Report of the Company Law Review Group 2011

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Mr Richard Bruton TD,

Minister for Jobs Enterprise and Innovation,

Department of Jobs, Enterprise and Innovation,

Kildare Street,

Dublin 2

29 March 2012

Re: Report of the Company Law Review Group 2010/2011

Dear Minister Bruton,

I am very pleased to attach for your consideration the Report of the Company Law Review Group in respect of our work programme for 2010/ 2011.

The publication by you of the first part of the draft Companies Bill in May of 2011 was a very significant milestone on the road to a state-of-the-art company law code for Ireland. The observations and comments from users and practitioners that have thus far been brought to our attention have been resoundingly positive and while the opportunity will be taken to make a number of adjustments before finalisation, the reaction to the publication of the draft Bill has validated its integrity and provided strong reassurances as to its soundness.

Since its publication, the Review Group has continued to prioritise rendering assistance to your officials in the Department of Jobs Enterprise and Innovation in advising on the drafting of the remainder of the Companies Bill.

Company law does not stay still, however, and in parallel to our work on the new Bill, we have examined a number of substantive company law issues in accordance with the work programme set for us for 2010/2011, upon which we now report. I am pleased that the Review Group has been able to respond to your additional requests to address the making of orders to record share charges on the register of companies and to consider whether bearer shares should continue to be permissible and that our recommendations in relation to both of these important issue are included in this report.

Where our recommendations involve legislative change to the Companies Acts, we have endeavoured to refer to corresponding provisions in the draft Bill so as to facilitate the more ready inclusion in the Bill of as many of these recommendations as possible.

I would like to thank the members of the Review Group who have given their time and experience in working for the betterment of Irish company law and the State in a low-key but committed and diligent manner. The Review Group has also had assistance from others outside of its immediate membership who have willingly brought their experience and knowledge to assist the Review Group's deliberations.

I would also like to acknowledge the enormous assistance rendered by your own Department officials. John P Kelly, secretary to the Review Group and Vincent Madigan, the Department's representative on the Group, both of whom retired from the Department in February, each made very significant contributions to the Review Group. Ms Sabha Greene who has recently been appointed Secretary to the Review Group has been hugely helpful in organising the finalisation of this Report and we are all very much looking forward to working with Sabha on our next programme set by you. We are also looking forward to working with Conor Verdon, the Department's new representative on the Review Group and the official charged with the critically important task of finalising the Bill for publication.

Lastly Minister, I would like to thank you for your support for the work of the Review Group and your enthusiasm for the reforms promised by the Companies Bill. Your decision to retain personal responsibility for company law following your appointment demonstrates your personal commitment to this project.

The work of the Review Group – designing the architecture for the new Bill and recommending sweeping changes to place the private company which is the cornerstone of the SME sector at the very centre of Irish company law – is coming to fruition. The Companies Bill represents the collective thinking of nearly a generation of the users, practitioners and regulators of Irish company law. Soon, under your captaincy, it will begin its voyage through the Houses of the Oireachtas and we look forward to being of ongoing assistance to you and your officials.

Yours sincerely

Dr Thomas B Courtney

Chairperson

Membership of the Company Law Review Group 2010/2012

Dr. Thomas B. Courtney (Chairman)	Arthur Cox
Paul Appleby	Director of Corporate Enforcement
Deirdre-Ann Barr	Matheson Ormsby Prentice
Jonathan Buttimore	Office of the Attorney General
Jim Byrne	Revenue Commissioners
Marie Daly	Irish Business & Employers' Confederation (IBEC)
Helen Dixon	Registrar of Companies
Mary Doyle (replaced Mike Percival)	Irish Banking Federation (IBF)
Ian Drennan	Irish Auditing & Accounting Supervisory Authority (IAASA)
Paul Egan	Mason Hayes + Curran
Mark Fielding	Irish Small & Medium Enterprises Association Ltd (ISME)
Joseph Gavin	Central Bank
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Tanya Holly	Department of Jobs, Enterprise & Innovation
William Johnston	Arthur Cox
Brian Kelliher	Irish Funds Industry Association
Aisling McArdle (replaced Mike Duignan)	Irish Stock Exchange
Ralph MacDarby	Institute of Directors
Vincent Madigan	Department of Jobs, Enterprise & Innovation
Kathryn Maybury	Small Firms Association
Declan Murphy	Bar Council of Ireland
Conall O'Halloran (alternate Aidan Lambe)	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
Mark Pery-Knox-Gore	Law Society of Ireland
Nóra Rice	Companies Registration Office (CRO)
Jon Rock	Institute of Chartered Secretaries & Administrators (ICSA)
Noel Rubotham	Courts Service
Conor Verdon (appointed March 2012)	Department of Jobs, Enterprise & Innovation

John P. Kelly	**Secretary to the Company Law Review Group**

Table of Acts	
1963 Act	Companies Act 1963
1983 Act	Companies (Amendment) Act 1983
1990 Act	Companies Act 1990
2001 Act	Company Law Enforcement Act 2001
2009 Act	Companies (Miscellaneous Provisions) Act 2009

Chapter 1: Work Programme of the Company Law Review Group for 2010/2011

1.1 The Company Law Review Group

The Company Law Review Group ("The Review Group") was established under the Company Law Enforcement Act 2001 to advise the Minister for Jobs, Enterprise and Innovation ("the Minister") on changes required in companies' legislation with specific regard to promoting enterprise, facilitating commerce, simplifying legislation, enhancing corporate governance and encouraging commercial probity. The Review Group is comprised of company law practitioners, business representatives, ICTU, IBEC and Government Agencies, including the Revenue Commissioners, the Office of the Director of Corporate Enforcement (ODCE) and the Irish Auditing and Accounting Supervisory Authority (IAASA).

1.2 The Company Law Review Group's Work Programme 2010/2011

The Minister determines the programme of work to be undertaken by the Review Group every two years. The latest Work Programme, which is for the period 2010/2011, was given to the Review Group in March 2010 by the then Minister for Trade and Commerce, Mr. Billy Kelleher T.D. and has now come to an end. This Report accounts for the full two year period.

The priority item of the 2010/11 Work Programme was to provide advice on the preparation of the Companies Consolidation and Reform Bill, now the Companies Bill, with a view to its publication in the Houses of the Oireachtas in 2012. Detailed advice was provided regularly and over the course of the entire Work Programme by members of the Review Group whenever queries arose in the drafting process. Further information on this part of the Work Programme is in Chapter 2 of this report.

Alongside the preparation of the Companies Bill, the Minister asked the Review Group to consider a number of other items and to make recommendations. Moreover, in the course of the two years, further issues arose and the Minister asked that these be added to the Review Group's agenda. For all of these issues, the Review Group established Committees to examine each topic and to report back to the full Review Group in plenary session. The Review Group then adopted recommendations and these are set out in Chapters 3 to 6 of this report. The full Review Group met seven times in plenary session over the course of the two-year Work Programme, while there were about 20 meetings at Committee level. A list of each of the Committees is set out below, at 1.4, together with their membership.

1.3 The Company Law Review Group's website

The Review Group maintains a website, www.clrg.org, where its membership, reports and other relevant information are made available. It also provides an avenue for members of the public to send in queries or comments on company law to the Review Group's Secretariat, which is based in the Department of Jobs, Enterprise and Innovation.

Website statistics for the two years of the Work Programme are as follows-

Website statistics 2010 | Website statistics 2011

Unique visitors	9,193	Unique visitors	10,297
Visits	13,461	Visits	16,093
Hits	217,046	Hits	232,240

1.4 The Company Law Review Group's Committees' Terms of Reference, Chairs and Membership

As mentioned above, the Review Group established Committees to consider most of the issues on its Work Programme. The terms of reference, Chairs and membership of each are set out below. On some topics, the Review Group called on the expertise of people outside its membership, and the names of those who kindly assisted are included in the Committee membership lists.

Registration and Incorporation Issues

Committee A – To consider the appropriateness of the recording the making of charging orders over shares on the Register of Companies

Chair: William Johnston

Members: Deirdre-Ann Barr

Jonathan Buttimore

Jim Byrne

Marie Daly

Helen Dixon

Paul Egan

Vincent Madigan

Kathryn Maybury

Mike Percival

Mark Pery-Knox-Gore

Nóra Rice

Committee B - To examine the need for provisions regarding the re-use of Companies Registration Office information

Chair: Helen Dixon

Members: Ralph MacDarby

Vincent Madigan

Kathryn Maybury

John O'Neill (Revenue)

Jon Rock

Audit and Financial Issues

Committee C- To consider the application of IFRS 27 and its consequences for Sections 62, 149(5) and 72 of the Companies Acts 1963

Chair: Conall O'Halloran & Aidan Lambe (ICAI)

Members: Deirdre-Ann Barr

Jim Byrne

Paul Egan

Tanya Holly

Pat A. Houlihan (D/JEI)

Vincent Madigan

John Moynihan (D/JEI)

Prof. Ciaran O'hOgartaigh (Consultant)

Compliance and Enforcement Issues

Committee D - To review the Recommendations in the Committee of Public Accounts' First Interim Report on the Loss of Fiduciary Taxes arising from abuse of Limited Liability

Chair: Ralph MacDarby

Members: Jim Byrne

Marie Daly

Paul Egan

Vincent Madigan

Conor O'Mahony (ODCE)

Nóra Rice

Committee E - **To advise on the various requirements on auditors to report under criminal justice legislation, under company law and, in particular, under Recommendations arising from the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions**

Chair: Ian Drennan

Members: Jim Byrne

Paul Egan

Aileen Harrington (D/Justice)

Ralph MacDarby

Vincent Madigan

Mark Pery-Knox-Gore

Kevin Prendergast (ODCE)

Committee F - **To review specified provisions of the Companies Acts, namely (i) abuse of strike-off provisions; (ii) late-filing penalties, in particular, the loss of exemption from the need to conduct a statutory audit; and (iii) with reference to a 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**

Chair: Deirdre-Ann Barr

Members: Jonathan Buttimore

Jim Byrne

Marie Daly

Helen Dixon

Denis Hosford (ODCE)

Brian Kelliher

Ralph MacDarby

Vincent Madigan

Kathryn Maybury

Nóra Rice

Jon Rock

EU and International Developments

Committee G - To consider the recommendation of the Global Forum on Transparency and Exchange of Information on Tax Matters concerning the identification of owners of bearer shares

Chair: Ralph MacDarby

Members: Bríd Brady (IDA)

Jim Byrne

Marie Daly

Paul Egan

Vincent Madigan

Helen O'Grady (Revenue)

Michael O'Leary (IOD)

Kevin Prendergast (ODCE)

Nóra Rice

Committee H - To consider the implications for Irish company law of the European Court of Justice judgment in the Cartesio Case C-210/06 relating to the transfer of registered office from one jurisdiction to another and to recommend options

Chair: Tanya Holly & Jonathan Buttimore

Members: Jim Byrne

Helen Dixon

Brian Kelliher

Vincent Madigan

Kathryn Maybury

Mark Pery-Knox-Gore

Nóra Rice

Jon Rock

Chapter 2: Overview and Update on the Companies Bill

2.1 Publication of Pillar A of the Companies Bill

The major activity of the Review Group since its establishment in 2001 has been the preparation of a Bill to modernise and consolidate company law, and this remained the case for the duration of the 2010/2011 Work Programme. On 30 May 2011, this work reached a significant milestone when the Minister published "Pillar A" of the Companies Bill in "soft-copy" format on the websites of his Department and of the Review Group. Speaking at the publication of the "soft-copy", Minister Bruton said –

> *"This reform will have a significant impact on reducing business costs. After these reforms are enacted, for example, it will be possible for a person to start a business without needing to find a second director. Small busineses will no longer have to go to the expense of holding a physical AGM every year. The burden of company legal documentation will be greatly reduced. And crucially, it will be easier for business-owners to find out the nature of their legal rights and duties and will reduce the need to consult with lawyers.*
>
> *"I commend all those involved for their work in the area and I am determined to press ahead to complete these reforms so that Irish businesses can benefit from them as soon as possible."*

Dr. Thomas B. Courtney, Chairman of the Review Group also spoke at the publication of Pillar A, saying –

> *"The publication of the provisions of Pillar A of the Companies Bill represents a landmark moment in the development of Irish company law. The document which is published today is the product of years of very careful and painstaking work in remodelling Irish company legislation around the entity which uses it most – the private company limited by shares – and in making that legislation more accessible to those who need to be familiar with its provisions, whether in the business community or professional advisors."*

The intention behind this early publication of the first part of the Bill was to allow time for those who will be affected to become familiar with and prepare for the changes. The complete Bill, incorporating the remaining sections known as "Pillar B", is due to be published in 2012.

2.2 Review Group's work on the Companies Bill

In early 2007, the Review Group submitted its General Scheme of the Companies Consolidation and Reform Bill to the Minister for Enterprise, Trade and Employment. The main purposes of the Scheme were to consolidate the existing law of 15 Companies Acts, many more Statutory Instruments and principles established in judgments of our Superior Courts, and to introduce a number of reforms designed to simplify the operation of a company in Ireland while preserving sufficient safeguards for members and creditors. The Scheme, which contained in the region of 1,400 Heads, represented the outcome of more than six years' work by the Review Group, both in its Committees and thanks to the ongoing contributions of individual members.

Soon afterwards, in July 2007, Government approved the formal drafting of the Bill along the lines of that General Scheme, and the Review Group has continued to work with the Parliamentary Counsel and the Department to provide specialist advice and assistance in the course of that drafting.

2.3 Structure and content of the Companies Bill

One of the principal innovations of the General Scheme was reflected in its general structure, and this has been carried over into what is now known as the Companies Bill. For the first time in Irish company law, the most common company type, the private company limited by shares is to be placed at the centre of the legislation, as the default company. This is reflected by placing all of the provisions governing the operation of the private company in the first portion of the Bill, called "Pillar A". Again reflecting the simplified structural concept, these provisions are arranged to reflect the life cycle of the company – first, the provisions dealing with how a company is set up, followed by the provisions which apply when the company is in operation, and finally the provisions which are relevant to closing the company down.

"Pillar A" of the Bill, which was published in May 2011, contains 15 constituent Parts, comprising 952 sections, together with 6 Schedules, and represents over two-thirds of the entire Bill.

The remainder of the Bill, "Pillar B", will provide for other company types, such as public limited companies, guarantee companies and the designated activity company.

2.4 Current Position

The Office of the Parliamentary Counsel (OPC) is now drafting "Pillar B" of the Bill, where work is well advanced, and the Review Group continues to provide advice to the Department on any queries that arise from the OPC. Once complete, "Pillar B" will be amalgamated with the already published "Pillar A" with a view to getting the Government's approval to introduce the entire Companies Bill in the Houses of the Oireachtas in autumn 2012.

Chapter 3: Registration and Incorporation Issues

3.1 Recording of charging orders over shares on the Register of Companies

3.1.1 Background

In November 2007 and on several occasions in 2010, the High Court directed that the Registrar of Companies place on the file of a company whose shares had been the subject of a charging order, notice of a charging order. It was understood that the reason for the High Court making such an order is that it would ensure that the public was aware of the existence of the charging order. The orders to place on the file of a third party company whose shares are charged had been made, not pursuant to any specific legislative provision but, by virtue of the High Court's inherent jurisdiction to make such an order. The charging orders themselves were made pursuant to the Debtors (Ireland) Act 1840 and the Common Law Procedure Amendment Act (Ireland) 1853 as facilitated by Order 46 of the Rules of the Superior Courts. The application of this legislation to private companies was confirmed by Laffoy J in *Honniball v Cunnigham*[1].

In light of these developments, on 27 September 2010, the Minister asked the Review Group to add to its Work Programme consideration of –

> "the issue of the High Court directing the Companies Registration Office to enter charges due by shareholders of certain companies to a judgment creditor on the entries for respective companies in the Register of Companies."

3.1.2 Role of the Register of Companies

The principal enactment governing company law is the Companies Act 1963. This Act provides that the relevant Minister shall maintain an office for the purpose of registration of companies under the Act. This is known as the Companies Registration Office ("CRO"). This office is a successor to the Office for the Registration of Joint Stock Companies established pursuant to the Joint Stock Companies Act 1844.

The Companies Act 1963 sets out the duty of the Registrar of Companies to accept particular documents for registration and to register certain specified information on a company's file. This includes making available to the public (for a fee), based solely on information filed with the Registrar, the registered number of the company's incorporation, its date of incorporation, the address of its registered office, the status of the company, its memorandum and articles of association, the names and addresses, date of birth, occupation and other directorships of each director of the company, the name and address of the secretary of the company, ordinary and special resolutions of the company, statutory declarations filed, for example where the company gives financial assistance for the purchase of its shares, registration of certain charges, annual return which will also indicate amongst others the names and addresses of the shareholders of the company and the annual accounts or abridged accounts of a company falling within the category of requiring such to be filed.

[1] [2006] IEHC 326

In *Business Communications Ltd v Baxter and Parsons*[2] Murphy J stated in the High Court:

> *" …since the introduction of legislation permitting people to incorporate with limited liability, it has been recognised that the protection which this conferred on those taking advantage of the privilege has to be counter balanced by statutory provisions to protect and safeguard the interests of those dealing with them. The original and essential protection to those dealing with companies incorporated under the Companies Acts from time to time was the creation of a registration office in which would be filed the essential information in relation to companies incorporated under legislation so that outsiders would have an opportunity of ascertaining the persons constituting the corporation and be in a position to form some estimate as to the assets which would be available to meet its liabilities."*

In summary, the information on file is intended to give a picture at a particular point in time to a member of the public as to the objects, share capital and internal rules of a company where the legal control of the company lies, its assets and liabilities and the extent to which its assets are charged. This picture is not comprehensive as, in the vast majority of cases, it will not disclose shareholder agreements or charges over assets not specified in section 99 of the Companies Act 1963, nor will it disclose the sale or purchase of shares since the date of the last filed annual return, beneficial ownership of the company's shares or the sale and purchase of assets since the date of the last filed accounts.

3.1.3 Other jurisdictions

The Review Group also considered the position in a number of other common law jurisdictions.

<u>England and Wales</u>

The Review Group found the position in England and Wales to be governed by the Charging Orders Act 1979 and Part 73 of the Civil Procedure Rules. Neither of these provisions provides for the registration of charging orders over shares although they allude to the registration of charging orders on land (which of course unlike shares in a company owned by a third party would be an asset actually owned by the company). Furthermore, in practice there appeared to be no procedure or evidence of the registering of court orders against the file of a third party company.

<u>Northern Ireland</u>

In Northern Ireland the Judgments Enforcement (Northern Ireland) Order 1981 provides for the making of a charging order over stock or shares in a public company and such an order may require that all dividends or interest accruing be paid to the owner to the charge. The order may also restrain the company from dealing with the stock or shares. While notice of such an order must be served on the company in question there is no provision for notice to be filed in the Register of Companies. The Order further provides that the Enforcement of Judgments office may make a "restraining order" to limit how shares in a private company may be dealt with. Such an order may restrain the company from paying to the debtor or to any other person any dividend or director's emolument and/or dealing in any way with the shares without the consent of the Enforcement of Judgments Office. Where the company has been served with a copy of the restraining order, the

[2] 21 July 1995

Enforcement of Judgments Office may require the company to provide it with details regarding the execution of the restraining order. The Judgments Enforcement (Northern Ireland) Order 1981 does not otherwise provide for the registration of restraining orders.

Australia and other jurisdictions

Provisions similar to those applying in England and Wales have been set out in the respective legislation applying to the Australian Capital Territory, New South Wales, Queensland, the Northern Territory, South Australia, Victoria, Western Australia and Tasmania.

Similarly in Hong Kong there is a duty on the registrar to register charges of assets of a company but we understand that there is no requirement to register a charging order over shares. As in other common law jurisdictions, there is provision in Hong Kong for service of notice of a charging order on the company whose shares are charged as well as other interested persons.

The law in Singapore is along the lines of that applicable in Ireland other than the requirement to register a charge on assets is to be complied with within 30 days rather than 21.

3.1.4 Charges over shares in the context of the Companies Acts

One piece of information which can be found on a company's files in the CRO are particulars of charges created by the company over certain classes of assets. The purpose of this information is to put third parties on notice that a company's assets have been secured in favour of a particular creditor(s).

One of the few categories of charges, particulars of which are not required to be filed (save where securing an issue of debentures) are where companies create a fixed charge over shares (which they hold in other companies). The Companies (No.2) Bill 1987 (which ultimately became the Companies Act 1990) proposed that fixed charges over a company's interest in shares be included in a class requiring registration. However, after due consideration and debate the draft section providing for registration of share charges was dropped. Security over shares is effective without registration where the parties to the charge fall within an appropriate category under European Communities (Financial Collateral Arrangements) Regulations 2010 (SI 626/2010 as amended by SI 49/2011 and SI 318/2011), which, as its name suggests, is the implementation of an EU Directive which applies across the 27 Member States of the European Union.

As an additional safeguard when taking security over shares, some creditors will prepare an affidavit and a notice to be filed in the High Court central office with the notice then delivered to the secretary of the company (whose shares are being charged) to the effect that the shares are charged and dealings are not to be carried out on those shares without that company giving prior notice to the secured creditor. This prior notice is to enable the secured creditor, if it wishes, to take steps to protect its interest. This procedure is facilitated by Order 46 of the Rules of the Superior Courts. Accordingly, while there is no public notice of any charge on shares, the law facilitates a procedure to give protection for creditors which have charges over shares.

3.1.5 Analysis

Requirements of society

It is accepted that in a society, such as Ireland, where a person (debtor) owes money to another person (creditor) and the creditor obtains a judgment of the court for the amount owing, or part of the amount owing, it is appropriate that the assets of a debtor be made available to discharge the judgment debt due to the creditor.

A note of each judgment for a debt can, in due course, at the option of the judgment creditor, be registered in the Register of Judgments in the High Court ("Judgments Office"). This register is available to any member of the public wishing to ascertain whether a particular person has a judgment registered against him or her. In any financing transaction where a person (whether a company or an individual) is obtaining a loan or giving a guarantee in respect of a loan it is the usual practice for a creditor, or its lawyer, to carry out a search against that person in the Judgments Office in order to ascertain whether or not there is an outstanding judgment against that person. This is a well-established practice. In addition, judgments which are registered are then published in Stubbs Gazette, which is commonly read by people making credit available (some of these notices are published elsewhere, such as Sunday newspapers). Notice of such a judgment is therefore available to interested and indeed uninterested people.

The recent decision that the public can not have access to "case books" in the Circuit and District Court Offices has no bearing on the right of the public to inspect the Register of Judgments. While it is understood that many judgments are not registered, the facility for registration is available to creditors and should be utilised by creditors to protect their position.

Purpose of Notifications

The Review Group understands that the intended purpose of the notification of the charging order to the CRO is to put the public on notice (of the charging order). However, in the circumstances where a consensual charge of shares is incapable of being so registered, it is inconsistent for there to be two distinct principles to be applied for charges over shares in a company. In addition, as already indicated the public are on notice of the fact of the judgment (assuming it is registered), which itself should give rise to a concern by any interested creditor. That creditor can then make further enquiries when dealing with assets of a judgment debtor. A member of the public wishing to ascertain whether a person has a judgment or order registered against it, will search in the Judgments Office. Without searching every file in the CRO – an almost insurmountable and time costly task, the searcher will not be able to ascertain whether an individual has any charging orders against him/her. The purpose of registration is to give notice of the charge. Filing a charging order on the register of a third party, the company, does not give notice of a judgment against a debtor, which is a separate person to the company.

Effect of Notification

The effect of notification of the share charging order to the CRO with a view to putting it on the file of the company whose shares are charged (the "affected company") is potentially a diminution in the reputation and thus value of the affected company, notwithstanding that, it is not a charge on an asset of the affected company. For example, an Irish registered company wishing to do business, particularly abroad with a counterparty who might not be familiar with the Irish company, could find its creditworthiness and reputation unfairly tainted following an online inspection of its file in the CRO which reveals that shares in the company owned by a third party are subject to a judgment order. This is potentially damaging to the interests of the State.

In addition where shares of an Irish company are quoted on a recognised exchange, the fact of the filing of charging orders and the uncertainty as to notice would render trading in shares of an Irish registered company unattractive, if not impossible. Article 46.1 of the consolidated European Directive on the admission of securities to official stock exchange listing (as implemented in Ireland by the European Communities (Admissions to Listing and Miscellaneous Provisions) Regulations 2007 (SI 286/2007)) provides that a condition of listing is that shares must be freely negotiable.

The fact that a number of a company's shareholders may have charging orders registered against it is no different from shareholders creating charges over their shares in the company – the shares are simply being used as collateral for a shareholder to raise money for himself / herself. The legislature has considered this category of charge as not meriting registration.

Interference with the rights of third parties

Unlike a judgment mortgage over an asset such as land, the registration of a charging order over shares on the public file of a stranger to the dispute (the company whose shares are charged) between creditor and debtor implicates that stranger to the dispute into the affairs of a shareholder.

Effectiveness of Notification

The purpose of the Order should be to realise value for the judgment creditor. The placing of a notice of the charging order on the public file in the CRO of the company whose shares are being charged does nothing towards giving value to the creditor.

The Review Group submits that a judgment creditor should, where shares are readily marketable, such as being listed on a recognised exchange, seek an order for sale with the proceeds to be remitted to the creditor (or where proceeds exceed the amount due to the creditor sufficient proceeds are paid to the creditor to discharge the debt). Where the shares are not readily marketable, for example, shares in a private company, it may be difficult for a creditor to obtain any value from the charging order, until the debtor disposes of its shares, in which event the creditor should be protected as a result of the judgment being registered in the Judgments Office.

Furthermore, if the court grants a charging order over the debtor's shares in a private company, the judgment creditor can file an affidavit in the Central Office of the High Court and serve a notice on the company secretary of the company whose shares are charged. Rule 6 of Order 46 of the Rules of the Superior Courts outlines the procedure for the issuing of a stop notice. Under Rule 10, compliance with this procedure will inhibit the transfer of shares without the creditor's agreement. In effect Order 46 of the Rules of the Superior Courts re-enacts the same principle as set out in section 24 of the Debtors (Ireland) Act 1840 and section 132 of the Common Law Procedure Amendment Act (Ireland), 1853.

3.1.6 Recommendations

The Review Group recommends that judgment creditors should be encouraged to register judgments obtained in the Judgments Office so that third parties become aware of the existence of the judgment.

Filing a charging order in the CRO against a third party company may adversely prejudice that innocent company, as well as adding to the work of the Registrar of Companies, all to little or no purpose. Accordingly, the Review Group further recommends that Part IV of the Companies Act 1963 be amended to provide that no order affecting a member, shareholder or debenture holder of a company will be required to be accepted by the Registrar of Companies for registration on the file of the company, which issued the shares or debentures.

3.2 Provisions regarding the re-use of CRO information

3.2.1 Background

The issue of re-use of information held in the Companies Registration Office was previously considered by the Review Group in its 2008/2009 work programme. However, at that time the CRO was seeking legal advice on the licence agreements it has with customers to whom it sells bulk data from the Register. So, the Review Group concluded that it could revisit the issue later, if requested to do so by the Minister. A related issue, that of the protection of directors' home addresses in certain circumstances, had also been given consideration by the Review Group in its 2006/2007 work programme. At that time, it had made recommendations for provisions in the Companies Acts to allow companies to make applications to have private residential addresses removed from the public Register, provided that a member of An Gardaí Siochána certified as to the security implications of making the residential address available to the public.

In setting the work programme for 2010/2011, the Minister asked the Review Group to revisit the question of the re-use of CRO information, to take into account some developments since the conclusion of the earlier work programmes, and to see if any new issues had come to light since.

Accordingly, as a starting point, the Review Group considered that it would be helpful to devote time to identifying all the relevant issues, to assess the full scope of the topic. In the course of this exercise, it became clear that the subject is complex and broad, but could be categorised into four main areas, namely –

- The interaction with data protection laws and the CRO's use of personal data
- Identity theft and other crimes using information gleaned from the CRO Register
- Onward sale of data to "bulk data customers" of the CRO including the impact of the *Compass Datenbank* ECJ Case and the impact of the Re-Use of Public Sector Information Regulations on the CRO
- Archiving of CRO data.

The Review Group examined each of the above areas in turn and set out a comprehensive list of issues arising under each heading, and these are set out below.

As the Minister had asked for other issues to be given priority, time did not allow for the Review Group to complete its work on this area and so effort was devoted to identifying the full range of issues under this heading. Accordingly, the Review Group proposes that the Minister include the four areas listed above in the terms of reference for the next Work Programme, 2012/13.

3.2.2 Interaction with Data Protection Laws and the CRO's use of personal data

The Review Group considered that a full treatment of this topic would require a re-examination of all of the personal data that the CRO is required to collect under the Companies Acts (including in respect of directors, company officers, members and auditors). In this re-examination, the question should be asked if all of this personal data is essential for the purposes intended under the Acts.

The Review Group also identified the need for some analysis to be done in the area of the additional personal data that is occasionally supplied to CRO by presenters in purported compliance with the

Companies Acts (e.g. marriage certificate where a director is switching from her maiden to married name). Since 2010, CRO has implemented systems to prevent recording of such information on the public register but the question arises with regard to the fate of historically available personal information.

3.2.3 Identity theft and other crimes using information gleaned from the CRO Register

The Review Group considered whether the issues of identity theft or insufficient protection of personal data arise with the CRO Register, and spent time assessing the extent of the issues, including an examination of the position in the UK, in particular with regard to corporate fraud and the publication of directors' home addresses. Attention was also paid to the Review Group's 2007 recommendation for restriction of directors' home addresses where a member of An Garda Síochána had certified that it would be appropriate, but these had not been implemented. It was agreed that it would be timely to re-examine this recommendation in light of current data and to assess whether it would place an unnecessary administrative burden on An Garda Síochána and the CRO.

A related issue, namely that of intra-company disputes, was also considered. In that case, there was a concern that a director could file a Form B10 validating his / her own appointment in spite of the fact that the company has not actually appointed him / her.

The Review Group concluded that information that is available to the public via the CRO Register could be used to commit frauds such as personal identity theft or corporate identity theft (company hijack) or by activists to learn the home addresses of directors who they wish to target. It went on to acknowledge that people may well believe that very sensitive personal information should be capable of being redacted if a strong case is made for doing so but this has to be balanced against the legitimate interest in keeping it in the public domain. As for intra-company disputes, there is an opening for people to place incorrect information on the public Register.

Accordingly, the Review Group found that this topic highlighted a number of issues that warranted in- depth consideration.

3.2.4 Onward sale of data to "bulk data customers" of the CRO

The Registrar keeps and maintains a register of documents supplied to her pursuant to the requirements of the Companies Acts 1963-2009 and the Registration of Business Names Act 1963. All the documents received form part of a database maintained by the Registrar ("the Registrar's Database") and the copyright in that database is held by the Government by virtue of section 191 of the Copyright and Related Rights Act 2000 ("the Copyright Act"). A "database right" also exists in the Registrar's Database within the meaning of section 321 of the Copyright Act. By virtue of section 370 of the Companies Act 1963, any person may inspect these documents on payment of a fee. This fee is set by the Minister for Jobs, Enterprise and Innovation by Statutory Instrument.

As well as supplying documents to individual users, the Registrar, as agent for the Minister, has entered into licensing agreements with a small number of parties. These parties have signed up to two licensing agreements; one which provides to them and allows them to use information from the Registrar's Database; and another which provides to them and allows them to use the scanned images of documents in the Registrar's Database.

The Review Group considered that the sale of this bulk data gave rise to a number of issues that would need detailed examination. To start, there is the question of whether there is a need for legislative underpinning for these arrangements. Secondly, while information collected by the Registrar in carrying out her functions is not subject to the Data Protection Acts, there is a need to assess the appropriate treatment of that information gathered by the Registrar that is not strictly necessary for performing her functions. Examples of this type of information include email addresses, registers of auditors, or excess or unnecessary information that is sometimes filed by companies with the CRO. The Review Group recommended that consideration be given to the appropriateness or otherwise of giving this type of information an exemption from the Data Protection Acts too. The Review Group also noted that there was a need to examine the impact, if any, of the Re-Use of Public Sector Information Regulations 2005 (SI 279/2005), on the ability of the CRO to sell its data and images in bulk or to deal with its data generally.

Finally, the Review Group noted the case of *Compass-Datenbank GmbH –v- Austria*, which is before the Court of Justice of Europe and a decision is expected in due course. In that case, Compass-Datenbank, an Austrian company, took an action against Austria because of that State's refusal to licence the provision of company information from the Austrian business undertakings register for downstream use. Ireland intervened in that case and the outcome may have implications for the way in which the CRO licences the use of its data. Once the Court's decision is known, it will need to be considered by the Group in formulating its recommendations.

3.2.5 Archiving of CRO data

Section 313 of the Companies Act 1963 provides that –

> "The registrar of companies shall, after the expiration of 20 years from the dissolution of a company, send all the documents filed in connection with such company to the Public Record Office [National Archives]."

The Review Group had considered this issue in its First Report (2001), but developments since then, not least advances in technology, mean that it is timely to review the situation.

The Review Group identified several issues here too. Firstly, there was the question of storage. In recent years, the National Archives has not had the capacity to accept company records. So, it has fallen to the CRO to find alternative solutions. Secondly, the length of time that information needs to be stored is an issue, as is the format in which it can be stored. Clearly, there are a number of possible alternatives to paper files, such as electronic files or a cloud computing solution. Given the falling costs of electronic storage, there could be a case for allowing the destruction of all physical records after a specified period of time (e.g. 3 years from the date of receipt by the CRO) but with retention of electronic copies by the CRO for an indefinite period.

A related issue is the question of legal effect of electronic records, and whether electronic versions of filed documents could be relied on in Court as evidence. The Review Group noted that section 9 of the Electronic Commerce Act 2000[3] could serve as a precedent here.

[3] Section 9 of the Electronic Commerce Act 2000 states "Information (including information incorporated by reference) shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise".

Chapter 4: Audit and financial matters

4.1 Application of IAS 27 and the consequences for Sections 62, 149(5) and 72 of the Companies Acts 1963

4.1.1 Background

Since IAS 27 Revised, which deals with Consolidated and Separate Financial Statements, came into effect for accounting periods commencing on or after 1st January 2009, entities have been faced with having to try to comply with inconsistent requirements of Irish Law and of Revised IAS 27. There are two distinct areas of inconsistency as between the Companies Act 1963 (the "1963 Act") and the requirements of IAS 27. The first and simplest relates to the accounting treatment of pre-acquisition dividends (see 4.1.2 below). The second and more complex issue relates to the reorganisation of a group where a new holding company is inserted above an existing company in circumstances where no substantive transaction occurs (see 4.1.3 below).

The Review Group believes that there is an immediate and on-going concern with respect to the Section 149(5) issue as this is likely to occur regularly in practice. The Section 62 issue is less common although it has arisen and for example necessitated recourse by Irish Life & Permanent to the Courts to resolve the anomaly. It is also likely that this is just the first of many instances in which similar matters will be faced by corporate entities in Ireland.

4.1.2 Section 149(5) issues

In considering the concern arising out of the conflicting requirements of Section 149(5) and IAS 27, the Review Group found that there has also been an ongoing contention regarding a further aspect of section 149(5), namely the proviso at the end of the section[4]. It seems clear that it was the intention of the drafters that depending on the facts and circumstances of the company, the directors should be permitted to distribute pre-acquisition dividends received from a subsidiary so long as it was not prejudicial to the rights of any person. Unfortunately, because the proviso requires a 'certification' and because it does not specify either what persons or for what timeframe the directors and auditors should concern themselves with when determining that a distribution would not "prejudice the rights and interests of any person", this option has, in practice, not been available for companies. The Review Group considers that it would be appropriate to rectify this position at the same time as seeking to address any conflict between Section 149(5) and IAS 27.

4.1.2.1 Scope of section 149(5)

The Review Group found that there had been some controversy as to whether section 149(5) applies to IFRS preparers or not as they prepare their financial statements under section 149A. However, there appears to be general consensus amongst the legal profession that, at a minimum, it is unclear as the wording in section 148(2) refers only to the preparation of individual accounts and does not specifically disapply the subsections of 149 that do not relate to the preparation of accounts. Consequently, it would appear that subsections 149(5) and 149(6) continue to apply to all companies. In fact any other interpretation would mean that the 1963 Act created an offence for

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[4] See paragraph 4.1.2.2 of this Report where section 149(5) is quoted.

not properly preparing Companies Act accounts but no similar offence for those failing to properly prepare IFRS accounts.

One solution to the issue above would be to clarify that IFRS preparers do not have to comply with section 149(5). This would, however, seriously advantage IFRS preparers over those preparing Companies Act accounts and this does not seem compatible with the stated objectives of the EU Modernisation Directive to create a level playing field between entities applying IFRS and those not doing so.

4.1.2.2 The pre-acquisition dividend issue – conflict with IAS 27

IAS 27.38A states that:

> *"An entity shall recognise a dividend from a subsidiary, jointly controlled entity or associate in profit or loss in its separate financial statements when its right to receive the dividend is established".*

In contrast, Section 149(5) of the 1963 Act states the following:

> *"The profits or losses attributable to any shares in a subsidiary for the time being held by a holding company or any other of its subsidiaries shall not, for any purpose, be treated in the holding company's accounts as revenue profits or losses so far as they are profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries, and for the purpose of determining whether any profits or losses are to be treated as profits or losses for the period the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly. Provided, however, that where the directors and the auditors are satisfied and so certify that it would be fair and reasonable and would not prejudice the rights and interests of any person, the profits or losses attributable to any shares in a subsidiary may be treated in a manner otherwise than in accordance with this subsection."*

There is a direct conflict between these two requirements in relation to the accounting treatment to be adopted as regards dividends received from pre-acquisition profits. Section 149(5) states that dividends from pre-acquisition profits may never, for any purposes, be treated as revenue profits, whereas IAS 27 requires them to be treated as revenue profits and reflected in the Income Statement from the time when the right to receive the dividend is established. It does not seem possible to comply with both of these requirements.

The rationale behind Section 149(5) seems to have been to prohibit a holding company from distributing onwards profits that it had acquired with its acquisition of shares in a subsidiary undertaking. However, if pre-acquisition profits are not included as revenue profits or losses they can never form part of the cumulated profits available for distribution in accordance with Section 45 of the Companies (Amendment) Act 1983. Accordingly, the Review Group proposes to solve the issue by making some small changes to the wording of Section 149(5) in order to ensure that the presentation of such profits in the Income Statement (as required by IAS 27.38 A) could still be achieved without impacting on the prohibition in Section 149(5), which prohibits their designation as profits available for distribution.

4.1.2.3 The pre-acquisition dividend issue – alternative treatment as distributable reserves

As stated above, the final sentence of section 149(5) as it stands clearly contemplated that in certain circumstances, the directors of a company should be in a position to make a distribution out of pre-acquisition reserves. However, because these circumstances were not specified and because it was unclear as to the extent of work required by the directors and auditors to form the view that no person would be prejudiced by the distribution, it has not in practice been generally possible to make such a distribution. The Review Group recommends that the sentence be deleted.

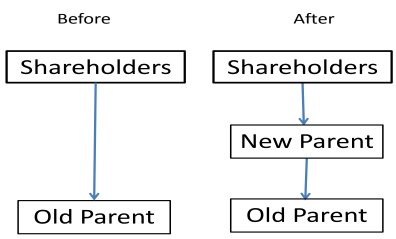
The Review Group also proposed a number of additional changes around section 149 and these are based on a new mechanism called the "Summary Approval Procedure", which is introduced in "Pillar A" of the Companies Bill (cf Chapter 7 of Part 4, Sections 198-208), as published on 30 May 2011.

The complete set of recommendations on this issue, were brought together by the Review Group in the form of Heads of Bill. They were prepared on the basis of the existing law, i.e. the 1963 Act, so would need modification if they are accepted and included in the Companies Bill. Those Heads, together with a detailed explanation, are set out in Appendix 2.

4.1.3 The Section 62 issue- Group reorganisation by introduction of holding company

The second area of inconsistency between the Companies Act 1963 and IAS 27 concerns the reorganisation of a group where a new group holding company is inserted above an existing company in circumstances where there is no substantive transaction such that there are no new shareholders introduced, no new assets are introduced and there is no relative or absolute change in the interests of any shareholders in the group assets and liabilities.

IAS27.38 B and IAS27.38 C address this type of group reorganisation. The actual words of the standard are included as Appendix 3 to this memo. They only apply in very limited circumstances where, under a share for share exchange, there has been a new holding company inserted somewhere within a group structure such that the assets and liabilities of the new group and the original group are the same immediately before and after the reorganisation and the owners of the original parent have the same absolute and relative interests in the net assets of the group after the reorganisation. Another requirement is that the new parent accounts for its investment in the original parent at cost in its separate financial statements. Diagrammatically this can be represented as follows:



The issue that the accounting standard was addressing was the amount at which the investment in a subsidiary should be shown in the financial statements of the new parent. The alternatives were to fair value the investment in the original parent or to arrive at an amount that would represent cost. Under accounting standards it is permissible to adopt fair value for investments in subsidiaries however this accounting policy choice would require that such investments would need to be revalued every year and this would impose a significant burden on financial statement preparers in accessing fair value calculations for subsidiaries at each reporting date. Consequently virtually all entities carry their investment in subsidiaries at the cost of those subsidiaries to the holding company.

The IASB were considering what constituted cost in the circumstances described above. They concluded that it would be inappropriate to record 'cost' at an amount in excess of the shareholders' interests in the net assets of the original parent at their existing book value in a transaction where there was no real substantive change to the financial position of the shareholders. Consequently they determined that the amount at which the cost of the subsidiary should be shown was its share of the equity items shown in the separate financial statements of the original parent. In other words this represented the shareholders' proportionate share of the book value of the assets and liabilities shown in the individual financial statements of the original parent. It was considered appropriate that these values should carry over into the new parent and that there should not be a valuation adjustment as a consequence of a transaction which did not have any real commercial substance.

Since the new parent has issued shares in order to effect this transaction, it is required by Section 62 of the 1963 Act to record any excess of the value of consideration received "whether in the form of cash or otherwise" over the nominal value of the shares issued as share premium account. The actual wording of Section 62 of the1963 Act is as follows:

> *"62(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the share premium account", and the provisions of this Act relating to the reduction of share capital of a company shall, except as provided in this section and section 207(2) of the Companies Act 1990, apply as if the share premium account were paid up share capital of the company".*

The accounting standard (IAS 27) addresses the amount at which the new parent should record its investment in the old parent and company law addresses how the share issue should be accounted for. Since each requires a different measurement basis the following example shows the inconsistency that arises.

Assume for the moment that the fair value of the old parent is €500 and that the 'equity items' (ie capital and reserves) shown in the individual financial statements of the old parent are either (1) €400 or (2) €550

Balance sheet of New Parent	***(1)***	***(2)***
	€	**€**
Investment in subsidiary	400	550
Total net assets	400	550
Share capital / premium	500	500
Other reserve*	(100)	50
Total equity	400	550

* The nature of this 'other reserve' was the subject of the IL&P court case.

In *Re Irish Life & Permanent plc* the scenario was like option (2) above and the judge found that this reserve was a 'profit' and since the consideration received was not qualifying consideration it would be an unrealised profit. In that particular case, when the investment in the subsidiary was impaired, the principles of realisation would allow a sufficient proportion of the reserve necessary to absorb the impairment to be treated as a realised reserve. In a scenario like option (1), which has not been tested in the courts, it is uncertain whether the loss would be considered realised or unrealised and consequently there may be a need to eliminate this deficit before the holding company would be in a position to pay any dividends. The Review Group considered that this would create a significant burden for companies in such transactions when there had been no real substantive transaction.

IAS 27 as amended was the subject of extensive consultation by the IASB and the majority of respondents supported the proposed guidance; therefore it is extremely unlikely that IAS 27 will change in the foreseeable future. For this reason it is appropriate to consider the issue of recognising share capital / premium at fair value in such a transaction.

UK Company Law has the same requirement in Section 610 of the Companies Act 2006 regarding the need to recognise share premium when shares are issued at a premium. However, UK Company Law provides relief from the requirement to recognise share premium at fair value where there is a group reconstruction. This relief is set out in Section 611 of the Companies Act 2006 (previously this was Section 131of the Companies Act 1985). The relief provided in this section applies where a wholly owned subsidiary of a holding company allots shares either to the holding company itself or to another wholly owned subsidiary of the holding company in consideration for the transfer to it of non-cash assets of another company that is a wholly owned member of the same group. In effect, the company issuing the shares is permitted to restrict the amount it recognises as share premium on the transaction to the difference between the book value of the consideration received and the nominal value of the shares issued.

This effectively recognises that there has been no change from a group perspective regarding the ownership of the assets and that they have merely moved from one part of the group to another part of the group, and that there is no need to re-measure the consideration received on issue of the shares to fair value. It should be noted that UK Company Law does not prohibit this transaction being accounted for at fair value but provides a relief which permits it to be accounted for at the amounts previously reflected in the financial statements of the entity giving up the assets or liabilities. The key elements that seem to be required to avail of this exemption are that it is all happening between entities in a group comprising a holding company and wholly owned subsidiaries. Consequently there are no assets leaving or entering the group and also there is no change in absolute or relative shareholder interest in the assets.

The Review Group found that it did not seem to be a big extension to apply this same type of relief to situations where a new holding company is being inserted between shareholders and an existing parent in a manner which also involves no assets or liabilities entering or leaving the group and no change happening in ultimate ownership interests in the assets or liabilities of the group. Accordingly, the Review Group proposed a new section, section 62A, to provide an exemption from the requirement in section 62 to recognise the consideration received on issue of shares at fair value in the very limited circumstances as outlined in IAS 27. It only applies when (i) a new company is being introduced into a group, (ii) there is no change in absolute or relative shareholder interests and it is a share for share exchange with no assets entering or leaving the group except for permitted cash. Permitted cash comprises cash payments for fractional shares and other payments authorised by the courts. As with the proposed changes around Section 149(5), the Review Group drafted Heads of a Bill to give effect to this recommendation, based on the existing law. As a result, it will be necessary to remodel the actual drafts for inclusion in the Companies Bill. The Heads are set out in detail in Appendix 2.

In order to ensure that companies can take advantage of any exemption from providing for share premium in these limited transactions, it will also be necessary to provide an exemption from the requirements of Section 149(5) for these particular transactions. This is provided for in subsection 149(5)C of the draft Heads. Otherwise significant dividend blockages would be created within the group.

4.1.4 Recommendations

The Review Group recommends that the anomalies between IAS 27 and sections 62 and 149(5) are addressed as quickly as possible along the lines of the Heads that are submitted in this report. The Review Group is confident that these proposed changes to company law will remedy these anomalies but with sufficient safeguards to protect against any potential abuse.

The key changes being proposed are as follows:

- Section 149(5) is amended to permit dividends from pre-acquisition profits of a subsidiary to be presented in the profit and loss account even though they are generally not available for distribution
- that an amount of the accumulated profits or losses attributable to any shares in a subsidiary for the time being held by a holding company or any other of its subsidiaries may, for a period of time, be treated in the holding company's accounts as profits available for distribution where summary approval procedures are carried out, including
    - The directors provide a declaration of solvency
    - An independent report from the auditor that the declaration of solvency is not unreasonable
    - The shareholders so approve by special resolution

- An exception is introduced from the requirement to recognise share premium at the value of consideration received where shares are issued in an internal group reorganisation which meets certain criteria, including:
    - There is no change in the total net assets of the group
    - No change in relative or absolute ownership of the group

The Review Group proposes that these changes be introduced as soon as possible as they are aimed at removing anomalies between existing law and accounting standards and also improving the legal ability for companies to restructure their internal organisation without impeding their ability to access existing distributable profits.

Chapter 5: Compliance and Enforcement Issues

5.1 Review of the Recommendations in the Committee on Public Accounts' First Interim Report on the Loss of Fiduciary Taxes arising from abuse of Limited Liability

5.1.1 Background

The Dáil Committee on Public Accounts (PAC) produced its First Interim Report on the Loss of Fiduciary Taxes arising from abuse of Limited Liability in February 2010. In coming to its conclusions, the PAC acknowledged that many companies become insolvent because of trading difficulties and in spite of the best efforts of the directors. Therefore, it focussed its attention on the situation where the State is not paid fiduciary taxes (i.e. PAYE, PRSI and VAT that is collected by companies from staff and suppliers and effectively held in trust before being paid over to the State) as a result of 'wilful tax evasion' by directors of companies that subsequently become insolvent. In these cases, the PAC proposed that a deterrent be put in place to prevent malfeasant behaviour on the part of those who use the protections of limited liability in company law to avoid paying tax that they have collected from third parties. The PAC was also concerned that some of these directors could open a new business, under a different name, a situation described as "phoenix companies".

To achieve that deterrent, the Report made four specific recommendations, two of which refer to company law. Those recommendations were –

1. That the legislative provisions of the UK authorities which could make directors, with a track record of non-compliance for tax purposes, personally liable for PRSI contributions collected by the company be introduced into Irish law as a deterrent to continued malfeasant behaviour of directors.
2. That the review of the phoenix monitoring programme[5] be widened to examine the interactions between Revenue and those companies where there was a significant write-off of tax with a view to establishing whether further measures are necessary in order to minimise the level of write-off.
3. That company law provide that company directors are required to have their tax affairs in order when incorporating a new company or on being appointed to an existing company.
4. That the Company Law Review Group examine whether the current levels of capitalisation required when incorporating a limited company in Ireland could be increased to a moderate level.

The Minister subsequently asked the Review Group to include the two company law issues in its work programme for 2010/2011.

As a result of its consideration of the PAC's proposals, the Review Group recommended increasing the current levels of minimum capital for companies with restricted directors but considered that the practical implications of an amendment to company law requiring directors to have their tax affairs in order would outweigh the benefits and would give rise to an unnecessary administrative burden. The Review Group's deliberations are set out in full below.

[5] The Commonality Programme (referred to also as the phoenix monitoring programme) manages cases where a risk to debt collection arises where businesses are linked. Often this arises where principals are involved with more than one business where there are significant tax debts, non-compliance or other links to a failed undertaking, where the protection of limited liability may have been deliberately used to evade the payment of fiduciary taxes.

5.1.2 PAC's Third Recommendation on directors and their tax affairs – findings

In order to give effect to this recommendation, the PAC proposed that a new director be required to provide a tax clearance certificate at the time of his/her appointment. Accordingly, as a start, the Review Group examined the procedure for getting a tax clearance certificate from the Revenue Commissioners[6]. In this regard, the Review Group noted that a tax clearance certificate relates to the personal tax affairs <u>of a person</u> and not to the tax situation regarding any other company of which he or she was/ is a director.

The Review Group then turned to the question of how the PAC recommendation could be given effect in law and two possible models emerged, as follows –

- Amend the Companies Acts to require a newly appointed director to supply his/her tax clearance certificate to the CRO, to be submitted at the same time as notifying the CRO of the appointment of that director
- Amend the Companies Acts to require a newly appointed director to supply his/her tax clearance certificate to an officer of the company within a specified period of time

Although confined to company law options, it came to the attention of the Review Group that the rules on public procurement require all members of a partnership to supply a tax clearance certificate to the State body with which it contracts, but do not impose the same requirement on all directors of a company, the most likely reason for this being that the State body is contracting with the company, not with its directors.

<u>Model 1 – Submission to CRO</u>

The Review Group considered the option of requiring a newly appointed director to supply his / her tax clearance certificate to the CRO at the same time that the company notifies the CRO of the appointment of that director in a Form A1 (application for incorporation) or Form B10 (information on change of director / secretary). However, the Review Group's research showed that this would be impractical, for a number of reasons, in particular -

- **Power to appoint directors lies with the company, not the CRO:** It is the company's shareholder(s) or its board of directors who appoint its directors, and the appointment of that director is effective from the date of that decision to appoint, not from the date on which the appointment is notified to the CRO. So, the CRO does not appoint company directors or, indeed, validate their appointment when it registers a Form B10. The CRO only receives the Form B10

[6] The purpose of the Tax Clearance scheme is to ensure that people (residents and non-residents) who derive an economic benefit from (a) a licence or permit to conduct certain activities in the State, and/or (b) receipt of contracts / grants, subsidies or other payments from the State are in compliance with their tax obligations. Irish residents can apply on-line to the Revenue Commissioners for general tax clearance. For non-residents, there are 3 categories of applicants, (i) non-resident applicants who are registered for Irish tax and who do not have a permanent established place of business in the State; (ii) non-resident applicants who are registered for Irish tax and also have a permanent established place of business in the State; and (iii) non-resident applicants who have neither an Irish tax registration nor a permanent established place of business in the State. Non-residents cannot apply on-line for a general tax clearance certificate but may apply to certain designated offices within the Revenue Commissioners. The turnaround time for tax clearance certificates is a week or less.

after the appointment has taken place and by registering that Form, the CRO is putting into the public domain the fact that the CRO has been informed of the appointment .

- **Extending the length of time it takes to incorporate companies:** If the CRO were to require production of a tax clearance certificate with the Form A1 (application for incorporation), it is likely that the process for incorporating companies would be delayed, as the CRO would have to refuse to incorporate any company where tax clearance was not available in respect of any one or more of the directors named on the form. In most instances, speed of incorporation is of the essence as far as presenters of applications for incorporation are concerned and is an international measure of how easy it is to setup a business in a modern economy. As a matter of good administrative practice, CRO operates to guaranteed time scales in respect of applications for company incorporation, which is very important to practitioners and company formation agents and their clients. Those service levels would be negatively affected and guarantees of incorporation within a particular timescale could not be adhered to by CRO if it were necessary to carry out this additional check on tax clearance. The reduction in speed of turnaround of incorporation would be a retrograde step as far as those forming companies and their clients are concerned. At the moment, CRO is moving closer to an electronic system of incorporation to facilitate speedier incorporations. The introduction of additional hurdles to be cleared before a company could be incorporated would be undesirable and would fly in the face of the accepted objective of reducing red tape. Moreover, in order to speed up the process, it was considered likely that companies would look to use non-Irish resident directors or employees of company formation agents as the first directors of companies. In the case of non-Irish resident, the tax clearance system is of limited if any value in assessing the full picture of a person's tax affairs. In the case of employees of company formation agents, these directors could resign shortly after incorporation. In either case, the impact of the PAC recommendation could be readily avoided in practice but would cause additional cost in terms of unnecessary delay and bureaucracy for the vast majority of tax-compliant directors.

- **Impact on auto-registration of Form B10 and risk of register being out of date for a longer period:** Form B10 is primarily filed electronically, with auto-registration of B10s taking place in many cases (B10s can be registered automatically, without the need for CRO staff to intervene as the checks are in-built to the e-filing process). The advantage of e-filing and auto-registration is that the CRO register is updated more quickly and efficiently as to directors' details, and backlogs of B10s are kept to a minimum. This would no longer be the case if a B10 could not be registered without a CRO staff member checking that there is an up to date tax clearance certificate in respect of the appointment of each individual director. Registration of B10s would be held up pending tax clearance being established, with backlogs increasing as auto-registration would not be an option. The CRO register would remain out of date for a longer period which would be undesirable.

- **Likelihood of increasing number of *de facto* directors:** Another risk identified was the likelihood of increasing the instances of *de facto* directors of Irish registered companies, in other words people acting as directors but where no notification of appointment as director has been delivered to the CRO. This could cause difficulties for any enforcement action as, for example, ODCE relies in its prosecutions and court proceedings on the content of Form A1 and Form B10 and signature of the CRO forms as constituting essential proofs that a person was acting as a director of a company at a material date. Similar concerns regarding *shadow directors* were recognised.

- **Risk of encouraging companies to register in another EU Member State:** Companies establishing in Ireland to do business may be tempted to register in an EU Member State where there is no requirement for a tax clearance certificate for directors, and then to register with the CRO as an external company which has established a branch or place of business in the State. In this situation, the overall obligation on the company to report certain matters to the CRO is reduced and, so, Irish people dealing with that company have far less information on the company available to them. The Committee noted that such provisions do not exist in other jurisdictions, particularly the UK.

  The Slavenburg file, which is a file maintained by the CRO relating to charges which have been created by external companies over Irish-based property where the external company should have registered with CRO as a branch or place of business but has failed to do so, is testament to the fact that there are foreign-incorporated companies which do not comply with their registration obligation. Non-compliance by any additional external companies would further exacerbate this situation.

Having regard to the above and the fact that any such requirement would apply to all individuals being appointed as directors, the Review Group decided against recommending that a newly appointed director be required to supply his/her tax clearance certificate to the CRO at the time that the company notifies the CRO of that appointment. Any benefits accruing are likely to be small, easily avoided by those so minded to do so and would impose significant additional bureaucracy and cost which would be entirely disproportionate to any possible benefit.

<u>Model 2 – Submission to an officer of the company</u>

The second possibility considered was to place an obligation on the newly appointed director to supply his / her tax clearance certificate within a specified period of time, say three months, to an officer of the company, such as the company secretary. The company officer could then be obliged to put on public record (e.g. by notifying the CRO) that the tax clearance certificate had been received.

In looking at this model, the Review Group considered the appropriate time frame for producing the tax clearance certificate. Options here included production upon appointment or within a reasonable period thereafter, say six months. However, it was concluded that requiring production on appointment could be an additional burden. Moreover, any time gap between appointment and production, however short, is not consistent with the fact that in law a person is a director immediately upon appointment. As for allowing a period of time, say six months, the Review Group considered that this too presented difficulties. In particular, it gave rise to the question of the director's standing during that period, in other words, are his / her actions as a director legitimate until such time as the 6 months expires and no certificate has been produced? One point raised in this discussion was that the effect of giving time to furnish the certificate would be to create in company law a new type of director, a ‘provisional director’. If this idea were pursued then serious consideration would need to be given to the effect of the actions of such a director in the interim period as there are significant complications associated with a person appearing to be a director when not one in fact or law. Uncertainty is anathema to corporate transactions.

In light of these concerns, the Review Group considered that the appointment of a director should not be made contingent on the production of a tax clearance certificate and instead considered whether it would be feasible to address a failure to supply the certificate within the specified period, by requiring such an individual to vacate the position of director or face the imposition of sanctions. In this regard, possible sanctions considered were a daily fine, personal liability for the taxes of the company or an offence. However, the Review Group considered it unworkable to impose personal liability on a director for the taxes as he or she may not have agreed to the decision of the other directors to withhold payment of the taxes to the Revenue.

In the end the Review Group decided that this second model gave rise to some of the same concerns outlined above with regard to the first model, in particular the risk of encouraging *de facto* directors and the likelihood of companies registering abroad, and would not be a proportionate response to the difficulties identified by the PAC, who acknowledge that many companies become insolvent because of trading difficulties despite the best efforts of the directors.

5.1.3 PAC’s Fourth Recommendation on minimum capital levels – findings

The PAC’s final recommendation was for an increase in minimum share capital requirements to a “moderate level”. However, the PAC did not define what it meant by a moderate level. In principle, a company with a larger opening share capital should be able to withstand a higher level of losses than a company with little or no share capital without becoming insolvent. However, in practice, most companies do not rely on share capital to fund the business. Loans from principals and bank borrowings are generally much more important sources of working capital.

Once a company is established, its ongoing solvency is contingent on it being profitable or, at a minimum, the cumulative losses incurred not exceeding the level of capital in the business. Where a company becomes insolvent, it is, by definition unable to pay its liabilities. This will be the case regardless of the level of share capital that the company had. In particular, all of the share capital will have been dissipated by the losses suffered by the company and will not, therefore be available to meet liabilities, including fiduciary tax liabilities.

Thus the Review Group concluded that there was no obvious correlation between a requirement for a higher level of share capital and the level of recoveries by Revenue from insolvent companies. In theory, a better capitalised company might survive for a slightly longer period. However, this is unlikely to be material unless the level of capital requirements was set at a prohibitively high level. Information from Revenue, dated end November 2011, showed that the average amount of taxes lost when a company goes into liquidation are in the order of €83,000 per case. Raising the requirement for minimum capital to this level could be seen as a serious impediment to incorporation.

While plc and SE company forms and companies with restricted directors have requirements for minimum capital, the levels set for the former category are generally extremely low relative to the scales of the enterprise being carried on. In the case of restricted directors, the level is intended to act as a deliberate barrier to entry into a new business unless there is a reasonably high level of share capital though in practical terms, the public disclosure of the restriction is probably a greater obstacle to the establishment of a new business because of the reluctance of 3rd parties , especially banks, to extend credit to individuals who have been restricted. In this way, the existing regime already uses share capital requirements as a means of tackling malfeasant behaviour, as evidenced by the making of a restriction order.

It is the case that share capital requirements act as a barrier to incorporation and, in the case of corporate groups, an additional cost to doing business and, in the case of non-trading companies, a wasteful use of capital. At the lower levels, this impact is probably not too material but as the levels rise the disincentive effect grows. This has been recognised at the European level where discussions have been focussed on reducing such requirements where they exist as a means of fostering entrepreneurship, and has been one of the stumbling blocks to the negotiations in Brussels on the European Private Company (the SPE), where some Member States, including Ireland, have supported a more flexible approach.

Moreover, raising the minimum threshold might also create the risk of sending companies and international groups abroad to incorporate in other jurisdictions, in particular in the UK where no minimum capital requirement currently exists. This latter point is acknowledged in the PAC Report. As mentioned above with regard to tax clearance certificates, this would lead to a situation where companies trading in Ireland would at best be registered here as branches or external companies and so have significantly fewer reporting obligations in this jurisdiction.

As well as the company law aspects, the Review Group took note of the Government's and the CLRG's ongoing work to reduce the administrative burden on business. Part of that programme is looking at the removal of any minimum capital requirement, which would, clearly, be contrary to any proposal to raise the current levels.

5.1.4 Recommendations

In examining the PAC's proposal regarding the tax affairs of company directors, the Review Group considered that the practical difficulties identified outweighed any benefits as may arise of introducing an amendment to company law that would require that company directors have to provide proof that their tax affairs are in order. Accordingly, the Review Group recommends that the current situation be maintained in this regard.

Turning to the PAC's proposal that the minimum capital requirements should be reviewed, the Review Group recommends that the level of capitalisation required for companies with restricted directors should be raised - because such directors have been found to have acted either dishonestly or irresponsibly - but that no change be made to the law regarding minimum levels of capital at this time for the generality of companies.

The Review Group also examined possible new levels of capitalisation for companies with restricted directors. Under the current law, a distinction is made between private companies and plcs with the former required to have a minimum capital of €63,500 and the latter required to have €317,000. If this distinction is to be maintained, the Review Group proposes new limits of €100,000 for private companies and €500,000 for plcs.

However, the Review Group considers that the distinction itself, together with the suggested new increased limits, should be looked at in the context of the Companies Bill, in particular to assess whether it would be more appropriate to distinguish between the private company limited by shares and the proposed designated activity company (DAC).

5.2 Requirements on auditors to report under criminal justice legislation, company law and, in particular, recommendations arising from the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions

5.2.1 Background

The Minister included this item in the Review Group's Work Programme following representations from the audit profession on the difficulties it faced in complying with its statutory reporting obligations. These difficulties arise from, *inter alia*, the apparently differing thresholds of proof or certainty that are required to trigger a reporting obligation, the inconsistent use of the concept of materiality and the absence of a standard framework for reporting.

Although the terms of reference given in the Work Programme refer to legislation, such as some criminal justice law, which falls outside the scope of company law, the Review Group agreed to make recommendations in that area to the extent practicable. It also agreed to look at the current reporting obligations from a macro perspective with a view to making recommendations as to how those obligations might be better aligned within the parameters of an overall framework. It did not consider it within its remit to assess the sufficiency or appropriateness of each individual reporting recommendation.

Since the adoption of the Work Programme, additional responsibilities have been imposed on auditors and others by legislation in the area of white collar crime, such as the Criminal justice Act 2011, and these were taken into account in discussing this issue. Although the Central Bank legislation also imposes reporting obligations on auditors, in that case the Review Group did not examine it in any detail, as the legislation is undergoing reform at the moment.

5.2.2 Reporting obligations coming within the scope of the terms of reference

The following are the principal auditor reporting obligations that come within the scope of the Review Group's terms of reference –

<u>Reporting of indictable offences under the Companies Acts</u>

Under section 194 of the Companies Act 1990, as amended by section 74 of the Company Law Enforcement Act 2001, auditors are required to make a report to the Director of Corporate Enforcement where, during the course of, and by virtue of, carrying out an audit, information comes into their possession which leads them to form the opinion that the company, or an officer or agent of it, has committed an indictable offence under the Companies Acts.

In the context of auditors' reporting obligations, section 194(6) of the 1990 Act provides that *"No professional or legal duty to which an auditor is subject by virtue of his appointment as an auditor of a company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, an auditor, by reason of his compliance with an obligation imposed on him by or under this section"*.

<u>Reporting of theft and fraud offences</u>

Section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001 requires a relevant person, which would include an auditor or accountant providing professional services, to report to a member of An Garda Síochána in circumstances where information or documents indicate that certain offences under the Act may have been committed by a client entity, or by its management or employees.

People making disclosures in good faith to An Garda Síochána under the Act are protected from liability under section 59(3) of that Act.

Reporting of suspected money laundering offences

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010[7] (the 2010 Act) designates external accountants, auditors and tax advisors (amongst others) for the purposes of its anti-money laundering and terrorist financing provisions. Designated people, including auditors, are required to report to An Garda Síochána and the Revenue Commissioners –

- Knowledge, suspicion or reasonable grounds for that knowledge or suspicion, on the basis of information obtained in the course of carrying on business as a designated person of money laundering or terrorist financing offences; and
- Services or transactions provided or carried out by the firm, in the course of its business, with any jurisdiction designated by the Minister for Justice and Law Reform under the 2010 Act

The 2010 Act also provides for protections for relevant persons and these include –

- Section 47, in relation to the reporting of suspicious transactions under Chapter 4, disclosures of information are not a breach of any restrictions imposed by another Act or rule of law; and
- Section 112, which affords the same protection in respect of reports to An Garda Síochána or other relevant person in relation to money laundering or terrorist financing.

In addition, directly applicable EU Regulations enforcing UN and EU sanctions contain obligations on all persons (i.e. not just auditors) to pass on information to the authorities. For example, Regulation 31 of Council Regulation (EU) No. 961/2010 of 25 October 2010 on restrictive measures against Iran requires natural and legal persons, entities and bodies "[to] …. supply immediately any information which would facilitate compliance with this Regulation, such as information on accounts and amounts frozen in accordance with Article 16, to the competent authorities of the Member States… and co-operate with the competent authorities … in any verification of this information."

Reporting of taxation offences

In addition to the foregoing, auditors also have reporting obligations under legislation including, for example, certain reporting obligations to the Revenue Commissions. Section 1079 of the Taxes Consolidation Act 1997 imposes an obligation on auditors to report taxation offences. If the auditor becomes aware that a company has committed, or is in the course of committing, a taxation offence, the auditor must write to the company and request it to either rectify the matter or inform the

[7] The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 gives effect to the EU Directive 2005/60/EC on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (the Third Anti-Money Laundering Directive) and repeals the anti-money laundering provisions in the Criminal Justice Act 1994 and related statutory instruments.

Revenue Commissioners of the offence. If the company does not, within 6 months, take either of these actions, the auditor must cease to act as auditor and notify the company and the Revenue Commissioners in writing that s/he is resigning. The act of notification constitutes the reporting obligation.

Other reporting obligations

It is also the case that auditors are covered by more broadly drafted legislative provisions such as, for example, the following, recently enacted provisions of the Criminal Justice Act 2011 (the 2011 Act), which apply to a large number of scheduled offences –

- Section 17 provides that any person who knows or suspects that an investigation by An Garda Síochána into a relevant offence…is being, or is likely to be, carried out and falsifies, conceals, destroys or otherwise disposes of a document or record which he or she knows or suspects is, or would be, relevant to the investigation or causes or permits its falsification, concealment, destruction or disposal, shall be guilty of an offence; and
- Section 19 provides that a person shall be guilty of an offence if he or she has information which he or she knows, or believes, might be of material assistance in (a) preventing the commission by any other person of a relevant offence[8], or (b) securing the apprehension, prosecution or conviction of any other person for a relevant offence and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of An Garda Síochána.

The 2011 Act provides strong legal protections for people who disclose the information as required by section 19, including providing protection for employees from penalisation for disclosing information relating to relevant offences (section 20).

5.2.3 Incidence of auditor reporting

With a view to getting a sense of the incidence of auditor reporting, the Review Group established that the Office of the Director of Corporate Enforcement received 191 indictable offence reports during the year ended 31 December 2010[9]. No response was received from an enquiry to An Garda Síochána regarding the number of reports received and no such data is provided in Garda annual reports. The Office of the Revenue Commissioners advised that it does not publish information of this nature but indicated that the level of reports received is very low.

5.2.4 Directors' and auditors' respective responsibilities and related matters

Auditors play an important role in providing independent assurance on companies' financial statements and associated matters and, in the course of discharging their duties, gain a unique insight into companies' affairs. In that context, the Committee recognises why the legislature considers it appropriate that auditors (and others) should, under certain circumstances, be conferred with statutory reporting obligations. With specific references to the reporting obligations provided for under theft and fraud, anti-money laundering and terrorist financing legislation, these

[8] Relevant offences are set out in Schedule 1 to the Act and include certain offences under the Companies Acts as well as offences relating to banking, investment of funds and other financial activities and offences under the Criminal Justice (Theft and Fraud) Offences Act 2001 and the corruption offence.
[9] Source: ODCE annual report 2010

statutory provisions reflect the legislature's commitment to tackling serious wrongdoing. Similarly, public concern regarding white collar crime was reflected in the Programme for Government and in the early enactment of the Criminal Justice Act 2011.

That having been said, the Review Group considers it important to recognise that the manner in which companies' affairs are conducted is ultimately the responsibility of their directors. In that context the Review Group noted that previous proposals have been made to require company directors to confirm compliance with certain legislative obligations and responsibilities, and that the draft Companies Bill proposes the reintroduction of directors' compliance statements.

The Review Group further noted that, in its own annual report for 2007, it concluded that good faith reporting (aka "whistleblowing") is not a matter exclusive to company law but, rather, that any such reporting rights / obligations ought to apply to breaches of all legal requirements. More recently, the Programme for Government includes a commitment to introducing a general whistleblowing protection, as the Review Group suggested rather than a specific sectoral provision, rejected by the Review Group in its 2007 Report.

5.2.5 OECD Report on the Convention on Combating Bribery of Foreign Officials in International Business Transactions

In reviewing Ireland's implementation of the Convention on Combating Bribery of Foreign Officials in International Business Transactions in Ireland, the OECD recommended –

> "with respect to reporting by auditors, the [OECD] recommended that the Irish authorities:
>
> - Take all necessary measures to require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act or the Criminal Justice (Theft and Fraud Offences) Act; and
> - Consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities."

During the course of the Review Group's engagement with members of the accountancy profession, it was advised of the profession's view that this OECD recommendation is covered by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which transposes EU Directive 2005/60/EC (the so-called Third Anti-Money Laundering Directive) into Irish law. The Irish profession, through the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) has issued revised guidance on the requirements of this anti-money laundering legislation. Specifically, CCAB-I issued a Miscellaneous Technical Statement (M42 (Revised)) entitled "Guidance for those providing audit, accountancy, tax advisory, insolvency or related services in Ireland, on the prevention of money laundering and the countering of terrorist financing".

In the course of examining this item on the Review Group's Work Programme, the profession's representatives undertook to make specific reference to the OECD recommendation in a revised M42. It was also suggested by the profession's representatives that, with the introduction of the

2010 Act, it is likely that there will be an increase in the number of reports made to the relevant regulatory authorities.

5.2.6 Recommendations

Following the examination of the issues, the Review Group considers that the issues raised by the profession were both valid and reasonable. In coming to its conclusions, the Review Group has had regard to the various issues outlined above and to its terms of reference and concludes that the most appropriate approach would be to make recommendations for the development of new reporting obligations and for any review of existing obligations that might take place in the future.

Accordingly, the Review Group recommends that if new auditor reporting obligations are to be introduced in future, they should be developed with regard to the following criteria –

- *Consultation* – the audit profession, together with other interested parties, should be consulted at any early stage of the development of any legislative proposals;
- *Materiality* – in order to facilitate the taking into account, where applicable / appropriate, of materiality considerations, *de minimis* provisions be included in reporting obligations;
- *Consistency* – in order to facilitate, to the extent practicable, consistency across auditors' reporting obligations, the language used in expressing those obligations should be consistent;
- *Protection* – adequate legislative protection should be afforded to auditors in circumstances where they are required to make statutory reports to regulatory authorities;
- *Avoidance of duplication* – to the extent practicable, provision should be made that where an issue identified by an auditor would otherwise give rise to reporting obligations to two or more statutory / regulatory authorities (such as, under anti-money laundering legislation, auditors and other designated bodies can be required to report the same offence to both the Revenue Commissioners and An Garda Síochána), a single report to one of the relevant authorities would discharge the auditor's responsibility to report with only a requirement to furnish any other relevant statutory/ regulatory authorities with a copy of the report;
- *Web access* – to the extent practicable, the making of on-line reports should be facilitated.

In the event that any of the auditors' existing reporting obligations are to be amended, any such amendments should be developed having regard to the foregoing criteria.

Given that auditors' current reporting obligations extend across a number of codes of legislation, which in turn come within the aegis of a number of separate Government Departments and Offices, the Review Group considers that it is likely to be more difficult to achieve consistency of legislative approach to statutory reporting in the near term. That said, the Review Group recommends that consideration be given to the establishment of a cross Departmental group charged with examining the extent to which the objective of consistency of approach might be achieved and that such group should include representatives of the profession. One possibility might be to provide in company law a comprehensive reporting obligation for auditors and the disapplication of all other reporting regimes to auditors.

The Review Group submits that, if the foregoing criteria were to be applied to future and / or amended auditor reporting requirements, the benefits accruing would include –

- A reporting framework more readily understood by the auditing profession and, as a consequence, a more consistent approach to reporting; and
- Reduced costs to the audit profession, leading in turn to reduced costs to business.

5.3 Review of abuse of strike off provisions

5.3.1 Background

Part 12 of the Companies Bill brings together the many diverse provisions dealing with the strike-off and restoration of companies. There are currently two ways in which a company may be struck off the Register of Companies (the Register), and these are either voluntary or involuntary strike- off. In its Work Programme, the Review Group was asked to identify possible openings for abuse of each and to make recommendations, if appropriate, to address those identified abuses.

5.3.2 Voluntary strike off

At present, a company may request to be struck off the Register under an administrative non-statutory scheme operated by the Registrar of Companies (the Registrar). The Bill provides that this existing voluntary process will be placed on a statutory basis for the first time. Under the Bill as drafted, the conditions to be met by a company applying for strike off are –

> 721(1). A company may apply to the Registrar to be struck off the Register if the following conditions are satisfied:
>
> (a) The circumstances relating to the company are such as to give the Registrar reasonable cause to believe that it has never carried on business or has ceased to carry on business;
> (b) The company has, within three months before the date of application, by Special Resolution:
>   (i) Resolved to apply to the Registrar to be struck off the Register on the ground that it has never carried on business or has ceased to carry on business; and
>   (ii) Resolved that pending the determination (or, should it sooner occur, the cancellation, at its request, of this process) of its application to be struck off, the company will not carry on any business or incur any liabilities;
>
> (c) The company has delivered to the Registrar all annual returns required by section 339 that are outstanding in respect of the company as at the date of application;
> (d) The company has delivered to the Registrar a certificate in the prescribed form signed by each director certifying that as at the date of application:
>
>   (i) The amount of any assets of the company does not exceed €100
>   (ii) The amount of any liabilities of the company (including contingent and prospective liabilities) does not exceed €100
>   (iii) The company is not party to ongoing or pending litigation: and
>   (iv) The amount of the issued share capital of the company does not, and did not at any time in the 3 years preceding that date, exceed €100
>
> (e) The Registrar has received from the Revenue Commissioners written confirmation dated not more than 30 days before the date on which the Registrar receives the

application that the Revenue Commissioners do not object to the company being struck off the Register; and

(f) The company has caused an advertisement, in the prescribed form, of its intention to apply to be struck off the Register to be published within 30 days before the date of application in at least one daily newspaper circulating in the State;

5.3.2.1 Perceived abuses of voluntary strike off provisions

The Review Group identified two primary concerns in relation to the existing voluntary strike off procedures, as follows –

(a) The practice by certain companies of asserting that they have no assets or liabilities in excess of the specified value threshold by netting their assets against their liabilities on their balance sheet; and

(b) The risk that a company should assert, incorrectly, that it had no liabilities in order to avail of voluntary strike-off and thereby evade creditors and the possibility of directors being made subject to disqualification proceedings pursuant to section 160(2)(h) of the Companies Act 1990.

<u>Netting of assets and liabilities</u>

A key pre-requisite to availing of voluntary strike-off both under the present regime and the proposed provisions in the Bill is that the company seeking to avail of strike- off must not have assets or liabilities above the minimum value threshold. Under the current procedure, the value threshold is €150 and under the Bill, the proposed value threshold is €100.

The Review Group noted that during 2011 the Companies Registration Office (“CRO”) issued a practice note clarifying that the threshold limits of €150 in respect of assets and liabilities apply *separately* to assets and to liabilities. This was in response to a perceived abuse of existing voluntary strike-off procedures *‘by companies asserting that they have “no assets or liabilities in excess of €150” by simply netting its assets on the balance sheet against its liabilities on the balance sheet.”*

Section 721(1)(d) of the Bill stipulates that a company applying for voluntary strike-off must not have at any time for three years preceding the date of application, an issued share capital of more than €100. Consistent with the provisions in the Bill, when it issued its practice note on voluntary strike-off requirements, the CRO stipulated that the administrative scheme which it operated would have a similar condition in respect of issued share capital.

In late 2011, following receipt of various submissions from stakeholders, the CRO removed the issued share capital requirement, finding that the fact that the assets and liabilities criteria had been clarified as separate requirements meant that the issued share capital threshold requirement was now redundant.

The Review Group considered the clarificatory provisions that confirm that the value of assets and liabilities should be assessed separately for the purpose of the value threshold. The Review Group also considered the rationale for the share capital requirement, that is, to avoid companies asserting that they have no assets or liabilities exceeding €100 by simply netting assets against liabilities. The Review Group noted that a company’s ability to apply for voluntary strike-off will not affect in any way its obligation, if appropriate, to convene an extraordinary general meeting as currently required pursuant to section 40 of the Companies (Amendment) Act 1983 where the net assets of a company are half or less of the amount of the company's called up share capital. The Review Group noted that although share capital is a liability of the company, it can be distinguished from other liabilities of the company, such as current or contingent liabilities. Although ordinary shareholders, and indeed even preference shareholders, have no entitlement to the return of their capital, as the statutory scheme requires a special resolution of the members, this means that 75% of the members must approve the decision to essentially write off any amount that they might expect from the company by way of return of capital. It is considered therefore that the quantum of issued share capital of a company should not be determinative of the company's ability to apply for strike off and that share capital should not be counted as a liability of the company *in this context*.

The Review Group also noted that the €150 threshold currently being operated by the CRO is working well and represents a rounding of the previous figure of £100. It is considered that there is no reason to change this figure in the Bill where the purpose is broadly to put the existing administrative scheme on a statutory footing.

<u>Failure to disclose liabilities</u>

Certain anecdotal evidence was presented to the Review Group which suggested that the voluntary strike-off regime may be subject to abuse by unscrupulous directors who fail to disclose a company's liabilities in order to avail of strike-off and evade creditors.

The Review Group noted that it is difficult to quantify the extent to which this is an issue. However, what is clear is that although an average of 5,153 companies were voluntarily struck off in the years 2008 – 2010, only five companies have been restored to the Register following a High Court application by creditors of such companies since 2006.

CRO received approximately 18 objections to voluntary strike-off in 2010 and 28 such objections as at the end of November 2011. These statistics relate to where the company concerned is still on the CRO register, i.e. it is pre-strike-off. Where such objection is received, and it appears on its face to be a bona fide objection, CRO practice is to remove the company concerned from the voluntary strike-off path. If, however, the objection is not received by CRO until after the company's strike-off, and the objector (generally a creditor) wants or needs to have the company as a live company on the Register, the objector's only option is to apply to the High Court to have that company restored. On the making of a restoration order, an official copy of which is filed with CRO, the company is deemed to have continued in existence as if its name had not been struck off.

CRO is aware of just two instances in 2011 where the CRO was contacted by a creditor unhappy about the exit from the Register of a debtor company, where the company concerned had already been dissolved following voluntary strike-off.

<u>Existing safeguards against abuse</u>

The Review Group considered the safeguards against this type of abuse under the current and proposed regime. The Review Group regarded the advertising requirements under both regimes as important safeguards in this context. Under the current and proposed voluntary strike-off regime, a company seeking to avail of voluntary strike-off must publish an advertisement setting out its intention to do so in one daily newspaper circulated nationwide in the State not more than six weeks (or not more than 30 days under the Bill) prior to the delivery to the CRO of the application for voluntary strike-off. Upon receipt of a voluntary strike-off application, the Registrar must publish a further notice in Iris Oifigiuil (or the CRO Gazette under the Bill). These requirements alert any creditors that might potentially be adversely affected by the voluntary strike-off of a company and allow for them to take action in advance of the strike-off proceeding. Often companies who have large creditors will also have debts due to the Revenue Commissioners. However, a company applying for voluntary strike-off must obtain a letter of no objection to strike off from the Revenue Commissioners. The Review Group regards these requirements as important mechanisms for the protection of creditors who could otherwise be prejudiced by the actions of unscrupulous directors in these circumstances.

Nevertheless, the Review Group acknowledges that under both current practices and the regime proposed in the Bill, there are no specific sanctions that can be imposed on directors who fail to disclose liabilities in order to avail of strike-off. The Review Group is of the view that, notwithstanding the lack of direct evidence of significant levels of abuse and the availability of safeguards against abuse in the form of the aforementioned advertising requirements, this is a weakness in the voluntary strike-off regime which lends itself to potential abuse.

Accordingly, the Review Group addressed itself to additional measures that could be incorporated into the Bill to counteract this perceived weakness. In that context, the Review Group considered three alternatives, as follows –

(i) Application of Chapter 7 Summary Approval Procedure to voluntary strike-off
(ii) Impose personal liability on directors for debts
(iii) Creation of a specific offence for failing to provide an accurate statement

Each was considered in turn and the detail is below.

5.3.2.2 Possible additional safeguards for voluntary strike-off

<u>Application of Chapter 7 Summary Approval Procedure (“SAP”) to voluntary strike-off</u>

The Review Group considered whether the SAP provided for in Chapter 7 of Part IV of the Companies Bill should be applied to the voluntary strike-off regime.

It was noted that the SAP involves, *inter alia*, the directors of a company making a statutory declaration with regard to assets and liabilities and the solvency of a company, which in certain cases, is required to be accompanied by an auditor’s report which confirms its reasonableness. It was noted that the Bill provides for personal liability for a director of a company who makes a declaration without having reasonable grounds to do so.

The Review Group considered that the SAP has certain features similar to the voluntary strike-off procedure but noted that the circumstances in which the SAP would be utilised in the Bill had been given careful consideration by the Review Group. Although the voluntary strike-off procedure is different to the SAP, it has certain, unique, features which are specific to its circumstances. In truth, the only reason why the SAP might be considered useful in a strike off situation would be the deterrent effect of directors having to swear the requisite statutory declaration in the SAP. The Review Group concluded that this specific aspect should be considered separately.

Impose personal liability on directors for debts

The argument has been made that once a company is struck off the Register, it becomes difficult for creditors to recover debts from that company and, unless the debt is sizeable, the option for the creditor to seek restoration of the company to the Register is not cost effective. Certain creditors take the view that this allows smaller companies and their directors to walk away from the debts of the company without following the proper procedures such as full liquidation. Such creditors maintain that if directors of such companies were made personally liable for the debts of the company this would have the requisite deterrent effect. The Review Group has considered this and concluded that this would be a dramatic attack on the separate corporate personality of the company and that any recommendation of the lifting the corporate veil would require detailed consideration. The Group was cognisant of the practical realities also, that directors faced with the prospect of personal liability for the debts of the company might simply seek to have the company restored to the Register. It was considered appropriate however to recommend that if a company is restored to the Register following voluntary strike-off pursuant to a successful application by a creditor, that all directors who signed the certificate issued to the CRO applying for the strike off, might be jointly and severally liable for the costs of restoration incurred by the creditor.

Creation of a specific offence of failing to provide an accurate statement

The Review Group notes that the Bill contemplates that a company seeking voluntary strike-off must deliver to the Registrar of Companies a certificate in the prescribed form signed by each director which certifies *inter alia* that the company's assets and liabilities do not exceed the specified threshold amount.

The Review Group has considered whether a provision should be included in the Bill making it an offence for directors to provide an inaccurate or incorrect certification. The Review Group is of the view that the inclusion of such a provision in the Bill would provide an effective and proportionate safeguard against the perceived abuse of the voluntary strike-off procedures.

The Review group acknowledges that it could be difficult in practice to prove that an inaccurate certification had been provided by the directors of a company. Accordingly, the Review Group is of the view that such a provision should include a rebuttable presumption that any certification which later proves to be incorrect should be presumed to have been made by a director without reasonable grounds for doing so.

Finally, the Review Group has considered the category into which such an offence should fall. The Review Group is of the view that such an offence should be categorised as a category 3 offence for the following reasons –

- The making of a false declaration can give rise to abuse of the voluntary strike-off facility to the disadvantage of creditors and to the possible advantage of directors who may evade the accountability inherent in reporting obligations to which they would be subject if the company were to go through a full liquidation process. Although the making of a false declaration could be described as a “technical” or “filing” offence, it is one which is likely to have a wider impact if committed.

- An omission in complying with a legal provision which might appropriately be categorised as a category 4 offence can be distinguished from the making of a false declaration or statement where a deliberate or intentional action is required. The latter is a more serious type of default which would merit a category 3 classification.
- In general, public policy should not preclude a court from imposing a term of imprisonment if the court deemed imprisonment to be appropriate in an exceptional case of misconduct. Category 3 classification of an offence of this type would give the court discretion to tailor the penalty to the particular misconduct.
- A comparison of existing offences in the Bill demonstrates that:
    - Trading under a misleading name which would be analogous to the making of a false or inaccurate application for voluntary strike-off has similar wider impact and intentional constituents
    - personation of a shareholder is a category 2 offence. Although arguably more serious than the offence of misrepresenting the financial status of a company applying for voluntary strike-off, the consequences of a commission of both offences are not so different as to merit the voluntary strike-off offence being categorised as category 4 offence
    - failure to afford inspection of a company’s minute book is a category 4 offence. It is considered that such an offence is less serious than the making of a false or inaccurate application for voluntary strike-off
    - the general offence of furnishing false information in purported compliance with company law is a category 2 offence. The new offence should not be two categories less serious than this existing offence.

5.3.3 Involuntary strike-off

Pursuant to Section 715 of the Bill, it is proposed that the Registrar may strike a company off the Register if there exists one or more of the grounds for striking off as set out in Section 716.

The grounds set out in Section 716 are –

(a) the company has failed to make an annual return
(b) the Revenue Commissioners have given a notice to the Registrar of the company’s failure to deliver the statement required under Section 882 of the Taxes Consolidation Act 1997;
(c) the Registrar has reasonable cause to believe that Section 134(1) (at least of the directors shall be a person who is resident in a Member State of the EEA) is not being complied with in relation to the company;
(d) the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting;
(e) the company is being wound up and the Registrar has reasonable cause to believe that the affairs of the company are fully wound up and that the returns required to be made by the liquidator have not been made for a period of six consecutive months;
(f) there are no persons recorded in the office of the Registrar as being current directors of the Company

Although the grounds for involuntary strike off are amended, the process for involuntary strike off is broadly similar to that currently applicable under the Companies Acts 1963-2009.

5.3.3.1 Perceived abuses of involuntary Strike-Off and Restoration Procedures

Pursuant to Section 160(2)(h) of the Companies Act 1990 (section 832(h) of the Bill ("section 832(h)")) a person may be disqualified from acting as a director where the Court is satisfied in any proceedings or as a result of an application under that section that a person was a director of a company[10] and the company is struck-off the Register for failure to file annual returns. The ODCE is concerned about directors in respect of whom proceedings pursuant to this section have been commenced, evading liability by applying to have the company restored to the Register in circumstances where it has ongoing liabilities but failing to address those liabilities or have the company properly wound up after restoration.

In exercising its power to seek disqualification orders against directors of companies that have been involuntarily struck-off for non-filing of annual returns, the ODCE begins by issuing a formal Notice pursuant to section 160(7) of the Companies Act 1990 (section 835 of the Bill) notifying the directors of ODCE's intention to commence disqualification proceedings. The notice invites the directors to submit representations or reasons as to why the ODCE should not take such disqualification proceedings and the current practice is to include a number of options open to the recipients including the provision of evidence to the ODCE that the company has been restored to the Register.

In some recent cases, directors have availed of this option where disqualification proceedings have been initiated. In one case this was done by CRO administrative restoration as its strike-off date was within the 12-month period. The effect of these restoration actions is to frustrate ODCE's disqualification action. In each case, a considerable body of work and unrecoverable costs is incurred by the ODCE and the directors avoid the sanction of being disqualified even in cases where it is clear that the restored companies are both non-trading and insolvent with significant tax and / or other creditor liabilities.

The Review Group considers that disqualification proceedings are an appropriate avenue to be pursued in relation to defaulting directors. Circumventing these proceedings by having a company restored to the Register and taking no further remedial action in terms of creditors is not a satisfactory position for creditors or in relation to the enforcement of appropriate corporate standards. The ODCE suggested a legislative amendment to provide that where the ODCE has commenced a disqualification action by issuing a formal Notice pursuant to section 835 and proceedings to restore the company to the Register subsequently issue and/or an application is subsequently made seeking restoration of the relevant company to which the Notice applies any pending court proceedings, and / or the restoration will not affect the continuance of the disqualification action. Should the directors of such companies be disqualified, the Court currently has the power to place a stay on such Orders to allow the directors to 'organise their affairs' in a such a way as to step down from existing directorships or wind up existing companies. This approach has been adopted by the Court previously in a number of existing disqualification cases where the disqualified directors were registered directors of other companies. The legislative amendment

[10] At a time when the Registrar sends a notice to a company pursuant to section 727 of the Bill of its intention to strike a company off the Register

would represent a strong disincentive to the current scenario where some directors, in order to avoid disqualification proceedings, are prepared to fund the cost of restoring a company.

It is acknowledged that the restoration of an insolvent company that has ceased trading and the filing of annual accounts means that aggrieved creditors are no longer disadvantaged as restoration allows such creditors to seek judgments or petition for winding-up. Equally, directors re-acquire statutory and common law duties upon restoration. The question arises as to whether the ODCE should be entitled to continue with disqualification actions pursuant to section 832(h) notwithstanding an application being made for the restoration of the company.

Ultimately the question as to whether it is appropriate, or not, to disqualify a director will be a decision for the court. Accordingly, it is proposed to insert a new section into Chapter 2 of Part 12 of the Bill as follows –

(1) In this Section 'relevant person' means a person who was a director of a company at the time of the sending of a notice by the registrar pursuant to section 717 where the company was struck-off the register pursuant to section 723 as indicated in the section 717 notice.
(2) The restoration of a company to the register pursuant to section 727 or 728 or section 30 of the Multi-Units Developments Act 2011 shall not preclude the Director continuing with an application against a relevant person pursuant to section 832(h) in circumstances where-
    (a) The Director has issued a notice to a relevant person in accordance with section 835; and
    (b) An application is subsequently made under section 727 or under section 728 or under section 30 of the Multi-Units Development Act 2011, as the case may be, to restore that company to the register.
(3) For the purposes of continuing with an application as referred to under subsection (2), the Director shall be entitled to rely upon a certificate that issued in respect of those proceedings pursuant to section 872, notwithstanding the subsequent restoration of the company and the consequential deeming of the company to have continued in existence as it had not been struck off.

The Group considered that it would be appropriate and a useful deterrent, if the prospect of the ODCE taking disqualification proceedings against the directors should be referred to in the correspondence from the Registrar of Companies in relation to the involuntary strike off process issued pursuant to section 717. It is considered that such information would put directors on notice of the possibility of disqualification proceedings being taken against them unless the company's business is either continued or wound down in an orderly manner. Putting <u>only</u> the CRO filing aspects of the company's business in order would no longer be a means of circumventing disqualification proceedings.

5.3.4 Recommendations

The Review Group considers that the clarificatory provisions in the Bill which confirm that the value of assets and liabilities of a company should be assessed separately adequately address the perceived abuse of the voluntary strike-off procedure by companies netting their assets against liabilities. The Review Group considers that, in light of the clarificatory provisions relating to the value threshold included in the Bill, the issued share capital requirement is not relevant to the determination of a company's liabilities *for the purposes of a voluntary strike off application only.* Accordingly, the Review Group is of the view that the issued share capital requirement in the Bill should be removed, and that Section 721(1)(d)(iv) of the Bill should be deleted.

The Review Group also recommends that the figure of €100 referenced in Section 721(1)(d)(i) and (ii) should be amended to €150.

The Review recommends further that, for voluntary strike off, the Companies Bill be amended to make it a category 3 offence for any director to provide an incorrect certification to the CRO pursuant to section 721(1)(d) of the Bill. Furthermore, the Bill should be amended to provide that if a company which has been voluntarily struck off the Register is restored pursuant to an application from a creditor, on the application for restoration, the Court may order that the directors who signed the certification pursuant to section 721(1)(d) should be liable for the costs of restoration.

Turning to involuntary strike-off, the Review Group recommends that the Companies Bill be amended to provide that disqualification proceedings undertaken by the ODCE pursuant to section 832(h) may be continued, notwithstanding the issuing of court proceedings to restore the company to the Register and/or restoration of the relevant company to the Register. The Review Group also recommends that consistent with the recommendation in respect of voluntary strike off, the Bill should be amended to provide that if a company which has been involuntarily struck off the Register is restored pursuant to an application from a creditor, on the application for restoration, the Court may order that the directors of the company as at the date of strike off should be liable for the costs of restoration.

5.4 Review of late filing penalties

5.4.1 Background

The CRO put in place a late filing system in 2001 to encourage companies to file their returns on time. Currently, companies that do not meet their filing deadline can incur fines of up to € 1,200. In addition, companies availing of an exemption from the need to conduct a statutory audit can lose that exemption for two years.

The existing filing requirements are replicated at Part B 6, supplemented by Part 15, Chapter 1 of the Bill (which, *inter alia*, empowers the Minister to specify different amounts of fees where a step required to be taken under the Bill has not been taken in observance of the specified time limit). The Review Group was asked by the Minister to consider these provisions, and should it deem it necessary, to suggest amendments.

5.4.2 Late filing fees

At present, a late filing fee of €100 is payable in respect of an annual return on the day after the expiry of the filing deadline, with a daily fee of €3 accruing thereafter, up to a maximum fee of €1,200 per return. These fees were fixed in 2001 and have not been increased since that date.

The late filing fee is only waived in certain circumstances, which are discussed further below.

5.4.2.1 Do the current financial penalties constitute a sufficient deterrent?

The Review Group considered whether the current financial penalties constitute a sufficient deterrent against non-compliance.

<u>Quantum / Amount of Fees</u>

The Review Group acknowledges that the current fee range of €100 to €1,200 for late filing is low. In particular, the Review Group notes that the incremental fee of €3 per day would be unlikely to cause any real financial burden, in particular, for larger or listed companies.

By way of comparison, the Review Group examined the applicable penalties for late filing in the UK. It is noted that the financial penalties resulting from late filing in the UK are more severe than those in Ireland, with penalties ranging from St£ 150 to St£ 1,500 for private companies and from St£1,500 to St£ 7,500 for public companies.

Notwithstanding that the current Irish fees are low, the statistics made available to the Review Group indicate that since the late filing fees were introduced in 2001, there has been a significant increase in compliance by Irish companies with their annual filing obligations. Whereas prior to 2001, only 13% of companies filed their annual returns on time, in 2010, only 12% of companies were late filing their returns. Details of the late filing penalties paid in 2010 and 2011 are set out in Appendix 6. Companies that are persistently in default also face the risk of on-the-spot fines, potentially (where applicable) the loss of audit exemption and ultimately, strike-off.

The Review Group concluded that the statistics did not suggest that increased fees for late filing would act as a strong deterrent to late filing. The Review Group was conscious of the requirement that fees be proportionate as emphasised by the Supreme Court in *Registrar of Companies v Judge David Anderson & anor*[11]. In the absence of a clear benefit to increasing the applicable fees, and cognisant of the financial implications of doing so, particularly for smaller companies, the Review Group considered that it would not be appropriate to increase the fees for late filing of annual returns at this time.

<u>Application of different fees to different company types</u>

The Review Group noted that, in contrast to the Irish position, the UK regime distinguishes between private and public limited companies, with higher fees being payable by the latter. The Review Group noted that although it might have certain attractions, it would not be possible for the CRO to operate a system which distinguished between companies based on their size, for example, with small to medium sized companies paying lower fees than larger companies.

The Review Group noted the small number of public limited companies on the Register and that generally the level of compliance with filing obligations by those companies is reasonably good. Accordingly, it was determined that there was no material advantage to applying different levels of fees to different company types.

<u>Increased penalties for repeat offenders</u>

The Review Group noted that the UK regime also provides for penalties to be doubled if a company files its accounts late in two consecutive financial years. A significant distinction between the systems operated in Ireland and the UK however is that the loss of the audit exemption for eligible companies is not applicable in the UK.

The Review Group noted the significant challenges there would be in identifying the criteria for repeat offenders. Inevitable challenges to the system by companies in marginal circumstances were envisaged. It was further noted that companies which are regularly late in filing returns with the CRO are already likely to be subject to a section 371 application by the CRO. It was concluded that no change should be introduced in respect of fees payable by companies which file their annual returns late on more than one successive occasion.

5.4.2.2 Do the current late filing fees constitute a disproportionate penalty?

The Review Group notes that the current Irish late filing fees are low, particularly compared to their UK equivalent fees.

The Review Group further noted that currently the CRO will consider, on a case-by-case basis, written requests for waiver of penalties where circumstances of a genuinely force majeure nature can be demonstrated by a company to have prevented the submission of an annual return to the CRO prior to the filing deadline. Therefore, a review mechanism is available to companies in cases where the late filing fees could result in genuine hardship or unfairness arising from circumstances beyond a company's control.

It is considered, however, that the determination of a waiver from penalties applied by statute should be made by a court rather than the CRO.

[11] [2004] IESC 103

The Companies Bill provides, at section 339(5) that the District Court may, on application by a company, if it is satisfied that it would be just to do so, make an Order extending the time for a company to file its annual return. It is considered that this provision should be availed of by a company seeking either an extension in time or a waiver of late filing penalties and that the Registrar should have no authority to waive payment of late filing fees.

It was noted that the Courts Services has indicated that there may be difficulties if the District Court has jurisdiction to hear such matters. It is the view of the Review Group that the relevant court for the purposes of section 339(7) should be, if not the District Court, then the Circuit Court for the area in which the company has its registered office.

The Review Group does not consider that the current financial penalties constitute a disproportionate penalty.

5.4.3 Loss of the audit exemption

5.4.3.1 Current provisions

Companies meeting certain criteria (broadly speaking, small to medium sized companies) can qualify for an exemption from the requirement to have their accounts audited.

Where an annual return is filed late in the year in which an exemption is claimed or in the preceding year, the company must have its accounts audited for the year in question and the following year. It may only avail of the audit exemption in the third year if it files correctly and on time in the second and third year. Thus, for example, if a company loses its audit exemption in 2010, it must file audited accounts in 2010 and 2011. It must file correctly and on time in 2011 and 2012 in order to be in a position to claim the audit exemption again in 2012. Audited accounts represent the norm; where companies are permitted to dispense with having their accounts audited, one of the conditions attaching is that their annual return and accounts are filed and publicly available. Failing to comply with the most basic of company law disclosures within the permitted time will cause companies to lose their ability to avail of the exemption having shown themselves remiss.

The current provisions regarding audit exemption are replicated in Chapter 15, Part 6 of the Companies Bill.

5.4.3.2 Criticisms of the current regime

The Review Group was aware that a number of criticisms have been levelled against the current regime, in particular by the audit and accounting profession.

Some of the arguments considered by the Review Group are summarised below.

<u>Regime is unduly harsh and disproportionate for smaller business</u>

Some critics of the current regime believe that the loss of audit exemption is too severe a penalty for small businesses. They also argue that the fact that a company loses its audit exemption for a two year period is disproportionate. The Review Group noted in that context that a notable contrast between the Irish penalties and those under UK legislation is that the UK provisions do not provide for any loss of audit exemption as a result of late filing.

The Review Group also noted that not all companies are eligible for audit exemption. This penalty therefore is only applicable to a subset of companies on the Register and it could be argued that it is an unjust and disproportionate penalty for the companies affected. By contrast, companies which are required to carry out an audit can delay filing for up to a year and the likely sanction against them is a penalty fine not exceeding €1,200.

Small business representative organisations have stated frequently that it is important to ensure that fewer small businesses should be burdened with cumbersome audits, which have proven to be both costly and onerous. In 2011 the Minister for Jobs, Enterprise and Innovation announced his intention to increase the thresholds for companies falling within the audit exemption by over 20% to the maximum allowable under EU law by the end of 2012. This decision was generally welcomed on the basis it would reduce the red tape and cost burden on Irish business.

The Institute of Certified Public Accountants' ("CPA") Report on Entrepreneurship (2010) recommended that small companies which file late returns should not lose their audit exemption status. The CPA carried out a survey of their members and noted that 30% of respondents believed that company law filing requirements represented a barrier to entrepreneurship and that the main focus of those who believed changes should be made was the audit exemption for small companies.

<u>Loss of audit exemption coupled with financial penalties amounted to "double jeopardy"</u>

The argument has been made that the loss of audit exemption in addition to the imposition of late filing penalties creates a "double jeopardy" situation. Proponents of this argument would suggest that it is unjust that late filing fees can continue to accrue during the period of delay whilst a company which has lost its audit exemption arranges for its audit to be completed (which can take a number of months). Proponents of this argument suggest that the harshness of this double jeopardy situation could be mitigated if the loss of the audit exemption could take effect in the subsequent year rather than the current year.

<u>Audit function should not be characterised as a "punishment"</u>

The current regime is criticised for characterising the audit function as a "punishment". This is not what an audit is intended to be.

It is also argued that going back after the fact to audit a company's accounts is neither easy nor desirable, particularly in terms of, for example, stock-taking exercises which should have occurred at certain points of time for the purposes of audit. This, however, may of course arise where a company's members insist an audit is performed, although it had previously availed of the exemption.

<u>High Court appeal is prohibitively expensive</u>

Currently, the CRO does not have the authority to reinstate a lost audit exemption. Once a company does not meet all the conditions required to be eligible for audit exemption, the CRO is legally obliged to apply late filing penalties and to require that the company file audited accounts.

However, a company may apply to the High Court, on notice to the CRO, for an order extending the time for filing of an annual return. If granted, this allows the company extra time to files its annual return before penalties are incurred. If the company files its annual return before this extended date, it will not be liable to late filing fees or lose its audit exemption.

However, the process of making an application to the High Court is costly. Many critics of the current regime would argue that the involvement of the High Court renders the appeal process prohibitively expensive particularly for the smaller to medium sized companies.

5.4.3.3 Review Group's consideration of the issue

The Review Group considered each of these arguments.

Although the loss of audit exemption may have harsh consequences for late filing companies, it serves an important purpose, namely the encouragement of compliance with basic corporate filings. Accordingly, very compelling arguments would need to be presented in order to convince the Review Group of the merits of changing the current regime. Prior to its introduction, there was a low level of compliance with the requirement to file annual returns on time. In tandem with the revisions to late filing fees, the potential loss of audit exemption has proved to be an effective way of encouraging a culture of compliance. It is important to note that companies have at least ten months after their financial year end in which to file their annual return. The majority of companies meet the requisite filing deadline and the Review Group would be slow to recommend a relaxation of the rules. The Review Group, having considered the arguments made, did not consider them sufficiently compelling to outweigh the benefits of the current regime.

The Review Group considered the argument that the loss of audit exemption, coupled with financial penalties, amounts to "double jeopardy". The judgment of the Supreme Court in *Registrar of Companies v Judge David Anderson & anor*[12] is instructive in that it considered the question of whether the imposition of late filing fees by the Registrar in respect of the late filing of annual returns and the prosecution of defaulting companies, constituted double jeopardy. Geoghegan J held as follows:

> *"It has for a long time been a principle of the common law that a person cannot be prosecuted and punished for an offence of which he has already been acquitted or convicted. This is commonly referred to as the rule against double jeopardy. It is a rule which applies to the prosecution for criminal offences. The rule, or what also might be called the notion, of double jeopardy, is not normally relied upon in express terms in the sense that if a person is prosecuted for an offence arising out of the same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted, his defence to the second prosecution will be based on the pleas of autrefois acquit or autrefois convict... However one approaches it, the fundamental point is that the rule of double jeopardy and associated protections against being prosecuted twice for the same offence is a rule which arises only in relation to the prosecution of offences."*

The imposition of a fine and withdrawal of privilege cannot, therefore, amount to double jeopardy in a legal sense. The Review Group considered whether the requirement to carry out an audit should be deferred to the year following the filing default and concluded that it should not as companies

[12] [2004] IESC 103

which are late in filing their returns are likely to be companies whose finances would benefit from scrutiny sooner rather than later.

The Review Group also considered whether, in the alternative, the accrual of penalties should be suspended in the period pending completion of an audit during the year in which a company loses its audit exemption. It was concluded that there was no justification for such a suspension. Companies may apply to court for an extension of the filing deadline for their annual return in that year, which application if successful, means that no late filing fees will apply unless and until the extended filing deadline has been passed. In response to the argument that the High Court appeal process in relation to the extension of the filing deadline is prohibitively expensive, it is noted that the Bill envisages moving this appeal function to the District Court. This is welcomed by the Review Group as it would allow for a faster, more cost effective procedure which could be availed of by companies in genuine difficulties, without necessarily having to instruct a lawyer. The Group noted that in the alternative, the Circuit Court might be given jurisdiction in such cases, noting the potential for uncontested applications to be delegated to the County Registrar.

5.4.4 Recommendations

The Review Group recommends that there be no change to the current late filing fees. In cases where a company seeks a waiver from the payment of late filing fees, the grant of that should not be within the powers of the CRO, but rather should be determined by a court of competent jurisdiction, preferably the District Court.

The Review Group also recommends no changes to the current system, as updated by the Companies Bill, in respect of loss of audit exemption for late filing of annual returns.

Finally, the Review Group notes the possibility of change emanating from the European Union on audit exemption issues in the coming years.

5.5 Criteria for categorisation of offences

5.5.1 Background

The Review Group considered this issue in the course of its 2008/9 Work Programme, when it was satisfied that the initiative proposed in what is now the Companies Bill would deal with this issue in a satisfactory way. That initiative, set out in section 861 of the Bill, introduced the categorisation of offences, and proposed 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 and will give rise to fine of no more than €5,000.
- Category 3 offences will likewise be prosecutable only summarily but on conviction and may give rise to a prison sentence (of up to 6 months duration) and / or a fine of no more that €5,000
- Both Categories 2 and 1 offences will attract the 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 five years and in the case of a Category 1 offence, a fine of up to €500,000 and/or imprisonment for up to ten years. There are two exceptions in the case of the most serious 'super offences', namely fraudulent trading and market abuse.

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 'super offences', are reportable.

This four-fold system will allow for an appropriately graduated system of penalties as between different offence provisions. In preparing the General Scheme of the Bill, the Review Group undertook 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".

For the purposes of the current Work Programme, the Review Group advanced its consideration to reviewing any developments since it last examined the issue and to assessing possible guidelines for categorising any offences that might be created in the future.

5.5.2 Recommendations

The Review Group recommends that the relationship, if any, of the Fines Act 2010 on the offences in the Bill should be considered.

The Review Group notes that if new company law offences are created in future, they will be categorised according to the four-fold system in the Companies Bill. By way of guidelines to be used in categorising new offences, the Review Group recommends the following –

- Proportionality between the commission of an offence and the consequence of committing an offence is key. Proportionality between the consequences for committing the new offence and other offences in the Bill should also be taken into account.
- It is unlikely that additional new ‘super offences’ would be introduced. Indeed, there is a case for their consolidation into the new scheme as Category 1 offences.
- New offences introduced should be reviewed to see whether they should be classified as ‘technical’ or ‘filing’ offences, in which case they should be classified as a Category 4 offence, or in the case of technical or filing offences which are likely to have a wider impact, possible as a Category 3 offence.
- Category 1 and 2 offences although capable of being prosecuted summarily, are also capable of prosecution on indictment and it is considered that only the more serious offences where there is a public policy reason for classifying the offence as indictable, should be classified in this way. In determining the respective merits of a Category 2 or 3 classification, account should be taken of the exceptional case of misconduct and the need to facilitate a Court in imposing a proportionate penalty in such a case.
- In assessing the potential deterrent effect of classifying a default in complying with a Companies Act requirement as an offence, regard should be had to the potential impact which the commission of such an offence would have on all relevant stakeholders, including without limitation, the company, its shareholders and creditors. Wider policy considerations such as the importance of the maintenance of accessible public records in respect of companies incorporated in Ireland might also be considered.

An example of the application of these guidelines to a new offence is contained in this Report in the earlier recommendation that it should be a Category 3 offence for a director to provide an incorrect certification to the CRO pursuant to section 721(1)(d) (application for voluntary strike off).

Chapter 6: EU and International Developments

6.1 Identification of owners of bearer shares

6.1.1 Introduction & background

The Global Forum on Transparency and Exchange of Information on Tax Matters conducted a review of Ireland and issued its report in January 2011. The Global Forum is an OECD body charged with in-depth monitoring and review of the implementation of the OECD's international standards of transparency and exchange of information for tax purposes. Overall, the Forum's Report found that Ireland is meeting the OECD standards of transparency and exchange of information for tax purposes. However, the Report did make some recommendations for improvement and one of these concerned the identification of owners of bearer shares.

In particular, the Forum's Report noted that it may be difficult to identify the holders of share warrants to bearer where those warrants are issued by public companies that are not closely-controlled, not publicly listed or not regulated by the Central Bank. The Report, therefore, recommended that "Ireland should take necessary measures to ensure that appropriate mechanisms are in place to identify the owners of share warrants to bearers in the case of such companies".

The Revenue Commissioners subsequently wrote to the Minister asking him to consider making an amendment to company law to give effect to this recommendation, and the Minister asked the Review Group to give the matter its earliest attention.

6.1.2 Findings

Before coming to any conclusions, the Review Group surveyed the existing law on bearer shares, in particular sections 88 and 118 of the Companies Act 1963, section 10 of the Exchange Control Act 1954, Regulation 106 of the UCITS Regulations (SI 352 of 2011) and other relevant sections of the Companies Act 1990. It was noted that the number of companies that come within the scope of the Global Forum's recommendation is small, particularly as the most popular form of company in Ireland, the private company, cannot issue bearer shares under current Irish law. In any case, it was decided to contact several legal and accountancy firms, the Central Bank and the Irish Funds Industry to assess the extent of and reasons for use of bearer shares in Ireland.

The Review Group's research demonstrated that there was virtually no use any longer of bearer shares in Ireland. Moreover, while some benefits of bearer shares were acknowledged, the Review Group considered that these did not warrant retention of bearer shares given the very limited circumstances in which they still exist.

The Review Group identified two issues that needed to be taken into account in assessing whether or not to abolish bearer shares. The first was the similarity between bearer shares and renounceable Letters of Allotment (RAL). Where there is a rights issue of new shares and each existing shareholder is issued with a RAL, that Letter is renounceable by the shareholder and, if so renounced, becomes a bearer instrument for a period, typically, of up to 3 weeks. The allotment of new shares is provisional only, and only becomes final when the period of up to 3 weeks has passed and a definitive list of allottees / renouncees is identified. The new shares, now paid up, are then issued and entered in the register of members. During the period of up to 3 weeks, before the allotment is final, the holder of a renounced RAL can transfer ownership of the shares therein by delivery, subject to the requirement for the acceptance on the RAL to be returned to the issuing company, along with the subscription price for the new shares by the end of the 3 week period. If the acceptance is not so returned, then the RAL has no value and the issuing company sells the nil-paid rights on the market to purchasers who themselves pay the subscription price. Any amount realised by the issuing company on the sale of these nil-paid rights is paid to the shareholders whose rights have been so sold. In the case of fully paid bonus shares, a similar situation applies save that, in the event of no renunciation, the original allottees are registered as the holders of the shares. As the use of RAL is just for a short period and is a means to an end, rather than an end in itself, the Review Group considered that any prohibition on bearer shares should not apply to RAL of partly paid or fully paid up bonus shares.

The second issue that the Review Group considered germane concerned the position of collective investment schemes. In representations to the Review Group, the Irish Funds Industry made representations that there would be some benefit in retaining the possibility for collective investment schemes to issue bearer shares, as they offer a useful flexibility. The Review Group put this view to the Central Bank, who agreed with the Funds Industry, and pointed out that any collective investment scheme that wished to issue bearer shares would require the prior approval of the Central Bank and would have to meet any requirements of the Central Bank to identify the owners of such warrants and to address any issues that could arise under anti-money laundering rules. It also came to the Review Group's attention that the Funds Industry use instruments called "global certificates", issued through a clearing system such as Euroclear. These have characteristics that are similar to the bearer share and so raise the same considerations as the RAL.

6.1.3 Recommendations

The Review Group recommends that the general provision for bearer shares be abolished by way of an express prohibition. In light of the fact that the Review Group's research showed that more than 300 Irish registered companies have provisions in their memorandum and articles of association for bearer shares, and that it was not possible to be certain whether or not any of them had in fact issued bearer shares that were still in circulation, the Review Group also recommended that transitional arrangements be provided to take account of companies that have issued bearer shares in the past. With regard to companies moving to Ireland that may have legitimately issued bearer shares in their previous jurisdiction, they could be required to deal with those shares in the course of the transfer to Ireland, for example by registering or abolishing them.

However, on the basis of the views of the Central Bank, the Review Group considers that the current position of collective investment funds and their specific regulatory regime should remain intact and not be affected by the Committee's recommendation to abolish bearer shares for the generality of companies. The Review Group considers that this could be achieved by 'housing' the essence of sections 88 and 118 of the 1963 Act in Part B9 of the Companies Bill, which correlates to Part XIII of the 1990 Act, with any necessary cross-application therefrom for UCITS that are companies.

Finally, the Review Group points out that its recommendation to abolish must be limited to bearer shares and not affect the position governing renounceable letters of allotment of fully or partly paid up bonus shares, or affect the beneficial interest in shares, for example, where such interests are listed on foreign stock exchanges e.g. American Depository Receipts.

The Review Group drafted Heads of Bill to further illustrate this recommendation, and these are set out in Appendix 4 of this report.

6.2 Implications of the Court of Justice of the EU's judgment in the Cartesio Case C-201/06

6.2.1 Introduction & background

The Minister asked the Review Group to consider the implications for Irish company law of the European Court of Justice judgment in the *Cartesio Case C-201/06*, which related to the transfer of registered office from one jurisdiction to another and to recommend options.

There is currently no EU legislation in force governing the transfer of seat or registered office of a company registered in a Member State of the EU to another Member State within the EU. Some Member States have adopted national laws which seek to regulate such transfers. Ireland has not adopted any such legislation yet. As Irish company law stands, whilst there is freedom for a company to move its headquarters to another Member State without dissolution and without a change in the governing law of the company, moving the registered office of an Irish company (other than an Irish registered SE) to another jurisdiction, involves the winding up of the company and its re-incorporation in the host jurisdiction because the applicable company law is linked to the country of the company's registration. This involves great cost, time, related administrative burden and procedural complexity.

There have been calls from the European Parliament as recently as January 2012 to revive the proposal for a 14th Company Law Directive on the transfer of registered office of a company between Member States with a change of applicable law, but the European Commission has not included it on its work programme for 2012, so there is no certainty as to when or if this proposal will be progressed[13].

Against this background, the European Court of Justice handed down its judgment in the *Cartesio Case, Case 210/2006* (the "Cartesio Case") in 2007. In the aftermath of the *Cartesio Case*, a further case of interest arose, *Case 378/2010* (the "Vale Case"). Ireland made oral and written observations in both cases before the European Court of Justice. Whilst the Review Group was asked to focus on the *Cartesio Case*, both of these cases were taken into consideration.

6.2.2 The Cartesio Case – Facts and substantial questions referred to the ECJ

Cartesio, a Hungarian Limited Partnership, sought to transfer its operational headquarters from Hungary to Italy but wanted to remain registered in Hungary so that its legal status could continue to be governed by Hungarian law. The Hungarian Commercial Court in the exercise of its function of maintaining the commercial register, refused to enter the new address of the operational headquarters in the local register on the grounds that the transfer was not possible under Hungarian law. It held that a company that wishes to transfer its operational headquarters to another Member State must first be wound up and then reconstituted under the law of the other Member State. The decision of the Hungarian Commercial Court was appealed and the appeal court referred four questions to the European Court of Justice for a ruling under Article 234 of the EC Treaty (now Article 267 TFEU). The substantive question (question 4) referred was as follows: -

[13] The draft fourteenth directive, which deals with transfer of registered office between Member States of a company with a change of applicable law, hasn't been progressed to date and whilst there have been many calls for it to be prioritised, there is no signal that it will be revived in the near future. The Report of the Reflection Group on the Future of EU Company Law has called for EU legislation "to provide for a right for national companies to transfer their registered office from one Member State to another effectively changing the applicable law regime from that of the former to that of the latter, such a change to entail cross-border conversion from a company form recognised by the former into a company form recognised by the latter". Whilst the timing is uncertain, there is clearly appetite amongst Member States for community legislation in this area.

A. *If a company, constituted in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its registered office to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?*

B. *May a Hungarian company request transfer of its registered office to another Member State of the European Union relying directly on Community law (Articles 43[14] [EC] and 48[15] [EC]? If the answer is affirmative, may the transfer of the registered office be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?*

C. *May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their registered office is situated, are incompatible with Community law?*

D. *May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its registered office to another Member State of the European Union, are incompatible with Community law?*

Paragraphs 99 to 124 of the judgment dealt with questions 4(a) to (c). The Court in considering the question of whether Articles 43 [EC] and 48 [EC] are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation, considered the various factors that connect a company to its jurisdiction and governing law. In some Member States it is the registered office (as in Ireland)[16] whilst in others it is the centre of operations, real head office or seat and in other Member States it is both. In some Member States, the transfer of the central administration to a foreign country may only be done subject to certain restrictions and the legal consequences of transfer vary from one Member State to another.

The ECJ held at paragraph 124 of its judgment in relation to the substantive question before it in this case, that as Community law now stands, Articles 43 [EC] and 48 [EC] are to be interpreted as <u>not</u> precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

The ECJ's findings on this question were consistent with Ireland's observations in the case and are favourable to Ireland in that the status quo as far as Irish company law is concerned, is preserved. The ECJ effectively distilled the issues raised in the sub-questions of question 4 into one – whether or not Member States are free through national law to determine the connecting factor with their jurisdiction and to insist that in order to retain corporate national identity, that such connecting factor is maintained. The response of the ECJ to question 4 has clarified that Member States are still free to determine the connecting factor which companies must comply with in order to be

[14] Now Article 49 TFEU
[15] Now Article 54 TFEU
[16] Section 113 of the Companies Act 1963 requires that all Irish registered companies maintain a registered office in the State and this is considered to be the connecting factor with the jurisdiction.

connected to the jurisdiction and subject to its governing law. Ireland may, therefore, continue to insist that all Irish registered companies maintain a registered office in this jurisdiction if they wish to remain on the register in this jurisdiction and subject to Irish law.[17]

The ECJ, in paragraphs 111 to 113 of its judgment made reference, unexpectedly to another scenario, that of a transfer and conversion. The ECJ confirmed in respect of such transfers/conversions, that where a company that wishes to move from one Member State to another Member State and convert to a form of company governed by the law of the host Member State (where this is provided for by the law of the host Member State), that company cannot be prevented from doing so by a requirement in its Member State of origin to wind up first. Any such barrier to the conversion of this class of company is prohibited by Article 43 [EC] unless it serves overriding requirements in the public interest. This element of the judgment is of most interest in that it opens up the question of whether or not Ireland should or must legislate to provide a legal framework to regulate how Irish companies may move their registered offices out of Ireland to other Member States (or third countries) and how companies from other Member States (or third countries) may move their registered offices into Ireland. The Review Group focused on these questions.

6.2.3 Implications of the ECJ's judgment for Irish law

As a general point, it must be borne in mind that the *Cartesio Case* is only binding in an EU context – i.e. in the context of dealings and relationships between companies and regulatory authorities of Member States. It does not have any binding effect on national law relating to the transfer of companies into and out of third countries.

The Review Group is of the view that the implications of the judgment of the court in relation to question 4 in this case for Irish law are that –

- Ireland may continue to object to a transfer of registered office out of Ireland where the transferring company wishes to maintain its registration in Ireland (on the basis of the connecting factor principle and the fact that this is governed by national law). This applies equally to transfers to third countries. This means that the status quo under Irish law is preserved.

- Where a company wishes to leave the Irish jurisdiction to register in another Member State and become governed by the law of that host Member State without first going through a liquidation process, this must be permitted under national law as this type of transfer falls within the scope of the freedom of establishment – Article 49 TFEU (previously Article 43 EC). There is no corresponding freedom in respect of transfers to third countries – so this is a matter of choice for Member States.

- Given the broad scope of the prohibition in Article 49, which covers all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment, a cautious view as to the imposition of restrictions or conditions on the exercise of that freedom is advisable. Such concerns do not arise in the case of transfers to or from third countries.

[17] Ireland does not place any restriction on Irish registered companies with respect to the location of their head office or centre of operations. Section 113 of the Companies Act 1963 requires that all Irish companies maintain a registered office in the State.

- Any conditions or requirements in respect of transfers to other Member States going beyond the notification of transfer of registered office would have to be justified as serving the overriding requirements in the public interest.

- It is a matter for each Member State to determine whether it will permit the transfer or migration inwards onto its register of companies from other Member States or third countries. There is currently a policy choice here for Ireland[18].

- A company wanting to move its registered office to a host state and thereby obtain the "nationality" of that Member State must comply with the national law of the host state, including any requirements as to change of legal form, registration in the national company register, place of registered office and real seat etc.

6.2.4 Recent developments at EU level

In 2010, the Hungarian Supreme Court made a request for a preliminary ruling to the ECJ under Article 267 TFEU in *Case 378/2010*, *Vale*, and some of the questions referred appear to touch on the issues highlighted by the ECJ in the *Cartesio Case*. The *Vale Case* must, therefore, be taken into consideration in formulating and making any recommendations arising out of the *Cartesio Case*. Ireland intervened by way of written observations to the ECJ and by attending the oral hearing on 14 September 2011. The opinion of the Advocate General was delivered on 15 December 2011. The Advocate General's view is that cross border reconstitution of companies comes within the ambit of Articles 49 and 54 TFEU. His view is that Articles 49 and 54 preclude rules of a host Member State which deny a company duly incorporated under the laws of another Member State the right to transfer its seat to the host Member State and to continue in business there as a company incorporated under the laws of that State unless this restriction is non-discriminatory, is justified by overriding reasons in the general interest, is apt to secure the attainment of the objective pursued and does not go beyond what is necessary to achieve it. The court's judgment is expected later in 2012.

Whilst not stated expressly in the order for reference, the difficulties for *Vale* appear to have arisen because Hungarian company law doesn't provide for the type of transfer with conversion or migration onto the Hungarian commercial register that is mentioned in paragraphs 111 to 113 of the judgment of the ECJ in the *Cartesio Case*. The outcome of the *Vale case* could impact on Ireland's current companies regulatory regime, as similarly, Irish company law doesn't provide for companies incorporated elsewhere (other than certain collective investment undertakings) to convert or transfer onto Ireland's register of companies and maintain continuity of corporate existence in Ireland.

6.2.5 Options identified by the Review Group

Having identified and considered the implications of the *Cartesio Case*, and taking into account the issues under consideration in the *Vale Case*, the Review Group considered the following options:-

(a) Legislating for transfers of registered office of Irish companies out of Ireland to other Member States of the EU which permit such inward transfers[19]; and

(b) Extension of the legislation mentioned at (a) to third countries;

[18] This is subject to the decision of the ECJ in the *Vale Case* – discussed at paragraph 6.2.4

[19] We can assume on the basis of the *Cartesio Case*, that Member States are obliged to permit transfers of seat out of their jurisdiction

(c) Legislating for transfers of registered office of companies from other Member States into Ireland where such Member States permit transfer of seat into and out of their jurisdiction; and

(d) Extension of the legislation mentioned at (c) to transfers of registered office of companies from third countries into Ireland where the law of those countries permits transfers of seat into and out of their jurisdiction.

(e) If legislation in any of these areas is considered necessary or desirable, the appropriate models to use – options considered were the draft fourteenth company law directive, the SE Regulation, the draft SPE Proposal, elements of the Cross Border Mergers Directive and the Irish provision for the migration of collective investment schemes set out in the Companies (Miscellaneous Provisions) Act 2009[20].

6.2.6 Conclusions and recommendations

The Review Group concludes as follows:

Firstly, in the light of the *Cartesio Case*, Irish companies have the right to transfer their registered offices to other Member States of the EU on the basis of continuation of incorporation.

Therefore, the Review Group recommends that provision be made in legislation for Irish companies to transfer their registered offices to another Member State, preferably in the Companies Bill. The Review Group has prepared suggested heads which, together with a full explanation, are set out in Appendix 5 to this report.

The Review Group also concludes that in the light of the *Cartesio Case*, there doesn't appear to be an automatic right, on the basis of the Treaty, for companies to move their registered offices to other Member States where the potential host Member States do not permit such transfers. This is subject to the judgment in the *Vale Case*[21].

Irish law doesn't currently provide for bodies corporate from other Member States of the EU (or from third countries) to move to Ireland on the basis of continuation of incorporation – i.e. to move their registered offices to Ireland without having to wind up in their home jurisdiction and without the need to re-incorporate in Ireland. Currently, bodies corporate from other jurisdictions that wish to establish themselves in Ireland without winding up in their home jurisdictions and re-incorporating in Ireland, may set up a branch, a place of business or subsidiary (unless they are collective investment undertakings in which case Section 256F of the Companies Act 1990 may apply and migration on a continuance basis may be possible into Ireland, or they are SEs, in which case, from a company law perspective, the SE Regulation (EC Regulation 2157/2001/EC) and SI 27/2007 may apply).

[20] In the Companies (Miscellaneous Provisions) Act 2009, a mechanism was introduced that allows collective investment undertakings in prescribed jurisdictions to migrate their registered offices to Ireland without firstly having to wind up in their home jurisdiction.

[21] As mentioned above, the Advocate General has not taken this view in the *Vale Case* and believes that such transfers come within the scope of the Articles 49 and 54 TFEU, however, we must await the judgment of the court to know whether his opinion will be followed

The Review Group is of the view that, whilst there appears at present, to be an obligation (on the basis of the *Cartesio Case*) to provide only for transfers of registered office out of Ireland, that it would, nevertheless, be desirable and appropriate to also provide for the possibility of bodies corporate from other Member States to migrate into Ireland on the basis of continuation of incorporation. The Review Group recommends, therefore, that provision be made in law for the transfer of companies based in another EU country into Ireland and that, if possible, such provision in the Companies Bill. The Review Group has drafted heads to cater for this which, together with an explanation, are set out in Appendix 5 to this report.

Chapter 7: Items brought forward to next Work Programme 2012/13

7.1. Consideration of the representation of a company before the Courts

The Review Group was asked by the Minister to consider this issue as part of its 2010/11 Work Programme. In the course of 2011, the Supreme Court directed that a hearing be held on the question of whether the decision in *Battle v Irish Art Promotion Centre Limited*[22] is good law. The Review Group is minded to wait the outcome of that case and proposes to the Minister that he extend its consideration into its next Work Programme.

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

Adopted by the 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 Review Group engaged in a consultation process with interested parties and this gave rise to some technical concerns which required further examination. Accordingly, the Review asks the Minister to extend its consideration of this issue into its next Work Programme.

[22] [1968] IR 252

Appendix 1 – Summary of all recommendations of the Company Law Review Group 2010/2011

Registration and Incorporation Issues

1. The Review Group recommends that judgment creditors should be encouraged to register judgments obtained in the Judgments Office so that third parties become aware of the existence of the judgment (3.1.6)
2. The Review Group recommends that Part IV of the Companies Act 1963 be amended to provide that no order affecting a shareholder, member, or debenture holder of a company will be required to be accepted by the Registrar of Companies for registration on the file of the company, which issued the shares or debentures (3.1.6)

Audit and Financial Issues

3. The Review Group recommends that the anomalies between IAS 27 and sections 62 and 149(5) are addressed as quickly as possible along the lines of the Heads that are submitted in this report. The Review Group proposes that these changes be introduced as soon as possible as they are aimed at removing anomalies between existing law and accounting standards and also improving the legal ability for companies to restructure their internal organisation without impeding their ability to access existing distributable profits (4.1.4)

Compliance and Enforcement Issues

4. The Review Group recommends that the level of capitalisation required for companies with restricted directors should be raised, but that no change be made to the law regarding the minimum levels of capital at this time for the generality of companies. The Review Group recommends figures for the increased levels for both private and public companies, but considers that the distinction between company types and the new levels should be considered in the context of the Companies Bill (5.1.4)
5. The Review Group recommends that, if new reporting obligations are to be imposed on auditors, those obligations should be developed with regard to specific criteria. The Review Group further recommends what those criteria should be. In the event that auditors' existing reporting obligations are to be amended, any such amendments should be developed having regard to the same criteria (5.2.6)
6. The Review Group recommends that consideration be given to the establishment of a cross Departmental group, charged with examining the extent to which the objective of consistency of approach to auditors' reporting obligations might be achieved and that such group should include representatives of the profession (5.2.6)
7. The Review Group considers that the clarificatory provisions in the Bill which confirm that the value of assets and liabilities of a company should be assessed separately adequately address the perceived abuse of the voluntary strike-off procedure by companies netting their assets against liabilities. The Review Group considers that, in light of the clarificatory provisions relating to the value threshold included in the Bill, the issued share capital requirement is not relevant to the determination of a company's liabilities *for the purposes of a voluntary strike off application only.* Accordingly, the Review Group is of the view that

the issued share capital requirement in the Bill should be removed, and that Section 721(1)(d)(iv) of the Bill should be deleted (5.3.4)

8. The Review Group also recommends that the figure of €100 referenced in Section 721(1)(d)(i) and (ii) should be amended to €150 (5.3.4)
9. The Review recommends that, for voluntary strike-off, the Companies Bill be amended to make it a category 3 offence for any director to provide an incorrect certification to the CRO pursuant to section 721(1)(d) of the Bill. Furthermore, the Bill should be amended to provide that if a company which has been voluntarily struck off the Register is restored pursuant to an application from a creditor, on the application for restoration, the Court may order that the directors who signed the certification pursuant to section 721(1)(d) should be liable for the costs of restoration (5.3.4)
10. The Review Group recommends that, for involuntary strike-off, the Companies Bill be amended to provide that disqualification proceedings undertaken by the ODCE pursuant to section 832(h) may be continued, notwithstanding the issuing of court proceedings to restore the company to the Register and/or restoration of the relevant company to the Register. The Review Group also recommends that consistent with the recommendation in respect of voluntary strike off, the Bill should be amended to provide that if a company which has been involuntarily struck off the Register is restored pursuant to an application from a creditor, on the application for restoration, the Court may order that the directors of the company as at the date of strike off should be liable for the costs of restoration (5.3.4)
11. The Review Group recommends that there be no change to the current late filing fees. In cases where a company seeks a waiver from the payment of late filing fees, the grant of that should not be within the powers of the CRO, but rather should be determined by a court of competent jurisdiction, preferably the District Court (5.4.4)
12. The Review Group also recommends no changes to the current system, as updated by the Companies Bill, in respect of loss of audit exemption for late filing of annual returns (5.4.4)
13. The Review Group recommends that the relationship, if any, of the Fines Act 2010 on the offences in the Bill should be considered (5.5.2)
14. The Review Group notes that if new company law offences are created in future, they will be categorised according to the four-fold system in the Companies Bill, and recommends guidelines for that categorisation (5.5.2).

EU and International Developments

15. The Review Group recommends that the general provision for bearer shares be abolished by way of an express prohibition, and that transitional arrangements be provided to take account of companies that may have legitimately issued bearer shares in the past. This prohibition should not affect the position governing renounceable letters of allotment of fully or partly paid up bonus shares or beneficial interests in shares and arrangements should be put in place to take account of the specific regulatory regime for collective investment funds (6.1.3)
16. The Review Group recommends that provision be made in legislation for Irish companies to transfer their registered offices to another Member State (6.2.6)
17. The Review Group recommends that provision be made in law for the transfer of companies based in another EU country into Ireland (6.2.6)

Appendix 2 – Application of IFRS 27 and the consequences for Sections 62 and 149 (5) of the Companies Acts 1963

Appendix 2(a) Draft Heads to revise Section 149(5)

149(5)(a) Subject to subsection (b) below any amount of the accumulated profits or losses attributable to any shares in a subsidiary for the time being held by a holding company or any other of its subsidiaries shall not, for any purpose, be recognised in the holding company's accounts as profits available for distribution so far as it relates to accumulated profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries, and for the purpose of determining whether profits or losses are to be treated as profits or losses for the period the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.

(b) Where the Summary Approval Procedure set out in section 149(5) A is effected, an amount of the accumulated profits or losses referred to in subsection (a) may be treated in a manner otherwise than in accordance with that subsection which treatment is called the 'Alternative Treatment' and all such profits provided they qualify as realised profits shall be available for distribution by the holding company for a period of 1 month from the date of the resolution referred to in section 149(5) A(1)(a) or such longer period as is provided for in section 149(5) B if that section is applicable.

149(5)A.(1) "Summary Approval Procedure' means the procedure whereby the following conditions are met -

(a) authority for the Alternative Treatment has been conferred by a special resolution of the company being a special resolution or unanimous resolution passed not more than 1 month prior to the date of distribution by the company or such longer period as is provided for in section 149(5)B if that section is applicable;

(b) either -

(i) the company has forwarded with each notice of the meeting at which the special resolution or other foregoing resolution is to be considered; or

(ii) if the means referred to in section 141(8) for passing the resolution is followed, the company has appended to the resolution,

a copy of a declaration pursuant to subsection 2 which complies with subsection 3 of this section,

(c) subject to (d) below the company also delivers, within 21 days after the date on which the distribution is made, a copy of the foregoing declaration to the Registrar,

(d) except that if the company is an unlimited company, other than an unlimited company that is in the scope of Part III of the European Communities (Accounts) Regulations 1993 (SI No. 396 of 1993), it shall be sufficient to deliver to the Registrar an extract from the declaration setting out the date the assessment required by section 149(5)A(3)(b) was made and the information required by section 149(5)A(3)(c).

(2) The declaration pursuant to subsection 3 shall be made at a meeting of the directors held –

(a) not earlier than 1 month before the date of the meeting referred to in subsection (1)(b)(i), or

(b) if the special resolution or other foregoing resolution is passed by the means provided under section 141 (8), not earlier than 1 month before the date of the signing of the resolution by the last member to sign,

and shall be made by all of the directors or, in the case of a company having more than 2 directors, by a majority of the directors.

(3) The declaration shall state –

(a) the amount of the profit that will be subject to the Alternative Treatment, being the 'Proposed Distribution',

(b) the total amount of the company's assets and liabilities as extracted from annual or interim accounts properly prepared as of a date specified in the declaration which is the latest practicable date before the making of the declaration and in any event at a date not more than 3 months before the date of the making of the declaration, where 'properly prepared' shall be construed in accordance with the provisions of section 49(9) of the Companies (Amendment) Act 1983,

(c) that the declarants have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that if the company were to make the Proposed Distribution within 2 months of the date of the declaration the company would be able to pay its debts and other liabilities included in the accounts referred to in subsection (b) above as they fall due.

In determining whether or not a company will be able to pay its debts as they fall due, the declarants shall be required to consider the likelihood (in circumstances where the following are relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be called[23] .

(4) A declaration referred to in subsection 3 shall have no effect unless it is accompanied by a report -

(a) drawn up in the prescribed form, by a person who is qualified at the time of the report to be appointed, or to continue to be, the statutory auditor of the company; and

(b) which shall state that, in the opinion of that person, the declaration is not unreasonable.

(5) Where a director of a company makes a declaration without having reasonable grounds for the opinion referred to in subsection (3)(c), the court, on the application of -

(a) a liquidator, creditor, member or contributory of the company or,

(b) the Director of Corporate Enforcement,

may declare that the director shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

(6) If a company, having made a distribution pursuant to this section, is wound up within 12 months after the date of the making of a declaration and its debts are not paid or provided for in full within 12 months after the commencement of the winding-up, it shall be presumed, until the contrary is shown, that each director of the company who made the declaration did not have reasonable grounds for the opinion referred to in subsection (3)(c).

149(5)B. (1) Unless one or more members who hold, or together hold, more than 90% in nominal value of each class of issued shares of the company and entitled to vote at general meetings of the company have voted in favour of the special resolution referred to in section 149(5)(A)(1) , the company shall not proceed with the distribution -

(a) subject to paragraph (b), until the expiry of 30 days after the date on which the special resolution has been passed and in that case, the 1 month

23. The sub-committee considered that the draft language proposed in relation to the SAP might give companies the right to ignore entirely any guarantees or security given irrespective of the likelihood of the guarantee or security being called; hence the positive obligation to consider these items.

period referred to in section 149(5) (b) shall commence on the expiry of those 30 days, or

(b) if an application under subsection (3) is made, until the application has been disposed of by the court (and then only (unless the application is withdrawn) to the extent, if any, that authority for its being proceeded with is provided by a confirmation of the special resolution by the court on that application) and in that case, the 1 month period referred to in section 149(5) (b) shall commence on the date the application is disposed of by the court or withdrawn.

(3) An application may be made to the court in accordance with this section for the cancellation of the special resolution.

(4) Subject to subsection (5), an application under subsection (3) may be made by one or more members who hold, or together hold, not less than 10 per cent in nominal value of the company's issued share capital or any class thereof.

(5) An application shall not be made under subsection (3) by a person who has consented to, or voted in favour of, the special resolution.

(6) An application under subsection (3) shall be made within 28 days after the date on which the special resolution was passed and may be made on behalf of the persons entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(7) On the hearing of an application under subsection (3), the court may, as it thinks fit -

(a) confirm the special resolution,

(b) confirm the special resolution as respects only specified amounts or aspects of the Alternative Treatment to which it relates,

(c) cancel the special resolution, or

(d) determine a new date by which the Proposed Distribution must be made.

149(5) C. Section 149(5) does not apply to the profits or losses attributable to shares in a subsidiary held by a holding company where those shares were acquired in a transaction to which section 62A ***[include correct reference to enactment introducing this section]*** applies.

Appendix 2(b) Draft Heads to revise Section 62A

"**62A Allotment of shares in return for acquisition of issued shares of body corporate.**

(1) This section applies where –

(a) a company (**"the issuer"**) allots and issues shares to the shareholders of a body corporate in consideration for the acquisition by the issuer of all of the issued shares in the body corporate (**"the acquired shares"**) such that the body corporate becomes the wholly-owned subsidiary of the issuer,

(b) the consolidated assets and liabilities of the issuer immediately after those shares are issued are exactly, except for any permitted cash payments, the same as –

(i) if the body corporate was itself a holding company, the consolidated assets and liabilities of the body corporate immediately before those shares were issued, or

(ii) if the body corporate was not a holding company, the assets and liabilities of the body corporate immediately before those shares were issued,

(c) the absolute and relative interests that the shareholders in the body corporate have in the consolidated assets and liabilities of the issuer are in proportion to (or as nearly as may be in proportion to) the interest they had in –

(i) if the body corporate was itself a holding company, the consolidated assets and liabilities of the body corporate immediately before the shares were issued,

(ii) if the body corporate was not a holding company, the assets and liabilities of the body corporate immediately before the shares were issued, and

(d) the issuer does not account for its investment in the body corporate at fair value in the issuer’s individual accounts.

(2) Notwithstanding section 62, where the shares in the issuer allotted in consideration for the acquisition of the acquired shares are issued at a premium, the issuer need not –

(a) transfer any amount in excess of the minimum premium value to the issuer’s share premium account, or

(b) include any such amount in determining the amount at which the shares or other consideration provided for the acquired shares is to be included in the issuer’s individual accounts and group accounts.

(3) Nothing in this section shall permit any share in the issuer to be issued at a discount to the share’s par value.

(4) In this section –

'base value of the consideration', in relation to shares allotted by an issuer, means the carrying value of the assets and liabilities that would be shown in the balance sheet of the body corporate if that body corporate were to prepare individual accounts in accordance with section 148 immediately before the issue of the shares;

'consolidated assets and liabilities' in relation to a holding company, means the assets and liabilities included in the group accounts of the holding company prepared in accordance with section 150;

'minimum premium value' in relation to shares allotted, means the amount (if any) by which the base value of the consideration for the acquisition of the acquired shares exceeds the aggregate nominal value of the shares issued.

‘permitted cash payments’ means:

(i) cash payments to shareholders of the body corporate in relation to fractional share entitlements in the body corporate that are not being replicated in the issuer, whether on account of different par values of shares or otherwise;

(ii) such cash payments as may be ordered or permitted by the court, including by reason of the imposition on the issuer of disproportionate expense arising from compliance with prospectus and similar requirements."

Appendix 2(c) Extract from IAS 27 Revised

38B When a parent reorganises the structure of its group by establishing a new entity as its parent in a manner that satisfies the following criteria:

(a) the new parent obtains control of the original parent by issuing equity instruments in exchange for existing equity instruments of the original parent;

(b) the assets and liabilities of the new group and the original group are the same immediately before and after the reorganisation; and

(c) the owners of the original parent before the reorganisation have the same absolute and relative interests in the net assets of the original group and the new group immediately before and after the reorganisation

and the new parent accounts for its investment in the original parent in accordance with paragraph 38(a) in its separate financial statements, the new parent shall measure cost at the carrying amount of its share of the equity items shown in the separate financial statements of the original parent at the date of the reorganisation.

38C Similarly, an entity that is not a parent might establish a new entity as its parent in a manner that satisfies the criteria in paragraph 38B. The requirements in paragraph 38B apply equally to such reorganisations. In such cases, references to 'original parent' and 'original group' are to the 'original entity'.

Appendix 3 – Identification of owners of bearer shares

Explanatory Note

The Heads have been drafted to with reference to the General Scheme of the Companies Bill. Accordingly, for Pillar A, i.e. the Private Company Limited by Shares, there is a prohibition on the issue of bearer shares and the shares shall be deemed not to have been issued or allotted.

The Pillar B draft provisions firstly give effect to the limited regime envisaged for plc's generally in relation to renounceable letters. This will be located in Part B 2 dealing with plc's. From a drafting perspective, it may be necessary to incorporate elements of existing sections 88 and 118, quoted above, into the provisions in Part B2.

Transitional arrangements are also proposed, which are designed to effectively require existing bearer shares that do not fall within the categories that are to be permitted in the future to disclose the holder's name on the shareholders' register by the end of the transitional period.

Pert B9, dealing with Investment Funds, will cross-apply the provisions relating to plc's, as the more specific provisions relating to global certificates, which will be subject to conditions specified by the Central Bank.

Proposed Heads of Bill

Head 1 - Pillar A

Share warrants to bearer

(1) In this section, **"bearer instrument"** means an instrument in relation to shares of a company, which entitles or purports to entitle the bearer thereof to transfer the shares therein specified by delivery of the instrument.

(2) A company shall not have power to issue any bearer instrument.

(3) Where a company purports to issue a bearer instrument, the shares specified therein shall be deemed not to have been allotted or issued, and the amount subscribed therefor (and in the case of a non-cash asset subscribed therefor, the cash value of that asset) shall be due as a debt of the company to the purported subscriber thereof.

Head 2 - Pillar B (Plc's B2)

(1) In this section:

"bearer instrument" means an instrument in relation to shares of a company, which entitles or purports to entitle the bearer thereof to transfer the shares therein specified by delivery of the instrument, and includes a share warrant within the meaning of section 88 of the Companies Act 1963;

"expiry date" in relation to a temporary bearer instrument means a date no later than [30 days] after the date of the instrument;

"temporary bearer instrument" means a letter of allotment by a company to a member of a company of–

(i) bonus shares of the company, credited as fully paid; or

(ii) shares of the company, in lieu of a dividend, credited as fully paid; or

(iii) shares allotted provisionally, nil-paid or partly-paid, where the shares are allotted in connection with a rights issue or open offer in favour of members where the shares are issued proportionately (or as nearly as may be) to the respective number of shares held by the members (there being disregarded any exclusions or arrangements as the directors of the company may deem necessary or expedient to make for the purposes of dealing with fractional entitlements arising or legal or practical problems under the laws of any territory or the requirements of any recognised regulatory body in any territory);

which is expressed to be transferable by delivery during a period expiring on its expiry date.

(2) A PLC may issue a temporary bearer instrument.

(4) Shares comprised in a temporary bearer instrument shall, until its expiry date, be transferable by renunciation and delivery of the temporary bearer instrument, subject to such conditions as may be specified therein.

(5) Where, on the commencement of this section, a company has in issue a bearer instrument in relation to shares of the company, other than a temporary bearer instrument:

(a) the company shall procure the entry in its register of members of the name of the holder or holders of those shares no later than the expiry of the transition period;

(b) if and to the extent that paragraph (a) is not complied with, the shares comprised in that bearer instrument be deemed registered in the name of [the Minister for Finance] [the company], and the company shallenter the said name in the company'sregister of members accordingly.

(6) Where on the commencement of this section, a person has or is entitled to possession of a bearer instrument, whether as owner or as encumbrancer, nothing in [Pillar A section] or this section shall affect any rights which such person would have by virtue of such entitlement or possession.

Head 3 – Investment Funds (B9)

Head 2 above applies and -

In this section **"global certificate"** means a bearer instrument in relation to shares of a company, the issue of which has the prior consent in writing of the Central Bank of Ireland;

(2) A PLC may issue a global certificate or a temporary bearer instrument.

(3) A global certificate shall be transferable by delivery and otherwise subject to such conditions as may be specified by the Central Bank of Ireland.

(5) Where, on the commencement of this section, a company has in issue a bearer instrument in relation to shares of the company, other than a global certificate or a temporary bearer instrument:

(a) the company shall procure the entry in its register of members of the name of the holder or holders of those shares no later than the expiry of the transition period;

(b) if and to the extent that paragraph (a) is not complied with, the shares comprised in that bearer instrument be deemed registered in the name of the company, and the company shall enter the said name in the company's register of members accordingly.

Appendix 4 – Implications for Irish company law of the ECJ judgment in the *Cartesio Case* relating to the transfer of a registered office from one jurisdiction to another

Appendix 4(a) – Irish companies migrating to another jurisdiction

Explanatory Note

The heads below are modelled on the SE Regulation[24] and the associated SI 27/2007 and on Sections 256G and H of the Companies Act 1990 (as inserted by Section 3 of the Companies (Miscellaneous Provisions) Act 2009.

The object of the heads is to facilitate Irish companies that wish to move to another Member State, by providing them with the possibility of transferring their registered office in an orderly and transparent way, hence allowing such companies to choose a legal environment that best suits their business needs, whilst at the same time ensuring transparency and guaranteeing as far as possible, the effective protection of the interests of the main stakeholders. The heads require the company to register in the host Member State and to apply for deletion of its registration in the State. The company thus transfers its registered office whilst retaining its legal personality. Following the transfer, the company will be subject to the law of the host Member State in the same way as any other company registered in that country and will have to adapt its statutes to the law of the host Member State. The possibility of transfer is limited to situations where the transfer will result in a change in the applicable law and where the law of the host Member State permits such inward migration.

The heads provide for the Minister to extend the scope of the scheme by prescribing by regulation, countries other than Member States into which companies may transfer, subject to any conditions or criteria which the Minister considers necessary on public interest grounds.

Draft Heads of Bill relating to transfer of registered office of an Irish company to another Member State

1. **Definitions**

In this Section

"applicant" means a company (other than an investment company which is authorised under Section 256(1) of Part XIII of the Companies Act 1990 or an investment company authorised pursuant to Part 3 of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011) that applies to Transfer under this section;

"declaration of solvency" means the declaration made by a director of the applicant pursuant to section x

[24] EC Regulation 2157/2001/EC

"Directors Explanatory Report" means the report prepared by the directors in accordance with subsection 3;

"Independent Persons Report" means the report of the independent person referred to in Section x;

"Host Country" means the Member State which permits transfers of seat into and out of its jurisdiction, to which the Transferring Company Transfers or any other country which by law permits such transfers, as prescribed by the Minster under subsection 25;

"registered office" means the registered office that a company is required, pursuant to Section 113 of the Principal Act, to have at all times in the State and to which all communications and notices to the company may be addressed;

"Transfer" means the transfer by a Transferring Company of its registered office to a Host Country by way of continuation as a body corporate, i.e. without the necessity for the company to wind up and without the creation of a new legal person in the Host Country but resulting in a change in the law applicable to the company from the Transfer Date and resulting in the de-registration of the applicant in the State;

"Transferring Company" means an applicant that engages in a Transfer in accordance with this section;

"Transfer Date" means the date upon which the Transferring Company is registered as a body corporate in the appropriate register of the Host Country*;*

"Transfer Documents" in relation to an applicant means the following documents:-

(a) a statutory declaration of a director of the applicant made not more than 28 days prior to the date on which the application is made to the registrar to the effect that –

(i) the applicant will upon registration in the Host Country, continue as a body corporate under the laws of that jurisdiction;

(ii) no petition or other similar proceeding to wind up or liquidate the applicant has been notified to the applicant and remains outstanding in any place, and no order has been notified to the applicant or resolution adopted to wind up or liquidate the applicant in any place;

(iii)the appointment of a receiver, liquidator, examiner or other similar person has not been notified to the applicant and, at the date of the declaration, no such person is acting in that capacity in any place with respect to the applicant or its property or any part thereof;

(iv)the applicant is not, at the date of the declaration, operating or carrying on business under any scheme, order, compromise or other similar arrangement entered into or made by the applicant with creditors in any place;

(v) the application for Transfer is not intended to defraud persons who are, at the date of the declaration, creditors of the applicant;

(vi) all filings that are required by the applicant to be made to the registrar pursuant to the Companies Acts have been made up to and including the date of the statutory declaration;

(vii) the Transfer is not prohibited by the memorandum and articles of association of the applicant;

(viii) the Transfer Proposal and the Directors Explanatory Report have been produced, publicised and made available for inspection in accordance with subsection [13],

(ix) the Transfer is permitted by the law of the Host Country; and

(x) the Host Country permits transfers of seat out of its jurisdiction.

(b) a declaration of solvency together with the Independent Person's Report thereon, prepared in accordance with the provisions of Section X; and

(c) a copy of a special resolution of the shareholders of the applicant approving the proposed Transfer.

"Transfer Proposal" means the proposal to be drawn up by the applicant in accordance with subsection 2;

Steps prior to the application for Transfer

2. An applicant shall draw up a Transfer Proposal which shall state the current name, registered office and number of the applicant and shall also contain the following details:-

   (a) the proposed registered office in the Host Country;
   (b) the proposed new memorandum and articles of association (or equivalent) of the applicant as required by the law of the Host Country including, where appropriate, its new name (and where such document is not written in the Irish language or the English language, a translation into the Irish language or the English language certified as being a correct translation thereof by a person who is competent to so certify);
   (c) any implication the Transfer may have on the position of employees;
   (d) the proposed transfer timetable; and
   (e) any rights provided for the protection of members and/or creditors.

3. The directors of the applicant shall draw up a Directors' Explanatory Report which shall explain and justify the legal consequences of the Transfer and the implications of the Transfer for shareholders, creditors and employees.

4. There shall be delivered to the registrar a copy of the draft Transfer Proposal accompanied by the prescribed form.

5. The registrar shall cause to be published in the CRO Gazette, notification of receipt of the draft Transfer Proposal.

6. No decision to Transfer shall be made, or general meeting to approve the Transfer shall be held, before the expiry of a period of at least two months following publication of the draft Transfer Proposal in accordance with subsection 5.

7. The applicant shall notify in writing its members and every creditor of whose claim and address it is aware, of the right to examine the Transfer Proposal and the Directors Explanatory Report at its registered office and on request to obtain copies of those documents free of charge, not later than two months prior to the general meeting called to decide upon the Transfer.

8. Every invoice, order for goods or business letter which at any time between the date on which the draft Transfer Proposal has been delivered to the registrar in accordance with subsection 4 and the Transfer Date or the withdrawal of the application in accordance with subsection 30, is issued by or on behalf of the applicant, shall contain a statement that the applicant is proposing to Transfer in accordance with this Section and identifying the Host Country to which the applicant proposes to Transfer.

9. Where an applicant proposes to Transfer, then notwithstanding any other provision of the Companies Acts, any member or members holding, in the aggregate not less than 5 per cent of the issued share capital of the applicant and who has not consented to or voted in favour of the Transfer or has abstained from voting, or any creditor of the applicant, may apply to the Court on notice to the applicant and the registrar and the Director, not later than 21 days following the passing of the resolution to approve the Transfer –

   (a) to have the decision to Transfer annulled,
   (b) in the case of an application by members, to require the applicant to acquire for cash the securities of the members opposed to the Transfer or
   (c) for such other remedy as the Court considers just.

10. Notice of an application for an order under subsection 9 shall be given by the [applicant?] to the creditors of the applicant by publication in at least one national newspaper in the State.

11. The Court may make an order under subsection 9 only if it is satisfied that

   (a) the Transfer would contravene the terms of an agreement or arrangement between the applicant and any member or creditor of the applicant; or

   (b) the Transfer would be materially prejudicial to any member or creditor of the applicant and the interests of members and creditors or both taken as a whole would be materially prejudiced.

12. Where an applicant proposes to Transfer, the Director may apply to the Court on notice to the applicant and the registrar, not later than 21 days following the passing of the resolution to approve the Transfer Proposal, for an order preventing the Transfer from proceeding on grounds of public policy.

13. Notice of an application for an order under subsection 12 shall be given by the [applicant?][Director?] to the creditors of the applicant by publication in at least one national newspaper in the State

14. An order made under subsections 9 or 12 shall specify the period in respect of which it remains in force and shall be final and conclusive.

<u>The application to Transfer</u>

15. An applicant that proposes to Transfer may make an application to Transfer to the registrar.

16. Where an application is made under subsection 15, the registrar shall register the application to Transfer if her or she is satisfied that all of the requirements of the Companies Acts in respect of the Transfer and of matters precedent and incidental thereto have been complied with and, in particular but without prejudice to the generality of the foregoing, he or she is satisfied that –

(a) the applicant has delivered to the registrar an application for the purpose, in the prescribed form and signed by a director of the applicant together with the Transfer Documents;

(b) the applicant has paid to the registrar such fee as may be specified from time to time pursuant to section 369 [of the Principal Act];

(c) the applicant has filed with the registrar notice of any proposed change in its name and of its proposed registered office or agent for service of process in the Host Country;

(d) there has been no order preventing the Transfer made by the High Court pursuant to subsections 9 or 12 and if an order has been made that any conditions have been fulfilled; and

(e) all annual returns of the applicant up to the date of the application have been made.

17. An application under this section shall be accompanied by a statutory declaration in the prescribed form which shall be made not more than 5 days prior to the receipt of the application by the registrar, by a solicitor engaged for this purpose by the applicant or by a director of the applicant, and stating that the requirements in subsection 16 have been complied with and that all filings required to be made by the applicant to the registrar under the Companies Acts have, as at the date of the application to Transfer been made. The registrar may accept such a declaration as sufficient evidence of compliance with the requirements of subsection 15.

18. The registrar shall, as soon as is practicable after receipt of the application to Transfer, publish notice of it in the Companies Registration Office Gazette.

Consequences of Transfer

19. When the applicant is registered as a body corporate under the laws of Host Country, it shall give notice to the registrar of that fact within 14 days of becoming so registered and such evidence as the registrar requires of registration in the Host Country, including details of the Transfer Date and the applicant's new name, if any and where any such evidence is not written in the Irish language or the English language, a translation into the Irish language or the English language shall be provided to the registrar, certified as being a correct translation thereof by a person who is competent to so certify.

20. As soon as practicable after receiving the notice and evidence satisfactory to the registrar as referred to in subsection 19, the registrar shall issue a certificate of de-registration of the applicant.

21. Following issue of the certificate of de-registration referred to in subsection 20, the registrar shall enter in the register of companies the Transfer Date and consequent date of de-registration of the applicant and shall, within 7 days of the issuance of the certificate under subsection 20, publish in the Companies Registration Office Gazette, notice of the following maters:

    (a) the Transfer Date ,
    (b) the Host Country; and
    (c) the new name of the applicant if different from the name under which it was registered.

22. From the Transfer Date, the applicant shall cease to be a company for all purposes of the Companies Acts and shall continue for all purposes as a body corporate under the laws of the Host Country, provided always that this section shall not operate-

    (a) to create a new legal entity,

    (b) to prejudice or affect the identity or continuity of the applicant as previously constituted under the laws of the State for the period that the applicant was so constituted,
    (c) to affect any contract made, resolution passed or any other act or thing done in relation to the applicant during the period that the applicant was constituted under the laws of the State,

    (d) to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant or any other person, or
    (e) to render defective any legal proceedings by or against the applicant.

23. Without prejudice to the generality of subsection 22, any legal proceedings that could have been continued or commenced by or against the applicant before the Transfer Date, may, notwithstanding the Transfer, be continued or commenced by or against the applicant after the Transfer Date.

24. Where within a period of three months following the making of an application to Transfer to the registrar in accordance with subsection 15, the registrar has not received notice from the applicant pursuant to subsection 19, the application to Transfer *shall be deemed to have been* withdrawn by the applicant and the Registrar shall publish notice of the withdrawal in the CRO gazette as soon as practicable following the expiry of the three month period.

Extension of this Section to Transfers to Third Countries

25. The Minister may, by regulation, prescribe countries other than Member States, to which an applicant may Transfer under this Section where he or she is satisfied that the law of the place concerned makes provision for a Transferring Company to continue under the laws of that place and that the laws of that place make provision for bodies corporate that are substantially similar to applicants under this section to continue under the laws of the State in a substantially similar manner to continuations under [include reference to Irish provisions dealing with migration of companies into the State]. The Minster may by regulation attach such conditions and requirements as he or she considers are appropriate to safeguard the interests of members and creditors and other stakeholders of the applicant.

26. Every regulation made by the Minister under subsection 25 shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

Appendix 4(b) – Non- Irish companies migrating to Ireland

Explanatory Note

The object of the draft heads set out below, is to facilitate bodies corporate from other Member States (and possibly third countries) to establish themselves in Ireland on a continuation of incorporation basis, by providing them with the possibility of transferring their registered offices into Ireland.

The "migrating company" is required to register as a company in the State and to apply for the deletion of its registration in its "Home Jurisdiction". The migrating company thus transfers its registered office into Ireland whilst retaining its legal personality. Following the registration of the migrating company in the State, it will be subject to Irish company law in the same way as any other company formed and registered under the Companies Acts. It will have had to adapt its statutes etc in order to be registered in the State.

From the date of registration of the migrating company in Ireland, it is deemed to be a company formed and registered under the Companies Acts and continues for all purposes under the Acts. No new legal entity is created and the registration of the migrating company in the State under this proposal doesn't affect the identity or continuity of the migrating company as previously established in its Home Jurisdiction, or affect the validity of any contracts entered into or render defective any legal proceedings by or against the migrating company, or affect any charges created prior to the registration etc.

The draft heads provide for the Minster to extend the scope of the scheme by prescribing by regulation, countries other than Member States (i.e. third countries) from which bodies corporate may migrate under this scheme and to include in such regulations, such conditions or criteria as he considers necessary on public interest grounds.

The draft heads are modelled on Sections 256F and H of the Companies Act 1990 (as inserted by Section 3 of the Companies (Miscellaneous Provisions) Act 2009).

Draft Heads of Bill relating to migration of bodies corporate from other Member States into the State E

1. Definitions

In this Section

"Declaration of Solvency" means the declaration made by a director of the migrating company pursuant to Section x;

"Independent Persons Report" means the report of the independent person prepared in connection with the declaration of solvency and referred to in Section x;

"*migrating company"* means a body corporate, other than a collective investment undertaking, that is established and registered under the laws of the Relevant Jurisdiction and applies to register in the State under this section;

"registration documents" in relation to a migrating company means the following documents and, when the original registration documents are not written in the Irish or English language, a translation thereof by a person who is competent to so certify:

(a) a copy, certified and authenticated in the prescribed manner, of the certificate of registration or equivalent document issued in respect of the migrating company under the laws of the Relevant Jurisdiction;

(b) a copy, certified and authenticated in the prescribed manner, of the memorandum and articles of association or equivalent constitutive document of the migrating company;

(c) a list setting out particulars of the directors and secretary of the migrating company in accordance with section 195 of the Principal Act;

(d) a statutory declaration of a director of the migrating company made not more than 28 days prior to the date on which the application is made to the registrar to the effect that -

i. the migrating company is as of the date of the application, established and registered in the Relevant Jurisdiction; no petition or similar proceedings to wind up or liquidate the migrating company have been notified to it and remain outstanding in any place and no order has been notified to the migrating company or resolution adopted to wind up or liquidate the migrating company in any place;

ii. the appointment of a liquidator, receiver, examiner or similar person has not been notified to the migrating company and as at the date of the declaration, no such person is acting in that capacity in any place with respect to the migrating company or its property or any part thereof;

iii. the migrating company is not at the date of the declaration operating or carrying on business under any scheme, order, compromise or similar arrangement entered into or made by the migrating company with creditors in any place;

iv. at the date of the declaration, the migrating company has served notice on its creditors of the proposed registration in the State,

v. any consents or approval to the proposed registration in the State required by any contract entered into or undertaking given by the migrating company has been obtained or waived, as the case may be;

vi. any regulatory or other consent to the proposed registration in the State which is required by the laws of the Relevant Jurisdiction have been obtained or have been waived;

vii. the registration in the State is not prohibited by and where required, has been approved in accordance with the memorandum and articles of association or equivalent constitutive document of the migrating company; and

viii. the law of the Relevant Jurisdiction makes provision for migrating companies to continue under the laws of the State or for companies to continue under the laws of that place in a substantially similar manner to continuations under this section.

(e) a Declaration of Solvency together with the Independent Person's report thereon prepared in accordance with Section X;

(f) a schedule of charges or security interests created or granted by the migrating company that would, if such charges or security interests had been created or granted by a company incorporated under the Companies Acts, have been registrable under Part IV of the Principal Act and such particulars of those security interests and charges as are specified in Section 103 of the Principal Act;

(g) notification of the proposed name of the migrating company if different from its existing name; and
(h) a copy of the memorandum and articles of association of the migrating company which the migrating company has resolved to adopt, which shall be in the Irish or English language, which shall take effect on registration in the State and which the migrating company undertakes not to amend before registration without the prior authorisation of the registrar.

"Relevant Jurisdiction" means a Member State other than the State, where the migrating company is established and registered at the time of its application under this section, or such other place as is prescribed by the Minster pursuant to subsection 16;

2. A migrating company may apply to the registrar to be registered as a company in the State by way of continuation.

3. Where an application is made under subsection (2), the registrar shall register the migrating company as a company in the State if he or she is satisfied that–
   (a) the migrating company has delivered to the registrar an application for the purpose, in the prescribed form and signed by a director of the migrating company, together with the registration documents;
   (b) the name or, if relevant, the proposed new name of the migrating company, has not been determined to be undesirable pursuant to section 21 of the Principal Act;
   (c) the migrating company has paid to the registrar such fee as may be specified from time to time pursuant to Section 369 of the Principal Act;
   (d) the migrating company has filed with the registrar notice of the address of its proposed registered office in the State and
   (e) the migrating company has complied with all of the requirements of the Companies Acts for registration of a company and with all maters precedent or incidental thereto

4. An application under this section shall be accompanied by a statutory declaration in the prescribed form by a solicitor engaged for this purpose by the migrating company, or by a director of the migrating company, and stating that the requirements of subsection (3) have been complied with. The registrar may accept such a declaration as sufficient evidence of compliance with subsection (3)

5. The registrar shall, as soon as practicable after receipt of the application for registration, publish notice of receipt of it in the Companies Registration Office Gazette.

6. Where the registrar is satisfied with the application, he or she may issue a certificate of registration by way of continuation of the migrating company as a body corporate under the laws of the State and if such a certificate is issued, the registrar shall enter in the register maintained for the purposes of Section 103 of the Principal Act, in relation to the charges and security interests of the migrating company referred to in paragraph [f] of the definition of "*registration documents"* in subsection (1), the particulars prescribed by section 103 of the Principal Act which have been supplied by the migrating company.

7. The migrating company shall, as soon as may be after being registered under subsection [3], apply to be deregistered in the Relevant Jurisdiction.

8. The registrar shall enter in the register of companies, the date of registration of the migrating company and shall forthwith publish notice in the Companies Registration Office Gazette, of the following matters:-

   (a) the date of the registration of the migrating company under this section;
   (b) the Relevant Jurisdiction; and
   (c) the previous name of the migrating company if different from the name under which it is being registered.

9. From the date of registration, the migrating company shall be deemed to be a company formed and registered under this Act and shall continue for all purposes under this Act, provided always that this section shall not operate-
   (a) to create a new legal entity;
   (b) to prejudice or affect the identity or continuity of the migrating company as previously established and registered under the laws of the Relevant Jurisdiction for the period that the migrating company was established and registered in the Relevant Jurisdiction;
   (c) to affect any contract made, resolution passed or any other act or thing done in relation to the migrating company during the period that the migrating company was so established and registered;
   (d) to affect the rights, powers, authorities, functions and liabilities and obligations of the migrating company or any other person, or
   (e) to render defective any legal proceedings by or against the migrating company.

10. Without prejudice to the generality of subsection (9)-
   (a) the failure of a migrating company to send to the registrar the particulars of a charge or security interest created prior to the date of registration shall not prejudice any rights which any person in whose favour the charge was made or security interest created may have thereunder; and
   (b) any legal proceedings that could have continued or commenced by or against the migrating company before its registration under this section, may, notwithstanding the registration, be continued or commenced by or against the migrating company after registration.

11. The migrating company shall notify the registrar in the prescribed form providing such evidence as the registrar shall require, within 7 days of its de-registration in the Relevant Jurisdiction, of that deregistration.

12. If there is any material change in any information contained in the statutory declaration mentioned in paragraph (d) of the definition of *"registration documents"* in subsection (1), after the date of the declaration and before the date of the registration under this section, the director who made that statutory declaration and any other director who becomes aware of that material change shall forthwith deliver a new statutory declaration to the registrar relating to the change.

13. If the migrating company fails to comply with any provision of this section, the registrar may send to the company by post a registered letter stating that, unless the migrating company rectifies the failure within 1 month of the date of the letter and confirms that it has rectified the failure, a notice may be published in the Companies Registration Office Gazette, with a view to striking the name of the migrating company off the register.

14. If the failure mentioned in subsection (13) is not rectified within 1 month after sending the letter referred to in that subsection, the registrar may publish in the Companies Registration Office Gazette, a notice stating that, at the expiration of 1 month from the date of that notice, the name of the migrating company mentioned therein will, unless the matter is resolved, be struck off the register and the migrating company will be dissolved.

15. At the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the migrating company, strike its name off the register and publish notice thereof in the Companies Registration Office Gazette, and on that publication, the migrating company shall be dissolved.

16. The Minister may make regulations prescribing places other than Member States, as Relevant Jurisdictions for the purposes of this section, where he or she is satisfied that the law of the place concerned makes provision for the migrating company to continue under the laws of the State or for companies to continue under the laws of that place in a substantially similar manner to continuations under this section. The Minister may in such regulations, attach such conditions and requirements as he or she considers are appropriate in the public interest.

17. Every regulation made by the Minister under subsection 16 shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

Appendix 4 (c) Draft Head relating to declaration of solvency

1. The directors of

    (a) the applicant in the case of an application under Section X; and
    (b) the migrating company in the case of an application under Section Y,

    shall make a statutory declaration stating that they have made a full inquiry into the affairs of the company and have formed the opinion that the applicant or the migrating company (as the case may be) is able to pay its debts as they fall due.

2. A declaration under subsection (1) shall have no effect for the purposes of this section unless

    (c) it is made not more than 28 days prior to the date on which the application is made to the registrar,
    (d) it contains a statement of the applicant's or the migrating company's (as appropriate) assets and liabilities as at the latest practicable date before the making of the declaration and, in any case as at a date that is not more than 3 months before the making of the declaration, and
    (e) a report by an independent person under subsection (3) is attached to the declaration along with a statement by the independent person that he or she has given and has not withdrawn consent to the making of the declaration with the report attached to it.

3. The report of the independent person shall state whether, in the independent person's opinion, based on the information and explanations given to him or her, the opinion of the directors mentioned in subsection (1) and the statement of the applicants assets and liabilities referred to in subsection (2)(b) are reasonable.

4. For the purposes of subsection (2), the independent person shall be a person who, at the time of the report is made, is qualified to be the auditor

    a. in the case of an application under Section X, of the applicant, under the laws of the State; and

    b. in the case of an application under Section Y, of the migrating company under the laws of the Relevant Jurisdiction.

5. A director who makes a declaration under this section without having reasonable grounds for the opinion that the applicant is able to pay its debts as they fall due commits an offence and is liable –

    a. on summary conviction to a fine not exceeding Eur5,000, or imprisonment for a term not exceeding 12 months, or to both, or

b. on conviction on indictment to a fine not exceeding Eur50,000 or imprisonment for a term not exceeding 5 years or to both.

6. Where the applicant or migrating company (as the case may be) is wound up within 1 year of the date upon which the application is made to the registrar, and its debts are not paid or provided for in full within that year, it shall be presumed that the directors did not have reasonable grounds for their opinion.

Appendix 5 – Review of late filing penalties

Analysis of late filing fees paid in 2010 and 2011

Late Fee All 2010

Company type	**Count**	**Late Fee €**
Guarantee	30	35,980
Guarantee company without a share capital (public)	2,303	1,193,599
Guarantee licence company w/o sh/capital (public)	69	30,373
Private	179	129,549
Private limited by shares	13,198	7,558,328
Private unlimited	106	51,160
Private unlimited with share capital	399	225,157
Public limited company	112	46,472
Public limited company with variable capital	1	544
Public unlimited company with a share capital	7	5,043
Public unlimited company without share capital	1	172
Single member company ltd by g/tee with sh/cap	3	1,242
Single member private company limited by shares	5,507	2,979,745
Unknown	1	901
	21,916	**12,258,265**

€1200 Late Fee

Guarantee	29	34,800
Guarantee company without a share capital (public)	325	390,000
Guarantee licence company w/o sh/capital (public)	5	6,000
Private	74	88,800
Private limited by shares	2,260	2,712,000
Private unlimited	12	14,400
Private unlimited with share capital	56	67,200
Public limited company	8	9,600
Public unlimited company with a share capital	1	1,200
Single member private company limited by shares	781	937,200
	3,551	**4,261,200**

€1200 Late Fee with H1

Company type	Count	Late Fee €
Guarantee company without a share capital (public)	58	69,600
Private	7	8,400
Private limited by shares	422	506,400
Private unlimited with share capital	8	9,600
Single member private company limited by shares	131	157,200
	626	**751,200**

Late Fee All 2011

Company type	Count	Late Fee €
Guarantee company without a share capital (public)	1,812	1,044,098
Guarantee licence company w/o sh/capital (public)	49	22,477
Private	137	113,710
Private guarantee with share capital	1	223
Private guarantee with shares, licence to omit ltd	1	100
Private limited by shares	10,374	6,758,475
Private unlimited	83	42,659
Private unlimited with share capital	461	279,179
Private unlimited without share capital	2	557
Public	1	1,108
Public limited company	73	47,511
Public unlimited company with a share capital	5	3,070
Single member company ltd by g/tee with sh/cap	4	1,630
Single member private company limited by shares	4,130	2,444,474
Societas Europaea – Transfer into State	1	844
	17,134	**10,760,115**

€1200 Late Fee

Guarantee company without a share capital (public)	322	386,400
Guarantee licence company w/o sh/capital (public)	3	3,600
Private	67	80,400
Private limited by shares	2,487	2,984,400
Private unlimited	12	14,400
Private unlimited with share capital	90	108,000
Public limited company	19	22,800
Public unlimited company with a share capital	1	1,200
Single member private company limited by shares	693	831,600
	3,694	4,432,800

€1200 Late Fee with H1

Guarantee company without a share capital (public)	69	82,800
Guarantee licence company w/o sh/capital (public)	1	1,200
Private	13	15,600
Private limited by shares	476	571,200
Private unlimited	3	3,600
Private unlimited with share capital	3	3,600
Public limited company	4	4,800
Single member private company limited by shares	146	175,200
	715	**858,000**