in the context of partnerships providing professional services.

3.6 List of Respondents to the Questionnaire

Consultative Committee of Accountancy Bodies – Ireland

DCA Accountants & Business Advisors

Deloitte & Touche

Department of Agriculture, Fisheries and Food

Dublin Solicitors' Bar Association

Ernst & Young

Grant Thornton

HLB Nathans

Horwath Bastow Charlton

Irish Dental Association

Irish Association of Investment Managers

KPMG

Law Society of Ireland

Office of the Director of Corporate Enforcement

OSK

PricewaterhouseCoopers

Revenue Commissioners

Russell Brennan Keane

Dr Michael Twomey

Veterinary Ireland

Chapter 4: Modernisation Issues

4.1 Distributions And Share Capital

4.1.1 Background

At the request of the Minister for Trade and Commerce, the Company Law Review Group considered in its previous Work Programme the issue of Distributions and Share Capital. This issue had been identified by various users of company law as a matter that could possibly affect Ireland's competitiveness since there is the possibility that transactions conducted by Irish companies may suffer a competitive disadvantage compared with those utilising UK companies. The Review Group was of the view in its 2007 Report that more analysis was needed before it could come to a conclusion and requested the Minister to extend that examination into its 2008/2009 Work Programme.

4.1.2 Introduction

The Companies Acts reinforce the common law principle that a limited company ought not make unlawful distributions to shareholders. The Heads of the proposed Companies Consolidation and Reform Bill with regard to distributions (Chapter 7 of Part A3) contain substantial reforms of the law, implementing most of the provisions proposed in the Review Group's Second Report.

However, one further aspect of the law in relation to distributions was brought to the Review Group's attention, relating to the assessment of the quantum of a potential distribution of a non-cash asset in transactions between groups of companies. It is not agreed among legal practitioners as to how the particular asset should be quantified, i.e. whether its book value or market value should be utilised.

The Irish company law rules governing distributions, are contained in Part IV of the Companies (Amendment) Act 1983 (the "**1983 Act**") which provides that a company shall not make a distribution except out of '*profits available for the purpose'*. The directors of the company making the distribution must therefore be satisfied that sufficient distributable profits (effectively, realised profits less realised losses) are available to justify the making of a distribution in individual cases for the distribution to be lawful.

A distribution is defined in the 1983 Act as "*every description of distribution of a company's assets to members of the company, whether in cash or otherwise*".

The heads of the proposed Companies Consolidation and Reform Bill (the "**Bill**") with regard to distributions (Chapter 7 of Part A3) replicate substantially the rules in Part IV and also contain substantial reforms of the law in this area. One further specific aspect of the law requires examination by the Review Group.

4.1.3 Capital Maintenance Rules

The rules governing "distributions" are one component of the capital maintenance rules.

4.1.4 Background

Capital maintenance is one of the fundamental doctrines of company law. The case of *Trevor v Whitworth*[1] is a long-standing authority for the basic principle that at common law a company may only reduce its share capital in a manner that is permitted by law and is frequently cited as the clearest elucidation of the capital maintenance principle.

> "*Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company…are entitled to assume that no part of the capital which has been paid into the coffers of the company has subsequently been paid out except in the legitimate course of its business*."

The rationale for the capital maintenance rules is that the company's creditors should be able to rely on the company's share capital to satisfy their claims on a winding-up. Jessel MR[2] summarised this rationale as follows:

> "*The creditor …gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business and he therefore has a right to say that the corporation shall keep its capital and not return it to the shareholders.*"

The capital maintenance rules do not operate to preserve the value of a company's net assets at the level initially subscribed by shareholders – rather they operate to preserve a company's share capital. However, in reality, share capital provides only an illusory protection – it is not what creditors seek to rely on for protection or to secure their debts. The reality in Irish private limited companies[3] is that the issued share capital may have a nominal value of as little as €1.00.

Although the historical rationale for the capital maintenance rules was clearly creditor protection, the rules which now come within the heading of "capital maintenance" may be considered to have other objectives. The rules restricting the payment of dividends for example could be regarded as having the objective of encouraging shareholders to remain invested in a company for the long term. One commentator has gone so far as to say that "*the brutal truth is that many of the share capital maintenance rules do not offer any real protection to creditors of limited companies but merely add to issuing and restructuring costs.*"[4]

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1. [1887] 12 App Cas 409

2. Re Exchange Banking Company (1882) 21 Ch.D.519

3. Public limited companies are required to have a minimum issued share capital of €38,092.14 by virtue of section 19 of the Companies (Amendment) Act 1983

4. *Share Capital Maintenance: Current developments and future horizons* David Milman, Sweet & Maxwell's Company Law Newsletter, 28 February 2007

4.1.5 Capital Maintenance Rules in Modern Legislation

Although the capital maintenance doctrine began by restricting share buy-backs and reduction of capital, it has given rise to a number of related rules to prevent companies from engaging in activities which could indirectly reduce the company's capital for example, the provision by a company of financial assistance to assist in the purchase of its own shares and the prohibition on a company paying dividends otherwise than out of profits.

The key company law provisions constituting the capital maintenance rules[5] are as follows:

- Prohibition on a company providing assistance in the purchase of its own shares[6];
- Restrictions on redemption and purchase by a company of its own shares[7];
- Capital reduction[8]; and
- Rules relating to distributions / payment of dividends[9].

These provisions are not contained in a discrete "capital maintenance rules" section of company legislation but are, rather, dispersed throughout the Companies Acts 1963 - 2006.

The prohibition on the purchase by a company of its own shares was introduced in section 72 of the Companies Act, 1963 (the "**1963 Act**"). This provision, together with those in the 1963 Act and the 1983 Act relating to capital reduction and those introduced in the Companies Act, 1990 relating to restriction on redemption and further rules (and exceptions) regarding the purchase by a company of its own shares, clearly relate directly to the fundamental principle of capital maintenance as set out in the original case law in this area.
Section 60 of the 1963 Act gave legislative expression to a related rule of capital maintenance – the prohibition on a company assisting in the purchase of its own shares.

5. Until the introduction of the UK Companies Act 2006 the capital maintenance rules in Ireland were broadly similar to those in the UK

6. Section 60 of the Companies Act 1963

7. Section 72 of the Companies Act 1963 and section 207 to section 211, of the Companies Act 1990

8. Section 10(6), 72(2) and 205(3) of the Companies Act 1963 and section 15 of Companies (Amendment) Act 1983

9. Part IV of the Companies (Amendment) Act 1983

Also in keeping with the basic capital maintenance principle are the rules on distributions which were introduced in the 1983 Act. The central rationale behind these rules is that a distribution can not be made from capital assets. The only assets which a company can distribute are those assets which roughly accord with the "disposable income" of an individual.[10]

This rule – ie that only available profits of a company may be paid out by a company – has been highlighted as the core of the capital maintenance rules in today's legislation.[11]

4.1.6 Issues Arising

The definition of "distribution" includes more than the declaration of dividends whether in cash or in specie by a company to its parent. The rules relating to distributions potentially also apply to other transactions many of which are common in complex group restructurings.

In *Ridge Securities Limited v IRC*[12], ("**Ridge**") it was held that:

> *"a company can only lawfully deal with its assets in furtherance of its objects. The Corporators may take assets out of the company by way of dividend, or with leave of the Court, by way of reduction of capital, or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described."*

Ridge was followed by *Aveling Barford v Perion*[13] ("**Aveling Barford**") which established that an intra-group transfer (to a parent or sister company) of assets at an undervalue in circumstances where the transferor does not have any distributable profits is an unlawful distribution.

The case looked at whether a company can transfer an asset at a known undervalue and specifically looked at a transfer of property between two companies in the same group at a value which was described by the judge as a "*gross undervalue*". The transferor had a negative balance on the company's profit and loss account both before and after the transfer. The transferee subsequently sold the assets at a large profit. The transferor then went into liquidation and the transferor's liquidator sued the transferee.

The court found that:

10. The Law of Private Companies, 2nd Edition, Courtney, p. 1083

11. *Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law?* ESRC Centre for Business Research, University of Cambridge, December 1999

12. (1964) 1 All ER 275

13. [1989] BCLC 626

- the directors of the transferor had transferred the assets in breach of their fiduciary duties;
- as the transferee knew of this breach the asset was held by the transferee as constructive trustee; and
- the breach was not ratifiable as the transfer constituted an unlawful return of capital.

Hoffmann J further held that:

> *"the Company had at the time no distributable reserves and the sale was therefore ultra vires and incapable of validation by the approval or ratification of the shareholder…It was the fact that it was known and intended to be a sale at an undervalue which made it an unlawful distribution".*

Following *Aveling Barford*, it was considered by some that an intra-group sale of an asset may constitute a distribution for the purposes of section 263 of the UK Companies Act 1985 (and, in Ireland, for the purposes of Part IV of the 1983 Act) if the asset concerned is sold for an amount equal to its book value, where this is less than its market value, even where the company has distributable reserves.

This cast doubt on the validity of intra-group asset transfers conducted by reference to book rather than market value. Such transactions are often carried out by reference to book value rather than to market value as it can be more straightforward from a business, administrative and/or tax perspective. The doubt created by *Aveling Barford* has resulted in such transactions being carried out in a more complicated way or in some instances not being carried out at all.

Unless sufficient distributable profits are available to justify any deemed "distribution", the transaction may constitute an unlawful distribution in the same way as if the transaction was effected by a subsidiary in favour of its parent company. A frequent difficulty arising in analysing such transactions is ascertaining the value of the asset being transferred, particularly when there is a discrepancy between the book value and the market value of the relevant asset.

4.1.7 Book Value Versus Market Value

Irish law as currently reflected in the 1983 Act, and as proposed in the Heads of the Companies Consolidation and Reform Bill, does not address the issue as to how a disposition of a non-cash asset should be quantified.

4.1.8 Market Value

The strongest argument in support of the view that intra-group transfers of assets should take place at market value is that by transferring an asset at book value to a member where the market value is higher, a company is gratuitously transferring to that member the additional value inherent in the asset (which in the company's hands is an unrealised profit). As such, the transaction involves a distribution of unrealised profits, in breach of section 49 of the 1983 Act.

This view is often stated to be consistent with or based on the decision in *Aveling Barford*. Interestingly, in *Aveling Barford*, (which was decided by reference to common law rules on distributions and maintenance of capital rather than the statutory rules) the transferring company did not have any profits available for distribution.[14] This argument asserts that reference must be made to the market value rather than to the book value since the market value represents the true amount of the distribution being made.

Proponents of the market value test are particularly concerned about the protection of creditors and argue that a book value test would facilitate a company in dissipating its assets to the detriment of creditors or (depending on the structure of the transaction) minority shareholders.

4.1.9 Book Value

The opposing view is essentially that the introduction of a provision similar to Section 845 of the UK Companies Act 2006 (see paragraph 5.1 below) would be simply declaratory of the Irish position which has never been tested in the courts. The argument is that a book value test is the only test which is consistent with the whole thrust of the rules regarding distributions in Part IV of the 1983 Act, as Section 49(1) of the 1983 Act provides that the question of whether a distribution can be made without contravening section 45 and, if so, the amount of any such distribution, "*shall be determined by reference to the relevant items as stated in the relevant accounts*". The "*relevant accounts*" means the audited consolidated financial statements, provided that they have been "*properly prepared*". The "*relevant items*" are defined as "*profits, losses, assets, liabilities, provisions…share capital and reserves*".

The argument goes that a transfer of assets at or above book value does not constitute a distribution as the transaction would be balance-sheet neutral (provided that the company has, at the relevant date, positive distributable reserves).

There is no requirement in law or in accounting standards to revalue assets at market value in order to give a true and fair view of a company's assets and liabilities. The principal reason for the preparation of audited accounts is to enable the members and creditors to receive assurances as to the financial state of a company.

4.1.10 Creditor Protection Issues

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14. Hoffman J in *Aveling Barford* concentrated on the market value of the relevant asset and did not examine the book value of the asset. The main decisions relied on by Hoffman were *Ridge* and *Re Halt Garages* (both involved a comparison of the market value of the asset or benefit which had been transferred with the actual value at which it had been transferred). Neither referred to the concept of book value

The principal concern in relation to the introduction of a book value test relates to creditor protection. It is worth noting however, that even if a book value test were introduced a transaction which might otherwise constitute a distribution will still be subject to analysis pursuant to the common law rules on unlawful return of capital. Broadly, this rule prevents a company passing assets to shareholders except where to do so would leave the company with assets whose value equals or exceeds the aggregate of its liabilities (including current liabilities) and its share capital and undistributable reserves. Put another way, the rule requires that the value of a transferor's net assets must equal or exceed its share capital and undistributable reserves after the transfer. The legal consequences of an unlawful return of capital are severe. The transfer would be ultra vires and void and could not be validated by shareholder approval or ratification.

It is also worth noting that if a book value test were adopted, it would be conditional on any transaction being analysed under the "Distribution" head, only being permitted to avail of the book value test if the relevant company has positive distributable reserves. Creditor protection concerns will be less acute in respect of a company which has positive distributable reserves than in respect of a company in a distressed financial situation.

4.1.11 What if Market Value is less than Book Value

It is consistent with the arguments in support of the book value test, that if the market value of an asset is less than the book value, the disposition of that asset to a shareholder (for example) at less than book value would constitute a distribution. The creditor protection arguments would also support that analysis as, if the creditors are relying on the accounts of a company to assess its creditworthiness, then in the absence of any accounting treatment which would permit the company to depreciate the value of the relevant asset, it would be detrimental to the creditors to permit the company to dispose of the asset to a shareholder at less than its book value, unless the company had sufficient distributable reserves to make up the difference.

4.1.12 Quantification Of Potential "Distributions" In Other Jurisdictions

How is the potential distribution of an asset treated in other jurisdictions?

4.1.13 United Kingdom

The question has long been a matter of debate in the UK, particularly since the decision in *Aveling Barford*. The issue was examined by the UK Company Law Review ("**UK CLR**") in its June 2000 review of "Modern Company Law for a Competitive Economy". The UK CLR noted that the *Aveling Barford* decision did not decide anything about the situation where a company has positive distributable reserves, but noted that there was a body of opinion, prompted by the decision, that an intra-group sale of an asset may constitute a distribution for the purposes of section 263 of the UK Companies Act 1985 if the asset concerned is sold for an amount equal to its book value, where this is less than its market value, even where the company has distributable reserves. It noted:

> *"The result of Aveling Barford and the debate it has engendered have cast doubt on the validity of intra-group asset transfers conducted by reference to book value rather than by reference to market value. It is understood that such transactions are often carried out by reference to book value rather than to market value for a variety of business, administrative or tax reasons. Because of this doubt such transactions are therefore commonly carried out in a more complicated way (often involving revaluation of the asset concerned and then its sale/distribution, relying on section 276, which provides that a distribution in kind of an asset carrying an unrealised profit is to be treated as a realisation of the profit) or do not proceed at all."*

The UK CLR put forward proposals to clarify the uncertainty and doubt. The UK Government White Paper of March 2005 agreed that *Aveling Barford* (which was decided by reference to common law rules on distributions and maintenance of capital rather than the statutory rules) was widely considered to have cast doubt on the validity of intra-group asset transfers conducted by reference to book value rather than by reference to market value. It proposed an amendment to the UK statutory rules to *"make clear that where the transferring company has distributable profits, its assets can be transferred at book value. This will remove any uncertainty about the current law, and also avoid the need for companies to carry out complex asset revaluations requiring significant professional advice and fees to advisors."*
That proposal was duly adopted and Section 845 of the UK Companies Act 2006 ("**Section 845**") provides:

*"**845 Distributions in Kind: Determination of Amount***

1. *This section applies for determining the amount of a distribution consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company of a non-cash asset where:*

    (b) at the time of the distribution the company has profits available for distribution, and

    (c) if the amount of the distribution were to be determined in accordance with this section, the company could make the distribution without contravening this Part.

2. *The amount of the distribution (or the relevant part of it) is taken to be:*

    (b) in a case where the amount or value of the consideration for the disposition is not less than the book value of the asset, zero;

    (c) in any other case, the amount by which the book value of the asset exceeds the amount or value of any consideration for the disposition.

3. *For the purposes of sub-section (1)(a) the company's profits available for distribution are treated as increased by the amount (if any) by which the amount or value of any consideration for the disposition exceeds the book value of the asset.*

4. *In this section "book value", in relation to an asset, means:*

   (b) *the amount at which the asset is stated in the relevant account, or*

   (c) *where the asset is not stated in those accounts at any amount, zero.*

5. *The provisions of Chapter 2 (justification of distribution by reference to accounts) have effect subject to this section."*

4.1.14 New Zealand

The relevant legislation on distributions in New Zealand is the Companies Act 1993 (the "**NZ Act**").

Section 52(1) provides that if the board of a company is satisfied on reasonable grounds that the company will immediately after the distribution, satisfy the solvency test (defined in section 4 of the NZ Act) it may authorise a distribution by the company at a time and of an amount and to any shareholders it sees fit. The directors must sign a certificate stating that, in their opinion the company will, immediately after the distribution, satisfy the solvency test.

In considering whether the company will satisfy the solvency test (i.e. will be in a position to pay its debts as they fall due (cash-flow test) and the value of its assets exceed its liabilities (balance-sheet test) regard must be had to the company's most recent financial statements and all other circumstances which the directors knew or ought to have known that affect, or might affect the value of the company's assets and liabilities.

Distribution is broadly defined to include:

- The direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder; or

- The incurring of a debt to or for the benefit of the shareholder — in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means.

4.1.15 Australia

Section 254T of the Corporations Act 2001 (the "**Corporations Act**") provides that a company can only pay dividends out of profits. Section 254U of the Corporations Act provides that the directors of a company may determine that a dividend is payable and fix the amount, time and method of payment. Methods of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets.

The issue is currently under review in Australia. The Australian Accounting Standards Board ("**AASB**") has called for reform of the rules relating to payment of dividends, either by restating the capital maintenance principle in modern terms as in the UK, or by adopting a solvency test as in New Zealand. The Australian Legislation Review Board also recommended[15] the adoption of a solvency test for payment of dividends rather than the existing "profits" and solvency formulation. However, this recommendation has not to date been implemented.

4.1.16 Canada

The relevant legislation on distributions in Canada is the Canada Business Corporations Act (the "**Canadian Act**") which provides that a company may not declare or pay a dividend if there are reasonable grounds for believing that:

- the company is, or would after the payment be, unable to pay its liabilities as they become due; or

- the realisable value of the company's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

Under section 43 of the Canadian Act, a company may pay a dividend by issuing fully paid shares of the company and may pay a dividend in money or in property.

4.1.17 Isle of Man

The relevant legislation on distributions in the Isle of Man is the Companies Act 2006. The approach taken is broadly similar to that taken in the NZ Act. Directors of a company are permitted to authorise a distribution by the company to its members at such time and of such amount as they think fit if they are satisfied, on reasonable grounds, that the company will, immediately after the distribution, satisfy the solvency test.

A distribution is defined as a transfer of any company asset to any member or the incurring of a debt by the company to or for the benefit of any member, which includes the payment of dividends, the redemption of shares or a purchase of own shares.

15. "*Payment of dividends under the Corporations Act 2001*" (December 2002 discussion paper)

A company satisfies the “solvency test” if:

- it is able to pay its debts as they become due in the normal course of its business; and
- the value of its assets exceeds the value of its liabilities.

If a company can pass the solvency test immediately after a distribution has been made, then the directors can make a distribution without the need for a formal members’ resolution, unless a company’s memorandum of association or articles of association specifically provide otherwise.

Should a company not pass the solvency test immediately after a distribution has been made to a member, such a distribution may be recovered from the member provided certain conditions are met. If the member received the distribution other than in good faith and the member’s position has not been altered by relying on the distribution and it would not prejudice the member to recover the payment in full, then such distribution shall be recoverable.

When a director fails to take reasonable steps to ensure that the company can satisfy the solvency test prior to making a distribution, such director shall be personally liable to the company for any such distribution that cannot be recovered from the members.

If a court considers that a company would have satisfied the solvency test by making a lesser distribution, then the court can authorise such lesser distribution or relieve the director of the personal liability equivalent to such lesser distribution.

Consequences Of Making An Unlawful Distribution

4.1.18 Repayment or Return of Asset

Section 50 of the 1983 Companies Act provides that a shareholder who receives a distribution in circumstances where he knows or should reasonably know that the distribution is unlawful is obliged to repay such distribution to the company. In the case of a distribution in specie, the recipient of the dividend will be obliged to repay to the company a sum equal to the value of the distribution. It is proposed that this Section will be re-enacted, without amendment, in Head 52, Part A3 of the General Scheme of the Companies Consolidation and Reform Bill.

4.1.19 Constructive Trustee

Liability to repay a distribution as a constructive trustee may also arise at common law where (i) the recipient has knowledge of the facts or (ii) where the monies are traceable. There is UK case law to indicate that common directorships between transferring companies could be sufficient for this knowledge test for the purpose of imparting the transferring company’s knowledge to the recipient company.

4.1.20 Directors' Liability

In the event that an unlawful distribution is made by a company, in the absence of shareholder ratification of the breach of their duty[16], the directors may also be liable for breach of fiduciary duty on the basis that they will have misapplied the company's funds and/or assets. If the company is insolvent, or becomes so as a result of the transaction, ratification may not help the directors as at that stage their primary duty is to consider creditors' interests.

A director must be conscious of his obligation to act in the best interests of the company of which he is a director. There must therefore be a legitimate reason for the transfer from the perspective of the transferor company – it should not be motivated by an intention to make a distribution. Each company in a group must be treated as a separate legal entity and the directors of a particular company are not entitled to sacrifice the interests of that company for those of another group company[17].

Furthermore, there is UK case law to support the proposition that directors of a company who cause a company to effect a distribution contrary to statute are accountable to the company for such unlawful payment.[18]

4.1.21 Section 139 of the Companies Act 1990

In situations where the company is insolvent, section 139 of the 1963 Act ("**Section 139**") may be of particular relevance. Section 139 provides that:

1. *"Where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that:*

    a) *any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and*

    b) *the effect of such disposal was to perpetrate a fraud on the company, its creditors or members,*

    the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit.

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16. Shareholder ratification would only be effective in relation to the directors' breach. If the transaction involves an unlawful return of capital or an unlawful distribution it will be ultra vires the company itself and the shareholders will be unable to ratify it.

17. This principle was established in the case of Charterbridge Corporation v Lloyds Bank Limited [1970] Ch 62

18. Bairstow v Queen's Moat Houses plc [2000] 1 BCLC 549

2. *Subsection (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which Section 286(1) of the Principal Act[19] applies.*

3. *In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application."*

In order to set aside a disposition of assets pursuant to Section 139, the liquidator does not have to prove that the company intended to defraud its creditors. Rather he has the lower evidential burden of merely establishing that the effect of the disposition has been to defraud the creditors. This section was recently considered in the case of *Le Chatelaine Thudicum Ltd (in voluntary liquidation) v Conway.*[20] Murphy J. noted that it is apparent from the terms of this provision that, before it can make an order under Section 139, the court must be satisfied that all three of the following criteria are met:

- there was a disposition;
- of company property; and
- the effect of the disposition was to perpetrate a fraud either on the company, its creditors or its members.

He also observed that the section is drafted in very broad terms so as to encompass almost any kind of transaction.

Although Section 139 has not to date been relied upon to effect the return of an asset which was unlawfully distributed, it is submitted that this is precisely the type of situation in which Section 139 might be invoked.

Related Provisions – General Scheme of the Companies Consolidation & Reform Bill

4.1.22 Share for Undertaking Transactions

Head 24, Part A3 of the General Scheme of the Companies Consolidation & Reform Bill (the General Scheme) (Variation of company capital on reorganisations) is new and provides as follows:

1. *"Subject to Subhead (2) a company may dispose of an asset, an undertaking or part of an undertaking or a combination of assets and liabilities to a body corporate, on terms that the consideration*

19. Fraudulent preference provisions

20. [2008] IEHC 349

therefore, being shares or other securities of such body corporate, are allotted to the members of the company or of its holding company rather than to the company (and whether with or without the payment of any cash to such members or the company).

2. *A transaction to which Subhead (1) applies must be:*

   (a) approved by the company by the validation procedure; or

   (b) by special resolution confirmed by the court under Head 18 of this Part.

4. *The company capital shall be deemed reduced by the book value of the disposed asset, undertaking or part of an undertaking as aforesaid.*

5. *The transaction shall take effect upon delivery for registration of particulars of the validation procedure or the confirmed special resolution in the prescribed form to the Registrar.*

6. *Any transaction in breach of this head shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had actual or imputed notice of the facts which constitute such breach."*

The explanatory note to this Head provides: *"This head is new. The head implements Recommendation 7.11.9 of the Second Report of the CLRG and enables the company to vary its capital on re-organisation. The head permits a company to enter into a transaction to dispose of assets, undertakings or liabilities, or a combination thereof, to a body corporate in return for shares or securities being allotted to the members of the company as consideration. Such transactions are only given effect following the approval by the company under the validation procedure in Part A4 or by special resolution passed, confirmed by the court."*

The facility introduced by this head is a form of distribution and the amount of the distribution is assessed by reference to the book value of the asset being transferred.

4.1.23 Revaluation of Assets

Head 53(6) of Part 3 of the General Scheme is a new provision which is not in the 1983 Act. It is based on section 276 of the UK Companies Act 1985 and provides that where a company makes a distribution of a non-cash asset, an unrealised profit thereon can in effect be treated as realised profit for the purpose of determining the lawfulness of the distribution.

If a provision similar to section 845 is not included in the General Scheme, there will be an inconsistency with this provision, which will be relatively easily (albeit expensively) circumvented in situations where a company with limited distributable reserves wishing to transfer an asset at book value to a related company could have the property re-valued, and the uplift in value treated as realised instantaneously at the moment of the distribution, and thus used legitimately by being taken into account for determining whether there is sufficient “cover” within the distributable reserves for the transaction.

4.1.24 Recommendation

In many transactions with an international scope, there was, until the commencement of Section 845 of the UK Companies Act 2006 a level of understanding of the Irish position on this issue given that it was so closely aligned with that pertaining in the UK (albeit there is currently no statutory equivalent to section 276 of the UK Companies Act 1985). However, there is now no doubt that transactions conducted by Irish companies suffer a significant competitive disadvantage compared to those utilising UK companies.

The arguments in support of an amendment to the statutory rules put forward by the UK CLR in 2000 are equally applicable in Ireland today. The Review Group accepts that:

- there is currently a lacuna in the law relating to distributions which must be addressed – essentially the decision to be made is whether a book value test or market value test is appropriate in the circumstances;

- the rules in relation to distributions currently reflected in Part IV of the 1983 Act are determined by reference to the books of account of the relevant company. It is a logical extension of these rules to provide that a book value test should also be applied to the evaluation valuation of transactions involving non-cash assets between companies and their shareholders. Conversely if a market value test were provided for, this aspect of the rules governing distributions would be inconsistent with all other aspects of those rules currently contained in Part IV of the 1983 Act;

- the introduction of a book value test in relation to these types of transactions would be consistent with the previous recommendations of the Group and reflected in the General Scheme, mentioned in paragraph 4.1.22 above; and

- the strongest argument militating against a book value test, that of creditor protection, will be addressed if a book value valuation of non-cash assets is applicable only in circumstances where the relevant company has positive distributable reserves.

The Review Group recommends the introduction of a provision into Irish law equivalent to Section 845 of the UK Companies Act 2006.

4.2 Extension of the audit exemption regime to small companies limited by guarantee

4.2.1 Introduction

Public companies limited by guarantee (CLGs) must in all circumstances have their accounts audited and they cannot avail of the audit exemption for private companies which satisfy certain conditions.

4.2.2 Companies Limited by Guarantee

The CLG is a type of company used primarily as a vehicle for non-profit organisations that require legal personality and facilitate structured governance, such as charities, residential management companies, sports clubs, trade associations and community or special interest groups. Although private companies limited by guarantee must have a share capital, since the enactment of the Companies (Amendment) Act 1983, a CLG cannot have a share capital or shareholders, but instead has members who act will act as guarantors. Every member gives an undertaking in the memorandum of association to contribute a specified amount (usually not more than €1.00) to the assets of the CLG in the event of it being wound up.

As one commentator has observed[21]—

> *"A company limited by guarantee is a suitable vehicle for a wide range of activities. Charities which are to have a corporate form must be companies limited by guarantee and must prevent the distribution of profit to their members, as must registered social landlords or housing associations.[22] Companies limited by guarantee are also frequently used for the not-for-profit promotion of education, commerce, art, science or sport, or for promoting the interests of a particular section of society or a particular policy. They may also be used for managing semi-governmental and regulatory functions, including where a former governmental or local authority function has been privatised.[23]*
>
> *A substantial number of companies limited by guarantee are property management companies, set up to manage blocks of flats or estate developments. Mutual assurance companies may be formed as companies limited by guarantee, as may both members' clubs and*

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[21] West, *Companies Limited by Guarantee* (Second Edition, Jordan Publishing Limited, 2004) at section 1.1.

[22] A CRO Search discloses more than 300 companies, most of them guarantee companies, that include the words "Housing Association" in their name.

[23] Examples of such companies in the Irish context would include (i) The Irish Auditing and Accounting Supervisory Authority (which is a company limited by guarantee, under Section 5 of the 2003 Act); (ii) The Investor Compensation Company Limited, established under Section 10 of the Investor Compensation Act 1998; (iii) The Irish Takeover Panel, established under Section 3 of the Irish Takeover Panel Act 1997; and (iv) County Enterprise Boards, established under Section 10 of the Industrial Development Act 1995.

proprietary clubs, the latter being a type of club where the owner of a business forms a club for its customers. Finally, clubs of traders and other companies may form themselves into a trade association with corporate form."[24]

While many companies limited by guarantee operate with comparatively small turnover or assets, some are very considerable in scale.[25]

4.2.3 The Audit Requirement

The basic position in Irish law is that every company must appoint an auditor[26] and have its annual accounts audited[27]. A statutory auditor performs an audit in accordance with International Standards on Auditing (ISA) (UK and Ireland) as issued by the Auditing Practices Board (APB). The auditors must make a report to the members on the accounts examined by them and on every balance sheet and profit and loss account laid before the company in general meeting during their tenure of office. The auditors' report must state whether the annual accounts give a true and fair view in accordance with the relevant financial reporting framework of the state of affairs of the company as at the end of the financial year and of the profits or loss of the company for the financial year.

4.2.4 Audit Exemption

Private companies which satisfy certain conditions can be exempted from the requirement to have an auditor and to have their annual accounts audited.[28] To avail of the exemption, the directors of the company must form the opinion that in respect of both the financial year in question and the immediately preceding financial year, the company satisfies the following conditions:-

(i) the company is a company to which the 1986 Act applies,
(ii) the amount of the turnover of the company does not exceed €7.3 million,
(iii) the balance sheet total of the company does not exceed €3.65 million,
(iv) the average number of persons employed by the company does not exceed 50,
(v) the company is not a parent undertaking or a subsidiary undertaking, and
(vi) the company is not a licensed bank, an insurance undertaking or a financial services company of the kind referred to in the Second Schedule of the 1999 (No2) Act. A company is not entitled to the

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[24] A CRO Search discloses companies limited by guarantee such as The Irish Association of Pension Funds (CRO 94448) and the Irish Association of Investment Managers (CRO 193905).

[25] For example the accounts as filed in the CRO of a company limited by guarantee which operates in the healthcare sector, indicate that its income in the year ending 31 December 2008 was in excess of €203m.

[26] Section 160(1) of the 1963 Act.

[27] Section 193(1) of the 1990 Act. See also Sections 157 and 159 of the 1963 Act.

[28] The audit exemption regime was introduced in Part III of the 1999 (No. 2) Act.

exemption in a financial year unless the company is up-to-date in the filing of its annual returns with the CRO.[29]

The audit exemption regime is subject to an important safeguard. Members holding shares in the company that confer not less than one tenth of the total voting rights in the company may serve a notice in writing on the company stating they do not wish the exemption to be available to the company in the financial year in question.[30]

CLGs cannot avail of audit exemption because they are not private companies. Moreover, in the Companies Consolidation and Reform Bill, private companies limited by guarantee will fall within the designated activity company category (DAC) and as such will be able to avail of the audit exemption subject to compliance with the relevant requirements and obligations.

Many CLGs are also excluded from the audit exemption regime in another way, as they fail to satisfy the condition that they must be companies to which the 1986 Act applies. Any company which is not "trading for the acquisition of gain by [its] members"[31] falls outside the scope of the 1986 Act.[32]

4.2.5 UK Legislation

In the UK, companies, including CLGs, which qualify as small companies can in general avail of audit exemption.[33] The legislation excludes from audit exemption public companies, certain financial services companies and certain trade unions and representative associations.[34] Non-profit-making companies whose accounts are subject to public sector audit rules are also excluded.[35] Companies limited by guarantee and not having a share capital are not considered to be public companies in the UK[36] and are not *per se* excluded from the right to avail of audit exemption.

The members of a company which would otherwise be entitled to audit exemption may, by notice, require it to obtain an audit of its accounts for a financial year. The notice must be given by (a) members representing not less than 10% in nominal value of the company's issued share capital, or any class of it, or (b) if the company does

[29] Section 32(1) and (3) of the 1999 (No. 2) Act.

[30] Section 33(1) of the 1999 (No. 2) Act as substituted by Section 9(1)(d)(i) of the 2006 Act.

[31] Section 2(1) of the 1986 Act.

[32] The ODCE at page 156 of its Company Law Handbook on Residential Property Owners' Management Companies (2008) expresses the view that property management companies probably come within the scope of the 1986 Act having regard to the meaning of "gain" as found by the Supreme Court in Deane v. Voluntary Health Insurance Board [1992] 2 I.R. 319 – where the term was held not be synonymous with commercial profits.

[33] Section 477 of the Companies Act 2006.

[34] Section 478 of the Companies Act 2006.

[35] Section 482 of the Companies Act 2006.

[36] They do not come within the definition of "public company" in Section 4(2) of the Companies Act 2006.

not have a share capital, not less than 10% in number of the members of the company.[37] This is slightly different from the 10% threshold in our 1999 (No. 2) Act which refers to members holding one tenth of the voting rights in the company.

4.2.6 The case for extending audit exemption to CLGs

More than ever, in a difficult economic environment, it is important that the regulatory burden does not fall disproportionately. It is argued that CLGs which meet the statutory exemption criteria should be allowed to opt out of audit unless an audit is specifically requested by their members, in the same way as a company limited by shares.

External audit is only one possible way of providing external assurance in relation to the financial information of companies. Alternative forms of assurance carried out in accordance with formal internationally accepted norms may be provided by auditors (or external accountants) and, while not being a full statutory audit in accordance with ISAs (UK and Ireland), may fulfil the needs of company members and the public interest. Such assurance/external reporting options include:

- a "review engagement" carried out in accordance with International Standard on Review Engagements 2400 (ISRE 2400) issued by the IAASB (International Auditing and Assurance Standards Board). The objective of such an assignment is to enable the auditor (or external accountant) to state whether, based on certain procedures carried out, anything has come to his attention that causes him to believe that the financial statements are not prepared, in all material respects, in accordance with an identified financial reporting framework, for example Financial Reporting Standards issued by the Accounting Standards Board and promulgated for application in Ireland by the Institute of Chartered Accountants in Ireland.

- an "assurance engagement" carried out in accordance with International Standards on Assurance Engagement (ISAEs) issued by the IAASB. ISAEs establish basic principles and essential procedures for, and provide guidance to, accountants for the performance of assurance engagements other than audits or reviews of historical financial information. The level of assurance to be provided is agreed prior to the commencement of the engagement.

- an "agreed-upon-procedures" engagement carried out in accordance with International Standards on Related Services (ISRSs) issued by the IAASB. According to ISRS 4400

"The objective of an agreed-upon-procedures engagement is for the auditor to carry out procedures of an audit nature to which the auditor and the entity and any appropriate third party have agreed and to report factual findings. As the auditor simply provides a report of factual findings no assurance is expressed. Instead, users of the report assess for themselves the procedures and findings reported by the auditor and draw their own conclusions from the auditor's work. The report is restricted to parties that have agreed to the procedures to be

[37] Section 476 of the Companies Act 2006.

performed since others, unaware of the reasons for the procedures, may misinterpret the results."

An engagement to perform agreed-upon-procedures may involve the auditor in performing certain procedures concerning individual items of financial data, a financial statement such as a balance sheet or even a complete set of financial statements. For example in the case of a property management company , members could engage an auditor to carry out an agreed-upon-procedures engagement in relation to the expenses incurred by the management company on their behalf or in relation to the calculation by the management company of the management charge to be paid by members. Such an engagement may more directly address the concerns of the members of the property management company than a full statutory audit. Indeed it is already common in practice for the statutory auditor of a property management company to be separately engaged as reporting accountant in relation to service charge calculations. The Institute of Chartered Accountants In England and Wales has published a technical release[38] dealing specifically with accountant's reports on service charge accounts which forms a useful basis for agreed-upon-procedures engagements in relation to property management company service charges.

It can be argued that the above options can provide a cost-efficient alternative to the statutory audit which meets the key needs of members. To extend the possibility of audit exemption to public companies limited by guarantee would provide the necessary flexibility for members to choose whether a statutory audit or some other form of external assurance is appropriate to their information needs.

While it may be argued that audited financial statements are necessary for the benefit of third parties and that therefore there is little merit in extending audit exemption, it should be noted that the auditor's report on financial statements is addressed to the members of the company only and is not intended to be for the benefit of third parties such as bankers or donors. In general interested third parties can seek access to financial data from the company to inform their decisions. For example bankers can request detailed information from a company in relation to loan covenants when they require it.

4.2.7 The case against extending audit exemption to CLGs

Audit exemption when introduced in 1999 was aimed at relieving the small business owner from the onus of obtaining an audit which provides reassurance to the shareholders that the directors are presenting a faithful record of the company's financial performance and position. In most small companies the shareholders and directors are one and the same. In effect audit exemption removed for very small companies a self-reporting requirement on issues that had very little if any wider impact in an environment where most other interested parties - for example, banks - had their own powers and sources of relevant financial information in any event.

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[38] Technical Release 03/07 "The Accountant's Report on Service Charge Accounts Prepared in Accordance with Regulations Made Under the Common hold and Leasehold Reform Act 2002" published by the Institute of Chartered Accountants in England and Wales.

Audit exemption has always been restricted to non-public companies, and those who oppose extending the audit exemption regime maintain that this is justified as members of public companies need the independent professional opinion of an auditor to protect them in what would otherwise be a relatively weak position vis-à-vis the directors.

It has been suggested that the classification of CLGs as public companies represents something of an anomaly. Most CLGs are very small, and would comfortably meet the financial conditions applicable to private companies in terms of qualifying for audit exemption. However this argument overlooks some important features of CLGs.

In practice these entities have become the main legal structure supporting a plethora of “not-for-profit”, voluntary, community and other enterprises. Typically these include local community development enterprises, community support activities (funded crèches, community halls, small business supports, etc.), charitable organisations, sports clubs, as well as more recently a large number of residential property management companies.

Those who express reservations to permitting CLGs avail of audit exemption do so on the grounds that the directors of some CLGs will not have much experience in managing companies and the members are often unclear as to the role of members in holding directors to account. Many CLGs manage relatively large budgets at the upper end of the current audit exemption threshold for private companies. The funding for CLGs can come from EU or State agencies, which tend in practice to require an audit report, thus overriding any exemption which might be available in law, but money can also come from community drives and voluntary sources, with an enhanced need for transparency and accountability.

Such companies may also have a much wider membership (not in the legal sense of that term), made up of individuals who have an interest in and in many cases may have contributed, in cash or through their own labour, to the operation of the company. This wider involvement and interest means that persons who may have no company law rights may in practice have a considerable interest in the performance of the directors in running the enterprise.

These factors can support the need for CLGs to obtain an independent professional opinion as to the whether the accounts give a true and fair view of the activities and state of affairs of the company. The audit plays an enhanced role in organisations where funding is disparate, where those charged with governance may not necessarily possess the particular skill sets which are needed to ensure that funds are utilised in a responsible manner, where the responsibility of the board may be in practice to a much wider constituency than just the members of the company, and where the impact of any accounting failure by the company can be felt not just by the members but also through the wider community.

4.2.8 The Review Group’s opinion

The Review Group is mindful that the widening of the audit exemption should not be undertaken if it might lead to lower standards of accountability, accuracy and transparency in the preparation of annual accounts or create a public perception that lower standards are permissible. The Review Group believes, however, that any such concerns can be addressed in a proportionate and measured exemption. Firstly, it should be noted that the Review Group did not consider any changes to the financial reporting framework (formats and accounting standards as prescribed by the Companies Acts) for CLGs. Secondly, the Review Group is of the view that there are many cases where the burden, in terms of cost and management time, of complying with audit requirements for small CLGs outweighs any benefit in terms of protecting the public interest, if that interest is indeed intended to be protected or is in fact protected by the Companies Acts requirement that CLGs be audited. Thirdly, the Review Group believes that the turnover and balance sheet thresholds applicable in the case of private limited company companies (€7.3 million and €3.65 million respectively) should be applicable, but additional safeguards are necessary in order to protect members' rights to seek an audit where they believe it is warranted. Finally, the Review Group is persuaded that alternative forms of external assurance may be suitable in given circumstances[39] and that people who require the assurance of an independent audit (e.g. State bodies or banks who deal with CLGS) may continue to require an audit as a term of engaging with a particular CLG.

The Review Group feels there is merit in extending the audit exemption regime to CLGs and in applying it on a similar basis to private companies, so that the Minister would fix the exemption threshold below which CLGs can avail of the exemption. The effect of this would be that if the directors of the CLG are of the opinion that the company will satisfy the numerical conditions which relate to turnover, balance sheet total and number of persons employed in the relevant financial year, and provided also that the numerical conditions are satisfied in the preceding financial year, then the requirement to have the audited accounts of the company audited will not apply in the relevant financial year. However, any one member who has the right to vote at general meetings of the CLG may veto the proposal to avail of the audit exemption.

For reasons which are explained below, charities should be subject to slightly different audit exemption rules.

4.2.9 Charities which are CLGs

CLGs which are formed for charitable purposes are now subject to the provisions of the Charities Act 2009. Part 3 of that Act deals with the regulation of charitable organisations. The legislation provides that the accounts of a charitable organisation shall be audited if the gross income or total expenditure of the charitable organisation in the relevant financial year or either of the two financial years preceding it exceeds such amount as may be prescribed by order of the Minister for Community, Equality and Gaeltacht Affairs. However, these provisions do not apply to charitable organisations that are companies to which the Companies Acts apply. The Charities Act 2009 does not regulate the auditing of companies that are charitable organisations nor give them any right to apply for audit exemption. Subject to consultation between the Department if Enterprise, Trade and Employment with the Department of

[39] The ODCE at page 164 of its Company Law Handbook on Residential Property Owners' Management Companies (2008) supports the view that management companies might find other forms of external reporting suitable for their needs.

Community, Equality and Gaeltacht Affairs and the charities regulator, the Review Group recommends that the audit exemption regime contained in Part III of the 1999 (No. 2) Act be extended to such class or classes of CLG which are charitable organisations (within the meaning of the Charities Act 2009) to the maximum extent to which a charitable organisation that is not a company may elect not have its financial statements audited. If 10% of the members who have voting rights decide that an audit should be conducted, they should be able to require the directors of the CLG to have the CLG's financial statements audited notwithstanding that it would otherwise be eligible to exemption.

4.2.10 CLGs formed for other purposes

As noted above, we propose that the audit exemption provisions in Part III of the 1999 (No. 2) Act should be extended to CLGs. The effect of this would be that if the directors of the CLG are of the opinion that the company will satisfy the numerical conditions which relate to turnover, balance sheet total and number of persons employed in the relevant financial year, and provided also that the numerical conditions are satisfied in the preceding financial year, then the requirement to have the audited accounts of the company audited will not apply in the relevant financial year. However, any one member of the CLG with voting rights should have the right to veto the proposal to avail of the audit exemption.

The Review Group considered that it was not appropriate to making specific recommendations in the case of CLGs used as management companies in apartment developments because such related to the activities that particular company types engage in whereas the Review Group is concerned with the law relating to the entity that is the company. The Review Group has no expertise in relation to the regulation of property management companies.

The Review Group recommend as an additional safeguard that a proposal to avail of audit exemption, in respect of the next ensuing financial year of the CLG, shall be a standing item on the agenda at each annual general meeting.

The Review Group considered making it a criminal offence where directors refused to act on foot of a member's veto but considered this unnecessary since in such circumstances, the right to audit exemption falls away and in such a company the failure to file an auditors' report with the company's financials would in itself be an offence.

4.2.11 Conclusions and Recommendations

In summary, the Review Group recommends that:-

(i) Subject in each case to consultation with the Minister for Community, Rural and Gaeltacht Affairs and the charities regulator, the audit exemption regime contained in Part III of the 1999 (No. 2) Act be extended to such class or classes of CLG which are charitable organisations (within the meaning of the Charities Act 2009) so as to bring them into alignment with charitable organisation organisations that are not companies provided that 10% of the members with voting rights should be able to require an audit.

(ii) The audit exemption regime contained in Part III of the 1999 (No. 2) Act be extended to all CLGs which are not charitable organisations, subject to a veto right, any one member of the company, and further subject to the requirement that audit exemption in respect of the following year, shall be an item on the agenda of the annual general meeting.

4.3 Further consider the extension of the audit exemption regime to dormant subsidiaries.

4.3.1 Background

The Minister for Trade and Commerce asked the Review Group to consider this matter in its 2007 Work Programme in the light of the fact that the UK had introduced legislation that allowed dormant companies to avail of audit exemption. Since the term "dormant" is not a defined phrase in Irish company law, the Review Group believed that it would need more data and analysis on the scale of dormant companies in Ireland, their purpose and activities, as well as a satisfactory definition, before it could recommend that they could avail of audit exemption. The Group requested the Minister to extend that examination into its 2008/2009 Work Programme.

4.3.2 Legal background

The current law is that neither parent companies nor subsidiary companies can avail of the audit exemption. Section 32(3)(v)(I) of the Companies (Amendment) (No.2) Act 1999 excludes the application of the exemption to:

" a parent undertaking or a subsidiary undertaking (within the meaning of the European Communities (Companies: Group Accounts) Regulations, 1992 (S.I. No. 201 of 1992))"

4.3.3 Issues arising

The term "dormant" is not a defined phrase in company law. However, the general law on audit exemption allows a stand alone company to avail of that option, if its activities are such that it does not exceed the three specified thresholds as set out in section 32(3) (ii)-(iv). Those thresholds are turnover not to exceed €7.2million, balance sheet total not to exceed €3.6million, as well as number of employees not to exceed 50.

This means in effect, that notwithstanding the absence of a statutory definition of the term, where a stand-alone company is not trading, does not employ staff and does not hold any significant assets, it will clearly be entitled to claim audit exemption.

However as currently constituted, this exemption is not available to dormant companies that are themselves part of a group of companies.

4.3.4 Arguments for and against the proposal

The Review Group considered the view that the necessity of providing individual audit reports in respect of dormant companies which are part of a larger group, when they are in any event subject to a larger group audit, represents an additional burden on business that is not justified. In practice, group audits are completed and signed off, and it may be some considerable time afterwards that all of the necessary individual company audit reports are approved. The worth of this exercise is questioned. The additional audit work required for even the most straightforward audit of a company with little or no activity is extensive, and the amount of work has increased substantially in recent years, notably due to the introduction of International Standards in Auditing.

The Review Group notes that the extent of any cost saving has not been quantified. In particular, as such entities will be necessarily subject to audit work as part of the group audit, the amount saved may not be all that significant.

The Review Group noted that whilst it can be said that groups should have dormant companies struck-off or wound up, this will not be an option for many groups where the dormant subsidiaries are required to hold trademarks and other assets and the not insignificant costs of a due diligence before taking the decision to dissolve a company and the costs involved in voluntary-strike off and winding up.

The ODCE has also expressed wider concerns about the increase availability of audit exemption over the last ten years, without any study into the effects this has had on business. The lack of any professional oversight of the activities of thousands of small companies leaves them exposed to the potential for poor business practice, and even illegal practice, perhaps unknowingly.

4.3.5 The UK position

Under UK law there is a specific exemption for all dormant companies, whether part of a group or not, and the term is defined as meaning a company that has "no significant accounting transactions" during the period. In considering whether a company is dormant, the following transactions may be excluded:

- payment for shares taken by subscribers to the memorandum of association;
- fees paid to the Registrar of Companies for a change of company name, the re-registration of a company and filing annual returns; and
- payment made in respect of civil penalties imposed by the Registrar of Companies for delivering accounts to the Registrar after the statutory time allowed for filing.

4.3.6 Conclusions

On balance, the Review Group believes that there is merit in allowing certain companies that are dormant within a group to avail of audit exemption. However, in the opinion of the Review Group the definition of dormant as contained in UK legislation could be more narrowly defined. In particular it does not address the issues of the assets and liabilities that may be carried on the balance sheet of a dormant company. There is a concern that certain assets or liabilities may be placed deliberately in companies which would then be classified as dormant and not subject to audit, which may lead to lesser oversight of such assets and liabilities with potentially serious consequences for the group as a whole. Any such assets and liabilities would however be subject to audit at group level as they are consolidated into the group accounts.

In order to address this, it is proposed that the definition of dormant, in the context of group companies, will require that such companies only have as assets or liabilities inter-company balances with other companies within the group.

4.3.7 Recommendation

The Review Group recommends that companies classified as dormant that are members of a group should be entitled to avail of the audit exemption and that the term "dormant company" be defined as a company that had no significant accounting transactions which were required to be entered in the company's records during the period (as defined in UK legislation) and whose assets and liabilities consist solely of investment in or amounts owed to and due from other companies within the group.

4.4 Capital Maintenance: Member State Options under recent amendments to the Second Company Law Directive

4.4.1 Background

The Second Directive on Capital Maintenance (2006/68/EC) contained mandatory elements that were transposed by Statutory Instrument 89/2008. At the time, it was decided to leave the optional elements of the Directive to the upcoming Companies Consolidation and Reform Bill. While these optional elements are provided for in the General Scheme, there was little substantive assessment of the merits or otherwise of these provisions done by the CLRG. Therefore, at the request of the Minister, the CLRG was asked to consider the optional elements in view of the implications for the Bill.

4.4.2 Introduction

The Review Group reviewed the Member State options in Directive 2006/68/EC of 6 September 2006 (the **"2006 Directive"**), which amended the Second Company Law Directive on company law (Council Directive 77/91/EEC of 13 December 1976 (the **"Second Directive"**), which concerned itself primarily the maintenance of capital).

The Second Directive was transposed in Ireland by the Companies (Amendment) Act 1983. Whereas the scope of the Directive was expressed to be public limited companies, as formed under the respective Member States' laws, many provisions of the 1983 Act apply not only to non-public, private limited companies, but some also apply to unlimited companies.

Apart from accession treaties, the first amendment to the Second Directive was Directive 92/101/EEC of 23 November 1992, which essentially provided that a PLC's subsidiary could not be used to circumvent the capital maintenance rules applicable to PLCs. This amending Directive was transposed by the European Communities (Public Limited Companies Subsidiaries) Regulations 1997 (SI 67 of 1997). The Companies Act 1990 Part XI transposed provisions of the Second Directive relevant to acquisition of own shares. Again the law was applied not only to PLCs but to all limited companies, public or private.

Directive 2006/68/EC of 6 September 2006 amended the Second Directive in the following areas:

- requiring amendments to:

    (a) the procedure for reduction of capital of PLCs, by regulating how particular creditors may assert their rights; and

(b) imposing new conditions on the redemption/purchase of shares of PLCs,

which amendments, have, as stated above been made by the European Communities (Public Limited Companies — Directive 2006/68/EC) Regulations 2008 (SI 89 of 2008).

- providing various options to Member States as to law that may be introduced (which in this Chapter are referred to as **"Member State Options"**); and

- specifying mandatory requirements where a Member State has a particular law (which are referred to in this Chapter as **"Contingent Mandatory Provisions"**).

More recently, on 16 September 2009, Directive 2009/109/EC was adopted, amending the Third, Sixth and Tenth Directives (on Mergers, Divisions and Cross-Border Mergers respectively) making incidental amendments to the Second Directive.

4.4.3 The Review Group and Maintenance of Capital

The Review Group has addressed issues concerning the maintenance of capital in a number of its previous reports. Some of those recommendations have been adopted by the Oireachtas and enacted into legislation, with other recommendations being proposed to be enacted in the General Scheme of the Companies Bill:

- First Report (2002, for the programme period 2000-2001)

  Chapter 5 *Simplification: Creditor Protection* reviewed the philosophy of maintenance of capital and put forward a number of recommendations concerning financial assistance by a company in connection with the acquisition of the company's (or holding company's) shares and the validation procedure to approve such assistance. Many of these recommendations were implemented by the Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 6. The recommendation to repeal, for private companies, the requirement for a "section 40 meeting" in the case of a loss of net assets as against share capital is included in the General Scheme.

  Chapter 6 *Simplification: Shareholder Protection* included a recommendation regarding the procedures for acquisition of own shares, which is included in the General Scheme.

- Second Report (2004, for the programme period 2002-2003)

  Chapter 7 *Share Capital* reviewed in depth the issues concerning share capital, making several recommendations to simplify the law, as well as to allow, in private companies, the reduction of share capital and transactions akin to the reduction of capital by validation procedure.

- Fourth Report (2007, for the programme period 2006-2007)

Chapter 7 *Modernisation Issues* again examined financial assistance by a company in connection with the acquisition of the shares of a company or its holding company. The Review Group made a number of recommendations but did not propose the repeal of the prohibition of financial assistance as has taken place in the UK for private companies.

Chapter 7 also conducted a preliminary examination of a related issue, that of distributions to shareholders potentially arising from transfers within a group at book value, whilst deferring coming to particular conclusions. That is further addressed in this Report in Section 4.1.

4.4.4 The Current Review

Whilst the Member State Options and Contingent Mandatory Provisions arising from the as-yet-not-transposed provisions of Directive 2006/68/EC and the more recent Directive and 2009/109/EC are not extensive, in order to make sense of them, it is relevant to put them in the context of the overall Second Directive.

Set out in the Appendix to this Chapter is an unofficial consolidated text of the Second Directive (based on a consolidated text published by the European Commission) identifying where applicable, the provenance of amending provisions, and the status of the Directive's provisions in present Irish law and in the General Scheme. Member State Options and Contingent Mandatory Provisions are identified in the table.

The Review Group's analysis of the Member State Options of the Second Directive inserted by Directives 2006/68/EC and 2009/109/EC is set out below.

4.4.5 Valuation of non-cash assets contributed as consideration for allotment of shares in a PLC

Section 30 of the Companies (Amendment) Act 1983, implementing Article 10 of the Second Directive, requires, subject to exceptions, that non-cash consideration tendered as consideration for the allotment of shares in a PLC must be valued. Other provisions of the 1983 Act require that shares are not issued at a discount to that value.

4.4.5.1 A new paragraph 5 in Article 10, inserted by Directive 2009/109/EC, provides that Member States have the option not to require a separate Article 10 / section 30 valuation report on the formation of a new company by way of merger or division where an independent expert's report on the draft terms of the actual merger or division has been drawn up. Where Member States allow this option, they may provide that the Article 10 / section 30 report and the independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.

The Review Group agrees with the reasoning for this option as set out in Recital 9 of Directive 2009/109/EC which inserted it: "An independent expert's report … is often not needed where an independent expert's report protecting the interests of shareholders or creditors also has to be drawn up in the context of the merger or the division. Member States should therefore have the possibility in such cases of dispensing companies from the reporting requirement under Directive 77/91/EEC or of providing that both reports may be drawn up by the same expert."

Recommendation:

The Review Group recommends that the Member State Option allowed by paragraph 5 be transposed into law.

4.4.5.2 The new Article 10a of the Second Directive provides that Member States may waive the Article 10 / section 30 requirement for the valuation report on non-cash consideration in one or more of three instances:

(i) traded securities;

(ii) assets other than securities by reference to a recent valuation, or

(iii) assets other than securities by reference to carrying value in the most recent annual accounts.

The philosophy of this provision is set out in Recital (4) of Directive 2006/68/EC:

"Member States should be able to permit public limited liability companies to allot shares for consideration other than in cash without requiring them to obtain a special expert valuation in cases in which there is a clear point of reference for the valuation of such consideration. Nonetheless, the right of minority shareholders to require such valuation should be guaranteed."

4.4.5.3 *Traded securities.* Member States can provide that the valuation report need not be prepared where "transferable securities ... or money market instruments … are contributed as consideration … and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated market(s) … during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash."

Recommendation

The Review Group is broadly satisfied that this is a logical and fair provision, and recommends that it be transposed into law, subject to the period being no more than 5 dealing days immediately before the allotment or unconditional agreement to allot.

4.4.5.4 *Assets other than securities by reference to a recent valuation*. Member States can provide that the valuation report need not be prepared where "assets, other than … transferable securities and money-market instruments … are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled:

(a) the fair value is determined for a date not more than six months before the effective date of the asset contribution;

(b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed."

A revaluation must be carried out by the directors "in the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution". Where such a revaluation does not take place one or more shareholders holding an aggregate percentage of at least 5% of the company's share capital can demand a valuation by an independent expert.

The Review Group observed that a 6 month period would allow the potential for a significant movement in prices, not just in property but in other assets also. Accordingly it is appropriate for exceptional or qualifying circumstances to be contemplated.

Recommendation

The Review Group is, on balance, in favour of this provision, and recommends that it be transposed into law, subject to:

- the period from sign-off of the valuation being not more than one month before the allotment or unconditional agreement to allot; or

- the directors, when resolving to allot the shares for the non-cash consideration, being required to note and resolve that they are satisfied that there are no new qualifying circumstances known to them that appear to them to have significantly changed the fair value of the assets being contributed at the date of the allotment or unconditional agreement to allot.

4.4.5.5 *Assets other than securities by reference to carrying value in the most recent annual accounts.* Member States can provide that the valuation report need not be prepared where "assets, other than … transferable securities and money-market instruments … are contributed as consideration other than in cash whose fair value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit …". The provisions referred to at 4.2.5.4 as to intervening qualifying or exceptional circumstances and the right of the holders of 5% or more of shares to require a valuation apply also.

The Review Group is not in favour of this proposed exception: valuations could be up to a year old, if, for example, a company with a 31st December year end issues shares for non-cash consideration in December. The provision is not specific as to whether such assets are to be valued at fair value in the balance sheet in the financial statements. Assets can of course be valued at historic cost, amortised cost, the lower of cost and net realisable value, and fair value in all its forms. Some of these can bear no relation to the actual market valuation of such an asset.

Recommendation:

The Review Group has concerns that, were this option to be implemented, shares might be issued in return for consideration that had a markedly different value to that implied by such a valuation technique, thereby disadvantaging shareholders. Notwithstanding the protections allowing shareholders to call for a valuation, the Review Group believes that such an option is has the potential for unfairness and recommends that it should not be transposed into law.

4.4.6 The new Article 10b contains Contingent Mandatory Provisions, which must be transposed into a Member State's law if any one or more of the Member State Options in Article 10a are transposed into the Member State's law.

4.4.6.1 *Declaration by allotting company*. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report, within one month after the date of the asset contribution, a declaration containing the following must be "published":

"(a) a description of the consideration other than in cash at issue;

(b) its value, the source of this valuation and, where appropriate, the method of valuation;

(c) a statement whether the value arrived at corresponds at least to the number, to the nominal value of, where there is no nominal value, the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration;

(d) a statement that no new qualifying circumstances with regard to the original valuation have occurred."

Publication is be effected in the manner laid down by the laws of each Member State in accordance with the First Company Law Directive 68/151/EEC, which in Ireland has usually meant being delivered for filing to the registrar of companies.

Recommendation:

The requirement to make and "publish" the declaration required by this provision should be stated to be the responsibility of the directors, with section 383 of the Companies Act 1963 applying accordingly.

4.4.6.2 *Enforcement.* Each Member State is provide for adequate safeguards ensuring compliance with the procedure set out in Articles 10a and 10b.

Recommendation:

In view of the other provisions of the 1983 Act, which regulate what is to happen where non-cash consideration is not valued correctly – the shareholder being obliged to pay the nominal value of and premium payable on the shares in question – the Review Group makes no recommendation for any further enforcement provisions.

4.4.7 Acquisition of own shares

Part XI of the Companies Act 1990 contains the law applicable to the acquisition by a company limited by shares of its own shares, or shares in its holding company, reflecting the requirements of the Second Directive. Article 19 of the Second Directive has been substituted by Directive 2006/68/EC. The original Article 19 contained Contingent Mandatory Provisions to apply where a Member State's laws permitted a company to acquire its own shares.

4.4.7.1 The changes effected by Article 19 as substituted by Directive 2006/68/EC are these, some of which give rise to Member State Options:

(a) any acquisition must be subject to the principle of equal treatment of all shareholders who are in the same position;

(b) any acquisition must be subject to compliance with the Market Abuse Directive 2003/6/EC of 28 January 2006 (transposed in Ireland by the Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 4 and SI No 342 of 2005);

(c) the duration of a shareholders' authority to the company's board to make acquisitions of shares can now extend up to 5 years, rather than 18 months as at present.

(d) Member States may subject acquisitions of own shares to any of the following conditions:

(i) that the nominal value or of the acquired shares, including shares previously acquired by the company and held by it or its nominees (i.e. treasury shares) may not exceed a limit to be determined by Member States, but this limit cannot be lower than 10 % of the subscribed capital. This contrasts with the previous

Article 19 where the amount could not be greater than 10%;

(ii) that the power of the company to acquire its own shares, the maximum number of shares to be acquired, the duration of the period for which the power is given and the maximum or minimum consideration are laid down in the company's statutes or in the instrument of incorporation of the company;

(iii) that the company complies with appropriate reporting and notification requirements;

(iv) that particular companies, to be determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in capital. This reserve may be used only for the purposes of capitalisation issues;

(v) that the acquisition shall not prejudice the satisfaction of creditors' claims.

4.4.7.2 *Extension of duration of share buy-back authority from 18 months to 5 years*. This aligns the period for such an authority with the 5 year period for allotment of shares under Article 25 (transposed in Ireland by section 20 of the Companies (Amendment) Act 1983). Irish law at present requires an ordinary resolution for market purchases of own shares by a PLC and a special resolution with full disclosure of contract particulars in the case of an off-market purchase of own shares. The Market Abuse Regulation 2273/2003 (included in Schedule 5 to SI 342 of 2003) Chapter II contains the procedures to be followed when a company, admitted to trading on a regulated market, repurchases its shares. Section 223 of the Companies Act 1990 states requirements to be followed for such share repurchases by companies admitted to trading on the Irish Stock Exchange.

<u>Recommendation:</u>

Notwithstanding the legal protections in the Market Abuse Regulation and section 223, misgivings were expressed by many members of the Group, and there was no great enthusiasm about the extension of duration of a share repurchase authority. The Review Group also noted that generally approved corporate governance guidelines advocate an annual authorisation to make market repurchases of shares.

Accordingly, the Review Group does not recommend making any change to the existing law.

4.4.7.3 *Increase in the maximum amount of shares to be held in treasury from no more than 10% to not less than 10%.*

Recommendation:

The Review Group is of the view that there are no particular compelling reasons to increase the percentage limit on treasury shares from 10% and therefore makes no recommendation on the subject.

4.4.7.4 *Inclusion of maximum number of shares to be acquired, the duration of authority and the maximum or minimum consideration in company's statutes*. Irish law at present requires an ordinary resolution for market purchases of own shares by a PLC and a special resolution with full disclosure of contract particulars in the case of an off-market purchase of own shares. The requirement to include these particulars in the company's memorandum and articles of association would require a special resolution, and would preclude the current possibility of periodic ordinary resolutions.

Recommendation:

The Review Group has not found any compelling reasons to vary the current alternative requirements and therefore makes no recommendation on the subject.

4.4.7.5 *Compliance with appropriate reporting and notification requirements.*

Recommendation:

Although this is new text in the Article, the current law contains provisions for reporting to the registrar of companies and notification to shareholders, both by way of notice of meetings and resolutions and particulars in the annual audited accounts, and the Review Group makes no recommendation under this heading.

4.4.7.6 *The acquisition should not prejudice the satisfaction of creditors' claims.*

Recommendation:

Again, although this is new text in the Article, the general law addresses this in many ways: requiring payment for acquired shares to come from distributable profits or a new issue, the matrix of law affecting companies as they approach insolvency, and the liabilities of directors in that context. Accordingly the Review Group makes no recommendation under this heading.

4.4.7.7 *Acquisitions without shareholders' approval to avoid serious and imminent harm.* Article 19, as substituted repeats a Member State Option which was in the original Article 19: this is to waive the requirement for shareholder's approval (whether by ordinary or special resolution) where an acquisition "is necessary to prevent serious and imminent harm to the company". In such a case, the "next general meeting" must be informed by the directors of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.

This is not provided for in Irish law at present, save to the extent that an order made under 1963 Act, s 205 to acquire the shares of a shareholder may be considered to fall under this heading

Recommendation:

The Review Group has no enthusiasm for this option. The fact of its not having been transposed into law up until now is indicative of comparable views of those who have examined the matter in the past.

4.4.7.8 *Acquisitions without shareholders' approval for employee share schemes.* This option, also from the original Article 19, is consistent with the disapplication (by statute sections 20(10) and 23(6) of the Companies (Amendment) Act requirement for a shareholder vote for employee share scheme allotments.

Recommendation:

The Review Group recommends that this be transposed into law.

4.4.8 Financial assistance in connection with the acquisition of own shares

Section 60 of the Companies Act 1963, as amended, contains the Irish law regulating the giving by a company of financial assistance for the purpose of or in connection with the purchase of or subscription for shares in itself or in its holding company. The law in this section was the subject of the Review Group's 2007 Report (in respect of the programme period 2006-2007). As the current review is concerned with this issue too, it is worth stating the recommendations from that Report:

"a) Section 60(1) of the 1963 Act (which outlaws financial assistance *for the purpose of* or *in connection with* purchases or subscriptions of shares) be amended by the repeal of the words "*or in connection with*".

(b) The law outlawing financial assistance in connection with *subscriptions* for shares in public companies should be mitigated to the fullest extent. Some amendments should be made to the exceptions in section 60, in particular to provide expressly for brokerage and commission in the terms of the recently repealed section 59 of the 1963 Act.

(c) The prohibition on financial assistance in connection with the purchase of shares will not prohibit a company from giving financial assistance for the purchase of shares in itself or its holding company if—

(i) the company’s principal purpose in giving the assistance is not to give it for the purpose of any such acquisition, or

(ii) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company, and

(iii) the assistance is given in good faith in the interests of the company.”

4.4.9 Directive 2006/68/EC substituted Article 23 of the Second Directive, replacing the general prohibition on PLCs giving financial assistance with Contingent Mandatory Provisions to apply where a Member State’s laws permit the giving by a PLC of financial assistance. In summary they are these:

(a) the assistance cannot be gratuitous and must be at fair market conditions, including with regard to interest and security; the credit standing of each counterparty thereto must be investigated;

(b) the assistance requires prior notification to and prior shareholder approval of the assistance;

(c) at the shareholders meeting, the shareholders must be presented a written report indicating:

(i) the reasons for the transaction,

(ii) the interest of the company in entering into such a transaction;

(iii) the conditions on which the transaction is entered into;

(iv) the risks involved in the transaction for the liquidity and solvency of the company; and

(v) the price at which the third party is to acquire the shares;

(d) the majority must be not less than 66⅔% or a bare majority where the attendance at the meeting represents at least 50% of the shares in issue;

(e) the aggregate financial assistance must not result in the reduction of the net assets below share capital and undistributable reserves;

(f) where the assisted acquirer of shares is a director or connected person, then Member States must ensure that there are adequate safeguards for shareholders.

4.4.10 At present therefore, PLCs are forbidden to avail of the validation procedure in section 60 of the 1963 Act. The above-mentioned amendments to the Second Directive provide the opportunity to Ireland to provide for a validation procedure for PLCs, but it will be one which has differences from that used by private companies.

4.4.10.1 When preparing the text for the General Scheme, the Review Group noted the then pending amendments to the Directive and envisaged the PLC validation procedure to be unremarkable, with the principal concern being to blend what was proposed in the Directive with what is required for a private company's validation procedure. Recent controversy regarding reported financial assistance by public has meant that the Review Group has considered carefully whether such financial assistance should be permitted. Whilst non-disclosure rather than the fact of financial assistance is of itself disturbing, real questions have to be asked as to what benefit accrues to a company by providing financial assistance for the purpose of the acquisition of its shares.

4.4.10.2 A distinction can and should be made between the various types of acquisitions of shares. For example, in the 2007 Report, the Review Group's recommendations were to liberalise financial assistance for the purposes of a *subscription* for shares, as opposed to the purchase of shares where the company is not a seller or purchaser.

4.4.10.3 The Review Group sees no virtue in any circumstances for a public company to provide financial assistance for the purposes of a sale of its shares among shareholders where the company is not a seller or purchaser.

The Review Group considered whether the current prohibition on financial assistance of share *subscriptions*, where the company is a net beneficiary of the subscription, should be repealed and the provisions of Article 23 transposed into law, subject to e.g. a shareholder of 75%, requiring directors and connected persons that are financially assisted not to vote and otherwise aligning with the validation procedure for private companies. However, notwithstanding the distinction between purchases and subscriptions, there was little enthusiasm in the Review Group to transpose this Member State Option.

The Review Group noted also that the UK had not hastened to transpose this Member State Option, it is understood, not on account of a policy objection, but, rather that its transposition was not considered a priority.

<u>Recommendation</u>

The Review Group recommends that this Member State Option should not be transposed into Irish law.

4.4.11 Other Member State Options

The review of Member State Options and related Contingent Mandatory Provisions in this Chapter has been focussed on the optional amendments to the Second Directive effected by Directives 2006/68/EC and 2009/109/EC.

However, there is one other option which the Review Group has considered, the period for response to a company's invitation to participate in a pre-emptive offer of shares, such as a rights issue or open offer.

At present, section 23(8) of the Companies (Amendment) Act 1983 requires that a company must give not less than 21 days' notice to shareholders of a pre-emptive offer. In the UK, in a recent amendment to section 562(5) of their Companies Act 2006 effected by Article 2 of the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009 (SI 2009/2022), that 21 day period has been reduced to the Directive's minimum of 14 days. This has been reflected also in amendments to the UK Listing Rules and Irish Listing Rules early in 2009 where the relevant rules as to duration of rights issue offer period has been reduced to a 10 business-day period. Therefore, UK companies listed in Ireland making a pre-emptive offer in Ireland can at present have a 10-business-day offer period whereas Irish-incorporated companies are at present required to have a 21-day period.

It is arguable that current shareholders' rights might be compromised by allowing only 14 days to make a proper assessment of whether they wish to take up pre-emption rights, and also to ensure they can organise funding where relevant. Also, in the context of some rights issues taking up to 80-90 days, there may be other administrative efficiencies in the process to be addressed.

As against that, the Review Group is, in this instance, in favour of aligning Irish law with that of the UK. In addition, in the case of funding requirements of companies, where there are competing interests between a company's requirements for funding and the individual interests of shareholders, it is arguable that the company's interest should prevail.

As stated in the UK's analysis of the issue: "Increasing the efficiency of pre-emptive rights can benefit the market, companies and shareholders by helping to ensure that this model of capital raising retains its place in the UK market….. Rights issues are a common capital raising technique for companies in the United Kingdom. Many of the problems that emerged with the financial sector capital raisings were caused or exacerbated by the duration of the rights issues process. For example, potentially abusive trading strategies are aided by the longer period from announcement to completion; and significant market movements that erode discounts are more likely over a longer time spell."[40]

[40] Explanatory Memorandum to the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009 No. 2022, p 7

Recommendation:

The Review Group recommends that the period for response to a pre-emptive offer of shares in section 23(8) of the 1983 Act be reduced from 21 days to 14 days.

Chapter 5 - Items brought forward to the next Work Programme

Item 13 – Advise the Department of Enterprise, Trade and Employment on the various requirements on auditors to report under criminal justice legislation, under company law and, in particular, Recommendations arising out of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was drawn up under the auspices of the Organisation for Economic Co-operation and Development and adopted in November 1997. This Convention was ratified on behalf of the Ireland in September 2003.

The Minister for Trade and Commerce asked the CLRG to consider the recommendations of the OECD report as part of its 2008/2009 Work Programme. The Review Group is still considering the recommendations of the Convention and has asked the Minister to extend its consideration into its next Work Programme.

Item 14 - Consideration of the adoption, in Irish company law, of the UNCITRAL Model Law on Cross-Border Insolvency.

Adopted by United Nations Commission on International Trade Law (UNCITRAL) in May 1997, the Model Law is designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law.

The Minister for Trade and Commerce asked the CLRG to consider the merits of incorporation of the Model Law into Irish law as part of its 2008/2009 Work Programme. The Review Group is still considering the issue and has asked the Minister to extend its consideration into its next Work Programme. Considerable work was done on this complex and potentially far-reaching proposal. The Review Group has been engaged in a consultation process with interested parties on the issues to which adoption of the Model Law would give rise, and this process had not concluded at the end of the reporting period.

Item 15 - To examine specific provisions under the Companies Acts and to review if, in practice, their application is consistent with the underlying policy objectives of the legislation, including improved compliance. Namely:

1. **Abuse of Strike-off provisions;**

The Review Group was asked by the Minister to consider this issue as part of its 2008/2009 Work Programme. Part A12 of the General Scheme of the Companies Consolidation and Reform Bill brings together the many diverse provisions regarding the Strike-off and Restoration of companies. At present it is possible for a company to opt voluntarily to be struck off the companies register, under conditions laid down by the Registrar of Companies. The General Scheme provides that elements of the existing voluntary strike-off process will be placed on a statutory footing. In particular, the company must pass a special resolution to seek the strike-off of the company. The Director of Corporate Enforcement is given power to require a company to furnish a statement of affairs if it has been struck off involuntarily.

The Review Group has decided to keep the matter under review for the time being and does not propose any action in this area.

2. **Late-filing penalties, and, in particular, the loss of exemption from the need to conduct a statutory audit;**

The Review Group was asked by the Minister to consider this issue as part of its 2008/2009 Work Programme. The Companies Registration Office put in place a late filing system in 2001 to encourage companies to file their returns on time. Currently, companies that did not meet the deadline lose the exemption from the need to conduct a statutory audit for two years. The Review Group is still considering the matter and has asked the Minister to extend its consideration into its next Work Programme.

3. **With reference to a small, select number of offences, consider whether there is proportionality between the seriousness of the offence (and the likelihood of malpractice) and its enforcement and whether offences under the Companies Acts should be subject to civil or criminal action, or both.**

The Review Group was asked by the Minister to consider this issue as part of its 2008/2009 Work Programme. The Review Group is satisfied that the initiative proposed in **Head 57** of **Part A13** of the General Scheme, which introduces the categorisation of offences, deals in a satisfactory manner with the issue above. This initiative proposes that the vast majority of offences under the Companies Acts should be classified according to a four-fold scheme:

- **Category 4** offences will be prosecutable only on a summary basis and on conviction, will give rise a fine of no more than €5,000.
- **Category 3** offences will likewise be prosecutable only summarily but on conviction, may give rise to a prison sentence (of up to 12 months duration) and/or a fine of no more than €5,000.

- Both **Categories 2 and 1** offences will attract those same consequences (as Category 3) when prosecuted summarily, but will also be capable of being prosecuted on indictment where the judge will be able to penalise any person convicted of a Category 2 offence by a fine of up to €50,000 and/or imprisonment for up to 5 years and in the case of a Category 1 offence, a fine of up to €500,000 and/or imprisonment for up to 10 years.

There are two exceptions in the case of the most serious offences, namely fraudulent trading and market abuse. These offences are dealt with under the *Investment Funds, Companies and Miscellaneous Provisions Act 2005*.

Moreover, the duty of auditors to report their suspicion that an indictable offence has been committed will be made easier to comply with, as the new provisions will mean only Category 1 and 2 offences (as well as the other handful of offences) are reportable.

This four-fold system will allow for an appropriately graduated system of penalties as between different offence provisions. In preparing these Heads, the CLRG has undertaken a comprehensive exercise, in conjunction with ODCE officials, of classifying the offences on what is thought to be the appropriate basis. In addition, it leads to the law being more easily understood because in each of the many provisions throughout the Bill creating offences, it is now possible to simply add a phrase along the lines of “which will be a Category 2 offence”.

A further innovative provision is introduced by Head 57(3) under which it is proposed that following conviction for a Category 1, 2, 3 or 4 offence, the trial court may order that the convicted person should remedy any breach of the Companies Acts in respect of which they were convicted.

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of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) THE COUNCIL OF THE EUROPEAN COMMUNITIES, Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 (3) (g) thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Parliament[41], Having regard to the opinion of the Economic and Social Committee[42], Whereas the coordination provided for in Article 54 (3) (g) and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by Directive 68/151/EEC[43], is especially important in relation to public limited liability companies, because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries; Whereas in order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important;		

[41] OJ No C 114, 11. 11. 1971, p. 18.
[42] OJ No C 88, 6. 9. 1971, p. 1
[43] OJ No L 65, 14. 3. 1968, p. 8.

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Whereas in the territory of the Community, the statutes or instrument of incorporation of a public limited liability company must make it possible for any interested person to acquaint himself with the basic particulars of the company, including the exact composition of its capital; Whereas Community provisions should be adopted for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the company's right to acquire its own shares; Whereas it is necessary, having regard to the objectives of Article 54 (3) (g), that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonized, HAS ADOPTED THIS DIRECTIVE:		
Article 1		
1. The coordination measures prescribed by this Directive shall apply to the provisions laid down by law, regulation or administrative action in Member States relating to the following types of company: ……. — *in Ireland:* the public company limited by shares, the public company limited by guarantee and having a share capital; ……	The Companies (Amendment) Act 1983 transposes the Second Directive and applies it to all companies, public and private, limited and unlimited.	Part A 3 applies many of the provisions of the Second Directive to companies generally, with Part B2 covering Public Limited Companies and Part B3 covering Designated Activity Companies

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The name for any company of the above types shall comprise or be accompanied by a description which is distinct from the description required of other types of companies.	1983 Act s4	Part B2, Head 5/Part B3, Head 5
2. The Member States may decide not to apply this Directive to investment companies with variable capital and to cooperatives incorporated as one of the types of company listed in paragraph 1. In so far as the laws of the Member States make use of this option, they shall require such companies to include the words 'investment company with variable capital' or 'cooperative' in all documents indicated in Article 4 of Directive 68/151/EEC. The expression 'investment company with variable capital', within the meaning of this Directive, means only those companies: — the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets, — which offer their own shares for subscription by the public, and	**<u>Member State Option</u>** Regulation 28 of the European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations 2003, SI 211 of 2003 relieves UCITS from the requirement to comply with provisions of the 1963, 1983, 1986 and 1990 Act transposing the Directive.	**<u>Member State Option</u>** <u>Part B9, Head 2 disapplies certain provisions from investment companies</u>
— the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares.	Section 260 of the 1990 Act relieves Part XIII investment companies from the requirement to comply with provisions of the 1963, 1983, 1986 and 1990 Act transposing the Directive.	<u>Part B9, Head 2</u>

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Article 2		
The statutes or the instrument of incorporation of the company shall always give at least the following information: (a) the type and name of the company; (b) the objects of the company; (c) — when the company has no authorized capital, the amount of the subscribed capital, — when the company has an authorized capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorized to commence business, and at the time of any change in the authorized capital, without prejudice to Article 2 (1) (e) of Directive 68/151/EEC; (d) in so far as they are not legally determined, the rules governing the number of and the procedure for appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;	1963 Act s 6	Part B2, Head 4/Part B3, Head 4
(e) the duration of the company, except where this is indefinite.	1963 Act s 251(1)(a)	Part A11, Head 20(2)(b)
Article 3		
The following information at least must appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC:		
(a) the registered office;	1963 Act, s 113	Part A2, Head 33
(b) the nominal value of the shares subscribed and, at least once a year, the number thereof;	1963 Act, ss 6, 69, 125	Part B2, Head 4(2)(d)/Part B3, Head 4(2)(d); Part A3, Head 25; Part A6, Head 52

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(c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;	Not applicable	Not applicable
(d) the special conditions if any limiting the transfer of shares;	1963 Act, s 11, 1983 Act s 39	Part B2, Head 4(3)/Part B3, Head 4(3); Part A3, Head 23
(e) where there are several classes of shares, the information under (b), (c) and (d) for each class and the rights attaching to the shares of each class;	1963 Act, ss 6, 69, 125	Part B2, Head 4(2)(d)/Part B3, Head 4(2)(d); Part A3, Head 25; Part A6, Head 52
(f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;	1963 Act ss 88, 6, 11	Part A3, Head 29; Part B2, Head 4/Part B3, Head 4
(g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorized to commence business;	1963 Act s 6	Part B2, Head 4(2)(d)/Part B3, Head 4(2)(d)
(h) the nominal value of the shares or, where there is not nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;	1963 Act, s 58	Part A3, Head 5(12); Part B2, Head 4(2)(d)/Part B3, Head 4(2)(d)
(i) the identity of the natural or legal persons or companies or firms by whom or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of these documents, have been signed;	1963 Act, ss 5(1), 6(4)	Part B2, Head 3(1)/Part B3, Head 3(1); Part B2, Head 4(2)/Part B3, Head 4(2)
(j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorized to commence business;	1983 Act, s 6(3)(c)	Part B2, Head 7(3)(c)

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(k) any special advantage granted, at the time the company is formed or up to the time it receives authorization to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorization.	1983 Act, s 6(3)(d)	Part B2, Head 7(3)(d)
Article 4		
1. Where the laws of a Member State prescribe that a company may not commence business without authorization, they shall also make provision for responsibility for liabilities incurred by or on behalf of the company during the period before such authorization is granted or refused. 2. Paragraph 1 shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorization to commence business.	1983 Act s 6(8)	Part B2, Head 7(8)
Article 5		
1. Where the laws of a Member State require a company to be formed by more than one member, the fact that all the shares are held by one person or that the number of members has fallen below the legal minimum after incorporation of the company shall not lead to the automatic dissolution of the company.	1963 Act, s 36	A PLC or DAC may be formed with one member
2. If in the cases referred to in paragraph 1, the laws of a Member State permit the company to be wound up by order of the court, the judge having jurisdiction must be able to give the company sufficient time to regularize its position.	1963 Act, ss 36, 213(d)	A PLC or DAC may be formed with one member
3. Where such a winding up order is made the company shall enter into liquidation.	1963 Act, s 220	A PLC or DAC may be formed with one member

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Article 6		
1. The laws of the Member States shall require that, in order that a company may be incorporated or obtain authorization to commence business, a minimum capital shall be subscribed the amount of which shall be not less than 25,000 [euros]. The ecus shall be that defined by Commission Decision No 3289/75/ECSC[44]. The equivalent in national currency shall be calculated initially at the rate applicable on the date of adoption of this Directive.	1983 Act s 19(1) specifies IR£30,000, now €38,092.41 as "the authorised minimum". Section 19(2) enables a greater (but not a lesser sum) to be specified by order made by the Minister.	Part B2, Head 1
2. If the equivalent of the [euros] in national currency is altered so that the value of the minimum capital in national currency remains less than 22,500 [euros] for a period of one year, the Commission shall inform the Member State concerned that it must amend its legislation to comply with paragraph 1 within 12 months following the expiry of that period. However, the Member State may provide that the amended legislation shall not apply to companies already in existence until 18 months after its entry into force.	No requirement to transpose.	No requirement to transpose.
3. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts expressed in this Article in [euros] in the light of economic and monetary trends in the Community and of the tendency towards allowing only large and medium-sized undertakings to opt for the types of company listed in Article 1 (1).	No requirement to transpose.	No requirement to transpose.
Article 7		
The subscribed capital may be formed only of assets capable of economic assessment.	1983 Act, s 26(1)	Part A3, Head 6(1)
However, an undertaking to perform work or supply services may not form part of these assets.	1983 Act, s 26(2)	Part B2, Head 17

[44] OJ No L 327, 19. 12. 1975, p. 4.

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Article 8		
1. Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.	1983 Act, s 27	Part A3, 6(2)
2. However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.	**Member State Option** Not expressly taken up by Ireland. 1963 Act, s 60(12)(m) exempts from the prohibition of financial assistance: “in connection with an allotment of shares by a company or its holding company, the payment by the company of commissions not exceeding 10 per cent of the money received in respect of such allotment to intermediaries, and the payment by the company of professional fees”.	**Member State Option** Part A3, Head 15(2)(m)
Article 9		
1. Shares issued for a consideration must be paid up at the time the company is incorporated or is authorized to commence business at not less than 25% of their nominal value or, in the absence of a nominal value, their accountable par.	1983 Act, s 28	Part B2, Head 19
2. However, where shares are issued for a consideration other than in cash at the time the company is incorporated or is authorized to commence business, the consideration must be transferred in full within five years of that time.	1983 Act, s 29	Part B2, Head 20

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Article 10		
1. A report on any consideration other than in cash shall be drawn up before the company is incorporated or is authorized to commence business, by one or more independent experts appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State. 2. The experts' report shall contain at least a description of each of the assets comprising the consideration as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them. 3. The expert's report shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.	1983 Act s 32	Part B2, Head 23
4. Member States may decide not to apply this Article where 90 % of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met: (a) with regard to the company in receipt of such consideration, the persons referred to in Article 3 (i) have agreed to dispense with the expert's report; (b) such agreement has been published as provided for in paragraph 3;	**Member State Option** Taken by Ireland. 1983 Act, s 32(1), (3)	**Member State Option** Part B2, Head 23(1), (3)

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(c) the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash; (d) the companies furnishing such consideration guarantee, up to an amount equal to that indicated in paragraph (c), the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which such consideration was furnished. Any transfer of these shares is prohibited within this period; (e) the guarantee referred to in (d) has been published as provided for in paragraph 3; (f) the companies furnishing such consideration shall place a sum equal to that indicated in (c) into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in (d) which are submitted during this period have been settled.		
5[45].[Member States may decide not to apply this Article to the formation of a new company by way of merger or division where an independent expert's report on the draft terms of merger or division is drawn up.	**Member State Option** Not yet transposed	**Member State Option** Not yet transposed

[45] Paragraph 5 inserted by Directive 2009/109/EC, Article 1.2.

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Where Member States decide to apply this Article in the cases referred to in the first subparagraph, they may provide that the report under this Article and the independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.]		See recommendation 7.2
[*Article 10a*[46]		
1. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 18 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (1) [47]or money market instruments as defined in point 19 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated market(s) as defined in point 14 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.	**Member State Option** See paragraph 7 of this [Chapter]	**Member State Option** Part B2, Head 29(1)(a)

[46] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

[47] OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2006/31/EC (OJ L 114, 27.4.2006, p. 60).

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However, where that price has been affected by exceptional circumstances that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body. For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.		
2. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1, are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled: (a) the fair value is determined for a date not more than six months before the effective date of the asset contribution; (b) the valuation has been performed in accordance with generally accepted valuation standards and principles in the Member State, which are applicable to the kind of assets to be contributed.	**<u>Member State Option</u>** See paragraph 7 of this [Chapter]	**<u>Member State Option</u>** Part B2, Head 29(1)(b)
In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body. For the purposes of the aforementioned revaluation, Article 10(1), (2) and (3) shall apply.		

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
In the absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5% of the company's subscribed capital on the day the decision on the increase in the capital is taken may demand a valuation by an independent expert, in which case Article 10(1), (2) and (3) shall apply.		
Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5% of the company's subscribed capital, as it was on the day the decision on the increase in the capital was taken.		Part B2, Head 29(2)
3. Member States may decide not to apply Article 10(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1, are contributed as consideration other than in cash whose fair value is derived by individual asset from the statutory accounts of the previous financial year provided that the statutory accounts have been subject to an audit in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts (1). The second and third subparagraphs of paragraph 2 shall apply *mutatis mutandis*.	**<u>Member State Option</u>** See paragraph 7 of this [Chapter]	**<u>Member State Option</u>** Part B2, Head 29(1)(b)

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 10b[48]		
1. Where consideration other than in cash as referred to in Article 10a occurs without an expert's report as referred to in Article 10(1), (2) and (3), in addition to the requirements set out in point (h) of Article 3 and within one month after the effective date of the asset contribution, a declaration containing the following shall be published: (a) a description of the consideration other than in cash at issue; (b) its value, the source of this valuation and, where appropriate, the method of valuation; (c) a statement whether the value arrived at corresponds at least to the number, to the nominal value or, where there is no nominal value, the accountable par and, where appropriate, to the premium on the shares to be issued for such consideration; (d) a statement that no new qualifying circumstances with regard to the original valuation have occurred. That publication shall be effected in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.	**Contingent Mandatory Provision**	**Contingent Mandatory Provision** Part B2, Head 29(3)

[48] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
2. Where consideration other than in cash is proposed to be made without an expert's report as referred to in Article 10(1), (2) and (3) in relation to an increase in the capital proposed to be made under Article 25(2), an announcement containing the date when the decision on the increase was taken and the information listed in paragraph 1 shall be published, in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC, before the contribution of the asset as consideration other than in cash is to become effective. In that event, the declaration pursuant to paragraph 1 shall be limited to the statement that no new qualifying circumstances have occurred since the aforementioned announcement was published.	**<u>Contingent Mandatory Provision</u>** **<u>Contingent Mandatory Provision</u>**	**<u>Contingent Mandatory Provision</u>** Part B2, Head 29(3)
3. Each Member State shall provide for adequate safeguards ensuring compliance with the procedure set out in Article 10a and in this Article where a contribution for a consideration other than in cash is made without an expert's report as referred to in Article 10(1), (2) and (3).]	Under the 1983 Act, where non-cash consideration is not valued correctly, the shareholder must pay the nominal value of and premium payable on the shares in question. 1983 Act, s 30(10)	**<u>Contingent Mandatory Provision</u>** Part B2, Head 21(10)

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 11		
1. If, before the expiry of a time limit laid down by national law of at least two years from the time the company is incorporated or is authorized to commence business, the company acquires any asset belonging to a person or company or firm referred to in Article 3 (i) for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in [Article 10(1), (2) and (3)] [49] and it shall be submitted for the approval of the general meeting. [Articles 10a and 10b shall apply *mutatis mutandis*.] [50]	1983 Act, s 32	Part B2, Head 23
Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.	**<u>Member State Option</u>** Taken up in part: extended to shareholders by 1983 Act s 32(2)(b)	**<u>Member State Option</u>** Part B2, Head 23(2)(b)
2. Paragraph 1 shall not apply to acquisitions effected in the normal course of the company's business, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.	1983 Act s 32(4)	Part B2, Head 23(4)
Article 12		
Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions.	1963 Act, s 72	Part A3, Head 17

[49] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

[50] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 13		
Pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 12 in the event of the conversion of another type of company into a public limited liability company.	1983 Act, s 37	Part B6, Head 9
Article 14		
Articles 2 to 13 shall not prejudice the provisions of Member States on competence and procedure relating to the modification of the statutes or of the instrument of incorporation.	1963 Act ss 9 (restriction on alteration of memorandum), 10 (change of objects), 15 (change of articles), 23 (change of name), 68 (change of authorised capital) all unaffected by transposition of Directive 77/91/EEC	Part A2, Head 4; Part B2, Head 11/Part B3, Head 8; Part B2, Head 12/Part A2, Head 15; Part A2, Head 13; Part A3, Head 16
Article 15		
1. (a) Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.	1983 Act, s 46	Part B2, Head 57
(b) Where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital referred to in paragraph (a).	1983 Act, s 46(4)	Part B2, Head 57(4)

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(c) The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.	1983 Act, s 45	Part A3, Head 49
(d) The expression 'distribution' used in subparagraphs (a) and (c) includes in particular the payment of dividends and of interest relating to shares.	1983 Act, s 51	Part A3, Head 53
2. When the laws of a Member State allow the payment of interim dividends, the following conditions at least shall apply: (a) interim accounts shall be drawn up showing that the funds available for distribution are sufficient, (b) the amount to be distributed may not exceed the total profits made since the end of the last financial year for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.	1983 Act, s 49(5)	Part B2, Head 58(5)
3. Paragraphs 1 and 2 shall not affect the provisions of the Member States as regards increases in subscribed capital by capitalization of reserves.	Regulations 130, 130A and 131 of Table A are unaffected by Part IV of the 1983 Act.	Part A3, Head 55
4. The laws of a Member State may provide for derogations from paragraph 1 (a) in the case of investment companies with fixed capital. The expression 'investment company with fixed capital', within the meaning of this paragraph means only those companies:	**Member State Option** 1983 Act, s 47	**Member State Option** Part B9, Head 12[51]

[51] Since this is not an investment company to which Part XIII of the 1990 Act applies and it appears that none have in fact been registered, consideration might be given to discontinue this derogation.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
— the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets, and — which offer their own shares for subscription by the public. In so far as the laws of Member States make use of this option they shall: (a) require such companies to include the expression ‘investment company’ in all documents indicated in Article 4 of Directive 68/151/EEC; (b) not permit any such company whose net assets fall below the amount specified in paragraph 1 (a) to make a distribution to shareholders when on the closing date of the last financial year the company's total assets as set out in the annual accounts are, or following such distribution would become, less than one-and-a half times the amount of the company's total liabilities to creditors as set out in the annual accounts; (c) require any such company which makes a distribution when its net assets fall below the amount specified in paragraph 1 (a) to include in its annual accounts a note to that effect.		
Article 16		
Any distribution made contrary to Article 15 must be returned by shareholders who have received it if the company proves that these shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.	1983 Act, s 50	Part A3, Head 52

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 17		
1. In the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken.	1983 Act, s 40	Part B2, Head 67
2. The amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital.	1983 Act, s 40(1)	Part B2, Head 67(1)
Article 18		
1. The shares of a company may not be subscribed for by the company itself.	1983 Act, s 41	Part A3, Head 36
2. If the shares of a company have been subscribed for by a person acting in his own name, but on behalf of the company, the subscriber shall be deemed to have subscribed for them for his own account.	1983 Act, s 42	Part A3, Head 37
3. The persons or companies or firms referred to in Article 3 (i) or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be liable to pay for shares subscribed in contravention of this Article.	1983 Act, s 42 (2)(b)	Part A3, Head 37(2)(b)
However, the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.	**Member State Option** Not expressly taken, but under 1983 Act, s 42(4), Court may relieve director of liability.	**Member State Option** Part A3, Head 37(4)

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 19		
[52] [1. Without prejudice to the principle of equal treatment of all shareholders who are in the same position, and to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[53], Member States may permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf.	**Member State Option** Transposed by 1990 Act, Part XI	**Member State Option** Part A3, Chapter 6; Part B2, Heads 52 to 56
To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:	1990 Act, ss 212 – 216	Part A3, Head 38; Part B2, Head 52
(a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and, in particular, the maximum number of shares to be acquired, the duration of the period for which the authorisation is given, the maximum length of which shall be determined by national law without, however, exceeding five years, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall satisfy themselves that, at the time when each authorised acquisition is effected, the conditions referred to in points (b) and (c) are respected;	**Member State Option** At present maximum duration of the authority to acquire own shares on the market is 18 months – 1990 Act, s 216(1). Time can be extended from 18 months to 5 years	**Member State Option** Transposed with maximum duration of authorityof 5 years – Part B2, Head 52(3) to be reduced to 18 months in accordance with CLRG Recommendation 9.2

[52] Article 19 substituted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.
[53] OJ L 96, 12.4.2003, p. 16.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	**IRISH TRANSPOSING MEASURE**	**REFERENCE IN GENERAL SCHEME**
(b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not have the effect of reducing the net assets below the amount mentioned in points (a) and (b) of Article 15(1);	Transposed by combination of 1983 Act, s 46 (as amended by SI 89 of 2008) (limitation on PLC paying dividends) and 1990 Act, s 208, requiring that redemptions or purchases of shares can only be funded out of profits available for distribution or the proceeds of a new issue.	Part B2, Head 57; Part A3, Head 38(9)-(11)
(c) only fully paid-up shares may be included in the transaction.	Transposed by 1990 Act, s 207(2)(b).	Omitted in General Scheme
Furthermore, Member States may subject acquisitions within the meaning of the first subparagraph to any of the following conditions:		
(i) that the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, may not exceed a limit to be determined by Member States.	Transposed by 1990 Act s 209(2)(a),	Part A3, Head 41(1)(a)
This limit may not be lower than 10 % of the subscribed capital;	**<u>Member State Option</u>** Part A3, Head 41(1)(a) The limit is set at 10%, originally the maximum, now the minimum.	**<u>Member State Option</u>** Part A3, Head 41(1)(a) The limit is set at 10%, originally the maximum, now the minimum

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(ii) that the power of the company to acquire its own shares within the meaning of the first subparagraph, the maximum number of shares to be acquired, the duration of the period for which the power is given and the maximum or minimum consideration are laid down in the statutes or in the instrument of incorporation of the company;	Transposed by (i) 1990 Act s 207, requiring the power to redeem (or purchase) shares must be in the company's articles; (ii) the extent and duration of the authority must be in an ordinary or special resolution passed by the members in general meeting.	Part A3, Head 38 [Note: The power to redeem (or purchase) is not specificed as having to be included in the company's articles – see Head 38(3)]
(iii) that the company complies with appropriate reporting and notification requirements;	If a purchase is approved by special resolution (for off market purchases) it must be delivered for registration to the CRO under 1963 Act, s 143(4)(a). If approved by ordinary resolution it must be filed by virtue of 1990 Act, s 215(2) and 1963 Act, s 143.	Part A4, Head 68(4); Part B2, Head 52(2)

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(iv) that certain companies, as determined by Member States, may be required to cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital. This reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;	**<u>Member State Option</u>** Transposed in part. 1990 Act Part XI does not stipulate that certain companies must cancel their shares. However requirement to transfer nominal value to capital redemption reserve fund is provided for at 1990 Act, s 208(b).	**<u>Member State Option</u>** Part A3, Head 38(10) – "undenominated capital"
(v) that the acquisition shall not prejudice the satisfaction of creditors' claims.	General company law principles	Part A3, Head 18(3); Part A4, Head 71(4)(b), (9)
2. The laws of a Member State may provide for derogations from the first sentence of paragraph 1 (a) where the acquisition of a company's own shares is necessary to prevent serious and imminent harm to the company. In such a case, the next general meeting must be informed by the administrative or management body of the reasons for and nature of the acquisitions effected, of the number and nominal value or, in the absence of a nominal value, the accountable par, of the shares acquired, of the proportion of the subscribed capital which they represent, and of the consideration for these shares.	**<u>Member State Option</u>** Not transposed	**<u>Member State Option</u>** Not transposed See Recommendation 9.7
3. Member States may decide not to apply the first sentence of paragraph 1 (a) to shares acquired by either the company itself or by a person acting in his own name but on the company's behalf, for distribution to that company's employees or to the employees of an associate company. Such shares must be distributed within 12 months of their acquisition.	**<u>Member State Option</u>** Not transposed	**<u>Member State Option</u>** See Recommendation 9.8

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Article 20		
1. Member States may decide not to apply Article 19 to:	**Member State Options**	
(a) shares acquired in carrying out a decision to reduce capital, or in the circumstances referred to in Article 39;	**(a)** Transposed by 1963 Act, s 72	Part A3, Head 17
(b) shares acquired as a result of a universal transfer of assets;	**(b)** Refers to the contribution of assets of an independent branch or activity back to the company itself, a concept under civil law.	Not transposed
(c) fully paid-up shares acquired free of charge or by banks and other financial institutions as purchasing commission;	**(c)** 1983 Act, s 41(2) - acquisition of shares other than for valuable consideration. Shares as commission are not expressly provided for. 1963 Act, s 60(12)(m) exempts from the prohibition of financial assistance: "in connection with an allotment of shares by a company or its holding company, the payment by the company of commissions not exceeding 10 per cent of the money received in respect of such allotment to intermediaries, and the payment by the company of professional fees".	Part A3, Head 36(1)(a); Part A3, Head 15(2)(m)

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(d) shares acquired by virtue of a legal obligation or resulting from a court ruling for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;	**(d)** 1983 Act, s 41(4)(c)	Part A3, Head 36(1)(d)
(e) shares acquired from a shareholder in the event of failure to pay them up;	**(e)** 1983 Act, s 41(4)(d)	Part A3, Head 36(1)(b)
(f) shares acquired in order to indemnify minority shareholders in associated companies;	**(f)** This is not expressly provided for.	n/a
(g) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares;	**(g)** This is akin to forfeiture, as provided by paragraph (e).	n/a
(h) fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 15 (4), and acquired at the investor's request by that company or by an associate company. Article 15 (4) (a) shall apply. These acquisitions may not have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.	**(h)** Regulation 28 of the European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations 2003, SI 211 of 2003 relieves UCITS from the requirement to comply with (inter alia) 1983 Act s 41, which transposes the relevant part of the Directive. Section 260 of the 1990 Act similarly relieves Part XIII investment companies from the requirements.	Part B9, Head 2

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2. Shares acquired in the cases listed in paragraph 1 (b) to (g) above must, however, be disposed of within not more than three years of their acquisition unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10 % of the subscribed capital.	1983 Act, s 43	Part B2, Head 41(3) and (14)
3. If the shares are not disposed of within the period laid down in paragraph 2, they must be cancelled. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction must be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in [points (a) and (b) of Article 15(1).] [54]	1983 Act, s 43	Part B2, Head 41(3) and (14)
Article 21		
Shares acquired in contravention of Articles 19 and 20 shall be disposed of within one year of their acquisition. Should they not be disposed of within that period, Article 20 (3) shall apply.	1983 Act, s 43	Part B2, Head 41(3) and (14)
Article 22		
1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make the holding of these shares at all times subject to at least the following conditions: (a) among the rights attaching to the shares, the right to vote attaching to the company's own shares shall in any event be suspended; (b) if the shares are included among the assets shown in the balance sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities.	1990 Act ss 209(3), 224(2)(b)	Part A3, Head 41(2); Part A3, Head 46(2)(b)/Part B3, Head 16(2)(b)

[54] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
2. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall require the annual report to state at least: (a) the reasons for acquisitions made during the financial year; (b) the number and nominal value or, in the absence of a nominal value, the accountable par of the shares acquired and disposed of during the financial year and the proportion of the subscribed capital which they represent; (c) in the case of acquisition or disposal for a value, the consideration for the shares; (d) the number and nominal value or, in the absence of a nominal value, the accountable par of all the shares acquired and held by the company and the proportion of the subscribed capital which they represent.	1986 Act, s 14	Part A6, Head 40
Article 23		
[55] [1. Where Member States permit a company to, either directly or indirectly, advance funds or make loans or provide security, with a view to the acquisition of its shares by a third party, they shall make such transactions subject to the conditions set out in the **<u>second, third, fourth and fifth subparagraphs</u>**.	**<u>Contingent Mandatory Provision</u>** Not transposed	**<u>Contingent Mandatory Provision</u>** Transposed Part A3, Head 15; Part B2, Head 33
<u>[Second]</u> The transactions shall take place under the responsibility of the administrative or management body at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in the first subparagraph. The credit standing of the third party or, in the case of multiparty transactions, of each counterparty thereto shall have been duly investigated.	**<u>Contingent Mandatory Provision</u>** Not transposed	**<u>Contingent Mandatory Provision</u>** Transposed Part B2, Head 33(a)

[55] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
[Third] The transactions shall be submitted by the administrative or management body to the general meeting for prior approval, whereby the general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. The administrative or management body shall present a written report to the general meeting, indicating the reasons for the transaction, the interest of the company in entering into such a transaction, the conditions on which the transaction is entered into, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. This report shall be submitted to the register for publication in accordance with Article 3 of Directive 68/151/EEC.	**Contingent Mandatory Provision** Not transposed	**Contingent Mandatory Provision** Transposed Part B2, Head 33(b)
[Fourth] The aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount specified in points (a) and (b) of Article 15(1), taking into account also any reduction of the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of its own shares in accordance with Article 19(1). The company shall include, among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.	**Contingent Mandatory Provision** Not transposed	**Contingent Mandatory Provision** Transposed Part B2, Head 33(c)-(d)
[Fifth] Where a third party by means of financial assistance from a company acquires that company's own shares within the meaning of Article 19(1) or subscribes for shares issued in the course of an increase in the subscribed capital, such acquisition or subscription shall be made at a fair price.]	**Contingent Mandatory Provision** Not transposed	**Contingent Mandatory Provision** Transposed Part B2, Head 33(e)

SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
2. Paragraph 1 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company. However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 15 (1) (a).	1963 Act, s 60(12)(d)(e)(f), (13)	Part A3, Head 15(2)(d)(e)(f)
3. Paragraph 1 shall not apply to transactions effected with a view to acquisition of shares as described in Article 20 (1) (h).	European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations 2003, SI 211 of 2003, reg 28; 1990 Act, s 260	Part B9, Head 2
[*Article 23a*[56]		
In cases where individual members of the administrative or management body of the company being party to a transaction referred to in Article 23(1), or of the administrative or management body of a parent undertaking within the meaning of Article 1 of Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts [57]or such parent undertaking itself, or individuals acting in their own name, but on behalf of the members of such bodies or on behalf of such undertaking, are counterparties to such a transaction, Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests.]	**Contingent Mandatory Provision** At present, 1990 Act ss 31 et seq provide restrictions on the amount of loans. 1963 Act s 194 will require disclosure at Board meetings and in the book of declarations of interest.	**Contingent Mandatory Provision** Part A5, Head 17 et seq.; Part A5, Head 12

[56] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

[57] OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2006/43/EC.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 24		
1. The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as an acquisition for the purposes of Articles 19, 20 (1), 22 and 23.	1983 Act ss 41, 44 (1)	Part A3, Head 36; Part B2, Head 32(1)
2. The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.	1983 Act, s 44(2)	Part B2, Head 32(2)
[*Article 24a*[58]		
1. (a) The subscription, acquisition or holding of shares in a public limited-liability company by another company within the meaning of Article 1 of Directive 68/151/EEC in which the public limited-liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence shall be regarded as having been effected by the public limited-liability company itself; (b) subparagraph (a) shall also apply where the other company is governed by the law of a third country and has a legal form comparable to those listed in Article 1 of Directive 68/151/EEC.	EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 5	Part A3, Head 36(3)-(8); Part A3, Head 15(3)
2. However, where the public limited-liability company holds a majority of the voting rights indirectly or can exercise a dominant influence indirectly, Member States need not apply paragraph 1 if they provide for the suspension of the voting rights attached to the shares in the public limited-liability company held by the other company.	**Member State Option** 1990 Act s 224	**Member State Option** Part A3, Head 45(6)
3. In the absence of coordination of national legislation on groups of companies, Member States may:	**Member State Options**	**Member State Options**

[58] Inserted by Council Directive 92/101/EEC of 23 November 1992 L 347 64 28.11.1992

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(a) define the cases in which a public limited-liability company shall be regarded as being able to exercise a dominant influence on another company;		Part A1, Head 6; Part B10, Head 21
if a Member State exercises this option, its national law must in any event provide that a dominant influence can be exercised if a public limited-liability company:		
— has the right to appoint or dismiss a majority of the members of the administrative organ, of the management organ or of the supervisory organ, and is at the same time a shareholder or member of the other company or	**(a)** 1963 Act, s 155; EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 4	
— is a shareholder or member of the other company and has sole control of a majority of the voting rights of its shareholders or members under an agreement concluded with other shareholders or members of that company.		
Member States shall not be obliged to make provision for any cases other than those referred to in the first and second indents;		
(b) define the cases in which a public limited-liability company shall be regarded as indirectly holding voting rights or as able indirectly to exercise a dominant influence;	**(b)** 1963 Act, s 155; EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 4	Part A1, Head 6; Part B10, Head 21
(c) specify the circumstances in which a public limited-liability company shall be regarded as holding voting rights.	**(c)** 1963 Act, s 155; EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 4	Part A1, Head 6; Part B10, Head 21
4. (a) Member States need not apply paragraph 1 where the subscription, acquisition or holding is effected on behalf of a person other than the person subscribing, acquiring or holding the shares, who is neither the public limited liability company referred to in paragraph 1 nor another company in which the public limited-liability company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence.	**Member State Option** EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 5(6)(c)	Part A3, Head 36(7)(c)

SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(b) Member States need not apply paragraph 1 where the subscription, acquisition or holding is effected by the other company in its capacity and in the context of its activities as a professional dealer in securities, provided that it is a member of a stock exchange situated or operating within a Member State, or is approved or supervised by an authority of a Member State competent to supervise professional dealers in securities which, within the meaning of this Directive, may include credit institutions.	**Member State Option** EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 5(6)(d)	Part A3, Head 36(7)(d)
5. Member States need not apply paragraph 1 where shares in a public limited-liability company held by another company were acquired before the relationship between the two companies corresponded to the criteria laid down in paragraph 1. However, the voting rights attached to those shares shall be suspended and the shares shall be taken into account when it is determined whether the condition laid down in Article 19 (1) (b) is fulfilled.	**Member State Option** EC (PLC Subsidiaries) Regulations 1997 SI 67 of 1997, reg 5(6)(b)	Part A3, Head 36(7)(b)
6. Member States need not apply Article 20 (2) or (3) or Article 21 where shares in a public limited-liability company are acquired by another company on condition that they provide for: (a) the suspension of the voting rights attached to the shares in the public limited-liability company held by the other company, and	**Member State Option** Not transposed	**Member State Option** Not transposed

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(b) the members of the administrative or the management organ of the public limited-liability company to be obliged to buy back from the other company the shares referred to in Article 20 (2) and (3) and Article 21 at the price at which the other company acquired them; this sanction shall be inapplicable only where the members of the administrative or the management organ of the public limited liability company prove that that company played no part whatsoever in the subscription for or acquisition of the shares in question.]		
Article 25		
1. Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.	1963 Act, ss 58, 68, 70 EC (Companies) Regulations 1973, SI 163 of 1973, regs 4(1)(c), 5	Part A3, Head 5(12); Part A3, Head 16(1); Part A2, Head 15(3)
2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorize an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law.	1963 Act, ss 68, 70 EC (Companies) Regulations 1973, SI 163 of 1973, reg 4(1)(c) 1983 Act, s 20	Part A3, Head 16(1); Part A3, Head 26; Part A2, Head 15(3); Part A3, Head 5; Part B2, Head 14
Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed, by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.	1983 Act, s 20	Part A3, Head 5; Part B2, Head 14

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3. Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorization to increase the capital referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.	1983 Act, s 38, 1963 Act, s 78	Part B2, Head 34/Part A3, Head 21; Part A3, Head 22
4. This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.	1983 Act, s 20(10)	Part A3, Head 1
Article 26		
Shares issued for a consideration, in the course of an increase in subscribed capital, must be paid up to at least 25 % of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it must be paid in full.	1983 Act, s 28(1)	Part B2, Head 19(1)
Article 27		
1. Where shares are issued for a consideration other than in cash in the course of an increase in the subscribed capital the consideration must be transferred in full within a period of five years from the decision to increase the subscribed capital.	1983 Act, s 29(1)	Part B2, Head 20(1)
2. The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State. [Article 10(2) and (3) and Articles 10a and 10b shall apply.] [60]	1983 Act, s 30	Part B2, Head 21[59]

[59] UK has a more expansive independence requirement – see 2006 Act, s1151.

[60] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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3.[61] Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger, a division or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or divided or which is the object of the public offer for the purchase or exchange of shares. In the case of a merger or a division, however, Member States shall apply the first subparagraph only where an independent expert's report on the draft terms of merger or division is drawn up. Where Member States decide to apply paragraph 2 in the case of a merger or a division, they may provide that the report under this Article and the independent expert's report on the draft terms of merger or division may be drawn up by the same expert or experts.	**Member State Option** Transposed in part, in relation to or a public offer for the purchase or exchange of shares: 1983 Act, s 30(2)	**Member State Option** Transposed in part Part B2, Head 21(2) does not include newly inserted provisions on mergers and divisions
4. Member States may decide not to apply paragraph 2 if all the shares issued in the course of an increase in subscribed capital are issued for a consideration other than in cash to one or more companies, on condition that all the shareholders in the company which receive the consideration have agreed not to have an experts' report drawn up and that the requirements of Article 10 (4) (b) to (f) are met.	**Member State Option** Not transposed.	**Member State Option** Not transposed.
Article 28		
Where an increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide.	1963 Act, s 53 (Minimum subscription and amount payable on application)	Part B2, Head 105

[61] Paragraph 3 substituted by Directive 2009/109/EC, Article 1.3. Former paragraph 3 provided:
"Member States may decide not to apply paragraph 2 in the event of an increase in subscribed capital made in order to give effect to a merger or a public offer for the purchase or exchange of shares and to pay the shareholders of the company which is being absorbed or which is the object of the public offer for the purchase or exchange of shares."

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 29		
1. Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.	1983 Act, s 23(1)	Part A3, Head 5(5)
2. The laws of a Member State: (a) need not apply paragraph 1 above to shares which carry a limited right to participate in distributions within the meaning of Article 15 and/or in the company's assets in the event of liquidation; or	**Member State Option** 1983 Act, s 23(13)	**Member State Option** Part A3 1(1); Part A3, Head 5(7)
(b) may permit, where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in distributions within the meaning of Article 15 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.	1983 Act, s 23(2)	Part A3, Head 5(6)
3. Any offer of subscription on a pre-emptive basis and the period within which this right must be exercised shall be published in the national gazette appointed in accordance with Directive 68/151/EEC. However, the laws of a Member State need not provide for such publication where all a company's shares are registered. In such case, all the company's shareholders must be informed in writing. The right of pre-emption must be exercised within a period which shall not be less than 14 days from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.	1983 Act, s 23(7), (8). The 1983 Act provides for an offer period of 21 days rather than the 14 day period in the Directive.	Part A3, Head 5(5)-(6) Already provides for a 14 day offer period in accordance with Recommendation 13.
4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation.	1983 Act, s 24	Part A3, Head 5(7)

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This may, however, be done by decision of the general meeting.		
The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price.		
The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40.	1983 Act, s 24(1), increasing the Article 40 66⅔% or 50%+ of 50% of shares in issue, to the standard 75% special resolution.	Part A3, Head 5(7)(b)
Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.	1963 Act s 143(4)(a)	
5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limit of the authorized capital.	**Member State Option** 1983 Act, s 24(1)	**Member State Option** Part A3, Head 5(7) No maximum period for exercise specified
This power may not be granted for a longer period than the power for which provision is made in Article 25 (2).		
6. Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.	1983 Act, s 23(13)	Part A3 1(1); Part A3, Head 5(7)

SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
7. The right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.	Not at present transposed, Until 1 July 2005, 1963 Act, s 51 provided that an allotment with a view to resale was considered to be an offer to the public by the company.	
Article 30		
Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 40 without prejudice to Articles 36 and 37. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC. The notice convening the meeting must specify at least the purpose of the reduction and the way in which it is to be carried out.	1963 Act, s 72	Part A3, Head 17; Part A4, Head 52(6)
Article 31		
Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.	1983 Act, s 38, 1963 Act, s 78	Part B2, Head 34/Part A3, Head 21; Part A3, Head 22

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 32		
[62] [1. In the event of a reduction in the subscribed capital, at least the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain security for claims which have not fallen due by the date of that publication. Member States may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company. Member States shall lay down the conditions for the exercise of the right provided for in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the reduction in the subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.]	1963 Act, s 73(2), as amended by EC (PLC Directive 2006/68/EC) Regulations 2008, S.I. No. 89 of 2008, reg 3	Part A3, Head 18(3) ; Part A4, Head 71(4)(b), (9)
2. The laws of the Member States shall also stipulate at least that the reduction shall be void or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.	1963 Act, s 72	Part A3, Head 17 [Query: Examine Validation Procedure at Part A4, Head 71 for compliance]
3. This Article shall apply where the reduction in the subscribed capital is brought about by the total or partial waiving of the payment of the balance of the shareholders' contributions.	1963 Act, s 72	Part A3, Head 17

[62] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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Article 33		
1. Member States need not apply Article 32 to a reduction in the subscribed capital whose purpose is to offset losses incurred or to include sums of money in a reserve provided that, following this operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders; it may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as the Member States permit such an operation.	**Member State Option** Not transposed	**Member State Option** Not transposed
2. In the cases referred to in paragraph 1 the laws of the Member States must at least provide for the measures necessary to ensure that the amounts deriving from the reduction of subscribed capital may not be used for making payments or distributions to shareholders or discharging shareholders from the obligation to make their contributions.	Not transposed, but would be caught by 1963 Act, s 72	Part A3, Head 17
Article 34		
The subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 6.	1983 Act, s 17	Part B2, Head 59
However Member States may permit such a reduction if they also provide that the decision to reduce the subscribed capital may take effect only when the subscribed capital is increased to an amount at least equal to the prescribed minimum.	**Member State Option** Not transposed	**Member State Option** Not transposed
Article 35		
Where the laws of a Member State authorize total or partial redemption of the subscribed capital without reduction of the latter, they shall at least require that the following conditions are observed:	**Contingent Mandatory Provision** 1990 Act, s 207	**Contingent Mandatory Provision** Part A3, Head 38

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(a) where the statutes or instrument of incorporation provide for redemption, the latter shall be decided on by the general meeting voting at least under the usual conditions of quorum and majority. Where the statutes or instrument of incorporation do not provide for redemption, the latter shall be decided upon by the general meeting acting at least under the conditions of quorum and majority laid down in Article 40. The decision must be published in the manner prescribed by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC; (b) only sums which are available for distribution within the meaning of Article 15 (1) may be used for redemption purposes; (c) shareholders whose shares are redeemed shall retain their rights in the company, with the exception of their rights to the repayment of their investment and participation in the distribution of an initial dividend on unredeemed shares.		
Article 36		
1. Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the following conditions are observed: (a) compulsory withdrawal must be prescribed or authorized by the statutes or instrument of incorporation before subscription of the shares which are to be withdrawn are subscribed for; (b) where the compulsory withdrawal is merely authorized by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned;	**<u>Contingent Mandatory Provision</u>** Not applicable in Ireland	n/a

SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(c) the company body deciding on the compulsory withdrawal shall fix the terms and manner thereof, where they have not already been fixed by the statutes or instrument of incorporation; (d) Article 32 shall apply except in the case of fully paid-up shares which are made available to the company free of charge or are withdrawn using sums available for distribution in accordance with Article 15 (1); in these cases, an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the withdrawn shares must be included in a reserve. Except in the event of a reduction in the subscribed capital this reserve may not be distributed to shareholders. It can be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as Member States permit such an operation; (e) the decision on compulsory withdrawal shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC. 2. Articles 30 (1), 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.		
Article 37		
1. In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.	**Contingent Mandatory Provision** Not applicable in Ireland	n/a

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
2. Article 32 shall apply unless the shares are fully paid up and are acquired free of charge or using sums available for distribution in accordance with Article 15 (1); in these cases an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the shares withdrawn must be included in a reserve. Except in the event of a reduction in the subscribed capital, this reserve may not be distributed to shareholders. It may be used only for offsetting losses incurred or for increasing the subscribed capital by the capitalization of such reserve, in so far as the Member States permit such an operation. 3. Articles 31, 33 and 40 shall not apply to the cases to which paragraph 1 refers.		
Article 38		
In the cases covered by Articles 35, 36 (1) (b) and 37 (1), when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.	1983 Act, s 38	Part B2, Head 34/Part A3, Head 21
Article 39		
Where the laws of a Member State authorize companies to issue redeemable shares, they shall require that the following conditions, at least, are complied with for the redemption of such shares:	**Contingent Mandatory Provision**	**Contingent Mandatory Provision**
(a) redemption must be authorized by the company's statutes or instrument of incorporation before the redeemable shares are subscribed for;	1983 Act, s 207(1)	Part A3, Head 38(1), (3) [Note: Not required to be authorised in articles – see Head 38(3)]
(b) the shares must be fully paid up;	1983 Act, s 207(2)(b)	Omitted in General Scheme

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
(c) the terms and the manner of redemption must be laid down in the company's statutes or instrument of incorporation;	1983 Act, s 207 (1)	Part A3, Head 38(1), (3) [Note: Not required to be authorised in articles – see Head 38(3)]
(d) redemption can be only effected by using sums available for distribution in accordance with Article 15 (1) or the proceeds of a new issue made with a view to effecting such redemption;	1983 Act, s 207 (2)(d)	Part A3, Head 38(1)
(e) an amount equal to the nominal value or, in the absence thereof, to the accountable par of all the redeemed shares must be included in a reserve which cannot be distributed to the shareholders, except in the event of a reduction in the subscribed capital; it may be used only for the purpose of increasing the subscribed capital by the capitalization of reserves;	1983 Act, s 208(b)	Part A3, Head 38(10)
(f) subparagraph (e) shall not apply to redemption using the proceeds of a new issue made with a view to effecting such redemption;	1983 Act, s 207 (2)(f)	Part A3, Head 38(2)
(g) where provision is made for the payment of a premium to shareholders in consequence of a redemption, the premium may be paid only from sums available for distribution in accordance with Article 15 (1), or from a reserve other than that referred to in (e) which may not be distributed to shareholders except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalization of reserves or for covering the costs referred to in Article 3 (j) or the cost of issuing shares or debentures or for the payment of a premium to holders of redeemable shares or debentures;	1983 Act, s 207 (2)(e)	Omitted in General Scheme
(h) notification of redemption shall be published in the manner laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.	1963 Act, s 69; 1990 Act, s 226	Part A3, Head 25; Part A3, Head 48; Part B2, Head 54

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 40		
1. The laws of the Member States shall provide that the decisions referred to in Articles 29 (4) and (5), 30, 31, 35 and 38 must be taken at least by a majority of not less than two-thirds of the votes attaching to the securities or the subscribed capital represented.	Where transposed, 75% has been adopted as the percentage.	
2. The laws of the Member States may, however, lay down that a simple majority of the votes specified in paragraph 1 is sufficient when at least half the subscribed capital is represented.	**Member State Option** Not transposed.	**Member State Option** Not transposed.
Article 41		
[1. Member States may derogate from Article 9(1), the first sentence of point (a) of Article 19(1), and Articles 25, 26 and 29 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.] [63]	**Member State Option** Transposed for the purposes of employee share schemes. Requirement that shares be paid up as to 25% par value, requirement for authorisation to directors to allot and for non-pre-emptive allotments do not apply. 1983 Act, ss 28(4), 20(10), 23(6).	**Member State Option** Part B2, Head 19(4); Part A3, Head 5(7)(e)
2. Member States may decide not to apply Article 19 (1) (a), first sentence, and Articles 30, 31, 36, 37, 38 and 39 to companies incorporated under a special law which issue both capital shares and workers' shares, the latter being issued to the company's employees as a body, who are represented at general meetings of shareholders by delegates having the right to vote.	**Member State Option** Not transposed.	**Member State Option** Not transposed.

[63] Inserted by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 L 264 32 25.9.2006.

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SECOND COUNCIL DIRECTIVE, AS AMENDED	IRISH TRANSPOSING MEASURE	REFERENCE IN GENERAL SCHEME
Article 42		
For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.	Not explicitly transposed. General company law ensures this. Acknowledged in 1990 Act s 211(4), as inserted by SI 89 of 2008.	Omitted in General Scheme
Article 43		
1. Member States shall bring into force the laws, regulations and administrative provisions needed in order to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof. 2. Member States may decide not to apply Article 3 (g), (i), (j) and (k) to companies already in existence at the date of entry into force of the provisions referred to in paragraph 1. They may provide that the other provisions of this Directive shall not apply to such companies until 18 months after that date. However, this time limit may be three years in the case of Articles 6 and 9 and five years in the case of unregistered companies in the United Kingdom and Ireland. 3. Member States shall ensure that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.		
Article 44		
This Directive is addressed to the Member States.		