COMPANY LAW REVIEW GROUP

REPORT ON CERTAIN COMPANY LAW ISSUES UNDER THE COMPANIES ACT 2014 RELATING TO CORPORATE GOVERNANCE

MAY 2022

CONTENTS

Chairperson's Letter to the Minister for Enterprise, Trade and Employment

Mr Leo Varadkar T.D.,
Tánaiste and Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

Mr Robert Troy, T.D.
Minister of State for Trade Promotion, Digital and Company Regulation
23 Kildare Street
Dublin 2
D02 TD30

31 May 2022

Dear Tánaiste,

Dear Minister,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on miscellaneous issues under the Companies Act 2014 relating to corporate governance.

I would like to extend my sincere thanks to the members of the CLRG's Corporate Governance Committee and in particular Committee Chairperson Mr Salvador Nash for their engagement and input in examining these issues.

I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, Secretary to the Group, Ms Deirdre Morgan and her predecessor Mr Stephen Walsh.

Yours sincerely,

_____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction

1.1 The Company Law Review Group

The Company Law Review Group (**CLRG**) is an expert advisory body charged with advising the Minister for Enterprise, Trade and Employment (**the Minister**) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment (**the Department**) and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department. Full lists of members of the Company Law Review Group and of the Corporate Governance Committee are set out in Section 2.

1.2 The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014.

1.3 Policy Development

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

1.4 Contact information

The CLRG maintains a website at www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Deirdre Morgan
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01
Email: clrg@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this Report is set out in this table.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Máire Cunningham	Law Society of Ireland (Beauchamps LLP)
Richard Curran	Ministerial Nominee (LK Shields LLP)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
Ian Drennan	Director of Corporate Enforcement
Bernice Evoy	Banking and Payments Federation Ireland CLG
James Finn	The Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Ministerial Nominee (DETE)
Shelley Horan	Bar Council of Ireland
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Prof. Irene Lynch Fannon	Ministerial Nominee (Matheson and School of Law, University College Cork)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)
Vincent Madigan	Ministerial Nominee, formerly of the Department of Enterprise Trade and Employment
Kathryn Maybury	Small Firms Association LTD (KomSec LTD)
Salvador Nash	The Chartered Governance Institute (KPMG)

Fiona O'Dea	Ministerial Nominee (DETE)
Ciara O'Leary	Irish Funds Industry Association CLG (Dechert LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Addleshaw Goddard (Ireland LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies-Ireland (CCAB-I) (Grant Thornton Ireland)

2.2 Corporate Governance Committee

The membership of the Review Group's Corporate Governance Committee is set out in this table.

Salvador Nash	Chairperson
Barry Conway	CLRG member
Máire Cunningham	CLRG member
Richard Curran	Ministerial Nominee (LK Shields LLP)
Marie Daly	CLRG member
Emma Doherty	CLRG member
Dr David McFadden	CLRG member
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member
Jacqueline O'Callaghan	Revenue Commissioners
Conor O'Mahony	Office of the Director of Corporate Enforcement
Gillian O'Shaughnessy	CLRG member

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in June 2020 and runs until mid-2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The impact of and the effect of Covid 19 on company law issues are also reflected in the current work programme.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's Work Programme during the currency of which this Report was prepared included the mandate to "[e]xamine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014." This Report is delivered in fulfilment of the Review Group's mandate under this heading.

3.3 Decision-making process of the Company Law Review Group

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

3.4 Committees of the Company Law Review Group

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

The Committee met 6 times during 2020 and 2021 by videoconference to consider these issues, as well as circulating draft text of its proposed conclusions several times between meetings.

4. Miscellaneous company law issues under the Companies Act 2014

4.1 Introduction

The issues considered by the Committee in this report arise primarily from practical problems and anomalies that legal practitioners have encountered in transactional matters. Particulars of these issues have been brought to the Committee by Committee members themselves and from submissions, formal and informal, received from nominating bodies.

4.2 Defined terms

In this Report, the following defined terms and expressions are used:

1997 Regulations	European Communities (Public Limited Companies Subsidiaries) Regulations 1997
2014 Act	Companies Act 2014
CLG	company limited by guarantee
Committee	the Review Group's Corporate Governance Committee
Companies Act	Companies Act 2014
CRO	Companies Registration Office
DAC	designated activity company
Department	Department of Enterprise Trade and Employment
LTD	private company limited by shares
PLC	public limited company
PRA	Property Registration Authority
PUC	public unlimited company
PULC	public unlimited company that has no share capital
Registrar	Registrar of Companies
SAP	the summary approval procedure as provided for in Chapter 7 of Part 4 of the Companies Act
ULC	private unlimited company

In this Report, references to sections, Chapters, Parts and Schedules are to sections, Chapters and Parts of and Schedules to the 2014 Act.

Issue 1 - Recognition by the Property Registration Authority of a Merger by Summary Approval Procedure

Issue

A summary approval procedure (SAP) can be used by companies (other than public limited companies) to effect a domestic merger by virtue of section 464. A domestic merger can also be confirmed for such companies by a court order pursuant to section 477 where the SAP has not been used. (In the case of public limited companies (PLCs), a distinct procedure under Chapter 16 of Part 17 is prescribed, which also requires Court approval.)

The provisions of section 472(1) disapply provisions relating to the court process for mergers where the SAP has been used, with certain exceptions set out in that section (with any necessary modifications). One of the exceptions by virtue of section 472(2) is the list of consequences of the merger listed in section 480(3). Accordingly, the usual consequences of a merger – such that the assets and liabilities of the transferring company are automatically transferred to the successor company, the transferor company is dissolved, court proceedings continue in the name of the successor company etc. – apply to a merger by SAP.

However, the provisions disapplied by section 472(1) include section 480(5) – (8) which deal with 'registration requirements and any other special formalities required by law' for the transfer of assets. Specific reference is made in section 480(7) to the Property Registration Authority (PRA) in the context of the production of a court order. However, there is no corresponding mention in those provisions to SAP documents therefore those sections do not apply to a merger by SAP by virtue of section 472(1).

A number of Committee members reported their own practical difficulties as well as those reported to them by colleagues for parties to a merger by SAP when dealing with the PRA on this issue by virtue of the 2014 Act's provisions relating to PRA registration formalities not applying to mergers by SAP.

Committee deliberations

The Review Group noted that this issue had been considered previously, as reported in the Review Group's Annual Report for 2019.[1]

The Committee considered a range of possible solutions to resolve the issue and it was decided to seek a meeting with PRA officials to ensure any resulting recommendation was workable from their perspective.

The PRA outlined their internal process and requirements for registration of a transfer of property effected by merger by SAP. The PRA requires the filing with it of these documents:

1. Unanimous resolution of the shareholders of each of the merging companies as provided `by 202(1)(iii);

2. Directors' Declaration as provided by section 202(6) and section 206 of the 2014 Act;

[1] Company Law Review Group Annual Report 2019, pp 16 et seq.

3. Document prepared by the Declarants either-

    a. confirming that the common draft terms of merger provide for such particulars of each relevant matter as will enable each of the prescribed effects provisions to operate without difficulty in relation to the merger; or

    b. specifying such particulars of each relevant matter as will enable each of those prescribed effects provisions to operate without difficulty in relation to the merger as set out in section 209(1);

4. Evidence from the (Companies Registration Office) CRO of the dissolution of the transferor company or companies pursuant to section 202(5). This is to prove that the declaration referred to at 2 above has been presented to the CRO within the 21-day time limit allowed; and

5. Covering letter from a solicitor stating that:

    a. none of the merging companies is a public limited company; and

    b. one, at least, of the merging companies is a private company limited by shares, as provided in section 462.

It was accepted that this procedure causes a level of duplication, with documents being lodged with both the CRO and PRA.

The Committee put forward the proposal of using the CRO 'company record' printout which would outline that a company had been dissolved by way of merger once all the relevant documents had been filed. The PRA provisionally indicated to the Committee that it would be willing to accept the printout as evidence of a merger done by way of summary approval procedure if the printout stated '*dissolved by merger with company x*' – as opposed to the current status of '*dissolved post-merger*' – and include the registration number of the successor company. This would obviate requirements 1- 5 as listed above.

The CRO examined the proposal from a technical point of view, and concluded it is possible to amend the company print out to allow for an additional tab which will display the information necessary for the PRA to effect the transfer of title. The Review Group notes that it is the view of the CRO that the proposal will need to be proofed against possible exposure for the Registrar of Companies, the CRO and the Department from litigation as well as consideration of the costs involved.

2019 Recommendation

The Review Group recommended that the Companies Registration Office's company printout be amended to include the following information:

- "Dissolved by merger with company "x" under Part 9 of the Companies Act 2014;
- Statement of the name and CRO number of the successor company.

The Review Group understands that such a document would be acceptable to the PRA and will obviate the requirement for the suite of papers described above.

Recommendation

As this issue continues to cause practical issues, and as no legislative change is being proposed, the Review Group recommends that the Department and the Companies Registration Office consider implementation of the previous recommendation of the Review Group, as contained in its 2019 Annual Report.

Issue 2 - Timing of a domestic merger (Section 472)

Issue

Where a domestic merger is effected by SAP, section 472(2) provides that, on the passing of the unanimous resolution, the merger is effective from the date specified in the common draft terms or any supplemental document. There is currently no requirement to file a copy of the common draft terms of merger with the Registrar as part of the SAP. The "effective date" of the merger is the date upon which the two (or more) entities which are undertaking the merger will be registered as merged, with the transferor company (or companies) being dissolved with effect from this "effective date" (section 480(3)(c) as applied by section 472(2)).

In a merger effected by SAP, the Directors' section 206 declaration must be delivered to the Registrar within 21 days "after the date on which the carrying on of the restricted activity concerned is commenced".[2] On the delivery of such declaration to the Registrar, "the Registrar shall register the dissolution of the transferor company or companies concerned". [3] The CRO treats the "effective date" of the dissolution of company (or companies) as the date of its receipt of the declaration and resolution, rather than the effective date in the common draft terms. Accordingly, entities are being registered as merged or dissolved (as appropriate) with effect from the date of the filings, rather than the effective date as stated in the common draft terms of merger.

Although the common draft terms are not required to be filed with the Registrar, it is practice to confirm the "effective date" as per the common draft terms either in the text of the unanimous resolution or in a separate cover letter addressed to the Registrar. The CRO cannot register the dissolution from the register of the transferor company (or companies) to a date prior to the date on which the declaration is delivered to the Registrar and this creates disparity between the effective date of the merger and the effective date of the dissolution of the transferor company or companies.

This anomaly has potentially serious consequences for companies that have structured their transaction around a contractually agreed "effective date" as permitted by section 472(2). In some instances, the contractually agreed "effective date" and the registered CRO "effective date" may differ to such an extent that the merger is registered as having taken effect in a different financial year from that in which the actual date set out in the common draft terms falls. This results in a change to the common draft terms, a change that was not approved nor inspected by the members of each merging entity and negating the purpose of the SAP which is intended as an approval procedure by which shareholders, having been fully informed on the particular restricted activity, can sanction it.

Committee deliberations

The Review Group noted that this issue had been considered previously, as reported in the Review Group's Annual Report for 2019. [4] The Committee did not believe that it was necessary to amend the 2014 Act to allow the Registrar to register the dissolution of the transferor company or companies

[2] Companies Act 2014, s 202(2).

[3] Companies Act 2014, Section 202(5).

[4] Company Law Review Group Annual Report 2019, pp 24 et seq.

concerned with effect from the date on which the merger takes effect as specified in the common draft terms of the merger.

The Committee identified a pragmatic solution to the issue which is an amendment to the CRO Statutory Form and CRO print out. Allowing for an additional information tab to include the "date of merger as per the common draft terms" as well as the existing tab which records the date in which the dissolution is registered with the CRO would provide certainty to companies engaging in such commercial transactions while maintaining the integrity of the CRO register thus negating the need for legislative amendments. The Statutory Form would be amended to facilitate the Directors stating the "effective date of merger" as per the common draft terms, signing same and filing with the CRO therefore allowing the CRO printout to be amended as outlined above.

2019 Recommendation

The Review Group recommended that the CRO printout be amended to include the following additional information:

- Effective date of merger in accordance with the common draft terms of merger and any supplemental document as indicated on forms presented for filing to the Companies Registration Office"
- Date of registration of dissolution by Registrar.

Recommendation

As this issue continues to cause issues in practice where there should be no ambiguity, the Committee concluded the 2019 recommendation is pragmatic and does not require legislative amendment. The Review Group thus recommends that the Department considers the previous recommendation on this issue, as contained in its 2019 Annual Report.

Issue 3 - Domestic mergers: inspection of documents (Section 471)

Issue

In domestic mergers by absorption, Section 471 requires the making available of certain documents for inspection by members for 30-days prior to implementation of the merger unless those documents have been published free of charge on its website for a period of at least two (2) months, commencing at least 30 days before the passing of the merger resolution. This 30-day waiting period causes significant delays for group internal reorganisations. In a situation where the SAP is to be employed to approve the merger (which requires a unanimous resolution of the members of each relevant company in respect of a merger), and in an absorption scenario (where by definition the absorbing parent – the 'successor company' – is the 100% owner of the subsidiary – the 'transferor company') the 30-day inspection period in favour of members does not appear to serve an effective purpose, but rather simply causes delays. If members of the successor company require time and further information, they can request it given that the members' resolution to be passed must be passed unanimously.

The Directors' Explanatory Report (Section 467) and the Expert's Report (Section 468) contain exemptions in relation to mergers by absorption. The Law Society considers it would be a significant improvement if Section 471 were amended to include a similar exemption for mergers by absorption[5].

Committee deliberations

The Committee noted that this issue had been considered previously, as reported in the Review Group's Annual Report for 2019[6], and noted that in a domestic merger by absorption, the transferor company is 100% owned by the successor company so there are no members without voting rights who would be impacted by such an exemption. However, the 30-day waiting period provides protection to non-voting shareholders of the successor company, allowing them an appropriate space in which to review the full details of the proposed merger. The Committee noted that Government Agencies such as Enterprise Ireland can often be non-voting shareholders and it would be in the public interest that they continue to enjoy the protection of this waiting period.

2019 Recommendation

The Review Group recommended, in the case of mergers by absorption, an amendment to the 2014 Act to provide an exemption from the 30-day display and inspection period required by section 471, provided all member(s), (voting and non-voting) of the successor company so consent in writing.

Recommendation

As this remains an issue, the Review Group recommends that the Department considers the previous recommendation on this issue, as contained in the 2019 Annual Report.

[5] law-society-3rd-submission-to-companies-act-2014.pdf (lawsociety.ie)

[6] Company Law Review Group Annual Report 2019, pp 21 et seq.

Issue 4 - Domestic mergers (Part 9 Chapter 3 (461 – 494))

Issue

In a domestic merger, one of the companies must be a private company limited by shares (LTD) rather than simply a non-PLC (PLCs being subject to distinct provisions in relation to their domestic mergers[7]).

Section 462 provides:

> This Chapter applies only if—
>
> (a) none of the merging companies is a public limited company, and
>
> (b) one, at least, of the merging companies is a private company limited by shares.

Committee deliberations

The Committee is aware that the Cross Border Mergers Directive only applies to limited companies. However, it was implemented at a time when Irish law only had one type of private limited company. The 2014 Act now provides for two types of private limited company, the LTD and the Designated Activity Company (DAC). It should not be necessary for a DAC to reregister as an LTD prior to a merger under Part 9.

There appears to be no policy or other reason for the requirement for one of the companies to be a LTD, although the origin of this requirement is indicated in the explanatory memo for the Companies Act, which states:

> 'Chapter 3 concerns mergers and is new. The Act provides, for the first time in Irish law, a statutory mechanism whereby two private Irish companies can merge so the assets and liabilities (and corporate identity) of one are transferred by operation of law to the other, before the former is dissolved. A further innovation is that a merger can be affected without the necessity for a High Court order. Where a merger meets the requirements of the legislation, it is proposed that the Summary Approval Procedure (as set out in Chapter 7 of Part 4 of the Act) can be utilised to effect the merger, which can be expected to result in a significant saving of time and money. The provisions have been based on Cross-Border Merger regime, as laid down in the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008), while re-modelling the cross-border element to apply in a domestic context.'

Recommendation

The Review Group recommends that, in a domestic merger, one of the companies must be either an LTD or a DAC. For this purpose, section 462(b) should be amended by the addition in Section 462(b) of the words "or a designated activity company limited by shares" after the word "shares".

[7] Companies Act 2014, Part 17, Chapter 16.

Issue 5 - Merger by absorption (Section 463(1))

Issue

Section 463(1) appears to only allow a "merger by absorption" where one company (only) transfers all its assets and liabilities to a successor company, as opposed to allowing a number of companies in the same group to transfer assets and liabilities to the successor company in the same merger. This means in a group restructuring scenario where you have a number of companies looking to be absorbed into another group company, each transferring company will need to have its merger with the successor company approved separately as opposed to having them all approved together under one common draft merger agreement. This is unnecessarily cumbersome and could also prove costly where there is a large number of companies in the same group merging by absorption and the court approval procedure is used.

Section 463 provides:

> (1) In this Chapter "**merger by acquisition**" means an operation in which a company acquires all the assets and liabilities of one or more other companies that is or are dissolved without going into liquidation in exchange for the issue to the members of that company or those companies of shares in the first-mentioned company, with or without any cash payment.
>
> (2) In this Chapter "**merger by absorption**" means an operation whereby, on being dissolved and without going into liquidation, ***a company***[8] transfers all of its assets and liabilities to a company that is the holder of all the shares representing the capital of the first-mentioned company.

Committee deliberations

The Committee could not identify any reason why only one company in a wholly owned group should be permitted to take part in a merger by absorption. While the Interpretation Act 2005 provides that a word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular,[9] the 2014 Act should be clear and free from doubt, especially where, in the same section of the 2014 Act in relation to a merger by acquisition, reference is made to "one or more companies" merging.

One practitioner reported to the Committee that they had persuaded a Court to apply the interpretation Act in one instance where several charities were merging operations and the directors wished to avail of the court procedure rather than use the SAP. In that instance, and by way of a concession because of the charitable status and not even by way of precedent for any similar situation, the court agreed to accommodate several mergers by way of one composite application.

[8] Our emphasis.

[9] Interpretation Act 2005, s 18:—The following provisions apply to the construction of an enactment:

(a) Singular and plural. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular.

The Committee concluded that it was unsatisfactory to extrapolate from this one case, where the Court would in any event have a certain discretion in dealing with merger applications.

Recommendation

In the absence of any known policy reason that would prevent a group of subsidiary companies wholly owned by the same parent company taking part in a merger by absorption, the Review Group recommends amendments to sections 463 and 1129.

The Review Group recommends that section 463 of the Companies Act 2014 be amended, in subsection (2), by the replacement of "a company transfers all of its assets and liabilities to a company that is the holder of all the shares representing the capital of the first-mentioned company" with "one or more companies transfer all of their assets and liabilities to a company that is the holder of the shares representing the capital of the transferor companies".

Similarly, in the case of PLCs, the Review Group recommends that section 1129 be amended:

- **in subsection (2), by the replacement of "a company transfers all of its assets and liabilities to a company that is the holder of all the shares representing the capital of the first-mentioned company" with "one or more companies transfer all of their assets and liabilities to a company that is the holder of all the shares representing the capital of the transferor companies", and**

- **in subsection (3), by the replacement of "the first-mentioned company" with "a transferor company", and**

- **in subsection (3), paragraph (b), by the replacement of "the first-mentioned" with "a transferor company"**

Issue 6 - Inspection of statutory financial statements in a Part 9 merger (Section 471(1)(b))

Issue

Section 471 of the 2014 Act requires that each of the merging companies must make several documents available for inspection by members at their respective registered offices for 30-days prior to implementation of the merger. This includes the statutory financial statements for the preceding 3 financial years of each company (audited, where required by that Part, in accordance with Part 6) as provided for by Section 471(1)(b).

Section 471 provides:

> *(1) Subject to subsection (5), each of the merging companies shall, in accordance with subsection (3), make available for inspection free of charge by any member of the company at its registered office during business hours:*
>
> *(a) the common draft terms of merger;*
>
> *(b) subject to subsection (2), the statutory financial statements for the preceding 3 financial years of each company (audited, where required by that Part, in accordance with Part 6);*[10]
>
> *(c) except in the case of a merger by absorption or in any other case where such a report is not required to be prepared by that section, the explanatory report relating to each of the merging companies referred to in section 467;*
>
> *(d) if such a report is required to be prepared by that section, the expert's report relating to each of the merging companies referred to in section 468; and*
>
> *(e) each merger financial statement, if any, in relation to one or, as the case may be, more than one of the merging companies, required to be prepared by section 469.*

As a consequence of Section 471(1)(b), a merger cannot happen until a company has statutory financial statements available for its most recent financial year. The effect of this is that a company cannot merge in say 2022 until it has its 2021 statutory financial statements fully completed, signed and (if required), audited. The requirement for an audit would, for most companies subject to audit, create a black spot of several months (certainly no merger could happen in January, February or March) and maybe even for longer.

[10] Section 471(2): (1) For the purposes of paragraph (b) of subsection (1)—

(a) if any of the merging companies has traded for less than 3 financial years before the date of the common draft terms of merger, then, as respects that company, that paragraph is satisfied by the statutory financial statements for those financial years for which the company has traded (audited, where required by that Part, in accordance with Part 6) being made available as mentioned in that subsection by each of the merging companies, or

(b) if, by reason of its recent incorporation, the obligation of any of the foregoing companies to prepare its first financial statements under Part 6 had not arisen as of the date of the common draft terms of merger, then the reference in that paragraph to the financial statements of that company shall be disregarded.

Committee deliberations

The Committee concluded that there was no reason to require audited statutory financial statements, and that the requirement was an unnecessary barrier to the use of a valuable statutory procedure. It introduces a delay at the beginning of each financial year where a merger is impossible.

The requirement to have documents open for inspection at the merging companies' registered office will not apply in relation to a merging company if it publishes free of charge on its website the documents specified in that subsection for a continuous period of at least two months, commencing at least 30 days before:

(a) where the summary approval procedure is employed to effect the merger, the date of the resolution referred to in section 202(1)(a)(ii) of the company; and

(b) where that procedure is not employed for that purpose, the date of the general meeting of the company which, by virtue of section 473, is to consider the common draft terms of merger, and ending at least 30 days after that date.[11]

However, the Committee discussed the delay to implement a merger in cases where audited financial statements are required and whether that reality was appropriate, given the safeguards inherent in implementing a merger utilising the summary approval procedure or by application to the High Court.

It was noted also that the successor company can choose to delay the merger until such time as audited financial statements become available, if this is something considered to be of material importance.

Recommendation

The Review Group recommends:

- **for the first 6 months of the year, a merging company be allowed to have unaudited financial statements available for inspection; however,**

- **where a company has audited financial statements, that such statements be made available for inspection.**

For this purpose, the Review Group recommends that section 471 be amended

- **by the substitution in subsection (2) paragraph (b) of the word "or" for "."; and**

- **the insertion of the following new subsection (2) paragraph (c):**

  if the date of the passing of either resolution referred to in *subsection (3)* is in the first 6 months of the current financial year and the statutory financial statements for the previous financial year of any of the merging companies has not been audited (where required by that Part, in accordance with Part 6) then as respects that company or companies that paragraph is satisfied by the unaudited statutory financial statements (where required by that Part, in accordance with Part 6) being made available for inspection as mentioned in that subsection by that company or companies".

[11] Companies Act 2014, s 471(1).

Issue 7 - Variation of rights attached to special classes of shares (Section 88)

Issue

Section 88 sets out the rules for the variation of class rights attaching to shares, depending on how those rights are prescribed and whether the Company's constitution provides a procedure for their being varied.

When the constitution of a company was split between a memorandum of association and articles of association, then prior law could differentiate between rights entrenched by the memorandum of association and those entrenched by the articles of association. In summary, the former could be entrenched, requiring the unanimous approval of all shareholders or compliance with variation procedures specified in the memorandum of association, whereas the latter could be varied by special resolution of the class and of the company.[12]

For LTDs with a single document constitution, including a company with a pre-2014 Act memorandum and articles of association which have been automatically amended by law to conform with the 2014 Act form constitution, a number of issues arise:

- Section 88(4) provides, where rights are attached to a class of shares in the company by the constitution and the constitution contains provision with respect to their variation which provision had been included in the constitution at the time of the company's original incorporation, those rights may only be varied in accordance with that provision of the constitution.

  Therefore, it is not possible to change the variation formalities for such companies – it is the variation procedure prescribed by the constitution – even if originally prescribed in original articles of association only – which must be followed.

- Section 88(5) provides, where rights are attached to a class of shares in the company by the constitution and the constitution does not contain provisions with respect to the variation of the rights, those rights may be varied if all the members of the company agree to the variation.

  This is the case, even if the constitution is a pre-2015 memorandum and articles of association which, by virtue of the operation of the 2014 Act, is a deemed one-document constitution. In certain cases, a variation of rights provision cannot be subsequently included in reliance on Section 88(7) because there was no provision for variation included in the Constitution at the time of the original incorporation.

Committee deliberations

The Committee approached the 88(4) issue with a view to devising a methodology for amendment of a variation procedure, where all shareholders agreed to it. This would allow an amendment of such procedure, where agreed to by all members of the Company at the time of inclusion.

The Committee concluded that that section 88 should be simplified so that class rights could be varied with the consent of 75% of the class – even if those rights were originally entrenched in a

[12] Companies (Amendment) Act 1983, s 38.

memorandum of association of a pre-2014 Act company – or, if the constitution includes provision for their variation, in accordance with such provision. It was argued that this would not be inconsistent with section 982 for DACs as it applies to class rights included in articles of association. It is also the approach adopted in the UK in relation to variation of class rights as provided for in section 630 of the UK Companies Act 2006. The Committee concluded that section 88 be replaced with a section similar to section 630 of the UK Companies Act 2006.[13] The point can be made that if an amendment to share rights intended to be incapable of amendment (by being in a pre-2014 memorandum of association or a post 2014 constitution as provided by section 88(5)) is able to be overridden by a 75% special resolution, that would interfere with the property rights of shareholders relying on the supposed non-alterability of the rights who might be dissenting from the proposed variation. As against this, it was pointed out that an LTD can reregister as a DAC, relocating the provisions as to share rights in such a way as to render them amendable to amendment.

The Committee noted the Review Group's previous recommendation for an amendment to the 2014 Act on this issue, as set out in its 2017 Report *Recommendations relating to corporate governance in the Companies Act 2014*. That amendment proposed that in the absence of an express provision in the constitution prohibiting or restricting variation of class rights, a special resolution (75%) of the affected class (with a one third quorum) should be capable of varying class rights.

One of the consequences of having two types of private limited companies is that one of them, the LTD, does not have a memorandum of association.

When considering share class rights and the process to amend or vary them, either the provisions or the Constitution apply. In that regard, for an LTD, which has no memorandum of association, if the Constitution (i.e., its articles of association) sets out the share class rights but is silent on their variation, the default position is to obtain the consent of all the members. However, for the other type of private limited company, a DAC, which has a memorandum of association, if the memorandum and articles of association set out the share class rights but is silent on their variation, the default position is to obtain the consent of 75% of the members.

The Committee noted the workaround of a LTD converting itself to a DAC, and concluded in such circumstances, there would appear to no reason to differentiate the required level of consent for a variation of share class rights between a LTD and a DAC. It commented that the 75% threshold is an

[13] UK Companies Act 2006, Section 630: Variation of class rights: companies having a share capital: (1) This section is concerned with the variation of the rights attached to a class of shares in a company having a share capital. (2) Rights attached to a class of a company's shares may only be varied— (a)in accordance with provision in the company's articles for the variation of those rights, or (b) where the company's articles contain no such provision, if the holders of shares of that class consent to the variation in accordance with this section. (3) This is without prejudice to any other restrictions on the variation of the rights. (4) The consent required for the purposes of this section on the part of the holders of a class of a company's shares is— (a) consent in writing from the holders of at least three-quarters in nominal value of the issued shares of that class (excluding any shares held as treasury shares), or (b)a special resolution passed at a separate general meeting of the holders of that class sanctioning the variation. (5) Any amendment of a provision contained in a company's articles for the variation of the rights attached to a class of shares, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights. (6) In this section, and (except where the context otherwise requires) in any provision in a company's articles for the variation of the rights attached to a class of shares, references to the variation of those rights include references to their abrogation.

acceptable level of consent in other areas of company law, and it is open to a shareholder to apply to the Courts for relief.

Recommendation

The Review Group recommends:

- **that section 88(5) be amended to allow the amendment of provisions in a company's constitution to which that subsection applies, where agreed to by all members holding shares of that class;**
- **that the variation by a LTD of class rights (other than those entrenched in the constitution on incorporation or by unanimous resolution of the members as recommended by the immediately preceding recommendation) be allowed by a 75% majority resolution of the class concerned, with a one-third quorum requirement.**
- **To this end, the Review Group will propose wording to the Department for its consideration.**

Issue 8 - Exemption from obligation to disclose home address of directors (Sections 149 and 150(11))

Issue

Section 149 of the 2014 Act requires that a company must deliver, within the period of 14 days after any change among its directors or in its secretary or assistant or deputy secretary or any change in any of the particulars contained in the register, a notification of such event to the CRO. Accordingly, a director's and secretary's residential address must be entered on a Form B10 (Notification of Change of Director or Secretary). In addition, it must be included on the Form B1 (Annual Return) and accordingly is publicly available on inspection of those documents when filed, and on derivative websites that make available such filed information.

Such an officer's residential address can be omitted from those documents when filed, where the officer's personal safety or security is at stake. This is to minimise potential risks to officers of certain types of company (e.g., certain pharma or social network companies). The applicable law is S.I. No. 543/2015, the Companies Act 2014 (Section 150) (No. 2) Regulations 2015. Thus, any change would require that these regulations be changed.

The procedure to omit information on the forms involves obtaining a supporting statement from a person not below the rank of Chief Superintendent in An Garda Síochána and an application to the CRO. There are several shortcomings in the law and the procedure:

- addresses already on the CRO register cannot be redacted;
- separate applications must be made for each company involved;
- the exemption is automatically cancelled where, even inadvertently, the officer's home address is included on any CRO filing.

In addition, the new process is untested, and no guidance has been published as to the level of threat which must be involved, the evidence which must be produced or whether the officer must appear in person at the police station. There seems to be no system in place within An Garda Síochána to deal with applications of this type nor was there common knowledge of the provision among any of the stations contacted.

A submission of a practitioner considered by the Committee proposed that:

(i) a dedicated unit or contact point within An Garda Síochána with the necessary resources be formally nominated (and/or details of same published) to deal with applications of this type;

(ii) guidelines be published as to the criteria to be used in granting any supporting statement by An Garda Síochána; and

(iii) procedures be put in place to allow officers residing outside the State to make the relevant application through their Irish legal advisers.

Committee deliberations

The Committee concluded that the proposal had merit, particularly in an environment of increasing public scrutiny and a policy shift towards affording individuals a suitable level of privacy.

The Committee noted the principle that there should be transparency of ownership and control of a company and noted the introduction of disclosure of beneficial ownership in Ireland. Historically, a key element of this was that there should be full details of a director, including the director's residential address. The CRO considered it would not be possible for an officer's home address to be redacted retrospectively as the information would have been publicly available for a significant period and they would have no control over who had already accessed it.

However, the legislature saw fit to introduce an exemption to the disclosure of an officer's residential address. In that regard, practical issues have arisen, particularly for non-resident individuals, and a review of the existing provisions in the context of a modern company law framework and environment is warranted.

Recommendation

The Review Group recommends that this issue be considered further by the Corporate Governance Committee as part of the future work programme for the Company Law Review Group, looking in particular at the desirability and practical issues arising with

- **guidelines and criteria to apply to those who would seek to avoid disclosure of their residential address;**
- **the redaction of information already on the register;**
- **the interaction of data protection law and the ethics of disclosure of officer information under the Companies Act.**

Issue 9 - Directors' conflict of interest (Section 161(7) and Table to section 1173)

Issue

For most categories of companies, the Companies Act provides that a director may vote in respect of any contract, appointment or arrangement in which he or she is interested, and he or she shall be counted in the quorum present at the meeting unless the constitution provides otherwise. This is the statutory position for LTDs,[14] DACs,[15] and unlimited companies (PUCs, PULCs and ULCs),[16] unless the constitution provides otherwise. In the case of PLCs, a director may not vote and may not be counted in the quorum unless the constitution provides otherwise, or specific arrangements or contracts are being considered.[17]

However, the statutory position for LTDs, DACs, PUCs, PULCs and ULCs (which is that a director can vote in respect of any contract, appointment or arrangement in which he or she is interested, and he or she shall be counted in the quorum present at the meeting) does not apply to Companies limited by guarantee (CLGs). Section 1173(5) and the Table to that section disapply section 161(7) but do not, as in the case of PLCs, provide any alternative or substituted provisions as to how and when a director should or should not be included in a quorum.

CLGs are the second most popular form of company incorporated in Ireland after the private company limited by shares and are normally formed for not-for-profit purposes – e.g. charitable purposes, clubs and societies or for multi-unit property developments. They are generally not set up for the purpose of making profits and do not distribute their profits to their members but use them to fund their object(s). Many, if not most, have specific restrictions in their constitutions on the distribution of any income to the members and indeed are required to have these limitations if they are to qualify for tax-exempt status or charitable status when registering with the Charities Regulatory Authority.

It can be noted that the pre-2014 Act position for company limited by guarantee not having a share capital was that a director could vote in respect of any contract in which he was interested or any matter arising out of such matter.[18] The omission of such default in the 2014 Act points to an appreciation by the draftsperson that such a default was inappropriate, given the predominant use of CLGs.

Committee deliberations

The Committee debated whether CLGs should be held to a higher standard than the default to avoid the risk, real or perceived, that their directors are awarding contracts to themselves, or companies owned or controlled by them, such that a default provision akin to that for PLCs be applied to them.

[14] Companies Act 2014, s 161(7).

[15] Companies Act 2014, s 964(1).

[16] Companies Act 2014, s 1230(1).

[17] Companies Act 2014, s 1113.

[18] Companies Act 1973, First Schedule, Table C, art 40.

As against that, in the case of multi-unit residential management companies, every director will have a conflict of interest, and it becomes unworkable for such companies for there to be such a default.

Recommendation

The Review Group are not in favour of an amendment to the Companies Act on this issue.

Issue 10 - Financial Assistance by PLC subsidiaries (Section 82(7))

Issue

The issue considered by the Review Group was the potential confusion as to the law that applies to financial assistance, when given by an Irish non-PLC for the purposes of assisting the acquisition of shares in its parent company, being a public company, whether an Irish PLC or a public company in another jurisdiction.

The European Communities (Public Limited Companies Subsidiaries) Regulations 1997 transposed Directive 92/101/EEC, which was concerned with capital maintenance of EU registered public companies. It extended the capital maintenance provisions of the Company Law Directive 77/91/EEC to public company subsidiaries, so as to prevent subsidiaries being used to reduce a public company's share capital. The principle underpinning the 1992 Directive was that any subsidiary of an EU public company ought not be used to circumvent the capital maintenance rules affecting EU PLCs – such as prohibitions on financial assistance.

The Companies Act appears to have re-enacted all relevant provisions of the 1997 Regulations, but the 1997 Regulations remain in force. How the 1997 Regulations interact with the 2014 Act is not immediately clear. It is interesting to note that the General Scheme for the 2014 Act published by the Review Group in 2007 anticipated the revocation of the 1997 Regulations but this was not followed through on in the 2014 Act.

Whereas the Companies Act's provisions on financial assistance are assisting-company-centric – i.e., focusing on what a company itself can directly do, the focus of the EU law is on what is done directly or indirectly to undermine the maintenance of capital of a public company within scope of the EU measures. The 1977 and 1992 Directives are now subsumed into Chapter IV of Directive (EU) 2017/1132. Annex 1 of the current Directive identifies the particular companies of Member States that are within scope of the Directive's capital maintenance provisions.

This prohibition is set out in section 82(7) (which derives from regulation 5 of the 1997 Regulations) and is limited to Irish subsidiaries and Irish public companies by virtue of the definitions in section 64(1). There has always been a question mark over whether the prohibition in the 1997 Regulations extends to overseas subsidiaries and overseas parent public companies. Since the 1997 Regulations have not been revoked, this question mark remains, despite the prohibition being contained in section 82(7).

Committee deliberations

The Committee started from the premise that the 1997 Regulations should be revoked, as an unnecessary duplication of laws.

That said, as Ireland must transpose EU measures correctly, such as not to leave a loophole whereby an Irish company could be utilized by a public company registered in another EU Member State to provide financial assistance for the purpose of the acquisition of shares in that EU Member State public company, such as to constitute a contravention of the EU law now found in Chapter IV of Directive (EU) 2017/1132. This however needs to be done in such a way that recognises that financial assistance by public companies is permissible in some EU Member States, as provided by Article 64 of

Directive (EU) 2017/1132, which has provisions regulating the granting by an EU Member State public company where a Member State's laws permit it.

In addition, it would be a concern for an Irish PLC using a non-Irish subsidiary to evade the law prohibiting financial assistance for the purpose of the acquisition of shares in the Irish PLC. It was acknowledged that there would be limits to the ability of Irish law to regulate the conduct of non-Irish companies not carrying on business in Ireland.

The Committee concluded

- that the 1997 Regulations should be revoked;
- a "parent public company", for the purposes of the prohibition on financial assistance should extend to include any company listed in Annex 1 of Directive (EU) 2017/1132, so that Irish companies should not be able to circumvent financial assistance prohibitions in other Member States, but not in such a way as to prevent an Irish company providing assistance for such an EU Member State public company where that is permitted in that public company's place of registration;
- that financial assistance of acquisition of shares in an Irish public company by a non-Irish subsidiary should be prohibited.

Recommendation

The Review Group recommends:

- **that the European Communities (Public Limited Companies Subsidiaries) Regulations 1997 be revoked; and**
- **that the 2014 Act be amended to provide that the expression "parent public company" be extended to any company for the time being listed in listed in Annex 1 of Directive (EU) 2017/1132;**
- **that the 2014 Act be amended to provide that financial assistance by an Irish company of a "parent public company" incorporated in another Member State be prohibited, save to the extent that that laws of that public company's State of registration permit it;**
- **by a majority, that the 2014 Act be amended to provide, to the extent possible, that financial assistance of the acquisition of shares in an Irish PLC by a non-Irish subsidiary, is unlawful**

Issue 11 - Special majority in the case of approval of schemes of arrangement (Section 449(1))

Issue

A scheme of arrangement among shareholders or creditors of a company (not being a scheme in an examinership of the small company administrative rescue process) requires a "special majority" being a majority in number representing 75% in value of the shares or debts voted.

An amendment was made to this provision for listed PLCs by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, providing a substituted requirement of a majority in number representing 75% in value of the shares or debts voted at a meeting with one third of the shares of the company in attendance.

Committee members considered whether there was merit in broadening out the amendment made by the 2020 Act to other companies beyond listed PLCs.

Committee deliberations

The Committee discussed the matter at length. While there was a view among several Committee members that the availability of the alternative "special majority" was merited, the Committee concluded that this was primarily an issue for PLCs, whether listed or unlisted. It therefore concluded that the matter was best addressed by the Public Company Committee of the Review Group.

Recommendation

The Review Group notes its recommendation at paragraph 7.5.4 of its Report of December 2021 on CSDR and SRD II issues[19] which recommends that an amendment be made to the Companies Act providing that in any scheme of arrangement among holders of transferable securities of a PLC[20] , a special majority may be constituted either as at present (by a majority in number and 75% in value) or as provided for "relevant issuers" (a majority of 75% in value at a meeting with a one-third quorum).

[19] Report on Company Law Issues arising under Directive (EU 2017/828 of 17 May 2017 (SRD II), Central Securities Depositories Regulation (EU) 909/2014 (CSDR) and the Companies Act 2014

[20] Whether listed or unlisted.