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COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dli cuideachtaí

COMPANY LAW REVIEW GROUP

firstreport

31 December 2001

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Ms Mary Harney TD
Tánaiste and Minister for Enterprise, Trade and Employment,
Kildare St.
Dublin 2.

31st December 2001

Dear Tánaiste,

In accordance with section 71(1) and (3) of the Company Law Enforcement Act 2001 I have the honour to present you with the *First Report (2000 to 2001)* of the Company Law Review Group. This report concerns the Review Group's activities since being established on an ad hoc basis on 4th February 2000 to the completion of its first work programme on 31st December 2001. The report also addresses the specific matters originally referred to the Group and affirmed by you after the Group was established on a statutory basis on 1st October 2001.

In presenting you with the Review Group's first report, I am particularly pleased to draw to your attention the fact that this is a unanimous report. This is, I believe, particularly significant in the light of the broad representative nature of the Group's membership, composed of the social partners, users of company law and relevant Government Departments and agencies. In the case of each of the 195 recommendations, agreement has been achieved on foot of thorough consideration and reasoned debate. Our overall objective was to simplify company law to the maximum extent possible, consistent with maintaining high standards of shareholder and creditor protection and good corporate governance. The Group strongly believes that making company law more accessible, more coherent and more in tune with actual business practice will improve the efficiency of the Irish economy generally and enhance our international competitiveness. I believe that the importance to the economy of a modern company law infrastructure cannot be overestimated.

In this first two years of chairing the Review Group I was struck by the remarkable commitment to the betterment of Irish company law shown by my colleagues on the Group. The members' commitment in terms of time and effort is evident from the fact that there were almost 100 meetings of the Review Group and of its committees in the 23-month period ending 31st December 2001. Many of these were held outside of what would be termed normal office hours. By any standard, this surpasses that which can be reasonably expected of a voluntary body. Even more striking was the altruism displayed by the Group's members. Although most members were representatives of particular interests there was a unique willingness to see the other person's position. The resulting synergy and co-operation informs this report. It was my pleasure and honour to chair such an outstanding body of talented and committed people.

31st December 2001

The substantive recommendations made in this report are I believe, radical, yet balanced. The Review Group has concluded that Ireland's company laws need to be refocused and realigned with modern businesses' needs. Irish company law must be structured in such a manner as to make applicable law more accessible and intelligible to those who choose to incorporate the most popular corporate form – *the private company limited by shares*, which accounts for 88.8% of all companies registered with the Companies Registration Office. The Group is convinced that only such a radical re-focus can achieve simplification of this body of law.

Your Department has already made considerable progress in consolidating the existing Companies Acts, 1963 to 2001. The Review Group believes, however, that before that process can be finalised the far-reaching infrastructural recommendations proposed in this first Report should first be implemented in a Pre-Consolidation and Company Law Reform Bill. It is a pointless exercise to consolidate obsolete provisions and to omit reforms recognised to be desirable. The Group intends that the work in its second programme would complete the review of the existing Companies Acts (e.g. the law relating to winding-up, shares and membership and security law etc) as quickly as possible so that necessary reforms can be implemented and included in the consolidation process.

Your own support and encouragement of our work, and that of Minister Noel Treacy TD, is very much appreciated. I would also like to acknowledge the support of the Attorney General, Mr Michael McDowell SC who chaired the *Working Group on Company Law Compliance and Enforcement*, (1998) which recommended the establishment of the Company Law Review Group on a statutory basis. As Chairman of the Review Group, I am especially grateful for the contribution made by the members of your Department, namely Vincent Madigan, Paul Farrell and Nora Rice. My gratitude goes to the Group's secretariat, headed up by the outstandingly talented and committed Pat Nolan. In paying tribute to Pat, I know that my sense of gratitude is shared by all of the Group's members. His unfailing courtesy and facilitation of the Group in meeting outside office hours and at weekends is greatly appreciated by us all.

It is my privilege to commend to you the Review Group's *First Report (2000 - 2001)*.

Yours sincerely,

Thomas B Courtney
Chairman

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Secretary P Nolan
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V Madigan

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Chair R MacDarby
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SIMPLIFICATION: INCORPORATION AND REGISTRATION
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AUDITORS
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Glossary of Terms

1908 Act	Companies Consolidation Act 1908
1963 Act	Companies Act 1963
1977 Act	Companies (Amendment) Act 1977
1982 Act	Companies (Amendment) Act 1982
1983 Act	Companies (Amendment) Act 1983
1984 Stock Exchange Regulations	European Communities (Stock Exchange) Regulations 1984
1986 Act	Companies (Amendment) Act 1986
1990 Act	Companies Act 1990
1990 Amendment Act	Companies (Amendment) Act 1990
1992 Prospectus Regulations	European Communities (Transferable Securities and Stock Exchange) Regulations 1992 (SI No 202 of 1992)
1999 (No 2) Act	Companies (Amendment) (No 2) Act 1999
2001 Act	Company Law Enforcement Act 2001
ADR	Alternative Dispute Resolution
CLS	Private company limited by shares, the proposed base or model company further to implementation of restructuring of Companies Acts pursuant to the recommendations of this report
CRO	Companies Registration Office
dac	designated activity company
Department	Department of Enterprise, Trade and Employment
Director	Director of Corporate Enforcement, as established under the 2001 Act
DPP	Director of Public Prosecutions
ECA 2000	Electronic Commerce Act 2000
EC Act	European Communities Act 1972 as amended
ESRI	Economic and Social Research Institute

IAASA	Irish Auditing and Accounting Supervisory Authority
McDowell Group	The Working Group on Company Law Compliance and Enforcement
McDowell Group Report	The report of the McDowell Group, 9 November 1998
Minister	Minister for Enterprise, Trade and Employment
ODCE	Office of the Director of Corporate Enforcement
PLC	Public Limited Company
Prospectus Directive	Council Directive 89/298/EECof 17 April 1989 co-ordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public
Registrar	Registrar of Companies
Review Group	Company Law Review Group
RGA	Review Group on Auditing, established by the Minister in February 2000 and which reported in July 2000
RPB	Recognised Professional Body
SD	Statutory Declaration
SI	Statutory Instrument
Third Schedule	Third Schedule to the Companies Act, 1963
TCA 1997	Taxes Consolidation Act 1997
UCITS Directive	Council Directive of 20 December 1985 (85/611/EEC) on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as amended by Council Directive of 22 March 1988 (88/220/EEC)
UCITS Regulations	European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (SI No 78 of 1989)
WGCC	Working Group on a Courts Commission

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CHAPTER 1

Introduction

one

1.1 The establishment of the Company Law Review Group

1.1.1 On 9 March 1999, the Government approved the implementation of the recommendations in the report of the Working Group on Company Law Compliance & Enforcement (the McDowell Report).[1] That report concluded that in the interests of competitiveness "Ireland must combine modernisation and codification of its company law in a period of major company law reform". The terms of reference of the McDowell Group were to:[2]

(i) review the compliance arrangements and enforcement regimes for company law;
(ii) consider the respective roles for the parties responsible for compliance and enforcement, particularly the courts, the Minister for Enterprise, Trade and Employment, the Director of Public Prosecutions and the Registrar of Companies;
(iii) identify and evaluate the legislative, organisational and resource issues affecting compliance and enforcement;
(iv) make appropriate recommendations to address these issues;
(v) examine and identify the resources and structures necessary to achieve a more frequent updating of companies legislation;
(vi) identify the costs and benefits involved in implementing its recommendations;
(vii) report to the Tánaiste and Minister for Enterprise, Trade and Employment and to the Minister for Science, Technology and Commerce by 30 November 1998.

1.1.2 The establishment of the Company Law Review Group and the consolidation of the companies code were included among the recommendations in the report of the McDowell Group, as follows:[3]

(i) There is a vital urgency in ensuring that Ireland, as a potential place in which to do business and from which to do business, has a first class system of company law which places Ireland in the forefront as a contender for the location of international commerce.
(ii) Amending legislation to reform company law should be regarded as a constant feature on the agenda of the Department of Enterprise, Trade and Employment. A reforming Bill should be laid before the Oireachtas at least every two years.
(iii) A Company Law Review Group composed along similar lines to the Company Law Review Group[4] should be established on a statutory basis as soon as possible which would develop proposals which would form the basis – but not exclusively – for this legislative programme.
(iv) The Company Law Review Group should, in consultation with the Minister, adopt a two yearly work programme, which would coincide with the proposed biennial Companies Bill. An annual report of its (the Group's) proceedings would be made to the Minister and be appended to the annual Companies Report, prepared by the Minister.
(v) The composition of the Company Law Review Group should be a matter of some flexibility. The emphasis of the Minister, in constituting the Group, should be on combining expertise with a broadly representative membership.
(vi) To support the work of the Company Law Review Group, a budget of £50,000 should be included in the Department's 1999 allocation to cover research, consultancy and other expenses with a full year cost of £100,000 in subsequent years.
(vii) Some issues which the Company Law Review Group could examine which arose during the course of the review include: (a) the introduction of a simpler regime for smaller companies; (b) the establishment of a statutory licensing or qualification regime for insolvency practitioners; and (c) the provision of proof of identity by all directors on initial appointment.
(viii) A programme should be undertaken to codify/consolidate company law. The object of the process would be to incorporate the provisions of the existing Companies Acts and the substantive company law now set

1 Government Publications (Pn. 6697), 30 November 1998.
2 McDowell Report, p 1, para. 1.3.
3 McDowell Report, pp ix – x Paras. 63 – 7.
4 This reference was to the earlier ad hoc review group, which reported to the Minister for Enterprise and Employment in December 1994.

out in Regulations made under the European Communities Acts into one single comprehensible companies code.

1.1.3 The Report further recommended that the Company Law Review Group (the Review Group) be set up on an administrative footing pending enactment of the necessary legislation to establish it on a statutory basis. Consistent with the Government decision of 9 March 1999, Mary Harney TD, Tánaiste and Minister for Enterprise, Trade and Employment announced the setting up, on an administrative basis, of the Review Group on 8 December 1999. The Review Group held its first meeting on 7 February 2000.

1.1.4 The 2001 Act, enacted on 9 July 2001, gives effect to the recommendations of the McDowell Group. Part 7 of the 2001 Act provides for the establishment of the Review Group. Part 7 of the 2001 Act was commenced on 1 October 2001, from which date the Review Group has had a statutory existence and role.

1.1.5 Section 67 of the 2001 Act succinctly provides: There is hereby established a body to be known as the Company Law Review Group. Section 69 of the 2001 Act prescribes the membership of the Review Group.[5] The Review Group brings together the expertise of company law practitioners, Government departments and agencies, recognised professional bodies, regulatory bodies and the social partners. It is chaired by Thomas B Courtney, solicitor. The following were appointed members of the Group in February 2000:

Chair	
Thomas B Courtney	Solicitor, Secretary, ICS Building Society
Members	
Alacoque Condon	High Court Examiner's Office
Frank Cunneen[6]	IBEC
David Devlin	Consultative Committee of Accountancy Bodies - Ireland
Paul Egan	The Law Society of Ireland
Paul Farrell	Registrar of Companies
Michael Halpenny	ICTU
Muriel Hinch	Revenue Commissioners
William Johnston	Arthur Cox
Gerardine Jones[7]	Irish Stock Exchange
Roger Kenny	Office of the Attorney General
Ralph MacDarby	Institute of Directors
Vincent Madigan	Department of Enterprise, Trade and Employment
Maire O'Connor	Ernst & Young
John O'Donnell SC[8]	The Bar Council
Tony O'Dwyer[9]	Institute of Chartered Secretaries and Administrators
Nora Rice	Companies Registration Office
Enda Twomey	Irish Bankers' Federation
Secretary	
Pat Nolan	Department of Enterprise, Trade and Employment

5 Section 69 provides: (1) The Review Group shall consist of such and so many persons as the Minister from time to time appoints to be members of the Review Group. (2) The Minister shall from time to time appoint a member of the Review Group to be its chairperson. (3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine. (4) A member of the Review Group may at any time resign his or her membership of the Review Group by letter addressed to the Minister. (5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

6 In June 2001, Marie Daly, IBEC, replaced Frank Cunneen as a member.

7 In March 2001, Deirdre Somers, Irish Stock Exchange, replaced Gerardine Jones as a member.

8 In October 2001, John O'Donnell became a senior counsel.

9 From January 2002, for the Review Group's second programme, the nominee of the Institute of Chartered Secretaries and Administrators is Martin Jacob.

1.2 Context of company law review in modern Ireland

1.2.1 There have been a number of dramatic changes in the Irish economy over the past decade. The indicators of economic wellbeing such as per capita income, employment and unemployment rates have all improved at unprecedented levels. The educational and skills basis for building a buoyant economy had already been laid in place by massive and targeted investment. The physical infrastructure deficit is being addressed, notably through the national development programme. With its highly skilled workforce and rapidly improving physical infrastructure Ireland now finds itself ready and able to compete in the global marketplace. These strengths will undoubtedly assist in the continued generation of wealth for Irish society. Even in the context of the economic slowdown in the United States, aggravated by the consequences of the terrorist attack of 11 September 2001, the prognosis for continued economic growth in Ireland is positive, albeit reduced. Both the ESRI's and the Central Bank of Ireland's projections (October 2001) suggest modest growth in 2002 with recovery to relatively higher levels of growth in the medium term.

1.2.2 There is, however, at least one area of our business environment which has not kept pace with developments. This is the legal and regulatory framework in which Irish companies operate and which is intended to provide the legal context for investment, for risk-taking, for profit-making, for corporate governance and for compliance with public policy objectives and ethical standards; in short, our companies code.

1.2.3 It would be neither fair nor accurate to say that there has been no activity in the area of company law over the last few decades. Quite the contrary: reform has been driven because of the need to comply with EU Directives and Regulations; because of crises in particular industrial sectors; because of important innovations in peer jurisdiction company law regimes; and because of lacunae identified by the findings of company investigations and tribunals of inquiry (and by the ad hoc company law review group which reported in 1994). The establishment of the Company Law Review Group, however, marks a very significant innovation. The desirability (if not, even, the necessity) of proactively reviewing our companies code on an ongoing basis has now been accepted. It has been established that company law reform is an ongoing aim of government policy, and the Review Group has been charged with the responsibility of drawing up policy proposals for change. In its commitment to fulfilment of that task, the Review Group is aiming to simplify the Companies Acts to bring greater clarity and transparency to the companies code and to increase its intelligibility to the business person.

1.2.4 In the last few years, compliance with the companies code as regards registration and filing requirements has been significantly increased due to policy decisions and improved resourcing of the Companies Registration Office "CRO". On foot of this there has been a dramatic improvement in the proportion of companies filing their annual returns – up from 44% (of those due to file) in 1998 to 98% in 2000. The Companies Report 2000[10] (published September 2001) documents this improvement. Similarly, the establishment of the Office of the Director of Corporate Enforcement with its powers to investigate and prosecute breaches of the Companies Acts and the provision of dedicated staff to that Office is likely to be an influential force that will increase compliance with the companies code. The Review Group believes that its report, similarly, will foster a culture of compliance, brought about not only through specific changes we recommend, such as those in the area of criminal acts, omissions and sanctions but also because of the general approach to simplification. The more intelligible and reasonable is the law, the more likely it is to be respected and the greater the moral justification for "zero-tolerance" for non-compliance.

1.2.5 Bringing greater clarification and simplification to the companies code is an imperative. Despite Ireland's economic advances, and indeed our state of the art profile in some areas of business there has not been an equal emphasis to date on bringing the *regulatory* company laws, and perhaps more importantly, *facilitatory* company laws, to a similar world class level. The importance of having an efficient and effective regulatory environment is set out cogently in the OECD review of regulatory reform in Ireland, published in 2001. That review notes:

10 Government Publications (Pn. 10423).

> "Regulatory reform is helping Ireland to manage the consequences of fast growth and to build new capacities to sustain growth into the future..... Regulatory reform is seen as a way to open up important infrastructure and policy bottlenecks to further growth and to attain efficiency improvements that can help manage inflationary pressures... The Irish government is…using reform to establish a more competitive and flexible economy that can innovate, adapt and prosper even as the sources of its current prosperity change. The challenge is to move from growth based on using more resources (mostly more labour) to growth based on using resources better, that is, on productivity improvements. This shift in sources of growth requires a more nimble and dynamic economy rooted in a modern regulatory environment that is consistent with market forces, rewards productivity and innovation, and responds to consumer needs and changing market opportunities, domestic and international."[11]

By facilitatory company law is meant the legal code that permits business to be conducted through the registered company, for example, the law relating to corporate governance (e.g. the holding of meetings, whether of members or of directors) and the law relating to the rights of shareholders and creditors.

1.2.6 The Review Group considers that it is necessary to create a new structure for Ireland's company laws which will provide the wherewithal for innovation and capacity building. Whilst it is believed that the recommendations in this first report will provide the cornerstone for the new companies code, maximum benefit will come only over time. The Review Group's aspiration is, through a series of reports, to establish a company law framework perceived as among the world's best; a framework with a degree of efficiency and effectiveness in legislation and indeed in the administration of justice such that Ireland becomes a forum of choice for dispute resolution by corporate litigants. In this respect the Review Group is ever mindful of the statutory injunction contained in s 68(2) of the 2001 Act, viz.:

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

The Review Group cherishes this imperative as being the very essence of its brief.

1.3 The Review Group's functions

1.3.1 The statutory functions of the Review Group are set out in s 68(1) of the 2001 Act, which provides:

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

1.3.2 Section 70(1) of the 2001 Act obliges the Minister to determine the Review Group's work programme at least once in every two years, and in fulfilment of that task the Group works in two yearly calendar year cycles.[12] This is notwithstanding the Review Group's obligation to make an annual report to the Minister.[13] The first such cycle runs to year-end 2001.

11 OECD, Regulatory Reform in Ireland. April 2001.

12 Section 70(1) of the 2001 Act provides that: The Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period.

13 Section 71(1) of the 2001 Act. See 1.10.2, below.

1.4 The Review Group's first work programme

1.4.1 The Minister assigned to the Review Group a very challenging and far-reaching work programme for the period 2000 to 2001. What follows here is a summary of the assigned work programme.

Simplification

1.4.2 The requirement of the Review Group was to make recommendations that will have the objective of simplifying company law for all companies, but in particular for small and medium-sized private companies. The Group has approached simplification from a number of perspectives. Lengthy consideration has been given to restructuring company law with a view to segregating provisions applying only to private companies limited by shares, which account for 88.8% of all companies registered as at 31 December 2000.[14] In addition, the simplification agenda is examined from the perspective of the main principles in company law, namely: corporate governance; creditor protection; shareholder protection; incorporation and registration; and criminal acts and omissions and the penalties relating to these. The Group also wishes to simplify the law with regard to the issuing of prospectuses for public companies: to clarify what is and is not a public offer; and to clarify filing requirements.

1.4.3 Recommendations directed towards the achievement of simplification are set out in Chapter 3, which deals with the philosophical and organisational approach taken to simplification, and in Chapters 4 to 10, which deal with the simplification agenda and initiatives from the aspect of a number of different themes and perspectives. Simplification is not confined to these chapters. It informs the whole ethos and content of the report. The biggest single innovation envisaged in the area of simplification is the differentiation and segregation of provisions applying to private companies limited by shares from those applicable to all other companies and bodies corporate. The approach proposed on this is set out in Chapter 3. The practical consequence in differentiating these provisions will mean that directors and other users of private companies would no longer have to trawl through substantial parts of the Companies Acts to establish which sections do or do not apply to them.

Corporate capacity and authority

1.4.4 In its review of *corporate capacity* the Review Group has examined the current, highly unsatisfactory, doctrine of *ultra vires*. At present, the extent to which a company can act outside its objects as stated in its memorandum and articles of association is far from clear. The Group recognises that the law in relation to *corporate authority* (i.e. the authority of corporate agents, such as directors) requires to be reviewed contemporaneously. The Group has examined these areas and makes recommendations for a major reform.

Company directors and other officers

1.4.5 The Review Group aims to review and then set out in a clear and accessible form the powers and duties of company directors and of company secretaries. The Group believes it is also important to codify important aspects of directors' obligations, which have to date existed in common law rather than in the companies code.

Corporate litigation

1.4.6 The Review Group assesses the case for the dedicated treatment of company and commercial law cases in the Irish courts and makes recommendations accordingly.

Regulation of insolvency practitioners

1.4.7 The Review Group examines the case for the regulation of liquidators, receivers and examiners and, on balance, proposes a requirement for an appropriate professional qualification along with a devolved basis for regulation via recognised professional bodies.

14 See p 34 of the Companies Report 2000.

Auditors

1.4.8 When the Minister set up the Company Law Review Group in February 2000 the regulation of auditors was among the issues, which the Review Group was asked to consider in its work programme. However, in parallel, a dedicated Review Group on Auditing (RGA) was constituted with a specific mandate to consider matters which had arisen on foot of examination by the Dáil's Public Accounts Committee of the evasion of Deposit Income Retention Tax and other issues related to the regulation of auditing. The RGA reported in July 2000. Consistent with the time window set for consultation on that report the Company Law Review Group gave its comments on the recommendations in the RGA report to the Minister on 3 November 2000. In considering the RGA report the Review Group concentrated on recommendations in Chapters 11 to 14 of that report, as these are the issues of relevance to company law. The Review Group focused on implementation rather than policy issues, as it did not see its role as producing an alternative to the RGA report.

Mitigating the effects of strike-off for creditors

1.4.9 Representations were made to the Minister by members of the public concerning the difficulties facing creditors where companies have been struck off the Companies Register for failure to file the appropriate details with the CRO. The Minister referred[15] this issue to the Review Group, which makes a number of recommendations on improving the remedies for such creditors.

1.5 Consolidation

1.5.1 As noted above, the report of the McDowell Group recommended the consolidation of the companies code in addition to setting up the Office of the Director of Corporate Enforcement and the establishment of the Company Law Review Group. The Review Group agrees on the importance of consolidating the companies code and is keen to ensure convergence between the review and consolidation initiatives. To that end the Group considered the appropriate sequencing of the consolidation and review projects. Because the substantial restructuring of the companies code and its principal Act, the Act of 1963, is recommended in this first report, the Group came to the considered opinion that it would be best to implement the first major review of company law, i.e. the restructuring undertaken on foot of this report, *before* consolidating the companies code.

1.5.2 Consolidation as an aspect of simplification is considered in Chapter 3 and is addressed in detail in Chapter 17. Chapter 17 sets out how the restructuring of the companies code should be achieved in the process of consolidation:

- to give primacy to the private company limited by shares as the model company; and
- to segregate provisions of the companies code, distinguishing provisions applying to private companies limited by shares from those applicable to all other companies and other bodies corporate.

The Review Group also considered the possibility of recommending the restatement[16] of the companies code as an alternative to consolidation but decided against this option. The rationale for the Group's decision that consolidation was the preferable option is set out in Chapter 3 and amplified in Chapter 17.

1.6 Other laws reviewed during the first work programme

1.6.1 During the process of deliberations on the Review Group's work programme and the formulation of its recommendations, the Company Law Enforcement Bill was progressing from initiation in the Oireachtas through to enactment as the Company Law Enforcement Act 2001. The Group made a limited number of proposals that resulted in the following additional sections being included in the 2001 Act:

15 Section 70(2) of the 2001 Act provides: Notwithstanding subsection (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

16 Restatement is conceived as a procedure whereby the Attorney General makes available the text of Acts that have been amended in an annotated form. A restatement is not submitted to the Houses of the Oireachtas but will be certified by the Attorney General as prima facie evidence of the law set out in the restatement. A Bill to facilitate such restatement is before the Oireachtas at present.

(i) Section 42. The changes insert additional paragraphs (h) and (i) in s 160 of the 1990 Act and provide for the court to make an order against a person disqualifying him from acting as a company director or auditor or from managing a company if he was a director of a company struck off the Companies Register for failing to file returns or if a person has been disqualified in another jurisdiction from being appointed a company director or secretary.

(ii) Section 60. Substitution of s 127 in the 1963 Act. Subsection 3 provides for the court to make an order extending the filing time for a company where it feels it would be just to do so.

(iii) Section 89. Amendment to s 60 of the 1963 Act to allow for the use of the unanimous written resolution procedure in the validation procedure where companies provide financial assistance in connection with the purchase of shares. The amendment also extends the deadline for filing a copy of the company directors' statutory declaration with the CRO.

1.6.2 The Review Group also deals in this report with a number of regulatory issues for the funds industry. While funds are regulated prudentially by the Central Bank of Ireland they are regulated as regards corporate governance by the companies code. Because funds generally have very distinct forms of company organisation it is often inappropriate to treat them as is done with the generality of companies. Accordingly, sections of the Companies Acts are often disapplied from funds. Other sections pertain only to funds. In January 2001 the Review Group established a mechanism for considering proposals coming forward for changes in the companies code as applying to funds. Under this process the Funds Group Legislation Subcommittee[17] brings forward proposals in relation to investment funds and refines and agrees these as much as possible, prior to reporting to the Review Group. Proposals initiated by the Funds Group Legislation Subcommittee, having gone through this process, are then scrutinised by the Review Group. As a consequence of this process, the Review Group agreed a number of recommendations applying to Investment Funds and these are set out in Chapter 16.

1.6.3 As the Review Group analysed the issues arising and considered the recommendations it should make it was clear that a number of issues were major in themselves but also somewhat outside the immediate parameters of the issues in the Group's programme. Accordingly, issues have been identified that the Group considered to be more appropriate for assignment in its second work programme 2002 to 2003. These are identified in the chapters as they occur naturally in the context of the issues under discussion.

1.7 The Review Group's approach

1.7.1 In reaching the conclusions in this report and setting out the recommendations to give them effect, the Review Group has sought to inform its decision-making processes with a consciousness of competition issues and of the need for the Irish economy to remain competitive. The Group has sought to transcend a "command and control" mindset. Indeed, our whole emphasis in bringing the framework on company law in Ireland into the 21st century is to ensure that economic activity is enhanced by both the efficiency and effectiveness of the company law regime. We have also been informed in our deliberations by a concern for where the balance of the public interest lies. The Group believes that, in general terms, less law is best and where possible has recommended the repeal of anachronistic provisions. In some instances there is a case for removing or lessening red tape; in others, the public interest requires the introduction of additional regulation. On balance, the Group came, notably, to this latter conclusion with regard to the regulation of insolvency practitioners. Chapter 13, which deals with this issue, sets out in detail the nature of the concerns that guided our conclusions.

1.7.2 For many years, from the perspective of consumer or customer protection the emphasis was on the legislative enactment of regulatory rules. The concern of the Review Group has been to shift that focus with a view to achieving best practice through compliance with balanced regulatory rules. Until recently, where compliance was not evident there was little concentration on enforcement. This general climate is changing. Certainly, the area

17 The Funds Group Legislation Subcommittee is a subcommittee of the IFSC Funds Group, an advisory group which brings together State and industry experts to advise the Government on policy and technical (legal/regulatory/tax) matters designed to ensure the continuing competitiveness of Ireland as an international centre for financial services. The IFSC Funds Group operates under the aegis of the Department of the Taoiseach .

of company law enforcement has been given a new emphasis by the 2001 Act and by the compliance policies being applied by the CRO.

1.7.3 From the inception of the Review Group, we recognised the importance of consultation with the business and individual users of company law. We outlined our role and task and sought submissions on our work programme in an advertisement in the national press on 17 February 2000. On 17 January 2001 the Group advertised again for submissions, this time specifically inviting proposals in the area of simplification. The list of individuals and bodies who made written submissions is set out at 1.12.1. The Group acknowledges these with gratitude. In addition to written submissions the Group has had the benefit of much information and proposals for change which have been made through its different committees and the wide array of expert contacts available through its membership. The work programme of the Review Group has also been displayed on the website of the Department of Enterprise, Trade and Employment throughout 2000 and 2001. Once the Group was constituted on a statutory basis we set about establishing our own website – www.clrg.org which we expect to be online early in 2002. The site will contain up-to-date information on the Group's activities, as well as links to the website of the Department, the CRO and ODCE.

1.7.4 In carrying out its work the Review Group functioned as a plenary body which met at monthly intervals.[18] Much of the preparatory work, information gathering and report drafting was done in committees. The Group set up dedicated committees for virtually all of the chapters. The Group was also mindful of the need to be aware of and to contribute to the development of company law issues at EU level. Two issues arising from the EU Financial Services Action Plan, the draft regulation on International Accounting Standards and the draft directive on European Public Offers are of particular interest and we have set up a standing committee on each of these to liaise with the Department of Enterprise, Trade and Employment.

1.7.5 In preparing the report the Group had available to it a budget of £88,000 (€111,736.95) in 2000 and £91,000 (€115,546.17) in 2001. Actual expenditure was considerably less than the financial provision, especially in 2000, the first year of the Group's existence. The budget was used for the purpose of information gathering, for augmenting, editing and refining the contents of a number of chapters, for setting up the Group's website and for general support activities. In addition to the amounts specified, the Department provided the Group with the resource of the secretary to the Group and a small support staff. In the period from inception to the final meeting in 2001 a total of 83 meetings were held, composed of plenary and committee meetings.

1.8 Taking cognisance of reforms in other common law jurisdictions

1.8.1 In approaching its task the Review Group was conscious that it was working in a world where the globalisation of capital, investment and business activity is an increasing fact of life. Company law blossomed in the 19th Century. While the basic principles of sound corporate governance remain as valid as ever, the Group considers that the law undoubtedly needs substantial updating and reform. To date, the degree of convergence internationally in commercial law has been less in the area of company law than, for example, in the regulation of capital markets. There is, nonetheless, significant cross-fertilisation internationally in company law. Developments in different common law jurisdictions offer a range of models not only for specific legislative changes but also for changes in the framework of company law, most usually differentiated by the public or private status of a company or by its size.

1.8.2 In its analysis, the Review Group has considered the most influential models and changes in company law in order to draw on the best elements of practice and regulation elsewhere with a view to shaping a state of the art company law regime for Ireland. The Group, for example, looked at the changes brought about by the Canada Business Corporations Act 1975. This drew substantially on the Model Business Corporations Act in the United

18 Section 70(3) of the 2001 Act provides: The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may make such arrangements for the conduct of its meetings and business (including by the establishment of sub-committees and the fixing of a quorum for a meeting) as it considers appropriate.

States while retaining elements of United Kingdom company law. The Australian Corporations Act 2001 includes a highly developed and detailed securities law regime. We have had regard also to other jurisdictions which have modernised company law such as the State of Delaware, Singapore, Malaysia and Hong Kong. The New Zealand Companies Act 1993 broadly adopted a North American/Canadian model of corporate law and an entirely new framework for company law has developed there. Closer to home there are models and specific sections of legislation in England and Wales, in Scotland and in Northern Ireland which we feel could usefully be emulated. It is instructive to note that in every peer jurisdiction we looked at there was a concern both to simplify the content of the company law regime and to improve the intelligibility of company law for both lawyer and non-lawyer. It is important to note that on foot of its analysis the Group decided it was appropriate to retain an omnibus companies code for Ireland and not to go the route of establishing a separate legal framework for small and closely held companies, e.g. on the analogy of the 1984 South Africa Close Corporations Act. Rather, the Group thought the most constructive approach was to differentiate, clarify and disapply existing provisions in the companies code as much as possible within a single legal framework.

1.9 The effects of membership of the European Union

1.9.1 Since joining the European Communities in 1973, Ireland's company law regime has been substantially influenced by Community Directives, with our companies code being amended to give effect to European law. Through this route Ireland has been influenced by the commercial law traditions of Continental Europe. The intensive phase of incorporating company law Directives in Irish law has been completed. However, the indications are that we are entering a new phase of activity as Europe as a whole seeks to modernise and streamline commercial law. Notable among these are the February 2001 final report of the Committee of Wise Men on the Regulation of European Securities Markets (the Lamfalussy Report). That report advocates the need to profoundly change and reform the regulation of EU financial markets in order to assist the creation of an integrated financial services market. The European Summit in Stockholm in March 2001 broadly endorsed the Lamfalussy approach; discussions are continuing between the Commission and the European Parliament on the application of the approach. The Commission has already proposed two draft framework Directives based on Lamfalussy – the Prospectuses Directive and the Market Abuse Directive. It is also noted that the Council has approved the statute for the European Company, which must become operable no later than 2004.

1.9.2 A High Level Group of Company Law Experts has also been set up by the European Commission to define new priorities for a modern regulatory European company law framework. The final report of that Group is due in mid-2002.

1.10 The Review Group's reporting obligations

1.10.1 The Review Group has a statutory obligation to make an annual report. Section 71(1) of the 2001 Act provides:

> No later than 3 months after the end of each calendar year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.[19]

1.10.2 This report is the Review Group's annual report for the year ending 31 December 2001.

1.11 Recommendations on the matters to be included in the Review Group's second work programme

1.11.1 In addressing its first work programme, the Review Group formed the opinion that certain areas of company law were in need of review. The Group recommends to the Minister that the following areas and topics be referred to the Review Group for consideration and review in its second work programme:

19 Section 71(2) provides: A report under subsection (1) shall include information in such form and regarding such matters as the Minister may direct.

(i) The preparation of heads of a Bill in respect of the recommendations in this Report. The Review Group would wish to assist in facilitating the translation of its recommendations into the Heads of a Bill in a timely manner.
(ii) The determination, in the early part of 2002, of the structure of the consolidated Companies Act.
(iii) Consideration of those Regulations in Table A of the First Schedule to the 1963 Act that were not considered in the Group's first work programme, with the intention of migrating them to the primary legislation or repealing them, thus facilitating a one document company constitution.
(iv) Whether Ireland should have a State-funded public interest liquidation service.
(v) The law relating to the winding-up of companies.
(vi) Shares and share capital.
(vii) Charges and other forms of security.
(viii) Accounting, audit and related matters.

Without prejudice to the breadth of the Group's review of the foregoing areas of company law, each area must be considered from the perspective of simplification.

1.12 Submissions

1.12.1 The Review Group received submissions from the following parties:

Arthur Cox, Solicitors

Consultancy Committee of Accountancy Bodies – Ireland

Dublin Solicitors Bar Association (Taxation and Commercial Committee)

Eircom plc

A &L Goodbody, Solicitors

Institute of Chartered Secretaries and Administrators (Irish Region)

Irish Institute of Credit Management

Jefferson Smurfit Group

Law Society of Ireland (Business Law Committee)

Alan J. Mitchell, Chartered Accountant

Sean M Nolan, McCann FitzGerald, Solicitors

Barry O'Neill, Eugene F. Collins, Solicitors

PriceWaterhouseCoopers

These submissions were of considerable assistance to the Group in analysing issues and identifying remedies for problems. The Group would like to express its gratitude to all those who contributed.

2

CHAPTER 2

Executive Summary of Recommendations

2.1 Introduction

2.1.1 The Review Group's substantive deliberations and recommendations are contained in Chapters 3 to 17. In the body of each chapter, particular issues are, to a greater or lesser extent, contextualised and a recommendation formulated. At the end of each chapter, the core recommendations are extracted and succinctly stated, with reference to the paragraph number in the body of the chapter where the issue is considered and the recommendation reached. In this chapter, each of those summaries of recommendations are clustered for readers' ease of reference and the Group's 195 recommendations are listed.

2.2 Areas for consideration in second work programme (Chapter 1)

2.2.1 In addressing its first work programme, the Review Group formed the opinion that certain areas of company law were in need of review. The Group recommends to the Minister that the following areas and topics be referred to the Review Group for consideration and review in its second work programme:

(i) The preparation of heads of a Bill in respect of the recommendations in this Report. The Review Group would wish to assist in facilitating the translation of its recommendations into the Heads of a Bill in a timely manner.
(ii) The determination, in the early part of 2002, of the structure of the consolidated Companies Act.
(iii) The consideration of those Regulations in Table A of the First Schedule to the 1963 Act that were not considered in the Group's first work programme, with the intention of migrating them to the primary legislation or repealing them, thus facilitating a one document company constitution.
(iv) Whether Ireland should have a State-funded public interest liquidation service.
(v) The law relating to the winding-up of companies.
(vi) Shares and share capital.
(vii) Charges and other forms of security.
(viii) Accounting, audit and related matters.

Without prejudice to the breadth of the Group's review of the foregoing areas of company law, each area must be considered from the perspective of simplification.

2.3 The Simplification of Irish Company Law (Chapter 3)

2.3.1 In Chapter 3 the Review Group considered the optimum way in which to achieve its simplification agenda and makes a number of recommendations:

1. The private company limited by shares, or CLS, should be the primary focus of simplification; anomalies and uncertainties should, however, be removed from the law applicable to other types of company. **(3.2.3**)

2. For private companies limited by shares the current two-document company constitution, composed of a memorandum of association and articles of association, should be replaced by a one-document constitution. **(3.2.7)**

3. The Review Group recommends an increased focus, in the enactment of all future companies legislation, on the needs of the small private limited company and in this respect fully endorses the "think small first" approach favoured by the (UK) Company Law Review Steering Group. The three principles to ensure that new legislation meets the needs of small private companies travel well to Ireland. These are: (i) the law should be clear and accessible; but (ii) accuracy and certainty should not be sacrificed unduly in an attempt to make the law merely

superficially more accessible; and (iii) the legislation should be structured in such a way that the provisions that apply to small companies are easily identifiable. **(3.2.8)**

4. Although the privilege of limited liability does give rise to much of the legislative complexity and compliance burdens for small businesses, the unlimited company is not the panacea to complexity. **(3.3.6)**

5. Shareholder protection measures should distinguish between the CLS and the PLC. (**3.4.13(i)**)

6. Shareholder protection measures should not be unnecessarily complex. Shareholder approval should be obtainable in all companies using the unanimous written resolution procedure in s 141(8) of the 1963 Act, whether or not their articles so permit. **(3.4.13(ii))**

7. Creditor protection measures should be reasonable and, to the extent that a company has limited liability driven by its solvency and the establishment of such. Rather than provide for outright prohibitions on companies engaging in particular activities, where possible, there should be validation procedures whereby companies can engage in particular activities upon their solvency being confirmed by statutory declaration of the directors. **(3.4.13(iv))**

8. Creditor protection measures should recognise de minimis exceptions whereby small or otherwise irrelevant transactions are exempt from strict regimes. **(3.4.13(vi))**

9. Permitting companies to fund otherwise prohibited activity, where financed by distributable profits should continue to be used to mitigate the more harsh effects of creditor protection provisions in respect of activities which are considered inappropriate to the validation procedure. (**3.4.13(vii)**)

10. The effect of the same legal provisions applying to CLSs and PLCs is to increase the complexity of the companies code as it applies to the CLS. The law applicable to the CLS should be divorced from the law applicable to public limited companies and other companies. **(3.5.5)**

11. The private company limited by shares (CLS) should be established as the model company in the Companies Acts. **(3.6.5)**

12. The CLS should be defined as a company which: (a) has a share capital; (b) has the liability of its members limited by shares; (c) by its constitution (i) restricts the right to transfer its shares; and (ii) limits the number of its members to one hundred and fifty, not including persons who are in the employment of the company; and (iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company. **(3.6.6)**

13. Following the redefinition of the private company and the realignment of the Companies Acts to recognise the CLS as the most important type of company, the law applicable to the CLS must be clearly identifiable. The law applicable to the CLS should be self-contained and segregated from the law applicable to other types of company and other bodies corporate. **(3.7.1)**

14. The consolidated Companies Act should be sub-divided into two groups of law. The first group of law (Group A) will define the CLS and contain all company laws that apply to it and the second group of law (Group B) will reference and define the remaining types of companies and other bodies corporate and provide, by cross-reference to Group A, those provisions that apply to each type of company. **(3.7.2)**

15. Greater use should be made of defined terms in order to make the legislation more succinct and less repetitive in form. Defined terms that apply throughout the Companies Acts should be highlighted in bold print and defined terms that apply only to the section Chapter or Part of the Acts in question should be in italics. **(3.9.1)**

16. Company officers and company members should be facilitated to transact business electronically, inter se, and with the regulatory authorities so as to minimise costs and to maximise the gain from efficiencies in time and convenience. **(3.11.3)**

17. The revision of company law must first be carried out and enacted before the consolidation of company law. **(3.12.4)**

18. Consolidation is a better option for Irish company law than restatement, although restatement may be used in respect of amendments subsequently made to the consolidated Companies Act. **(3.12.6)**

19. Regulations concerning company law made under the European Communities Act 1972 should be included in the consolidated companies Act without first being enacted as primary legislation. **(3.12.7)**

2.4 Simplification – Corporate Governance (Chapter 4)

2.4.1 In Chapter 4 the Review Group makes the following recommendations to achieve simplification in the context of corporate governance:

20. There should be no change to the requirement that every company must have a registered office, and recommends against any amendments to the general requirement to publicise the name of a company. **(4.3.1)**

21. The company seal should be retained; however, a person registered under Regulation 6(2) of SI No 163 of 1973 should be deemed to be a person appointed by the directors to affix the seal and sign the instrument under seal and in such a case, no countersignature is required.**(4.3.9)**

22. Section 40 of the 1963 Act should be amended to be made explicitly declaratory of the fact that the power to appoint an attorney (i) is regardless of any provision in the memorandum and articles of association, and (ii) extends to acts done within the State. **(4.3.14)**

23. Documents required to be made available for inspection should be made available for inspection either at the registered office or another place in the State, subject to notification to the Registrar of that location (as is at present the case with regard to the register of members). **(4.4.5(i))**

24. The Minister should make an order to standardise register inspection and copying fees commensurate with the actual cost of provision of copies. **(4.4.5(ii))**

25. No change should be made to those documents that must be made available by companies for inspection and those documents that must be furnished, notwithstanding apparent anomalies. **(4.4.5(iii))**

26. There should be no change to the law whereby a company need not have for inspection a copy of its memorandum and articles of association. **(4.4.5(iv))**

27. There should be no change to the classes of disclosee of registers and documents. It should be provided that auditors, in fulfilment of their duties, are in all cases made specific disclosees of registers, documents and minutes. **(4.4.5(v))**

28. The ECA 2000 should be taken as the principal legislation on the keeping of electronic records by companies under the Companies Acts. **(4.4.14(i))**

29. The provisions of the Companies Acts regarding companies and their ability to keep records in electronic form should, with the exception of s 239 of the 1990 Act, be repealed. **(4.4.14(ii))**

30. The Minister should be enabled to make regulations to give better effect to the provisions of ECA 2000 as they apply to companies. **(4.4.14(iii))**

31. In the case of records retained or produced under the Companies Acts which may be accessed by a class of persons (e.g. shareholders or the public), any reasonable form of retention or production may be used by the company provided that it complies with regulations (if any) made by the Minister. **(4.4.16(i))**

32. In the case of the production of extracts or copies of records or documents, hard copies should be retained as the standard mode of delivery, with s 12 of the ECA being available on a non-mandatory method to facilitate electronic delivery. **(4.4.16(ii))**

33. The powers of the Minister to make regulations should explicitly provide that such regulations may delete the requirement for the production of written extracts from registers. **(4.4.16(iii))**

34. Where records are retained by a company on a generally accessible website, the Registrar should be notified on the existing statutory form (B3) of the relevant address of the website. **(4.4.18)**

35. For companies other than PLCs it should be permissible in law for such companies' members to dispense with the need to hold an annual general meeting. **(4.5.6)**

36. In all companies, except PLCs, the members entitled to attend the annual general meeting should be able to sign a unanimous written resolution, dispensing with the need to convene and hold a meeting and agreeing to accept, in lieu thereof, copies of all documents they would otherwise receive and to take such decisions as require to be taken by unanimous written resolution. **(4.5.6(i))**

37. Any resolution required to be passed at any general meeting in any company, including the annual general meeting, should be able to be achieved by unanimous written resolution, consisting of any number of pieces of paper, regardless of what is in the company's articles of association. **(4.5.6(ii))**

38. Companies that are permitted to dispense with the annual general meeting should be able to initiate a procedure in advance of the time they would be required to convene the annual general meeting so that, if unanimous consent is not forthcoming, a meeting can be convened and held in accordance with the Companies Acts. **(4.5.6(iii))**

39. In the event that a written resolution is not contemporaneously signed (with separate documents being circulated to shareholders) the company should confirm the passing of the resolution to the members within one month of its passing. **(4.5.6(iv))**

40. Companies' auditors should continue to be entitled to demand that the directors convene an annual general meeting where there is a proposed resolution for any change in the audit appointment. The consent of the auditors should not, however, be required for the transaction of the business of the annual general meeting (other than matters affecting the auditors per se). **(4.5.6(v))**

41. As with all matters to be attended to in writing, the paperwork which could replace an annual general meeting should by reason of the ECA 2000 be able to be achieved electronically. **(4.5.6(vi))**

42. The Companies Acts should specify precisely what are to be the periods of notice for meetings, rather than delegating it to provisions in articles of association. The periods of notice should be 21 days for an annual general meeting, meetings to pass a special resolution and meetings convened under s 201 of the 1963 Act. The period of notice for an extraordinary general meeting should be 7 days, except in the case of a public limited company where it should be kept at 14 days. Companies would be entitled to increase these periods of notice. **(4.5.10(i))**

43. A notice, whether of a meeting or of any other matter and any other document, once posted to the registered address of a member should be deemed received 24 hours following posting.**(4.5.10(ii))**

44. The period of notice for any matter under the Companies Acts should exclude the day of receipt or, when posted, the deemed date of receipt, as well as the date of the meeting. (**4.5.10(iii))**

45. As with all matters to be attended to in writing, the giving of notice of company meetings should by reason of the ECA 2000 be able to be achieved electronically. **(4.5.10(iv))**

46. Any notice may be served and any other document may be delivered by hand at a member's registered postal address (as well as by post to that address and personally to the member). **(4.5.12)**

47. The requirement of directors to disclose directorships during the previous 10-year period should be reduced to 5 years. **(4.6.3)**

48. All changes of name of a director or secretary, no matter how occasioned, ought to be notified to the Registrar when they occur and disclosed as a previous name in subsequent filings. **(4.6.5)**

49. Table A should be retained for the present, but its provisions as to internal corporate governance should also be set out in the main body of the statute, with the same provisions as to opt-outs as exist under articles of association. **(4.7.3)**

50. Regulation 75 of Table A should be merged with s 3 of the 1982 Act to provide that the first directors and their number are as specified on the Form A1. **(4.8.2)**

51. Regulation 77 of Table A should be repealed on grounds of obsolescence. **(4.8.4)**

52. Regulation 79 of Table A should be repealed, and reliance be placed on Regulation 80 instead. **(4.8.5)**

53. Regulation 80 should be migrated from the articles of association to primary legislation and, the words "such directions" should be replaced with "such regulations". **(4.8.10)**

54. Regulation 81 of Table A should be repealed, on grounds of obsolescence. **(4.8.13)**

55. Regulation 88 of Table A should be repealed, on grounds of obsolescence. **(4.8.15)**

56. Regulations 92 to 95 of Table A should be repealed for private companies limited by shares and replaced for PLCs by a rotation scheme in line with current best practice in corporate governance. **(4.8.17)**

57. Meetings of directors of all companies ought, by statute, to be capable of being held by telephone or by other suitable electronic means whereby all directors can hear and be heard unless the articles of association of the company specifically provide otherwise. **(4.8.19)**

58. Written resolutions of directors under Regulation 109 of Table A ought to be possible by separate pieces of paper signed separately. **(4.8.20)**

59. The European Communities (Single Member Private Limited Company) Regulations 1994 should be repealed, with a provision that private companies can be formed with one member or more, and that any public company can be formed with two members or more. All other provisions in these Regulations can be provided for in statute, as may be considered necessary. **(4.9.2)**

60. Section 36 of the 1963 Act should be repealed. (**4.9.3)**

2.5 Simplification – Creditor Protection (Chapter 5)

2.5.1 In Chapter 5 the Review Group makes the following recommendations to achieve simplification in the context of creditor protection:

61. There should be a single validation procedure which can be carried out for validating what would otherwise be prohibited by s 60 of the 1963 Act, guarantees and the provision of security in connection with loans, quasi-loans and credit transactions, prohibited by s 31 of the 1990 Act, and s 256 of the 1963 Act. **(5.2.6/14)**

62. The single validation procedure should require the majority of the directors to make a declaration in which it is stated that they are satisfied that the company is solvent at the time of the declaration. The declaration should incorporate a statement of the company's assets and liabilities and the benefit to the company in carrying out the transaction should be stated in the declaration. The directors should, if the court considers it just and equitable, be personally responsible for the company's debts where the declaration is made without reasonable grounds and the company is not subsequently able to pay its debts and they and persons connected to them should be liable to indemnify the company where they have received a benefit from the transaction. In addition, a special resolution of the members should be required to validate the proposed transaction. **(5.2.8)**

63. The additional requirement of an independent person's report is unnecessary in validation procedures and should be dispensed with. **(5.2.10)**

64. The validation procedure under s 34 of the 1990 Act should continue to be capable only of validating guarantees and the provision of security in connection with loans, quasi-loans and credit transactions. **(5.2.12)**

65. The breach of s 60 of the 1963 Act, s 31 of the 1990 Act, and s 256 of the 1963 Act should be a criminal offence, modelled on s 40 of the 1990 Act and punishable in accordance with s 240 of the 1990 Act. **(5.2.13)**

66. Gratuitous dispositions should be subject to the general duty that directors of companies can only act bona fide and in the interests of the company as a whole. **(5.3.4)**

67. There should be no requirement to validate the refinancing of s 60 transactions which have been already validated. **(5.4.3)**

68. The requirement under s 60 to validate the giving of warranties to purchasers and underwriters in connection with the purchase of shares should be repealed. **(5.4.5)**

69. The requirement under s 60 to validate subscribers' advisory fees should be repealed. **(5.4.6)**

70. The requirement under s 60 concerning the application of incurring of expense by a company to facilitate the admission to or continuance of a trading facility where shares on the stock exchange or securities market including expenses associated with the preparation of filing of any documents should be repealed. **(5.4.7)**

71. Compliance by the company with the Irish Takeover Panel Act 1997 be exempt from the provisions of s 60 of the 1963 Act. **(5.4.8)**

72. Section 60 of the 1963 Act should not apply to "abort fees" in connection with the offer of shares. **(5.4.9)**

73. Section 40 of the 1983 Act should be repealed for private companies. **(5.5.4)**

74. The obligation for auditors to state in their audit report whether, in their opinion, there existed at the balance sheet date a situation which would require the covening of an EGM of the company pursuant to s 40 of the 1983 Act should be repealed for audit reports in respect of all companies. **(5.5.5)**

75. Consideration should be given to the abolition of duty of 1% on the issue of share capital. **(5.8.5)**

76. Annual accounts should be made up to date no more than 6 months before the annual general meeting. **(5.10.2)**

2.6 Simplification – Shareholder Protection (Chapter 6)

2.6.1 In Chapter 6 the Review Group makes the following recommendations to achieve simplification in the context of shareholder protection:

77. The Companies Acts should be amended to acknowledge the validity of electronic communication between a company and its members as if it were specified in the articles of association. **(6.5.3)**

78. Any member should be able to opt out of receiving communications electronically, without resorting to the protection of s 205 of the 1963 Act. **(6.5.4)**

79. The Minister should have the power to make regulations to take account of technological developments and possible abuses emerging. **(6.5.4)**

80. Section 134 of the 1963 Act should be amended to provide that a company should be able to hold a meeting at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. **(6.5.6)**

81. Companies should be entitled to deliver abbreviated financial information, subject to the right of members to request delivery of full accounts. **(6.5.10)**

82. Section 213 of the 1990 Act should be amended to allow all the members of any company to shorten or waive by unanimous written agreement the 21-day period of notice for exhibiting the proposed contract of purchase. **(6.7.4)**

83. Section 213(3) of the 1990 Act should not apply where the company has one member only. **(6.7.5)**

84. Subject to EU developments the following recommendations are made regarding the law related to the compulsory acquisition of shares as allowed by s 204 of the 1963 Act:

(i) the 80% value threshold for triggering compulsory acquisition entitlements should remain;
(ii) an offeror's subsidiaries' shares should contnue to be excluded from the 80% of shares accepting the offer which triggers the compulsory acquisition right;
(iii) shares held by (a) a holding company of an offeror and (b) existing shareholders who alone or in concert hold 33⅓% or more of the voting shares of an offeror should be excluded from the 80% of shares accepting the offer which triggers the compulsory acquisition right ;
(iv) the 75% of shareholders number threshold (which applies where an offeror is interested in 20% or more of the shares of the target company) should be reduced to 50%;
(v) an offeror, which at present must be a company in order to obtain rights under s 204, should be capable of being an individual or partnership. **(6.9.4)**

85. Unclaimed consideration in respect of shares compulsorily acquired as a result of the exercise of the provisions of s 204, whether moneys or shares, should be held on trust for at longest 7 years, and then given to the Exchequer. Moneys remaining unclaimed should be paid into the Exchequer on the same basis as that applying to the Companies Liquidation Account and shares should be sold and the funds paid into the Exchequer on this basis also. **(6.9.5)**

86. The terms offeror and offeree should replace transferor and transferee in the Companies Acts. **(6.9.6)**

87. Cash consideration for acquisition of securities of an Irish-incorporated PLC to members with a registered address in the State should be drawn on a bank in the State, unless such member agrees otherwise. **(6.9.7)**

88. Court approval should no longer be required to convene scheme of arrangement meetings of shareholders or creditors, where the proposed meetings are convened by the board of directors. **(6.10.5)**

89. What is now the second court hearing – to approve the notification of/ advertisement to the participants in the scheme of arrangement of the passing of the scheme resolution and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act. **(6.10.6)**

90. Section 198 of the 1963 Act should be repealed. **(6.11.1)**

91. Section 29 of the 1990 Act should be amended to remove the threshold of £50,000 (€63,486.90) for PLCs, only applying a 10% of net asset value test. **(6.11.3)**

92. The "reasonable period" at s 29(3) of the 1990 Act should be subject to ratification taking place at the next annual general meeting and in any event not later than 15 months this to apply to all companies. **(6.11.4)**

93. Section 29(7)(a) of the 1990 Act should be amended to define what is meant by a "wholly owned subsidiary" as per s 150(5) of the 1963 Act. **(6.11.4)**

94. Section 29(7) of the 1990 Act should be amended by the addition of a third exemption (c) regarding the disposal of a company's assets by a receiver. **(6.11.4)**

95. The current minimum number of members of a PLC should be reduced from 7 to 2. (**6.13.1)**

2.7 Simplification – incorporation and registration (Chapter 7)

2.7.1 In Chapter 7 the Review Group makes the following recommendations to achieve simplification in the context of registration and incorporation:

96. The various sections of the Companies Acts regarding the incorporation of private companies limited by shares should be replaced by a provision that any one or more persons may, by subscribing their names to an application for incorporation in a form prescribed for that purpose, form a private company limited by shares. **(7.2.1)**

97. There is at present a requirement that each subscriber must write in the memorandum the number of shares for which he is subscribing. The need for actual writing – as opposed to signing a typed statement – is an anachronism. This provision should be repealed. This recommendation applies to all company types. **(7.2.5)**

98. The simplified form for application for incorporation of private companies limited by shares produced by the CRO should be approved for use, containing the following:

Part I: The company name, details of the first officers, address of the registered office, the company's activity in the State and where it is carried on.

Part II: The company constitution containing (i.e. repeating) the company name, the share capital clause, and the rules currently contained in the articles of association.

Part III: A signature section, in which the first officers of the company consent to acting as such, and which includes the current association or subscription clause, wherein the subscribers subscribe to the documents and verify their contents. **(7.2.7)**

99. Where the company constitution is altered post-incorporation, only Part II of the document would be required to be re-filed in full. **(7.2.7)**

100. Persons engaged in the formation of a company ought to be permitted, on payment of the prescribed fee, to reserve a company name for a period not exceeding 28 days from the date of confirmation by the CRO that the name has been reserved in favour of that person. **(7.3.3)**

101. As long as the application for incorporation is received by the CRO within the period during which the name in question is reserved, the fee for name reservation should be offset against the incorporation fee, as the pre-approved name would not have to be checked on receipt by the CRO of the application for incorporation. **(7.3.4)**

102. All existing requirements (as identified in 7.4.1) to make and file statutory declarations with the CRO should be replaced with a requirement to make an unsworn declaration in the proscribed form, which the Registrar may in relevant circumstances accept as sufficient evidence of compliance. **(7.4.12/7.4.13)**

103. It should be open to the board of a company to authorise agents to sign documents electronically on behalf of the company and to forward them directly to the CRO. It should be a matter between the agent so authorised and the company to manage the control of these documents. **(7.5.1)**

104. Appointments should be notified to the Registrar with a confirmation that the company accepts that agents are authorised to sign documents on its behalf. The Registrar, under the general powers provided pursuant to the ECA 2000, should lay down the means whereby such agents could file electronically with the CRO. **(7.5.1)**

105. It should be expressly recognised by the Companies Acts that an authorised agent is not, by virtue of his appointment as such, to be deemed to be an officer or servant of the company, for the purposes of s 187(2)(a) of the 1990 Act. **(7.5.2)**

106. Section 242 of the 1990 Act should be altered to take account of the appointment of electronic filing agents. An offence should be created of "knowingly or recklessly to furnish false information to an electronic filing agent" under s 242. **(7.5.2/7.6.2)**

107. Section 242(1) of the 1990 Act should be expanded to create an offence for any person who "completes, signs, produces, lodges or delivers" any document. **(7.6.2)**

108. Section 249 of the 1990 Act should be repealed, and s 248 expanded to cover the delivery of documents in non-legible as well as legible form. **(7.7.3)**

109. It should be lawful to prescribe forms, which would allow a director on one form to file a change in personal particulars to be applied to the records on more than one company and would allow directors who have already provided data on other directorships in an electronic format to the CRO to exclude that information from subsequently filed forms. **(7.8.3)**

110. Persons filing documents electronically or carrying out company searches electronically should be allowed to pay CRO fees by credit card. This recommendation does not extend to searches carried out by post or in the CRO where the administrative burden would not be greatly reduced. **(7.8.4)**

111. Subject to there being a reliable assurance as to the integrity of the information, and provided that the information is capable of being displayed in intelligible form, and that it is readily accessible so as to be usable for subsequent reference, the Minister ought to be empowered to permit by order the destruction of a certain class or classes of documents, after a period of at least three years has elapsed since date of delivery of a document in that class to the CRO, and to deem the electronic copies of such documents to be the originals of the documents for all purposes. **(7.9.2)**

112. The statutory functions of the Registrar should be expressly stated in the Companies Acts. Specific reference ought to be made therein to the Registrar's function of operating advanced, readily accessible, information systems relating to the documents filed with him. **(7.10.1)**

113. Formal identification procedures such as are found in certain civil law countries ought not be initiated, but rather consideration should be given to requiring the pre-registration of directors who would at all times subsequently identify themselves confidentially on CRO filings by reference to their PPSN. In the case of non Irish-resident directors, parallel provisions would be required. **(7.12.4)**

2.8 Simplification – Criminal Acts and Omissions (Chapter 8)

2.8.1 In Chapter 8 the Review Group makes the following recommendations to achieve simplification in the context of criminal acts and omissions:

114. Subject to any constitutional restrictions, s 379 of the 1963 Act should be amended to require all non-resident directors on appointment (on Form A1 or B10) to nominate an address within the State for the purpose of service of all criminal proceedings under the Companies Acts subject to any constitutional constraints. **(8.3.15)**

115. The CRO should, on receipt of a Form B69, take immediate action against the company in question for failure to file a Form B10, as required under s 195(6) of the 1963 Act. If it emerges, as a result of this action, that false information has been supplied by a person on Form B69, the matter should be referred by the CRO to the ODCE and/or the DPP as appropriate. **(8.3.17)**

116. The approach adopted in s 240 of the 1990 Act should be extended to all offences under the Companies Acts, i.e. the same section should set out the act or omission and a statement that failure to comply is an offence, with a separate section listing those sections under which offences are created and the penalties applicable thereto, with appropriate categorisation, including daily default fines. **(8.4.4)**

117. The Director should be obliged to publish and maintain a complete list of offences under the Companies Acts, distinguishing between summary and indictable offences. When the Director publishes such a list, reliance thereon shall be a defence to any prosecution for failure to notify any person of the suspected commission of any offence not on the list. **(8.4.5)**

118. A minimum fine for summary offences should be established under the Companies Acts, save with such limited statutory exceptions (if any) as are necessary to comply with the constitutional rights of the defendant. This minimum should be set at €500. **(8.5.2)**

119. The Review Group sees merit in the introduction of a power to apply an attachment procedure to persons in default, and recommends that consideration be given by the Minister for Justice, Equality and Law Reform to the introduction of such a power. **(8.5.4)**

120. The lowest maximum fine for all indictable offences should be increased to €12,500. **(8.5.6)**

121. There should be a provision in the Companies Acts to make non-compliance with a requirement to provide a recognisance in breach of a court order an offence. **(8.6.3)**

2.9 Simplification – Prospectuses and Public Offers (Chapter 9)

2.9.1 In Chapter 9 the Review Group makes the following recommendations to achieve simplification in the context of prospectuses and public offers:

122. The 1963 Act provisions as to when a prospectus must be prepared and filed should be repealed and the 1992 Prospectus Regulations utilised and amended so as to regulate this. **(9.4.1)**

123. Regulation 6 of the 1992 Prospectus Regulations should be amended to state: "subject to Regulation 21 of these regulations it shall not be lawful to make a public offer of securities unless a prospectus is published which complies with the requirements of this Part and the issue of which does not contravene s 46 of the 1963 Act". **(9.4.2)**

124. Regulation 6 of the 1992 Prospectus Regulations should state that a public offer of securities is defined as:

(i) an offer of transferable securities to the public in Ireland; or
(ii) an offer of transferable securities to the public (anywhere) by an Irish company. **(9.4.3)**

125. Regulation 6 of the 1992 Prospectus Regulations should include an exemption for a "restricted circle" which would be defined as:

(i) a limited number of persons which the Review Group suggests be 150 persons (regardless of level of sophistication or affiliation or otherwise); and
(ii) persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer subject to a minimum subscription of €40,000. **(9.4.9)**

126. The Minister should be authorised to exempt specified types of offer of securities from the requirement of publication of a prospectus, subject to:

(i) the offer not being made in the State, and residents of the State being precluded from accepting or procuring or assisting the acceptance of that offer;
(ii) a prospectus being published which complies with the regulatory requirements of the territory in which the offer is primarily made and such prospectus being filed with the Registrar;
(iii) it appearing to the Minister that the regulatory requirements governing the offer in that territory provide substantially comparable information with that which would otherwise be required under Irish law. **(9.4.11)**

127. The current requirement for the filed prospectus to be signed by all directors for Irish issuers should be retained, but in order to facilitate non-Irish offerors, it should be sufficient that the filed prospectus be signed by an authorised officer certifying that the prospectus is being issued with the unanimous approval of the board of the issuer. **(9.4.15(i))**

128. The present requirement to file material contracts with the CRO in certain circumstances should be dispensed with for all offers, on the basis that all material information is required to be included in the prospectus. **(9.4.15(ii))**

129. Regulation 12 should be amended to regulate and specify the publication requirements for all prospectuses and listing particulars, so as to align the obligations. **(9.4.16)**

130. Only essential extra specific requirements as to content of prospectuses beyond the Prospectus Directive should be imposed, these being:

(i) Audited accounts for the three years prior to the public offer.
(ii) Minimum amount to be raised.
(iii) Expenses of the issue.
(iv) Major shareholdings. **(9.4.17)**

131. In the case of pre-emptive offers, the Review Group recommends that there be an exemption from the requirement for accounting information, subject to its having been published to shareholders already. **(9.4.18)**

132. The following documents ought to be excluded from the definition of investment advertisement and consequent regulation under the Investment Intermediaries Act 1995 and the advertising guidelines issued by the Central Bank made under the Act:

(i) a listing particulars;
(ii) a prospectus which complies with the law as to prospectuses, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares;
(iii) a mini-prospectus approved for issue (without approval of its contents) by the Irish Stock Exchange under

its Listing Rules, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares. **(9.6.2)**

133. Section 56 of the 1963 Act should be repealed. **(9.9.1).**

134. The two-year presumption period in s 51 of the 1963 Act should be reduced to one year. **(9.9.3)**

135. Public offers as redefined of securities by shareholders should be regulated by the 1992 Prospectus Regulations as amended, alone, subject to an exemption from the law to the extent that information has been omitted which was unavailable to the seller of the shares after reasonable enquiry made. **(9.9.8)**

136. The five-year accounting disclosure period which currently applies to prospectuses for secondary offers should be reduced to three years. **(9.9.8)**

2.10 Corporate Capacity and Authority (Chapter 10)

2.10.1 In Chapter 10 the Review Group makes the following recommendations in relation to corporate capacity (ultra vires) and corporate authority:

137. Private companies limited by shares (i.e. the proposed CLS) should be granted the legal capacity of a natural person with the consequent effect that the doctrine of ultra vires is disapplied from the CLS. **(10.9.2)**

138. Public companies should be required to continue to have an objects clause in line with the Second Directive, and should thus continue to be subject to the ultra vires doctrine. **(10.9.8)**

139. Companies limited by guarantee should be required to retain objects and continue to be subject to the ultra vires doctrine. **(10.9.9)**

140. Special purpose companies, whether private companies limited by shares or otherwise, should be permitted to retain objects and be bound by the ultra vires doctrine. **(10.9.10)**

141. Companies having objects, and thus subject to the ultra vires doctrine, should be identified with the words "plc" (where such companies are a public limited company) or "dac" as part of their name. **(10.9.11)**

142. A transition period of 12 months should be allowed for (non-public) companies wishing to retain objects to pass a special resolution to change their name (with the addition of "dac" to their name). No filing fee should be required for notifying the CRO of such special resolutions. A subvention should be provided by the State to the CRO to make up for the shortfall in such filing fees. **(10.9.12)**

143. To avail of the ultra vires rule for its own benefit or the benefit of certain creditors over other creditors, a private company (being a company limited by guarantee or a special purpose company) should be required to change its name within 12 months to identify it as a designated activity company. Failure to do so at the expiration of 12 months should have the automatic effect of removing the company's objects and giving it the capacity of a natural person. **(10.9.13)**

144. An agent registered in the CRO should have authority to bind the company to lawful contracts concluded (on behalf of the company) within the terms of this authority as filed in the CRO without the need for counterparties to enquire further. **(10.10.6)**

145. In addition to the provisions of Regulation 115 of Table A, where a registered agent is appointed and registered in the CRO he should be deemed to have authority to affix the company seal and to be the sole signatory to the seal, without the need for further enquiry on the part of counterparties. **(10.10.7)**

2.11 Directors and other Officers (Chapter 11)

2.11.1 In Chapter 11 the Review Group makes the following recommendations in relation to directors and other officers:

146. The fiduciary duties of a director to his company primarily as identified by the Irish courts should be stated in statute law. This statement should be in general rather than specific terms, derived from principles established by the courts and on the basis that the statement of duties is not exhaustive. Ultimately, in the consolidated Companies Act, the statement of the director's fiduciary duties should introduce other provisions of the Companies Acts touching on directors' fiduciary responsibilities, such as the provisions at present found in ss 186 to 189 of the 1963 Act and Part III of the 1990 Act. **(11.3.6/11.3.7)**

147. Upon notification of appointment as a director (on Form B10 or Form A1) and, in due course, on registration as a director, a would-be director's signature should appear below a statement: "I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Acts, other statutes and at common law". **(11.3.8)**

148. Where a director is appointed by reason of an entitlement of a shareholder so to appoint the director under the articles or by a shareholders' agreement, the director's fiduciary duties to the company should be varied to the extent that they may have co-existing duties to third parties e.g. in the case of a nominee director, their appointors. This clarification of the law is best effected by insertion of an appropriate paragraph in the statement of directors' duties set out in this Report at **(11.3.6./11.3.7)**

149. No distinction should be made between the duties of executive and non-executive directors. **(11.5.2)**

150. Section 200 of the 1963 Act ought to be amended to provide:

(i) that a company can take out and fund directors' and officers' insurance;
(ii) that such policies of insurance cannot be avoided by reason of the other provision of s 200; and
(iii) all existing policies of insurance where the parties have agreed not to invoke s 200 should be recognised as being and always to have been unaffected by s 200. **(11.6.4)**

151. The Companies Acts should provide that:

(i) The duties of the secretary of the company will, without derogating from their own responsibility, be such duties as are delegated by the board of directors acting as a whole.
(ii) The directors will in their appointment of a secretary have a duty to ensure that the person appointed as secretary has the necessary skills to maintain (or to procure the maintenance of) the records (other than accounting records) required to be kept under the Companies Acts.
(iii) Upon notification of appointment as a director (on the Form B10 or Form A1) the secretary-designate's signature should appear below a statement stating "I acknowledge that, as a secretary, I have legal duties and obligations under the Companies Acts and other enactments". **(11.7.11)**

152. The office of company secretary should be retained. **(11.8.9)**

153. The existing prohibition on corporate directors should be retained. **(11.8.10)**

154. It should be possible for private companies limited by shares (i.e. the proposed CLS) to have one director only with a requirement that there be a separate company secretary. Sole directors should not also be the company secretary. The existing requirement for two directors should remain for all other companies. **(11.8.11).**

155. No individual should be capable of becoming a director or secretary of a company unless such individual has attained the age of 18 years. **(11.9.13(i))**

156. Any purported appointment of an individual before his having attained the age of 18 years should be ineffective and void as between the company and the individual under 18 years. However, third parties would not be required to enquire as to the age of a director and the rules of ostensible authority of an individual to represent a company would apply. **(11.9.13(ii))**

157. The implementing legislation should provide for an 18-month time period within which directors would be obliged to ensure that all directors are aged 18 years or more. **(11.9.13(iii))**

158. The obligation of a director or secretary to make a notification under Part IV of the 1990 Act should be disapplied where the interest of a director or secretary falls short of 1% of issued share capital or debentures of the company in which the holding is (whether that company is the company itself, its holding company or a subsidiary of a holding company). In such event, that director or secretary ought to be required merely to disclose the fact of such an interest to the company of which he is a director, along the lines of a general disclosure as to interest in company contracts under s 194 of the 1963 Act. This disapplication should apply whether the company is private or public. This is without prejudice to listing requirements. **(11.10.8 (i))**

159. What is and is not an interest in shares should defined more clearly, to the extent, if possible, of aligning the definition with that for disclosure of substantial interests in voting capital of PLCs (so that at least the differences can be more apparent to users of the law). **(11.10.8 (ii))**

160. Directors and secretaries should be exempted from notifying where an original or a copy of a stock transfer form is delivered to the company which on its face identifies the director, secretary or a connected person as purchaser or seller of the shares and the purchase price, within a period of 30 days following the transfer. **(11.10.8 (iii))**

161. Notification of interests should be permitted on the day of acquisition or disposal also, as well as in the five days following. **(11.10.8 (iv))**

162. For a period of eighteen months after enactment of the amending law, a company should be empowered by a combination of (i) an ordinary resolution of the members and (ii) a board resolution to reinstate the enforceability of rights attaching to shares of any director, without the need for the director or secretary to apply to court, where the director-shareholder or secretary-shareholder makes an affidavit for or representation to the company that the failure to make the notification was inadvertent, and where the board is satisfied with that explanation. **(11.10.8 (v))**

163. Rights attaching to shares of directors and secretaries (and persons controlled and connected to them, etc.) should be enforceable where the information required in the register of interests in shares has appeared in a register or a combination of registers of the company from no later than one month following the director or secretary concerned acquiring the shares or debentures in question. **(11.10.8 (vi))**

2.12 Corporate Litigation (Chapter 12)

2.12.1 In Chapter 12 the Review Group makes the following recommendations in relation to corporate litigation:

164. A Commercial Division should be established within the High Court which would deal with all business-to-business and business-to-State civil litigation. **(12.9.4)**

165. Within the Commercial Division a dedicated Companies list should be established in the High Court, with a named judge assigned to the list with overall responsibility for that list, and a number of judges named as dedicated back-up. Such a Companies list would combine elements of the present non-jury and Chancery lists. The Companies list would facilitate the consideration of company administration and share capital issues in an integrated way. **(12.9.5)**

166. Judges assigned to the Commercial Division (and within this Division to the Companies list) should be encouraged to engage and assist in case management subject to the principle of active judicial intervention only where necessary. **(12.9.6)**

167. Relevant bodies should be asked to put in place the appropriate rules and practice directions to implement this process. **(12.9.7)**

2.13 The Regulation of Insolvency Practitioners (Chapter 13)

2.13.1 In Chapter 13 the Review Group makes the following recommendations in relation to the regulation of insolvency practitioners:

168. The Law Society of Ireland should be a prescribed professional body. **(13.8.5)**

169. Section 58 of the 2001 Act should be extended to include persons appointed as examiners under the 1990 Amendment Act.**(13.8.5)**

170. Section 55 of the 2001 Act should be extended to include members acting as examiners.**(13.9.2)**

171. The appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and the Review Group recommends accordingly. On balance, the Review Group concludes that it is preferable that a licensing system on the lines set out above should be introduced without delay. **(13.9.8)**

172. RPBs should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such. **(13.9.8)**

173. Insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover. **(13.10.3)**

2.14 Auditors (Chapter 14)

2.14.1 In Chapter 14 the Review Group's submissions to the Minister on the Report of the Review Group on Auditing are set out in full.

2.15 Mitigating the Effects of Strike-off for Creditors (Chapter 15)

2.15.1 In Chapter 15 the Review Group makes the following recommendations in relation to mitigating the effects of strike-off for creditors:

174. The Circuit Court Rules Committee should draw up rules (a) to simplify procedures for applications to have a company restored; and (b) to facilitate a reduction in the costs of restoration by the establishment of a scale of measured costs. **(15.6.7)**

175. Section 311(8) of the 1963 Act and s 12(B)(3) of the 1982 Act should be amended to provide that the court shall award the applicant the costs of restoration against the company unless to do so would be in breach of the constitutional rights of any person. **(15.6.7)**

176. The Registrar should notify the Director of the names of persons who were recorded in the CRO as being directors of a company as at the date of initiation of the strike-off procedure under s 12 of the 1982 Act, where the name of that company was subsequently struck off the register pursuant to s 12(3). **(15.6.9)**

177. The Director should be accorded the powers such that in the event of strike-off he could require each person who was a director of a company at the time of strike-off to produce a statement of affairs for the company as at the date of strike-off and on foot of this decide if an investigation and consequent application to court for a disqualification order under s 160 of the 1990 Act or some other order under s 251 of the 1990 Act to have the directors made personally liable for the company's debts was warranted. **(15.6.12)**

178. The case for and against a State-funded public interest liquidation service should be considered in the Review Group's second work programme. **(15.6.13)**

179. It should be expressly provided in statute that all actions necessary to restore a company to the register may be taken on the basis that the company is treated, for the limited purpose of achieving restoration, as if it has an existence. Such permitted actions should include directors preparing or arranging for the preparation of the company's annual accounts, the approval and auditing of those annual accounts and the preparation and submission of outstanding annual returns to the CRO. **(15.11.2)**

2.16 Investment Companies (Chapter 16)

2.16.1 In Chapter 16 the Review Group makes the following recommendations in relation to investment companies:

180. The establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. **(16.7.3)**

181. In restructuring the Companies Acts so as to create the paradigm envisaged 3.7.3, Part XIII of the 1990 Act should be placed within a Part of Group B of the consolidated Companies Act. To the extent that it is possible, the pre-consolidation Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies Acts) would facilitate this hive-off and achieve two resulting Bills: the consolidated Companies Bill and the Collective Investment Schemes Bill. **(16.7.4)**

182. If the amendments to the UCITS Regulations recommended by the IFSC Funds Group cannot be effected by secondary legislation, they should be included in the Bill which will give effect to the overall recommendations contained in this report. **(16.8.1)**

183. Sections 252(1), 253, 256(2) and 266(1) of the 1963 Act should be modified in their application to investment companies so as to dispense with the requirement for a shareholders' resolution in the voluntary winding-up of an investment company and to facilitate limited duration investment companies. **(16.8.3)**

184. Open-ended investment companies should be exempted from the 1986 Act. **(16.8.6)**

185. The disapplication of s 53 of the 1990 by s 55 of the 1990 Act in the case of UCITS investment companies should be extended to non-UCITS investment companies. **(16.8.7)**

186. In the interests of ensuring that Ireland remains competitive vis a vis other investment funds jurisdictions where cross-investment is generally permitted, amendments proposed by the IFSC Funds Group should be given priority attention. **(16.9.2)**

2.17 Consolidation (Chapter 17)

2.17.1 In Chapter 17 the Review Group makes the following recommendations in relation to the consolidation of company law:

187. The consolidated Companies Act should be structured so that the private company limited by shares (i.e. the proposed CLS) becomes the model company. The Group envisages that the layout of the consolidated Companies Act will be composed of two Groups of Parts, A and B. The First Group of Parts, Group A, will be composed of sections which apply in their totality to the model company, i.e. the private company limited by shares. The First Group of Parts will also be set out on the life cycle basis of a company, from incorporation to winding-up. No other provisions of the consolidated Act will apply to private companies limited by shares. **(17.3.2)**

188. The Companies Acts should be amended on the basis proposed in this report before being consolidated. **(17.4.1)**

189. The Companies Acts and Companies (Amendment Acts) since the 1963 Act (and including that Act) should be included in the consolidation. **(17.6.1)**

190. Statutory instruments made under the European Communities Act 1972, as amended, should be included in the consolidation. **(17.6.2)**

191. The Uncertificated Securities Regulations should be enacted in primary legislation and then included in the consolidation process. **(17.6.3)**

192. The Irish Takeover Panel Act 1997 should be included in the consolidation. **(17.6.4)**

193. The establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. (17.6.7) (This recommendation is also set out at **(16.7.3)**

194. To the extent that it is possible, the pre-consolidation element of the Amendment and Review Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies acts) would facilitate the hiving-off of Part XIII of the 1990 Act into a stand-alone piece of legislation and lay the basis for two resulting Bills: the Consolidated Companies Bill and the Collective Investment Schemes Bill. (17.6.8) (This recommendation is also set out at **(16.7.4)**

195. A distinct consolidated Partnership Act should follow on from conclusion of the company law consolidation process. **(17.7.1 / 17.7.2)**

3

CHAPTER 3

The Simplification of Irish Company Law

three

3.1 The "Simplification" term of reference

3.1.1 The Tánaiste and Minister for Enterprise, Trade and Employment asked the Review Group to examine "the simplification of company law as it applies to small and medium sized enterprises".[1] More specifically, the Group was asked under the heading of *Simplified Company Law Code for Small Businesses*, to have:

> "Consideration of a simplified and more flexible legal form and regulation for small and medium sized enterprises and attendant changes in the regulation of other enterprises." [2]

3.1.2 Simplification is a central part of the Review Group's role in ensuring that Ireland has a company law code that embodies best practice in both the content and operation of law. In its first work programme, the Group is committed to establishing the optimum Irish legal model and form for small and medium sized incorporated businesses. The Group's operating premise is that Ireland's company law code must be predicated on the principles of simplicity, effectiveness and balance. The Group is committed to ensuring that Irish company law will facilitate the transaction of legitimate business in a nurturing environment whilst always having the capacity to address any wrongdoing in the most effective manner possible.

3.2 The Review Group's approach to simplification

3.2.1 The simplification of Irish company law was, without doubt, the most daunting of the areas, which the Review Group was asked to consider. At the outset of the Group's deliberations, it was quickly realised that a body of law that must afford protection to shareholders and creditors and legislate for the orderly administration (whilst solvent and insolvent) of the entity can never be truly *simple*.

The complexity of company law

3.2.2 The very fact that the Review Group has been asked to examine ways in which Ireland's company laws can be "simplified" indicates the belief that the Companies Acts are complex. In addition to the fact that company law is by its very nature highly technical, there are a number of reasons why such law is complex:

(i) The output of the last major review and consolidation of Irish company law was the 1963 Act. Since then there have been nine further amending Acts, amending and extending the provisions of the 1963 Act.

(ii) Ireland's membership of the EU and its attendant responsibilities in relation to the harmonisation of laws has added to the volume and complexity of Irish company law. It is also notable that much EU-driven law has been applied in Ireland's domestic laws by statutory instrument.

(iii) Historically, legislation has never clearly distinguished the law applicable to private companies limited by shares (which constitute 88.8% of all companies registered in Ireland) from that applicable to public limited companies (which constitute 0.6%).[3] This has resulted in small businesses being faced with an apparently massive company law code, when in fact a considerable amount has no application to their particular business enterprise.

(iv) The sources of company law are diverse. In addition to statute and statutory instruments there are also statutory codes and a common law and equitable judicial jurisprudence that now spans three centuries.

(v) There has been a tendency to house in the Companies Acts statutory provisions that do not apply generally to companies e.g., the role of the Central Bank of Ireland in monitoring the activities of investment companies in s 258 of the 1990 Act.

(vi) Company law involves the balancing of many conflicting and possibly competing interests. Whilst company law should facilitate and encourage economic activity and growth by licensing the use of the company as a business vehicle, the legislature must balance many competing principles. The Review Group identified creditor protection, shareholder protection, corporate governance, incorporation and

1 *Press Release* of the Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney TD, 4 February 2000.

2 Extract from the Review Group's first work programme. See 1.1.

3 See p 34 of the Companies Report 2000, Government Publications (Pn. 10423). Guarantee companies (the vast bulk of which are public companies) comprise 5.9% of the total and unlimited companies (which figure includes both public and private companies) constitute 2.4%.

registration, as some of the generic principles in company law. Pursuing these principles has resulted in voluminous law:

(a) The necessity for *creditor protection* in company law has given rise to a considerable volume of both *preventative* and *remedial* laws. In the nature of such laws, brevity and succinctness have been sacrificed in an attempt to eliminate loopholes and the ingenuity of delinquent debtors;

(b) The necessity of ensuring compliance with company law – *incorporation and registration* – has also given rise to a considerable volume of law. The intolerable abuses and failures to comply with the Companies Acts, so clearly identified by the *Working Group on Company Law Compliance and Enforcement* (the McDowell Group's Report), led to the enactment of 114 new sections of company law, the majority of which were directed at improving compliance and strengthening enforcement measures;

(c) The necessity of ensuring that the investing public is protected has also added to the volume of company law in the area of *shareholder protection* and *corporate governance*.

It is against this background that the Review Group addressed its assigned task of simplifying Ireland's Companies Acts.

3.2.3 The Review Group approached its task in the belief that, notwithstanding the reasons for its complexity, the existing body of legislation could still be *simplified*, to a greater or lesser extent. It was, in particular, accepted that simplification could be achieved by distinguishing particular types of companies and fine-tuning the principles identified in the preceding paragraph. In consequence of this, the Group also determined at an early stage of its deliberations on simplification that apart from the removal of anomalies and uncertainties[4] it was neither necessary nor desirable to simplify the law applicable specifically to *public limited companies*. This arose from the recognition that the investing public requires comprehensive protection when investing in public companies. Indeed, the Group's terms of reference make specific mention of small and medium sized companies. Moreover, it was considered that PLCs are generally well resourced and have expert professional advisers at their disposal to steer their way through the Companies Acts. Finally, and even if the Group thought it desirable to simplify the law relating to PLCs, there exist serious legal obstacles to such a policy in existing and proposed EU Directives. There are also practical obstacles in the nature of the expectations of international investors as to the regulation of PLCs. For these reasons, the Group has confined its simplification agenda, in the main, to the *private company limited by shares (CLS)*.

A principled approach to simplification

3.2.4 The Review Group's approach to simplification was to adopt the principled or generic approach identified above, e.g. to review the principle of creditor protection in the context of simplification. In adopting this approach, company law is broken down into distinct principles and areas and the law arising thereunder is reviewed with a view to its simplification. The alternative approach would be specific-issue driven (e.g. reviewing financial assistance in connection with share purchase[5]). The Group worked through six committees, which were established to consider the simplification of company law from the perspective of Corporate Governance, Incorporation and Registration, Shareholder Protection and Creditor Protection. In addition, the Group considered it desirable to review the simplification of Criminal Acts and Omissions under the Companies Acts and the Simplification of Prospectuses in Public Companies.

Simplification through structural changes

3.2.5 In addition, the Review Group considers that a series of specific structural changes to the Companies Acts will greatly assist users of company law in their accessing and understanding of what is, by any standard, a complex, lengthy and highly technical code. It is the Group's view that in addition to substantive changes to the Companies Acts, considerable progress could be made by a series of structural changes in those Acts. Examples of such

4 As, for example, in the case of prospectuses: see Chapter 9.

5 The Review Group's approach was different from that followed by the English Company Law Review Steering Group's *Final Report*, June 2001, where simplification and streamlining were considered (in Chapters 9 to 14) by reviewing specific measures that, when taken as a whole and applied, would have the cumulative effect of simplifying English company law.

initiatives include ring-fencing the law applicable to private companies limited by shares and by the greater use of defined terms.[6]

Simplification through codification

3.2.6 The Review Group supports the codification in statute law of well-established common law and equitable principles of company law, such as in the area of directors' duties as a further aid to simplification.[7] The Review Group supports the general approach that where possible, *"less legislation is best"*, and is conscious that the foregoing recommendation is somewhat at odds with that adage. However, although codification of the common law will add new statutory provisions to an already voluminous body of legislation, it is thought with some confidence that any disadvantage will be substantially outweighed by the advantage of clarity and certainty.

Simplification through restructuring the Companies Acts

3.2.7 Much of what we understand to be company law is contained in the model articles of association in Table A, resulting in a bi-location of legal provisions applicable to corporate governance. The Review Group believes that there is considerable merit in migrating those provisions to the primary legislation. Ultimately, it is hoped that default articles of association, such as Table A, might be eliminated and the purpose of the articles of association redefined as a document for company-specific internal rules.[8] For private companies limited by shares the current two-document company constitution, composed of a memorandum of association and articles of association, should be replaced by a one-document constitution.

Achieving simplification by "thinking small first"

3.2.8 The Review Group recommends an increased focus, in the enactment of all future companies legislation, on the needs of the small private limited company and in this respect fully endorses the *"think small first"* approach favoured by the English Company Law Review Steering Group.[9] The three principles to be followed to ensure that new legislation meets the needs of small private companies travel well to Ireland. These are: (a) the law should be clear and accessible; but (b) accuracy and certainty should not be sacrificed unduly in an attempt to make the law merely superficially more accessible; and (c) the legislation should be structured in such a way that the provisions that apply to small companies are easily identifiable.

3.2.9 In summary, the Review Group's approach to simplification involves:

(i) A primary focus on the simplification of the law applicable to private limited companies.
(ii) Public limited company (plc) simplification to be confined to removing anomalies and uncertainties.
(iii) Simplification to be conducted from the perspective of the generic principles that are the *raison d'être* of our company laws. In the first work programme, those identified and reviewed are: creditor protection, shareholder protection, corporate governance, incorporation and registration and the criminalisation of company law transgressions.
(iv) The restructuring of the Companies Acts, the ring-fencing of law that is only applicable to private limited companies and the greater use of defined terms.
(v) Following the *"think small first"* approach when considering new companies legislation.
(vi) The codification of well established common law and equitable principles of company law.
(vii) The gradual migration of widely adopted provisions, currently contained in Table A, into primary legislation, with a view to redefining the articles of association as a document for company-specific internal rules.

3.2.10 The foregoing sets out the Group's approach to generic simplification. In addition, the Group was charged with the review of a number of specific areas of company law. In reviewing those areas the Group is mindful of its simplification agenda and accordingly makes recommendations designed to simplify the law in its overall review. [10]

6 In this respect the Review Group's approach can be seen to be similar to that of the New Zealand Law Commission's Report, *Company Law Reform: Transition and Revision*, (NZLC R 19) at Chapter 1.
7 See Chapter 11.
8 See, generally, Chapter 4.
9 Company Law Review Steering Group's, *Modern Company Law for a Competitive Economy – Final Report,* (2001) at para 2.34 (at p 37).
10 See, generally, Chapters 10 to 13 inclusive.

3.2.11 It is important to stress that the Review Group cannot achieve the complete simplification of Ireland's company laws in its first work programme. Consequently, the simplification of Ireland's company laws will form part of a staged process and, it follows, that the simplification review will be complete only at the end of the second work programme.

3.3 Limited liability and alternative forms of business structure

3.3.1 The cornerstone of Irish commercial life is the registered private company limited by shares. The Companies Report 2000[11] records that of the 137,654 companies registered with the CRO at year-end 2000, 88.8% were private limited companies.[12] The Review Group began its review of simplification by questioning whether this should remain the cornerstone and, in particular, whether an entity affording its owners and controllers *limited liability* was necessary. This enquiry was central to answering the question: how far can simplification go? The Group accepts that the phenomenon of incorporation with limited liability through State registration is essentially a form of State licence. The effect of registration is detailed in s 18(2) of the 1963 Act, which provides:

> From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate with the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

3.3.2 From this statutory provision can be seen the main advantages of the registered company: separate legal personality from its owners and controllers, limited liability of its members (where opted for), transferability of interests, perpetual succession and having a common seal. The Group considers that of these consequences, it is *limited liability* that gives rise to much of the complexity in the legislation that is applicable to private limited companies. Where the liability of the owners and controllers of a company is limited, it is reasonable that more regulation, disclosure, restriction on self-dealing etc. is required as a balance to the legal right of the owners of a failed limited company to walk away from its debts. This is the primary justification for giving the creditors of limited companies more protection than that afforded to the creditors of sole traders and partners.[13] Accordingly, it can be seen that the statutory licence to avail of limited liability is made conditional in many respects. So, a limited liability company formed and registered under the Companies Acts must conform to that body of law for the purposes of protecting shareholders, protecting creditors, allowing the public access to certain basic information and generally protecting its assets. It has even been said that the protection of assets is the corollary of limited liability.[14] It occurred to the Group that it might be possible to further disapply certain legislative provisions to companies where their members do not have the privilege of limited liability.

Limited liability operates to increase the complexity of company laws

3.3.3 It was against this background that the Review Group considered the research work that had been conducted in the United Kingdom into alternative company structures, with particular reference to small businesses.[15] One of the proponents of this approach has written:

11 See p 34 of the Companies Report 2000.

12 Of the remaining 11.2% of registered companies, 0.6% are public limited companies, 2.4% are unlimited companies, 5.9% are guarantee companies, 2.3% are external companies and .006% are European Economic Interest Groups (EEIGs) as at 31 December 2000.

13 The Review Group notes, however, that the creditors of an unlimited company have an additional obstacle to overcome to creditors of sole traders and partners before they can get at the assets of an individual. In particular, the liability of a member with unlimited liability is not concurrent with that of the company and a creditor will have to have a company wound up in order to obtain an order to compel a member with unlimited liability to contribute: see s 207 of the 1963 Act.

14 In *Brady v. Brady* [1988] BCLC 20 Nourse LJ said (at 38): "In its broadest terms the principle is that a company cannot give away its assets…The principle is only a facet of the wider rule, the corollary of limited liability, that the integrity of a company's assets, except to the extent allowed by its constitution, must be preserved for the benefit of all those who are interested in them, most pertinently its creditors".

15 See, for example, Hicks, Drury & Smallcombe, *Alternative Company Structures for the Small Business* (1995), the Chartered Association of Certified Accountant's Research Report No 42.

> "First introduced in the middle of the nineteenth century, limited liability companies were primarily intended to attract risk capital for large public undertakings. At the hundredth anniversary of the *Salomon* case, [1997] which confirmed their use by small private businesses, it has to be asked whether limited liability is appropriate for all of the million small limited companies that now claim it. Assuming that limited liability is essential to encourage start-ups, governments have never dared to question the accidental proliferation of private limited companies…All that is often needed is a simple unlimited corporate form. The majority of limited companies do not perform the economic functions of attracting risk capital that was originally assumed. They also generate economic disadvantages such as increased costs and the transfer of trading risks to unsecured creditors."[16]

3.3.4 The Group accepts that an unlimited corporate form is more amenable to simplification. Indeed, the corporate form that is the sole trader is almost entirely unregulated. The same proponent of the unlimited corporate form had this to say:

> "While incorporation is cheap and offers an exceptional package of advantages including limited liability, the usual Table A style articles are archaic and inappropriate for small businesses. The general complexity of the legal regime of the limited company is a source of potential pitfalls and of substantial professional fees if these pitfalls are to be avoided. Many transactions are beset with expensive technicality such as the prohibition on loans to directors, a part of the legal jungle designed to prevent returns of capital and to protect creditors. In small companies the director/proprietors often continue to believe that they own the business assets when in law they must constantly take account of the separate interests of the company…If two major participants want to split the company and go their separate ways the maintenance of capital provisions again make the transfer of assets to one of them a major nightmare. Purchase of shares by the company to achieve a split may be possible but the legal protections for creditors create a labyrinthine legal steeple chase and generate substantial professional costs, if not blocking the process entirely. The costs and complications such as these arise in consequence of having limited liability." [17]

3.3.5 The Group accepts that the privilege of limited liability requires, in return, comprehensive statutory protections that will frequently be complex, bureaucratic and, to the vast majority of honest and compliant business persons, unnecessarily burdensome.

Unlimited business corporations?

3.3.6 The alternative business organisation considered by the Review Group was to allow partnerships and sole traders to incorporate what has been called a "business corporation" in which the members would have unlimited liability and to the extent that there was more than one member, the law of partnership would apply.[18] Although the Group recognised that it is the privilege of limited liability which gives rise to much of the legislative complexity and compliance burdens for small businesses, on balance the Group was of the opinion that the unlimited company form was, far from being a panacea, likely to give rise to as many new problems as old problems that it might solve.

3.3.7 In the first place, the Review Group accepts that there is no significant demand for unlimited liability companies from the business community that currently elect to operate through the medium of the private limited company. The Group acknowledges that this is notwithstanding the existence of certain empirical evidence that would suggest the contrary position in the United Kingdom.[19] In the second place, in the context of a simplification agenda, the addition of an alternative form of corporate structure, believed to be of limited utility, is highly questionable, even if it might be availed of by a limited number of businesses. This would be further exacerbated by the fact that the private company limited by shares would in all likelihood continue to be the chosen business structure and it is accepted by the Group that the law applicable to the private limited company is in need of simplification. In the third place, the socio-economic consequences for both individual business persons, their families and indeed the wider society, occasioned by the honest business failure of unlimited businesses, are something the Group believes should be avoided.

16 See Hicks, "Corporate Form: Questioning the Unsung Hero" [1997] *Journal of Business Law* 306.

17 *ibid.* at 309-310.

18 See Hicks, Drury & Smallcombe, *Alternative Company Structures for the Small Business* (1995), the Chartered Association of Certified Accountant's Research Report No 42 at Chapter 12: A Proposed 'Business Corporation.

19 *ibid.* at pp 11-30. See, however, the UK's Company Law Review Steering Group's consultation document: *Modern Company Law for a Competitive Economy – Developing the Framework* p 305, para 9.61, (March 2000) where they say: "In the *Strategic Framework Consultation Document* we invited views on the desirability of restricting access to limited liability. A significant majority of respondents said that restrictions were undesirable. A number agreed that limited liability status acted as a spur to entrepreneurship and innovation. As one respondent put it, limited liability status has played a key role in creating a dynamic private sector since its inception and its benefits should be open to all those who wish to set up a legitimate firm".

3.3.8 The Review Group is, however, of the view that in the application of the Companies Acts to particular types of companies there is some scope for the measured disapplication of certain creditor protection laws in the case of unlimited companies. For two reasons, one must, however, proceed with caution. First, creditor protection measures are as needed in the case of unlimited companies *whose members are limited companies* as in the case of limited companies. Secondly, even where unlimited companies' members are natural persons, it must be recognised that creditors must first place an unlimited company into liquidation before being able to get at the assets of its members. In comparison with marking judgment against a sole trader or partner, obtaining an enforceable order against the members of an unlimited company will take longer. There are, however, statutory remedies available to creditors where members seek to evade their liabilities, including the right to freeze such members' assets and even cause absconding members to be arrested.[20]

3.4 Balancing simplification with creditor and shareholder protection

3.4.1 In the Review Group's discussions and deliberations, one of the recurring themes was the difficulties in balancing any simplification of the Companies Acts with the need for both creditor protection[21] and shareholder protection.[22] In its first work programme, the Group concentrated almost exclusively upon the simplification of *preventative* shareholder protection and creditor protection laws. It is the Group's intention to consider the simplification of *remedial* protection laws in its second work programme when it is expected that insolvency and the winding-up of companies will be reviewed.

3.4.2 The need for creditor protection is occasioned by the fact that in a limited liability company, generally, the only assets available to satisfy debts owed by the company to creditors will be those assets owned by the company. Moreover, the Group recognises that because of the potential artificialities of limited companies, creditors dealing with such entities deserve, in justice, greater protections and remedies than do creditors who deal with sole traders or partnerships. This is because sole traders and partners have a personal liability for the debts of their businesses and, therefore, a vested personal interest in ensuring that debts are paid. The law applicable to security for costs provides one example of this. Under s 390 of the 1963 Act, a defendant who is sued by a limited liability company can apply to court for an order that the plaintiff limited company provides, up front, a sum of money intended to meet some or all of the defendant's costs should the defendant be successful in his defence. There is no equivalent provision that can be invoked against resident sole traders or partnerships. The reason for this discriminatory treatment was succinctly stated by Megarry V-C in the English decision in *Pearson v. Naydler*,[23] a passage that was cited with approval by O'Hanlon J in the Irish High Court decision in *Harrington et al v. JVC (UK) Ltd* :[24]

> "[It is not] surprising that there should be such a rule. A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and [the security for costs law] provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons."

3.4.3 Both the common law[25] and statute[26] have recognised the necessity of affording the creditors of limited companies with protection over and above that afforded to creditors of sole traders and partnerships and have sought to provide such protection in a variety of ways.

3.4.4 The need for shareholder protection is due to the fact that companies invariably adopt Regulation 80 of Part I of Table A[27] by which the responsibility for the management of companies is delegated to their directors.

20 1963 Act, s 247.
21 See Chapter 5.
22 See Chapter 6.
23 [1977] 3 All ER 531.
24 High Court,16 March 1995 (O'Hanlon J).
25 For example, *Ashbury Railway Carriage and Iron Co v. Riche* (1875) LR 7 HL 653 (where the House of Lords held that *ultra vires* transactions are void); *Re Frederick Inns Ltd* [1994] 1 ILRM 387 (where the Supreme Court held that directors owe duties to creditors where a company is insolvent).
26 For example, s 31 of the 1990 Act which restricts the making of loans, quasi-loans, credit transactions and the entering into of guarantees and the provision of security in connection with loans, quasi-loans and credit transactions, the intention being to prevent self dealing by directors to the detriment of creditors (and shareholders).
27 First Schedule to the 1963 Act.

Accordingly, shareholders rely, to a greater or lesser extent,[28] upon the directors to act bona fide and in the interests of the company. Again, both common law[29] and statute[30] seek to protect the rights of shareholders. Some statutory protection regimes are designed to protect shareholders' interests and creditors' interests. An example in point is s 60 of the 1963 Act which is intended to prevent companies from directly or indirectly providing financial assistance to third parties in connection with the purchase of their own (or their holding company's) shares.

Evaluating existing creditor and shareholder protection provisions

3.4.5 The Review Group has comprehensively reviewed the existing statutory and common law creditor and shareholder protection regimes. The Group's approach has been twofold: to critically assess and evaluate existing laws to ensure that they continue to serve the purpose for which they were intended and to consider whether new laws might improve the achievement of these two important principles that underpin company law.

3.4.6 An example of a protection regime in need of review is the ubiquitous doctrine of *ultra vires*, which was originally intended to further both creditor and shareholder protection. On the one hand, it was intended to protect creditors by preventing companies from engaging in any activity other than an activity stated by the company in its memorandum of association. It was assumed that, because memoranda of association are public documents, creditors had notice of the permitted activity. On the other hand, the doctrine of *ultra vires* was also originally intended to give protection to shareholders: by ensuring that companies could only engage in the activity specified in their objects clauses, the rationale was that investing shareholders' funds could not be applied in pursuit of any other activity.

Striking the appropriate balance

3.4.7 The Review Group is very conscious of the necessity of striking the appropriate balance. On the one side is the necessity to protect the legitimate interests of shareholders and creditors; on the other side is the imperative to promote enterprise by the removal of unnecessary, bureaucratic or anachronistic fetters on the transaction of legitimate business by companies. The Group believes that there should be few absolute prohibitions in the Companies Acts and that, where possible, the law should provide for suitable *validation procedures*, which it is thought, can operate to strike a more appropriate balance of legitimate interests.

Shareholder protection - the rejection of absolute prohibitions in favour of validation procedures

3.4.8 In relation to the simplification of laws designed to provide *shareholder protection* the Review Group accepts that all restrictions and prohibitions should be capable of being overridden by shareholder consent. Where there is unanimous shareholder support for a particular course of action that is lawful, there is every justification for the setting aside of statutory and common law rules designed to protect shareholders only. In *Buchanan Ltd and another v. McVey,*[31] Kingsmill Moore J said:

> "If all the corporators agree to a certain course then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two pre-requisites: Re Express Engineering Works Ltd [1920] 1 Ch 466, Parker and Cooper Ltd v. Reading [1926] 1 Ch 975. [32] The two necessary pre-requisites are (1) that the transaction to which the corporators agree should be *intra vires* the company; (2) that the transaction should be honest: *Parker and Cooper Ltd v. Reading* [1926] 1 Ch 975." [33]

28 If, for example, the shareholders are also the company's directors, as is common in many Irish private companies.

29 For example, *Clark v. Workman* [1920] 1 IR 107 (where it was held that *bona fides* was the test applicable to the exercise of directors' powers); and *Nash v. Lancegaye (Ireland) Ltd* (1958) 92 ILTR 11 (where it was held that directors' powers must be exercised for the benefit of the company).

30 For example, s 29 of the 1990 Act, which requires the approval of a company's members to substantial property transactions between companies and their directors (and persons connected with such directors).

31 [1954] IR 89.

32 In *Parker and Cooper Ltd v. Reading* [1926] 1 Chapter 975 at 982 Astbury J had said: "…where a transaction is *intra vires* the company and honest, the sanction of all the members of the company, however expressed, is sufficient to validate it, especially if it is a transaction entered into for the benefit of the company itself".

33 See also *Re Duomatic Ltd* [1969] 2 Chapter 365 where Buckley J held:"…where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be".

3.4.9 Of course, consent or approval will not always be unanimous and the Group recognises that the general rule in companies is that of "majority rule". Accordingly, it can be acceptable for some lesser assent to suffice, most likely a *special resolution*, which requires a qualified majority of 75%. Where the (qualified) majority is intent upon proceeding with a course of action that is oppressive or to the fundamental detriment of the dissenting minority, the minority should continue to have statutory protection. All of these concepts feature in the most frequently used validation procedure, in current usage. Section 60(2) to (11) of the 1963 Act permits companies to provide financial assistance in connection with the purchase of shares where such is given under the authority of a special resolution (s 60(2)(a)). Where the approval is unanimous, the assistance can be given forthwith; where there is not unanimity, there is a cooling-off period of 30 days before the assistance can be given (s 60(7)). There is also a right of recourse to court for disgruntled dissenters (s 60(8)). The Review Group notes with approval that s 78 of the 2001 Act has tempered the severity of s 31 of the 1990 Act by introducing a validation procedure that is in many material respects modelled on s 60(2) to (11) of the 1963 Act. In Chapter 6 the Group considers and makes recommendations, inter alia, on how this validation procedure which balances shareholder protection with commercial exigencies, can be extended further.

Creditor protection - the rejection of absolute prohibitions in favour of validation procedures

3.4.10 In relation to the simplification of the laws designed to provide *creditor protection* the Review Group recognises that creditors' rights are directly related to a company's ability to meet creditors' claims. In an unlimited liability company, whose members are natural persons, most creditor protection laws can be safely disapplied on the grounds that creditors might as well be dealing with natural persons. The Group recognises, however, that unlimited liability trading companies are very much the exception. In limited liability companies, the acid test for the application of creditor protection laws is *solvency*. Most common law jurisdictions now recognise that company directors owe duties to creditors where their company is insolvent. In the Supreme Court decision of *Re Frederick Inns Ltd* [34]Blayney J said:

> "Where, as here, a company's situation was such that any creditor could have caused it to be wound up on the ground of solvency, I consider that it can equally well be said that the company had ceased to be the beneficial owner of its assets with the result that the directors would have had no power to use the company's assets to discharge the liabilities of other companies."

3.4.11 By accepting this as the correct approach the corollary is that the creditors of *solvent companies* are not owed duties by directors and, indeed, do not have a recognised proprietary interest in companies' assets. It is against this background that the Review Group supports the relaxation of absolute prohibitions designed to further creditor protection by the extension of *validation procedures* that are designed to strike a just balance between creditors' rights and legitimate corporate activity. Existing validation procedures are of two main kinds. The first, more stringent kind only permits a distribution of corporate assets where such distribution is financed from *"distributable profits"* e.g. the payment of dividends[35] or the purchase by a company of its own shares.[36] The second, less stringent kind requires a company's directors to swear a statutory declaration to the effect that the company is solvent and will be after carrying out a particular transaction or arrangement that would otherwise not be permitted.

3.4.12 Again, it is considered that the validation procedure contained in s 60(2)(b) of the 1963 Act is capable of being more widely used. There, the essential protection afforded to creditors in their dealings with companies that wish to provide financial assistance in connection with the purchase of shares, is to require such companies' directors to make a statutory declaration of solvency, which if unreasonable will render the makers liable to criminal

34 [1991] ILRM 582 (High Court); [1994] 1 ILRM 387 at 396 (Supreme Court).
35 1983 Act, s 45.
36 1990 Act, s207.

sanction. This aspect of the s 60(2) validation procedure was modified in its application to s 31 of the 1990 Act by s 78 of the 2001 Act by requiring the report of an independent person (qualified to be the company's auditor) to provide a report indicating whether or not the directors' opinion on solvency is reasonable and also by providing that an unreasonable declaration can render the directors personally liable for some or all of the company's debts. The Group assesses the possible application of this more specific creditor-protection measure in Chapter 5.

The tenets of the Review Group's approach

3.4.13 In addition to the utility of these statutory validation procedures, in striking the appropriate balance between simplification and creditor/shareholder protection, the Review Group endorses the following approach:

(i) Shareholder protection measures should distinguish between companies where the shareholders and directors are connected (e.g. many private companies) and companies where the shareholders are many and unconnected to the directors (e.g. in a public limited company).[37]
(ii) Shareholder protection measures should not be unnecessarily complex. Shareholder approval should be obtainable using the unanimous written resolution procedure in s 141(8) of the 1963 Act, whether or not their articles so permit.
(iii) Creditor protection laws, over and above those available to creditors when dealing with natural persons such as sole traders and partnerships, are more amenable to disapplication in unlimited companies than in limited companies.
(iv) Creditor protection measures should be reasonable and, to the extent that a company has limited liability, driven by its solvency and the establishment of such. Rather than provide for outright prohibitions on companies engaging in particular activities, where possible, there should be validation procedures whereby a company's solvency can be confirmed by statutory declaration of the directors.
(v) Rather than have several validation procedures located in different parts of the Companies Acts, there is considerable merit in having one omni-purpose validation procedure which will be cross-referenced to provisions that restrict or prohibit particular activities.
(vi) Creditor protection measures should recognise *de minimis* exceptions whereby small or otherwise irrelevant transactions are exempt from strict regimes.
(vii) Permitting companies to fund otherwise prohibited activity where financed by distributable profits, should continue to be used to mitigate the more harsh effects of creditor protection provisions.

3.5 The private limited company/public limited company divide

3.5.1 It was recognised early in the Review Group's deliberations and discussions that central to the simplification of company law in Ireland was the recognition of the different nature of private companies and public companies. There is a world of difference between a one-person private company formed by a tradesman, at one end of the spectrum, and a listed public limited company, at the other. Yet, the Group's starting point was that it is the same body of law, the Companies Acts, that governs all incorporated companies. The Group considered that not only was it inappropriate for such differing types of company to be broadly governed by the same legislative provisions, but that a different mindset was required when legislating for different types of companies.

An historical perspective – recognising why we are where we are

3.5.2 The origins of modern company law legislation are to be found in 19th century English company law legislation.[38] The most readily recognisable legislation are the Joint Stock Companies Act 1844, the Limited Liability Act 1855 and the statute which repealed and replaced both of the foregoing, the Joint Stock Companies Act 1856. All previous statutes were consolidated by the Companies Act 1862, described as the "first great consolidation Act

37 It is notable that the s 60(2) to (11) validation procedure is not available to public limited companies.
38 See generally, Gower, *Modern Company Law*, Butterworths , (5th ed 1992), Chapters 2, 3.
39 See Schmitthoff (ed), *Palmer's Company Law*, Sweet & Maxwell, (24th ed 1987), para 2-09.

concerning companies".[39] This legislation was *exclusively* concerned with public, not private, enterprises. At this time the private company was not even a distinct form of company. The intention of this legislation was to facilitate enterprise through a corporate structure, which was created by registration.

3.5.3 Moreover, it was intended that this legislation, the predecessor to the Companies Acts of Ireland, would provide protection to the investing public for it was not, originally, considered that all or most of the issued shares would be beneficially held by one person. In the 19th century and for two hundred years previous, the employment of a corporation to conduct business was synonymous with an invitation to the public to invest in it. The use of a corporation for private purposes was virtually, if not entirely, unheard of. The significance of this feature of corporations up to the 20th century is that legislation reflected the then reality as legislators considered prospectuses and general shareholder protection to be of paramount importance.

3.5.4 The decision in *Salomon v. A Salomon & Co Ltd*[40] is the seminal authority for the proposition that in law a company has a separate legal personality from its members. In addition to such a tangible legal consequence, however, *Salomon* can also be seen as the catalyst for the turning point in the psychological understanding of corporate forms. What was considered to be so novel about the House of Lords' findings in *Salomon* was, it is thought, more the fact that the company's separate legal personality was preserved and distinguished from the seven people who comprised its shareholders than the fact that the company's separate legal personality was preserved *per se*! The macro principle of limited liability may have been enshrined in law since the Limited Liability Act of 1855, but it may be surmised that at a time when companies were expected to have a multiplicity of shareholders, it was the application of the principle at micro level that caused surprise. The circumstances of the *Salomon* case were acute: there were only seven shareholders (Mr Salomon and six members of his family); the business of A Salomon & Co Ltd had acquired Mr Salomon's 30-year-old bootmaking and leather manufacturing business. Furthermore, the company had granted a debenture to Mr Salomon to secure his loan to the company of part of the purchase price of his business. When the company became insolvent, the law of priorities meant that he was entitled to be repaid on foot of the debenture ahead of the company's unsecured creditors. Notwithstanding the foregoing, the House of Lords upheld the principle that the company is separate in law from its members and allowed the consequences of that principle to stand in Mr Salomon's favour. It is significant that the next legislative action after the *Salomon* decision, the Companies Act 1907, gave *de jure* recognition to the private company.

3.5.5 Despite the fact that public limited companies and private companies are fundamentally different business models, it is by and large the same body of law that applies to them. The Review Group believes that the effect of this is to increase the complexity of the companies code as it applies to private companies and that simplification will result from divorcing the law applicable to the private company from the law applicable to public limited companies and other companies.

3.6 The new model company: The limited private company

3.6.1 At the present time, there are nine distinct types of company that can be formed and registered under the Companies Acts:

(i) Private companies limited by shares;
(ii) Private companies limited by guarantee that have a share capital;
(iii) Private unlimited companies that have a share capital;
(iv) PLCs that are limited by shares;
(v) PLCs that are limited by guarantee and that have a share capital;
(vi) PLCs that have a variable share capital;

40 [1897] AC 22.

(vii) Public companies limited by guarantee that do not have a share capital;
(viii) Public companies do not have a share capital;
(ix) Public unlimited companies that have a share capital;
(x) Public unlimited companies that do not have a share capital.

There are, in addition, a number of other types of bodies corporate recognised by the Companies Acts, e.g. overseas companies and unregistered companies. These shall be referred to here as "other bodies corporate".

3.6.2 Whether there is now a real demand for all of the nine types of company is doubted. It is the view of the Review Group that there is no principled driver behind the foregoing list, which is the product of historical evolution rather than modern election. The most recent deliberately-created type of company is the PLC, which was necessitated by the harmonisation of EU company law and introduced to Irish law by the 1983 Act.

3.6.3 Of the nine types or forms of company, one type, the *private company limited by shares*, accounts for 88.8% of all companies registered as at 31 December 2000.[41] Ironically, this most popular company form was a legislative after- thought and its first statutory recognition, s 37(1) of the Companies Act 1907, was located under the ignominious heading of "Miscellaneous". That legislative sidelining of the most popular corporate form continues to this day and although the vast bulk of companies are private companies, "the company" that is envisaged by those Acts is the *public company*. By according the private company a specific definition, s 33(1) of the 1963 Act presupposes that the average company is the public company of which the private company is but a peculiar variation. Another example of this is provided by the model articles of association contained in Table A of the First Schedule to the 1963 Act. Notwithstanding that most companies registered in Ireland are private companies, Part II of Table A *applies* Part I, with certain modifications, to private companies limited by shares. To the extent that the most popular type of company is treated as if it were a minority variant form of registered company, this is a classic example of the "tail wagging the dog." The Group considers that the elevation of the private company, from an apparent afterthought to centre stage in the Companies Acts, is long overdue and recommends accordingly.

3.6.4 "Private company" is defined by s 33(1) of the 1963 Act as follows:

> For the purposes of this Act, "private company" means a company which has a share capital and which, by its articles -
>
> (a) restricts the right to transfer its shares, and
> (b) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after the determination of that employment to be, members of the company, and
> (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

3.6.5 As was noted at 3.6.1, there are three distinct types of private company: private company limited by shares; private company limited by guarantee that has a share capital; and unlimited private company that has a share capital. The Group accepts that of the three variants of private company, it is the *private company limited by shares* that is by far the most popular form of private company in Ireland. The Group recommends that the private company limited by shares (CLS) should be established as the model company in the Companies Acts.

3.6.6 The Review Group recommends that the definition of a private company limited by shares should be:

> A **private company limited by shares** means a company which:
> (i) has a share capital
> (ii) has the liability of its members limited by shares;
> (iii) by its constitution[42] –

41 See p 34 of the Companies Report, 2000.
42 That is, what its articles and memorandum of association would be, see 3.2.7, above.
43 It is recommended that "management company" be defined to mean a company that is wholly and exclusively formed and operated to manage a building or series of buildings and whose members are the owners of a freehold or leasehold estate or interest in a part of such building or buildings.

(a) restricts the right to transfer its shares; and
(b) in the case of all companies other than management companies,[43]
(c) limits the number of its members to one hundred and fifty, not including persons who are in the employment of the company; and
(d) prohibits any invitation to the public to subscribe for any shares or debentures of the company.[44]

3.6.7 It will be noted that existing companies limited by guarantee and having a share capital would be excluded from the definition of CLS because of the paucity of their number as a subset of private limited companies. The increase from fifty to one hundred and fifty in the numeric limit on membership is recommended to bring the requirement for the CLS into line with the exemption threshold proposed in the draft EU Prospectus Directive[45] definition of a "small company".

3.6.8 The exclusion of *management companies* from the requirement that private limited companies must limit their number to one hundred and fifty is intended to provide an alternative to persons who are currently obliged to form *public companies limited by guarantee and not having a share capital* when forming management companies. Such management companies are commonly utilised to hold the legal title to the common areas within apartment complexes and shopping centres. The Review Group understands that the only reason why such companies are not formed as private companies is because such developments commonly involve more than fifty member-owners. After the private limited company, the guarantee company is the most common type of registered company.[46] The Group does not view retention of the current number of permitted members to be central to the definition of a CLS or as an important distinguishing feature between it and other types of company and recommends as outlined. The Group recommends that the CLS can also be a single-member company.

3.6.9 Although the Group sees considerable merit in rationalising the number of types of registered companies, it does not favour the compulsory re-registration of any particular type of company. The Group does, however, believe that there is merit in encouraging incorporators to form particular types of company and would not rule out the future possibility of compulsory re-registration where it becomes apparent from the register of companies that a particular form is obsolete or anachronistic. Existing companies that meet the definition of CLS will not be required to re-register. Provision will need to be made for the re-registration as a CLS by other existing companies.

3.7 Ring-fencing the law applicable to the private company limited by shares (CLS)

3.7.1 It is the Review Group's view that, following the redefinition of the private company and the realignment of the Companies Acts to recognise the CLS as the most important type of company, the law applicable to the CLS must be clearly identifiable. As currently composed, the Companies Acts do not clearly distinguish the law applicable to any one type of company from any other type of company. The Group believes that access to the law can be simplified by the reorganisation of the Companies Acts in such a way as to segregate the law applicable to the CLS from the law applicable to other types of company and other bodies corporate. This restructuring will assist not only business people but also their professional advisers in their understanding of the law as applied to the small and medium sized business enterprise. Accordingly, it is recommended that the law applicable to the CLS should be self-contained.

3.7.2 The Group recommends that the consolidated Companies Act will be sub-divided into two groups of law. The first group of law (Group A) will define the CLS and contain all company laws that apply to this, the most common

44 The highlighting in **bold print** of certain words indicates that they are defined terms: see 3.9.1, below.
45 See *Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading*. 30.05.2001 COM (2001) 280.
46 These accounted for 5.9% as at 31 December 2000: Companies Report, 2000 at p 34.

type of company. The second group of law (Group B) will reference and define the remaining types of companies and other bodies corporate and provide, by cross-reference to Group A, those provisions that apply to each type of company. It is envisaged that in relation to each particular Group B company type: (a) the law contained in Group A will be applied to the extent that certain provisions are not disapplied; and (b) additional statutory provisions will also be applied as are only relevant to that type of company.

3.7.3 In tabular format, the following is a broad outline of the structure for the consolidated Companies Act that is envisaged by the Review Group. Chapter 17 contains a more detailed breakdown.

Group A

The law applicable to the private company limited by shares (CLS)

Part 1 Definitions for the purposes of the law applicable to CLSs
Part 2 Incorporation and Registration
Part 3 Management and Administration
Part 4 Duties of Directors
Part 5 Accounts and Audit
Part 6 Share Capital and Membership
Part 7 Debentures and Charges
Part 8 Compliance, Enforcement and Investigations
Part 9 Reconstructions
Part 10 Examinerships
Part 11 Receiverships
Part 12 Winding-Up
Part 13 Dissolution and Reinstatement

Group B

The law applicable to companies and bodies corporate other than CLSs

Part 1 Definitions for the purposes of the law applicable to companies and bodies corporate other than CLSs
Part 2 Public Limited Companies (PLCs) – specific law
Part 3 Public Offers and Listing of Securities
Part 4 Takeovers of Public Limited Companies
Part 5 Guarantee Companies – specific law
Part 6 Unlimited Companies – specific law
Part 7 Overseas Companies, Branch Registration – specific law
Part 8 Unregistered Companies – specific law
Part 9 Conversion and Re-registration
Part 10 Miscellaneous Bodies Corporate – specific law
Part 11 Special Accounting Requirements
Part 12 Miscellaneous

3.7.4 The Group recognises that this will not, to the same extent, simplify access to the law that is applicable to PLCs, or indeed, any type of company or body corporate, other than the proposed CLS. The Group believes, however, that those users of company law who are most in need of assistance are small and medium sized companies, most of which fall to be classified as the new CLS. Those who choose to incorporate PLCs, guarantee companies and unlimited companies tend, in general, to be more sophisticated users of company law who have access to professional legal, accounting and taxation advisers – many of whom will, indeed, have recommended the incorporation of a non-standard type of company to fulfil the particular requirements of the company's promoters. The Group believes, however, that the more structured approach that is proposed will assist all users of company law.

3.8 Exempt companies

3.8.1 The introduction of the exemption from audited accounts in the 1999 (No 2) Act for smaller private companies is thought to provide a useful and sensible definition of what the Group believes should be called an "exempt company".[47] The Group believes that in striking the appropriate balance between competing principles in company law with the facilitation of enterprise, the law applicable to exempt companies, as defined, can be simplified to a greater extent than can the law applicable to CLS.

3.9 Greater use of defined terms

3.9.1 The Review Group believes that among the administrative measures that can be taken in furtherance of the simplification agenda is the greater use of defined terms within the Companies Acts. It is thought that a greater use of defined terms can make the legislation more succinct and less repetitive in form. The Review Group also believes that where a defined term is used in the Companies Acts, it should be highlighted. Accordingly, a word or phrase that is a defined term throughout the Companies Acts could be in **bold** print, whereas a defined term that applies only to the section, Chapter or Part of the Acts in question could be in *italics*. The Review Group recommends accordingly.

3.10 The rationalisation of criminal offences

3.10.1 The Review Group acknowledged that the Companies Acts criminalised several hundred acts and omissions. The schedule to the McDowell Report listed all of the offences existing at the time of the report, which came to approximately 300. That list has already been added to considerably by both the 1999 (No 2) Act and the 2001 Act. The Group believes that it is in keeping with the spirit of the McDowell Group's Report that the number and content of the criminal offences under the Companies Acts should be reviewed with a view to rationalisation. The Group believes that the law should be enforced and, that in a compliance enforcement environment, it is correct to review that law.[48]

3.10.2 In addition to the number of offences, there is also the question of their categorisation as being triable either summarily or on indictment. Because most indictable offences under the Companies Acts carry a maximum term of imprisonment of five years a person who is suspected of their commission is liable to arrest without warrant and detention under s 4 of the Criminal Justice Act 1984. The Review Group believes that those offences that are so categorised should be reviewed. It has reviewed them and makes appropriate recommendations as to their "proper" characterisation.

3.10.3 Finally, the Group believes that all criminal acts and omissions under the Companies Acts should also be reviewed with a view to determining whether they ought properly to be characterised as criminal offences at all. In this respect the Group believes that it was necessary to consider whether it was proper to deem presently criminalised acts and omissions as such or whether certain transgressions of the Companies Acts were more properly characterised as civil wrongs. The Group concluded, on balance, that public policy considerations warranted the retention, in most cases, of a criminal offence.

3.10.4 The Group does, however, believe that the criminal acts and omissions in the Companies Acts can be simplified through standardisation of penalties and the use of omnibus sanction sections, such as s 240 of the 1990 Act. These issues are considered in Chapter 8.

47 See Chapter 11.
48 See Chapter 8.

3.11 Incorporation and registration[49]

3.11.1 The Review Group believes that the process for the *incorporation* of a company can be simplified and that the recommendations made in relation to corporate capacity,[50] the articles of association[51] and the use of statutory declarations[52] will, in this regard, act as a springboard to simplification. Changes to the process of incorporation must, however, be made having due regard to the First Directive on Company Law.[53] That Directive provides that where any change is made to the *"instrument of constitution"* or *"the statutes"* of a company, the complete text of those documents as amended to date must be filed. It would be problematic, therefore, to merge completely all of the documents into one, such that a complete new set would have to be filed following a change in any particulars. The Group believes that there is, however, considerable scope for the simplification of the incorporation process and details its findings and recommendations in Chapter 7.

3.11.2 In addition to incorporation, the Group has considered ways in which the process of delivery and *registration* of documents to and by the CRO can be simplified. It is apparent to the Group that electronic communications via e-mail, websites, internet etc. will all become an even more normal way of doing business in the coming years. Companies and other firms that make an early move to electronic communications will gain a competitive advantage. Moreover, it is recognised that it is very much in the interests of the Irish economy that the State is to the fore in the use of electronic communications.

3.11.3 As a general principle it is desirable that company officers and company members should be facilitated to transact business electronically, *inter se*, and with the regulatory authorities so as to minimise costs and to maximise the gain from efficiencies in time and convenience. The Group recommends accordingly. The tenets of the Review Group's approach to *registration* and electronic communications are:

(i) companies should be facilitated in utilising electronic communications;
(ii) legal and administrative barriers to the use of electronic communications by companies and users of company law should be removed where possible;
(iii) legislative provisions on electronic communication issues should be simple and easy to understand; and
(iv) where electronic communications are used, care must be taken to ensure that such does not diminish the protections that currently exist to protect companies' members and creditors.

3.12 Consolidation[54]

3.12.1 In addition to the establishment of the Office of the Director of Corporate Enforcement and to setting up the Review Group, the McDowell Report also recommended the consolidation of the Companies Acts. The consolidation project is being implemented by the Company Law Review and Consolidation Section of the Department of Enterprise, Trade and Employment, which also serves as the secretariat for the Review Group. Section 68(1)(a) of the 2001 Act provides that the Review Group shall monitor, review and advise the Minister on the consolidation of the Companies Acts.

3.12.2 The benefits of consolidation are obvious. Indeed, the consolidation of the Companies Acts with the emphasis on the CLS, and in accordance with the proposed structure considered above, is considered by the Review Group to be absolutely vital to achieving the simplification of access to the Companies Acts. The availability of company law in a single statute will benefit the owners and managers, existing and potential, of Irish companies. Consolidation will make Irish company law more accessible and manageable for the transaction of business. The existence of a single streamlined code will be a positive factor for inward investment. The greater transparency that a single code brings will also facilitate compliance with company law.

49 See Chapter 7.
50 See Chapter 10.
51 See Chapter 4.
52 See 7.4.
53 68/151/EEC.
54 See Chapter 17.

3.12.3 The Group devoted considerable time to considering how the project to simplify and update company law and the project to consolidate company law could be carried out in a way that achieved synergy. It was clear that unless the two ventures – consolidation and revision following review – are carefully managed and dovetailed there is the potential for inconsistency and incoherence in the reform of company law.

3.12.4 The initial task was to decide which should come first – revision or consolidation. The Group came to the clear conclusion that revision must first be carried out and enacted before consolidation. This is because the nature of the review undertaken by the Group proposes a significant restructuring of the Companies Acts; it would be folly to consolidate a body of law that the Group is proposing should be radically overhauled in the immediate future. The consolidation must, therefore, be of the law as revised.

3.12.5 The Review Group considered the option of a restatement rather than a consolidation of company law. A Bill to provide for restatements of bodies of law is currently (December 2001) before the Oireachtas. Once restatement of company law becomes a possibility; it will provide an alternative to consolidation. As envisaged, restatement is an administrative consolidation, with the important proviso that the restatement is not in the form of an Act passed by the Oireachtas but is instead a statement of existing law in a single text certified by the Attorney General. A restatement is merely laid before the Oireachtas rather than enacted by it.

3.12.6 The Review Group carefully considered the respective advantages of the consolidation and restatement options before concluding that consolidation offered the better option for Irish company law as it currently subsists on the statute book. The Group concluded that restatement, would not achieve the radical restructuring of the Companies Acts proposed. Once the Companies Acts are correctly structured as the Review Group recommends, then restatement will be of significant assistance in presenting subsequent variations of the law in their correct context.

3.12.7 A considerable volume of Irish company law is EU based. Some of this is enacted into Irish law by secondary legislation, i.e. statutory instrument. In this regard the Review Group considered how best to treat Regulations concerning company law made under the European Communities Act 1972[55] (the EC Act) in the context of consolidation. The main argument in favour of including Regulations made under the EC Act in the company law consolidation is that such Regulations have statutory effect – i.e. they can and do amend company law statutes, expressly or implicitly. There would seem to be little point in consolidating the company law statutes if one does not include those Regulations which amend them and indeed are to be construed as one with the statutes. The objections normally raised to inclusion of statutory instruments in a consolidation exercise are that: (a) statutory instruments normally deal with matters of detail whereas statutes deal with matters of principle; and (b) statutory instruments do not attract the same level of parliamentary scrutiny as a statute.

3.12.8 The Review Group concluded, however, that neither of those objections applies in this case. Many of the Regulations made under the EC Act do in fact deal with matters of principle rather than matters of detail. Moreover, unlike other statutory instruments, there is explicit provision in the EC Act for the Oireachtas to give Regulations made under the Act whatever degree of scrutiny it deems necessary in the relevant designated Committee. Having regard to the above analysis the Group concluded that it would be desirable to incorporate Regulations made under the EC Act in the consolidated Companies Act without first enacting them in primary legislation. In order to clarify the position, the Department of Enterprise, Trade and Employment raised these points with the Office of the Attorney General. That Office concurred with the analysis of the Review Group and advised that statutory instruments drawn up under the EC Act could be consolidated without first being enacted as primary legislation.

3.12.9 Chapter 17 sets out how the differentiation between public and private companies and redefinition of the private company as the standard company should be achieved in the context of consolidation.

55 As amended by the European Communities (Amendment) Act 1973.

threesummary

3.13 Summary of Recommendations

3.13 Summary of recommendations

- The private company limited by shares, or CLS, should be the primary focus of simplification; anomalies and uncertainties should, however, be removed from the law applicable to other types of company. **(3.2.3)**

- For private companies limited by shares the current two-document company constitution, composed of a memorandum of association and articles of association, should be replaced by a one-document constitution. **(3.2.7)**

- The Review Group recommends an increased focus, in the enactment of all future companies legislation, on the needs of the small private limited company and in this respect fully endorses the "think small first" approach favoured by the English Company Law Review Steering Group.[56] The three principles to be followed to ensure legislation meets the needs of small private companies travel well to Ireland. These are: (i) the law should be clear and accessible; but (ii) accuracy and certainty should not be sacrificed unduly in an attempt to make the law merely superficially more accessible; and (iii) the legislation should be structured in such a way that the provisions that apply to small companies are easily identifiable. **(3.2.8)**

- Although the privilege of limited liability does give rise to much of the legislative complexity and compliance burdens for small businesses, the unlimited company is not the panacea to complexity. **(3.3.6)**

- Shareholder protection measures should distinguish between the CLS and the PLC. **(3.4.13(i))**

- Shareholder protection measures should not be unnecessarily complex. Shareholder approval should be obtainable in all companies using the unanimous written resolution procedure in s 141(8) of the 1963 Act, whether or not their articles so permit. **(3.4.13(ii))**

- Creditor protection measures should be reasonable and to the extent that a company has limited liability, driven by its solvency and the establishment of such. Rather than provide for outright prohibitions on companies engaging in particular activities, where possible, there should be validation procedures whereby companies can engage in particular activities upon their solvency being confirmed by statutory declaration of the directors. **(3.4.13(iv))**

- Creditor protection measures should recognise *de minimis* exceptions whereby small or otherwise irrelevant transactions are exempt from strict regimes. **(3.4.13(vi))**

- Permitting companies to fund otherwise prohibited activity where financed by distributable profits, should continue to be used to mitigate the more harsh effects of creditor protection provisions in respect of activities which are considered inappropriate to the validation procedure. (**3.4.13(vii))**

- The effect of the same legal provisions applying to CLSs and PLCs is to increase the complexity of the companies code as it applies to the CLS. The law applicable to the CLS should be divorced from the law applicable to public limited companies and other companies. **(3.5.5)**

- The private company limited by shares (CLS) should be established as the model company in the Companies Acts. **(3.6.5)**

- The CLS should be defined as a company which: (a) has a share capital; (b) has the liability of its members limited by shares; (c) by its **constitution** (i) restricts the right to transfer its shares; and (ii) limits the number of its members to one hundred and fifty, not including persons who are in the employment of the

56 Company Law Review Steering Group, *Modern Company Law for a Competitive Economy – Final Report,* (2001) p 37, para 2.34.

company; and (iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company. **(3.6.6)**

- Following the redefinition of the private company and the realignment of the Companies Acts to recognise the CLS as the most important type of company, the law applicable to the CLS must be clearly identifiable. The law applicable to the CLS should be self-contained and segregated from the law applicable to other types of company and other bodies corporate. **(3.7.1)**

- The consolidated Companies Act should be sub-divided into two groups of law. The first group of law (Group A) will define the CLS and contain all company laws that apply to it and the second group of law (Group B) will reference and define the remaining types of companies and other bodies corporate and provide, by cross-reference to Group A, those provisions that apply to each type of company. **(3.7.2)**

- Greater use should be made of defined terms in order to make the legislation more succinct and less repetitive in form. Defined terms that apply throughout the Companies Acts should be highlighted in **bold** print and defined terms that apply only to the section, Chapter or Part of the Acts in question should be in *italics*. **(3.9.1)**

- Company officers and company members should be facilitated to transact business electronically, *inter se*, and with the regulatory authorities so as to minimise costs and to maximise the gain from efficiencies in time and convenience. **(3.11.3)**

- The revision of company law must first be carried out and enacted before the consolidation of company law. **(3.12.4)**

- Consolidation is a better option for Irish company law than restatement, although restatement may be used in respect of amendments subsequently made to the Consolidated Act. **(3.12.6)**

- Regulations concerning company law made under the European Communities Act 1972 should be included in the consolidated Companies Act without first being enacted as primary legislation. **(3.12.7)**

4

CHAPTER 4

Simplification: Corporate Goverance

four

4.1 Introduction

The existing statute law

4.1.1 The present statute law concerning internal administration, commonly called corporate governance, is found mainly in Part V of the 1963 Act. Rather than dealing with the broad sweep of what is now called corporate governance, the existing statute law deals with rudiments of internal administration. Corporate governance encompasses areas of company administration such as the protection of shareholders, employees, creditors and other members of the public. The recommendations made in this Chapter are concerned primarily with simplifying and enhancing the procedures of corporate governance, as opposed to the protective objectives or results of those procedures.

Table A Regulations

4.1.2 In addition to the body of the statute, the provisions of Table A need to be considered.[1] This model set of articles of association applies in all companies limited by shares, save to the extent to which it is disapplied or varied by specifically adopted articles of association.[2] Table A contains a significant body of standard principles and practices of corporate governance, even if a number of its provisions are modified slightly in the case of each company by specifically adopted articles of association. What started off as a default model has, to a great extent, become the standard for most companies.

4.1.3 A number of comments can be made regarding Table A. In the first place, some of the provisions in Table A cannot be amended, or only to a certain extent.[3] Secondly, some of the provisions are merely repetitions of the statute.[4] Thirdly, some of the provisions which are variable have a present default, which is not the normal practice,[5] and, as a consequence, there are now fairly standard amendments made to Table A. The bilocation[6] of the rules of law which relate to internal administration renders it very difficult for non-experts, and perhaps most importantly, company directors, to navigate the law.

Technology

4.1.4 Corporate governance has incorporated new technology and, in the case of some old technology such as telephones, more reliable technology. Board meetings by telephone and faxed shareholders' resolutions are not uncommon, subject to the articles so providing. Most significantly, the ECA 2000 recognises the exponential increase in use of e-mail and the Internet and, subject to its provisions, that Act facilitates certain transactions which otherwise would require to be transacted in person or in writing. The existing Companies Acts and Table A are largely silent on these technologies.

4.2 Approach of the Review Group

4.2.1 The Review Group decided, in the absence of any submissions or controversy on the subject, that corporate governance be examined on the assumption of the present single-tier board, rather than considering the possibility of a split between a management board and a supervisory board as is found in a number of European civil law jurisdictions.[7]

1 Likewise, Table C is relevant for the companies limited by guarantee not having a share capital incorporated since 1982, which automatically adopt Table C on incorporation, subject to amendments and exclusions in specifically adopted articles. For convenience, reference is made in this Chapter only to Table A provisions rather than also to the corresponding Table C provisions. The analysis of and recommendations with respect to Table A apply equally to Table C.

2 1963 Act, ss 13, 13A.

3 See s 133 of the 1963 Act as to minimum periods of notice for meetings; s 137 as to right to a poll.

4 See s 139 of the 1963 Act, Table A Regulation 74.

5 Regulation 79 which limits the powers of directors to exercise the company's borrowing powers to an amount referable to share capital.

6 And sometimes trilocation – see s 134 of the 1963 Act, Table A Regulations 51 and 133 regarding notices of meetings.

7 See also 11.8.13.

4.2.2 The Review Group analysed the existing law and regulation that concern corporate governance on a section by section basis as follows:

Companies Act 1963

Sections 113 to 114	Registered office and name
Sections 116 to 124	Register of members
Sections 131 to 146	Meetings and proceedings
Section 195	Register of directors and secretaries
Sections 378 to 379	Registers, notices

Table A

Regulations 47 to 74	General Meetings
Regulations 75 to 114	Directors
Regulation 115	Seal
Regulations 133 to 136	Notices

European Communities (Single Member Private Limited Companies) Regulations 1994

Regulations 4 to 14	Consequences of being a single member private limited company

4.3 Registered office, name and company seal

Registered office and name

4.3.1 The Review Group recommends no change to the requirement that every company must have a registered office, and recommends against any amendments to the general requirement to publicise the name of a company.

Requirement for a company seal

4.3.2 One of the principal and recognised consequences of incorporation is that a company has a common seal.[8] In addition, there are statutory requirements incidental to incorporation, such as that in s 114 of the 1963 Act, which requires that a company must, inter alia, "(b) … have its name engraven in legible characters on its seal". Most companies adopt Regulation 115 of Table A which provides:

> The seal shall be used only by the authority of the directors or of a committee of directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.

4.3.3 The key points in this model regulation are: (i) the authority of the directors; and (ii) the fact of two signatures. There is, however, no legal minimum or maximum on the number of countersignatories to a company seal. Companies incorporated under the Companies Consolidation Act 1908 adopted (subject to amendment by specifically adopted articles) a 1908 Table A provision requiring the signatures of two directors and of the secretary. Some companies adopt an article requiring only one countersignatory.[9] All variations are permissible.

4.3.4 There are relatively few legal documents that are *required* to be executed under seal. The principal ones are:

(i) conveyances and transfers of freehold land;
(ii) mortgages and certain fixed charges over land;
(iii) documents agreeing transactions with a "voluntary" or gratuitous element;

8 1963 Act, s 18(2).

9 The securities seal (the "official seal") provided for public companies under s 3 of the 1977 Act is routinely applied by registrars of companies without countersignature of the directors or other officers.

(iv) deeds poll – documents executed by one party only – to a greater or lesser degree purporting to bind the party, such as a power of attorney;
(v) share certificates;
(vi) transfers of securities in the form of stock transfer forms specified under the Stock Transfer Act 1963;
(vii) certain court documents required to be under seal.[10]

4.3.5 Many other documents are, *as a matter of practice*, executed under seal, such as:

(i) transactions in leasehold property;[11]
(ii) contracts with financial institutions, especially guarantees and security documents;
(iii) building agreements;
(iv) establishment of trusts, including those for pension funds.

4.3.6 In addition, significant commercial agreements – for example long-term supply or distribution agreements will often be executed under seal. What distinguishes all of the above documents from other contracts is their relative importance to the parties executing them.

4.3.7 The Law Reform Commission recently considered this issue in depth in the context of execution of property transaction documents.[12] The Commission concluded:

> "The Commission accepts that for a small number of large companies, notwithstanding the provisions of section 38(1)(b) of the Companies Act 1963, it is inconvenient to have to execute large numbers of documents under the companies' seal. On the other hand, for the vast majority of companies, the number of times that such companies are required to execute documents under seal is very limited. When such execution is required it is normally in respect of very significant documents such as those dealing with the transfer of interests in land or the establishment or variation of pension schemes. It is the Commission's view that the completion of such instruments, in the case of the majority of companies, is a matter of such importance to those companies that it should be marked with appropriate formality. Accordingly it recommends the retention of the requirement of sealing for those documents which are required to be deeds."[13]

4.3.8 In Chapter 10,[14] the Review Group recommends that in the interests of settling the authority of the person who affixes and signs instruments to which the seal is affixed, greater use could be made of the mechanism in Regulation 6(2) of SI 163 of 1973 whereby a person can be registered to act on a company's behalf.

4.3.9 The Review Group considered whether a company ought to be required to have a company seal. In principle, the Group sees no inherent merit in the fact of there being a seal, but considers there is merit in the corporate procedures which are routinely required in connection with the affixing of the company seal. The Group therefore agrees with the Law Reform Commission on this subject and, accordingly, recommends the retention of the company seal. The Group also recommends that a person registered under Regulation 6(2) of SI No 163 of 1973 should be deemed to be a person appointed by the directors to affix the seal and sign the instrument under seal and that in such a case, no countersignature is required.

10 e.g. a bankruptcy petition. The Rules of Court (Order 76 Rule 20(1) provides: "A creditor's petition by a limited company or body corporate shall be sealed with the seal of the company or body corporate and signed by two directors or by one director and secretary. Such seal and signature shall in all cases be attested."

11 Notwithstanding ss 4, 7 and 9 of the Landlord and Tenant Law Amendment Act, Ireland 1860 ("Deasy's Act"), which permit leases, surrenders of leases and assignments/transfers of leasehold property to be effected by, inter alia, "note in writing".

12 The Law Reform Commission *Report on Land Law and Conveyancing Law: (6) Further General Proposals including the Execution of Deeds* (LRC - 56 – 1998) May 1998.

13 *ibid*. para 2.76.

14 See 10.10.6.

Mitigating formalities by appointing attorneys

4.3.10 There are, however, a number of legal alternatives to the use of a seal by a company which companies desirous of mitigating formalities can invoke. A company may, subject to its memorandum and articles of association,[15] appoint an attorney to execute deeds. In that event the attorney would execute the document as attorney of the company. If the attorney is an individual, that individual will sign, seal and deliver the document. If the attorney is a company it will execute the document as it would for a document it executes in its own right.

4.3.11 Section 40 of the 1963 Act explicitly provides that a company may appoint an attorney to execute deeds in any place outside the State. This section might suggest that for want of a similar section for deeds within Ireland it is not possible to do so in Ireland.[16] The section does not, however, qualify a company's power to do this by reference to its memorandum and articles of association and effectively adds an extra express power to all registered companies, regardless of what is in their memorandum or articles of association.

4.3.12 This is reinforced by s 41 of the 1963 Act which enables "a company whose objects require or comprise the transaction of business outside the State ... *if authorised by its articles*" [of association] to have an official seal for use abroad. Such official seal is a facsimile of the common seal with the addition of the name of every "territory, district or place where it is to be so used". In the case of limited companies, Regulation 6 of the 1973 Regulations is helpful. This provides:

> (1) In favour of a person dealing with a company in good faith, any transaction entered into by any organ of the company, being its board of directors *or any person registered under these regulations as a person authorised to bind the company*, shall be deemed to be within the capacity of the company and any limitation of the powers of that board or person, whether imposed by the memorandum or articles of association or otherwise, may not be relied upon as against any person so dealing with the company.
> (2) Any such person shall be presumed to have acted in good faith unless the contrary is proved.
> (3) For the purpose of this Regulation, the registration of a person authorised to bind the company shall be effected by delivering to the registrar of companies a notice giving the name and description of the person concerned.

4.3.13 This is the implementation into Irish law of Article 1(d)(i) and Articles 7 to 9 of the First EU Company Law Directive.[17] It is particularly useful as it enables the registration of individuals other than directors as representatives of a company. It may be noted, however, that there is some hesitation to rely on this provision of law, perhaps because of the requirement of "good faith".[18]

4.3.14 The Review Group recommends that s 40 of the 1963 Act should be declaratory of the fact that the power to appoint an attorney: (i) is regardless of any provision in the memorandum and articles of association; and (ii) extends to acts done within the State.

4.4 Register of members and other registers

Register of members

4.4.1 The Review Group does not recommend any change to the substantive law regarding registers of members, notwithstanding considerable changes in the mode of keeping registers during the lifetime of the provisions of the 1963 Act. The amendments made by the 1977 Act further facilitated the holding of records in electronic form and along with the 1990 Act (and Uncertificated Securities Regulations 1996) have ensured that the law is up to date and conformable with common practice. The ECA 2000 further facilitates the easy implementation of the law. For example, s 12 of that Act operates to recognise the legality of the delivery in electronic format of information on the register of members in lieu of the written form where the parties agree.

15 Subject to whether it may as a matter of law delegate its authority, e.g. a trustee cannot delegate in certain circumstances and an attorney cannot sub-delegate.

16 In *Industrial Development Authority v. Moran* [1978] IR 161 it was held by the Supreme Court that a company had the power to grant powers of attorney within Ireland, reversing a High Court decision which had erroneously picked up on this suggestion.

17 68/151/EEC of 9 March 1968.

18 See 10.10.2.

Registers generally

4.4.2 The Review Group considered that there was room for improvement in the rules that apply to maintenance and inspection of the various company registers and records. Issues which arise here include: (i) the varied nature of the obligation to maintain registers and documents, to provide access and to furnish extracts; (ii) the interaction between the ECA 2000 and the provisions of the Companies Acts, including those provisions which anticipate the use of electronic registers; and (iii) the desirability of using the Internet and other technologies to facilitate compliance with the law regarding registers.

Obligations in relation to registers and documents

4.4.3 The Companies Acts require that a company keep various registers and other documents, to allow access and to furnish copies and extracts from various registers and documents, as set out in the following table.

Register or other document	To be kept at	Inspection/cost	Copies
ACCOUNTS Accounts (1990 s 202)	Registered office or somewhere else in the State	Directors – free	Annual accounts to be furnished each year to members and debenture holders
CONSTITUTIONAL DOCUMENTS Copies of memorandum and articles (1963 s 29)	To be provided to members on request		A fee of not more than IR£0.25 (€0.32) for each copy
DEBENTURES AND CHARGES Register of debenture holders (1963 s 91)	Registered office or anywhere in the State	Members and debenture holders – free Others IR£0.05 (€0.06)	Must be furnished by company to any person at IR£0.02½ (€0.03) per 100 words, but there is no time limit
Debenture trust deeds (1963 s 92(3))			Must be furnished by company to any debenture holder at IR£0.02½ (€0.03) per 100 words, but there is no time limit
Copies of instruments creating charges (1963 s 110(1))	Registered office	Members and debenture holders – free	
DIRECTORS Register of directors and secretaries (1963 s 195)	Registered office	Members - free Others - IR£1(€1.27)	
Book containing particulars of directors' interests in company contracts (1963 s 194(5))	Registered office	Auditors, directors, members and Secretary - free	
Register of directors' and secretaries' interests in group/ company securities (1990 ss 59, 60)	With register of members	Members - free Others - IR£0.30 (€0.38)	Must be furnished by company to any person within 10 days at IR£0.15 (€0.19) per 100 words
Copies of certain service agreements of directors or secretary (1990 s 50)	Registered office or with register of members or at principal place of business	Members - free	Must be furnished by company to any member within 7 days at IR£0.05 (€0.06) per 100 words
MEETINGS Minute book of proceedings of meetings of board and board committees (1963 s 145)	Anywhere	Directors only - free	
Minute book for proceedings at general meetings (1963 s 145)	Registered office (and at AGM on day of AGM)	Members - free	Must be furnished by company to anyone within 10 days at IR£0.02½ (€0.03) per 100 words

Register or other document	To be kept at	Inspection/cost	Copies
MEMBERS Register of members (1963 ss 116, 119)	Registered office or anywhere in the State	Members - free Others - IR£0.05 (€0.06)	Must be furnished by company to any person within 10 days at IR£0.15 (€0.19) per 100 words
Index of members (for companies with more than 50 members) (1963 ss 117, 119) Contracts to purchase own shares (1990 s 213(5))	With register of members Registered office (and at A/EGM on day of A/EGM)	Members - free Others - IR£0.05 (€0.06) Members and others - free	Must be furnished by company to anyone within 10 days at IR£0.02½ (€0.03) per 100 words
PLCs – EXTRA REQUIREMENTS Register of interests in plc shares (1990 s 80)	With the register of Directors' interests in company securities	Members and others – free	
Copies of plc's investigations of own shareholdings (1990 ss 82, 84)	Registered office	Members – free	

4.4.4 The present law on the obligation to maintain, provide access to and furnish extracts of registers and documents contains a number of anomalies: (i) *As to location* – in some cases a register's location can be migrated elsewhere in the State (e.g. the register of members), whereas others cannot (e.g. the register of directors). (ii) *As to cost of inspection and copies* - s 105 of the 1990 Act does provide for the Minister by order to alter the basis of charges referred to in the sections of the Companies Acts regulating various matters.[19] No such order has been made. (iii) *As to what must be available for inspection and what must be furnished* – service agreements and contracts to purchase own shares must be available for inspection, but need not be copied to members, whereas the memorandum and articles of association need not be available for inspection but must be furnished. (iv) *As to class of disclosees of registers or documents* - members can see some registers and documents while creditors and members of the public can see others.

4.4.5 Subject to the comments below, with regard to electronic inspection of documents, the Review Group recommends:

(i) That documents required to be made available for inspection should be made available for inspection either at the registered office or another place in the State, subject to notification to the Registrar of that location (as is at present the case with regard to the register of members).

(ii) That the Minister should make an order to standardise inspection fees and copying fees commensurate with the actual cost of provision of copies.

(iii) That no change be made to those documents that must be made available for inspection and those documents that must be furnished, notwithstanding the apparent anomalies. Specifically, the Group notes a distinction between registers (members, directors, directors' and secretaries' interests, debenture holders) relating to company structure on the one hand and transactional documents such as service agreements of directors and contracts of purchase of the company's own shares on the other. Extracts from the registers must be furnished whereas copies of agreements need not.

(iv) That a company, as at present, need not have for inspection a copy of its memorandum and articles of association. This is the one document which must be furnished on demand to members which is not required to be available for inspection. The Group's reason for this is convenience to the company – far better that a document be furnished by post or by e-mail than unnecessary inconvenience be caused to a company.

19 e.g. the register of interests of directors and secretary in shares and debentures of a company (or other group companies); the register of debenture holders; the register of members; the register of directors and secretary; minute books of a company.

(v) That there be no change to the classes of disclosee of registers and documents. It should be provided that auditors, in the fulfilment of their duties, are in all cases made specific disclosees of registers, documents and minutes.

4.4.6 The Review Group notes that the law as to registers is complex and considered a number of methods of rationalising it. The Group observes, however, that the law does not provide any constraint on the development of simplified methods of retention and inspection of records. The Group is particularly optimistic that the simplification of information to be disclosed in relation to the interests of directors and secretaries in company shares and debentures[20] will reduce the practical complexity for the majority of companies.

Maintenance of records by companies in electronic format

4.4.7 The ECA 2000 creates legal equivalence for the keeping of records in electronic format with records kept in writing. There is an important distinction between the ECA 2000 and the company law code, however, in that the ECA 2000 is elective in its approach whereas the Companies Acts are prescriptive. The ECA 2000, apart from its provisions for public bodies,[21] assumes agreement between the parties on the use and form of electronic communications. Section 18(2)(e) of the ECA 2000 would appear to give to any person entitled to view records retained by a company a veto over the form in which those records are to be retained or produced. That is unreasonable, and indeed inoperable, in the case of company records which are retained for access by a wide range of possible users.

Compatibility between the ECA 2000 and the Companies Acts

4.4.8 It is important to eliminate the potential for confusion, real or perceived, between the ECA 2000 and the Companies Acts with regard to the maintenance of electronic records by companies. The current situation is that the ECA 2000 provides at s 18(1):

> If...a person...is required...or permitted...to retain for a particular period or produce a document in written form, then, subject to subsection (2), the person...may retain...or, as the case may be, produce, the document in electronic form, whether as an electronic communication or otherwise.

4.4.9 Section 18(2) of the ECA 2000 qualifies s 18(1) by providing savers for the integrity of information in the document, the need to display it in intelligible form and the need for reasonable access.

4.4.10 Potential confusion, or at least duplication, can be inferred from s 18(3) which provides that:

> Subsections (1) and (2) are without prejudice to any other law requiring or permitting documents in the form of paper or other material to be retained or produced—
> (a) in accordance with particular information technology and procedural requirements,
> (b) on a particular kind of data storage device, or
> (c) by means of a particular kind of electronic communication.

4.4.11 Section 378 of the 1963 Act provides for record keeping by a company or the Registrar in bound books or any other manner. This has been further amplified by s 4 of the 1977 Act which specifically provides for recording the matters in question otherwise than in a legible form so long as the recording is capable of being reproduced in a legible form. The Companies Act 1990 (Uncertificated Securities) Regulations 1996,[22] made pursuant to s 239 of the 1990 Act also makes extensive provisions in regard to registers of securities.

4.4.12 Section 18(3)(a) of the ECA 2000 preserves existing statutory provisions on "procedural requirements". The Review Group recognises that that provision was intended to ensure that any specific rules, laid down for example under s 4(4) of the 1977 Act, would not be prejudiced. However, the consequence of this is that

20 See 11.10.8.
21 ECA 2000, s 12(2)(b).

provisions regarding company records are now covered by both areas of law, as illustrated above. From the point of view both of simplification and of legal certainty it seems clear that only one legal basis should apply to the maintenance of company records in electronic form.

4.4.13 Section 4 of the 1977 Act provides that: a register kept in non-legible form shall be capable of being reproduced in legible form. Section 18(2)(b) of the ECA 2000 takes the more generalised approach that information must be "capable of being displayed in intelligible form to the person or public body to whom it is to be produced". While in due course it will be possible to assume that direct computer access will be reasonable for all persons, there are circumstances where written copies are still required.

4.4.14 The Review Group makes the following recommendations:

(i) That the ECA 2000 should be taken as the principal legislation on the keeping of electronic records by companies under the Companies Acts.
(ii) The provisions of the Companies Acts, other than s 239 of the 1990 Act,[23] regarding companies and their ability to keep records in electronic form should be repealed.
(iii) That the Minister be enabled to make regulations to give better effect to those provisions of the ECA 2000 as they apply to the maintenance of records of companies.

Mode of display and copies of electronic information

4.4.15 Section 18(2)(e) of the ECA 2000 would appear to give any person entitled to view the records a veto over the form in which the records are to be retained or produced. That may be unreasonable in the case of company records where a wide range of people might be involved.

4.4.16 The Review Group makes the following recommendations:

(i) In the case of records retained or produced under the Companies Acts which may be accessed by a class of persons (e.g. shareholders or the public), any reasonable form of retention or production may be used by the company provided that it complies with regulations (if any) made by the Minister.
(ii) In the case of the production of extracts or copies of records or documents, hard copies may be retained as the standard mode of delivery, with s 12 of the ECA 2000 being available as a non-mandatory method to facilitate electronic delivery.
(iii) The powers of the Minister to make regulations should explicitly provide that such regulations may delete the requirement for the production of written extracts from registers. For example, it would be reasonable at present to provide that a register of members of a PLC with perhaps 50,000 or more shareholders may be delivered in electronic form.

Website disclosure

4.4.17 The Companies Acts set out requirements as to the locations at which particular records are to be kept by a company. It would appear to be necessary to clarify what is meant by "keeping a record" at a particular location, as electronic records may be stored elsewhere than the location where access to those records is made available. The purpose of requiring the records to be kept at a particular location is to facilitate the right of inspection which the Acts accord in respect of those records. The ECA 2000 permits records such as registers to be kept on a website and this is clearly a convenient and generally accessible means of keeping records. Similar considerations may arise in respect of s 90 of the 2001 Act which requires the location of the exact address of a company's books and records to be disclosed in the directors' report.

22 SI No 123 of 1996.

23 Section 239 of the 1990 Act provides as follows: The Minister may make provision by regulations for enabling title to securities to be evidenced and transferred without a written instrument.

4.4.18 The Review Group recommends that where records are retained by a company on a generally accessible website, the Registrar should be notified on the existing statutory form (B3) of the relevant address of the website.

4.5 Notices, meetings and proceedings

The annual general meeting and written resolutions

4.5.1 At present, the standard forum for decisions of company members is the general meeting, whether annual or extraordinary. Every year there must be an annual general meeting and there may be extraordinary general meetings. Single-member private limited companies can dispense with the annual general meeting. Section 141(8) of the 1963 Act provides for the use of members' written resolutions in lieu of passing ordinary or special resolutions, subject to the articles of association of a company permitting them. Regulation 6 of Table A Part II provides such an enabling article as a norm for private companies. A frequent amendment to the articles of association of private companies limited by shares at present is that such a written resolution may consist of several separate pieces of paper. Although it is technically possible for the resolutions ordinarily passed at an annual general meeting being passed by using the written resolution procedure, it would be pointless as the law does not provide for dispensing with the actual annual general meeting itself (save in the case of the single-member company).

4.5.2 The usual business of an annual general meeting is: (i) the laying of the accounts before the members, which accounts must be sent to the members at least 21 days before the meeting; (ii) the declaration of a dividend; (iii) the re-election of directors appointed since the last annual general meeting and those retiring by rotation; and (iv) the reappointment of auditors (which takes place automatically in the absence of a resolution to remove or replace them). In addition, the annual general meeting is the usual forum for: (i) fixing the remuneration of the directors; and (ii) approving the remuneration of the auditors. This is frequently dealt with by delegating to the directors the authority to fix the auditors' remuneration until the conclusion of the next annual general meeting. In public companies, the agenda usually includes resolutions to approve the issue and repurchase of shares.

4.5.3 The Review Group noted that in many private companies the business of an annual general meeting is a foregone conclusion, particularly where the members in their capacity as directors will already have approved the accounts, the level of dividend, the re-election of themselves as directors (in the unlikely event of rotation of directors applying) and the continuance in office of auditors. The Review Group believes that for many private companies, the holding of an annual general meeting is an empty gesture. In many cases no meeting may actually have been held, but rather the paperwork attendant upon the convening and holding of an annual general meeting will be generated, signed and filed. The Group acknowledges that this may happen in practice and whilst such cannot be condoned, the Group strongly believes that it is not desirable that the law should be so out of tune with practice as to bring the law into disrepute.

4.5.4 The Review Group considered whether it was either desirable or necessary to retain the requirement that all companies must hold an annual general meeting. The choices open to the Group in making its recommendations were threefold. In the first place, the law could continue to retain an unbending requirement for an annual general meeting. Secondly, the law could be changed to enable companies to establish paper procedures for arriving at decisions ordinarily dealt with at annual general meetings, including enabling resolutions to be passed by majority written resolution. Thirdly, a variation on this might be to provide that private companies limited by shares, i.e. the proposed CLS, would not be required to hold annual general meetings unless by a particular point in time each year any one member applied to the company for an annual general meeting be held. The Group considered whether a majority of members, including a qualified majority, could dispense with the need to convene and hold an annual general meeting in the face of minority opposition. The Group was not prepared to allow such a decision to be taken by a majority and believes that any relaxation must be conditional upon unanimous

shareholder approval, including the approval of shareholders whose rights extend only to attending general meetings.

4.5.5 Whilst the Group considers that a majority of private companies will survive without a requirement for annual general meetings, there will be a substantial minority for whom a meeting is unquestionably the best procedure to follow. Apart from the practical difficulties in seeking unanimous shareholder consent in large companies, it is considered to be undesirable that PLCs should be permitted to dispense with the holding of the annual general meeting.

4.5.6 For other companies – particularly the private company limited by shares – the Group recommends that it should be permissible in law for such companies' members to dispense with the need to hold an annual general meeting. The following are the Review Group's recommendations:

(i) In all companies, except PLCs, the law of meetings should be aligned with practice by permitting all of the members entitled to attend the annual general meeting to sign a unanimous written resolution, dispensing with the need to convene and hold a meeting and agreeing to accept, in lieu thereof, copies of all documents they would otherwise receive and to take such decisions as require to be taken by unanimous written resolution.

(ii) Any resolution required to be passed at any general meeting in any company, including the annual general meeting, may be achieved by unanimous written resolution, consisting of any number of pieces of paper, regardless of what is in the company's articles of association.

(iii) Companies that are permitted to dispense with the annual general meeting should be able to initiate a procedure in advance of the time they would be required to convene the annual general meeting so that, if unanimous consent is not forthcoming, a meeting can be convened and held in accordance with the Companies Acts.

(iv) In the event that a written resolution is not contemporaneously signed (with separate documents being circulated to shareholders) the company should confirm the passing of the resolution to the members within one month of its passing.

(v) Companies' auditors should be entitled to demand that the directors convene an annual general meeting where there is a proposed resolution for any change in the audit appointment. The consent of the auditors should not, however, be required for the transaction of the business of the annual general meeting (other than matters affecting the auditors *per se*).

(vi) As with all matters to be attended to in writing, the foregoing would by reason of the ECA 2000 be able to be achieved electronically.[24]

Length of notice for meetings

4.5.7 The 1963 Act lays down minimum notice periods for holding meetings. This is done indirectly rather than directly, by providing that any provision in the articles of association is void to the extent that it permits convening of meetings by shorter notices. The different minimum notice periods are

(i) 21 days for an annual general meeting and meetings to pass a special resolution;

(ii) 14 days for an extraordinary general meeting in a public limited company and company limited by guarantee not having a share capital;

(iii) 7 days for an extraordinary general meeting in a private company or unlimited company (public or private); and

(iv) unspecified, in the case of meetings convened under s 201 of the 1963 Act.

24 See 6.5 on the subject of electronic communications to and from members.

4.5.8 The 1963 Act again indirectly seeks to deal with how these periods of time are to be construed. Section 134 of the 1963 Act provides that notice of a meeting of a company must be served in the manner in which notices are required to be served by Table A, save where the articles of association provide otherwise. Regulation 51 of Table A provides that a notice of general meeting shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given. Regulation 133 of Table A provides that where a notice is sent by post, service of a notice of a meeting is deemed to have been given at the expiration of 24 hours after the letter containing the same is posted, but then providing that any other notice (e.g. a notice making a pre-emptive offer of shares under s 23 of the 1983 Act) is deemed received at the time at which the letter would be delivered in the ordinary course of post.

4.5.9 Just to complicate matters further, s 11(h) of the Interpretation Act 1937 provides:

> 11.—The following provisions shall apply and have effect in relation to the construction of every Act of the Oireachtas and of every instrument made wholly or partly under any such Act, that is to say:—
> Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period, and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period.

4.5.10 The Review Group recommends:

(i) That the Companies Acts should specify precisely what are to be the periods of notice for meetings, rather than delegating it to provisions in articles of association. The periods of notice should be 21 days for an annual general meeting, meetings to pass a special resolution and meetings convened under s 201 of the 1963 Act. The period of notice for an extraordinary general meeting should be 7 days, except in the case of a public limited company where it should be kept at 14 days. Companies would be entitled to increase these periods of notice.

(ii) That a notice, whether of a meeting or of any other matter and any other document, once posted to the registered address of a member should be deemed received 24 hours following posting.

(iii) That the period of notice for any matter under the Companies Acts should exclude the day of receipt or, when posted, the deemed date of receipt, as well as the date of the meeting.

(iv) As with all matters to be attended to in writing, the foregoing would by reason of the ECA 2000 be able to be achieved electronically.

Place of service of notice

4.5.11 Under the standard Table A[25] provisions as to service of notices, a notice "may be given by the company to any member either personally or by sending it *by post* to him to his registered postal address." It is not possible to serve notice on a member by delivery other than by post to the registered address of the member.

4.5.12 The Review Group recommends that any notice may be served and any other document delivered by hand at a member's registered postal address (as well as by post to that address and personally to the member).

4.6 Register of directors and secretaries

4.6.1 The Review Group does not propose any material change to the provisions as to this register, apart from the comments made with respect to registers generally at 4.4.

25 Regulation 133.

Former directorships

4.6.2 The Group noted the burden on certain company directors to identify all companies worldwide, along with their registered numbers, of which they have been directors during the 10 years prior to appointment. This requirement was introduced by the 1990 Act. The Bill as initiated proposed to copy the UK example of 5 years but the period was increased to 10 years when the Bill was proceeding through the Oireachtas.

4.6.3 Having regard to the experience of its operation since enactment the Review Group recommends that the 10-year period be reduced to 5 years.

Changes of name

4.6.4 The Group noted anachronistic anomalies which exempt directors who change their name from being required either to notify the Registrar of this change or from disclosing this change at any stage in the future. These are found in s 195(15)(b) of the 1963 Act, as inserted by s 51 of the 1990 Act which provides:

> [R]eferences to a "former forename" or "surname" do not include—
> (i) in the case of a person usually known by a title different from his surname, the name by which he was known previous to the adoption of or succession to the title; or
> (ii) in the case of any person, a former forename or surname where that name or surname was changed or disused before the person bearing the name attained the age of 18 years or has been changed or disused for a period of not less than 20 years; or
> (iii) in the case of a married woman, the name or surname by which she was known previous to the marriage.

4.6.5 The Review Group recommends that all changes of name, no matter how occasioned, ought to be notified to the Registrar when they occur and disclosed as a previous name in subsequent filings.

4.7 Table A

Table A generally

4.7.1 The Review Group examined three possibilities as to how to deal with the situation whereby there is parallel law concerning company administration in Table A and the main body of the statute. The options are: (a) to leave things as they are; (b) to bring all the Table A provisions back into the main body of the statute; (c) where there is nothing at present in the main body of the statute relating to the practice adopted in Table A, either add that practice to the statute, or cross-refer to Table A.

4.7.2 The Group considered that the common modes of internal governance of companies ought to be readable immediately from the main body of the statute, even if certain variations from those common modes of governance are chosen by particular companies. It is thought that notwithstanding existing familiarity with Table A, there is no disadvantage to placing the Table A language in the main body of the statute. Finally, although it is thought that there is some advantage in the removal of Table A in its entirety, it is not possible to consider this in the absence of a consideration of all, rather than part only, of Table A, especially with respect to share capital matters.[26]

4.7.3 Having considered the matter carefully, the Review Group recommends that Table A (with the amendments proposed) should remain, but that its provisions as to internal corporate governance should also be set out in the main body of the statute, with the same provisions as to opt-outs as exist under articles of association.[27]

4.8 Specific amendments to Table A

Regulation 75

4.8.1 Regulation 75 of Table A states that the number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them. Section 3 of

26 One of the matters proposed to be reviewed by the Review Group in its second two-year Report.

the 1982 Act, provides that there shall be delivered to the Registrar together with every memorandum of a company delivered to him pursuant to s 17 of the 1963 Act a statement in the prescribed form containing the…particulars specified in relation to the persons who are to be the first directors of the company.

4.8.2 The Review Group recommends that Regulation 75 be merged with s 3 of the 1982 Act to provide that the first directors and their number are as specified on the Form A1.

Regulation 77

4.8.3 Regulation 77 provides that the shareholding qualifications for directors may be fixed by the company in general meeting and unless and until so fixed, no qualification shall be required. The Group noted that this provision appears to be obsolete. If companies wish to impose shareholding conditions, that can be done in the articles of association or in the contract under which the director is appointed.

4.8.4 The Review Group recommends that Regulation 77 be repealed on grounds of obsolescence.

Regulation 79

4.8.5 Regulation 79 of Table A which empowers the directors to exercise the power of a company to borrow money also limits the directors power to do so to an amount equivalent to the nominal value of the issued share capital of the company. This is almost always deleted from the articles of association of private companies. Regulation 80 of Table A provides that the directors are to have the power to manage the company and exercise the powers of the company. The Group recommends that Regulation 79 of Temple A should be repealed, and reliance be placed on Regulation 80 instead.

Regulation 80

4.8.6 Regulation 80 of Table A is perhaps the most important regulation to bring into the main body of the statute. It provides as follows:

> The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such directions, being not inconsistent with the aforesaid regulations or provisions, as may be given by the company in general meeting; but no direction given by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that direction had not been given.

4.8.7 A debate has arisen about the meaning of members' entitlement under Regulation 80 to give "such directions…not inconsistent with the aforesaid regulations" to the directors. The question which arises is whether the members by simple majority vote in general meeting are able to direct directors to do something in a particular way where the directors already have a power under the articles of association to do that thing.[28]

4.8.8 In the UK the words "such directions" are not used, the expression in their comparable regulation being "such regulations". Current English judicial interpretation of that formulation of words has established that the exclusive management of the company is vested in the directors and that the members cannot interfere in the exercise of the directors' powers.[29] Indeed, the Irish courts gave the same interpretation to the predecessor of Regulation 80. In *Clark v. Workman*[30] Ross J said: "…the powers given to directors are powers delegated to the directors by the company, and when once given the company cannot interfere in the subject matter of the delegation unless by special resolution."

27 The methodology to be adopted would be the restatement of the Regulations considered. Ultimately, after all of Table A has been reviewed (including those provisions relating to share capital, dividends and reserves to be addressed in the Review Group's second programme of work) the entire text of Table A will be placed in the main body of the statute and Table A will then become redundant as a separate text.

28 See Temple Lang "Shareholder Control in Irish Companies", (1973) *Gazette* ILSI 241 and Ussher "Directing the Directors," (1975) *Gazette* ILSI 303.

29 *John Shaw & Sons (Salford) Ltd v. Shaw* [1935] 2 KB 113; *Salmon v. Quin & Axtens Ltd* [1909] AC 442, *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunningham* [1906] 2 Chapter 34; *Alexander Ward and Co Ltd v. Samyang Navigation Co Ltd* [1975] 2 All ER 424; *Scott v. Scott* [1943] 1 All ER 582; and *Breckland Group Holdings Ltd v. London and Suffolk Properties Ltd et al* [1989] BCLC 100.

30 [1920] IR 107.

4.8.9 The Review Group is of the view that uncertainty, howsoever small, is not a good thing from the perspective of corporate administration and governance. It would engender considerable confusion and uncertainty were it to be the case that an outsider could not rely upon the directors' powers to manage the company's business. There ought to be no uncertainty as to the authority of a company's management.

4.8.10 Regulation 80 has, however, served us well and whilst it has engendered academic debate,[31] it has not given rise to difficulties in practice. As the effect of the implementation of the Review Group's recommendations will mean that Regulation 80 will be relied on more specifically, the Group recommends that it be emphasised that the power of members to give directions is subject to the primary rights of the directors to manage. It is recommended that in migrating Regulation 80 from the articles of association to primary legislation the word "directions" should be replaced with the word "regulations". The effect of this recommendation will be to restore the status quo ante, which prevailed at the time of the decision in *Clark v. Workman*.

Regulation 81

4.8.11 Regulation 81 of Table A provides that "the directors may by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these Regulations) and for such period and subject to such conditions as they may think fit, and any such power of attorney may contain such provisions for the protection of persons dealing with any such attorney as the directors may think fit, and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him."

4.8.12 This is a curious provision. It can be interpreted to mean any one of three things. First, it can mean that the directors have a power distinct from that of the company – the words used are "the directors may" rather than in Regulation 79 which states "the directors may exercise all the powers of the company". Secondly, it can mean that directors have an ability by resolution to delegate power to an attorney. This is the case certainly under Regulation 80. Thirdly, it can mean that directors, as delegates, can delegate their powers by attorney.

4.8.13 The Review Group recommends that Regulation 81 be repealed, on the basis that it is most probably redundant, and that the power of the directors to appoint an attorney is encompassed by Regulation 80. To the extent that Regulation 81 is not redundant and purports to enable a power of attorney to be created by resolution, the Group considers it preferable that companies, if creating a power of attorney ought do so with due solemnity,[32] ideally under seal. Whilst a power of attorney need not be executed under seal, in practice few third parties dealing with a company will accept a power of attorney other than under seal.

Regulation 88

4.8.14 Regulation 88 of Table A provides that all cheques, promissory notes, drafts, bills of exchange and other negotiable instruments and all receipts for moneys paid to the company shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, by such person or persons and in such manner as the directors shall from time to time by resolution determine. This is effectively a subset of Regulation 80 which gives management and control to the directors.

4.8.15 The Review Group recommends that Regulation 88 be repealed, on the basis that it is redundant and encompassed in Regulation 80.

Regulations 92, 93, 94 and 95

4.8.16 Regulations 92, 93, 94, 95 of Table A are concerned with rotation of directors. Insofar as any companies have rotation of directors, the majority of such companies adopt specific articles which follow norms set down by

31 See Temple Lang and Ussher, above, n 28.

32 Section 15 of the Powers of Attorney Act 1996 provides that: [a] power of attorney is not required to be made under seal. It then states that the section: is without prejudice to any requirement in or under any other enactment as the execution of instruments by bodies corporate.

guidelines of bodies such as the Irish Association of Investment Managers and the Combined Code.[33] In particular schemes of retirement by rotation now tend to provide for compulsory retirement every three years, which does not always necessarily occur if one were to apply the Table A scheme of retirement by rotation.

4.8.17 The Review Group recommends that Regulations 92 to 95 be repealed for private companies limited by shares and replaced for PLCs by a rotation scheme in line with current best practice in corporate governance.

Regulation 101

4.8.18 Regulation 101 of Table A provides that the directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. It does not provide for board meetings by teleconferencing or by telephone.

4.8.19 The Review Group recommends that the Companies Acts should provide that meetings of directors of all companies may be held by telephone or by other suitable electronic means whereby all directors can hear and be heard unless the articles of association of the company specifically provide otherwise.

Regulation 109

4.8.20 Regulation 109 of Table A provides for written resolutions of directors. The Review Group recommends that written resolutions of directors ought to be possible by separate pieces of paper signed separately.

4.9 European Communities (Single Member Private Limited Company) Regulations 1994

4.9.1 These Regulations were enacted by statutory instrument to give effect to the Twelfth Directive on company law. In so doing they establish extra procedures to be followed and create extra offences in the event of non-compliance. It appears to the Review Group that the number of members in a company will generally be a matter of indifference to the public and badging the companies in a particular way is of no inherent merit.

4.9.2 The Review Group recommends that the European Communities (Single Member Private Limited Company) Regulations 1994 be repealed, with a provision that private companies can be formed with one member or more, and that any public company can be formed with two members or more.[34] All other provisions in these Regulations can be provided for in statute, as may be considered necessary. It is thought that this will remove the requirement for registration and deregistration, and has the welcome effect of: (i) reducing the law; (ii) reducing the number of documents filed in the CRO; and (iii) reducing the number of offences.

Consequential amendments

4.9.3 It will be necessary to amend specific provisions of the Companies Acts. Section 36 of the 1963 Act, which provides for unlimited liability of members where the number of members falls below the statutory minimum would now need to apply only to public limited companies. The Review Group however recommends that s 36 be repealed altogether. It has been described as an "ancient and obsolete rule" which "serve[s] no purpose in protecting the public or anyone else".[35] In addition, Regulation 7 of the Single Member Regulations which deals with the dispensing of the requirement for an annual general meeting can be addressed in the same way as the proposal to permit companies generally to dispense with meetings of members where the subject matter of the meeting is dealt with in writing. The sections of the 1963 Act referred to in the Regulations will each need to be amended. Finally, the requirement in Regulations 9(2) and 13 that decisions of a single member and contracts between a single member and the company be recorded in writing will need to be brought into the main Act.

33 Now embedded in the Listing Rules of the Stock Exchange at Rule 12.43A.

34 Under Part XIII of the 1990 Act investment companies can now be formed with two members only; see s 54 of the 1999 (No 2) Act. See also 6.13.1 on the point of minimum membership of public companies.

35 Hoffmann J in *Nisbet v. Shepherd* [1994] 1 BCLC 300 at 305.

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4.10 Summary of Recommendations

4.10 Summary of recommendations

- There should be no change to the requirement that every company must have a registered office, and recommends against any amendments to the general requirement to publicise the name of a company. **(4.3.1)**

- The company seal should be retained; however, a person registered under Regulation 6(2) of SI No 163 of 1973 should be deemed to be a person appointed by the directors to affix the seal and sign the instrument under seal and that in such a case, no countersignature is required. **(4.3.9)**

- Section 40 of the 1963 Act should be amended to be made explicitly declaratory of the fact that the power to appoint an attorney: (i) is regardless of any provision in the memorandum and articles of association; and (ii) extends to acts done within the State. **(4.3.14)**

- Documents required to be made available for inspection should be made available for inspection either at the registered office or another place in the State, subject to notification to the Registrar of that location (as is at present the case with regard to the register of members). **(4.4.5(i))**

- The Minister should make an order to standardise register inspection and copying fees commensurate with the actual cost of provision of copies. **(4.4.5(ii))**

- No change should be made to those documents that must be made available by companies for inspection and those documents that must be furnished, notwithstanding the apparent anomalies. **(4.4.5(iii))**

- There should be no change to the law whereby a company need not have for inspection a copy of its memorandum and articles of association. **(4.4.5(iv))**

- There should be no change to the classes of disclosee of registers and documents. It should be provided that auditors, in fulfilment of their duties, are in all cases made specific disclosees of registers, documents and minutes. **(4.4.5(v))**

- The ECA 2000 should be taken as the principal legislation on the keeping of electronic records by companies under the Companies Acts. **(4.4.14(i))**

- The provisions of the Companies Acts regarding companies and their ability to keep records in electronic form should, with the exception of s 239 of the 1990 Act, be repealed. **(4.4.14(ii))**

- The Minister should be enabled to make regulations to give better effect to the provisions of ECA 2000 as they apply to companies. **(4.4.14(iii))**

- In the case of records retained or produced under the Companies Acts which may be accessed by a class of persons (e.g. shareholders or the public), any reasonable form of retention or production may be used by the company provided that it complies with regulations (if any) made by the Minister. **(4.4.16(i))**

- In the case of the production of extracts or copies of records or documents, hard copies should be retained as the standard mode of delivery, with s 12 of the ECA 2000 being available as a non-mandatory method to facilitate electronic delivery. **(4.4.16(ii))**

- The powers of the Minister to make regulations should explicitly provide that such regulations may delete the requirement for the production of written extracts from registers. **(4.4.16(iii))**

- Where records are retained by a company on a generally accessible website, the Registrar should be notified on the existing statutory form (B3) of the relevant address of the website. **(4.4.18)**

- For companies other than PLCs it should be permissible in law for such companies' members to dispense with the need to hold an annual general meeting. **(4.5.6)**

- In all companies, except PLCs, the members entitled to attend the annual general meeting should be able to sign a unanimous written resolution, dispensing with the need to convene and hold a meeting and agreeing to accept, in lieu thereof, copies of all documents they would otherwise receive and to take such decisions as require to be taken by unanimous written resolution. **(4.5.6(i))**

- Any resolution required to be passed at any general meeting in any company, including the annual general meeting, should be able to be achieved by unanimous written resolution, consisting of any number of pieces of paper, regardless of what is in the company's articles of association. **(4.5.6(ii))**

- Companies that are permitted to dispense with the annual general meeting should be able to initiate a procedure in advance of the time they would be required to convene the annual general meeting so that, if unanimous consent is not forthcoming, a meeting can be convened and held in accordance with the Companies Acts. **(4.5.6(iii))**

- In the event that a written resolution is not contemporaneously signed (with separate documents being circulated to shareholders) the company should confirm the passing of the resolution to the members within one month of its passing. **(4.5.6(iv))**

- Companies' auditors should continue to be entitled to demand that the directors convene an annual general meeting where there is a proposed resolution for any change in the audit appointment. The consent of the auditors should not, however, be required for the transaction of the business of the annual general meeting (other than matters affecting the auditors *per se*). **(4.5.6(v))**

- As with all matters to be attended to in writing, the paperwork which could replace an annual general meeting should by reason of the ECA 2000 be able to be achieved electronically. **(4.5.6(vi))**

- The Companies Acts should specify precisely what are to be the periods of notice for meetings, rather than delegating it to provisions in articles of association. The periods of notice should be 21 days for an annual general meeting, meetings to pass a special resolution and meetings convened under s 201 of the 1963 Act. The period of notice for an extraordinary general meeting should be 7 days, except in the case of a public limited company where it should be kept at 14 days. Companies would be entitled to increase these periods of notice. **(4.5.10(i))**

- A notice, whether of a meeting or of any other matter and any other document, once posted to the registered address of a member should be deemed received 24 hours following posting.**(4.5.10(ii))**

- The period of notice for any matter under the Companies Acts should exclude the day of receipt or, when posted, the deemed date of receipt, as well as the date of the meeting. **(4.5.10(iii))**

- As with all matters to be attended to in writing, the giving of notice of company meetings should by reason of the ECA 2000 be able to be achieved electronically. **(4.5.10(iv))**

- Any notice may be served and any other document may be delivered by hand at a member's registered postal address (as well as by post to that address and personally to the member). **(4.5.12)**

- The requirement of directors to disclose directorships during the previous 10-year period should be reduced to 5 years. **(4.6.3)**

- All changes of name of a director or secretary, no matter how occasioned, ought to be notified to the Registrar when they occur and disclosed as a previous name in subsequent filings. **(4.6.5)**

- Table A should be retained for the present, but its provisions as to internal corporate governance should also be set out in the main body of the statute, with the same provisions as to opt-outs as exist under articles of association. **(4.7.3)**

- Regulation 75 of Table A should be merged with s 3 of the 1982 Act to provide that the first directors and their number are as specified on the Form A1. **(4.8.2)**

- Regulation 77 of Table A should be repealed on grounds of obsolescence. **(4.8.4)**

- Regulation 79 of Table A should be repealed, and reliance be placed on Regulation 80 instead. **(4.8.5)**

- Regulation 80 should be migrated from the articles of association to primary legislation and the words "such directions" should be replaced with "such regulations". **(4.8.10)**

- Regulation 81 of Table A should be repealed on grounds of obsolescence. **(4.8.13)**

- Regulation 88 of Table A should be repealed on grounds of obsolescence. **(4.8.15)**

- Regulations 92 to 95 of Table A should be repealed for private companies limited by shares and replaced for PLCs by a rotation scheme in line with current best practice in corporate governance. **(4.8.17)**

- Meetings of directors of all companies ought, by statute, to be capable of being held by telephone or by other suitable electronic means whereby all directors can hear and be heard unless the articles of association of the company specifically provide otherwise. **(4.8.19)**

- Written resolutions of directors under Regulation 109 of Table A ought to be possible by separate pieces of paper signed separately. **(4.8.20)**

- The European Communities (Single Member Private Limited Company) Regulations 1994 should be repealed, with a provision that private companies can be formed with one member or more, and that any public company can be formed with two members or more. All other provisions considered in the Regulations should be provided for in statute as may be necessary. **(4.9.2)**

- Section 36 of the 1963 Act should be repealed. **(4.9.3)**

5

CHAPTER 5

Simplification: Creditor Protection

five

5.1 The principle of creditor protection

5.1.1 The Review Group considers that one of the more important principles of company law is creditor protection. Legal protection stronger than that normally afforded to creditors of sole traders and individuals in partnership is particularly desirable where a company's members have limited liability.[1] The Group considered ways in which company law could be simplified while simultaneously improving creditor protection.

5.2 Validation procedures in creditor protection

5.2.1 The effectiveness of creditors' rights is related directly to a company's financial ability to meet its obligations. The Review Group believes stronger creditor protection may be achieved by measured and focused prohibitions which, where possible, are subject to validation procedures and occasionally *de minimis* exceptions. Current validation procedures are contained in s 60 of the 1963 Act,[2] s 256 of the 1963 Act[3] and s 34 of the 1990 Act.[4]

5.2.2 Section 60 of the 1963 Act sets out a validation procedure to be complied with in circumstances where a company seeks to provide financial assistance in connection with the purchase of shares. The creditor protection measures are:

(i) A majority of the company's directors make a statutory declaration stating, inter alia, 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 the company, having carried out the transaction whereby such assistance is to be given, will be able to pay its debts in full as they become due";[5]

(ii) Any director who makes such a statutory declaration without having reasonable grounds for the opinion that the company, having carried out the transaction, will be able to pay its debts in full as they become due is liable to imprisonment for a period not exceeding 6 months or to a fine not exceeding £1,500 (€1,904.61) or to both.[6] In making the declaration, the directors need to be conscious that where a company is wound up within 12 months of the making of the statutory declaration and its debts are not paid in full, within 12 months after the commencement of the winding-up, it is "presumed until the contrary is shown that the director did not have reasonable grounds for his opinion".[7]

5.2.3 Section 34 of the 1990 Act (as inserted by s 78 of the 2001 Act) goes further. This validation procedure mitigates the effect of the s 31 prohibition on guarantees and the provision of security in connection with loans, quasi-loans and credit transactions by companies for directors of such companies and of their holding companies and persons connected with such directors. In addition to providing shareholder protection, s 34 contains measures designed to achieve creditor protection where companies propose to enter into a guarantee or provide security which would otherwise be prohibited by s 31 of the 1990 Act. These are:

(i) The directors are required to make a statutory declaration which states, inter alia, that they have made a full inquiry into the company's affairs and have formed the opinion that the company, having entered into the guarantee or provided the security, will be able to pay its debts in full as they become due;

(ii) A director who makes such a statutory declaration without having reasonable grounds for believing that the company, having entered into the guarantee or provided the security, will be able to pay its debts in full as they become due may be liable to a fine of up to £1,500 (€1904.61) or to imprisonment for a term of up to 12 months or to both. Moreover, where a company is wound up within 12 months of the making of the statutory declaration and its debts are not paid in full within 12 months after the commencement of

1 See the earlier discussion at 3.3.1 and 3.4.2.
2 As amended by s 89 of the 2001 Act.
3 As amended by s 128 of the 1990 Act.
4 As amended by s 78 of the 2001 Act.
5 1963 Act, s 60(4)(d).
6 See s 60(5) of the 1963 Act (fine increased by s 240(7) of the 1990 Act as inserted by s 104 of the 1999 (No 2) Act).
7 1963 Act, s 60(5).

the winding-up, "it shall be presumed until the contrary is shown that the director did not have reasonable grounds for his opinion."[8]

5.2.4 The fore going, apart from the penalties, are along identical lines to the s 60 validation procedure. However, the s 34 validation procedure contains some further measures, namely:

(i) The statutory declaration is required to specify the benefit which will accrue to the company by entering into such a guarantee or providing such security.[9]
(ii) The reasonableness of the statutory declaration is to be confirmed by an independent person (such as the company's auditor) who is required to state whether, in his opinion, the statutory declaration is reasonable.[10]
(iii) A director who makes the declaration may be declared by a court to be personally responsible for all or any of the company's debts if the declaration is made without reasonable grounds and the company is not able to subsequently pay its debts in full.[11]
(iv) The director or connected person and any other director who authorised the transaction or arrangement in contravention of s 31 may be liable to indemnify the company for any loss or damage resulting from the arrangement or transaction.[12]

5.2.5 Where a company proposes to have a voluntary members' winding-up, s 256 of the 1963 Act provides that certain creditor protection measures must be followed. These are:

(i) a majority of the directors make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company and that having done so, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of the winding-up;[13]
(ii) where it is proved to the court that the company is unable to pay its debts, the court may declare that any director who was a party to the declaration (without having reasonable grounds for the opinion that the company would be able to pay its debts in full within the period specified in the declaration) shall be personally responsible, without limit, for such of the debts or liabilities of the company as the court may decide.[14] Furthermore, where a company's debts are not paid or provided for in full (within the period specified in the declaration) it is presumed, unless the contrary can be shown, that the director did not have reasonable grounds for his opinion;[15]
(iii) unlike other validation procedures, the declaration must include a statement of the company's assets and liabilities;[16]
(iv) as with the s 34 procedure, a report of an independent person (who may be the company's auditor) must be attached to the directors' statutory declaration.[17] The independent person must state in his report whether in his opinion and to the best of his information (and according to the explanations given to him), the opinion of the directors in the statutory declaration and the statement of the company's assets and liabilities are reasonable.[18]

8 1990 Act, 34(5)(b).
9 1990 Act, s 34(3)(e).
10 1990 Act, s 34(4).
11 1990 Act, s 34(5).
12 1990 Act, s 38(2).
13 1963 Act, s 256(1).
14 1963 Act, s 256(8).
15 1963 Act, s 256(9).
16 1963 Act, s 256(2)(b).
17 1963 Act, s 256(2)(c)).
18 1963 Act, s 256(4).

5.2.6 The Review Group believes that there is no justification for having two or more validation procedures and recommends there should be one validation procedure which is capable of being invoked in the case of a number of specific prohibitions. In summary, some or all of the validation procedures require:[19]

(i) a majority of the directors to make a statutory declaration;
(ii) the declaration states that a full inquiry has been undertaken by the directors into the affairs of the company, and having done so, the directors believe the company will be able to pay its debts in full within 12 months from the commencement of the company's winding-up (s 60 and s 34 providing no time limit but presuming if the debts are not paid in full within the 12 months, the directors did not have reasonable grounds for making their declaration);
(iii) in the case of s 60 and s 34, the purpose of the assistance or the security;
(iv) in the case of s 256, a statement of the company's assets and liabilities is incorporated in the declaration;
(v) in the case of s 34, the declaration must specify the benefit accruing to the company by entering into the proposed transaction;
(vi) in the case of s 256 and s 34, an independent person issues a report specifying that the opinion of the declarants is reasonable (and in the case of s 256, the statement of assets and liabilities is reasonable);
(vii) in the case of s 256 and s 34, the directors may be personally liable for the debts of the company if their opinion is not reasonable;
(viii) in the case of s 34, the directors may be required to indemnify the company for loss as a result of entering into a transaction not validated by the s 34 procedure;
(ix) in the case of s 60 and s 34, the directors may be liable to a fine or imprisonment if the section is breached.

5.2.7 The Review Group considered whether the measures, provided for in the validation procedures, were necessary or desirable. The Group weighed the protection (both preventative and remedial) afforded to creditors against a number of factors. These factors included:

(i) first, the potential liability for directors and the need on the one side to ensure directors or connected persons receive no benefit from a company's assets (other than where full value is given) and on the other side not to penalise directors who have approved of transactions honestly and reasonably, but unforeseen developments have triggered the collapse of the company without fault on the part of the directors. In this regard, the Review Group noted that, under the s 34 procedure, when a company's directors state that they have formed the opinion that the company "having entered into the guarantee or provided the security, will be able to pay its debts in full as they become due," it is not clear whether one is to assume that the guarantee has been called upon or the security realised. The Review Group believes what is important is that the company is solvent at the time the guarantee is entered into or security is provided. As there is no requirement to credit the benefit (direct or indirect) that accrues to the company[20] arising from the giving of the guarantee or provision of security, there should be no requirement to debit such contingent liabilities as if they had crystallised. The Group believes, it is impractical to expect declarations of solvency to be entirely open-ended and the opinion that a company is solvent should be confined to the time of entering into the transaction. The Review Group recommends that the directors' declaration specify that the company is solvent at the time of the creation of the security or guarantee to replace the statement that the company will be able to pay its debts in full as they become due;
(ii) second, the cost to and time incurred by companies being obliged to retain their auditors to verify the reasonableness of directors' statutory declarations and the possibility that Ireland's laws would be more stringent than those in other EU jurisdictions.

5.2.8 On balance, the Group concluded that the creditor protection principle necessitated the directors to make a considered decision and that the protections being provided by :

19 These procedures are in addition to a special resolution to be passed by the members of the company, with the right of 10 % of the shareholders to petition the court to restrain the implementation of the transaction.

20 See s 34(3)(e) of the 1990 Act.

(i) a majority of the directors making a declaration;
(ii) the declarants being satisfied that the company is solvent at the time of the declaration;
(iii) a statement of the company's assets and liabilities is incorporated into the declaration;
(iv) the benefit to the company is stated in the declaration (in the case of a winding-up, it will be to the effect that the directors intend the company to cease business, a continuation of which can be detrimental to the company); and
(v) the directors being personally responsible for the company's debts, where the declaration is made without reasonable grounds and the company is not subsequently able to pay its debts, if the court considers it just and equitable, and be liable to indemnify the company where the court considers it just and equitable and the director or a connected person has received a benefit from the transaction.

In addition a special resolution of the members should be required to validate the proposed transaction.

5.2.9 The Review Group had previously made an interim recommendation concerning the s 60 validation procedure which resulted in the enactment of s 89(a) and s 89(b) of the 2001 Act. The first provision enables a copy of the statutory declaration to be filed with the CRO within 21 days of the notice for the extraordinary general meeting (or the date of the special resolution if no meeting is called) rather than on the same day. The second provision enables the special resolution to be passed by written resolution if signed by all shareholders and if permitted by the relevant company's articles of association. The Group understands that these recommendations have already facilitated legal practitioners in implementing the s 60 validation procedure.

5.2.10 Bearing in mind the additional cost and delay in completing transactions, the Group considers the additional requirement of an independent person's report to be unnecessary in view of the other protective measures, particularly the directors' personal liability.

5.2.11 The Group believes that the disapplication of the requirement for an independent person's report in a voluntary members' winding-up will not result in abuse of that means of winding-up. In particular, the Group is satisfied that the provisions of s 131 of the 1990 Act operate to prevent the practice of "centrebinding". The Group is satisfied that the threat of personal liability is sufficient to deter the winding-up of insolvent companies using the members' voluntary winding-up procedure. The Group is also cognisant of the fact that it expects it will be asked to review the law relating to winding-up in its second work programme. Accordingly, the Group recommends the amendment of the validation requirements so that all validation procedures incorporate the safeguards set out in paragraph 5.2.8.

5.2.12 The Review Group recommends that the validation procedure under s 34 of the 1990 Act should continue to be capable only of validating guarantees and the provision of security in connection with loans, quasi-loans and credit transactions otherwise prohibited by s 31 of the 1990 Act. Thus, in respect of loans, quasi-loans and credit transactions the only exceptions to s 31 should continue to be ss 32, 36 and 37 of the 1990 Act.

5.2.13 The Review Group recommends that the breach of s 60 of the 1963 Act, s 31 of the 1990 Act and s 256 of the 1963 Act be an offence, modelled on s 40 of the 1990 Act and punishable in accordance with s 240 of the 1990 Act.

5.2.14 The Review Group recommends that the one validation procedure should be capable of being invoked in the case of the following existing creditor protection measures:

(i) the prohibition on the provision of financial assistance in connection with the purchase of shares (but subject to the exceptions listed below);[21]

21 See 5.4 below.

(ii) the prohibition on the entering into of guarantees and the provision of security in connection with loans, quasi-loans and credit transactions by companies for directors of such companies and of their holding companies and persons connected with such directors; and

(iii) the proposed members' voluntary winding up of the company.

5.3 Gifts and dispositions at an undervalue

5.3.1 As the controllers of property which is not their own, company directors are in a position analogous to that of trustees. Under company law, directors are subject to certain standards of behaviour. In exercising their powers (whether relating to the disposal of a company's assets or otherwise), directors are required to act *bona fide* and in the interests of the company.[22] Directors may not make a personal profit from their position[23] and directors may not cause companies to make gifts or dispose of property gratuitously or at an undervalue.[24] As the Supreme Court indicated in *Re Greendale Developments Limited*:[25]

> "it has been settled law since the decision in *Hutton v. West Cork Railway Co*[26] that a company cannot spend money or dispose of its property except for purposes which are reasonably incidental to the carrying on of the business of the company." [27]

It is a separate recommendation of the Review Group that the common law and equitable duties of directors be codified by statute.[28]

5.3.2 Until the 1990 Act, the legislature was content to rely upon these common law and equitable statements of directors' duties to govern corporate transactions and arrangements. Indeed, in relation to transactions and arrangements between companies and third parties, it is these general duties which apply to directors' dealings. In Part III of the 1990 Act the legislature recognises the greater likelihood of abuse of trust and position by directors in cases where their companies make loans and certain other transactions in their favour, or in favour of persons connected to them. There has been, since 1 February 1991,[29] a statutory prohibition (albeit subject to exceptions) on companies making or entering into loans, quasi-loans, credit transactions and guarantees and the provision of security for directors or persons connected with directors.

5.3.3 The Review Group considered whether a further, specific, statutory prohibition or restriction is required for gratuitous dispositions of a company's cash and assets to directors and persons connected with directors. A particular concern of the Review Group in relation to the abolition of the doctrine of *ultra vires* for a private company is the fact that the doctrine served a role in inhibiting gratuitous dispositions of corporate property, as seen in *Re Greendale Developments Limited*.[30] In that case, a disposition by a company in favour of its directors was found to be *ultra vires* and void. It was accepted that the company had obtained no benefit from the payments made by it. However, it is significant that in acknowledging there was no express object authorising gratuitous payments, Keane J said, were it otherwise, "different considerations might apply".[31]

5.3.4 There is no direct express statutory prohibition on a company providing a gift of real or personal property to a director although a company may not lend money to a director.[32] The Review Group considered and noted the effect of a number of statutory provisions which may apply to such a disposition. These include s 29 of the 1990

22 *Clark v. Workman* [1920] 1 IR 107.
23 *Bray v. Ford* [1896] AC 44 at 51.
24 *Daniels v. Daniels* [1978] Ch 406.
25 [1998] 1 IR 8.
26 [1883] 23 Ch D 654.
27 [1998] 1 IR 8 at 22.
28 See Chapter 11.
29 The commencement date of s 31 of the 1990 Act.
30 [1998] 1 IR 8.
31 *ibid*. at 23.
32 1990 Act, s31(1).

Act which requires the approval of a company's members for substantial property transactions between directors and their company. Of more relevance is s 139 of the 1990 Act which prohibits the improper transfer of assets where the effect is to perpetrate a fraud on the company, its members or creditors. The Group believes that the propriety of gratuitous dispositions by companies to directors must ultimately turn upon whether or not such dispositions are made *bona fide* and in the interests of the company as a whole. Each case will turn on its own facts. The Review Group does not believe it is either necessary or desirable to regulate gratuitous dispositions, as statutory prohibition would be likely to cause more difficulties that it would solve. As Bowen LJ said in *Hutton v. West Cork Railway Co*:[33]

> "The law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company...Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."

5.3.5 The Group accepts that creditors (and shareholders) will have sufficient protection by the codification in statute of the common law duty that directors will have acted in breach of their duty if they do not act *bona fide* and in the interests of the company as a whole. The Group believes also that the new prominence of the duty, in statute, will be a significant deterrent to abuse.[34]

5.4 Maintenance of capital

5.4.1 Section 60(1) of the 1963 Act provides:

> subject to [certain exceptions including where the validation procedure is completed], it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company.

5.4.2 The width of this prohibition means many transactions are caught and, thus, prohibited. The Review Group considers that a number of these, as set out below, should be exempt from the prohibition and, thus, from the requirement to be effected through a validation procedure.

5.4.3 The Group believes that where the financing of a share acquisition is validated in accordance with s 60, the subsequent refinancing should not require to be validated. A typical example is where a bank (or a syndicate of banks) lends money to a person who uses the funds to purchase the shares of a company. As security for that loan, the company (being acquired) and its subsidiaries guarantee the repayment of the loan and, as security for their guarantee, create fixed and floating charges over their respective assets. The giving of the guarantees and the charges can be effected only after the requirements of s 60(2) have been satisfied (a copy of the statutory declaration and notice of the special resolution being filed in the CRO). In practice, it will often happen that subsequently, say two to three years hence, the loan is refinanced with the same bank, or possibly a different bank. Because the new loan is being used partly to repay the outstanding indebtedness under the initial loan, a conservative but common legal view is that the s 60(2) procedure must be repeated for the re-financing notwithstanding that no new acquisition is taking place. This has little benefit to any interested party. Accordingly, the Review Group recommends that the refinancing of assistance previously validated be exempted from the prohibition and, thus, the procedural requirements of s 60.

5.4.4 The Review Group believes the avoidance of a re-validation of such transactions would facilitate refinancing by companies. In practice, such a refinancing is often on more advantageous terms, as to the cost of borrowing, than the initial financing and is thus for the benefit of the company, including its creditors. Completing the s 60 procedure on a refinancing provides little if any additional protection to creditors but adds to the cost of a refinancing.

33 [1883] 23 Ch D 654 at 673, applied by Murphy J in *Re Kill Inn Hotel Limited* (in liq), unreported, High Court, 16 September 1987.

34 See Chapter 11.

5.4.5 It is not unusual for companies and their subsidiaries to enter into extensive agreements with investors, which agreements will contain warranties and indemnities. In such circumstances, the company receives a benefit from the investment while giving the warranties and indemnities. Where companies have securities quoted on a stock exchange or securities market, it is not unusual for the companies themselves to give warranties to purchasers and underwriters for those securities. The Review Group recommends that to facilitate transactions in the normal course of a company's business of raising company capital, the s 60 prohibition should not apply to the giving by the company of warranties and indemnities for the purpose of or in connection with the subscription for its shares or the shares of its holding company. Similarly the Review Group recommends that the s 60 prohibition should not apply where securities of a company or of its holding company are, or are to be, afforded a trading facility on a stock exchange or securities market, for the purpose of or in connection with the purchase of its shares or the shares of its holding company.

5.4.6 It is not unusual for companies to pay a subscriber's advisory fees (e.g. legal and due diligence fees) in connection with an investment made in a company. The company obtains the benefit of the investment. The Review Group recommends that to facilitate a normal aspect of agreements raising funds for a company, the s 60 prohibition should not apply to the payment by a company of the fees of advisers to a subscriber for shares in the company in connection with the subscription.

5.4.7 Whenever a public company offers shares to the public or a listed company increases its listed share capital by 10% or more, the company is obliged to issue a prospectus and/or a listing particulars. Whenever a shareholder offers company shares to the public, that shareholder must procure the issue of a prospectus which can be issued by the shareholder or by the company. In the United States, such prospectuses must be issued by the company rather than by the shareholder. Whether the prospectus is issued by the company or the shareholder, there will be expense to a greater or lesser degree but it is in connection with supplementary regulation to which companies with quoted securities are subject. The Review Group recommends that the s 60 prohibition should not apply to the incurring of expense by a company to facilitate the admission to or continuance of a trading facility for securities of the company on a stock exchange or securities market, including the expenses associated with the preparation and filing of any documents required under the laws of any jurisdiction.

5.4.8 The Irish Takeover Panel Act 1997 and Rules made under that Act require, inter alia, that a relevant company must engage independent financial advisers where there is an approach to or offer made for the relevant company. A relevant company is an Irish-incorporated PLC whose shares are quoted on the Irish Stock Exchange, the London Stock Exchange, the New York Stock Exchange, NASDAQ, EASDAQ or the Neuer Markt.[35] The Review Group recommends that compliance with the Irish Takeover Panel Act (ITPA) should not create a breach of the Companies Acts. Accordingly, the payment by a relevant company or a subsidiary of a relevant company of fees and expenses to such advisers as must be retained by a relevant company within the meaning of and for the purposes of the ITPA should not be prohibited by s 60 of the 1963 Act.

5.4.9 It has become the prevalent market practice for PLCs to agree abort fees with an intending offeror, which become payable where the offeror is outbid by another offeror. In the UK, the Panel on Takeovers and Mergers approves such fees subject to their not exceeding 1% of the value of the offer. The Irish Takeover Panel has agreed these on a case by case basis, subject to the same 1% limit.[36] The Irish Takeover Panel's note[37] on their rule on inducement fees alludes to possible legal issues under s 60 of the 1963 Act. With a view to dispelling any question as to the applicability of s 60 to such fees, the Review Group recommends that the s 60 prohibition should not apply to the payment by a relevant company or a subsidiary of a relevant company, within the meaning of the ITPA, of an inducement fee to an offeror within the meaning of the ITPA, where the amount and preconditions to payment of that fee have been approved by the Irish Takeover Panel.

35 Irish Takeover Panel Act 1997, s 2; Irish Takeover Panel Act 1997 (Relevant Company) Regulations, 2001 (SI No 87 of 2001), Reg 3.

36 See Rule 21.2 of the Irish Takeover Panel Act 1997, Takeover Rules 2001, and notes on that rule.

37 Note 2 on Rule 21.2 of the Irish Takeover Panel Act 1997, Takeover Rules 2001.

5.5 Loss of share capital

5.5.1 Section 40 of the 1983 Act requires the directors of a company to convene an extraordinary general meeting (EGM) where the net assets of the company "are half or less of the amount of the company's called-up share capital".

5.5.2 This provision implemented Article 17 of the EC Second Company Law Directive which applied only to public companies limited by shares and public companies limited by guarantee and having a share capital.[38] Its implementation in the UK applies only to public companies.[39]

5.5.3 The Review Group considers that, in practice, the section is meaningless, at least with regard to private companies. When the EGM is held, inevitably the financial position of the company is noted and the company carries on business as before. There is no requirement to provide additional capital, for the very good reason that, particularly in the early stages, the company may simply be going through a development phase.

5.5.4 If the members at a specially convened EGM decide to take no action in the face of a need to do so, a creditor will have no remedy against the members. A creditor's remedy is more likely to be against the directors for reckless trading. Accordingly, the Review Group recommends that s 40 be repealed to the extent that private companies should not be required to convene and hold an EGM upon suffering a serious capital loss. Furthermore, the auditors, in their report, should not be required to state separately the net asset position of the company. However, the requirement should remain for public companies.

5.5.5 A consequence of the foregoing recommendation at 5.5.4 is that the requirement at s 193(4)(g) of the 1990 Act – that auditors must state in their audit report whether, in their opinion, there existed at the balance sheet date a situation which pursuant to s 40 of the 1983 Act would require the convening of an EGM of the company – should also be repealed for private companies. The Review Group is of the view that the requirement is not necessary, even in the case of public companies, and indeed causes confusion, particularly regarding multinational companies in Ireland. The Review Group recommends that the obligation be repealed for audit reports in respect of all companies.

5.6 Reduction of capital

5.6.1 The requirements in s 73 of the 1963 Act, dealing with the publication in connection with the reduction of share capital under s 72, while unwieldy, are considered to be appropriate. The reduction of share capital has to be sanctioned by the court[40] and to date the manner in which such reductions have been sanctioned is considered to be appropriate.

5.7 Memorandum and articles of association

5.7.1 It was noted that the recommendation elsewhere in the Report[41] to abolish, with some exceptions, the *ultra vires* rule for private companies should not have an adverse effect on creditors. Although one of the 19th century reasons for having the *ultra vires* rule was the protection of creditors,[42] this no longer effectively applies due to the preponderance of objects and powers in virtually all memoranda of association.[43] Indeed, in those cases

38 1997/91/EEC.
39 UK Companies Act 1980, s 34.
40 But in the case of a redenomination of share capital into the euro unit see s 26 of the Economic and Monetary Union Act 1998.
41 See Chapter 10.
42 See 10.1.4
43 Such as in *Re MJ Cummins Ltd, Barton v. The Governor and Company of the Bank of Ireland* [1939] IR 60; and in *Northern Bank Finance Corporation Ltd v. Quinn & Achates Investment Company* [1979] ILRM 221.

where the doctrine has applied it was invoked to avoid corporate contractual responsibilities to the detriment of a particular creditor.[44]

5.7.2 The reference in the memorandum and articles of association to *authorised* share capital was considered. It was noted that this was meaningless for creditor protection as it is the *issued* share capital which is of real relevance to creditors. Details of the issued share capital can be found from a search against a company in the CRO, which would highlight allotments and the amount of issued share capital specified in each annual return. It may, however, have relevance for shareholder protection and thus no recommendation is made with regard to the specification of the authorised share capital in a company's memorandum and articles of association.

5.8 Allotment of shares

5.8.1 The under capitalisation of companies is one of the causes of corporate failure. When persons choose to incorporate a company, one of the most important decisions is in what manner share capital or loan capital will be required to capitalise the company. Traditionally, members contributed capital to a company by subscribing for its shares. Save in the case of PLCs[45] (or other companies where the directors are the subject of a restriction order made under s 150 of the 1990 Act), there is no compulsory capitalisation of Irish companies. Capitalisation by way of share capital (as opposed to capitalisation through the provision of directors' or shareholders' loans) is preferable to creditors because the capital so contributed cannot be repaid[46] until all the company's creditors have received what is due to them by the company.

5.8.2 Today, it is more common for start-up capital to be provided by way of loans from shareholders or by way of bank finance. The Review Group does not believe the State should oblige companies to be capitalised[47] as this would have the effect of discouraging enterprise and hindering unnecessarily the development and particularly the commencement of businesses.

5.8.3 The Review Group considers, however, the State should ensure that adequate capitalisation of companies is facilitated by the removal of any obstacles which may exist to the capitalisation of companies through the issue of shares. It was noted that there is a 1% capital duty on the allotment of shares[48] which the Group, on balance, considers to be a disincentive to financing companies by the issue of equity share capital and which is, therefore, detrimental to creditor protection. The capital duty on share capital has encouraged the use of subordinated loans by companies (there being no stamp duty on subordinated loans). This duty has encouraged the use by some companies in the State, but also internationally,[49] of capital contributions (which in most circumstances are generally perceived to avoid the obligation to pay a 1% capital duty). The capital injection into a company by either of these methods is not as protective to creditors as share capital. This is because even subordinated loans may be repaid prior to the repayment of other debts, and although capital contributions should not be repaid prior to creditors being repaid, an early repayment of a capital contribution could not be excluded (this would depend upon the manner in which capital contributions are treated in the balance sheet of the recipient company).

5.8.4 The treatment by the State of issued share capital is out of line with other jurisdictions (including Northern Ireland). Although this point may be perceived by some as a fiscal issue, it is in fact a company law issue as the effect of this treatment is to weaken creditor protection. This arises from the desire to minimise the level of capital duty which serves as a disincentive to inject share capital into a company for the greater protection of creditors.

44 As highlighted by the Report of the Committee on Company Law Amendment (1945))(The Cohen Report).
45 1983 Act, s 10.
46 Otherwise than by court sanction pursuant to s 72 of the 1963 Act or Part XI of the 1990 Act.
47 Save where capitalisation is required for regulatory purposes such as licensed banks.
48 Stamp Duties Consolidation Act 1999.
49 See, for example the discussion of the nature and effect of capital contributions in the Privy Council decision in *Kellar v. Stanley William (Turks and Caicos Islands)* [2000] 2 BCLC 390.

5.8.5 The fact that this duty raised approximately €48 million in the year 2000[50] is an indication of the cost of incorporation for persons wishing to have sufficient equity capital. This is a cost which attacks the prudence of providing adequate share capital to meet the needs of the company and its creditors. There was some concern as to whether this issue was within the Review Group's terms of reference. The Group is mindful that taxation is essentially a policy matter for Government. However, for the reasons set out above, it is, on balance, considered that capital duty is a disincentive to creditor protection. Accordingly, the Review Group recommends that consideration be given to the abolition of capital duty on the issue of shares, albeit against the background of what is recognised to be a wider political and economic context.

5.9 Disclosure in the annual return

5.9.1 The Review Group noted that the requirement whereby a company is required to specify in its annual return the amount owing to creditors which is secured by charges requiring registration, pursuant to s 99 of the 1963 Act, is to be omitted from the new annual return form. In practice, it is believed, little attention has been given to completing this requirement accurately or possibly because of the lack of attention in its completion as a source of accurate information. While it may be useful to have such information, in practice, it has not proven to be so. The Review Group proposes to consider this further in its second work programme.

5.10 Annual accounts

5.10.1 The Review Group considered whether the requirements of the 1986 Act needed reforming to give more helpful information to creditors. Submissions were sought from certain credit agencies and in the absence of receipt of any submissions, whether from the credit agencies or from the public generally, it was considered not to make recommendations for changes to the form of accounts as set out in the 1986 Act. It was noted also that the Fourth and Seventh Company Law Directives are currently under review.

5.10.2 To give more up-to-date information to creditors, the Review Group recommends that annual accounts should be made up to a date not more than 6 months before the annual return date, rather than 9 months.[51] This should not prove to be a burdensome requirement as it applies already to listed companies.[52]

5.11 Debentures and series of debentures

5.11.1 Sections 91 to 97 of the 1963 Act deal with the register of debentures and provisions concerning the issue of debentures. In practice, the issue of debentures in the manner set out in the 1963 Act no longer applies and has been replaced by commercial paper, bond or note issues. These are usually, but not always, issued to the public where prospectus requirements would apply. The prospectus requirements are, however, for the benefit of investors rather than creditors. It is doubtful whether companies issuing short-term commercial paper privately through the inter-bank system actually enter the names of the holders of the commercial paper (strictly speaking, debenture holders) on a register as required by company law. In practice, banks issue short-term commercial paper on behalf of their corporate customers who are simply informed of the amount issued and the rate of interest applicable. Although ss 91 to 97 may be somewhat irrelevant, it is proposed that the Review Group should consider the issue in more depth in its second work programme with a view to recommending appropriate reform.

5.12 Charges

5.12.1 Section 99 of the 1963 Act requires particulars of certain charges to be delivered to the Registrar within 21 days of their creation. The Review Group noted that the Companies (No 2) Bill 1987[53] had proposed that the category

50 Source: The Revenue Commissioners.
51 See s 148(1) of the 1963 Act.
52 Irish Stock Exchange Listing Rules for Specialist Securities para 5.5
53 Which ultimately when amended became the 1990 Act.

of charges be extended to include shares and debts (other than book debts where registration is already required).[54] It had been proposed also in the 1987 Bill that each time there is an increase in a secured facility, a further form of particulars should be delivered to the Registrar. Both these provisions were dropped due to the perceived disruption for some companies in having security over shares or debts registered. An additional concern in relation to the second proposal was the increased cost and administration associated with further filings. While the Review Group sees merit in the concern, fixed charges on shares tend, in practice, to be registered as such charges include charges on dividends which are perceived could be deemed to be a book debt (a charge over which requires to be registered).[55] Registering all charges would give greater information to creditors as to prior secured creditors. The Group believes it is illogical to have a requirement to register some categories of charges but not others, as the secured creditor in each case has priority. However, EU developments on the registration or otherwise of charges need to be considered. Company law reform on the registration and priority of charges is to be considered in the Review Group's second programme.

5.13 Strike-off

5.13.1 The effect on creditors of a company being struck off was considered and it was noted that the Review Group's report on strike-off has dealt extensively with this.[56]

5.14 Investigations

5.14.1 No submissions have been received with regard to the right of creditors to instigate investigations in a company (the right is given to any creditor to apply to court to have an inspector appointed under s 7 of the 1990 Act). The Review Group considers that to date, as the appropriate Minister had instigated investigations where there seemed to be a perceived need, it was not recommended to make any change in this regard.

5.15 Priority of debts and winding-up

5.15.1 The priority of debts in a winding-up or receivership of a company, as set out in s 285 of the 1963 Act and other statutory provisions, was not considered. This is to be considered in the Review Group's second programme, together with the rules for advertising petitions, notices and location of creditors' meetings, proxies for creditors' meetings, committees of inspection and proof of debts.

54 See s 99(2)(e) of the 1963 Act.
55 *ibid.*
56 See Chapter 15.

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5.16 Summary of Recommendations

5.16 Summary of recommendations

- There should be a single validation procedure which can be carried out for validating what would otherwise be prohibited by s 60 of the 1963 Act, guarantees and the provision of security in connection with loans, quasi-loans and credit transactions, prohibited by s 31 of the 1990 Act, and s 256 of the 1963 Act. **(5.2.6/5.2.14)**

- The single validation procedure should require the majority of the directors to make a declaration in which it is stated that they are satisfied that the company is solvent at the time of the declaration. The declaration should incorporate a statement of the company's assets and liabilities and the benefit to the company in carrying out the transaction should be stated in the declaration. The directors should, if the court considers it just and equitable, be personally responsible for the company's debts where the declaration is made without reasonable grounds and the company is not subsequently able to pay its debts and they and persons connected to them should be liable to indemnify the company where they have received a benefit from the transaction. In addition, a special resolution of the members should be required to validate the proposed transaction. **(5.2.8)**

- The additional requirement of an independent person's report is unnecessary in validation procedures and should be dispensed with. **(5.2.10)**

- The validation procedure under s 34 of the 1990 Act should continue to be capable only of validating guarantees and the provision of security in connection with loans, quasi-loans and credit transactions. **(5.2.12)**

- The breach of s 60 of the 1963 Act, s 31 of the 1990 Act, and s 256 of the 1963 Act should be a criminal offence, modelled on s 40 of the 1990 Act and punishable in accordance with s 240 of the 1990 Act. **(5.2.13)**

- Gratuitous dispositions should be subject to the general duty that directors of companies can only act bona fide and in the interests of the company as a whole. **(5.3.4)**

- There should be no requirement to validate the refinancing of s 60 transactions which have been already validated. **(5.4.3)**

- The requirement under s 60 to validate the giving of warranties to purchasers and underwriters in connection with the purchase of shares should be repealed. (**5.4.5)**

- The requirement under s 60 to validate subscribers' advisory fees should be repealed. **(5.4.6)**

- The requirement under s 60 concerning the application of incurring of expense by a company to facilitate the admission to or continuance of a trading facility where shares on the stock exchange or securities market including expenses associated with the preparation of filing of any documents should be repealed. **(5.4.7)**

- Compliance by the company with the Irish Takeover Panel Act 1997 be exempt from the provisions of s 60 of the 1963 Act. (**5.4.7)**

- Section 60 of the 1963 Act should not apply to "abort fees" in connection with the offer of shares. **(5.4.9)**

- Section 40 of the 1983 Act (re: EGMs) should be repealed for private companies. **(5.5.4)**
- The obligation for auditors to state in their audit report whether, in their opinion, there existed at the balance sheet date a situation which would require the convening of an EGM of the company pursuant to s 40 of the 1983 Act should be repealed for audit reports in respect of all companies. **(5.5.5)**
- Consideration should be given to the abolition of duty of 1% on the issue of share capital. **(5.8.5)**
- Annual accounts should be made up to date no more than 6 months before the annual general meeting. **(5.10.2)**

6

CHAPTER 6

Simplification: Shareholder Protection

6.1 Introduction

6.1.1 The existing law regarding the protection of shareholders of a company is found both in the Companies Acts and in the common law. The 1963 Act sets out the basic law to do with shareholders in a logical sequence: first with matters associated with the incorporation of a company and the extent to which contracts are created between a company and its members and between member and member, with matters of share capital and variation of shareholders' rights. It then goes on to deal with management and administration of the company including details of records of members, meetings and proceedings involving members. The Act makes provision for a company to report to members through statements and accounts and sets out the extent to which members appoint and retain in office or remove the management of a company in the person of directors and other officers.

6.1.2 In this chapter the Review Group addresses the possibility of simplifying company law as it deals with the protection of shareholders, conscious of the need to balance the competing interests of shareholders, creditors and others and of the need to legislate for the orderly administration (whilst solvent and insolvent) of a company. Company law cannot always be simple, but its transparency and consistency can be improved.

6.1.3 The principle of shareholder protection set out at 3.4 of the Review Group's report formed the basis of our consideration of issues in this chapter.

6.2 Approach of the Review Group

6.2.1 The Review Group approached its task by examining sections of the Companies Acts from the perspective of shareholder protection. The Group decided on the merits of each case whether a provision should be amended or not. The Group considered the following issues (see chart). In many cases the Group came to the view that, while the law might benefit from some fresh wording, the actual law itself was sound and operated satisfactorily to reflect a fair balance between the interests of shareholders and directors. Therefore the Chapter refers only to those areas where either a recommendation to amend the law is made or where a recommendation to keep the law as it is at present is made, following submissions or arguments to amend.

- Objects – s 10 of the 1963 Act
- Liability – s 27 of the 1963 Act
- Video conferencing general meetings – s 134 of the 1963Act
- Furnishings of abbreviated accounts to members in lieu of full accounts
- AGM to be held abroad
- Acquisition of own shares and shares in holding company – Part XI of the 1990 Act, s 206 to s 233
- Authority for market purchase: maximum/minimum price – s 215 of the 1990 Act
- Duration of authority granted by PLCs to purchase own shares – s 216 of the 1990 Act
- Notice to shareholders with regard to company buying back its own shares – s 213 of the 1990 Act
- Right of members to object – s 15 of the 1963 Act
- Percentage thresholds for acceptance of offer – s 204 of the 1963 Act
- Power of limited company to make liability of directors unlimited – s 198 of the 1963 Act
- Substantial property transactions involving directors and others – s 29 of the 1990 Act
- Meaning of "authorised minimum" (share capital) – s 19 of the 1983 Act
- Remedy in cases of oppression – s 205 of the 1963 Act
- Share transfers: obligation of director or secretary to notify interest in shares or debentures of company – s 53 of the 1990 Act
- Minimum number of PLC members – s 5 of the 1963 Act
- Minority Shareholdings

6.3 Shareholder consent in validation procedures

6.3.1 In order to protect the interests of minorities, a minimum level of consent for approval by shareholders is required when a company undertakes certain activities that may impact on the interests of shareholders. Examples of these are special resolutions required under s 60 of the 1963 Act and s 34 of the 1990 Act after the directors have made a statutory declaration of solvency. At 5.2 the Review Group proposes a rationalisation of these procedures by applying a standard validation procedure to the two examples referred to as well as to members' voluntary winding-up procedures.

6.3.2 Prior to the 2001 Act, s 60 validation procedures were undertaken in general meeting but following the enactment of s 89(b) of that Act they can now be effected by written resolution, so providing the opportunity for a minority to object by withholding their written consent.

6.3.3 The Review Group recommends that a common validation procedure is also desirable from the perspective of shareholder protection.

6.4 Alteration of memorandum of association

Objects – s 10 of the 1963 Act

6.4.1 The 1963 Act gives the holders of 15% or more of the voting shares or voting rights (or of the holders of debentures) the right to apply to court in the event of a proposed alteration in objects to which they object. The removal of *ultra vires*, as proposed in Chapter 10 of this report, affects this as the effect of the abolition of ultra vires in private companies is to remove the requirement for the objects clause of the memorandum. It will, however, be possible for companies which wish to retain the *ultra vires* rule to do so by so providing in their memorandum or articles and renaming the company to add "dac"[1] to the name.

Liability – s 27 of the 1963 Act

6.4.2 This section provides that no member of a company shall be bound by an alteration made in the memorandum or the articles of association after the date on which he became a member, if the alteration requires him to subscribe for more shares than the number held by him at the date on which the alteration is made or in any way increases his liability to the company. The Review Group decided against recommending any change to existing provisions, noting a 1999 Australian case,[2] which, following a comprehensive review of the law on this point, upheld the rights of a company member in this situation.

6.5 Communications from the company to the member

6.5.1 The legal status of electronic communications is set out in s 12 of the ECA 2000. In summary, an electronic communication is lawful and of equivalent effect to a written communication, provided a recipient agrees to the receipt of the communication by electronic means. Section 21(2) of the ECA 2000 provides:

> Where the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee or the law otherwise provides, the electronic communication is taken to have been received when it enters that information system.

1 designated activity company; see further 10.9.11

2 *Ding v. Sylvania Waterways* [1999] New South Wales Supreme Court 58 (15 February 1999)

The 1963 Act provides at s 25(1):

> Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants by each member to observe all the provisions of the memorandum and of the articles.

6.5.2 It is clear therefore, where the technical requirements set out in the ECA 2000 are met, electronic communications by a company to its members are permitted and valid provided either: (a) each shareholder to whom an electronic communication is sent has individually agreed to the receipt of the communication; or (b) provision for the communication is made in the articles, in which event under s 25(1) of the 1963 Act it will "bind the members".

6.5.3 Because of the global provision in the ECA 2000 and the effect of s 25 of the 1963 Act it might be argued that there is no need to make a specific statutory provision to enable a company to communicate with its members electronically. However, the Review Group considers that the establishment of legal certainty regarding communications is an important first principle. There is, moreover, a general public policy interest in facilitating the transition to electronic communication by existing companies, to obviate the necessity for existing companies to alter their articles of association. Accordingly, the Group came to the conclusion that the Companies Acts should be amended to provide for electronic communication between a company and its members as if it were specified in the articles of association.

6.5.4 The Review Group then considered whether general company law provisions on the protection of shareholders are sufficient to protect their interests or whether specific provision should be made with regard to electronic communications. The combined effect of the ECA 2000 and s 25 of the 1963 Act is that it allows a company to impose electronic communications on members who may not have the capacity to receive them. The ECA 2000 is broad enough to cover any form of electronic communication. For example, a company could place information on a website or send individual e-mails. The obvious point arises, particularly for PLCs, that some shareholders may not even have a communications device. The Group recognized that it was important to protect the right of persons who were not electronically literate or who did not have facilities to access electronic communications readily. The Review Group recommends that any member should be able to opt out of receiving communications electronically, without resorting to the protection of s 205 of the 1963 Act. The Group also recommends that the Minister should have the power to make regulations to take account of technological developments and of possible abuses emerging.

Videoconferencing general meetings – s 134 of the 1963 Act

6.5.5 Generally, the Review Group is of the view that the Companies Acts should recognise and facilitate the use of current widely available technology, subject to protections for shareholders. It is thought that this should lead to efficiencies of both time and expenditure, particularly in the case of PLCs and of private companies with overseas members. The use of videoconferencing would be less for domestic CLSs. The Group believes that companies should be permitted to make use of videoconferencing in holding annual general meetings and extraordinary general meetings, subject to a reasonability test on the opportunity of persons to participate. Sections 249S and 1322(3A) of the Corporations Act 2001 in Australia provide the model for this recommendation. Section 249S provides:

> "A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate."[3]

3 Note: see s 1322 of the (Australian) Corporations Act for the consequences of a member not being given a reasonable opportunity to participate.

6.5.6 Section 1322(3A) provides:

> "If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if the Court is of the opinion that:
>
> (a) a substantial injustice has been caused or may be caused; and the injustice cannot be remedied by any order of the Court; and
> (b) the Court declares the meeting (or that part of it) invalid."

The Review Group recommends that s 134 of the 1963 Act should be amended to provide that a company should be able to hold a meeting at two or more venues using any technology which gives the members as a whole a reasonable opportunity to participate.

AGM to be held abroad

6.5.7 The Review Group considered whether it should be possible generally to permit a company to hold general meetings abroad but concluded that there should be no change proposed to the provisions as set out in s 140 and Table A of the 1963 Act, i.e. that meetings should be held in the State unless the articles of association provide otherwise or a decision to hold the annual general meeting outside the State has been taken at the previous annual general meeting or by all the members.

Furnishing of abbreviated accounts to members in lieu of full accounts

6.5.8 A number of submissions were received proposing that companies ought to be permitted to furnish abbreviated accounts rather than the full accounts to which shareholders are entitled under the existing law. The points made in support of this argument were:

(i) the expense to the company;
(ii) the limited interest on the part of certain shareholders in full accounting information;
(iii) the ability to clarify important points of substance when abbreviating the information.

6.5.9 The Review Group noted that the law in the UK was amended in 1995[4] to facilitate delivery of abbreviated accounts, subject to the members' right at all times to request delivery of full accounts. The Review Group recommends that consideration should be given to the appropriate form and content of such abbreviated accounts as part of its action proposed at 1.11.1(viii).

6.5.10 The Review Group recommends that companies be entitled to deliver abbreviated financial information, subject to the right of any individual member at any time to request delivery to him of full accounts on an occasional or permanent basis.

6.6 Communications from the member to the company

6.6.1 Although formal communications might be relatively infrequent in private companies they are more common in the case of PLCs. A shareholder may communicate with a company for a number of reasons, a summary of which, by no means exhaustive, includes:

- Notification of a change of address.
- Notification of a change of name.
- Notification of particulars of a dividend mandate or changes thereof.
- Notification of an election for a scrip dividend.
- Lodgement of a form of proxy for a general meeting.

4 Companies (Summary Financial Statement) Regulations 1995 (SI No 2092 of 1995)

- Request for duplicate share certificates.
- Lodgement of stock transfer forms in respect of a purchase or disposal of shares.
- Notification of the death of a shareholder, lodgement of a death certificate and grant of probate in respect of a deceased shareholder.
- Notification of an election in respect of a rights issue.

6.6.2 Clearly, there are many occasions on which a shareholder may communicate with the secretary of a company. In cases where the register of members is of any significant size, the volume of paper being processed at any one time may be considerable. It would appear therefore that electronic communication offers considerable scope for savings both in terms of costs to the company and in speed and convenience for shareholders.

6.6.3 Of all the forms of communication outlined, the greatest scope for electronic communication arises with regard to the lodgement of the form of proxy for general meetings. The articles of association of a company and the Companies Acts provide the legal support for many of the practices of company officers in dealing with these matters. The Review Group is here concerned with the lodgement of electronic proxy forms rather than electronic voting as such. Such communications are generally governed by the ECA 2000 as specified earlier in this chapter.[5] A number of important issues arise with regard to the privacy, authority and integrity of such communications but in the view of the Review Group these are more appropriate to conformity with best practice rather than being enshrined in primary legislation.

6.6.4 It is interesting to see how the issue has been addressed in the UK where the Companies Act (Electronic Communications) Order 2000[6] amends Regulation 115 of Table A (when notices are deemed to be given) by the inclusion of the following:

> "Proof that a notice contained in an electronic communication was sent in accordance with guidance issued by the Institute of Chartered Secretaries and Administrators (ICSA) shall be conclusive evidence that notice was given."

6.6.5 The guidance referred to is contained in the ICSA's publication *Electronic Communications with Shareholders – a Guide to Recommended Best Practice*. The Review Group urges the Minister to encourage production of a similar guide in Ireland.

6.7 Acquisition of own shares

Acquisition of own shares and shares in holding company - Part XI of the 1990 Act, s 206 to s 233

6.7.1 The Review Group is not proposing major changes to this Part. It was noted that any proposals for change would have to take into account obligations under the Second Company Law Directive.[7]

Authority for market purchase: maximum/minimum price – s 215 of the 1990 Act

6.7.2 This section outlines the conditions on the basis of which a company can make a market purchase of its own shares. The authority for such a purchase, conferred at a general meeting, should determine both the maximum and minimum prices which may be paid for the shares. This is determined by the Second Company Law Directive[8] also and no change is proposed.

Duration of authority granted by PLCs to purchase own shares – s 216 of the 1990 Act

6.7.3 This section provides that such authority expires not later than 18 months after the resolution granting authority is passed. This is determined by the Second Directive and no change is proposed.

5 See 6.5

6 The Companies Act (Electronic Communications) Order 2000 came into force on 22 December 2000 (SI 2000 No 3373).

7 77/91/EEC of 13 December 1976.

8 77/91/EEC of 13 December 1976

Notice to shareholders with regard to company buying back its own shares – s 213 of the 1990 Act

6.7.4 The Review Group considered whether it would make sense for smaller and private companies to shorten the 21-day period of notice for exhibiting the proposed contract of purchase or if it should be possible to allow shareholders generally to waive the need to exhibit the contract 21 days before its consideration by the members. The Group came to the conclusion that, in accordance with the rationale identified in Chapter 3 and 6.3.1 above whereby shareholders should themselves be able to abridge the period for inspection, it should be possible to shorten this period for all companies by agreement through unanimous written consent. Accordingly, the Review Group recommends that s 213 should be amended to allow all the members of any company to shorten or waive by unanimous written agreement the 21-day period of notice for exhibiting the proposed contract of purchase.

6.7.5 There is one anomaly in the procedures for purchase of own shares in the case of single member companies. Section 213(3) of the 1990 Act provides that a special resolution authorising the purchase of own shares is not effective "if any membe holding shares to which the resolution relates exercises the voting rights carried by any of these shares in voting on the resolution and the resolution would not have been passed if he had not done so". Accordingly, single member companies cannot pass such resolutions. The Review Group recommends that s 213(3) should not apply where the company has one member only.

6.8 Alteration of articles of association

Right of members to object – s 15 of the 1963 Act

6.8.1 Section 15 of the 1963 Act allows a company to alter its articles of association where the members so resolve by special resolution. Throughout company law the binding of the minority by 75% is an established principle. On consideration, the Review Group decided against proposing to change the threshold from 75% on the basis that this correctly balances the interests of all parties.

6.8.2 In certain circumstances the law allows a minority shareholder to object or seek redress in the courts, e.g. the right of shareholders holding 15% of the voting shares or voting rights under s 10 of the 1963 Act to object to amendments to objects clause.[9] However, the Group notes that any abuse may be proceeded against under s 205 of the 1963 Act which provides redress for minority shareholders in the event that the affairs of a company are being conducted in a manner oppressive to them and does not propose that a statutory percentage should be inserted.

6.9 Minority rights in takeovers – s 204 of the 1963 Act

Percentage thresholds for acceptance of offer

6.9.1 Section 204 facilitates the compulsory acquisition of shares held by dissenting shareholders in a takeover. The section contains a number of provisions requiring and regulating percentage holdings:

(i) shareholders holding 80% in nominal value of issued shares must accept an offer, in order to compel the acquisition of the remaining shares;
(ii) where an offeror is a subsidiary and the bidder holds shares, these shares are excluded from the shares of which 80% must accept;
(iii) where a holding company of an offeror holds shares, these shares are included in the shares of which 80% must accept;
(iv) where an offeror holds 20% or more of the shares, then 80% in value and 75% in number of the shareholders other than the offeror (or subsidiary of the offeror) must accept the offer.

9 See 6.4.1.

6.9.2 The Review Group noted that it can be difficult to reach the level of 80% assent from which to acquire the beneficial ownership of the remaining shares. If this were to be increased to 90%, as in the UK, it would be likely to make takeovers very difficult to achieve and have an adverse effect on competition. The 80% threshold to be exceeded is of the "free" shares, i.e. the shares other than those held by the bidding company and any subsidiary of the bidding company. However, shares held by a holding company or sister company of a bidder, or of a company controlled by shareholders of the bidder can be included. This makes it possible for existing shareholders to coalesce in a new entity in order to make a bid for their company.[10] It appears to the Review Group that this is anomalous and it is appropriate that shares of persons with a material interest in a bidder ought to be excluded from consideration.

6.9.3 Where a bidder and its subsidiaries have 20% or more of the shares being bid for, then the bidder must obtain acceptances from 75% in number of the shareholders as well as 80% in nominal value of the shares of accepting shareholders for compulsory purchase procedures to be triggered.

6.9.4 The Review Group considered the above percentages and requirements and recommends, subject to EU developments:

(i) that the 80% value threshold for triggering compulsory acquisition entitlements should remain;
(ii) the continued exclusion of an offeror's subsidiaries' shares from the 80% of shares accepting the offer which triggers the compulsory acquisition right;
(iii) the exclusion of shares held by (a) a holding company of an offeror and (b) existing shareholders who alone or in concert hold 33$^{1}/_{3}$% or more of the voting shares of an offeror. This 33$^{1}/_{3}$% interest tallies with the provisions of s 54(5) and s 72(2) of the 1990 Act in relation to attribution of interests which should accept the offer. Although this amendment to the imputation of ownership of shares by a bidder is less extensive than in the UK, the Review Group considers this aspect of its recommendation as being fair and comprehensible and has the advantage of using pre-existing principles of drafting from existing legislation and therefore is in harmony with the simplification objective of the Group;
(iv) the 75% of shareholders number threshold (which applies where an offeror is interested in 20% or more of the shares of the target company) should be reduced to 50%;
(v) an offeror, which at present must be a company in order to obtain rights under s 204, should be capable of being an individual or partnership.

Unclaimed consideration

6.9.5 The Review Group is aware that unclaimed consideration in respect of shares compulsorily acquired as a result of the exercise of the provisions of s 204 can remain on trust for dissenting shareholders. The Review Group recommends that the unclaimed consideration, whether moneys or shares,[11] should be held on trust for at longest 7 years, and then given to the Exchequer. Moneys remaining unclaimed should be paid into the Exchequer on the same basis as that applying to the Companies Liquidation Account[12] and shares should be sold (where possible) and the funds paid into the Exchequer on this basis also. The Minister for Finance should indemnify the company against any future claims. The company should provide a schedule of moneys and the names of beneficial owners (where known) to the Minister for Finance.[13]

10 This was the caase in *Re Fitzwilliam Public Limited Company, Duggan V. Stoneworth Investment Limited* [2002] 1 IR 566

11 Section 204(6) of the 1963 act provides: Any sums recieved by the transferor company under this section shall be paid into a separate bank account and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

12 See s 307 of the 1963 Act which provides: (1) Where a company has been wound up voluntarily and is about to be dissolved, the liquidator shall lodge to an account to be known as The Companies Liquidation Account in the Bank of Ireland in such manner as may be prescribed by rules of court the whole unclaimed dividends admissible to proof and unapplied or undistributable balances. (2) The Companies Liquidation Account shall be under the control of the court. (3) Any application by a person claiming to be entitled to any payment or dividend or payment out of a lodgment made in pursuance of subsection (1), and any payment out of such lodgment in satisfaction of such claim, shall be made in a manner prescribed by rules of court. (4) At the expiration of 7 years from the date of any lodgment made in pursuance of subsection (1), the amount of the lodgment remaining unclaimed shall be paid into the Exchequer, but where the court is satisfied that any person claiming is entitled to any dividend or payment out of the moneys paid into the Exchequer, it may order payment of the same and the Minister for Finance shall issue such sum as may be necessary to provide for that payment.

13 It is proposed that unclaimed dividends should be considered in the context of shares and share capital, in the Group's second work programme.

Terminology in Act

6.9.6 The Review Group noted the complexity of descriptions applying to takeovers. The Companies Acts use the terms transferor and transferee, the Irish Takeover Panel Act 1997 – and the proposed EU 13th Company Law Directive – use the terms offeror and offeree, and the Stamp Duty Act uses the terms acquirer and target. The terms acquirer and target are the clearest of such terms and in principle should ideally replace transferor and transferee in the Companies Acts. In view of the use by the proposed European Directive, the Irish Takeover Panel Act 1997 and the Rules under that Act (as well as the London City Code on which it is based), it appears the most practical recommendation to make is that the expressions "offeror" and "offeree" be used.

6.9.7 In the absence of a European clearing system, the Review Group noted that where consideration is paid in the form of cheques drawn on a bank outside the State's clearing bank system, bank charges in clearing these cheques can reduce the amount per cheque receivable below that which would be received if a cheque from an Irish clearing bank were used. The advent of the euro will not change this possibility, in view of the separate banking systems. The draft EU Prospectus Directive gives Member States the right to require locally-based paying agents in public share issues to deal with this issue. The Review Group recommends that cash consideration for acquisition of securities of an Irish-incorporated PLC to members with a registered address in the State should be drawn on a bank in the State, unless such member agrees otherwise.

6.10 Schemes of arrangement with shareholders and creditors

6.10.1 The Review Group examined the procedures for effecting a scheme of arrangement under s 201 of the 1963 Act. Section 201 enables companies to reorganise their shareholders' holdings and/or rights and/or their creditors' rights. Whilst schemes of arrangement under this section have become rare, if non-existent, in the case of creditors' arrangements,[14] schemes of arrangement involving reductions of capital and takeovers of companies continue to be utilised.

6.10.2 The procedures for bringing forward a scheme of arrangement are contained in Order 75 of the Rules of the Superior Courts 1986, as amended, and to that extent, many procedures can be amended by statutory instrument rather than by statute. However, s 201 expressly provides for two distinct involvements on the part of the court, which has the result of adding to the court time involved as well as to the timescale of any scheme timetable. Added to that are certain entrenched procedures which further complicate and prolong the procedures.

6.10.3 A typical[15] procedure followed in a scheme of arrangement is as follows:

Stage	Legal basis
Obtain court approval to convene the meeting of shareholders to approve scheme	s 201(1)
Hold the meeting of shareholders and/or of creditors and pass resolution(s) approving scheme	s 201(3)
Issue petition to approve scheme	s 201(3), Rules of the Superior Courts, Order 75
Apply to court for directions as to how to advertise the approval of the scheme and the petition for court approval of the scheme	Rules of the Superior Courts, Order 75 rule 6

14 Because of the examinership procedures under the 1990 Amendment Act, as amended.

15 There are variations in complex schemes, depending on their component parts: for example, where there is to be a reduction of share capital as part of the scheme with a return of capital to members, then procedures under s 73(3) of the 1963 Act would also need to be followed.

Obtain court approval of scheme	s 201(3)
Register Order approving scheme with Registrar	s 201(5)

6.10.4 There are two principal shortcomings in the above procedure:

(i) the initiation of two separate legal proceedings – one under s 201(1), by Originating Notice of Motion, to convene the Scheme meeting(s) of shareholders (and creditors) and the other under s 201(3) to approve the Scheme; and

(ii) the bringing of the matter before the court three times
(a) to convene the meeting
(b) to advertise the petition and
(c) to approve the Scheme.

6.10.5 The Review Group recommends that court approval should no longer be required to convene scheme meetings of shareholders or creditors, where the proposed meetings are convened by the board of directors. As matters now stand, it is established law that the court will not give pre-approval of the classification of shareholders and creditors at this hearing – the court reserves its discretion at (what is now) the third court hearing to disapprove a Scheme where such classification is defective. Therefore, there appears little virtue in retaining the court's involvement. Such an amendment would remove one of the two sets of proceedings as well as one of the court hearings. It would preserve the right of a member or creditor of a company to apply to court to convene such a meeting.

6.10.6 The Review Group recommends also that (what is now) the second court hearing – to approve the notification of /advertisement to the participants in the scheme of the passing of the scheme resolution and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by advertising in two daily national newspapers, as at present, along the lines of s 266(2)[16] of the 1963 Act. The participants in the scheme ought to have been notified of the scheme meetings, and therefore there ought to be no requirement to re-notify them of the passing of the scheme resolution(s). The courts appear to recognise this, and such an amendment would remove what appears to be an otiose procedure.

6.11 Directors' duties

Power of limited company to make liability of directors unlimited – s 198 of the 1963 Act

6.11.1 The rationale for inclusion of this section in the 1963 Act appears to be because it was in the 1908 Act, and due to historical accretion. In addition, it predates the introduction of specific liabilities of directors. As such it can be assumed to be redundant and should be deleted from the Act. The Review Group recommends repeal of s 198 of the 1963 Act on grounds of obsolescence.

Substantial property transactions involving directors and others – s 29 of the 1990 Act

6.11.2 The Review Group is of the opinion that, in principle, the thresholds above which approval in general meeting is required – £50,000 (€63,486.9) or 10% of the amount of the company's relevant assets[17] if these amount to less than £50,000 (€63,486.9) – were too low. Because of this the process of compliance with this section could be unnecessarily burdensome, particularly for small companies.

16 The company shall cause notice…to be advertised once at least in 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situate.

17 The amount of a company's relevant assets is defined as the value of its net assets determined by reference to the accounts prepared and laid in accordance with the requirements of s 148 of the Principal Act in respect of the last preceding financial year in respect of which such accounts were so laid. Where no accounts have been so prepared and laid the amount of the relevant assets is the amount of the company's called-up share capital.

6.11.3 For PLCs the Group considered this issue in the overall context of the Irish Stock Exchange listing rules. The ISE regulates in this area, applying a number of criteria in its listing rules. These vary according to the size and profits of the company. This is a more flexible test than that applied under s 29 and the Group considered whether instead of a threshold figure it might have a more proportionate test by comparing the size of the transaction with, e.g. a proportion of net asset value. The Group concluded that this was indeed a more reasonable test and accordingly recommends removing the threshold of £50,000 (€63,486.9) for PLCs, only applying a 10% of net asset value test. However, the Review Group concluded also that the existing test should remain for private companies limited by shares as the existence of a clear limit will help with the determination of whether or not the section applies to particular transactions. The Review Group notes that approval for the purposes of s 29 is frequently effected by written resolution under s 141(8) of the 1963 Act.

6.11.4 The Group reflected also on the appropriate duration of the "reasonable period" referred to at s 29(3). The Review Group recommends that that period should be subject to ratification taking place at the next annual general meeting and in any event not later than 15 months, unless all the members at any time unanimously consent in writing to the transactions involved. This recommendation applies to all companies. The Group further believes that s 29(7)(a) should be amended to identify a "wholly owned subsidiary" as per s 150(5) of the 1963 Act. Subsection (7) should further be amended by the addition of a third exemption (c) regarding the disposal of a company's assets by a receiver as the Review Group believes that s 316A of the 1963 Act gives adequate protection to the company and its shareholders.

6.11.5 The Review Group noted that a number of concerns about transactions involving directors are addressed in Part IX (ss 75 to 79) of the 2001 Act.

6.12 Further shareholder safeguards

Meaning of "authorised minimum" (share capital) – s 19 of the 1983 Act

6.12.1 The Review Group is of the opinion that these provisions are satisfactory. Accordingly, no change is recommended.

Remedy in cases of oppression – s 205 of the 1963 Act

6.12.2 This section provides for any member of a company, who complains that the affairs of the company are being conducted in a manner oppressive to him or in disregard of his interests, to make an application to court for an order. The court may make any order it deems fit for the circumstances. The Review Group noted that there is considerable jurisprudence on this section with the rights of members and the role of the High Court properly defined. Accordingly, no change is recommended.

Share transfers – obligation of director or secretary to notify interest in shares or debentures of company – s 53 of the 1990 Act

6.12.3 This issue is dealt with in Chapter 11. See 11.10.8 for recommendations on this issue.

6.13 Other issues raised in discussion

Minimum number of plc members – s 5 of the 1963 Act

6.13.1 The distinctive characteristic of public as opposed to private companies is the right to issue shares to the public and the unfettered right to transfer shares, rather than the minimum number of shareholders. The minimum of seven members originated in the early life of company law and has survived without analysis or review rather than as a consequence of analysis and review. The Review Group noted that in most EU countries the minimum number of members for a PLC is lower than the seven currently applying in Ireland. The UK sets a minimum of

two and in some jurisdictions only one member is required. The Review Group recommends the reduction of the current minimum from seven to two as the Group believes a PLC should have at least two members.

Minority shareholdings

6.13.2 The Review Group addressed the issue as to whether valuation criteria or rules could or should be provided for in the Companies Acts to regulate the price for or compensation for cancellation of minority shares in cases where minority shareholders were exiting a company further to proceedings under s 205 of the 1963 Act. Currently, the value of a minority shareholding can in practice be discounted substantially from what it would in principle be worth as a proportion of the total value of the business operation. For the Review Group, the issue was whether there was any merit in proposing a statutory mechanism to measure the quantum, e.g. a proportion of net tangible assets related to the proportion of the minority interest, in the event of the minority shareholder not being able to reach agreement with the other members of the company on the value of the stock being disposed of. In considering this, the Group is conscious that it does not wish to constrain the forces that regulate the free market or what is just in any particular circumstances.

6.13.3 The Review Group recognised that serious issues arise here: a good example is a private company which may control substantial assets although the immediate return to the members may be small. If a member then sells his minority shareholding the market value realised is less than that proportion of the business that it is in fact worth. The Group noted that there are two conflicting principles at issue: the protection of minority rights and whether or not this proposal would be in the best interests of the company. A core principle arising is that a change could mean the imposition of a legislative norm over privately agreed mechanisms. The Group considers that an attempt to define the standard for valuing minority shareholders might mean that this standard would become a norm rather than the intended default position, in effect worsening the position of many minority shareholders. For these reasons, the Group decided not to recommend a change in the law in this area.[19]

18 In addition, the fixing of an exit price might conflict with the equitable jurisdiction of the court under s 205 to make "such order as it thinks fit" with a view to bringing to an end the matters complained of.

sixsummary

6.14 Summary of Recommendations

6.15 Summary of recommendations

- The Companies Acts should be amended to acknowledge the validity of electronic communication between a company and its members as if it were specified in the articles of association. **(6.5.3)**

- Any member should be able to opt out of receiving communications electronically, without resorting to the protection of s 205 of the 1963 Act. **(6.5.4)**

- The Minister should have the power to make regulations to take account of technological developments and possible abuses emerging. **(6.5.4)**

- Section 134 of the 1963 Act should be amended to provide that a company should be able to hold a meeting at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. **(6.5.6)**

- Companies should be entitled to deliver abbreviated financial information, subject to the right of members to request delivery of full accounts. **(6.5.10)**

- Section 213 of the 1990 Act should be amended to allow all the members of any company to shorten or waive by unanimous written agreement the 21-day period of notice for exhibiting the proposed contract of purchase. **(6.7.4)**

- Section 213(3) of the 1990 Act should not apply where the company has one member only. **(6.7.5)**

- Subject to EU developments the following recommendations are made regarding the law related to the compulsory acquisition of shares as allowed by s 204 of the 1963 Act:

  (i) that the 80% value threshold for triggering compulsory acquisition entitlements should remain;
  (ii) he continued exclusion of an offeror's subsidiaries' shares from the 80% of shares accepting the offer which triggers the compulsory acquisition right;
  (iii) the exclusion of shares held by

  (a) a holding company of an offeror and
  (b) existing shareholders who alone or in concert hold 33_% or more of the voting shares of an offeror;

  (iv) the 75% of shareholders number threshold (which applies where an offerer is interested in 20% or more of the shares of the target company) should be reduced to 50%;
  (v) an offeror, which at present must be a company in order to obtain rights under s 204, should be capable of being an individual or partnership. **(6.9.4)**

- Unclaimed consideration in respect of shares compulsorily acquired as a result of the exercise of the provisions of s 204, whether moneys or shares, should be held on trust for at longest 7 years, and then given to the Exchequer. Moneys remaining unclaimed should be paid into the Exchequer on the same basis as that applying to the Companies Liquidation Account and shares should be sold and the funds paid into the Exchequer on this basis also. **(6.9.5)**

- The terms offeror and offeree should replace transferor and transferee in the Companies Acts. **(6.9.6)**

- Cash consideration for acquisition of securities of an Irish-incorporated PLC to members with a registered address in the State should be drawn on a bank in the State, unless such member agrees otherwise. **(6.9.7)**

- Court approval should no longer be required to convene scheme of arrangement meetings of shareholders or creditors, where the proposed meetings are convened by the board of directors. **(6.10.5)**

- What is now the second court hearing – to approve the notification of advertisement to the participants in the scheme of arrangement of the passing of the scheme resolution and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act. **(6.10.6)**

- Section 198 of the 1963 Act should be repealed. **(6.11.1)**

- Section 29 of the 1990 Act should be amended to remove the threshold of £50,000 (¤63,486.90) for PLCs, only applying a 10% of net asset value test. **(6.11.3)**

- The "reasonable period" at s 29(3) of the 1990 Act should be subject to ratification taking place at the next annual general meeting and in any event not later than 15 months; this to apply to all companies. **(6.11.4)**

- Section 29(7)(a) of the 1990 Act should be amended to define what is meant by a "wholly owned subsidiary" as per s 150(5) of the 1963 Act. **(6.11.4)**

- Section 29(7) of the 1990 Act should be amended by the addition of a third exemption (c) regarding the disposal of a company's assets by a receiver. **(6.11.4)**

- The current minimum number of members of a PLC should be reduced from 7 to 2. **(6.13.1)**

7

seven

CHAPTER 7

Simplification: Incorporation and Registration

7.1 Introduction

7.1.1 The procedures surrounding the registration of new companies and the disclosure, through the CRO, of subsequent information comprises a substantial part of the compliance with regulatory requirements of companies. It is necessary to keep under review the law and practice regarding these functions to ensure the minimum imposition on companies whilst preserving the protection principles outlined elsewhere in this Report. The Review Group explored a range of measures to facilitate easier registration processes and to encourage electronic filing by companies. The Group also recognises the importance that the CRO should be in a position to make registered information readily available to customers using the opportunities resulting from electronic communications.

7.2 Incorporation of a company

7.2.1 The recommendations made in the Report regarding the capacity of a company at Chapter 10, articles of association at 3.2.7, and statutory declarations at 7.4.12, when taken together, provide a basis for considerably simplifying the process of the incorporation of a private company limited by shares.[1] To maximise the benefits of these proposed changes, there is a need for a further merging of the provisions regarding the incorporation of companies. The Review Group recommends that the various sections of the Companies Acts regarding the incorporation of private companies limited by shares should be replaced by a provision that any one or more persons may, by subscribing their names to an application for incorporation in a form prescribed for that purpose, form a private company limited by shares.[2]

Company constitution

7.2.2 The Review Group considers that, as regards private companies limited by shares, it is no longer necessary to retain the distinction between the memorandum of association and the articles of association and that it is possible to merge them into a single document – the company constitution. As these companies will by definition have limited liability, and as they will have their own application for incorporation,[3] it will not be necessary to include a limited liability clause in that constitution. Because of the recommendation in Chapter 10, the requirement for an objects clause does not arise.

7.2.3 The Review Group does not, however, recommend a complete merging of the incorporation documents. The law must have regard to the First Directive[4] which provides at Article 2.1(c) that where any change is made to the "instrument of constitution" or "the statutes" of a company, the complete text of those documents as amended to date must be filed with the regulatory authority. If, therefore, all the incorporation documents were to be merged into one, a complete new set would have to be filed following a change in any of the particulars.

Capital duty statement

7.2.4 The incorporation application includes a statement in respect of companies' capital duty required by the Stamp Duty Consolidation Act 1999. The Review Group understands that the Revenue Commissioners would be prepared to have this statement incorporated in the new application form which the Group is proposing. (See also Chapter 5 at 5.8)

1 i.e. the proposed CLS recommended by the Review Group as the base company in 3.6. The Review Group will consider simplification of incorporation procedures in respect of other company types at a later date.

2 Replacing s 5 of the 1963 Act.

3 See 7.2.1.

4 68/151/EEC.

Writing the number of shares subscribed for

7.2.5 There is at present a requirement that each subscriber must write in the memorandum of association the number of shares for which he is subscribing.[5] The need for actual writing – as opposed to signing a typed statement – is an anachronism. The Review Group recommends that this provision should be repealed. This recommendation applies to all company types.

New application form for incorporation

7.2.6 A draft form set out in Annex I to this chapter was produced by the Registrar for consideration by the Review Group. This form would be used for the incorporation of a private company limited by shares.

7.2.7 The form prescribed for the application should contain the following:

Part I: The company name, details of the first officers, address of the registered office, the company's activity in the State and where it is carried on.[6]

Part II: The company constitution containing (i.e. repeating) the company name, the share capital clause, and the rules currently contained in the articles of association.

Part III: A signature section, in which the first officers of the company consent to acting as such, and which includes the current association or subscription clause, wherein the subscribers subscribe to the documents and verify their contents.

Where the company constitution is altered post-incorporation, only Part II of the document would be required to be re-filed in full.[7]

7.2.8 The Review Group recommends the adoption of a form along the lines of the draft form for the incorporation of private companies limited by shares, annexed to this chapter.

7.3 Reservation of a company name

7.3.1 Whatever further simplification takes place, it will remain necessary for the CRO to ensure the suitability of a proposed company name having regard, inter alia, to the similarity of a proposed name to names already on the register. If the name could be checked and reserved while the documentation for incorporation is being prepared, the registration of the final documents could be greatly expedited. The sole purpose of such a name reservation system should be to facilitate swifter company incorporation. It will be necessary therefore to prevent names being blocked from proper use by other parties for an unreasonable amount of time.

7.3.2 If the time delay associated with the process of name approval could be dealt with separately, it would be easier to establish a process for the immediate incorporation of a company electronically.

7.3.3 The Review Group recommends that persons engaged in the formation of a company ought to be permitted, on payment of the prescribed fee,[8] to reserve a company name for a period not exceeding twenty-eight days[9] from the date of confirmation by the CRO that the name has been reserved in favour of that person.

7.3.4 The Review Group further recommends that as long as the application for incorporation is received by the CRO within the period during which the name in question is reserved, the fee for name reservation should be offset against the incorporation fee, as the pre-approved name would not have to be checked on receipt by the CRO of the application for incorporation.[10]

5 See s 6(4)(d) of the 1963 Act.
6 Currently required by s 42(2) of the 1999 (No 2) Act.
7 This will additionally overcome the anomaly of repeat filing of the particulars of the first subscribers.
8 Say, €25.00.
9 With one further reservation of that company name for an immediately consecutive 28-day period being permissible on payment of a further fee.
10 In effect providing the reservation service free of charge to a person who goes on to incorporate a company bearing a name which he has reserved provided that it is used within one month.

7.4 Statutory declarations

7.4.1 The Companies Acts 1963 to 2001 require, in many instances, the making and filing of statutory declarations with the CRO.[11] The relevant sections are listed in the following table, and "SD" adopted as an abbreviation for "statutory declaration".

Section	Provision
1963 Act	
24 (inserted by s 88 of the 2001 Act)	Exemption from use of the word "limited" in company name – SD of officer that company complies, or where applicable will comply, with the requirements of s 24(a) and (b).
60 (2)	On giving financial assistance for the purchase of shares – SD by directors as to the nature of that assistance that they have formed the opinion that the company, having carried out the transaction, will be able to pay its debts in full as they become due.
115 (1)(d)	Restrictions on commencement of business – SD by officer that certain conditions have been complied with, where company has share capital and has issued a prospectus.
115 (2)(c)	Restrictions on commencement of business – SD by officer that certain conditions have been complied with, where company has share capital and has not issued a prospectus.
179 (1)(b)(iv)	Optional SD by director that he has taken up shares.
256(1)	Statutory declaration of solvency in case of proposal to wind up voluntarily.
320(4)	Statement as to the affairs of the company to be delivered to Receiver.
332	(Part IX Registration of companies not formed under the Act) SD by two or more directors verifying lists of members and directors.
1983 Act	
5(5)	SD to be delivered with application for incorporation.
6(2)	(Restriction on commencement of business by plc) SD by officer that allotted share capital is not less than authorised minimum.
9(3)(e)	Re-registration of private company as plc - SD by officer that certain conditions have been met.
12(5)(b)	Re-registration of "old public limited company" to plc – SD by officer that conditions for conversion have been met.
18(4)(e)	Companies registering under the Act pursuant to Part IX of the 1963 Act; conversion to plc – SD by officer that certain conditions have been met.
52(3)(b)	Re-registration of limited company as unlimited – SD by the directors of the company that the persons by whom or on whose behalf the form of assent is subscribed constitute the whole membership of the company, and, if any of the members have not subscribed that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered so to do.

11 In certain other instances, statutory declarations are not expressly required by the legislation, but are required pursuant to CRO Forms Orders – for instance, Forms 49 (full satisfaction of a charge) and Form 49a (partial satisfaction of a charge) each contain a declaration verifying the memorandum of satisfaction of charge for the purposes of s 105, 1963 Act, although that section does not stipulate that a statutory declaration is required, merely that "evidence [must be] given to [the] satisfaction of " the Registrar.

Section	Provision
1990 Act	
34 (inserted by s 78 of the 2001 Act)	Provision of guarantee or security in connection with loan or credit transaction made by another person for a director or a connected person – SD by directors stating the circumstances in which the guarantee is to be entered into or the security is to be provided, the nature of same.
1999 (No 2) Act	
42	Carrying on of an activity in the State – SD that company will do so.
45	Limit on number of directorships – SD that company falls within a category of company specified in the table to s 45.
47	Notice of resignation of officer – SD of resigning officer that s/he has resigned, and that company has failed despite written request to file notice of that resignation with the CRO.

7.4.2 Statutory declarations are additional to the actual information being provided. Statutory declarations made under the Companies Acts are furnished to designated persons, most commonly the Registrar. For example, when registering a new company with the Registrar, it is necessary to lodge a statutory declaration of compliance with the Companies Acts in respect of registration signed either by the solicitor involved in the company formation or by a person named in the articles of association as a director or secretary of the company.[12]

7.4.3 Where a statutory declaration is required to be delivered to the CRO for the purposes of an application, it is not possible to complete that application by a single electronic communication. The question arising is how best to address this. A number of options arise.

7.4.4 One option would be to prepare an order pursuant to the ECA 2000 enabling the documents listed in Annex II to this Chapter to be dealt with electronically. The ECA 2000 provides at s 10(1):

> Sections 12 to 23 are without prejudice to the law governing the creation, execution, amendment, variation or revocation of the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose; except to the extent that regulations under section 3 may from time to time prescribe.

Section 3 is the general provision as to the making of regulations.

7.4.5 Section 10(2) provides:

> Where the Minister is of the opinion that–
>
> (a) technology has advanced to such an extent, and access to it is so widely available, or
> (b) adequate procedures and practices have developed in public registration or other services, so as to warrant such action, or
> (c) the public interest so requires
>
> he or she may by regulations extend the application of this Act to or in relation to a matter specified in subsection (1) subject to such conditions as he or she thinks fit.

12 Section 5(5) of the 1983 Act.

7.4.6 The drawback to going the route of an order under the ECA 2000 is that there will remain major practical difficulties in making a statutory declaration electronically. There are always two unconnected parties whose signatures are required on a statutory declaration. It would be necessary for each party to the declaration to be able to sign electronically.

7.4.7 The other possibility would be to remove the requirement for statutory declarations, and to replace it with a requirement for an unsworn declaration.[13] The requirement for statutory declarations could be removed for electronic communications only. This was done in the UK where the requirement for a statutory declaration for electronic communications was replaced with a specific statutory offence for falsely making declarations to the registrar[14] with severe penalties for breach.

UK provisions

7.4.8 The UK have replaced the provisions in their companies code on statutory declarations *as they apply to electronic filing* as follows: [15]

> "(3) In place of the statutory declaration there may be delivered to the registrar of companies using electronic communications a statement made by a person mentioned in paragraph that the requirements mentioned in subsection (1) have been complied with; and the registrar may accept such a statement as sufficient evidence of compliance.
> (3B) Any person who makes a false statement under subsection (3A) which he knows to be false or does not believe to be true is liable to imprisonment or a fine, or both.
> (3B) makes provision for a simple offence of making a false statement. The new penalties in (3B) are to replace existing Perjury Act offences for making false declarations."

7.4.9 The Companies Acts in Ireland could adopt a similar approach.It should be noted, however, that there is no equivalent in the UK to s 242 of the 1990 Act which sets out the offence of, and penalty for, furnishing false information in purported compliance with the Companies Acts.

Purpose of a statutory declaration

7.4.10 A statutory declaration is an attempt to increase the awareness of somebody making a false statement. It is notable, however, that the penalty for falsely making a statutory declaration is very much less than the penalty for any other false statement on a CRO form, although the making of a false statutory declaration could be considered as a separate and additional offence. Section 6 of the Statutory Declarations Act 1938 provides that:

> Every person who makes a statutory declaration which to his knowledge is false or misleading in any material respect shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding fifty pounds or, at the discretion of the Court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

Section 242 of the 1990 Act, however, provides that:

> A person who, in purported compliance with any provision of the Companies Acts, produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false, or recklessly...lodges or delivers any such document false in a material particular shall be guilty of an offence.

7.4.11 The maximum penalty under s 242 is €1,904.61 (£1,500) or 12 months on summary conviction or €12,697.38 (£10,000) or 5 years on indictment. Where a person is guilty of an indictable offence under subsection (1) and the court is of opinion that the offence has had certain specified severe effects, the maximum penalty on conviction on indictment increases to "imprisonment for a term not exceeding 7 years or to a fine not exceeding €12,697.38 (£10,000) or to both". The existing penalty for breach of s 242 of the 1990 Act is therefore far greater than that applying under s 6 of the Statutory Declarations Act 1938.

14 The UK Companies Act 1985 (Electronic Communications) Order 2000.

15 Section 12 of the UK Companies Act ,1985 as amended.

13 To date, a statutory declaration may be accepted by the Registrar as sufficient evidence of compliance with various statutory requirements. If statutory declarations were no longer to be required to be delivered to the CRO, it would be necessary to replace them with another form of proof on which the Registrar could rely. The relevant provisions of the Companies Acts would have to be amended to reflect this change.

Conclusion

7.4.12 From the perspective of simplification, the Review Group concluded that the most logical approach is to remove the need for a statutory declaration with regard to the filing of any information in compliance with the Companies Acts. The Group considered this is warranted on the basis that it is not appropriate to have different offences, and different levels of penalties, apply to electronic filings and hard copy filings. Nor is it necessary, in the view of the Group, to create an additional specific offence in the companies code given the existence of s 242 of the 1990 Act which established the offence and penalty for furnishing false information in purported compliance with any provision of the Companies Acts. The Review Group recommends that all existing requirements (as identified in 7.4.1) to make and file statutory declarations with the CRO should be replaced with a requirement to make an unsworn declaration.

7.4.13 The Group acknowledges, however, that the scope of s 242 requires to be broadened if statutory declarations are no longer to be required to be delivered to the CRO by the Companies Acts.[16] The Review Group recommends that a statutory declaration should be replaced with a requirement to deliver "an unsworn declaration in the prescribed form," which the Registrar may in relevant circumstances accept as sufficient evidence of compliance.

7.5 Company electronic filing agents

7.5.1 While it can be expected that many larger companies will use electronic filing methods as soon as these become feasible, uptake by many smaller companies can be expected to be slower. It is the reality that the company accountant, solicitor, or other secretarial service provider, is often charged with the task of preparing returns based on the company records and on information supplied by the officers of the company. The company assigns effective responsibility in practice to the service providers to ensure that company filings are kept in order. The documents, however, are sent out to be signed by the company secretary or the director, who remains ultimately responsible for ensuring the accuracy of its contents. The Review Group recommends that it should be open to the board of a company to authorise agents to sign documents electronically on behalf of the company and to forward them directly to the CRO. It should be a matter between the agent so authorised and the company to manage the control of these documents. The Review Group recommends that appointments should be notified to the Registrar with a confirmation that the company accepts that such agents are authorised to sign documents on its behalf. The Group further recommends that the Registrar, under the general powers provided pursuant to the ECA 2000,[17] should lay down the means whereby agents could file electronically with the CRO.

Signatory cannot currently act as auditor

7.5.2 Large accountancy and legal firms in particular should be in a position to deal electronically with the CRO. Many already have in place the technology to file returns electronically and could readily register for electronic signatures under the ECA 2000. Section 187(2)(a) of the 1990 Act however prohibits "an officer or servant of the company" from acting as the company's auditor. Where a firm of accountants acts as the company auditor, it is not possible for them to act also as the company secretary. That means that they may not sign documents on behalf of the company for filing at the CRO, creating a real barrier to the uptake of electronic filing. This is despite the fact that the involvement of professional auditors in this process should facilitate both efficiency and good compliance. The Review Group recommends that it should be expressly recognised by the Companies Acts that authorised electronic filing agents are not, by virtue of their appointment as such, to be deemed to be an officer or servant of the company, for the purposes of s 187(2)(a) of the 1990 Act. The Review Group also recommends that s 242 of the 1990 Act should be further altered to take account of the appointment of electronic filing agents.[18] Auditors, in particular, should have procedures in place to ensure that their independence is preserved and that management are responsible for the integrity of the information provided to them.

16 See 7.6 below.
17 ECA 2000, s 12 (writing) and s 13 (signatures).
18 See 7.6.2.

7.6 Requirements to broaden scope of offence under s 242 of the 1990 Act

7.6.1 An offender under s 242 of the 1990 Act is anyone who, inter alia, "produces, lodges or delivers" a document in purported compliance with the Companies Acts "knowing it to be false" in a material particular, or who recklessly delivers such false information. Under the Statutory Declarations Act 1938, an offence is committed by a person who makes a false declaration. If statutory declarations are removed from all documents to be filed with the CRO, leaving s 242 as the only sanction for the delivery of false particulars, it will be possible to deliver false information to the CRO and yet avoid criminal conviction.This could be achieved if the person who falsely completes the form uses a presenter (agent) to deliver the form who is entirely unaware as to whether the contents are correct or not. The person who falsely completed the form has not "produced, lodged or delivered " the form and so he falls outside the ambit of s 242. The person who has delivered the form to the CRO does not know that the contents of the document were false, and so he also falls outside the ambit of s 242.

7.6.2 The Review Group recommends that s 242(1) of the 1990 Act should be expanded to create an offence for any person who "completes, signs, produces, lodges or delivers" any document. The Review Group also recommends that s 242 should be further expanded to take account of filings by electronic filing agents and so recommends the creation of an offence "knowingly or recklessly to furnish false information to an electronic filing agent" under s 242.[19]

7.7 Delivery of documents otherwise than in legible form to the Companies Registration Office

7.7.1 Provisions regarding the rejection of documents by the Registrar were consolidated by s 107 of the 2001 Act. Unless a document delivered to the CRO satisfies Regulations prescribed[20] as to the form and content of documents filed at the CRO, or does not comply with any other requirement of the Companies Acts or other legislation relating to the completion of a document and its delivery to the CRO,[21] the document may be returned to the presenter by the Registrar with a notice indicating the respect in which the document does not comply. Unless a replacement document complying with the matters identified in the notice is delivered to the CRO within 14 days, the original document will be deemed never to have been delivered to the CRO.

7.7.2 Section 249 of the 1990 Act, dealing with the delivery to the Registrar of documents otherwise than in legible form, has not yet been commenced. If s 249 is commenced, this will necessitate the making of a further set of Regulations as to form and content pursuant to s 249, in the same terms as the Regulations pursuant to s 248. The ECA 2000,[22] however, makes adequate provision for the filing of documents by electronic means with public bodies.

7.7.3 The Review Group recommends that s 249 of the 1990 Act should be repealed, and s 248 expanded to cover the delivery of documents to the Registrar in non-legible as well as legible form. One set of Regulations as to form and content will then apply to the delivery of both paper filings and electronic filings to the CRO. This may be achieved by amending s 248(1) to read:

> (1) This section applies to the delivery to the [R]egistrar under any provision of the Companies Acts of documents, whether in legible form or otherwise.

7.8 Exploiting Electronic Communications

7.8.1 Electronic communications have already made it possible to introduce improvements in the performance of its obligations by the CRO. For instance, the 2001 Act[23] provides for the filing by companies of a reference text for

19 See schedule attached to Chapter 8.
20 Pursuant to s 248 of the 1990 Act (delivery of documents in legible form).
21 See s 249A of the 1990 Act, inserted by s 107 of the 2001 Act.
22 ECA 2000, s 12 (writing) and s 13 (signatures).
23 2001 Act, s 80.

the subsidiary objects clauses of the memorandum of association or for the articles of association. This is possible because the CRO electronic document imaging system can cross-reference from one document to another and display them to searchers as though they were one document. Clearly, there will be savings in paperwork and general administration if companies exploit this provision. It is valuable to explore ways in which similar advantages might be gained in other respects.

Dealing with a director directly

7.8.2 The CRO maintains a register of company directors for internal administrative purposes rather than for general public use. In principle, each director should have only one entry in this register with electronic pointers to each company with which he is associated. As is the case with many such sets of records, much duplication has arisen over time with some directors having multiple entries. The CRO is commencing a project to eliminate duplications and will in due course be asking directors to supply their unique Personal Public Services Number (PPSN).[24] The use of this unique number is being promoted by the Government agency REACH, established to develop a strategy for the integration of public services and to develop and implement a framework for electronic government. As the duplications are eliminated over time, it should be possible for a director to notify, *in his own capacity*, changes in personal particulars such as address.

Re-using data supplied electronically

7.8.3 It is also possible for the CRO to retain a history of directors' "other directorships" with "date of appointment" or "date of ceasing to act". This arises for example on the form notifying a change of director as well as on the form for the incorporation of a new company. Where a director provides this information electronically on one occasion, it should not be necessary to provide it again as the CRO system would be able to retrieve it into the future and display it as appropriate. The Review Group recommends that it should be lawful to prescribe forms, which would:

(i) allow a director on one form to file a change in personal particulars to be applied to the records on more than one company;

(ii) allow directors who have already provided data on other directorships in an electronic format to the CRO to exclude that information from subsequently filed forms.

Modern payment methods

7.8.4 Remote access to CRO services would be encouraged by the ability to pay for such services electronically. The Review Group understands that the REACH and BASIS[25] projects will support electronic direct debit or other payment methods. These facilities will be valuable for regular clients of government services. For more casual users, including searchers from abroad, it should be possible to pay by credit card. The Group notes that this would not require any change in company law but recommends that provision of such a facility should be considered. The Review Group recommends that persons filing documents electronically or carrying out company searches electronically should be allowed to pay CRO fees by credit card. This recommendation does not extend to searches carried out by post or in the CRO where the administrative burden would not be greatly reduced.

7.9 Records kept by the Companies Registration Office

7.9.1 Section 378 of the 1963 Act provides that any register required to be kept by the Registrar may be kept by making entries in bound books or "by recording the matters in question in any other manner". All statutory information supplied by companies is kept on file by the CRO - in paper format in the case of companies formed prior to 3 May 1990, and in electronic format for companies incorporated since that date. All company documents received in the CRO since 11 March 1991 are copied onto a computerised imaging system.

24 This will have the additional advantage of verifying to the CRO the identity of the person concerned. Parallel provisions would be required in the case of non Irish-resident directors.

25 BASIS (Business Access to State Information and Services) is a Government initiative to improve compliance processes that affect business in Ireland by delivering electronic information and services based around the "life events" of a business, e.g. business start-up and development, paying taxes and employing staff.

Destruction of documents

7.9.2 Section 313 of the 1963 Act provides that the Registrar shall, after the expiration of 20 years from the dissolution of a company, send all the documents filed in connection with such companies to the Public Record Office. Consequently, the CRO is obliged to retain all documents filed during the lifetime of every company for a twenty-year period after each company has been dissolved, notwithstanding that the documents may also be stored in electronic form. The Review Group recommends that, subject to there being a reliable assurance as to the integrity of the information, and provided that the information is capable of being displayed in intelligible form, and that it is readily accessible so as to be usable for subsequent reference, the Minister ought to be empowered to permit by order the destruction of a certain class or classes of documents, after a period of at least three years has elapsed since date of delivery of a document in that class to the CRO, and to deem the electronic copies of such documents to be the originals of the documents for all purposes.

7.10 Statutory functions of the Companies Registration Office

7.10.1 The Review Group noted that existing law does not set out all the functions of the CRO. Various sections throughout the Companies Acts require documents to be filed with the Registrar. Certain important functions of the CRO, however, have to be inferred from the legislation, which is unsatisfactory. The Review Group accordingly recommends that the statutory functions of the Registrar ought to be expressly stated in the Companies Acts, in a form equivalent to s 12 of the 2001 Act, which sets out the statutory functions of the Director. The Review Group further recommends that specific reference ought to be made therein to the Registrar's function of operating advanced, readily accessible, information systems relating to the documents filed with him.

7.11 A searchable index of company directors

7.11.1 The Review Group considered whether there ought to be a publicly searchable index of company directors. As noted above[26] the CRO retains a register for its own purposes and that might form the basis of such a publicly available register.

7.11.2 There is a significant amount of personal data available on public registers.[27] It is possible, to a greater or lesser extent, to find out who owns what shares in what company and who are the directors. If a company complies with all the requirements to keep information and records under the Companies Acts, it should be possible to ascertain when and for how much the director acquired shares in the company of which he is director. It should also be possible to ascertain of what other companies he is director. Even though all the above information is generally available, it is not instantly available. Some research has to be done to build a picture around a particular individual. It is in this context that the question arises as to whether there should be a lateral publicly available index of directors.

7.11.3 The Review Group considered that it might make sense for there to be a deliberate lateral index of directors for public inspection, but that it brings the possibility of extending further information which may be considered gratuitous and possibly unnecessary. Each director when complying with the law will periodically notify the identity of other companies of which he is a director. It is in principle preferable that this register be a deliberate register rather than an accidental consequence of other filings. However, there is no compelling reason at this stage to introduce such a publicly available register. The CRO stated that while it might see an advantage in revisiting this issue at some future stage, considerable logistical and resource issues would arise. The Review Group noted that the requirement for correct company information would create the likelihood of clashing information such as to increase substantially the likelihood of documents being rejected. The Group noted in this context that the Registrar of Companies for England and Wales had discontinued the use of a software system

26 See 7.8.2.

27 One can access birth, marriage and death certificates. One can look up wills and schedules of assets of deceased persons. The planning and development files of local authorities are open to the public. It is possible to find out who has mortgaged their house to whom, and in some cases to ascertain how much has been spent in the purchase and how much has been borrowed.

which validated addresses of company officers against the postcode supplied, in view of the fact that discrepancies between addresses and postcodes was triggering rejections of a large volume of documents. Consequently, Companies House decided to cancel its address validation policy and now utilises the software for ease of keying purposes only. Moreover, no compelling reason was given or case made out for the public availability of a register of directors. The Review Group therefore recommends that there should not be a publicly available register of directors.

7.12 Establishment of identity of directors and secretaries

7.12.1 The Review Group considered whether there was a need for formal verification of identity of directors and secretaries where documents signed by or concerning them were delivered for filing to the CRO. Irish law, like that of the UK and other common law jurisdictions, appears to be in a minority with respect to the level of proof of identity required to be furnished to the CRO on the formation of a company and on subsequent filings. Although there does not appear to be any widespread abuse in spite of this apparent laxity, the Group understands that the CRO has from time to time intercepted incorporation and other documents with obviously fictional incorporators or signatories.

7.12.2 It is usual in a number of European civil law countries for identity cards or passports to be produced to the notary or registrar before whom a company is formed or a corporate act is attested. The notary's authentication of the incorporation papers or other documents for onward transmission to the commercial register presumes that the notary has checked the identity papers. The commercial register itself is not the invigilator of the truth of the identities. When amendments are made to constitutional documents of civil law companies, similarly the identities of the relevant officers will be cited in the documentation.

7.12.3 As against that, in Ireland, there is no such practice. The principal company law provision that punishes provision of false identities is s 242 of the 1990 Act. However, this punishes wrongdoing rather than seeking in practical terms to prevent it.

7.12.4 The Review Group came to the view that it is difficult to argue against the requirement for such proof of identity, while at the same time noting that there are many comparable public and other filings made with State bodies without the requirement for production of identity.[28] The Review Group is of the view that the REACH programme referred to above[29] provides the best way of ensuring the bona fide identity of intending company directors and secretaries on incorporation papers and of the identity of directors and secretaries on subsequently filed documents. The Group therefore recommends that formal identification procedures such as are found in certain civil law countries ought not be initiated, but rather that consideration be given to requiring the pre-registration of directors who would at all times subsequently identify themselves confidentially on CRO filings by reference to their PPSN. Parallel provisions would be required in the case of non Irish-resident directors.

28 e.g. property documents delivered for filing to the Registry of Deeds and Land Registry, tax returns.

29 See 7.8.2.

sevensummary

7.13 Summary of Recommendations

7.13 Summary of recommendations

- The various sections of the Companies Acts regarding the incorporation of private companies limited by shares should be replaced by a provision that any one or more persons may, by subscribing their names to an application for incorporation in a form prescribed for that purpose, form a private company limited by shares. **(7.2.1)**

- There is at present a requirement that each subscriber must write in the memorandum the number of shares for which he is subscribing.The need for actual writing – as opposed to signing a typed statement – is an anachronism. This provision should be repealed. This recommendation applies to all company types. **(7.2.5)**

- The simplified form for application for incorporation of private companies limited by shares produced by the CRO should be approved for use, containing the following:

  Part I: The company name, details of the first officers, address of the registered office, the company's activity in the State and where it is carried on.
  Part II: The company constitution containing (i.e. repeating) the company name, the share capital clause, and the rules currently contained in the articles of association.
  Part III: A signature section, in which the first officers of the company consent to acting as such, and which includes the current association or subscription clause, wherein the subscribers subscribe to the documents and verify their contents. **(7.2.7)**

- Where the company constitution is altered post-incorporation, only Part II of the document would be required to be re-filed in full. **(7.2.7)**

- Persons engaged in the formation of a company ought to be permitted, on payment of the prescribed fee, to reserve a company name for a period not exceeding 28 daysfrom the date of confirmation by the CRO that the name has been reserved in favour of that person. **(7.3.3)**

- As long as the application for incorporation is received by the CRO within the period during which the name in question is reserved, the fee for name-reservation should be offset against the incorporation fee, as the pre-approved name would not have to be checked on receipt by the CRO of the application for incorporation. **(7.3.4)**

- All existing requirements (as identified in 7.4.1) to make and file statutory declarations with the CRO should be replaced with a requirement to make an unsworn declaration, which the Registrar may in relevant circumstances accept as sufficient evidence of compliance. **(7.4.12/7.4.13)**

- It should be open to the board of a company to authorise agents to sign documents electronically on behalf of the company and to forward them directly to the CRO. It should be a matter between the agent so authorised and the company to manage the control of these documents. **(7.5.1)**

- Appointments should be notified to the Registrar with a confirmation that the company accepts that such agents are authorised to sign documents on its behalf. The Registrar, under the general powers provided pursuant to the ECA 2000, should lay down the means whereby agents could file electronically with the CRO. **(7.5.1)**

- It should be expressly recognised by the Companies Acts that an authorised agent is not, by virtue of his appointment as such, to be deemed to be an officer or servant of the company, for the purposes of s 187(2)(a) of the 1990 Act. **(7.5.2)**

- Section 242 of the 1990 Act should be altered to take account of the appointment of electronic filing agents. An offence should be created of "knowingly or recklessly to furnish false information to an electronic filing agent" under s 242. **(7.5.2)**

- Section 242(1) of the 1990 Act should be expanded to create an offence for any person who "completes, signs, produces, lodges or delivers" any document. **(7.6.2)**

- Section 249 of the 1990 Act should be repealed, and s 248 expanded to cover the delivery of documents in non-legible as well as legible form. **(7.7.3)**

- It should be lawful to prescribe forms, which would allow a director on one form to file a change in personal particulars to be applied to the records on more than one company and would allow directors who have already provided data on other directorships in an electronic format to the CRO to exclude that information from subsequently filed forms. **(7.8.3)**

- Persons filing documents electronically or carrying out company searches electronically should be allowed to pay CRO fees by credit card. This recommendation does not extend to searches carried out by post or in the CRO where the administrative burden would not be greatly reduced. **(7.8.4)**

- Subject to there being a reliable assurance as to the integrity of the information, and provided that the information is capable of being displayed in intelligible form, and that it is readily accessible so as to be usable for subsequent reference, the Minister ought to be empowered to permit by order the destruction of a certain class or classes of documents, after a period of at least three years has elapsed since date of delivery of a document in that class to the CRO, and to deem the electronic copies of such documents to be the originals of the documents for all purposes. **(7.9.2)**

- The statutory functions of the Registrar should be expressly stated in the Companies Acts. Specific reference ought to be made therein to the Registrar's function of operating advanced, readily accessible, information systems relating to the documents filed with him. **(7.10.1)**

- Formal identification procedures such as are found in certain civil law countries ought not be initiated, but rather consideration should be given to requiring the pre-registration of directors who would at all times subsequently identify themselves confidentially on CRO filings by reference to their PPSN. In the case of non Irish-resident directors, parallel provisions would be required. (**7.12.4)**

sevenannex

Annex I and Annex II

Companies Registration Office

CRO receipt date stamp

Application to form a private company limited by shares

Section X, Companies Act Y,

Companies Acts, 1963 to y

A1p

Company Number

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

PART ONE COMPANY DETAILS

Company name *in full*

Limited

Registered Office *note one*

Activity in State

Nace Code *note two* _

General nature of the business activity *note two*

Place(s) of activity *note three*

Place of central administration *note three*

Presenter details

Name

Address

DX Number DX Exchange

Telephone Number Fax Number

Email Reference Number

Director and secretary details

Please give details below of the persons who have consented in writing to become director(s) and/or secretary of this company.

Surname *note four*
Forename *note four*

Business Occupation
Nationality

Date of Birth Day Month Year

Irish Resident *note five*

Residential Address *note four*

Office held *note six*
Director **Secretary**

Company *note seven*
Registered at *note eight*
Company Number

Other Directorships

Surname *note four*
Forename *note four*

Business **Occupation**
Nationality

Date of Birth Day Month Year

Irish Resident *note five*

Residential Address *note four*

Office held *note six*
Director **Secretary**

Company *note seven*
Registered at *note eight*
Company Number

Other Directorships

Surname *note four*
Forename *note four*

Business **Occupation**
Nationality

Date of Birth Day Month Year

Irish Resident *note five*

Residential Address *note four*

Office held *note six*
Director **Secretary**

	Company *note seven*	**Registered at** *note eight*	**Company Number**
Other Directorships			

PART TWO COMPANY CONSTITUTION

Company name
in full

	Limited

Company capital and stamp duty statement

Total authorised value	**Total authorised number**	**made up as follows:**

Class	**Number of shares**	**Value per share**

Total issued value	**Total issued number**	**made up as follows:**

Class	**Number of shares**	**Consideration for each share**

Management Rules

Tick one box only (if applicable)

☐ (a) Registered constitution reference number pursuant to section 80, Company Law Enforcement Act, 2001

☐ (b) As set out in Annex I attached

Where neither (a) nor (b) above is ticked, the company's management rules defaults to adopting Table A Part II of First Schedule to Companies Act, 1963, in its entirety

Where either (a) or (b) above is adopted, the company share details in the company capital and stamp duty section above are understood to constitute part of the company's management rules.

Where (b) is adopted, the company share details in Annex I attached must correpond with the details in the company capital and stamp duty section above.

PART THREE CONFIRMATION AND SUBSCRIPTION

Confirmation

We the undersigned apply for registration of a private company limited by shares on the basis of the information in the form and any attachments. We also consent to act in the capacity set out below.

The information provided in this application and the annexes is true and correct at the time of signing.

Signature(s) *note nine*	**Subscriber**	**Agent**	**Officeholder**	**Number of shares taken, if any**	**Date**		
	Tick box(es)				**Day**	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**
					Day	**Month**	**Year**

NOTES ON COMPLETION OF FORM A1p

These notes should be read in conjunction with the relevant legislation.

general This form must be completed in full and in accordance with the following notes. Where the space provided on Form A1p is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section.

note one A full postal address must be given. A P.O. Box will not suffice.

note two The NACE code is the common basis for statistical classifications of economic activites within the E.U. The code is available on www.cro.ie.

note three A full postal address must be given.

note four Insert full name (initials will not suffice) and the usual residential address. Where the secretary is a firm, the corporate name and registered address of the firm ought to be stated.

note five Every company must have at least one Irish-resident director or a Bond pursuant to section 43(3), Companies (Amendment)(No.2) Act, 1999. Place an" X" in the box if the director is resident in the State in accordance with section 43 of the 1999 Act as defined by section 44(8) and (9) of that Act. If no director is so resident, a valid Bond must be furnished with application. (Please note that "Irish resident" means resident in the Republic of Ireland.)

note six Tick either or both boxes, where appropriate.

note seven Company name and number of other bodies corporate, whether incorporated in the State or elsewhere, except for
bodies of which the person has not been a director at any time during the past 10 years;
bodies of which the company is (or was at the relevant time) a wholly owned subsidiary;
bodies which are (or were at the relevant time) wholly owned subsidiaries of the company.

Please note that pursuant to section 45(1), Companies (Amendment)(No.2) Act, 1999, a person shall not at a particular time be a director of more than 25 companies. However, under section 45(3) of the Act, certain directorships are not reckoned for the purposes of section 45(1).

note eight Place of incorporation if outside the State.

note nine An officeholder described in Part One must sign Part Three to indicate that he/she consents to act in the capacity indicated, and accepts the duties and responsibilities that go with the post. An agent may not sign on his/her behalf.

A subscriber or agent must sign to indicate that he/she as owner or representative consent to the individuals shown as officeholders in Part One acting in that capacity for the company. However, where the subscriber is also an officeholder described in Part One, the officeholder's own signature is required and an "X" placed in both boxes i.e. "Subscriber" and "Officeholder".

Annex II Making and filing of statutory declarations

Section	Provision
1963 Act	
60(2)	On giving financial assistance for the purchase of shares; that the [directors]...have formed the opinion that the company will be able to pay its debts in full as they become due
115(1)(d) & (2)(c)	Restriction on the commencement of business; Declaration by secretary or director that conditions have been complied with
179(1)(b)(iv)	Optional statutory by director that he has taken up shares.
256(1)	Statutory declaration of solvency in case of proposal to wind up voluntarily.
320(4)	Statement to be delivered to Receiver.
332	Part IX registration of companies not formed under the Act; verification of lists of members and directors.
Table A; Regulation 63	Statutory declaration by director or the secretary that a share in the company has been duly forfeited.
1983 Act	
5(5)	Statutory declaration to be delivered with application for incorporation.
6 (2)	plc; SD that capital is not less than minimum.
9(3)(e)	Re-registration of private company as plc; statutory declaration as to meeting conditions.
12(5)(b)	Conversion from "old public limited company" statutory declaration by a director or secretary that conditions for conversion have been met.
18(4)(e)	Companies registering under the Act pursuant to Part IX of the 1963 Act; Conversion to plc; statutory declaration as to meeting conditions.
52(3)(b)	Re-registration of limited company as unlimited; statutory declaration by the directors of the company that the persons by whom or on whose behalf the form of assent is subscribed constitute the whole membership of the company, and, if any of the members have not subscribed that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered so to do.

8

CHAPTER 8

Simplification: Criminal Acts and Omissions

8.1 Introduction

8.1.1 The Review Group addressed the issue of criminal offences and penalties applying under the Companies Acts in the context of furthering the simplification agenda as set out in Chapter 3. With the enactment of the 2001 Act, there are approximately four hundred separate offences and associated penalties specified in the Companies Acts. That is not, in itself, surprising in view of the scale and complexity of company law. Moreover, within the companies code there are two modes of trial determined for offences, summarily or on indictment. Given that the Group is charged with both simplification of the companies code and improving the efficacy of that code it is appropriate to examine the existing offences and penalties with a view to:

(i) determining if the overall number of offences could be reduced, for example by the consolidation of some offences and the elimination of others;
(ii) determining if in some cases a civil action offers a better remedy for an injured party;
(iii) establishing if penalties are proportionate to offences and if offences are appropriately categorised as to mode of trial;
(iv) identifying where new sanctions may be appropriate; and
(v) identifying the appropriate prosecutor for specific summary offences, e.g. the Director of Corporate Enforcement or Registrar.

8.2 Approach of the Review Group

8.2.1 The Review Group approached its task by setting out to ascertain the experience to date of prosecutions under the Companies Acts with a view to establishing how successful they have been and the operational difficulties which have arisen in pursuing them. The experience of the Department of Enterprise, Trade and Employment, the CRO and the Chief State Solicitor's Office has all helped to inform the Group's thinking. The Review Group also considered the experience of the Revenue Commissioners in prosecuting offences under the Taxes Consolidation Act 1997.

8.2.2 It was the initial expectation of the Review Group that it would be recommending a significant reduction in the number of offences, for example, because no prosecutions on indictment had been taken during the life of the 1963 Act.

8.2.3 To assist in its deliberations, the Review Group had available to it a schedule of company law offences derived from *Irish Company Law Index* by Donal McGahon[1] and updated to include offences in both Companies (Amendment) Acts of 1999 and the 2001 Act. The results of the Review Group's consideration of each existing offence are set out in the Schedule. In addition to indicating the Group's recommendation in relation to each offence (e.g. repeal/retain, increase/decrease maximum fine, etc.), we draw attention to those offences where we believe a complaint by the wronged party to the Office of the Director of Corporate Enforcement (ODCE) is likely to be the most effective means of securing redress. The result is the suggested repeal of about 22 offences (circa 5% of the total number of offences), albeit largely due to the fact that these are obsolete, or otherwise covered by subsequent legislation.

8.2.4 The overall conclusion from this detailed review has been that almost all of the existing offences should be retained in the interests of achieving the twin policy aims of deterring the commission of offences and ensuring compliance with filing obligations. As outlined above, however, there are aspects to simplification and objectives to be attained in its pursuit other than merely reducing the numbers of offences.

1 Gill and Macmillan (1991)

8.2.5 The Review Group considered whether it was appropriate to deal with the issue of offences and penalties separately for public and for private companies. It decided, however, that it was not necessary to treat the two types of company differently in this context, as the same general principles relating to compliance and good practice apply to both types of companies.

8.2.6 The Review Group considered, at an initial stage, whether it would be helpful to compile a list of civil remedies currently existing in company law. The expert advice available to the Group was, however, that (a) there is no complete list currently existing of civil remedies relating to the Companies Acts and (b) such a list would be difficult, if not impossible, to compile. Whereas a criminal offence is clearly such and is prosecutable by a limited number of persons, civil remedies are varied and diverse and available to many. Instead, with a view to improving existing models or identifying an effective set of civil remedies the Group decided it would be more useful to identify those civil legal remedies which are most often employed and appear to be the most effective.

8.2.7 A number of general principles guided the Review Group in its consideration of this area. The objective of simplification is driven by a concern to bring transparency and clarity to the companies code in the interests of all its users. There is also a concern to foster a culture of compliance with regulatory and administrative requirements while facilitating competitiveness within the Irish economy and between Ireland and other countries. Although the Group's analysis was driven by the objective of simplification, in the review of offences and penalties the Group encountered issues that are not, strictly speaking, to do with simplification but which the Group felt should be addressed.

8.2.8 A key issue in examining the whole area of offences and penalties is if, in the absence of a specified offence, it would be possible to enforce a statutory obligation by way of court order. The advice available to the Review Group from the Attorney General is that this is possible. The Group also recognises, however, that the existence of an offence can act as a deterrent to criminal activity and that there is a strong public policy dimension to company law: the companies code prescribes correct and appropriate behaviour. It is also important that the code should continue to outlaw offences of wilful neglect, dishonesty and fraud in order to set the norms of responsible company and commercial practice. The Group judged this last point to be so important that it has concluded that a number of offences should remain on the statute books for this purpose even where they appear to have been prosecuted very rarely or not at all and even if an alternative civil remedy is available.

8.2.9 The Revenue Commissioners report that in their experience there is a need for both criminal and civil sanctions. While persistent defaulters may not respond to civil penalties, the notion of criminality and the threat of imprisonment can often act as a significant deterrent.

The McDowell Group Report and the 2001 Act

8.2.10 The McDowell Group Report sets out at paragraphs 2.6 to 2.9 the responsibility for enforcement of the criminal provisions of the Companies Acts as follows:

> 2.6 Responsibility for enforcement of the criminal provisions of the Companies Acts is divided among the following State agencies -- the Director of Public Prosecutions, the Minister for Enterprise, Trade and Employment and the Registrar of Companies.
>
> 2.7 The Director of Public Prosecutions, who functions under the Prosecution of Offences Act, 1974, has the sole right to prosecute on indictment in respect of any offences committed under the Companies Acts and may also prosecute any other offences which are summary offences under the Act.
>
> 2.8 Section 240(4) of the Companies Act, 1990 specifically provides that summary proceedings in respect of any offence under the Companies Acts may be prosecuted by the Minister for Enterprise, Trade and Employment. In relation to such summary offences, the Minister has, accordingly, a concurrent right to prosecute with the Director of Public Prosecutions.
>
> 2.9 In addition, the Registrar of Companies is specifically authorised to prosecute in respect of 34 summary offences – which relate mainly to offences of omission in respect of obligations to make information available to the public, principally through the Companies Registration Office.

8.2.11 The 2001 Act gives effect to the central recommendation of the McDowell Group for the establishment of the ODCE. Section 12 sets out the Director's functions, including:

> 12(a) to enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings.

Section 14 sets out the transfer to the Director of the Minister's power to bring summary proceedings under the Companies Acts. In essence, responsibility for prosecution under the Companies Acts now is as outlined in the McDowell Group Report save for the substitution of the Director for the Minister in most instances. The Minister remains responsible for prosecution for only a very limited number of offences.[2]

8.2.12 The Review Group welcomes the establishment of the ODCE as a significant development in improving enforcement of the Companies Acts and in offering an additional, and in many cases more effective, route to secure redress for shareholders and creditors who have been the victims of offences committed under the Acts. In addition to the powers of prosecution transferred from the Minister, the 2001 Act confers on the Director a range of functions of investigation, prosecution and enforcement. The Group noted, in particular, that the Director has power (under s 371 of the 1963 Act) to seek a High Court order to remedy any default in complying with the provisions of the Companies Act, which could be availed of in instances where no offence is specified.

8.2.13 Given the additional resourcing of the administrative, regulatory and investigative bodies – notably the establishment of the ODCE with its dedicated interdisciplinary staff – the Group is optimistic that there will be an increased level of enforcement by way of investigations and prosecutions, at least in the short term as compliance improves. The result of this is likely to be an improved culture of compliance and good practice in the company law area.

8.2.14 The Review Group welcomes s 62 of the 2001 Act,[3] amending s 370 of the 1963 Act, in providing that a certificate in writing by the Registrar as to filing details shall be admissible in all legal proceedings without further proof, until the contrary is shown, as evidence of the facts stated in the certificate. This will, in the opinion of the Group, remove an impediment to the efficient running of prosecutions.

8.3 Experience of prosecutions under the Companies Acts

The Companies Report 2000

8.3.1 The most recent annual Companies Report,[4] for 2000 (published in September 2001), gives a picture of the state of company law prosecutions and investigations. Compliance with the filing of CRO returns improved dramatically over 1999, with 92% of companies filing returns in 2000 as compared with 57% in 1999. The CRO policy of prosecuting or striking off companies in default of filing of annual returns appears to have been a key element in improving compliance.[5]

8.3.2 At 31 December 2000 there were ten investigations in progress under relevant sections of the 1990 Act. During 2000, forty-five convictions were obtained by the Minister in respect of breaches of the Companies Acts 1963 to 1999. These figures compare favourably with the position recorded in the McDowell Group Report. That report found that "Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of annual returns on time. For example, in 1997 only 13% of companies complied with their obligations to file annual returns on time." The McDowell Group Report was instrumental in ensuring that extra resources were allocated to the CRO and the Company Law Division of the Department. The key recommendation in that report was the establishment of the

2 For example, s 196 of the 1963 Act requires details of directors to be published in all business letters, unless there is an exemption from this. Because of the powers of the Minister to exempt companies from the requirements of the section, the Minister has retained the power to prosecute. See also s 153(3) of the 1963 Act.

3 Section 62 provides that in specified instances a certificate in writing made by the Registrar shall in all legal proceedings be admissible without further proof, until the contrary is shown, as evidence of the facts stated in the certificate.

4 Stationery Office, Dublin, 2001, ISBN 0-7557-1131-9.

5 Figures cited in this paragraph are for returns made by year-end rather than necessarily on time.

ODCE with significant resources allocated to it for investigation and prosecution of company law offences. As already mentioned, that recommendation was given effect through the 2001 Act.

8.3.3 The Minister was the appointed prosecutor of most offences under the Companies Acts until the transfer of functions to the Director under the 2001 Act. In addition, the 1990 Act conferred considerable powers of investigation on the Minister, which have been transferred to the Director. The law has been amended to address particular problems and unacceptable practices which have come to light on foot of investigations. For example, in the wake of the McCracken Tribunal Report[6] and various investigations of companies initiated under Part II of the 1990 Act, a number of initiatives were undertaken to increase the supervisory role of the Minister.

8.3.4 As the flow of complaints to the Minister regarding possible breaches of the Companies Acts increased on foot of these investigations, there was a consequent increase in the use of the Minister's powers of prosecution. It is worth noting that 2000 saw the highest-ever number of convictions for offences other than filing or failure to file. At end-1999 and end-2000 there were, respectively, ten and eleven such investigations in progress under ss 8 and 19 of the 1990 Act.[7] In November 2001, investigations were still in progress in respect of the following companies:[8]

- Ansbacher (Cayman) Ltd.
- Celtic Helicopters Ltd.
- College Trustees Ltd.
- Guinness & Mahon (Ireland) Ltd.
- Hamilton Ross Company Ltd.
- Kentford Securities Ltd.
- National Irish Bank Ltd., and
- National Irish Bank Financial Services Ltd.

6 Report of the Tribunal of Inquiry (Dunnes Payments), 25 August 1997.
7 Companies Report 2000.
8 Source: Department of Enterprise, Trade and Employment.

8.3.5 The Companies Report 2000 recorded the following enforcement activity.

Filing offences (s 125 of the 1963 Act)	Convictions obtained against 979 companies and 32 directors.
Failure to maintain proper books of accounts (s 202 of the 1990 Act)	Convictions obtained against 6 companies and 9 directors.
Failure to provide a copy of the register of directors' interests (s 60 of the 1990 Act)	Convictions obtained against 2 companies.
Failure to notify the Registrar of status of company (Regulation 6 of the Single Member Private Limited Companies Regulations, 1994)	1 conviction obtained.
Failure to hold an annual general meeting (s 131 of the 1963 Act)	1 conviction obtained.
Abuse of limited liability (s 381 of the 1963 Act)	1 conviction obtained.
Trading under a misleading name – misuse of 'plc' (s 56 of the 1983 Act)	One conviction obtained.
Failure to maintain a register of members (ss 116–124 of the 1963 Act, as amended)	One conviction obtained.
Failure to comply with a direction to change a company name (s 23 of the 1963 Act)	2 convictions obtained.
Prosecutions for acting as an auditor while not qualified (s 187 of the 1990 Act)	2 convictions obtained.
Restriction of directors (s 150 of the 1990 Act)	113 currently restricted.
Disqualification (s 160 of 1990 Act)	4 directors currently disqualified.

8.3.6 The Companies Report 2000 does not record any instances of prosecution on indictment. In fact, there does not appear to be any recorded instance of prosecution on indictment.

8.3.7 Discussions between the Department of Enterprise, Trade and Employment and the Review Group expanded on the general picture regarding enforcement. Sections 202 (keeping of books of account) and 242 (furnishing false information) of the 1990 Act were cited as particularly useful sections from the point of view of enforcement. Prosecutions for s 202 offences have been taken as a result of a systematic examination of the CRO register of notifications by auditors of inadequate books of account under s 194 of the 1990 Act. Otherwise, investigation to date has, in the main, arisen from complaints to the Department by members of the public[9] concerned about the activities of the relevant companies and directors. The establishment and resourcing of ODCE is likely to ensure a more proactive approach to investigation in the future.

8.3.8 The experience of the Department also suggested that the courts are concerned to vindicate the rights of shareholders. The point was made, however, that company law prosecutions are often expensive to run from the State's perspective if expert witnesses need to be called. Costs are rarely recouped. The Department's view was that disqualification, or the threat of disqualification, from serving as a company director is an effective penalty and serves as a useful deterrent.

Filing of documents

8.3.9 It is important to note that the duty to file documents with the CRO is concerned with information disclosure rather than information validation, unlike the situation pertaining in a number of other European countries, e.g. Germany and the Netherlands. The practical consequence of this is that corporate governance decisions are not usually voided merely because no information, or incorrect information, has been filed with the CRO. The Review

9 Frequently company members or creditors.

Group considers that the consequence of validation could serve as a useful aid to ensure compliance and is of the opinion that the feasibility of introducing such a system in Ireland should be examined at a future stage.

8.3.10 The Registrar is empowered under the Companies Acts to prosecute a total of forty-five offences. In practice, the sole offence which is currently prosecuted by the Registrar is under ss 125/126 of the 1963 Act (failure to comply with the obligation to file an annual return with the CRO). This is an offence which is provable on the face of the record; third party evidence is not required. Sections 125 and 126, as amended, provide that if a company fails to comply with the filing obligation, the company and "every officer in default" shall be liable to a fine not exceeding £1,500 (€1904.61). Prosecutions for breach of ss 125/126 are labour-intensive from the point of view of both the Registrar and the courts. A maximum of 200 company summonses or 140 director summonses can be listed in any one day before a District Court. Seven to ten days a year are currently dedicated to prosecutions for failure to file documents in the CRO. The expectation is that use of the new s 62 of the 2001 Act (see 8.2.14) will reduce significantly the amount of time spent by CRO staff in court, and should enable greater volumes of summonses to be dealt with by the court.

8.3.11 The Review Group reflected on the CRO's experience of prosecutions as set out above. It was noted that a useful remedy available to the Registrar is s 371 of the 1963 Act where, in the case of default, the Registrar could apply to the High Court for enforcement of the duty to comply with the Act. Section 371 provides:

> (1) If a company or any officer of a company, having made default in complying with any provision of this Act fails to make good the default within 14 days after the service of a notice on a company or the officer requiring him or it to do so, the [High] court may on an application made to the court by any member or creditor of the company or by the Registrar make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.
>
> (2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.
>
> (3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.

The 1963 Act was amended by s 97 of the 2001 Act which creates a new s 317A giving a similar power to the Director.

8.3.12 A number of s 371 notices were served by the Registrar on companies and their officers during 2000 in relation to the failure to file annual returns. These arose where a company had asked the CRO to remove its name from a strike-off list because that company claimed that circumstances prevented the returns being filed (e.g. ongoing Revenue inspections which the company alleged were holding up the preparation of accounts, or appearances as a witness before one of the Tribunals of Inquiry or, more commonly, inability to file accounts). In all but one case, the company filed the outstanding return on foot of the Registrar's 14-day notice of intention to apply to court.

8.3.13 The advantage of using s 371 is that it is a fast and effective method. The company and its officers appear to take the Registrar's application seriously – possibly because the level of costs and the publicity involved greatly exceed those encountered in a District Court prosecution. This remedy is also available to creditors and members of the company and is now available to the Director, by virtue of s 97 of the 2001 Act. It was noted, however, that this may not be a suitable procedure for a high volume of cases because of the necessary commitment of time and resources.

8.3.14 The CRO commenced an enforcement campaign in 2000 against defaulting liquidators. Failure to deliver a liquidator's return is an offence[10] which is prosecutable by the Registrar. Section 302 of the 1963 Act was viewed, however, by the CRO as a more efficient enforcement tool. Under that section, if a 14-day notice is served on a liquidator who is in default of filing returns, and the returns are not filed within that period, application can be made to the High Court by the Registrar for an order directing compliance by the liquidator with the statutory obligation to file returns within such period as the court may specify and for an order for costs. Not only is this far speedier than a summary prosecution, it is also much more likely to achieve the desired result of getting the defaulting liquidator to file the outstanding returns. The Registrar's practice is to issue warning letters in advance of a formal (s 302) notice. Where liquidators did not file, despite receipt of warning letters, s 302 notices were issued. A total of thirty s 302 notices were issued to liquidators during 2000. In almost all cases, issuing the warning letter and/or the s 302 notice was sufficient to secure compliance.

8.3.15 The CRO cited the difficulty in prosecuting non-resident directors in the absence of an address within the State. One way in which this might be resolved would be to provide that, in the absence of an address within the State (on Form A1 or B10) for a director of a company, the registered office of the company shall be deemed to be the address of that director for service of all criminal proceedings under the Companies Acts subject to any constitutional constraints. The Review Group recommends accordingly.

8.3.16 The Review Group's attention was also drawn by the CRO to the possibility of abuse of the Form B69 procedure. Under this procedure,[11] directors of a company can notify the CRO of the termination of their directorship, if the company itself defaults in its obligation to file a Form B10. Directors who are being prosecuted could seek to avoid responsibility by backdating the date on which they ceased to be a director.

8.3.17 It is easier to identify this problem than to come up with a solution. The Review Group recognises that it would be important not to introduce a remedy which penalises the genuine, if tardy, correction of details on the companies register and which might actually lead to such corrections not being made. There is already an offence under s 242 of the 1990 Act in relation to the furnishing of false information but there has never been a prosecution under this section. The Group considers that co-operation between the different enforcement agencies on this matter could solve the problem. The Review Group recommends, therefore, that the CRO should, on receipt of a Form B69, take immediate action against the company in question for failure to file a Form B10, as required under s 195(6) of the 1963 Act. If it emerges, as a result of this action, that false information has been supplied by a person on Form B69, the matter should be referred by the CRO to the ODCE and/or the DPP as appropriate.

8.4 Consolidation and recategorisation of offences

8.4.1 In the interests of simplification, the Review Group considered the following options regarding consolidation and recategorisation of offences:

(i) Retain the existing practice in the Companies Acts (other than the 1990 Act) of setting out in the same section the act or omission, together with the offence and the applicable penalties.
(ii) Set out in the same section the act or omission and a statement that failure to comply is an offence, with a separate section listing those sections under which offences are created and the penalties applicable thereto, with appropriate categorisation, including daily default fines. This is the approach adopted in the 1990 Act (s 240).
(iii) Prescribe the act or omission in the relevant section and, in a separate section: (a) state that failure to comply with an obligation under any of the sections listed is an offence; and (b) set out the penalties applicable, again with appropriate categorisation.
(iv) A variation of the third option above: this would involve categorising not only the penalties but also the offences (e.g. filing offences, administrative offences).

10 See ss 262, 263, 272, 273 and 306 of the 1963 Act.
11 See s 47 of the 1999 (No 2) Act.

8.4.2 This last is the approach adopted in the TCA 1997. Section 1078 of the TCA 1997 sets out a list of Revenue offences, not merely in relation to direct taxes but to all indirect taxes, capital taxes and duties. It imposes a common penalty for all offences within a specified category, which means that penalties adequately reflect the seriousness of the offence. This consolidation of penalties recognises that there is a certain degree of commonality between the various offences, e.g. failure to make returns, the making of incorrect returns, preparing incorrect documents, failing to keep/retain records, and obstructing officers in the use of their powers. The legal obligation is imposed by the appropriate section which requires the task to be carried out, e.g. the requirement to keep certain records is contained in s 882 of the TCA 1997 but the offence is committed under s 1078 of that Act.

8.4.3 The Review Group considered, as an alternative, whether it would be useful to attach to the 1963 Act, and subsequently to the consolidated Companies Act, a complete list of Companies Acts offences and penalties, categorised by type of offence, to assist users of the Acts. Such a schedule would be cited as being included in the Act for convenience of reference, with the appropriate section continuing to cite the offence and the penalty whilst retaining legal primacy.

8.4.4 The Review Group believes that some form of consolidation of Companies Acts offences is not only possible but desirable. The Group noted that there were already two possible models for this in the Companies Acts, i.e. at s 22 of the 1986 Act, which cites the sections referred to, and at s 240 of the 1990 Act, which is of general reference. The Group does not consider, however, that a categorisation of company law offences is practicable, unlike Revenue offences, in view of the varied nature of the obligations imposed under the Companies Acts, and the potential number of parties involved. The Group considers, furthermore, that there is merit, in the interests of certainty, in retaining the creation of an offence in the same section in which the obligation arises. Accordingly, the Group recommends the extension of the approach adopted in s 240 of the 1990 Act to all offences under the Companies Acts. While this will not result in a reduction in the number of offences, it will result in a more comprehensible statement of offences and will significantly reduce the amount of text in the Companies Acts[12] thus furthering the objective of simplification.

8.4.5 The Review Group is mindful of the obligations of various persons to be aware of (and, in some cases, to notify) the various criminal offences under the Companies Acts, including the obligation placed on auditors by s 74 of the 2001 Act to notify the Director of suspected commissions of indictable offences under those Acts. The Review Group recommends that the Director shall be obliged to publish and maintain a complete list of offences under the Companies Acts, distinguishing between summary and indictable offences. The Group further recommends that when the Director publishes such a list, reliance thereon shall be a defence to any prosecution for failure to notify any person of the suspected commission of any offence not on the list.[13]

8.5 Penalties

8.5.1 One of the most critical distinctions in the range of penalties specified under company law is whether the offence gives rise to summary prosecution or prosecution on indictment. The difference in approach derives from the difference in degree of seriousness between offences, with less serious offences being pursued by way of summary proceedings in the District Court (and in practice without the involvement of the DPP) and more serious offences being prosecuted on indictment by the DPP in the Circuit Criminal Court. Only indictable offences are tried before a jury. For both types of indictable offence, the penalty can be a prison term as well as, or instead of, a fine. In each case, the level of fines and imprisonment is intended to be proportionate to the offence.

8.5.2 The Review Group welcomes the increased rate of compliance illustrated at 8.3.1. The Group also welcomes the increase to £1,500 (€1904.61) in the maximum level of fines for summary offences provided for in the 2001 Act.

12 This may seem a fine distinction but the fact is that currently the offence provisions in individual sections of the Acts contain two or three paragraphs, repeated with variation approximately 400 times through the Acts. On foot of the above proposal we would estimate a reduction in the present volume of text devoted to penalties to about one-third of its current amount.

13 Along the lines of s 202(10) of the 1990 Act.

The strike-off/prosecution approach, coupled with the increased maxima, enhances the effectiveness of enforcement. However, it should be noted that the experience of the Department and of the CRO is that it has been the practice of the courts to impose low fines for company law offences – of the order of £250 (€317.43). This does not help the deterrent factor. Accordingly, the Group recommends that, as per the TCA 1997, there should be a minimum fine for summary offences under the Companies Acts of €500, save with such limited statutory exceptions (if any) as are necessary to comply with the constitutional rights of the defendant.

8.5.3 As with the Companies Acts, offences under the TCA 1997 can be prosecuted summarily or on indictment, depending on the severity of the offence. One point of interest is that there is, effectively, a minimum penalty of £375 (€476.15) in relation to offences as s 1078(3) of the TCA 1997 prohibits mitigation of the standard penalty to below one quarter of the fine. Furthermore, s 1078(8) prevents other offences from being taken into consideration, i.e. where the offence is proven but the court effectively consolidates the fine with a fine in relation to another offence of which the individual has been convicted. As a result, the penalty imposed on summary conviction can be substantial; the experience of the Revenue Commissioners is that this acts as a deterrent and helps to ensure substantial compliance.

8.5.4 The Review Group acknowledged that the failure to pay fines is a problem, and one not confined to fines imposed under the Companies Acts. At present, the only remedy available is arrest on foot of a bench warrant. The Group sees merit in the introduction of a power to apply an attachment of earnings or assets procedure to persons in default, and recommends that consideration be given by the Minister for Justice, Equality and Law Reform to the introduction of such a power.

8.5.5 Work is also underway in the Department of Justice, Equality and Law Reform on the indexation of fines imposed by the District Court. The Review Group understands that legislation may be proposed, the objective of which is to provide an efficient mechanism whereby fines can be revised at regular intervals to reflect changes in the value of money. It is proposed that all fines will be indexed through a band system, in order to ensure consistency. Four levels of fine are envisaged. Proposals to effect this change are likely to be submitted to Government in the future.

8.5.6 In its consideration of the range of fines for indictable offences under the Companies Acts, the Review Group noted the fact that the maximum level of fine payable for individual offences is, in a number of instances, low proportionate to the seriousness of the offence and having regard to the associated maximum prison term.[14] In identified instances in the attached schedule, the Group recommends that the maximum fine for certain indictable offences should be increased and also recommends that the lowest maximum fine for all indictable offences be increased to €12,500. At present, the lowest maximum fine is €3,200 approximately.

8.5.7 The Review Group also considered the impact of the provisions of the Criminal Justice Act 1984, s 4 of which gives power to the Garda Siochana to arrest and detain, for up to 12 hours, a person suspected of committing an indictable offence, without warrant in cases relating to indictable offences carrying a term of imprisonment of five years or over. By virtue of s 104 of the 2001 Act, this power can now be invoked in respect of all 164 indictable offences under the Companies Acts.[15] The Review Group gave some consideration as to whether the seriousness of an indictable offence under the Companies Acts justified the availability of the exercise of this power. The Group decided, on balance, that s 4 of the Criminal Justice Act 1984 should continue to apply to such offences, on the basis that the provision acts as a significant deterrent in relation to the commission of offences under the Companies Acts.

14 e.g. the maximum fine of £2,500 (€3,174.35) applicable to s 24(6) of the 1983 Act which provides: A person who knowingly or recklessly authorises or permits the inclusion in a statement circulated under subsection (5) of any matter which is misleading, false or deceptive in a material particular shall be guilty of an offence. Section 24 deals with the allotment of shares, subs (5) deals with the statement setting out the reasons for and financial details of the allotment.

15 Section 104 of the 2001 Act provides that in any provision of the Companies Acts for which a term of imprisonment of less than 5 years is provided in respect of a conviction on indictment, the maximum term of imprisonment shall be taken to be 5 years.

8.6 Payment of recognisances

8.6.1 The Revenue Commissioners highlighted difficulties which have arisen where a company is being prosecuted. The issue arose in relation to two separate cases being prosecuted for Revenue offences. One of the cases was also being prosecuted for fraudulent trading under the Companies Acts. Under s 22 of the Criminal Procedures Act 1967, a person may be returned for trial. Pending trial he may be held in custody or released on bail. If released on bail, a person may be required to provide recognisances, with or without sureties. If a company is being prosecuted, recognisances are required. In practice, this can only be provided by the directors or officers of the company. If they refuse to provide the recognisances, problems can clearly arise in progressing the prosecution.

8.6.2 The District Court Rules provide that the court can dispense with the requirement for a recognisance. In at least one case in which the Revenue Commissioners were involved in prosecuting a company, however, the court refused to dispense with the requirement and the prosecution failed because the directors/officers of the company refused to provide the recognisance.

8.6.3 The Review Group considers that it is desirable to seek a solution to this difficulty in order to facilitate the prosecution of companies (whether under the Companies Acts or otherwise). This could be done by providing in the Companies Acts that it is an offence for a director or other officer of a company not to comply with a requirement to provide a recognisance. The Review Group accordingly recommends the creation of such an offence.

eightsummary

8.7 Summary of Recommendations

8.7 Summary of recommendations

- Subject to any constitutional restrictions, s 379 of the 1963 Act should be amended to require all non-resident directors on appointment (on Form A1 or B10) to nominate an address within the State for the purpose of service of all criminal proceedings under the Companies Acts. **(8.3.15)**

- The CRO should, on receipt of a Form B69, take immediate action against the company in question for failure to file a Form B10, as required under s 195(6) of the 1963 Act. If it emerges, as a result of this action, that false information has been supplied by a person on Form B69, the matter should be referred by the CRO to the ODCE and/or the DPP as appropriate. **(8.3.17)**

- The approach adopted in s 240 of the 1990 Act should be extended to all offences under the Companies Acts, i.e. the same section should set out the act or omission and a statement that failure to comply is an offence, with a separate section listing those sections under which offences are created and the penalties applicable thereto, with appropriate categorisation, including daily default fines. **(8.4.4)**

- The Director should be obliged to publish and maintain a complete list of offences under the Companies Acts, distinguishing between summary and indictable offences. When the Director publishes such a list, reliance thereon shall be a defence to any prosecution for failure to notify any person of the suspected commission of any offence not on the list. **(8.4.5)**

- A minimum fine for summary offences should be established under the Companies Acts, save with such limited statutory exceptions (if any) as are necessary to comply with the constitutional rights of the defendant. This minimum should be set at €500. **(8.5.2)**

- The Review Group sees merit in the introduction of a power to apply an attachment procedure to persons in default, and recommends that consideration be given by the Minister for Justice, Equality and Law Reform to the introduction of such a power. **(8.5.4)**

- The lowest maximum fine for all indictable offences should be increased to €12,500. **(8.5.6)**

- There should be a provision in the Companies Acts to make non-compliance with a requirement to provide a recognisance in breach of a court order an offence. **(8.6.3)**

Specific recommendations on individual sections of the Companies Acts follow in the schedule attached to this Chapter.

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Schedule of Offences under the Company Acts

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
MEMORANDUM OF ASSOCIATION Failure to deliver to the Registrar within thirty-six days of amendment a printed copy of the altered memorandum of association; or to give notice of an application to the court in relation to such alteration or to file copy of court order in relation thereto.	63/10(10)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that certification by the Registrar is acceptable as evidence of failure to file information with CRO. Offence may be less of an issue in the light of the Review Group's recommendations to provide for the generality of private companies to have the powers of a natural person. Creditors have civil remedy of suing directors for loss arising from failure to comply.	Director
UNLIMITED COMPANY, INCREASE IN MEMBERS Failure by unlimited company or company limited by guarantee to deliver to the Registrar notice of the increase within fifteen days of increase.	63/12(3)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group regards this as a reasonably serious offence. Certification by Registrar acceptable as evidence of failure to comply. With regard to redress the main emphasis should be on the possibility of Registrar, ODCE, members and creditors to seek an injunction under s 371, 1963 Act.	Director
NAME, CHANGE OF Failure to comply with direction of Registrar to change the company's name.	63/23(2) - IN 2001/87	Company	Summary		€1,904.61	Retain. Certification by Registrar acceptable as failure to comply. The certificate shall be admissible as evidence of failure to comply in any criminal prosecution, provided the certificate is served on the defendant 21 days in advance of the court hearing and he does not object to the admissibility in evidence of the same. The Group notes the potential scope for giving enforcement notice powers to ODCE analogous to those given to Registrar under s 66, 2001 Act.	Registrar/ Director
NAME, INCLUSION OF "LIMITED" OR "TEORANTA" Provision of incorrect, false or misleading information under 63/24(1)(c)	63/24(7) -IN 2001/88	Any person in default	Summary		€1,904.61	This offence should lapse on foot of the Review Group's recommendations in Chapter 10 which will require companies having restricted objects to indicate that in their title. There is a need to introduce a new penalty for incorrect use of new title.	Registrar/ Director
			Indictment		€12,697.38		DPP
Alteration of memorandum or articles of Association in contravention of 63/24(4)	63/24(7) -IN 2001/88	Any person in default	Summary		€1,904.61	Need to retain offence for failure to change company name where too similar to existing company name, following direction of the Registrar.	Registrar/ Director
			Indictment		€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to comply with a direction from the Registrar under 63/24(5)	63/24(7) -IN 2001/88	Any person in default	Summary		€1,904.61		Registrar/ Director
			Indictment		€12,697.38		DPP
MEMORANDUM OF ASSOCIATION Failure to supply copy to any member who requires it.	63/29(2)	Company and every officer in default	Summary		€1,904.61	This offence should be removed, on the basis that a copy of the memorandum can be obtained from the CRO for a modest sum. Note that the obligation to supply a copy should be maintained.	Director
ARTICLES OF ASSOCIATION Failure to supply copy to any member who requires it.	63/29(2)	Company and every officer in default	Summary		€1,904.61	Repeal.	Director
MEMORANDUM OF ASSOCIATION Failure to ensure all issued copies contain alterations made to date.	63/30(2)	Company and every officer in default	Summary		€1,904.61	Repeal. Covered by overall obligation to supply copy.	Director
PRIVATE COMPANY, CEASING TO BE A Failure to re-register a private company as a public limited company under s 9 of the 1983 Act.	63/35(6) - AM 83/ Sch 1, para 6	Company and every officer in default	Summary		€1,904.61	Review Group viewed this as a serious offence appropriate for prosecution as an indictable offence. Possibility that if a company does not re-register as a PLC it remains a private company and the alteration has no effect. In consequence persons who had bought shares might have no title.	Director
PROSPECTUS, STATEMENT IN LIEU Failure to deliver a statement in lieu of prospectus to the Registrar with an application to re-register a private company as an unlimited public company.	63/35(6) -AM 83/ Sch 1, para 6	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to have endorsed on or attached to statement in lieu of prospectus a written statement signed by persons making reports where certain adjustments have been made	63/35(6) -AM 83/ Sch 1, para 6	Company and every officer in default	Summary		€1,904.61		Director
Delivering a statement in lieu of a prospectus to the Registrar containing any untrue statement	63/35(7) -AM 83/ Sch 1, para 6	Any person who authorised delivery	Summary	6 months or both	€1,904.61		Director
			Indictment	5 years or both	€3,174.35		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
PROSPECTUS Failure to comply with the Third Schedule to the 1963 Act or to issue a form of application for shares except with a prospectus which complies with that Schedule.	63/44(8)	Any person in default	Summary		€1,904.61	For as long as the Third Schedule remains in full (i.e. before implementation of the Group's recommendation in Chapter 9), the Review Group recommends that there should be a penalty only to the extent that there has been material non-compliance with the contents requirements of the Third Schedule. If the Third Schedule contents requirement is removed, then the penalty will apply to failure to issue a prospectus complying with the new contents requirements, in which event the offence should remain.	Director
Issuing a prospectus without obtaining expert's consent to the issue of expert's report with the prospectus or failing to include a statement that consent has been given and not withdrawn.	63/46(2)	Any person knowingly a party to the issue of same	Summary		€1,904.61	The Review Group felt this is serious enough to be an indictable offence.	Director
Failure to deliver copy or endorsed copy to the Registrar before issue.	63/47(4)	Any person knowingly a party to the issue of the prospectus	Summary		€1,904.61	Repeal. Review Group of the view that there should be an obligation to deliver an endorsed copy within two business days after the date of the prospectus. However, there should not be a specific penalty for failure to do this where the document was freely available to the public in the State before late filing.	Director
Inclusion of any untrue statement in issued prospectus.	63/50(1)	Any person who authorised the issue of the prospectus	Summary Indictment	6 months or both 5 years or both	€1,904.61 €3,174.35	Retain. The Review Group recommends that the maximum fine on indictment be increased to €65,000.	Director DPP
PROSPECTUS, STATEMENT IN LIEU OF Failure to deliver to Registrar at least three days before the first allotment a statement in lieu of prospectus which complies with the Fourth Schedule to the 1963 Act.	63/54(4)	Company and every director of the company who knowingly and wilfully authorises or permits the contravention	Summary		€1,904.61	Repeal. This provision relates to an unlikely hypothesis – the raising of finance by an offer to the public by an unlimited company.	Director
Delivery to Registrar of statement in lieu of prospectus containing false statement.	63/54(5)	A person who authorised the delivery	Summary Indictment	6 months or both 5 years or both	€1,904.61 €3,174.35	Repeal. This provision relates to an unlikely hypothesis – the raising of finance by an offer to the public by an unlimited company.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
PROSPECTUS Allotment of shares before the fourth day after which the prospectus is issued or a later date if specified in the prospectus.	63/56(3)	Company and every officer in default	Summary		€1,904.61	Repeal.	Director
PROSPECTUS, ALLOTMENT OF SHARES Failure to retain subscription moneys in separate bank account pending permission for shares to be dealt with on stock exchange.	63/57(3)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
ALLOTMENT OF SHARES Failure to file return of allotments with registrar within one month after allotment.	63/58(3)	Officer in default	Summary		€1,904.61	Retain.	Director
ALLOTMENT OF SHARES, COMMISSIONS Failure to file with Registrar in prescribed form details of authorised commissions paid in connection with the allotment of shares.	63/59(5)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
PURCHASE OF OWN SHARES, FINANCIAL ASSISTANCE Making of statutory declaration by director without reasonable grounds for the opinion as to the company's solvency.	63/60(5)	Director who makes declaration	Summary	6 months, or both	€1,904.61	Retain. Review Group believes that this is serious enough to be an indictable offence. The Group notes that the replacement of statutory declarations with unsworn declarations is recommended in Chapter 7.	Director
Giving financial assistance for the purchase of a company's own shares without observing the requirements of s 60 of the 1963 Act.	63/60(15)	Officer in default	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €3,174.35	Retain.	Director DPP
CAPITAL, CERTAIN ALTERATIONS IN Failure to notify Registrar within one month of consolidation, division, conversion, subdivision, redemption or cancellation of shares.	63/69(2)	Company and every officer in default	Summary		€1,904.61	Retain. Overall principle at issue is maintenance of correct public record. Certificate of non-notification by Registrar is acceptable as evidence.	Director
CAPITAL, INCREASE IN Failure to notify Registrar within 15 days of increase in authorised or nominal capital.	63/70(3)	Company and every officer in default	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
CAPITAL, REDUCTION OF Wilful concealment of name of creditor entitled to object to reduction of capital or wilful misrepresentation of nature or amount of debt or claim by creditor.	63/77	Officer	Summary		€1,904.61	The Review Group believes that this should also be an indictable offence, although notes that the legal nature of fraud is evolving, so important not to limit description too much. Necessary to extend offence to cover negligence as well as concealment. The Review Group notes that prosecution is not of much advantage to creditor who has not been informed. The Review Group also notes the possibility of pursuing civil liability of company officers involved in the proceedings, with court having its own remedies.	Director
SHAREHOLDERS' RIGHTS, VARIATION Failure to forward to Registrar within twenty-one days copy of court order on application by shareholders to have variation of shareholders' rights cancelled.	63/78(5)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
SHARE TRANSFER Failure to send to transferee, within two months of lodgement of transfer, notice of refusal to register transfer of shares.	63/84(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
SHARE CERTIFICATES Failure to provide share-stock certificates within two months of allotment or lodgement of share transfer.	63/86(2)	Company and every officer in default	Summary		€1,904.61	Retain. ODCE has option of applying for injunction under s 371, 1963 Act.	Director
SHAREHOLDER, PERSONATION OF False and deceitful personation of owner of share/interest in company/share warrant/coupon and obtaining or endeavouring to obtain rights thereto.	63/90	Any person in default	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €3,174.35	Retain.	Director DPP
DEBENTURES, REGISTER OF Failure to keep and maintain register of debenture holders. Failure to advise Registrar of place where register of debenture holders is kept and any change in that place.	63/91(5) 63/91(5)	Company and every officer in default	Summary Summary		€1,904.61 €1,904.61	Retain.	Director
Refusal to permit inspection of register of debenture holders or to supply a copy of it.	63/92(4)	Company and every officer in default	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
CHARGES, REGISTER OF Failure by company to register charges with registrar within twenty-one days after the date of creation.	63/100(3)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that, in practice, charges are usually registered by chargeholder.	Registrar/ Director
CHARGES ON PROPERTY ACQUIRED Failure by company to register with Registrar registrable charges existing on property acquired within twenty-one days of completion of acquisition.	63/101(2)	Company and every officer in default	Summary		€1,904.61	Retain. It may be appropriate for the Registrar to be given power to prosecute, as this is a similar offence to that under s 100, 1963 Act.	Director
JUDGEMENT MORTGAGES Failure by judgement creditor to obtain and deliver two certified copies of the affidavit to the company within twenty-one days of registration of the judgement as a mortgage.	63/102(2)	Judgment creditor	Summary		€1,904.61	Retain. The Review Group notes that this is not a serious offence, as the judgment mortgage is effective in any event.	Director
Failure by company to deliver one copy of affidavit to the registrar within three days of receipt.	63/102(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
RECEIVER Failure to give notice of appointment within seven days by a) publication in "Iris Oifigiúil" b) publication in at least one daily newspaper c) delivery of notice in prescribed form to Registrar.	63/107(3)	Any person in default	Summary		€1,904.61	Retain. The Review Group notes that acts of receiver are valid notwithstanding such failure.	Director
Failure to deliver notice to Registrar on ceasing to act as receiver.	63/107(3)	Any person in default	Summary		€1,904.61	Retain.	Director
CHARGES Failure to permit inspection at registered office of instruments creating charges.	63/110(2)	Officer in default	Summary		€1,904.61	Retain.	Director
Failure to register with Registrar within six months charges, etc. created before the operative date (1 April 1964).	63/112(3)	Company and every officer in default	Summary		€1,904.61	Repeal as obsolete.	Director
REGISTERED OFFICE Failure to have a registered office in the State.	63/113(5) -AM 82/4	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to file with Registrar within fourteen days notice of change in the situation of the registered office	63/113(5) -AM 82/4	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director
NAME Failure to paint or affix name of company outside every office or place in which its business is carried on.	63/114(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Use of seal which does not bear name of company. Issue of business letter, publication, bill of exchange, promissory note, endorsement, cheque, order for money or goods, invoice, receipt or letter of credit which does not bear the company's name.	63/114(4)	Officer of a company or any person on its behalf			€1,904.61	Retain.	Director
COMMENCEMENT Commencement of any business or exercise of any borrowing powers by a company which has issued a prospectus to the public to subscribe for its shares which has not observed the necessary conditions in s 115 of the 1963 Act.	63/115(6)	Every person responsible for the contravention	Summary		€1,904.61	Repeal. Now covered by s 6(7) of the 1983 Act.	Director
MEMBERS, REGISTER OF Failure to maintain a register of members in accordance with s 116 of the 1963 Act.	63/116(9)	Company and every officer in default	Summary		€1,904.61	Combine s 116 and s 117, 1963 Act. Retain offence, but amend to read "Failure to maintain an indexed register —"	Director
Failure to notify Registrar within fourteen days of the place where the register is kept and any change in that place.	63/116(9)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
MEMBERS, INDEX OF Failure to index register of members (where more than fifty) unless it is in a form which in itself constitutes an index.	63/117(4)	Company and every officer in default	Summary		€1,904.61	Repeal.	Director
MEMBERS, REGISTER OF, INSPECTION OF Failure to permit inspection of register of members or to provide a copy of it.	63/119(3)	Company and every officer in default	Summary		€1,904.61	Retain. It may be appropriate to amend "inspection at a reasonable cost" to "providing a copy at a reasonable cost".	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
ANNUAL RETURN Failure to file annual return once per year .	63/125(2) - IN 2001/ 59	Company, every officer in default, and any person in accordance with whose directions and instructions the directors are accustomed to act and to whose directions or omissions the default is attributable	Summary Indictment	12 months or both 5 years or both	€1,904.61 €12,697.38	This offence should be consolidated with the following offence.	Registrar/ Director DPP
Failure to file annual return on time.	63/127(2) - IN 2001/60	Company, every officer in default, and any person in accordance with whose directions and instructions the directors are accustomed to act and to whose directions or omissions the default is attributable	Summary Indictment	12 months or both 5 years or both	€1,904.61 €12,697.38	Consolidate with previous offence.	Registrar/ Director DPP
ANNUAL RETURN, DOCUMENTS ANNEXED Failure to annex to the annual return certified copy of every balance sheet and report of auditors.	63/128(3)	Company and every officer in default	Summary		€1,904.61	This section applies only to public unlimited companies and guarantee companies without a share capital. If the obligation to file an annual return is deemed to include the obligation to file the accounts required by law to be annexed to the return, this offence can be repealed as it will come within consolidated s 125/127. (Ditto in relation to 1986/22(1), below, re the obligation to annex accounts to an annual return which is imposed by 1986/7).	Registrar/ Director
ANNUAL GENERAL MEETING Failure to hold annual general meeting or to hold meeting in accordance with a direction of the ODCE	63/131(6) -AM 2001/ 14(1)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to file copy of resolution to treat a meeting as being the annual general meeting for a previous year with the Registrar within fifteen days of its passing	63/131(6)	Company and every officer in default	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
PROXY Failure to include in notice of general meeting statement that a member may appoint a proxy to attend, speak and vote in his/her stead and that the proxy need not be a member.	63/136(3)	Officer in default	Summary		€1,904.61	Retain.	Director
Issue of invitations to appoint as proxy a specified person or persons to some of the members only.	63/136(5)	Officer of the company who knowingly and wilfully authorises or permits issue	Summary		€1,904.61	Retain.	Director
RESOLUTIONS Failure to file with Registrar copy of resolutions etc. within fifteen days of the passing thereof.	63/143(5)	Company and every officer in default	Summary		€1,904.61	Retain. Overall principle at issue is the maintenance of correct public record. Certificate of the Registrar accepted as evidence as provided for in 2001 Act.	Director
Failure to embody or issue resolution with every copy of the articles issued after passing the resolution.	63/143(6)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the failure to provide an up-to-date version of the Articles could mislead and prejudice members and creditors, who are fixed, in certain contexts, with knowledge of all matters registered with the Registrar.	Director
Failure to supply a copy to a member who requests it.	63/143(6)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
MINUTES Failure to prepare minutes of general meetings and directors' meetings as soon as possible and to enter in books kept for that purpose.	63/145(4)	Company and every officer in default	Summary		€1,904.61	Retain. The preparation and proper compilation of appropriate records of the deliberation and decision of the organs of the company is an important objective.	Director
Failure to produce to the Director the books kept in accordance with s 145(1) or to give to him such facilities for inspecting and taking copies of the contents as the ODCE may require	63/145(4) -IN 2001/ 19	Company and every officer in default	Summary		€1,904.61	Retain.	Director
MINUTE BOOKS Failure to permit inspection of general meeting minute books by members or to supply a copy thereof.	63/146(3)	Company and every officer in default	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
ACCOUNTS Failure by directors to ensure laying of accounts before annual general meeting.	63/148(3)	Director who fails to take all reasonable steps to comply	Summary	6 months or both	€1,904.61	Retain. The Review Group notes that the general obligation to prepare and retain proper books of account under s 202 of the,1990 Act is an indictable offence, and believe that, in principle, making the failure to prepare appropriate profit and loss accounts and/or balance sheets should be an indictable offence, particularly in the circumstances of wilful commission of offences where s 148(3) currently envisages imprisonment. The Review Group believe that it may be appropriate to consider this in greater detail in the second work programme.	Director
Failure by director to secure compliance with contents and form requirements.	63/149(7)	Director who fails to take all reasonable steps to comply	Summary	6 months or both	€1,904.61	Retain.	Director
ACCOUNTS, GROUP Failure to lay group accounts before annual general meeting of holding company where required.	63/150(4)	Director who fails to take all reasonable steps to comply	Summary	6 months or both	€1,904.61	Retain.	Director
ACCOUNTS, SUBSIDIARY Failure to supply copy of subsidiary accounts when these are not included in the group accounts to any member requesting them within fourteen days of the request.	63/150(3)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
FINANCIAL YEAR Failure to ensure that financial year of holding company and its subsidiaries coincide.	63/153(3)	Director who fails to take all reasonable steps to secure compliance	Summary		€1,904.61	Retain.	Minister
RIGHT OF MEMBER TO BALANCE SHEET OF SUBSIDIARY Failure by a private company to supply copy of subsidiary accounts to member of company who requests them within fourteen days of the request.	63/154(5)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or any officer in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act by the 2001 Act. The Review Group further notes that the High Court has power to order compliance.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
ACCOUNTS, SIGNING OF Issue, circulation or publication of balance sheet and profit and loss account which has not been signed by two of the directors (in the case of a banking company by its secretary and three of the directors).	63/156(3)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or any officer in default might be prosecuted. The Review Group further notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act.	Director
BALANCE SHEET, DOCUMENTS ANNEXED Issue, circulation or publication of balance sheet without profit and loss account and auditor's report etc. annexed.	63/157(2)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or any officer in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act.	Director
DIRECTORS' REPORT Failure to prepare and annex to the balance sheet the Directors' report dealing with matters required by the Act.	63/158(7)	Director who fails to take all reasonable steps to secure compliance	Summary	6 months or both	€1,904.61	Retain.	Director
ACCOUNTS Failure to send not less than twenty-one days before the annual general meeting to members and debenture holders copies of the balance sheet and annexed documents required to be laid before the annual general meeting.	63/159(5)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or any officer in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act.	Director
AUDITORS Failure to give notice within one week to the Minister that his power under 63/160(4) has become exercisable.	63/160(5A) -IN 90B/183	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or any officer in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act.	Director
Failure to give to the Registrar notice within fourteen days of removal of an auditor.	63/160(5A) -IN 90B/183	Company and every officer in default	Summary		€1,904.61	Retain.	Director
DIRECTOR, ADVERTISEMENT OF Delivery to Registrar of list of persons consenting to be directors of a company which is the subject of a prospectus or statement in lieu of a prospectus where it contains the name of a person who has not consented.	63/179(4)	Applicant for registration	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
DIRECTOR S, SHARE QUALIFICATION Acting as a director of a company without acquiring a share qualification if required to do so by its articles within two weeks of appointment or such shorter time as may be fixed by the articles.	63/180(5)	Unqualified person	Summary		€1,904.61	Repeal. The Review Group considers this to be an internal matter for the company and notes that the director would be deemed to have vacated his office.	Director
BANKRUPT Undischarged bankrupt acting as officer, liquidator or examiner or directly or indirectly being involved in the promotion, formation or management of any company without court approval.	63/183 -IN 90B/169	Undischarged bankrupt	Summary Indictment	12 months or both 5 months or both	€1,904.61 €12,697.38	Retain. Need for bankruptcy list notification to ODCE.	Director DPP
Failure to produce to the ODCE a sworn statement of all facts relevant to director's financial position, where director is an undischarged bankrupt	63/183A -IN 2001/40(4)	Director	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
DIRECTORS, DISCLOSURE OF PAYMENTS Failure by director to disclose to members payments made to him/her in connection with transfer of shares in company.	63/188(2)	Director or any person properly required by such director to include particulars in or send them with notice	Summary		€1,904.61	Retain.	Director
DIRECTORS, REGISTER OF SHAREHOLDINGS Failure to maintain register of directors' and secretary's shareholdings in the company and its subsidiary or its parent.	63/190(9) REPEAT 90B/60	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to produce register at commencement of annual general meeting.	63/190(9) REPEAT 90B/60	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that a member might gain access to the register under s 190(6), and failing this by an application to court specifically under s 190(10).	Director
Failure to supply copy of register of directors' holdings to member or debenture holder.	63/190(9) REPEAT 90B/60	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that a practical remedy is provided by s 190(10).	Director
DIRECTORS, DISCLOSURE Failure by director or secretary to give notice in writing of shareholdings.	63/193(4)	Any person who fails to comply	Summary		€1,904.61	Retain. Complaint to ODCE appropriate route to secure compliance.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure by director to give notice in writing relating to salaries, payments and loans.	63/193(4)	Any person who fails to comply	Summary		€1,904.61	Retain.	Director
Failure by director to make declaration disclosing interest in contracts made by the company.	63/194(6)	Any director who fails to comply	Summary		€1,904.61	Retain.	Director
Failure of company to enter interest in contracts into special book.	63/194(5)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the Court has power to order inspection.	Director
REGISTER OF DIRECTORS AND SECRETARIES Failure to maintain register of directors and secretaries with required details.	63/195(12) -IN 90B/51	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to notify Registrar within fourteen days of change in directors and secretaries or in their particulars.	63/195(12) -IN 90B/51	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to supply to Registrar signed consent of new director or secretary.	63/195(12) -IN 90B/51	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to supply a member or any other person with a copy of the register, or any part thereof, within 10 days of request	63/195 (10A) -IN 2001/91	Company	Summary Indictment		€1,904.61 €12,697.38	Retain. The Review Group notes that s 195(13) allows a court application to compel inspection.	Director DPP
Refusal to permit inspection of register	63/195(12) -IN 90B/51	Company and every officer in default	Summary Summary		€1,904.61 €1,904.61	Retain. The Review Group notes that s 195(13) allows a court application to compel inspection.	Director
Failure by director or secretary to give written notice to company of information required for register.	63/195 (12) -IN 90B/51	Person who fails to comply	Indictment Summary		€12,697.38 €1,904.61	Retain. The Review Group notes that a director who is persistently in default with this or other requirements might be disqualified under s 160(2)(f) of the 1990 Act.	Director DPP
BUSINESS LETTERS Failure to publish details of directors in all business letters, unless exempted.	63/196(4)	Officer in default, and where a body corporate is an officer of the company, any officer of that body corporate is deemed to be an officer of the company	Summary		€1,904.61	Retain.	Minister

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
DIRECTORS WITH UNLIMITED LIABILITY Failure by promoters, directors or secretary to state and to give notice to a director that his/her liability is to be unlimited.	63/197(3)	Director or proposer in default of adding statement; promoter, director or secretary in default of giving notice	Summary		€1,904.61	Retain.	Director
RECONSTRUCTION Failure to deliver to registrar copy Of court order for compromise or Arrangement with creditors	63/201(6)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to attach court order for compromise or arrangement with creditors to copies of memorandum of association issued after its making.	63/201(6)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
CREDITORS, MEETING OF Failure to supply with notice of meeting of creditors the information required by s 202 of the 1963 Act.	63/202(4)	Company and every officer in default	Summary		€1,904.61	Retain. The practical remedy in this context is the threat that a court might refuse to sanction a scheme. There is a possibility that schemes might pass and be sanctioned on the basis of the wilful provision of misleading information. This would indeed be a serious offence and would merit prosecution on indictment and/or personal liability to those adversely affected.	Director
Failure of director to give company notice of any matters necessary for such a meeting.	63/202(6)	Any person in default	Summary		€1,904.61	Retain.	Director
Failure to deliver copy of court order for compromise or arrangement with creditors to Registrar within twenty one days of its making.	63/203(3)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that a practical remedy is provided by s 201(5), in that a scheme does not take effect until registration.	Director
OPPRESSION Failure to deliver copy of court order made under s 205 in remedy of oppression to the Registrar within twenty one days of its making.	63/205(5)	Company and every officer in default	Summary		€1,904.61	Retain. Section 205(5) might be amended to the effect that any such alterations of the Memorandum or Articles of Association shall not take effect until they are registered.	Director
WINDING-UP (COURT, BY) Failure to deliver copy of winding-up order to Registrar.	63/221(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to file with the court within twenty one days from the date of the appointment of the liquidator or the making of the winding up order a statement of affairs verified by affidavit.	63/224(5)	Person in default without reasonable excuse	Summary		€1,904.61	Amend. The proper and timely provision of the statement of the company's affairs were better treated as a contempt of court, on the model of s 224(7). This would in any event codify the present practice whereby the names of those who are to prepare the statement are recorded in the winding-up order and are thereby under the threat of contempt. The Review Group also notes that the failure of directors to fulfil any obligation would be a significant factor in an application under s 150 of the 1990 Act.	Director
WINDING-UP (COURT BY), PUBLICATION Failure by liquidator to publish notice of appointment in "Iris Oifigiúil" within twenty-one days of appointment and deliver to Registrar a copy of the court order.	63/227(2)	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING-UP (COURT BY), ANNULMENT OR STAY Failure to file with Registrar copy of court order for the annulment or staying of a winding-up.	63/234(5)	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING-UP, EXAMINATION Obstruction of persons entering property pursuant to court order or obstruction of persons taking possession of company property pursuant to such order.	63/245A (5) - IN 2001/45	Person who so obstructs	Summary Indictment		€1,904.61 €12,697.38	Retain. The Review Group notes that the possibility of such a prosecution is without prejudice to contempt proceedings.	Director DPP
WINDING-UP (COURT BY), Failure by liquidator to file with Registrar within twenty one days of its making a copy of court order for dissolution of the company.	63/249(3)	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING-UP, VOLUNTARY (BOTH KINDS) Failure to publish within fourteen days in "Iris Oifigiuil" notice of resolution by company for voluntary winding-up.	63/252(2)	Company and every officer in default (including liquidator)	Summary		€1,904.61	Retain.	Registrar/ Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
WINDING-UP (COURT, BY) Failure to deliver to Registrar within twenty-one days of copy order applying creditors' voluntary winding-up provisions to the winding-up.	63/256(7) -IN 90B/128	Any person in default	Summary		€1,904.61	Retain.	Director
WINDING-UP, VOLUNTARY CREDITORS Failure by liquidator to call meeting of creditors when he forms opinion company will be unable to pay its debts.	63/261(7) -IN 90B/129	Liquidator	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
WINDING-UP, VOLUNTARY (BOTH KINDS) Failure by liquidator to summon a general meeting at the end of the first year from the commencement of the winding-up and of each succeeding year to lay before it an account of his/her acts and dealings and of the conduct of the winding-up and to send a copy of the account to the Registrar within seven days of the meeting	63/262(2) AM 90B/145	Liquidator	Summary Indictment		€1,904.61 plus daily default fine not exceeding ¤63.49 €12,697.38 plus daily default fine not exceeding €317.44	Retain.	Registrar/ Director DPP
Failure by liquidator to send to Registrar copy of final account and report of final meeting within seven days of the meeting	63/263(3)	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
Failure by applicant to file with Registrar within fourteen days of its making copy of court order deferring the date of dissolution of the company.	63/263(6)	Applicant for court order	Summary		€1,904.61	Retain.	Registrar/ Director
Failure by liquidator to hold final general meeting to lay before it an account.	63/263(7)	Liquidator	Summary		€1,904.61	Retain. The Review Group recommends that this should be an indictable offence consistent with s 262(2) of the 1963 Act.	Registrar/ Director
WINDING-UP, VOLUNTARY CREDITORS Failure to summon meeting of creditors in accordance with s 266 of the 1963 Act.	63/266(6)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure by liquidator to summon a general meeting at the end of the first year form the commencement of the winding-up and of each succeeding year to lay before it an account of his/her acts and dealings and of the conduct of the winding-up and to send a copy of the account to the Registrar within seven days of the meeting.	63/272(2) AM 90B/145	Liquidator	Summary		€1,904.61 plus daily default fine not exceeding €63.49	Retain.	Registrar/ Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure by liquidator to send to Registrar copy of final account and report of final meetings within seven days of the meetings.	63/273(3)	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
Failure by applicant to file with Registrar within fourteen days of its making copy of court order deferring the date of dissolution of the company.	63/273(6)	Applicant for court order	Summary		€1,904.61	Retain.	Registrar/ Director
Failure by liquidator to hold final general meeting and meeting of creditors to lay before it an account.	63/273(7)	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING-UP, VOLUNTARY CREDITORS Failure of chairman to notify liquidator in writing or appointment unless liquidator or duly authorised representative is present at meeting making appointment.	63/276A -IN 90B/133	Chairman of meeting at which liquidator is appointed	Summary		€1,904.61	Retain.	Director
LIQUIDATOR, APPOINTMENT OF (ALL MODES) Failure by liquidator to file notice of appointment with Registrar within fourteen days of appointment.	63/278(3) - AM 2001/48	Liquidator	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING UP, VOLUNTARY (BOTH KINDS) Failure to file with Registrar forthwith copy of court order annulling or staying the winding-up.	63/280(4)	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director
WINDING UP, VOLUNTARY (BOTH KINDS) Obstruction of persons entering property pursuant to court order or obstruction of persons taking possession of company property pursuant to such order	63/282C (5) - IN 2001/49	Person who so obstructs	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
WINDING-UP, OFFENCES BY OFFICERS (ALL MODES) Offences listed in s 293(1) subsections (a) to (l) and (p) of the 1963 Act.	63/293(1)	Past or present officer	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €3,174.35	Retain.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Offences listed in s 293(1) subsections (m), (n) and (o) of the 1963 Act.	63/293(1)	Past or present officer	Summary	6 months or both	€1,904.61	Retain.	Director
			Indictment	5 years penal servitude/5 years imprisonment; or both fine and imprisonment	€6,348.69		DPP
Where offence is committed under section s293(1)(o), in that company property has been pawned, pledged or disposed of by a past or present officer of a company, which property was obtained on credit and not paid for, it is also an offence to receive the property knowing it to be pawned, pledged or disposed of in such circumstances	63/293(3)	Person who takes in pawn or pledge or otherwise receives the said property with knowledge of the circumstances	Summary	6 months or both	€1,904.61	Retain.	Director
			Indictment	5 years penal servitude/5 years imprisonment; or both fine and imprisonment	€6,348.69		DPP
WINDING-UP, FRAUD BY OFFICERS (ALL MODES) Fraud by an officer of a company which is ordered to be wound-up or which passes a resolution for voluntary winding-up.	63/295	Officer of company at time of commission	Summary	6 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€3,174.35		DPP
FRAUDULENT TRADING Knowingly carrying on the business of the company with intent to defraud creditors or for any fraudulent purpose.	63/297 -IN 90B/137	Any person knowingly a party to the carrying on of the business	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	7 years or both	€63,486.90		DPP
WINDING-UP, BODY CORPORATE AS LIQUIDATOR (ALL MODES) Body corporate acting as liquidator of a company.	63/300	Body corporate	Summary		€1,904.61	Retain.	Director
LIQUIDATOR, DISQUALIFIED PERSON Disqualified person acting as liquidator.	63/300A(4) - IN 90B/146	Disqualified person	Summary		€1,904.61	Retain. The Review Group believes that the offence should be defined as knowingly acting when disqualified.	Director
			Indictment		€12,697.38		DPP
WINDING-UP, LIQUIDATOR, CORRUPT INDUCEMENT (ALL MODES) Giving, offering or agreeing any valuable consideration as inducement for appointment or nomination of self or some other person as liquidator.	63/301	Any person in default	Summary		€1,904.61	Review Group believes conviction of any such offence should disqualify the person from acting as liquidator.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
CREDITORS' MEETING Failure by creditor or creditor's representative to disclose to chairman of creditors meeting connection with proposed liquidator.	63/301A(5) -IN 90B/147	Any person in default	Summary		€1,904.61	Retain. As above.	Director
WINDING UP, NOTICE (ALL MODES) Failure to include statement that company is in liquidation on invoices, orders for goods, or business letters.	63/303(2)	Company and any officer, liquidator, or receiver who knowingly and wilfully authorises or permits the default	Summary		€1,904.61	Retain.	Director
WINDING-UP, DISPOSAL OF BOOKS (ALL MODES) Failure of liquidator to dispose of books in accordance with - court order - resolution of members in voluntary winding-up - direction of committee of inspection in creditors' winding-up	63/305(2)	Liquidator	Summary		€1,904.61	Retain.	Director
WINDING-UP, INFORMATION (ALL MODES) Failure by liquidator where liquidation is not concluded within two years, to send to the Registrar particulars about the progress of the liquidation.	63/306(2) AM 90B/145	Liquidator	Summary		€1,904.61 plus daily default fine not exceeding €63.49	Retain.	Registrar/ Director
			Indictment		€12,697.38 plus daily default fine not exceeding €317.44		DPP
WINDING-UP, DISSOLUTION VOIDED (ALL MODES) Failure of applicant to file with Registrar within fourteen days of its making copy of court order declaring dissolution of company void.	63/310(2)	Applicant for court order	Summary		€1,904.61	Retain.	Director
RECEIVER, BODY CORPORATE Body corporate acting as receiver.	63/314	Body corporate	Summary		€1,904.61	Retain.	Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
RECEIVER Acting as receiver when disqualified by being an undischarged bankrupt; officer of company within twelve months; parent, spouse, brother, sister, or child thereof; partner or employee of officer or servant of company; auditor of company.	63/315(5) -IN 90B/170	Disqualified person	Summary Indictment		€1,904.61 €63,486.90	Retain.	Director DPP
RECEIVERSHIP, NOTICE Failure to include statement that company is in receivership on invoices, orders for goods, or business letters.	63/317(2)	Company and any officer, liquidator and receiver who knowingly and wilfully authorises or permitted the default	Summary		€1,904.61	Repeal. Combine sections re receivership and liquidation at s 303(2) of the 1963 Act.	Director
RECEIVER, NOTIFICATION Failure by receiver to - send notice of appointment to company forthwith - send to Registrar within two months of receiving it a statement of affairs prepared in accordance with s 320 of the 1963 Act - failure to send at cessation of receivership a statement to the Registrar as to the solvency of the company	63/319(8) - AM 2001/52	Receiver	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP
Failure by receiver to send abstract of receipts and payments to the Registrar every six months	63/319(8) - AM 90B/145 -AM 2001/52	Receiver	Summary Indictment		€1,904.61 plus daily default fine not exceeding €63.49 ¤12,697.38 plus daily default fine not exceeding ¤317.44	Retain.	Registrar/ Director DPP
RECEIVER, STATEMENT OF AFFAIRS Failure by officers of the company, promoters, employees to prepare and submit the statement of affairs to the receiver within fourteen days of receipt of the notice of the appointment of the receiver.	63/320(5)	Any person in default	Summary Indictment	6 months or both 5 years or both	€1,904.61 €6,348.69	Retain. The Review Group notes that the practical remedy is likely to be found in s 320A under which court may compel compliance with s 319 and s 320.	Registrar/ Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
RECEIVER, ABSTRACTS Failure by receiver to deliver to Registrar within one month abstract of receipts and payments made up every six months.	63/321(2) AM 90B/145	Receiver	Summary		€1,904.61 plus daily default fine not exceeding €63.49	Retain. The Review Group notes that an application may be made to court to compel compliance.	Registrar/ Director
			Indictment		€12,697.38 plus daily default fine not exceeding €317.44		DPP
Failure by receiver to give one month's notice of resignation to holders of floating and fixed charges over the company, the company and the liquidator if any.	63/322C(3) -IN 90B/177	Receiver	Summary		€1,904.61	Repeal. Failure to comply makes any purported resignation ineffective (cf. s 322C(1)).	Director
Failure by receiver to furnish books, answer questions or give assistance to ODCE	63/323A(4) -IN 2001/53	Receiver	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
FOREIGN COMPANIES Failure to comply with registration requirements in Part XI of 1963 Act.	63/358	Company incorporated outside the State establishing a place of business within the State	Summary		€1,904.61	Retain. Officers and agents should be liable where they have failed to take all reasonable steps to ensure compliance.	Director
FOREIGN COMPANIES, PROSPECTUS Issue, circulation or distribution of prospectus of a foreign company knowingly in contravention of ss 361 to 364 of 1963 Act.	63/365	Any person knowingly responsible	Summary	6 months, or both	€1,904.61	Retain. The Review Group recommends the increase of the maximum indictable fine to €65,000.	Director
			Indictment	5 years or both	€3,174.35		DPP
UNREGISTERED COMPANIES Failure of existing unregistered company to deliver documents to the registrar by 1 October, 1964.	63/377(5)	Unregistered company	Summary		€1,904.61	Repeal as being obsolete.	Director
Failure of new unregistered company to deliver documents within three months of coming into existence.	63/377(6)	Unregistered company	Summary		€1,904.61	Retain.	Director
REGISTERS Failure to keep registers in the required manner.	63/378 -Am 77/4	Company and every officer in default	Summary		€1,904.61	Retain.	Director
"LIMITED", IMPROPER USE Improper use of "limited" or "teoranta" by person or persons not incorporated with limited liability.	63/381(1) - IN 2001/98	Persons in default	Summary	12 months or both	€1,904.61	Retain. The Review Group notes the power of the Director and the Registrar to apply to court pursuant to 381(2) to stop offence.	Director
			Indictment	5 years or both	€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
WINDING-UP BEFORE OPERATIVE DATE Failure to deliver to Registrar forthwith copy of court order staying proceedings in a winding-up commenced before 1 April, 1964.	63/398(2)	Company and any officer in default	Summary		€1,904.61	Repeal as obsolete.	Director
PUBLIC LIMITED COMPANY Commencement of business or exercise of borrowing powers prior to issue of certificate of compliance by Registrar.	83/6(7)	Company and any officer in default	Summary		€1,904.61	Retain.	Director
PUBLIC LIMITED COMPANY, OLD Failure by old public limited company to re-register not later than 11 January 1985.	83/13	Company and any officer in default	Summary		€1,904.61	Repeal as obsolete.	Director
PRIVATE COMPANY, RE-REGISTRATION AS Failure to give notice to Registrar of application to court for cancellation of special resolution for re-registration of a public limited company as a private company.	83/15(10)	Company and any officer in default	Summary		€1,904.61	Retain.	Director
Failure to deliver to Registrar copy of court order cancelling or confirming special resolution to re-register as private company.	83/15(10)	Company and any officer in default	Summary		€1,904.61	Retain. The Courts Service should inform the Registrar.	Director
OLD PUBLIC LIMITED COMPANY, FAILURE TO RE-REGISTER Failure by old public limited company (which has applied to re-register as another form of company and has not met the requirements) to: (a) meet the requirements; (b) re-register in a form other than that applied for, or (c) wind up voluntarily.	83/16	Company and any officer in default	Summary		€1,904.61	Repeal as obsolete.	Director
ALLOTMENT, AUTHORITY REQUIRED Allotment by directors of shares without authority from the company in general meeting or the articles of association.	83/20(7)	Director who knowingly and wilfully contravenes or permits or authorises a contravention	Summary Indictment		€1,904.61 €3,174.35	Retain.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
SHARES/DEBENTURES, OFFER TO PUBLIC Offering to public any shares in or debentures of a private company or allotting shares or debentures with such an intention.	83/21(4)	Company and any officer in default	Summary		€1,904.61	Retain. The Review Group believes that it may be appropriate to consider making this an indictable offence because so serious and contrary to organising companies code.	Director
SHARES, PRE-EMPTION RIGHTS Knowingly or recklessly permitting inclusion of any matter which is misleading, false or deceptive in a material particular in a director's statement circulated with a special resolution to propose the allotment of shares without applying pre-emption rights.	83/24(6)	Person in default	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €3,174.35	Retain.	Director DPP
NON-CASH CONSIDERATION, EXPERTS' REPORTS Knowingly or recklessly making a misleading, false or deceptive statement to any expert carrying out a valuation or making a report in respect of non-cash consideration before the allotment of shares.	83/31(3)	Person in default	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €6,348.69	Retain.	Director DPP
NON-CASH CONSIDERATION, SUBSCRIBERS Failure by public limited company to file with Registrar copy of ordinary resolution and report required by s 32, 1983 Act within fifteen days of the passing of the resolution.	83/33(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
CONSIDERATION Failure to observe the requirements of sections 26 to 30, 32 and 35 of the 1983 Act. 26. Subscription of share capital 27. Prohibition on allotment of shares at a discount 28. Payment for allotted shares 29. Payment of non-cash consideration 30. Experts' reports on non-cash Consideration before allotment of shares. 32. Experts' reports on non-cash assets acquired from subscribers, etc. 35. Special provisions as to issue of shares to subscribers.	83/36(1)	Company and every officer in default	Summary Indictment		€1,904.61 €3,174.35	Retain. The Review Group notes how the amendment of s 383 of the 1963 Act by the 2001 Act has made it less difficult to secure convictions against officers.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
SHARES WITH SPECIAL RIGHTS Failure to deliver to Registrar within one month of allotment of shares with rights not stated in memorandum or articles of association a statement containing particulars of those rights.	83/39(5)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to deliver within one month of allotment statement containing particulars of the variation.	83/39(5)	Company and every officer in default	Summary		€1,904.61	Retain	Director
Failure to deliver notice to the Registrar within one month of assignment of name or designation to any class of shares.	83/39(5)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
CAPITAL, MAINTENANCE OF Knowing and wilful failure by directors to convene extraordinary general meeting to be held not later than eighty-four days of becoming aware that the net assets of the company are half or less of the amount of the company's called-up share capital.	83/40(2)	Director	Summary Indictment		€1,904.61 €3,174.35	Retain. The Review Group notes the mens rea requirements, namely that the director in question knowingly and wilfully authorised or permitted the breach.	Director DPP
ACQUISITION OF OWN SHARES Acquisition of own shares by company limited by shares or by guarantee and having a share capital, whether by purchase, subscription or otherwise	83/41(3)	Company and every officer in default	Summary Indictment		€1,904.61 €3,174.35	Retain.	Director DPP
PUBLIC LIMITED COMPANY Failure to cancel its own shares acquired by itself or to apply for re-registration as another form of company as required.	83/43(8)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
INVESTMENT COMPANY Failure to include expression "investment company" on business letters and order forms.	83/47(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director
PUBLIC LIMITED COMPANY – OBLIGATION TO PUBLISH Failure to publish in Iris Oifigiuil notice of the delivery to the Registrar of certain documents	83/55(3)	Company and every officer in default	Summary		€1,904.61	Retain.	Registrar/ Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
PUBLIC LIMITED COMPANY, MISLEADING NAME Carrying on a trade etc. under name including "public limited company " or "cuideachta phoibli theoranta" or abbreviations of those words when not registered as such.	83/56(5)	Person in default, including company and any officer in default	Summary		€1,904.61	Retain	Director
Public limited company carrying on a trade, etc. under a name giving the impression it is a company other than a public limited company.	83/56(2)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
ACCOUNTING POLICIES Failure to maintain the accounting principles in s 5 of the 1986 Act, subject to s 6.	86/22(1)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes the company or officer in default might be prosecuted and further notes how the amendment of s 383 of the 1963 Act has made it less difficult to secure convictions against officers.	Director
ACCOUNTING PRINCIPLES, DEPARTURE FROM Failure to state in a note to the accounts any departure from the accounting principles set out in s 5 of the 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	As above.	Director
ANNUAL RETURN, ANNEXED DOCUMENTS Failure to annex to the annual return the documents required by s 7 of the 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	Repeal, as recommended re s 128 of the 1963 Act – this offence can be repealed as it will come within the consolidated ss 125 and 127 of the 1963 Act.	Registrar/ Director
ACCOUNTS, MODIFIED Failure to draw up modified accounts for small and medium companies in accordance with ss 10 and 11 of the 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	As above.	Registrar/ Director
SUBSIDIARY/ASSOCIATED COMPANIES Failure to provide information about subsidiary and associated companies as required by s 16 of 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	As above.	Registrar/ Director
ANNUAL RETURN, ACCOUNTS ANNEXED TO Failure to have accounts annexed to annual return signed in accordance with s 18 of 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	As above.	Registrar/ Director

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
ACCOUNTS, PUBLICATION OF FULL OR ABBREVIATED Failure to publish with full or abbreviated accounts the information required by s 19 of 1986 Act.	86/22(1)	Company and every officer in default	Summary		€1,904.61	As above.	Director
ACCOUNTS COMPLIANCE Failure by director to take all steps to ensure that accounts comply with ss 3, 4, 13 and 14 and the Schedule of 1986 Act.	86/22(2)	Director	Summary	6 months, or both	€1,904.61	Retain.	Director
ACCOUNTS, FALSE STATEMENT Knowingly and wilfully making a statement false in any material particular in any return, report, certificate, balance sheet or other document required or for the purposes of the 1986 Act.	86/22(3)	Any person in default	Summary Indictment	6 months, or both 5 years or both	€1,904.61 €3,174.35	Retain. The Review Group recommends that the maximum indictable fine should be increased to €25,000.	Director DPP
COURT PROTECTION Failure by examiner, without reasonable excuse, to deliver within seven days to the Registrar an office copy of order permitting disposal of charged property etc.	90/11(7)	Examiner	Summary		€1,904.61	Retain.	Registrar/ Director
Failure by petitioner to deliver notice of petition to Registrar within three days of its presentation.	90/12(5)	Any person in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP
Failure by examiner to publish notice of his appointment within twenty one days in "Iris Oifigiuil".	90/12(5)	Examiner	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP
Failure by examiner to publish notice of his appointment within three days in at least two daily newspapers.	90/12(5)	Examiner	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP
Failure by examiner to deliver notice of appointment within three days to the registrar.	90/12(5)	Examiner	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP
Failure to publish statement "under the protection of the court" on invoices, orders or business letters	90/12(5)	Any person in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Person acting as examiner who is not qualified to act as liquidator of the company.	90/28(2)	Any person in default	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP
Failure by examiner, or person directed by the court, to publish notice in "Iris Oifigiuil" within fourteen days of delivery to Registrar of copy of court order made under 90/17 or 90/24 or of proposal confirmed under 90/24.	90/30(2)	Person in default, including company and any officer in default	Summary		€1,904.61	Retain.	Registrar/ Director
INVESTIGATION Failure to give information required or knowingly making statement false in a material particular or recklessly making a statement false in a material particular in relation to the ownership of shares in or debentures of a company	90B/15(3)	Any person in default	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that those who refuse to answer questions put by the inspectors could be dealt with under contempt powers of the High Court under ss 10(5) and (6) of the 1990 Act as applied by s 10(5) and thereby compelled to answer the inspector's questions.	Director
			Indictment	5 years or both	€12,697.38		DPP
Where Ministerial/Directoriak notice has been given to restrict shares under 90B/16, exercising or purporting to exercise any right to dispose of such shares; or option thereon; or voting in respect of such shares; failing to notify restriction to person entitled to vote in respect of such shares; entering into agreement to sell shares or attached rights.	90B/16(14)	Any person in default	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that under s 16(2) of the 1990 Act any transfer or agreement to sell or exercise of voting rights is void.	Director
			Indictment	5 years or both	€12,697.38		DPP
Issuing shares in contravention of restrictions	90B/16(15)	Company and every officer in default	Summary	12 months, or both	€1,904.61	As above. The Review Group notes that such an issue is void.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure to comply with direction of ODCE to produce books or documents or provide an explanation or make a statement.	90B/19(6) - IN 2001/29	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Providing an explanation or making a statement knowing it to be misleading in any material respect.	90B/19(8) - IN 2001/29	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Destruction, mutilation, falsification or concealment of books or documents the subject of a direction	90B/19(9) - IN 2001/29	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Destruction, mutilation, falsification, concealment or disposal of books or documents when an investigation is being or is likely to be carried out	90B/19A IN 2001/29	Any person in default	Summary	12 months or both	€1,904.61	Retain. The concealment of facts is the offence.	Director
			Indictment	5 years or both	€12,697.38		DPP
Obstruction of exercise of right of entry or search under warrant or right to take possession of any books or documents or failure to give proper name address or occupation to officer or failure to produce to officer information in his custody or possession.	90B/20(6) - IN 2001/30	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Unauthorised publication of any information, book or document.	90B/21(2) -AM 2001/31	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
DIRECTORS Dealing in right to call for or to make delivery at specified price, time, and number of relevant shares or debentures.	90B/30(1)	Director or any person who does so at instigation of director	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure by director to repay surplus business expenses advance within six months of expenditure.	90B/36(3)	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Making a prohibited loan to a director or connected person.	90B/40(1)	Officer	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Procuring a company to make a prohibited loan to a director or connected person	90B/40(2)	Person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure by licensed bank to maintain register of substantial contracts with directors which are excluded from publication by 90B/41(6).	90B/44(8)	Company and every director at material time	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that given the defence contained in s 44(9) of the 1990 Act the offence effectively consisted of the failure to take reasonable steps to ensure compliance with the section; as such, the possibility of prosecution on indictment is appropriate.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure by licensed bank to permit inspection of register of substantial contracts with directors.	90B/44(8)	Company and every director at material time	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
DIRECTORS' SERVICE CONTRACTS Failure to keep copies of directors' service contracts at an appropriate place.	90B/50(7)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
DISCLOSURE OF INTERESTS IN SHARES Failure by director, shadow director or secretary to notify company in writing within the proper period of interests in shares and debentures of the company.	90B/53(7)	Person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group further notes that failure to notify as required by the section results in the unenforceability of rights attaching to relevant shares.	Director DPP
Failure by director, shadow director, or secretary, without reasonable excuse, to ensure notification by agent of acquisitions or disposals of shares or debentures in the company.	90B/58(7)	Person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure to maintain register of directors' interests in shares and debentures.	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group believes that it should become offence for failure to maintain 'indexed' register.	Director
Failure to permit inspection of register of directors' interests.	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to produce register of directors' interests in shares and debentures at annual general meeting.	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to maintain register in chronological order	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to record information within three days of receipt or grant of right.	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to maintain register with index or in index form.	90B/60(10)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
Failure to amend index following removal of register entry.	90B/61(3)	Company and every officer in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
Improper deletion of register entry.	90B/62(3)	Company and every officer in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
Failure to restore improper deletion.	90B/62(3)	Company and every officer in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure by director, shadow director or secretary to notify company in writing of grant of right to subscribe for shares or debentures of the company to spouse or minor child or the exercise of such right.	90B/64(6)	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure by company whose shares are dealt in on recognised stock exchange to notify that stock exchange of acquisitions and disposals by director, shadow director, secretary or spouse or minor child thereof.	90B/65(3)	Company and every officer in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
ACQUISITION OF PLC SHARES Failure to make disclosure within proper period of acquisition of relevant share capital equal to or exceeding the notifiable level (5 per cent)	90B/79(7) -AM 2001/35	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure of persons acting together to acquire interests in pubic limited company ("concert party") to keep each other informed	90B/79(7) -AM 2001/35	Any person in default	Summary	12 months, or both	€1,904.61	As above.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure of purchaser to ensure immediate notification to purchaser by his agent of acquisitions or disposals	90B/79(7)	Any person in default	Summary	12 months, or both	€1,904.61	As above.	Director
			Indictment	5 years or both	€12,697.38		DPP
REGISTER OF INTERESTS IN SHARES Failure to maintain register of interests in shares	90B/80(10)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or officers in default may be prosecuted. The Group further notes how the amendment of s 383 of the 1963 Act has made it less difficult to secure convictions against officers.	Director
INVESTIGATION OF INTERESTS ACQUIRED Failure to prepare report of investigation requisitioned by members to investigate purported acquisition of interests in shares in the company and to make the report available at the company's registered office; (and where the investigation is not completed within three months, an interim report); and notifying the requistionists within three days of the report becoming available.	90B/84(7)	Company and every officer in default	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to comply with a notice served by the company	90B/85(3)	Any person in default	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP
REGISTER OF INTERESTS IN SHARES Failure to notify within fifteen days person notified by third party as having interests in the shares of the company.	90B/86(7)	Company and every officer in default	Summary		€1,904.61	Retain. The review group notes that the company and/or officers in default may be prosecuted and further notes how the amendment of s 383 of the 1963 Act has made it less difficult to secure convictions against officers.	Director
			Indictment		€12,697.38		DPP
Failure to make within fourteen days any necessary alterations in any associated index of any removal from the register.	90B/86(7)	Company and every officer in default	Summary		€1,904.61	As above.	Director
			Indictment		€12,697.38		DPP
Making unauthorised deletion from register.	90B/87(3)	Company and every officer in default	Summary		€1,904.61	As above.	Director
			Indictment		€12,697.38		DPP
Failure to restore unauthorised deletion.	90B/87(3)	Company and every officer in default	Summary		€1,904.61	As Above.	Director
			Indictment		€12,697.38		DPP
Refusal to permit inspection of register or report made under 90B/84 or to supply a copy thereof.	90B/88(4)	Company and every officer in default	Summary		€1,904.61	Retain. The Review Group notes that the company and/or officers in default may be prosecuted and notes further how the amendment of s 383 of the 1963 Act has made it less difficult to secure convictions against officers. The Review Group also notes that application may be made to Court to compel immediate inspection.	Director
			Indictment		€12,697.38		DPP
INSIDER DEALING Unlawfully dealing in securities in contravention of 90B/108	90B/111	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	10 years or both	€253,947.61		DPP
Dealing within twelve months of conviction by person convicted of insider dealing.	90B/112(3)	Any person in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	10 years or both	€253,947.61		DPP
Dealing on behalf of another person with reasonable cause to believe deal would be unlawful under 90B/108	90B/113(2)	Any person in default	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that the available penalty on conviction on indictment seems disproportionate to any wrong done.	Director
			Indictment	10 years or both	€253,947.61		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to observe professional secrecy.	90B/118(3) -AM 2001/38	Any person in default	Summary	12 months, or both	€1,904.61	Retain	Director
			Indictment	10 years or both	€253,947.61		DPP
WINDING UP, VOLUNTARY CREDITORS Failure by liquidator to comply with 90B/131	90B/131(7)	Liquidator	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
WINDING UP, REPORT OF OFFENCES Failure by liquidator or receiver to include in periodic returns a report relating to any past or present officer or member of the company who is the subject of a disqualification order or who has been made personally responsible for debts of a company.	90B/144(2)	Liquidator or receiver	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP
WINDING-UP, PERIODIC RETURNS Failure by liquidator or receiver to make or file any return etc required by the Companies Acts,	90B/145(1)	Liquidator or receiver	Summary		€1,904.61 plus max. daily default fine of €63.49	Retain.	Director
			Indictment		€12,697.38 plus max. daily default fine of €317.44		DPP
ODCES OF INSOLVENT COMPANIES Failure by liquidator within seven days of the relevant date to notify every director that they are persons to whom 90B/149-158 applies and to notify the Registrar of the name of every such person	90B/151(3)	Liquidator	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP
Failure of liquidator to notify court of his opinion that the interests of any other company or its creditors may be placed in jeopardy because a director of the insolvent company is acting as a director or is involved in the promotion or formation of such other company.	90B/151(3)	Liquidator	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP
Failure by liquidator to notify creditors and contributors of receipt of notice of intention of director of insolvent company to apply to court for relief from 90B/150.	90B/152(5)	Liquidator	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
DISQUALIFIED DIRECTOR Person acting in contravention of disqualification order.	90B/161(1)	Any person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by liquidator to report to court where disqualified person is or becomes a director of a company which commences to be wound up (and is unable to pay it debts) within five years of the date of commencement of the winding-up of the company whose insolvency caused his disqualification.	90B/161(6)	Liquidator	Summary		€1,904.61	Retain.	Director
Director or other officer or member of committee of management or trustee of any company knowingly acting in accordance with the directions or instructions of a disqualified person.	90B/164(1)	Any person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group notes the civil consequences of such a conviction as set out in s 165 of the 1990 Act. Review Group notes the potential for offenders to be personally liable.	Director DPP
Failure by director or shadow director charged with alleged fraud or dishonesty to give written advance notice to the court of required particulars of director ships.	90B/166(3)	Director or shadow director	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
AUDITORS Failure by auditor to notify Registrar of companies within fourteen days of service of notice of resignation on company.	90B/185(6)	Auditor	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by auditor to include required material in notice of resignation.	90B/185(6)	Auditor	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure to give, within fourteen days, notice to persons entitled to receive documents under 63/159(1) of an auditor's written notice of intention to resign in which are set out the circumstances connected with the resignation which should be brought to the notice of the members or creditors of the company.	90B/185(7)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group notes that the company and/or officers in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act. The Review Group suggests that an effective solution would be to amend this section to require the forwarding of the resigning auditor's notice to ODCE.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure to convene a general meeting within fourteen days of service of notice by auditor for the purpose of receiving and considering an account and explanation of the circumstances connected with the auditor's resignation.	90B/186(6)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group notes that the company and/or officers in default might be prosecuted and notes the expansion of liability brought about by the amendment of s 383 of the 1963 Act.	Director DPP
Failure to send to persons entitled to receive documents under 63/159(1) and to the Registrar a copy of any further statement by auditor to members.	90B/186(6)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group notes that the company and/or officers in default might be prosecuted and notes the expansion of personal liability brought about by the amendment of s 383 of the 1963 Act.	Director DPP
Failure to send to the auditor notices of the meeting and all other documents relating thereto and to permit him to attend and be heard on any part of the business which concerns him as former auditor.	90B/186(6)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	As above.	Director DPP
Failure to vacate office as auditor or public auditor on becoming disqualified and to give written notice of this to the company, society or friendly society.	90B/187(9)	Any person in default	Summary Indictment		€1,904.61 plus max. daily default fine of €63.49 €6,348.69 plus max. daily default fine of €1,269.74	Retain.	Director DPP
Failure by person acting as auditor or as a public auditor to furnish to ODCE, following request, evidence of his qualifications to act as such within 30 days of the demand	90B/187 (12) -IN 2001/72	Person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by body of accountants to provide a report to ODCE as soon as possible where its disciplinary committee has reasonable grounds for believing that an indictable offence under the Companies Acts may have been committed by a person while a member of the body	90B/192(7) -IN 2001/73	Body of Accountants recognised for purposes of 90B/187	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by auditor to serve notice on company and to notify Registrar within seven days of such notice of his opinion that company is contravening or has contravened requirement to maintain proper books of account.	90B/194(4) - AM 2001/74	Auditor	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain. The Review Group notes the requirement on the Registrar.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
Failure by auditor to furnish ODCE with explanations or to give him access to documents	90B/194 (4) -IN 2001/74	Auditor	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	As above. The Review Group notes the power of ODCE to seek relief under s 371 of the 1963 Act.	Director DPP
Failure by Auditor to notify ODCE of his opinion as to the commitment of an indictable offence.	90B/194 (4) - IN 2001/74	Auditor	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Person who is subject of disqualification order becoming or remaining partner in firm of auditors; giving directions or instructions in relation to conduct of audit; working in any capacity in conduct of audit of accounts of a company.	90B/195(1)	Person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by subsidiary company or its auditor to give to the auditors of the holding company such information and explanations as may be required.	90B/196(2)	Auditor; Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure of holding company to obtain from its subsidiary information needed for purposes of audit.	90B/196(2)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Knowingly or recklessly making a statement to the auditor, when an officer or employee of the company, which is misleading or false or deceptive in a material particular.	90B/197(1)	Officer, including any employee of the company	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure to provide to auditor within two days of requisition any information or explanations required.	90B/197(3)	Officer, including any employee of the company	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by recognised body of accountants to deliver within one month of renewal/recognition to the Registrar's list of members qualified for appointment as auditors.	90B/199(4)	Body of accountants	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Failure by recognised body of accountants to deliver within one month of their qualification list of members qualified for appointment as auditors.	90B/200(4)	Body of accountants	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
BOOKS OF ACCOUNT Failure to keep, on a continuous and consistent basis, proper books of account.	90B/202 (10)	Company and director in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure to keep proper books of account being considered to have contributed to a company's insolvency.	90B/203(1)	Officer in default	Summary	6 months, or both	€1,904.61	Retain. The Review Group notes the civil sanction against such directors in s 204 of the 1990 Act and recommends the exclusion of auditors from the scope of s 204(6) of the 1990 Act which exposes auditors to personal liability for the entire debts of an insolvent client company if they are convicted under s 194 of the 1990 Act.	Director
			Indictment	5 years or both	€12,697.38		DPP
PURCHASE OF OWN SHARES Failure to retain and permit inspection of contracts for purchases of own shares.	90B/222(3)	Company and every officer in default	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that an application might be made to court under subs(4).	Registrar/ Director
			Indictment	5 years or both	€12,697.38		DPP
Failure to deliver to registrar within twenty-eight days return relating to purchase of own shares.	90B/226(4)	Company and every officer in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure to comply with Ministerial regulations relating to purchase of own shares.	90B/228(3)	Company and every officer in default	Summary	12 months, or both	€1,904.61	Retain. The Review Group notes that failure to abide by any such Ministerial Regulations would result in any share buy back being void.	Director
			Indictment	5 years or both	€12,697.38		DPP
Failure by quoted company to notify recognised stock exchange.	90B/229(3)	Company and every officer in default	Summary	12 months, or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
Contravention of provisions, 90B/207-211, 218, 222-224.	90B/234	Company; director, manager, secretary or other officer or other person purporting to act in such capacity, where offence committed with consent of or connivance or neglect; if affairs managed by members, member with whose consent, connivance or to whose neglect it is attributable	Summary		€1,904.61	Retain.	Director
			Indictment		€12,697.38		DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
FALSE INFORMATION Furnishing false information in any return, report, certificate, balance sheet etc. in purported compliance of the Companies Acts. (In certain circumstances, maximum prison term on indictment may be increased)	90B/242(1) -AM 2001/106	Person in default	Summary Indictment	12 months, or both 5 years or both (7 years or both)	€1,904.61 €12,697.38	Retain.	Director DPP
DOCUMENTS Destroying, mutilating or falsifying any book or document or being privy thereto.	90B/243(1)	Officer	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
Fraudulently parting with, altering or making an omission in any book or document or being privy thereto.	90B/243(2)	Any person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
CLASSIFICATION Failing to comply with any system of classification required by Ministerial regulation for documents to be filed with the registrar.	90B/247(4)	Any person in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
UCITS Contravention of 90B/252-261; any regulation made thereon; or any condition laid down under 90B/257 by Central Bank of Ireland	90B/262	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
ACCOUNTS-EXEMPTION FROM AUDIT REQUIREMENT Failing to include statement in balance sheet in accordance with 99/33 (4) and (5):	99/33(6)	Company and every officer in default	Summary Indictment		€1,904.61 €12,697.38	Retain.	Director DPP
Wilfully making a false statement in any return, balance sheet or other document required for the purposes of 99/Part II	99/37(1)	Any person in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Director DPP
RESIDENT DIRECTOR Failure of a company to have a resident director or bond or a certificate under 99/44	99/43(13)	Company and every officer in default	Summary Indictment	12 months, or both 5 years or both	€1,904.61 €12,697.38	Retain.	Registrar/ Director DPP

Offence	Section	Offender	Mode of Trial	Maximum Prison Term	Maximum Fine	Review Group's Recommendations and Comments	Responsibility for Prosecution
LIMITATION ON NUMBER OF DIRECTORSHIPS Becoming or remaining a director or shadow director in breach of 99/45(1)	99/45(8)	Person in default	Summary	12 months, or both	€1,904.61	Retain.	Registrar/ Director
			Indictment	5 years or both	€12,697.38		DPP
DISCLOSURE OF INFORMATION Disclosure, except in accordance with law, of information obtained by the Director which has not otherwise come to the notice of the public	2001/17(4)	Any person	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
OBLIGATION TO REPORT ON CONDUCT OF DIRECTORS Failure by Liquidator of insolvent company to provide report to ODCE, or to apply to Court for the restriction of directors under 1990B/150 unless relieved by ODCE of obligation	2001/56(3)	Liquidator	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
EXAMINATION OF LIQUIDATOR'S BOOKS Failure by liquidator to produce books to the ODCE for examination or to answer questions of the ODCE as to the content of the books and give such assistance in the matter as is reasonable	2001/57(4)	Liquidator	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP
REPORTING TO ODCE OF MISCONDUCT BY LIQUIDATORS OR RECEIVERS Failure of professional body to report to the ODCE a finding by its disciplinary committee that member conducting liquidation or receivership failed to maintain appropriate records.	2001/58	Professional body and every officer to whom the failure is attributable	Summary	12 months or both	€1,904.61	Retain.	Director
			Indictment	5 years or both	€12,697.38		DPP

9

CHAPTER 9

Simplification: Prospectuses and Public Offers

9.1 Introduction

9.1.1 The principal legislation governing public offers of securities and their admission to trading in Ireland ("public offers legislation") is as follows:

(i) Parts III and XII of and the Third Schedule to the 1963 Act. This is the original Irish law imposing requirements to prepare and file a prospectus when shares or debentures are offered in writing to the public. This law largely follows Part III of the UK Companies Act 1948. Part III of the 1963 Act contains the law imposing criminal and civil liabilities for untrue or misleading statements in prospectuses. It also contains other provisions which regulate public offers of shares and debentures.

(ii) The 1984 Stock Exchange Regulations, as amended, which implement the Listing Particulars Directive,[1] the Admissions Directive[2] and the Interim Reports Directive.[3] These Directives are now consolidated in Directive 2001/34/EC dated 28 May 2001. This law is not directly concerned with public offers per se, but regulates the procedures for admission of securities to official listing, including the contents of listing particulars, i.e. the prospectus-type document which must be prepared when securities are admitted to listing for the first time.

(iii) The 1992 Prospectus Regulations which implement the Prospectus Directive.[4] This law regulates when a prospectus must be issued, as well as the content of such a prospectus where securities (not just shares or debentures) are offered to the public (whether in writing or orally).

(iv) The Investment Intermediaries Act 1995 and the advertising requirements imposed under that Act. This Act implements the Investment Services Directive and Capital Adequacy Directives (93/22/EEC of 10 May 1993 and 93/6/EEC of 15 March 1993). Amongst other things the Act and the advertising guidelines made under the Act regulate communications made with a view to inducing persons to enter into an "investment business contract", which includes the purchase of securities.

(v) Collective investment scheme legislation such as the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989, the Unit Trusts Act 1990, Part XIII of the 1990 Act and the Investment Limited Partnerships Act 1994.

9.1.2 In this area there is also an abundance of further, non-legislative, regulation through the Listing Rules of the Irish Stock Exchange and, in relation to collective investment schemes, the requirements of the Central Bank of Ireland.

9.1.3 Submissions received by the Review Group indicated a widespread belief that there is a lack of cohesion between key aspects of these main bodies of legislation and that this can lead to confusion, uncertainty and inconsistency in the application of public offers legislation.[5] Many of the difficulties arise from the fact that the 1992 Prospectus Regulations do not clearly fit with Parts III and XII of and the Third Schedule to the 1963 Act and the 1992 Prospectus Regulations are unclear as to their interaction with the 1984 Stock Exchange Regulations.

1 80/390/EEC of 17 March 1980, subsequently amended by Council Directives: 87/345/EEC of 22 June 1987; 90/211/EEC of 23 April 1990; and 94/18/EC of 30 May 1994.

2 79/279/EEC of 5 March 1979.

3 82/121/EEC of 15 February 1982.

4 89/298/EEC of 17 April 1989.

5 Views were expressed that one of the intentions behind the adoption of the Prospectus Directive, that of facilitating public offers both in Ireland and cross-border has not been achieved. This is due in part to the manner in which the Prospectus Directive was implemented into Irish law but the issue is by no means an Irish issue alone; the proposed reforms of public offers legislation at EU level is ample testimony to this

9.1.4 The circumstances in which a disclosure document, whether a prospectus or listing particulars, must be prepared vary depending on the status of the securities to be offered, the number of people to whom they are to be offered and where such a document might have been circulated. The position (subject to exceptions) is summarised in the following table.

Nature of securities[6] to be offered	**No public offer**		**Public offer subject to 1992 Prospectus Regulations**	**Public offer exempt from 1992 Regulations**	
	Issue is less than 10% of existing capital of that class[7]	**Issue is greater than 10% of existing capital of that class**		**Document first circulated in UK[8] or oral[9] offer**	**Other offers (i.e. other than UK or oral offers)**
Shares, debentures or other debt securities, not to be listed	No document required	No document required	Prospectus in accordance with 1992 Regulations.	No document required	Prospectus in accordance with 1963 Act
Other securities, not to be listed	No document required	No document required	Prospectus in accordance with 1992 Regulations	No document required	No document required
Shares, debentures or other debt securities, to be listed	No document required	Listing Particulars	Prospectus in accordance with 1992 Regulations	No document other than Listing Particulars	No document other than Listing Particulars
Other securities, to be listed	No document required	Listing Particulars	Prospectus in accordance with 1992 Regulations	No document other than Listing Particulars	No document other than Listing Particulars
Shares, debentures or other debt securities, already[10] listed	No document required	No document required	Not applicable to offers of already listed securities	No document required	Prospectus in accordance with 1963 Act
Other securities, already listed	No document required	No document required	Not applicable to offers of already listed securities	No document required	No document required

9.2 Approach of the Review Group

9.2.1 The Review Group decided to approach issues concerning public offers of securities with a view to addressing perceived anomalies only rather than seeking to amend and restate the entire law. The present law concerning public offers has to a large extent become a matter decided, and to be further decided upon, at EU level. Whilst an overhaul of the law in this area would be welcomed by many securities' market participants and professionals, such overhaul in an Irish context is unlikely to be a useful exercise in the long term. There have been significant proposals made during 2001, which, if implemented, would standardise the law applicable to public offers throughout the EU.[11] In addition, the Review Group decided not to include collective investment legislation in its review in this chapter.

6 The 1963 Act defines "share" as a "share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied". "Debentures" are defined as "debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not". The definition of shares would not appear to extend to options over or derivatives of shares.

7 See Article 6.3 of the Listing Particulars Directive.

8 See 9.3.4.

9 Where no prospectus or letter of application is circulated.

10 i.e. where a holder sells the securities in question.

11 See *Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading*. 30 May 2001 COM(2001) 280. See also Consultation Document of the Services of the Internal Market Directorate General, *Towards an EU regime on transparency obligations of issuers whose securities are admitted to trading on a regulated market*: Markt / 11 July 2001.

9.2.2 The central issue the Group identified is the existence of public offers legislation in addition to the legislation implementing the Prospectus Directive. The Group, therefore, examined the approach of some other EU Member States to the implementation of the Prospectus Directive and to public offers legislation in general The European jurisdictions chosen were the UK, Germany, France and Italy as the largest countries and Austria, Denmark and Luxembourg as peer countries.

9.2.3 Arising from the submissions and the approach taken, the Group examined:

(i) the interaction of Parts III and XII of and the Third Schedule to the 1963 Act with the 1992 Prospectus Regulations;
(ii) the application of law to prospectuses which are listing particulars;
(iii) the perceived effect of s 23 of the Investment Intermediaries Act 1995 and advertising requirements under that section;
(iv) the accommodation of sophisticated and/or derivative financial instruments under the law;
(v) the regulation of public offers via the Internet;
(vi) miscellaneous anomalies.

9.3 The interaction of Parts III and XII of and the Third Schedule to the 1963 Act with the 1992 Prospectus Regulations.

1992 Prospectus Regulations preserve 1963 Act prospectus contents requirements

9.3.1 The decision to implement the Prospectus Regulations by means of secondary legislation necessarily fettered the ability to synchronise the provisions of the Prospectus Directive with those of Part III of the 1963 Act. In this context Regulation 8(2) of the 1992 Prospectus Regulations preserves the prospectus contents requirements contained in the Third Schedule to the 1963 Act. It has been submitted to the Review Group that, the preservation of these requirements in their entirety is excessive[12] – the application of Articles 11.2 to 11.6 of the Prospectus Directive ought to be sufficient.

9.3.2 The objective of the 1992 Prospectus Directive is *complete* disclosure of *all* relevant information rather than *accurate* disclosure of *specified* information. Article 11 of the Prospectus Directive[13] requires disclosure in a prospectus of:

> the information which, according to the particular nature of the issuer and of the transferable securities is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities.[14]

9.3.3 The 1963 Act does not require this level of disclosure – all that is required is the furnishing of specific information without "untrue statements".[15] A statement included in a prospectus is deemed to be untrue if it is misleading in the form and context in which it is included.[16] However, there is no requirement that there be complete or even adequate information. The Review Group accepts that it is possible to prepare a prospectus which complies with the 1963 Act but which in fact provides little information on the business of the company concerned.

Exemptions do not carry over from 1992 Prospectus Regulations to the 1963 Act

9.3.4 Compliance by an EU company with the prospectus preparation and filing requirements under the 1992 Prospectus Regulations excuses such a company from having to comply with the comparable law in Parts III and XII of the 1963 Act. However, if an offer of shares is exempted from the 1992 Prospectus Regulations such as not to trigger a requirement for a prospectus, that exemption operates to revive the requirements of the 1963 Act rather than to keep an exemption. This is illustrated by the example of employee share offers, which are

12 e.g. the requirement for the full details of option holders or the inclusion of separate accounts for the company in addition to consolidated accounts.
13 By application of the Listing Particulars Directive 80/390/EEC of 17 March 1980. See also Article 7.
14 Comparable provisions are contained in the Listing Particulars Directive.
15 See ss 49 and 50 of the 1963 Act, dealing with civil and criminal liability respectively.
16 1963 Act, s 52(b).

exempt from the 1992 Prospectus Regulations' prospectus requirements, but are not necessarily so under the 1963 Act.

9.3.5 One particular idiosyncracy that arises is that an offer in Ireland to employees in the State of shares or debentures of a company first made in the UK (exempt from the requirement to prepare a prospectus under the 1992 Prospectus Regulations) would not appear to be subject to a requirement to prepare a prospectus, although it would be if the the issue were only made in Ireland. This is because of the joint effect of s 367(3) of the 1963 Act and Article 2 of the Companies (Recognition of Countries) Order 1964. Section 367(3) states:

> This Part[17] shall not apply to a prospectus or to a form of application for shares or debentures first published or issued in a country recognised for the purpose of this section if the prospectus or form of application complies with the law for the time being in force in the country in which the prospectus or form of application was first published or issued.

9.3.6 Article 2 states:

> Northern Ireland and Great Britain are hereby recognised for the purposes of s. 367...of the Companies Act, 1963.

Section 367 does not specify what law must be complied with. Therefore a situation exists where an offer of securities to employees may benefit from an exemption under UK law to prepare a prospectus, and under Irish law the form of application or document which is used to offer the securities to employees need not conform to Irish law.

Some European examples

9.3.7 In France, Italy, UK, Denmark and Luxembourg the law on public offers does not materially extend beyond the implementation of the Prospectus Directive. In Germany, the law extends for procedural aspects only. In all of these jurisdictions, however, the law is centred around the implementation (however subjective it might be in any particular case) of the Directive, rather than other law.

9.3.8 There are exemptions from the relevant legislative provisions for restricted circles in all of these countries. Restricted circles are variously defined but commonly include "sophisticated investors" who understand the risks (France, Italy, Germany, UK and Austria) and groups of offerees limited by size (France, Italy, UK, Denmark and Luxembourg). The ceiling on the number of persons exempted under the latter provision can range from 5 to 1,000.

9.3.9 Exemptions for share offers to employees apply to a greater or lesser extent in all seven of the countries considered.

9.3.10 In all seven countries - and in Ireland - the applicable rules for public issues apply to offers by shareholders as well as to companies making an offer of shares to the public. The only, partial, exception to this is Germany where this provision applies only to first time public offers.

1992 Prospectus Regulations preserve requirement for Third Schedule information

9.3.11 The provisions of the 1963 Act are such that they set out a schedule of matters that should be included in prospectuses and require that those matters be set out truthfully and accurately. The Prospectus Directive imposes a much more onerous requirement. Not only does it set out matters for inclusion in prospectuses, as stated above at 9.3.2, it imposes a requirement that the prospectus must contain "the information which, according to the particular nature of the issuer and the…securities…is necessary to enable investors...to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities". This imposes a legal duty upon the issuer to ensure that the information in the prospectus is complete. This, in the Group's view, is a much more onerous obligation and more likely to ensure that all information that investors will need will be included in the prospectus.

17 Part XII.

Conclusion as to interaction between the 1963 Act and the 1992 Prospectus Regulations

9.3.12 It appears to the Review Group that the main issue causing difficulties in the public offers area in Ireland is the retention of certain legislation in addition to the Prospectus Directive which is anomalous to the intent of that Directive. The most appropriate course of action is to repeal the provisions of the 1963 Act which are causing difficulty, and to amend or supplement the 1992 Prospectus Regulations appropriately so that they can be utilised as a competent regulatory framework for public offers pending the outcome of current deliberations in the EU.[18]

9.4 Proposed amendments to the 1992 Prospectus Regulations

9.4.1 Working on the basis of the integration of the prospectus obligations of the 1963 Act and the 1992 Prospectus Regulations, the Review Group recommends that the 1963 Act provisions as to when a prospectus must be prepared and filed be repealed and that the 1992 Regulations be utilised and amended so as to regulate this.[19]

Clarify that the 1992 Prospectus Regulations apply to all offers, written or oral

9.4.2 The Review Group recommends that Regulation 6 should be amended to state: "subject to Regulation 21 of these regulations it shall not be lawful to make a public offer of securities unless a prospectus is published which complies with the requirements of this Part and the issue of which does not contravene s 46 of the 1963 Act". The effect of this change is to remove reference to "a form of application for securities of a company" and places the focus squarely on whether a public offer is being deemed to be made or not. It also makes it clear that offers made by Irish registered companies are subject to the 1992 Prospectus Regulations even if the offer is not being made in Ireland.

Identify those issues that are and are not considered to be public offers

9.4.3 The Review Group recommends that Regulation 6 should be further amended to identify what is and what is not considered, generally speaking, to be a public offer. The Group recommends that Regulation 6 should state that a public offer of securities is defined as:

(i) an offer of transferable securities to the public in Ireland; or
(ii) an offer of transferable securities to the public by a company.

This means that any offer (whether written or oral) to the public by any entity, Irish or overseas, of any securities (whether shares, debt securities or derivatives of either) in or to persons in Ireland would be an offer to the public. It would also mean that any offer by an Irish-incorporated and registered company, no matter where made, would be an offer to the public.

9.4.4 The integration of the law will mean that the exemptions which currently apply in the Prospectus Directive, such as offers to persons in the context of their professions or to a restricted circle (see 9.4.7), or offers where the total amount raised is less than €40,000, can now extend to all public offers. Similarly, offers to employees would not now be considered to be offers to the public.

9.4.5 Much time and money can be expended where issuers try to establish whether a particular offer is "to the public" in the first place. A number of submissions were received on this point and on the related issue of what a "restricted circle of persons" is.

9.4.6 Section 61 of the 1963 Act provides:

> (1) Any reference in this Act to offering shares or debentures to the public shall, subject to any provision to the contrary contained therein, be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person

18 See 9.2.1 and footnote 11.

19 This will require that an enabling section is inserted in the Act to amend the Regulations, as the amendments proposed would not be able to be effected under the European Communities Act 1972.

> issuing the prospectus or in any other manner ...
> (2) Subsection (1) shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it...

9.4.7 There is no definition of a "restricted circle of persons". It can be argued that all the left-handed people in the world constitute a "restricted circle" as, try as they might, right-handed people cannot become part of it. More plausibly, a pre-emptive offer (such as a rights issue or open offer) to the existing shareholders of a company only would appear to be an offer to a restricted circle – there is a qualitative nature to the "circle" and the "restriction". As against that, Article 11.7 of the Prospectus Directive anticipates not a disapplication of the Directive but rather a lessening of the information to be set out in the prospectus in the case of a pre-emptive offer:

> Where shares are offered on a pre-emptive basis to shareholders of the issuer on the occasion of their admission to dealing on a stock exchange market, the Member States or bodies designated by them may allow some of the information specified in paragraph 2 (d), (e) and (f) to be omitted, provided that investors already possess up-to-date information about the issuer equivalent to that required by Section III as a result of stock exchange disclosure requirements.[20]

9.4.8 Alternatively, the word "restricted" might be construed as "limited in number" so as to suggest that for example 12, 30 or 50 persons constitute a restricted circle. The Group also noted that Irish legislation does not provide for exemptions for offers to sophisticated investors or in minimum tranche sizes in all relevant aspects.

9.4.9 The Review Group therefore recommends that Regulation 6 of the 1992 Prospectus Regulations should include a definition of "restricted circle" which to some extent follows the approach taken under UK legislation. Therefore an offer to a "restricted circle" would be defined as an offer to:

(i) a limited number of persons which the Review Group suggests be 150 persons[21](regardless of level of sophistication or affiliation or otherwise);
(ii) persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer subject to a minimum subscription of €40,000.[22]

Provide for (i) mutual or similar recognition and (ii) exemptions from Irish law where the offer is not made in Ireland

9.4.10 There are situations which arise where securities of an Irish company or derived from securities of an Irish company are offered in another jurisdiction, for example in the USA with a quote for those securities on NASDAQ. In such circumstances the company will be obliged to comply with exacting disclosure requirements in the prospectus under US law and then face further Irish requirements. The 1992 Prospectus Directive applies only to the offer of securities in the EU, regardless of issuer rather than to offers of securities by EU companies regardless of where the offers are made. Where the location of the offer triggers a requirement for compliance with rigorous securities laws, the Review Group considers that there is no public purpose served by applying distinct Irish laws which may have modest, if any, additional value.

9.4.11 The Review Group therefore recommends that the Minister may by order from time to time exempt types of offer of securities from the requirement of publication of a prospectus, subject to:

(i) the offer not being made in the State, and residents of the State being precluded from accepting or procuring or assisting the acceptance of that offer;
(ii) a prospectus being published which complies with the regulatory requirements of the territory in which the offer is primarily made and such prospectus being filed with the Registrar;

20 This is similar to the existing disapplication of the Third Schedule where a prospectus is not issued generally, i.e. where it is issued to existing members or debenture holders of the company; see ss 44(7) and 361(8) of the 1963 Act.

21 To be aligned with the proposals in the draft EU proposals discussed at 9.2.1.

22 This figure is aligned with that in Article 2.2(a) of the Prospectus Directive which suggests an exemption for offers in amounts in excess of €40,000 only where all offerees of the securities acquire such minimum value of securities.

(iii) it appearing to the Minister that the regulatory requirements governing the offer in that territory provide substantially comparable information with that which would otherwise be required under Irish law.

9.4.12 The effect of the above amendments will be to provide that offers which are properly and reputably regulated overseas will be able to avail of mutual recognition-type exemptions.

Provide for a unified registration regime for prospectuses and listing particulars

9.4.13 The filing requirements under ss 47 and 364 of the 1963 Act impose onerous and inconsistent obligations on those conducting public offers other than where an application for listing is made. For example, depending on the circumstances, the prospectus must be signed by each of the directors or their attorneys (or in the case of non-Irish companies, by the chairman and two other directors or their attorneys) and copies of all material contracts must be lodged with the CRO along with, perhaps, already-filed accounts. This can cause delays and is regarded as unduly inconvenient by some issuers. It is also unclear as to whether the filing requirements of s 47 as applied by the 1992 Prospectus Regulations can apply to prospectuses of non-Irish incorporated companies, as it is s 364 of the 1963 Act which applies to non-Irish companies. If a filed document is a listing particulars and a prospectus, it is not clear whether it should be signed by all directors (as per s 47), the chairman and two other directors (as per s 364) or by none (as is the case with listing particulars).

9.4.14 The various bodies of legislation vary in their requirement for filing of material contracts. They are not required in the case of listing particulars or a pre-emptive offer but are required in the case of other offers.

9.4.15 The Group considers that the key matter to be addressed in this area is lack of clarity. The Review Group therefore recommends:

(i) that the current requirement for the filed prospectus to be signed by all directors for Irish issuers be retained but, in order to facilitate non-Irish offerors, it should be sufficient that the filed prospectus be signed by an authorised officer certifying that the prospectus is being issued with the unanimous approval of the board of the issuer; and

(ii) that the present requirement to file material contracts with the CRO in certain circumstances be dispensed with for all offers, on the basis that all material information is required to be included in the prospectus.

Provide for a unified publication regime for prospectuses

9.4.16 As a corollary to the rationalisation of when a disclosure document (i.e. prospectus or listing particulars) must be published, the Review Group recommends that Regulation 12 should be amended to regulate and specify the publication requirements for all prospectuses and listing particulars, so as to align the obligations.

Remove the requirement for Third Schedule information, subject to retention of some specific requirements

9.4.17 Whilst accepting that the key guiding principle is that the Prospectus Directive imposes a requirement that all necessary information be included in the prospectus, the Review Group considered whether there were any matters of such importance that they should be specifically included in prospectuses and should survive the repeal of the Third Schedule. For this, the Group examined the implementing provisions of the Prospectus Directive in the UK, i.e. the Public Offers of Securities Regulations 1995 (SI 1995 No 1537) ("the POS Regulations"). The Group found that there were a number of matters which the UK authorities found desirable to impose in addition to the matters set out in the Prospectus Directive and in a number of cases the Group found that it would be hard to argue that such requirements should not be imposed under Irish legislation also. The Group recommends that only essential extra specific requirements should be imposed and these are as follows:

(i) Audited accounts for the three years prior to the public offer.

The Prospectus Directive requires that accounts be included in the prospectus but does not specify the period which the accounts should cover. Regulation 45 of the POS Regulations specifies a three year accounts' requirement (if the company has been in existence for three years) or gives the alternative of an accountant's report;

(ii) Minimum amount to be raised.

The Prospectus Directive does not specifically require that the prospectus contain information on the minimum amount which is required to be raised before the offer can proceed. Regulation 21 of the POS Regulations imposes this requirement.

(iii) Expenses of the issue.

The Prospectus Directive does not specifically require that the prospectus contain information on the commissions and expenses relating to the offer. Regulation 23 of the POS Regulations imposes this requirement.

(iv) Major shareholdings.

There is no requirement in the Prospectus Directive for disclosure of major shareholdings in the issuer. Regulation 47(2) of the POS Regulations imposes such a requirement.

Items (i), (ii) and (iii) are at present included in the Third Schedule.

9.4.18 In the case of pre-emptive offers, at least some of which at present benefit from the requirement to include Third Schedule information,[23] the Review Group recommends that there be an exemption from the requirement for accounting information, subject to its having been published to shareholders already.[24]

9.5 The application of law to prospectuses which are listing particulars

1992 Prospectus Regulations may duplicate prospectus contents requirements

9.5.1 Submissions received by the Review Group indicated that some concern exists in relation to whether or not the obligations set out in the 1992 Prospectus Regulations are applied to listing particulars. Some issuers are of the view that Regulations 4 (which applies the Prospectus Directive) and 8 (which applies the Prospectus Directive contents requirements) of the 1992 Prospectus Regulations can be interpreted to mean that companies issuing listing particulars may still be required to comply with the requirements of the 1992 Prospectus Regulations in addition to the 1984 Stock Exchange Regulations. There is no carve-out from the application of these Regulations for documents which comply with the contents requirements of listing particulars set out in the 1992 Stock Exchange Regulations. The changes proposed at 9.4 ought to address this issue.

9.5.2 A nuance in the drafting of Regulation 21, and in particular the interaction between paragraphs (2) and (3) of that Regulation, was brought to the Review Group's attention. Regulation 21 relieves companies from the provisions of ss 44(3) and 361(4) of the 1963 Act (which prohibit the issue of a form of application for securities or debentures by an Irish or overseas company without attaching a prospectus which complies with the Third Schedule) but does not, in the absence of a form of application, appear to relieve them from the provisions of ss 44(1) and 361(1) which require every prospectus (as opposed to application form) issued by or on behalf of a company to comply with the Third Schedule. The reference to an application form has, in particular, led to varying

23 Sections 44(7) and 361(8) of the 1963 Act.

24 This would implement Article 11.7 of the Prospectus Directive.

interpretations of what this means and, occasionally, the use of forms of application for compliance purposes rather than as a part of the application process. The changes proposed at 9.4 ought to address this issue.

9.6 The perceived effect of s 23 of the Investment Intermediaries Act 1995 and advertising requirements under that section

9.6.1 In the UK, prospectuses are exempt from the provisions of the Financial Services Act 1995 regulating the content and issue of advertising materials. In Ireland, there is no comparable exemption, and this can cause confusion as to whether those issuing prospectuses must also comply with all of the relevant provisions of the Investment Intermediaries Act 1995. This is particularly the case as the Advertising Guidelines made under s 23 of the Act, most recently published in September 2000, specifically include "prospectus" as an investment advertisement. Where a document is issued by an intermediary rather than by a principal the Act applies. Where a document is issued by the company a principal view is sometimes expressed by advisers that the Act might still apply.

9.6.2 The Group recommends, for the avoidance of any doubt, that the following documents ought to be excluded from the definition of investment advertisement and consequent regulation under the Investment Intermediaries Act 1995 and the advertising guidelines issued by the Central Bank made under the Act:

(i) a listing particulars;
(ii) a prospectus which complies with the law as to prospectuses, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares;
(iii) a mini-prospectus approved for issue (without approval of its contents) by the Irish Stock Exchange under its Listing Rules, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares.

The rationale for this recommendation is that investment advertising legislation and regulation exists as a safety net for documents not regulated as above and not as a primary regulatory regime. Subject to these documents being prepared in compliance with the applicable prospectus law, they ought not require to be treated as though they were documents unregulated by any other law.

9.7 The inadequate provision for sophisticated and/or derivative financial instruments

9.7.1 The public offers legislation in Ireland was framed before many of the current sophisticated investment products, currently in issue, were developed. As these securities can have very different characteristics and be issued in very different circumstances than straightforward equities or bonds, a number of submissions argued that special provision should be made in Irish legislation to facilitate their different needs. The implementation of the recommendation at 9.4.9 may prove to be of assistance to sophisticated investors.

9.7.2 It is the view of the Group that it is outside the Group's simplification remit to make specific recommendations for sophisticated instruments. In any event, the Group considers that the simplification measures now being suggested will be of considerable assistance in respect of public offers of all instruments, including those of sophisticated instruments.

9.8 The regulation of public offers via the Internet

9.8.1 Offers via the Internet are becoming an increasing reality worldwide and they are not provided for specifically in Irish legislation. The Group noted that most of the issues under this heading relate to difficulties that issuers

meet under the laws of jurisdictions other than Ireland. This issue is more appropriate for investment supervision and the investment services sector. Regard should also be had to the Group's recommendations in relation to the definition of public offers at 9.4.3.

9.9 Other anomalies

Timing of allotments

9.9.1 Section 56 of the 1963 Act provides that allotment of shares or debentures cannot take place until the fourth day after publication of the relevant prospectus. This can be very difficult to comply with for most companies because the current practice is that often firm placings of securities take place almost immediately after the document issues. This rule is particularly problematic for international bond issues. The Group recommends the repeal of s 56 of the 1963 Act.

Secondary offerings

9.9.2 Secondary offers are offers of securities made by a seller of securities other than by the company which issued them in the first place. Section 51 of the 1963 Act at present can impute the public issue of shares or debentures to the company where the shares or debentures are offered to the public within two years of their first being allotted. There is a presumption, subject to proof otherwise, that where they are so allotted and subsequently offered, that they were allotted with a view to being offered to the public. This section therefore catches offers for sale where securities are allotted to a merchant bank and then sold immediately by that bank. In those circumstances the company is deemed to be the offeror and it and its directors undertake liability accordingly.

9.9.3 The Group considers that the two-year presumption period is excessive and although there was considerable support for a drawing back of the period to six months, as in the UK, The Group recommends at this stage that it be reduced to one year.

9.9.4 In circumstances where s 51 does not apply, whether by rebuttal of the presumption or by falling outside the section altogether, the law is inconsistent. For example, a secondary offering of unlisted shares is regulated as though it were an issue of unlisted securities by a company and hence, the 1992 Prospectus Regulations apply. This triggers an obligation for a prospectus to be issued with "the information which, according to the particular nature of the issuer and of the transferable authorities offered to the public, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities". Filing of material contracts is also required. This is notwithstanding that the seller may not itself have information (or copies of the material contracts) to facilitate compliance with this requirement.[25]

9.9.5 A secondary offering of already-listed securities is exempt from the Prospectus Directive, and therefore one is sent back to compliance with the Companies Acts. If, however, the secondary offering is of shares or debentures and is made pursuant to a prospectus first issued in Great Britain or Northern Ireland, then there is no Irish law to comply with.[26]

9.9.6 Finally, if there is a form of application for shares or debentures issued to effect a secondary offer (other than an issue first made in the UK), then there is an obligation to prepare a prospectus, with five (not three) years accounts, but not to file either it or any other documents in the CRO.

9.9.7 As to secondary offers generally, it appears that in Europe there is little if any differentiation between offers of shares made by a company or by a shareholder. They all trigger a requirement to prepare, publish and file a prospectus. It was argued that where shares are already listed and the listed company is complying with the law

25 There is scope for administrative exemption of information where it is unavailable to the seller of shares. Article 13.2 of the Directive provides that where "where the initiator of an offer is neither the issuer than a third party acting on the issuer's behalf, the Member States or the bodies designated by them may authorise omission from the prospectus of certain information which would not normally be in the initiator's possession".

26 See s 367(3) of the 1963 Act referred to at 9.3.4.

and Listing Rules, there ought to be sufficient information on the market and generally available to investors. As against that there is a clear difference between, on the one hand, selling shares through a broker without documentation and or a marketing campaign and, on the other, embarking on a marketing campaign of shares to the public.

9.9.8 For consistency and simplicity therefore, the Group recommends that public offers as redefined of securities *by shareholders* be regulated by the Regulations as amended, alone, subject to an exemption from the law to the extent that information has been omitted which was unavailable to the seller of the shares after reasonable enquiry made. The five-year accounting disclosure period which currently applies should be reduced to three years.

Expenses associated with a PLC's securities being traded

9.9.9 The Review Group makes a number of recommendations at Chapter 5, (5.4 *et seq*.) to remove prohibitions on companies with listed securities incurring expenses in connection with capital markets activities at present inhibited by the rules on financial assistance contained in s 60 of the 1963 Act.

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9.10 Summary of Recommendations

9.10 Summary of recommendations

- The 1963 Act provisions as to when a prospectus must be prepared and filed should be repealed and the 1992 Prospectus Regulations utilised and amended so as to regulate this. **(9.4.1)**

- Regulation 6 of the 1992 Prospectus Regulations should be amended to state: "subject to Regulation 21 of these regulations it shall not be lawful to make a public offer of securities unless a prospectus is published which complies with the requirements of this part and the issue of which does not contravene s 46 of the 1963 Act". **(9.4.2)**

- Regulation 6 of the 1992 Prospectus Regulations should state that a public offer of securities is defined as:

  (i) an offer of transferable securities to the public in Ireland; or
  (ii) an offer of transferable securities to the public (anywhere) by an Irish company. **(9.4.3)**

- Regulation 6 of the 1992 Prospectus Regulations should include an exemption for a "restricted circle" which would be defined as:

  (i) a limited number of persons which the Review Group suggests be 150 persons (regardless of level of sophistication or affiliation or otherwise); and
  (ii) persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer subject to a minimum subscription of €40,000. **(9.4.9)**

- The Minister should be authorised to exempt types of offer of securities from the requirement of publication of a prospectus, subject to:

  (i) the offer not being made in the State, and residents of the State being precluded from accepting or procuring or assisting the acceptance of that offer;
  (ii) a prospectus being published which complies with the regulatory requirements of the territory in which the offer is primarily made and such prospectus being filed with the Registrar;
  (iii) it appearing to the Minister that the regulatory requirements governing the offer in that territory provide substantially comparable information with that which would otherwise be required under Irish law; **(9.4.11)**

- The current requirement for the filed prospectus to be signed by all directors for Irish issuers should be retained, but in order to facilitate non-Irish offerors, it should be sufficient that the filed prospectus be signed by an authorised officer certifying that the prospectus is being issued with the unanimous approval of the board of the issuer. **(9.4.15(i))**

- The present requirement to file material contracts with the CRO in certain circumstances should be dispensed with for all offers, on the basis that all material information is required to be included in the prospectus. **(9.4.15(ii))**

- Regulation 12 should be amended to regulate and specify the publication requirements for all prospectuses and listing particulars, so as to align the obligations. **(9.4.16)**

- Only essential extra specific requirements as to content of prospectuses beyond the Prospectus Directive should be imposed, these being:

  (i) Audited accounts for the three years prior to the public offer.
  (ii) Minimum amount to be raised.
  (iii) Expenses of the issue.
  (iv)Major shareholdings. **(9.4.17)**

- In the case of pre-emptive offers, the Review Group recommends that there be an exemption from the requirement for accounting information, subject to its having been published to shareholders already. **(9.4.18)**

- The following documents ought to be excluded from the definition of investment advertisement and consequent regulation under the Investment Intermediaries Act 1995 and the advertising guidelines issued by the Central Bank made under the Act:

  (i) a listing particulars;
  (ii) a prospectus which complies with the law as to prospectuses, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares;
  (iii) a mini-prospectus approved for issue (without approval of its contents) by the Irish Stock Exchange under its Listing Rules, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares. **(9.6.2)**

- Section 56 of the 1963 Act should be repealed. **(9.9.1).**

- The two-year presumption period in s 51 of the 1963 Act should be reduced to one year. **(9.9.3)**

- Public offers as redefined of securities by shareholders should be regulated by the 1992 Prospectus Regulations as amended, alone, subject to an exemption from the law to the extent that information has been omitted which was unavailable to the seller of the shares after reasonable enquiry made. **(9.9.8)**

- The five-year accounting disclosure period which currently applies to prospectuses for secondary offers should be reduced to three years. **(9.9.8)**

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CHAPTER 10

Corporate Capacity and Authority

10.1 Introduction

10.1.1 The Review Group was asked to consider whether the *ultra vires* doctrine, applicable today, should be retained or reformed. A transaction entered into by a company, which does not come within that company's objects (as described in its memorandum of association), or which is not reasonably incidental to its objects, is *ultra vires*. A contract, outside a company's objects, is void and unenforceable against the company (save in certain circumstances where the company's counterparty has entered contractual relations with the company in good faith).

10.1.2 The *ultra vires* doctrine, to a greater or lesser extent, has been diluted or removed in a number of common law jurisdictions. It is now associated with circumstances where the legitimate business expectations of parties to a transaction have been frustrated, with unjust consequences.

10.1.3 It appears from the case of *Sutton's Hospital* (decided nearly 400 years ago),[1] that a chartered corporation had all the powers of a natural person, but if it exceeded its objects as set out in its charter then action could be taken to restrain the corporation or to have its charter forfeited. This action though, if successful, would not affect the validity of the transactions entered into by the corporation.

10.1.4 With the development of industry and commerce (particularly in England) during the 19th century, the need arose to protect the interests of investors/shareholders and creditors to the effect that a corporation's activities be restricted to activities set out in its objects clause.This is subject to the corporation being able to carry on any activity incidental to the objects such as a trading company's powers to borrow.[2] This approach was firmly established, in 1875, in *Ashbury Railway Carriage and Iron Co. v. Riche*[3] where the House of Lords emphasised that the purpose of the *ultra vires* rule is the protection of both investors and creditors, i.e. investors should know the purpose for which their funds are to be used and creditors should know the nature of the business of the company to which they are giving credit.

10.1.5 Although the intention was that a company be limited in its activities by the objects set out in its memorandum of association, this has been effectively circumvented by companies having objects clauses enabling them to carry on most types of activity.[4] However, the courts have constrained this development by distinguishing between objects and powers, powers being used only for the purpose of carrying out the objects.[5]

1 (1612) 10 Co Rep 1.

2 *General Auction Estate and Monetary Company v. Smith* [1891] 3 Ch 342.

3 (1875) LR 7 HL 653. The rule was applied in Ireland as early as 1886 in *Re The Balgooley Distillery* (1886) 17 LR Ir 239 and later in *Re Bansha Woolen Mills Co Ltd* (1887) LR Ir 181. The *Ashbury* authority was expressly imported into post-1937 Irish law in *Re Cummins, Barton v. Bank of Ireland* [1939] IR 60 and in *Hennessy v. Agricultural and Industrial Development Association* [1947] IR 159. 4

4 In *Bell Houses Ltd v. City Wall Properties Ltd*[1966] 2 QB 656 the Court of Appeal upheld the validity of an object permitting the company to "carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to any of the above businesses or the general business of the company."

5 The distinction was explained by *Buckley LJ in Re Horsley & Weight Ltd* [1982] Ch 442 at 448: " In the case of express 'objects' which, upon construction of the memorandum or by their very nature, are ancillary to the dominant or main objects of the company, an exercise of any such power can only be *intra vires* if it is in fact ancillary to the pursuit of some dominant object." In *Cotman v. Brougham* [1918] AC 514 the House of Lords mitigated the effects of the "main objects" rule by upholding an "independent objects clause" which declared that every sub-clause of the objects should be construed "as a substantive clause and not limited or restricted by reference to any other sub-clause…and none of the sub-clauses or objects specified therein should be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause." The limits of the independent objects clause were exposed, however, in *Re Introductions Ltd* (No 1)[1968] 2 All ER 1221 where it was held that the power to borrow money can never be an independent object.

10.2 UK analysis and reform

10.2.1 In 1945 the Cohen Report[6] in the UK noted the tendency to include a whole range of activities in a company's objects clause, the effect of which was to make the doctrine of *ultra vires* "an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company."[7] They considered that "the *ultra vires* doctrine serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation."[8] Accordingly, they recommended that a company have the same powers as an individual. However, this recommendation was not implemented in the UK Companies Act 1948.

10.2.2 Subsequently, in 1962, the Jenkins Committee[9] reported that a company, not being a natural person, could act only through directors or other agents exercising powers delegated to them by the company. The Committee considered that the delegation to the directors of all the powers of a natural person (conferred on the company) would be a retrograde step. The Jenkins Report highlighted the difficulty posed by third parties being fixed with constructive notice of the directors' delegated powers, which would make the third party fixed with such notice little better off if the *ultra vires* rule was abolished. The Report stated that "to give complete protection to the third party it would be necessary to absolve him not only from constructive, but also from express, notice of any limitation upon the directors' delegated powers. In other words he would have to be deemed not to know things which he actually did know – a legislative expedient which seems to us highly undesirable."[10]

10.2.3 The Jenkins Report did recommend that a contract should not be invalidated against a party entering into the contract "in good faith" even though the contract was beyond the powers of the corporation.[11] The concept of "good faith" was given statutory recognition in the UK by the European Communities Act 1972. Real reform seemed likely in the UK with the introduction of the Companies Bill 1973 but, with the change of government the following year, the Bill lapsed.

10.2.4 Some reform was made by the UK Companies Act 1985. Shortly thereafter, a report on the reform of *ultra vires* was prepared by Dr Dan Prentice of Pembroke College, Oxford, for the Department of Trade and Industry.[12] The consultation document which followed his report invited recommendations on the proposals that:

(i) a company should have the capacity to do any act whatsoever;
(ii) a third party dealing with a company should not be affected by the contents of a document merely because it is registered with the Registrar or with the company;
(iii) a company should be bound by the acts of its board or of an individual director;
(iv) a third party should be under no obligation to determine the scope of the authority of a company's board or an individual director or the contents of a company's memorandum or articles;
(v) a third party who has actual knowledge that a board or individual director does not have actual authority to enter into a transaction on behalf of the company should not be allowed to enforce it against the company but the company should be free to ratify it;
(vi) companies should not be required to register objects but should provide a statement of their principal business activities when they commence business and thereafter as part of their annual return;
(vii) no additional safeguards are required to protect the interests of shareholders and creditors against imprudent or unfair gratuitous distributions;
(viii) existing remedies are sufficient to protect the interests of shareholders generally even if full capacity is conferred on a company.[13]

6 Report of the Committee on Company Law Amendment (1945).
7 *ibid.*, para 12.
8 *ibid.*
9 Report of the Company Law Committee (1963).
10 *ibid.*, para 39(ix).
11 *ibid.*, para 41.
12 *Reform of the Ultra Vires Rule, A Consultative Document*, Department of Trade and Industry (1986).
13 *ibid.*, pp 3–4.

10.2.5 It appears to the Review Group that many of these proposals have much merit. These proposals gave rise ultimately to certain provisions of the UK Companies Act 1989. The Group understands that UK law (as set out in s 35 of the UK Companies Act 1985 and amended by s 108 of the UK Companies Act 1989) can be broken down into three sub-divisions:

(i) "the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."[14] In addition, a member of a company may bring proceedings to restrain it from doing an act which would be beyond the company's capacity and it remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum;[15]

(ii) "in favour of a person dealing with a company in good faith, the powers of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution."[16] A person is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution;[17]

(iii) "a party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation of the powers of the board of directors to bind the company or authorise others to do so."[18]

10.2.6 Subsequently, in October 1992, the final report of the Legal Risk Review Committee in the UK proposed that the *ultra vires* doctrine be abolished and all artificial persons should have the same capacity as natural persons. It indicated the reasons for this as being:

(i) "there is no conceptual reason why the powers of a corporation or other artificial person should be limited by its constituent instrument;

(ii) the powers or purposes expressed in that instrument may be treated as delimiting the powers of the corporation's agents to act on its behalf;

(iii) a counterparty dealing with the corporation may then be able to claim the benefit of the principle of ostensible authority;

(iv) this provides a general safe harbour for counterparties who reasonably rely on the corporation's representation that its agents have power to act on its behalf."

10.2.7 However, it added that it does not protect a counterparty who knew or should reasonably have known that the agent's powers were limited but removes risks arising from an honest misapprehension induced by the corporation itself.

10.2.8 The Review Group has sympathy with that Report's suggestion "that the *ultra vires* doctrine creates unnecessary risks and allocates them in an unfair way. It leads, as it did in the swaps case,[19] to a denial of legitimate expectations that bargains will be enforced." The Report concludes that some criticism can be made of the language of the amendments introduced by the Companies Act 1989 and it would in their view have been more elegant to adopt the Australian solution of giving a company the legal capacity of a natural person.

10.2.9 It appears that, notwithstanding the recommendations of the Legal Risk Review Committee, no action has been taken in the UK to implement the Committee's recommendations.

14 UK Companies Act 1985, s 35(1).
15 *ibid.*, s 35 ss (2) & (3).
16 *ibid.*, s 35A (1).
17 *ibid.*, s 35A (2).
18 *ibid.*, s 35B.
19 *Hazell v. Hammersmith & Fulham LBC* [1992] 2 AC 1; see 10.6.4 below.

10.3 Common law jurisdictions (outside the UK)

Australia

10.3.1 In Australia, the Corporations Act 2001[20] provides that "a company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate…". It goes on to set out some powers.[21]

10.3.2 Interestingly, the legislation provides that "a company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it."[22] This provision should be particularly helpful in the context of corporate guarantees where a common law principle of commercial benefit has developed in Ireland,[23] a position more recently recognised by the 2001 Act.[24] It would be useful also in respect of some corporate transactions, such as a reorganisation, which may involve a gratuitous element on the part of a corporation within a group.[25]

10.3.3 The Australian legislation further provides[26] that "if a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers" and further that "if a company has a constitution, it may set out the company's objects." It goes on to provide that an act or the exercise of a power is not invalid merely because it is contrary to an express restriction or prohibition, or beyond any objects.

10.3.4 The legislation prescribes[27] the manner in which a person dealing with a company or its agent should act. It specifies that a person dealing with a company is entitled to make certain assumptions, namely:

> "(1) A person may assume that the company's constitution (if any), and any provisions of this Law that apply to the company as replaceable rules, have been complied with.
>
> (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC[28], to be a director or a company secretary of the company:
>
> (a) has been duly appointed; and
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
>
> (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:
>
> (a) has been duly appointed; and
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company."

20 In s 124(1).

21 The powers listed in s 124(1) are: "(a) the power to issue and cancel shares in the company;(b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long); (c) grant options over unissued shares in the company; (d) distribute any of the company's property among the members, in kind or otherwise; (e) give security by charging uncalled capital; (f) grant a floating charge over the company's property; (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction; (h) do anything that it is authorised to do by any other law (including a law of a foreign country)."

22 In s 124(2).

23 In *Hutton v. West Cork Railway Co* (1883) 23 Ch D 654 Hutton LJ stated that "charity cannot sit at the boardroom table …There can be no cakes and ale except for the benefit of the company," or as Murphy J put it in *Re Kill Inn Motel Ltd*, High Court, 16 September 1987, "a commercial body cannot make gifts." Accordingly, a trading company cannot: make gratuitous payments (*Parke v. Daily News Ltd* [1962] Ch 927); distribute surplus assets in a liquidation to persons who are not members (*Roper v. Ward* [1981] ILRM 408); nor guarantee the obligations of others (*Re PMPA Garage (Longmile) Ltd* (*No 1*) [1992] 1 IR 315) unless some benefit can be shown to accrue to the company as a result.

24 See s 78 of the 2001 Act which repealed and substituted s 34 of the 1990 Act.

25 In *Re Frederick Inns Ltd* [1991] ILRM 582 (High Court), [1994] 1 ILRM 387 (Supreme Court) the sale of assets by companies in a group with a view to meeting the liabilities of the group to the Revenue Commissioners was held to be *ultra vires* since the proceeds contributed by some of the companies exceeded their own individual liability to the Revenue Commissioners.

26 Corporations Act 2001.

27 *ibid.*, ss 128 and 129.

The Review Group believes these assumptions are helpful.

10.3.5 However, the legislation provides that a person is not entitled to make such an assumption if, "at the time of the dealings they knew or suspected that the assumption was incorrect."[29] The Review Group believes this would give rise to interpretative difficulties, but may be useful with an additional statutory provision to the effect that there is no duty on a third party to review a company's constitution prior to entering into a contract with the company.

10.3.6 With regard to constructive notice, the legislation provides that (save in the case of a charge that is registrable under the Act) "a person is not taken to have information about a company merely because the information is available to the public from ASIC."[30]

New Zealand

10.3.7 There are somewhat similar provisions in the New Zealand Companies Act 1993 which provides that (subject to the other provisions of the Act) "a company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction, and for [these purposes has] full rights, powers and privileges."[31] It provides also that subject to certain exceptions "no act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property."[32] It further provides, as in Australia, that "the fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act."[33]

10.3.8 Helpfully, the New Zealand legislation refers also to guarantors. A company, or a guarantor of an obligation of a company, may not assert against a person dealing with the company, or with a person who has acquired property, rights, or interests from the company, that the constitution of the company has not been complied with; or that a person held out by the company as a director of the company has not been duly appointed, or does not have the authority to exercise a power "unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to."[34]

10.3.9 It is also provided that "a person is not affected by, or deemed to have notice or knowledge of the contents of, the constitution of, or any other document relating to, a company merely because – (a) the constitution or document is registered on the New Zealand register; or (b) it is available for inspection at an office of the company."[35]

10.3.10 The Review Group believes this is a useful provision, taking the objects clause out of the realm of being subject to constructive notice, although the Group believes it should be subject to the *caveat* that this does not apply to registered charges (as excluded under the Australian legislation).[36] Registered charges are a separate area of the law and not the subject of deliberation at this time by the Review Group.

Canada

10.3.11 The provisions under the Canada Business Corporations Act are somewhat similar; this Act[37] provides that a corporation has the capacity and rights, powers and privileges of a natural person.[38] Indeed, the New Zealand

28 Australian Securities and Investments Commission.
29 *ibid.*, s 128(4).
30 *ibid.*, s 130.
31 New Zealand Companies Act 1993, s 16.
32 *ibid.*, s 17(1).
33 *ibid.*, s 17(3).
34 *ibid.*, s 18.
35 *ibid.*, s 19.
36 See 10.3.6 above.
37 R.S. 1985, c-44.
38 *ibid.*, s 15(1).

provision is almost identical to it. Although a corporation is restricted from exercising any power contrary to its articles[39] there is no constructive notice by virtue of a document being filed or available for inspection.[40]

Singapore and Malaysia

10.3.12 The Singapore Companies Act[41] and the Malaysian Companies Act[42] both provide that no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act.

10.3.13 In May 2000, the Registry of Companies in Malaysia issued a requirement that no more than three objects could be stated in a company's memorandum of association. In Ireland, the Registrar could not issue such a requirement without statutory authority. It could not be effective, in any event, without further reform as most companies carry out more than three objects or powers in the normal course of their business. It does, however, highlight the need for reform in common law jurisdictions.

10.4 The Cox Report and the 1963 Act

10.4.1 In 1958, the Cox Report[43] in Ireland noted that "the purpose of the doctrine of *ultra vires* has been largely defeated. It does not now give any protection to the shareholders or the creditors of the company and becomes a waste of time and paper. There is much in favour of the view that the doctrine should now be wholly abolished and that every company should have the same powers as an individual whether these are conferred by the Memorandum or not."[44] Despite this statement, the Committee decided not to recommend the abolition of the doctrine. In referring to the Cohen Report's recommendation for reform, they noted that this "is not adopted by the British Parliament and we must assume that there were strong reasons for this decision."[45]

10.4.2 However, partial reform was implemented by s 8 of the 1963 Act. This section states:

> (1) Any act or thing done by a company which if the company had been empowered to do the same would have been lawfully and effectively done, shall, notwithstanding that the company had no power to do such act or thing, be effective in favour of any person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company, but any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof..
> (2) The court may, on the application of any member or holder of debentures of a company, restrain such company from doing any act or thing which the company has no power to do.

Accordingly, this section gives effect to any act done by a company, notwithstanding that the company had no power to do such act, in favour of a person who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company.

39 *ibid.*, s 16(2).
40 *ibid.*, s 17.
41 Chapter 50; section 25(1) provides as follows: "No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer."
42 Act Number 125 (1965).
43 Report of the Company Law Reform Committee (PR 4523) (1958).
44 *ibid.*, p 20, para 49.
45 *ibid.*, p 21, para 50. In fact the Cohen Committee's proposals had not been implemented simply because the Board of Trade decided it would not be justified in holding up the preparation of the UK Companies Act 1948 in order to work out what appeared to them to be a "far-reaching change" which could involve "highly complicated drafting."

10.4.3 Despite this reform, the practice of reviewing objects clauses to ensure that a company has the appropriate object or power to carry out and be bound by the intended transaction is still maintained in corporate, conveyancing and secured lending transactions. Notwithstanding the language of the statute – "actually aware" – the High Court held[46] that a person or its agent who has read the memorandum of association, but who has not understood the language to mean that the company lacked capacity to enter into a certain type of contract, is deemed still to have been "actually aware" of the company's incapacity and therefore cannot rely upon s 8. Thus, the reform implemented by s 8 has not resulted in any change in practice from that prevailing prior to the section's implementation.

10.4.4 More recently, the Supreme Court held that payments received by the Revenue Commissioners from a company in respect of taxes owed to them by other companies in the same group were *ultra vires*. Furthermore, although the Revenue Commissioners were not found by the Supreme Court to have been "actually aware" that the payments were *ultra vires*, they were prevented from relying on s 8 as the payments were held not to have been "lawfully and effectively done" within the meaning of s 8.[47]

10.5 The First Company Law Directive and the 1973 Regulations

10.5.1 Article 9 of the First Directive on Company Law[48] provides:

> 1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.
>
> However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.
>
> 2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.
>
> 3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a person in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 3.

10.5.2 It further provides, in Article 11, that nullity may be ordered where the objects of a company are unlawful or contrary to public policy.

10.5.3 Accordingly, the First Directive encourages Member States to enable companies to be bound by actions and contracts entered into by their officers where such officers are carrying out their duties in accordance with the Companies Acts. This applies even where such officers carry on activities or enter into contracts in the name of the company and the company does not have the capacity to carry out such activities or enter into such contracts.

10.5.4 The Directive also enables Member States to provide that a company will not be bound by an *ultra vires* transaction if the third party knew of the incapacity or could not in view of the circumstances have been unaware of it. This aspect gives rise to difficulty as is evident from the uncertainty created by the Irish Regulations implementing this Directive and the concept of "good faith."

46 *Northern Bank Finance Corporation Limited v. Quinn & Achates Investment Company* [1979] ILRM 221.

47 In *Re Frederick Inns Limited* [1994] 1 ILRM 387; see also Lardner J in the High Court [1991] ILRM 582 at 590.

48 68/151/EEC of 9 March 1968 (OJ Special Edition 1968(1), pp 41–45).

10.5.5 The First Directive was implemented in Ireland by the European Communities (Companies) Regulations 1973.[49] Regulation 6 of these Regulations provides:

> (1) In favour of a person dealing with a company in good faith, any transaction entered into by any organ of the company, being its board of directors or any person registered under these regulations as a person authorised to bind the company shall be deemed to be within the capacity of the company and any limitation of the powers of that board or person, whether imposed by the memorandum and articles of association or otherwise, may not be relied upon as against any person so dealing with the company.
> (2) Any such person shall be presumed to have acted in good faith unless the contrary is proved.
> (3) For the purpose of this Regulation, the registration of a person authorised to bind the company shall be effected by delivering to the Registrar a notice giving the name and description of the person concerned.

10.5.6 These Regulations apply to every company with limited liability but not to companies with unlimited liability[50] (and thus they did not apply to the facts in the decision of *Northern Bank Finance Corporation Limited v. Quinn & Achates Investment Company*[51]).

10.5.7 The critical words of Regulation 6 are its opening words, namely "[i]n favour of a person dealing with a company in good faith." This is a very different test to that of s 8 of the 1963 Act as highlighted in the Second Report of the Joint Committee on the Secondary Legislation of the European Communities (1974). The words "good faith" have been considered outside the State in *International Sales and Agencies Limited and others v. Marcus and another*[52] and in *International Factors (NI) Limited v. Streeve Construction Limited*.[53] In the former case it was held that, "the test of lack of good faith in somebody entering into obligations with a company will be found either in proof of his actual knowledge that the transaction was *ultra vires* the company or where it can be shown that such a person could not in view of all the circumstances, have been unaware that he was party to a transaction *ultra vires*." In the latter case it was held that "the test of lack of good faith depends upon proof of actual knowledge that the transaction was *ultra vires* of the company or that the person dealing with the company could not have been unaware that he was a party to a transaction *ultra vires*, which amounts to a deliberate closing of one's mind to circumstances which would have pointed towards the conclusion of *ultra vires*."

10.5.8 The Review Group recognises that a difficulty with "good faith" is that it is a subjective test. A person cannot be sure he will be found to have acted in good faith unless the simple precaution is taken of ascertaining the capacity of a company and the delegated power of the persons with whom he is dealing prior to concluding a contract. For example, is a person acting in "good faith" if, when proposing to acquire a significant asset from a company, he does not examine the memorandum and articles of association to verify the powers of the company and those of its directors? At present, it would be surprising if the courts found the purchaser to be acting in "good faith" in choosing not to examine the company's memorandum and articles of association.

10.6 Current practice in Ireland

10.6.1 Notwithstanding the provisions of s 8 and Regulation 6, the practice (in transactions involving a significant sum of money) is still to review the objects clause and articles of association of companies entering into transactions. For example, a typical secured financing transaction may involve a company (in a group of companies) borrowing funds from a lender (or syndicate of lenders) to purchase a property and where each company in the group is guaranteeing the borrowing company's obligations to the lender and creating a mortgage and charge over their respective assets in support of their guarantees or, in the case of the borrowing company, to secure directly their own borrowings. Prior to finalising such a contract, the practice is that each company's memorandum and articles of association is reviewed to ascertain:

49 SI No 163 of 1973.
50 *ibid.*, Regulation 3.
51 See 10.4.3 above.
52 [1982] 3 All ER 551.
53 [1984] NI 245.

(i) its correct name;
(ii) its principal objects (to ensure that its borrowing is for the purpose of carrying out one or more of its principal objects);
(iii) its power to borrow and to mortgage/charge to secure borrowings;
(iv) its power to guarantee and to mortgage/charge to secure guarantees;
(v) the power of its directors to manage the company and thus to authorise the giving of a guarantee and a mortgage or charge;
(vi) whether the proceedings of its directors satisfy requirements as to quorum;
(vii) its directors' borrowing powers and any restrictions;
(viii) whether the company's sealing requirements in executing the mortgage/charge have been complied with; and
(ix) whether any other clause or article imposes a restriction on the execution and performance of the anticipated transaction (such as ministerial consent for semi-State companies or the consent of preference shareholders or debentureholders).

10.6.2 If there are any inadequacies, a special resolution will need to be passed by each company (having any inadequacies) amending its objects clause and/or articles of association so that the appropriate objects/powers/articles are sufficient. A notice of the resolution with an amended memorandum and articles of association must be filed in the CRO. A certified copy of the amended memorandum and articles of association is then provided to the lender's solicitor so that he may be satisfied as to the appropriate capacity and powers of the company. This procedure, as required by current law, clearly adds to the cost and time of completing a commercial transaction and, as such, the Review Group believes that it is detrimental to commercial enterprise.

10.6.3 Sometimes comfort is given to counterparties when a company represents and warrants in an agreement that it has the appropriate capacity and power to enter into the agreement to perform its obligations under and to be bound by the terms of the agreements. It may be thought that the company would then be estopped from denying its lack of capacity or powers. This is likely to be false comfort, for a liquidator of the company is unlikely to be bound by such a warranty or representation, particularly where the company may not have had the capacity to make such a warranty or representation in the first place.

10.6.4 The decisions in England at the end of the 1980s concerning the powers of local authorities to enter into interest rate exchange transactions, starting with the House of Lords' decision in *Hazell v. Hammersmith & Fulham LBC*,[54] prompted the Irish Bankers Federation to recommend to their members that they ensure that their corporate customers entering into interest and currency exchange agreements and other derivative transactions have the appropriate power to do so.

10.7 PLCs – The Second Directive on Company Law

10.7.1 The Second Directive on Company Law[55] sets out safeguards for the protection of the interests of members and others in respect of the formation of public limited companies. While the Directive was concerned principally with the maintenance and alteration of capital, it provided also that the instrument of incorporation of a public company limited by shares (and also a public company limited by guarantee and having a share capital), would include the objects of the company.[56] The Directive provides also that in so far as they are not legally determined, the instrument of incorporation would include the rules governing the number of, and the procedure for, appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies.

54 [1992] 2 AC 1.
55 77/91/EEC of 13 December 1976 (20 OJ L 26, 31 January 1977, pp 1 – 13).
56 *ibid.*, Article 2: "The statutes or the instrument of incorporation of the company shall always give at least the following information: (a) the type and name of the company; (b) the objects of the company …".

10.8 Reform for State sponsored bodies

10.8.1 Due to the concerns raised by the English decision in *Hazell v. Hammersmith and Fulham LBC*[57] and questions raised as to the nature of finance leases and note issues (amongst others), partial reform has been implemented for State sponsored bodies. The Financial Transactions of Certain Companies and Other Bodies Act 1992 and the Borrowing Powers of Certain Bodies Act 1996 have removed uncertainty in certain specific areas of capacity for State sponsored bodies.

10.9 Objects and powers

10.9.1 The Review Group accepts that the ability of companies to provide for a multiplicity of objects and powers has rendered the rationale of the *ultra vires* doctrine obsolete in the 21st century. The Group believes that for contracts of a small monetary value the doctrine has become irrelevant as it is simply ignored. For contracts of a large monetary value the possible adverse consequences for a counterparty and its lawyer, in the absence of a thorough review of a company's constitution, are a very real factor. Each review of a company's constitutional documents utilises a lawyer's time at the cost of industry with no particular benefit to any person.

Private companies limited by shares (CLS)

10.9.2 Almost nine out of ten companies registered are private companies limited by shares.[58] The majority of these companies are closely held companies. In many instances the directors and shareholders are likely to be the same people or closely connected. Accordingly (apart from special types of companies such as special purpose companies[59] and property management companies[60]) the Review Group believes that private limited companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person (without the natural person's incapacity status imposed by being a minor, insane, drunk or being subject to undue influence). Thus, the Review Group recommends that, except where otherwise specifically required by a company's promoters, private companies limited by shares be given the legal capacity of a natural person. Clause 2 of a company's memorandum of association should provide simply that pursuant to the relevant section in the proposed Companies Act the company has the legal capacity of a natural person.

10.9.3 The Review Group makes its recommendations for the repeal of the *ultra vires* doctrine for private companies limited by shares because:

(i) *ultra vires* offers little if any protection to shareholders; *ultra vires* has operated to the detriment of creditors;
(ii) *ultra vires* entails additional work to be undertaken by persons and their agents in the preparation of a company's constitution prior to its incorporation, as well as additional work by the CRO prior to the company being granted a separate legal status;
(iii) *ultra vires* results in additional delay and costs being incurred by purchasers, borrowers, guarantors (and other parties) in completing their business transactions;
(iv) *ultra vires* has resulted in some persons, who have entered into commercial arrangements in good faith, having their legitimate expectations thwarted;
(v) *ultra vires* has resulted in companies having pages of objects (and powers) so that they can carry out virtually any (non-regulated) activity thereby rendering the rule meaningless.

57 [1992] 2 AC 1.
59 Companies Report 2000; see 3.2.2.
59 See 10.9.10 below.
60 See 10.9.9 below

10.9.4 If the abolition of the doctrine of *ultra vires* for private companies limited by shares (other than special categories) is to mean anything in practice, it must be clear in any statutory reform that persons entering into contracts with such companies will receive the full benefit of the abolition, without the requirement or desirability for the company's counterparty, or his lawyer, to examine and consider the company's memorandum of association.

10.9.5 Under the current law, counterparties, particularly persons receiving guarantees, are or should be concerned that the guarantor company receives a benefit in giving the guarantee – a separate concept to the doctrine of consideration in the law of contract (which will continue to be relevant).

10.9.6 A gratuitous payment by a company, not specifically authorised by its objects, is *ultra vires*. The abolition of the *ultra vires* doctrine for private companies limited by shares may in the first instance appear to create the opportunity for companies to give gratuitous payments without restriction.[61] To restrict the ability to make such payments would negate the reform of *ultra vires* as it would require a counterparty or its lawyer to make enquiries as to certain payments and guarantees.[62]

10.9.7 It is for the shareholders to appoint persons as directors who will carry out their duties for the benefit of the company. The directors in carrying out their functions should ensure, for their own benefit, that they carry out their duties in accordance with their duties under the Companies Acts[63] and the powers delegated to them by the shareholders. A failure to do so may result in a successful action against them for breach of their fiduciary duty to the company or, indeed, for misfeasance.[64]

10.9.8 However, as already noted,[65] the Second Directive requires PLCs to have objects. There may, particularly in the case of companies which have a listing on an exchange, be some rationale for retaining objects so that investors can feel some comfort when acquiring shares in such a company. Public companies should thus continue to be subject to the *ultra vires* doctrine.

Companies limited by guarantee

10.9.9 The Review Group accepts that public policy considerations require certain companies to have objects. A company limited by guarantee and not having a share capital may be used also as a management company in residential apartment schemes. It is suggested that the members of such companies would wish their companies to have very specific and restrictive objects and powers. Similarly, companies whose functions are to carry out activities of a charitable nature, and which may be granted charitable status by the Revenue Commissioners, may require the retention of designated objects. Accordingly, the Review Group recommends that the *ultra vires* doctrine should be retained for companies limited by guarantee.

Special purpose companies

10.9.10 Individuals or corporations often form what are described as "special purpose companies" or "special purpose vehicles." As the name suggests, these are companies incorporated for a special purpose such as a joint venture or a financing company used in a single specific financing transaction. Many of these entities are used in transactions concluded in the International Financial Services Centre and are a recognised mechanism for achieving the legitimate expectations of the parties involved. It is considered by the company's promoters, in many such cases, to be essential that such companies are not empowered to enter into other transactions. Accordingly, the Review Group recommends that the doctrine of *ultra vires* be retained for special purpose companies.

61 But see the restrictions under s 51 of the 1983 Act on the making of distributions.
62 See also the Prentice Report's penultimate recommendation at 10.2.4 above.
63 For directors' duties proposed to be codified into the Companies Acts, see further Chapter 11.
64 For creditor protection, see further Chapter 5.
65 See 10.7.1 above.

Identity and transition period

10.9.11 To identify to a third party that a company has specific objects, and is therefore subject to the *ultra vires* rule, for a public limited company the word "plc" or for any other special category company, including companies limited by guarantee the word "dac" (standing for designated activity company) should form the last part of the name of such company.

10.9.12 A transition period of 12 months should be allowed for (non-public) companies wishing to retain objects to pass a special resolution to change their name (with the addition of "dac" to their name). No filing fee should be required for notifying the CRO of such special resolutions. A subvention should be provided by the State to the CRO to make up for the shortfall in such filing fees.

10.9.13 To avail of the *ultra vires* rule for its own benefit or the benefit of certain creditors over other creditors, a private company (being a company limited by guarantee and having a share capital or a special purpose company) should be required to change its name within 12 months to identify it as a designated activity company. Failure to do so at the expiration of 12 months should have the automatic effect of removing the company's objects and giving it the capacity of a natural person.

10.10 Authority to conclude transactions on behalf of companies

10.10.1 Even if a company is given the status of a natural person, a company nevertheless will, apart from certain contracts executed by it under its seal, require an individual to negotiate and conclude contracts on its behalf. Thus, notwithstanding the abolition of the *ultra vires* doctrine, there still remains the question as to whether the company should be bound by acts or contracts entered into on its behalf by any director or other person with purported authority.

10.10.2 Most companies adopt, as part of their articles of association, Regulation 80 of Part I of Table A of the First Schedule to the 1963 Act. This regulation provides:

> The business of the company shall be managed by the directors, who… may exercise all such powers of the Company as are not by [the Companies Acts] or by these regulations, required to be exercised by the company in general meeting…

Regulation 105 provides that the directors may delegate any of their powers to committees. Regulation 112 provides that:

> the directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit…

Regulation 6 of the European Communities (Companies) Regulations 1973[66] gives protection to a counterparty who has dealt, in good faith, with a company's board of directors or registered agent. To obtain the protection the counterparty has to show that he entered into the transaction with the board of directors (i.e. with their approval) or with a person registered under the regulations with the CRO as authorised to bind the company.[67]

10.10.3 The rule in *Turquand's case*[68] has also proved to be helpful to counterparties when entering into transactions, in good faith, with companies.[69] The rule does not require the counterparty to investigate whether the company has complied with its articles of association when entering into a transaction.

66 SI No 163 of 1973, see 10.5.5 above in connection with capacity rather than authority.

67 See Blayney J in *Re Frederick Inns Limited* [1994] 1 ILRM 387 at 394.

68 *The Royal British Bank v. Turquand* (1856) 6 El & Bl. 327.

69 See *Ulster Investment Bank Limited v. Euro Estates Limited and Drumkill Limited* [1982] ILRM 57.

10.10.4 In practice the concept of ostensible authority is used to negotiate and complete many transactions.[70] Examples of situations where the law of ostensible authority is relied upon include those where contracts are concluded by shop assistants, car salesmen, travel consultants and hotel reservation staff.

10.10.5 The Review Group believes a counterparty should be able to enter into contracts with a company without fear of invalidity due to lack of authorisation provided the counterparty does so with: (a) an agent of the company registered in the CRO as authorised to carry out the type of transaction in question; or (b) any other person who has actual or ostensible authority to bind the company. Whilst certainty for counterparties would be furthered by deeming contracts concluded with any director to be binding on the company, the Group concluded that this was not desirable, would be open to abuse and would be unjust to companies.

10.10.6 A search in the CRO, which can be done on the website,[71] through law researchers or in person at nominal cost, enables the names of registered agents to be ascertained. The Review Group believes that companies should utilise to a greater extent the facility of the CRO to register persons authorised to bind the company, as happens more frequently in other EU jurisdictions. Accordingly, the Review Group recommends that a person registered in the CRO should have authority to bind the company to lawful contracts concluded (on behalf of the company) within the terms of this authority as filed in the CRO without the need for counterparties to enquire further.[72]

10.10.7 Where companies adopt Regulation 115 of Table A, two directors or one director and the secretary are required to attest the company seal. The Review Group recommends that, as an alternative to this, where a registered agent is appointed and registered in the CRO he should be deemed to have authority to affix the company seal and to be the sole signatory to the seal, without the need for further enquiry on the part of counterparties.

10.10.8 Turning next to other persons authorised to bind the company, the best evidence that a particular person has authority is a resolution of the board of directors to that effect. In the absence of such evidence, it will be a matter of fact whether or not a particular director or other individual has actual authority to bind a company to a particular course of action. However, even if such a person does not have *actual authority*, companies may be bound to contracts where the person who concluded them has *ostensible authority*. The Review Group does not recommend any change in the law in this regard.

70 For further elucidation on this topic see the Supreme Court's decision in *Kett v. Shannon & English* [1987] ILRM 364.

71 This service is not currently available due to a court injunction.

72 See also 4.3.8.

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10.11 Summary of Recommendations

10.11 Summary of recommendations

- Private companies limited by shares (i.e. the proposed CLS) should be granted the legal capacity of a natural person with the consequent effect that the doctrine of *ultra vires* is disapplied from the CLS. **(10.9.2)**

- Public companies should be required to continue to have an objects clause in line with the Second Directive, and should thus continue to be subject to the *ultra vires* doctrine. **(10.9.8)**

- Companies limited by guarantee should be required to retain objects and continue to be subject to the *ultra vires* doctrine. **(10.9.9)**

- Special purpose companies, whether private companies limited by shares or otherwise, should be permitted to retain objects and be bound by the *ultra vires* doctrine. **(10.9.10)**

- Companies having objects, and thus subject to the *ultra vires* doctrine, should be identified with the words "plc" (where such companies are a public limited company) or "dac" as part of their name. **(10.9.11)**

- A transition period of 12 months should be allowed for (non-public) companies wishing to retain objects to pass a special resolution to change their name (with the addition of "dac" to their name). No filing fee should be required for notifying the CRO of such special resolutions. A subvention should be provided by the State to the CRO to make up for the shortfall in such filing fees. **(10.9.12)**

- To avail of the *ultra vires* rule for its own benefit or the benefit of certain creditors over other creditors, a private company (being a company limited by guarantee or a special purpose company) should be required to change its name within 12 months to identify it as a designated activity company. Failure to do so at the expiration of 12 months should have the automatic effect of removing the company's objects and giving it the capacity of a natural person. **(10.9.13)**

- An agent registered in the CRO should have authority to bind the company to lawful contracts concluded (on behalf of the company) within the terms of this authority as filed in the CRO without the need for counterparties to enquire further. **(10.10.6)**

- In addition to the provisions of Regulation 115 of Table A, where a registered agent is appointed and registered in the CRO he should be deemed to have authority to affix the company seal and to be the sole signatory to the seal, without the need for further enquiry on the part of counterparties. **(10.10.7)**

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CHAPTER 11

Directors and other Officers

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11.1 Introduction

11.1.1 In recent years, Irish company law and other legislation has seen a number of developments imposing and regulating liabilities of directors. The 1990 Amendment Act first imposed the concept of reckless trading in an examinership, which concept was extended to liquidations by the 1990 Act. The 1990 Act, which followed shortly after, introduced restriction of directors and extended the circumstances in which persons can be disqualified as directors, which procedures have been updated by Part 4 of the 2001 Act. The 1990 Act also extended the responsibilities of directors to include consideration of the interests of employees.[1] The Irish Takeover Panel Act 1997 introduced a statutory regime regulating the conduct of takeovers of public companies, which regime imposes specific responsibilities on the directors of public companies and of offeror companies.

11.1.2 A number of non-company law statutes, most notably the Safety, Health and Welfare at Work Act 1989 and the Environmental Protection Act 1992, express or have extended the liabilities of directors.[2]

11.1.3 The 2001 Act, in its substitution of s 383 of the 1963 Act, has expressly raised the standard of behaviour expected on the part of directors, as well as imposing an obligation on directors and the secretary to comply with the Companies Acts.[3] In summary, therefore, the nature and extent of the duties and liabilities of directors have been updated by statute. The present non-statutory fiduciary duties of directors have remained, and are applied by the courts on an ongoing basis.

11.2 Approach of the Review Group

11.2.1 In the context of the recent evolution and development of directors' statutory duties, the Review Group considered whether the present non-statutory fiduciary duties of directors ought to be stated in statute law. This led to consideration of related issues of the duties of directors of joint venture companies as well as to the law affecting directors' and officers' insurance.

11.2.2 The Group also considered the related issue of whether the duties of the company secretary ought to be stated in statute law.

11.2.3 Finally, a number of issues were raised by submissions to the Review Group[4] and by Group members, namely: (a) board structure, including the issue of one-director companies; (b) minimum and maximum ages of director; and (c) the disclosure of holdings of shares, options and other securities of directors and secretaries and of dealings in such securities.

11.3 Fiduciary duties of directors

11.3.1 An issue which has been considered from time to time by other company law review bodies has been whether directors' fiduciary duties ought to be expressed in a statute. It can of course be difficult and, in some cases, counter-productive to attempt to simplify the statement of complex legal obligations. The fiduciary duties of

1 Section 52 states: (1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members. (2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

2 Section 48(19)(a) of the Safety Health and Welfare at Work Act 1989 states: Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

3 Section 383(3), as inserted by s 100 of the 2001 Act states: It is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company.

4 The Review Group also considered certain issues relating to overseas disqualification orders and how they might affect the status of persons affected by them under Irish law. The Group made a brief submission to the Department on the Company Law Enforcement Bill, which is now reflected in the final text of the 2001 Act.

directors have been enunciated on a case by case basis[5] rather than in a codified form. Following much discussion and analysis, the Review Group has come firmly to the view that inaccessibility and incomprehensibility of the law concerning the duties of directors can be remedied by their being stated in statute law. Such inaccessibility and incomprehensibility can in practice be a disincentive to compliance or a ready excuse to the indolent who have no wish to comply with such duties.

Jenkins Report 1962

11.3.2 The Jenkins Committee, which reported on the UK Companies Act 1948,[6] recommended that the Act should provide that:

> "a director of a company should observe the utmost good faith towards the company in any transaction with it or on its behalf and should act honestly in the exercise of his powers and the discharge of the duties of his office;
>
> a director of a company should not make use of any money or other property of the company or of any information acquired by virtue of his position as a director or officer of the company to gain directly or indirectly an improper advantage for himself at the expense of the company;
>
> a director who commits a breach of these provisions should be liable to the company for any profit made by him and for any damage suffered by the company as a result of the breach;
>
> these provisions should be in addition to and not in derogation of any other enactment or rule of law relating to the duties or liabilities of directors of a company."[7]

Joint English and Scottish Law Commission Report 1999

11.3.3 More recently, in 1999, the joint report of the English Law Commission and the Scottish Law Commission[8] has recommended that there should be a statutory statement of a director's main fiduciary duties and his duties of care and skill, signed by the director. The statement should be in broad language and should not be exhaustive.[9] The duties to be stated are organised under the headings of

(i) Loyalty
(ii) Obedience
(iii) No secret profits
(iv) Independence
(v) Conflict of interest
(vi) Care, skill and diligence
(vii) Interests of employees etc.
(viii) Fairness

11.3.4 The law stating the duties of directors is not affected by the statement, which is intended to be non-exhaustive. By signing this document, a director acknowledges that he has read the statement, but not necessarily that he understands it.

5 See, for example, the leading cases of *Clark v. Workman* [1920] 1 IR 107 and *Re Regal Hastings v. Gulliver* [1942] 1 All ER 378.
6 And which inspired some variations of that Act in our own 1963 Act on other issues, e.g. providing for validation procedures for financial assistance.
7 Jenkins Report, p 34, para 99(a).
8 *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Joint Report – Scottish Law Commission, September 1999).
9 *ibid.*, p 43, para 4.48.

Modern Company Law For a Competitive Economy 2001

11.3.5 Most recently, the reports of the UK Company Law Review Steering Group culminating in the Final Report of June 2001,[10] recommend an amendment to UK company law so as to express the fiduciary duties of directors, with a view to setting the "basic standards of directors' accountability… [and to provide] clarity about the rules governing decision making by directors." The duties are organised under the headings of:

(i) Obeying the constitution and other lawful decisions
(ii) Promotion of company's objectives
(iii) Delegation and independence of judgement
(iv) Care, skill and diligence
(v) Transactions involving a conflict of interest
(vi) Personal use of the company's property, information or opportunity
(vii) Benefits from third parties
(viii) Special duty where company more likely than not to be unable to meet debts
(ix) Special duty where no reasonable prospect of avoiding insolvent liquidation.

The duties are stated in considerable detail – so much so that there are a number of notes to them to provide clarity – and the text runs to almost four pages of the report, as against a page or so in the 1999 Report.

Statutory statement of fiduciary duties

11.3.6 Starting on the assumption that directors' fiduciary duties ought to be stated in statute, the choices available are to go for a general statement of duties or to seek to expand them along the lines of the UK Report of 2001. In view of the novelty of the proposal, and with a view to keeping a light touch in the drafting of statements of what are fundamentally straightforward duties, the Review Group recommends that the fiduciary duties of a director to his company should be stated in general rather than specific terms, and on the basis that the statement of duties is not exhaustive. The Review Group is not convinced that the UK Company Law Review Steering Group's approach is the appropriate way to go and sees inherent conflicts concerning interpretation. Moreover, whereas this Group is primarily concerned with the consolidation of duties that have been well established in the Irish courts, the UK Company Law Review Steering Group is not content with this and seeks to impose additional duties and expand traditional duties to include matters that are currently in vogue. Such a prescriptive approach is susceptible to fossilisation and inappropriate application on particular facts and the Review Group prefers a more general statement which gives the judiciary interpretational latitude. Ultimately, in the consolidated Companies Act, the Review Group recommends that the statement of directors' fiduciary duties should introduce other provisions of the Companies Acts touching on directors' fiduciary responsibilities, such as the provisions at present found in ss 186 to 189 of the 1963 Act and Part III of the 1990 Act.[11] Those existing statutory provisions can be better put in context if their preamble is the statement of the underlying fiduciary duties.

11.3.7 The Review Group recommends a statutory statement of directors' fiduciary duties, being expressed along the following lines:

Context of directors' duties

Without prejudice to the provisions of any enactment (including this Act) directors shall owe the following duties to companies of which they are directors, and which shall be enforced in the same way as any other fiduciary duty owed to a company by its directors.[12]

10 Modern Company Law For a Competitive Economy, (Company Law Review Steering Group June 2001).

11 This would, in particular, underpin directors' obligations to disclose contracts in which they have an interest as required by s 194 of the 1963 Act.

12 See s 52(2) of the 1990 Act.

Duty of loyalty

A director must act in good faith in what he considers to be the interests of the company.[13]

Duty of obedience to company constitution

A director must act in accordance with the company's memorandum and articles of association and must exercise his powers only for the purposes allowed by law.[14]

Duty of avoidance of secret profits

A director must not use the company's property, information or opportunities for his own or anyone else's benefit unless he is allowed to by the company's memorandum or articles of association or the use has been disclosed to the members and an ordinary resolution passed consenting to it.[15]

Duty of independence of judgment

A director must not agree to restrict his power to exercise an independent judgment.[16] However, if he considers in good faith that it is in the interests of the company for a transaction to be entered into and carried into effect, he may restrict his power to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this.[17]

Duty to avoid conflicts of interest

If there is a conflict between an interest or duty of a director and an interest of the company in any transaction, he must account to the company for any benefit he receives from the transaction. This applies whether or not the company sets aside the transaction.[18]

However, a director need not account for the benefit if he is allowed to have the interest or duty by the company's memorandum and articles of association or the interest or duty has been disclosed to the members and approved by ordinary resolution.

Duties of care, skill and diligence

A director owes the company a duty to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director, and (ii) the knowledge and experience which the director has.[19]

Duty to consider interests of third parties

A director must have regard to the interests of the company's employees in general and [to those of] its members,[20] and where the company is insolvent, its creditors.[21]

13 *Clark v. Workman.* [1902] 1 IR 107; *Percival v. Wright* (1902) 2 Ch 421.

14 *Punt v. Symons & Co* [1903] 2 Ch 506; *Piercy v. S Mills & Co* [1920] 1 Ch 77.

15 *Re Regal Hastings v. Gulliver* [1942] 1 All ER 378.

16 *Clark v. Workman,* [1902] 1 IR 107.

17 This principle has been accepted in a number of other common law jurisdictions in cases such as: *Fulham Football Club Ltd et al v. Cabra Estates PLC* [1994] 1 BCLC 363 (England and Wales); and in *Thorby v. Goldberg* [1965] 112 CLR 597 (Australia).

18 *Gabbett v. Lawder* (1883) 11 LR Ir 295.

19 *Re City Equitable Fire Insurance Limited* [1925] Ch 407.

20 This is a restatement of s 52(1) of the 1990 Act.

21 *Re Frederick Inns Limited* [1991] ILRM 582; [1994] 1 ILRM 387. This statement is without prejudice to the provisions of any other enactment, including those provisions of the Companies Acts imposing special obligations and penalties on directors in the event of insolvency. It should be noted that as with all duties enumerated in the statement, this duty is only enforceable against directors by the company (most likely acting through its liquidator). It is not enforceable at the instance of creditors.

A director appointed or nominated for appointment by a member with an entitlement so to appoint or nominate under the articles of association or a shareholders' agreement may have regard to the interests of that member.[22]

Duty of fairness

A director must act fairly as between different members.[23]

Directors' acknowledgement

11.3.8 The Review Group considered the benefit or otherwise from having a director acknowledge his duties upon appointment or notification of appointment. For example, if a newly-appointed director were to confirmed having read the fiduciary duties as stated in the statute it might appear to be of some advantage. However desirable that directors should be familiar with their duties, in the absence of a means of establishing actual familiarity (which is tantamount to having qualifications for directors), the Review Group does not accept that it is desirable to create a statutory fiction. Accordingly, the Group is of the view that a simple acknowledgement of the *existence* of directors' duties is preferable. The Review Group therefore recommends that upon notification of appointment as a director (on Form B10 or Form A1) and, in due course, on registration as a director,[24] a director's signature should appear below the statement: "I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Acts, other enactments and at common law".

11.4 Nominee directors

11.4.1 Frequently directors are nominated to the board of companies as a representative of one of the shareholders. Irish law is silent on nominee directors' duties. The fiduciary obligations of directors of joint venture companies make no exception for primary duties of those directors to the joint venturer which will have nominated them to the board of the joint venture company. The reality of the directors' position in this environment can pose real difficulties for nominees who may find themselves caught in a dilemma as to whom they owe their duties.[25]

11.4.2 Louis Brandeis, who was later to become a United States Supreme Court Justice provides a robust advocacy of the obligation which affects directors of joint venture companies (where the joint venturers might be companies with financial interests in the same field of activity as the joint venture itself):

> "The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event, it tends to inefficiency; for it removes incentive and destroys soundness of judgement."[26]

11.4.3 In some Australian decisions[27] this strict rule has mellowed to permit (in the particular circumstances of that case) a nominee director to have regard to the interests of his appointor provided that in so doing the nominee director has an honest and reasonable belief that he is also acting in the best interests of the company.

11.4.4 The Review Group considers that the continued strict application of such a principle disregards the many situations where no adverse consequences to third parties arise, e.g. where the joint venture is a centre of profit in its own right, with the joint venturers having an investor's financial interest and ancillary trading relationships

22 This paragraph is proposed further to the recommendation at 11.4.6.

23 *Nash v. Lancegaye (Ireland) Ltd* (1958) 92 ILTR 11.

24 See Chapter 7.

25 Lower, "Good Faith and the Partly-Owned Subsidiary", [2000] *Journal of Business Law*; Christie, "The Director's Fiduciary Duty not to Compete" [1992] *Modern Law Review*. 506; Young, "Corporate Groups: Legal Aspects of the Management Dilemma", [1997] *Lloyd's Maritime & Commercial Law Quarterly* 208; Boors, "The Duties of Nominee and Multiple Directors", 11 *Co Lawyer* 6 and 211; Lower, "Do we need a Joint Venture Act?", (1995) *Palmers In Company*.

26 'Breaking the Money Trusts' *Harpers Weekly* 6 December 1913, cited in Lower, *Journal of Business Law*., above, n. 25.

27 See In *Re Broadcasting Station 2 GB Ltd* [1964-65] NSWR 1662.

appropriate to their competences. In the New Zealand case of *Berli Hesdtia (NZ) v. Fernyhough*[28] Mahon J commented that:

> "As a matter of legal theory as opposed to judicial precedent, it seems not unreasonable for all the corporators to be able to agree upon an adjusted form of fiduciary liability, limited to circumstances where the rights of third parties vis-a-vis the company will not be prejudiced."

11.4.5 At present, the law is not altogether clear as to whether a company can contract out of its legal entitlement to compel performance by directors of their fiduciary duties.[29] It appears to the Review Group that no purpose is served by preserving this lack of clarity where the interests of third parties are not affected. In the absence of any release of a director from his fiduciary duty, the director must prefer the interests of the joint venture company rather than those of his appointor. One author concludes that "in the area of nominee directors the law is trailing a long way behind inoffensive commercial reality."[30]

11.4.6 The Review Group recommends that where a director is appointed by reason of an entitlement of a shareholder so to appoint the director under the articles or by a shareholders' agreement, the director's fiduciary duties to the company are varied to the extent that they may have duties to third parties' interests, e.g. in the case of a nominee director, their appointors. The Group recommends that this clarification of the law is best effected by insertion of an appropriate paragraph in the statement of directors duties set out in this Report at 11.3.7.

11.5 Non-executive directors

11.5.1 The Review Group considered whether there are any grounds to vary the legal position of non-executive directors such that their duties as directors might be recognised in law as being different from those of executive directors. The Group could see no valid argument to vary the law by reference only to the position of a director as a non-executive.

11.5.2 The proposed new provisions as to a statutory statement of directors' duties recognise that each director brings his particular abilities to the board table and, to that extent only, there would be validly expected differences in competence expected. However, the Group sees no particular justification in separating out non-executive directors as such.

11.6 Directors' and officers' insurance

11.6.1 At present there is an active market in the provision of directors' and officers' insurance, as well as a frequent practice of directors of Irish subsidiaries of overseas companies receiving indemnities from those overseas companies. This practice exists notwithstanding s 200 of the 1963 Act, which reads as follows:

> **Avoidance of provisions exempting officers and auditors of company from liability.**
> **200.**—Subject as hereinafter provided, any provision whether contained in the articles of a company or in any contract with a company or otherwise for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void, so, however, that—
>
> (a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and
> (b) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such officer or auditor against any liability incurred by him in defending proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 391 in which relief is granted to him by the court.

28 [1980] 2 NZLR 150.
29 *Russell v. Northern Bank Development Corporation Ltd* [1992] 1 WLR 588; *Clark Boyce v. Mouat* (1993) 4 All ER 268 and *Kelly v. Cooper* [1993] AC 205.
30 "Nominee Directors: The Law and Commercial Reality," *The Company Lawyer*, Vol 12, No 7, 136 at 142.

11.6.2 There is a general practice among insurers who underwrite directors' and officers' insurance for the contract of insurance to contain a clause along the lines of "the insurer will not invoke section 200 of the Irish Companies Act 1963 to invalidate this policy of insurance". The flaw in this practice is that it is not for an insurer, or any person for that matter, to decide whether or not a contract is void under the section – the section states "void", not "voidable" – if a contract such as a contract of insurance falls under the section, then it will be void, and there is nothing an insurer or the intended insured can do.

11.6.3 Market practice appears to be to write the policy under the laws of a jurisdiction other than Ireland, usually that of England and Wales. This would appear to offer a better possibility of the insurance overcoming s 200 in order to be enforceable against the insurer, but does not address the breach of duty by the directors in contravening the section: the underlying philosophy of the section being that the company ought not spend its money in bailing out negligent directors and other officers.

11.6.4 In the UK, this issue was addressed by an amendment to their comparable legislation,[31] which enables companies to take out directors' and officers' insurance. As the insurance is in practice for the benefit of a wronged third party (whilst of course providing an indemnity to the director or other officer) the Review Group recommends that s 200 of the 1963 Act ought to be amended to provide:

(i) that a company can take out and fund directors' and officers' insurance;
(ii) that such policies of insurance cannot be avoided by reason of the other provision of s 200; and
(iii) all existing policies of insurance where the parties have agreed not to invoke s 200 should be recognised as being and always to have been unaffected by s 200.

11.7 Duties of the company secretary

11.7.1 The responsibilities of company secretaries are stated only obliquely in statute law, and arguably with even less clarity than those of directors. Historically, the secretary has been expected to be the principal administrative officer of the company insofar as administration concerns compliance with the requirements to maintain registers and the requirements to file documents with the Registrar under the Companies Acts.

11.7.2 The Institute of Chartered Secretaries' Handbook states:

> "Every board and its directors should have recourse to the advice and support of a named, Irish-resident company secretary, suitably qualified to provide the necessary advice and guidance to the directors individually and collectively, as to their obligations and responsibilities under company law and regulation, the company's constitution and prevailing corporate governance guidelines.
>
> The secretary has a general duty to make enquiries as to whether the company is complying with its company law and corporate governance obligations and to advise the board accordingly.
>
> To preserve his independence the appointment, remuneration and any question of the removal of the company secretary should be a matter for the board as a whole."

11.7.3 In all well-run companies, the importance of a company secretary is recognised. Some companies describe the function as "chief administrative officer" or "chief legal and administrative officer." The function has certainly advanced, as was recognised by Lord Denning in *Panorama Development Guilford Ltd v. Fidelis Furnishing Fabrics Ltd*[32] who stated that "the company secretary is a much more important person nowadays", from the suggestion that the secretary is a "mere servant" as so described in a leading case, in 1887, *Barnett, Hoares and Co v. South London Tramways Co*.[33]

31 See s 137 of the UK Companies Act 1989, substituting s 310 of the UK Companies Act 1985, which provides that the prohibition on indemnities, etc. "does not prevent a company from purchasing and maintaining for any such officer or auditor insurance against any such liability".

32 [1971] 2 QB 711.

33 [1887] 18 QBD 815.

11.7.4 The importance of the role of the secretary has been recognised by reviews of corporate governance, including the UK Cadbury Code,[34] which states at para 1.6:

> "All directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are followed and that applicable rules and regulations are complied with. Any question of the removal of the secretary should be a matter for the board as a whole."

Cadbury states at para 4.25 that "the company secretary has a key role to play" and "the chairman and the board will look to the secretary for guidance on what their responsibilities are under the rules."

11.7.5 Irish company law provides that:

(i) Every company shall appoint a secretary.[35]
(ii) The secretary shall be an officer of the company.[36]
(iii) It is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company.[37]
(iv) A certain level of skill and expertise is required by those who fill the office of secretary of a public limited company. Section 236 of the 1990 Act provides:

> It shall be the duty of the directors of a public limited company to take all reasonable steps to secure that the secretary (or each joint secretary) of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company and whom
>
> (a) on the commencement of this section held the office of secretary of the company; or
> (b) for at least three years of the five years immediately preceding his appointment as secretary held the office of secretary of a company; or
> (c) is a member of a body for the time being recognised for the purposes of this section by the Minister; or
> (d) is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging those functions.

11.7.6 Until the insertion of the new s 383 of the 1963 Act by s 100 of the 2001 Act, there was no statement of what the secretary's duties might be. Nowhere in the Companies Acts does it suggest how a secretary will "ensure that the requirements of the Companies Acts are complied with" by a company. The function of the secretary, like that of the directors, will vary from company to company. In a quoted plc, the person will most probably be professionally qualified and have functions beyond the routine convening and recording of the proceedings of meetings and making of filings to the CRO.

11.7.7 In the same way as the Review Group proposes that the fiduciary duties of directors be stated in law, the Group is of the view that there should be recognition for the expected role of the secretary as the person who – by order of the board – convenes meetings, records their proceedings, is custodian of the registers required under the Companies Acts and the person to whom the directors are permitted or expected to delegate their responsibility to make filings under the Companies Acts.

11.7.8 There are in effect two suggested alternatives in order to implement such a proposal, the South African example set out in section 268 of their Companies Amendment Act 1999, on the one hand, and, on the other, a more minimalist approach. The South African law provides:

> "A secretary's duties include but are not restricted to
>
> (a) providing the directors of the company collectively and individually with guidance as to their responsibilities and powers,

34 *Report of the Committee on the Financial Aspects of Corporate Governance* (Cadbury Committee Report) and *Code of Best Practice*. 1 December 1992.
35 1963 Act, s 175. This applies to single member private limited companies also.
36 1963 Act, s 2.
37 1963 Act ,s 383, as inserted by s 100 of the 2001 Act.

(b) making the directors aware of all law and legislation relevant to or affecting the company and reporting at any meeting of the shareholders of the company or of the company directors any failure to comply with such law or legislation,

(c) ensuring that minutes of all shareholders' meetings, directors' meetings and meetings of any committee of directors are properly recorded,

(d) certifying in the annual financial statements of the company that the company has lodged with the Registrar all such returns as are required by the Act and that all such returns are true, correct and up to date, and

(e) ensuring that a copy of the company's annual financial statements is sent to every person who is entitled thereto in accordance with the Act."

This statement is quite legalistic and, more importantly, out of step with the reality in Ireland. To move to such an exacting level of duties would constitute a substantial change in the law.

11.7.9 The more minimalist approach would be broadly declaratory of the present position. For example in his book *Company Law In The Republic Of Ireland*, Ronan Keane states that the functions of the secretary, shall include, but shall not be limited to the following:

"(a) keeping charge of the register of members, register of directors and secretaries register of debentures and register of directors shareholdings;
(b) making the annual return to the Registrar;
(c) keeping the minutes of general meetings and of meetings of the board of directors;
(d) notifying the Registrar of any alterations in the memorandum and articles;
(e) giving notice to members of meetings;
(f) furnishing the Registrar with particulars of charges entered into by the company."[38]

11.7.10 If there is to be a statement of the responsibilities of the company secretary, such statement must: (a) be realistic; (b) reflect properly that it is the directors who are primarily responsible for the management and direction of the company, and to that extent primarily responsible for compliance with the Companies Acts; and (c) reflect the fact that the secretary is appointed by and can be removed by the directors.

11.7.11 The Review Group therefore recommends that the Companies Acts provide that:

(i) The duties of the secretary of the company will, without derogating from his own responsibility, be such duties as are delegated by the board of directors acting as a whole.
(ii) The directors will in their appointment of a secretary (who may be one of their number)[39] have a duty to ensure that the person appointed as secretary has the suitable skills to maintain (or to procure the maintenance of) the records (other than accounting records) required to be kept under the Companies Acts.
(iii) Upon notification of appointment as a director (on Form B10 or Form A1) the secretary's signature should appear below a statement: "I acknowledge that, as a secretary, I have legal duties and obligations under the Companies Acts and other enactments."[40]

11.8 Board structure

11.8.1 The Group examined a number of issues concerning the make-up of the board of directors. The sum total of the statute law concerning the make-up of the board of directors is s 174 of the 1963 Act, which says:

174.—Every company shall have at least two directors.

11.8.2 The 1999 (No 2) Act introduced a considerable amount of reform with a view to dealing with the Irish registered

38 Keane, p 379, para 28.02.
39 Save in the case of a single director company. See 11.8.4 – 11.8.7.
40 Following the precedent for company directors.

non-resident company issue, with a requirement now for (i) an Irish-resident director or (ii) certified real and continuous link to Ireland or (iii) bond for £20,000 (€25,394.76) in favour of the Registrar and/or the Revenue Commissioners, and a limit, subject to exceptions, of 25 on the number of directorships which can be held by an individual.

11.8.3 Beyond these reforms, there are a number of aspects of the law which have been left unexamined, unreformed or unstated. The Group looked at a number of interrelated issues – ought it be possible for there to be single director companies? If so did it make sense for a company to have a company secretary? Ought there be the possibility of corporate directors?

Single director companies

11.8.4 The legal background to the idea of there being single director companies is found in the 12th Directive on "one person private limited companies."[41] This Directive has been implemented in Ireland by means of the European Communities (Single Member Private Limited Companies) Regulations 1994[42] which deals with the question of membership only rather than with the number of directors. It is understood that the text of the Directive, which is non-mandatory with respect to the number of company directors, reflects a lack of consensus on this issue among the Member States as to whether single director companies should be permitted. That said, the third recital of the Directive refers to the "small and medium-sized enterprise action programme" having been approved by the Council of Ministers. The fifth recital reads:

> "whereas it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community, without prejudice to the laws of the Member States which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking [emphasis added]."

11.8.5 Therefore, whilst allowing for single member companies, Irish law has preserved the requirement for two directors. This has had the perverse consequence (by anecdotal evidence of the members of the Review Group) of this form of corporate entity being used predominantly other than by entrepreneurs, and instead being used by Irish subsidiaries of multinational groups.

11.8.6 Incorporation and limited liability are of course privileges conferred by the law and it is proper that in certain circumstances – most notably in the case of quoted companies – that there should be a requirement for more than one director. This aims to ensure that there will always be at least two senior individuals involved in the management of a company so that abuse of limited liability can to some extent be limited.

11.8.7 Most entrepreneurs will seek a second person, usually a family member, to be a director, even though that family member may have little or no involvement with the business for whose direction they are collectively responsible. This appears to the Review Group to serve only to devalue and trivialise the office of director of a company – far better that a director's liabilities be properly understood and complied with by a "real" director rather than being foisted on a non-participator in the business. There appears to be an irrefutable argument that the philosophy underpinning the 12th Directive has to a notable extent not been adequately implemented by the failure to enact the law in such a way as to facilitate single entrepreneurs. However, this is, as stated above, attributable in part to the lack of consensus on this issue at European level in the first place. An example of how to deal with this issue is how it has been dealt with in the UK where the law provides for private companies to have one director, provided that the company secretary is a different person.

Position of the company secretary

11.8.8 The UK Company Law Review Group Steering Group has complicated the present proviso in UK law by suggesting that the position of company secretary ought to be optional, not obligatory, for all private companies.[43] Only public companies would, if this proposal was implemented, be required to have a company secretary.

41 89/667/EEC of 21 December 1989.
42 SI No 275 of 1994.

11.8.9 The Review Group noted, however, that issues of corporate governance and compliance are becoming increasingly complex and important. In the light of historically high (although now reducing) levels of failure to comply with rudimentary filing obligations on the part of companies, it would appear to be a step backward to remove the officer generally expected to be the one to attend to, or at least to be competent to attend to, such obligations. The Review Group recommends that the office of company secretary be retained.

Corporate directors

11.8.10 Before formulating its recommendation with respect to the overall issue of whether there ought to be single-director companies, the Review Group considered whether there ought to be a possibility for there to be corporate directors. The Group believes that such a possibility would be neither popular nor would it assist in the drive for directors to be personally accountable for their actions and, hence, recommends that the existing prohibition be retained.

Conclusions

11.8.11 The Review Group considers that it ought to be possible for private companies limited by shares (i.e. the new model company envisaged by the Group) to have one director only, and recommends accordingly. As in the UK, the Group sees an advantage to following the present rule in the UK of requiring that there be a separate company secretary. The Review Group believes that the current minimum requirement of two directors should remain for all other companies on the grounds that wider accountability is desirable in the case of PLCs, guarantee companies (many of which will be charities, interest groups or management companies) and unlimited companies. The Group's recommendations may be summarised thus:

Type of company	Minimum number of directors?	Must there be a company secretary?	If a sole director, can he also be the secretary?
Private company limited by shares (i.e. the CLS)	1	Yes	No
All other companies	2	Yes	Not applicable

A maximum number of directors?

11.8.12 The Group is of the view that there is no movement to change the law in this area and therefore makes no recommendation on the subject.

A management board and a supervisory board

11.8.13 The Review Group considered whether Irish law might provide for a distinction between a management board and a supervisory board, as envisaged by the draft Fifth Company Law Directive. The Group observed that there was little domestic pressure to change the board structure of companies along the lines originally envisaged by the draft Fifth Directive. Where individual companies required various tiers – e.g. the requirement for audit committees or remuneration committees – individual companies could and did insert such tiers.[44] Furthermore, it was felt that this issue is one which is being developed in the context of the European Company Statute,[45] and the Group would defer consideration of it until any further move on the subject is made in Europe.

An entrenched right of employees to elect a director?

11.8.14 The Review Group considered whether there is any desirability for an initiative in this area and came to the conclusion that this is best kept as a voluntary matter. Irish law does exist to deal with the issue in State sponsored companies.[46] Employee involvement in the workings of large companies has been enhanced by

43 *Modern Company Law for a Competitive Economy* (Final Report June 2001), para 4.6.

44 See, for example, recommendation 13.1 of the RGA's report.

European Works Councils.[47] In addition, the successive agreements between the social partners have advanced employer-employee consultation structures.[48] The adoption of an agreed amended proposal for a Council Directive "establishing a general framework for improving information and consultation rights of employees in the European Community"[49] which will have the effect of introducing statutory works councils to Ireland, ultimately to all companies with 50 or more employees, to a great degree has dealt with the requirement for employer / employee interface. Most recently, the Directive supplementing the Statute for a European Company with regard to the involvement of employees has been agreed.[50] The Review Group therefore makes no recommendation to provide for such an entrenched right at this time.

11.9 Minimum and maximum ages for directors

11.9.1 The Registrar informed the Review Group that the CRO had identified a number of companies where the age of the directors fell below 18 years. In a small number of companies, the age of the directors was under 6 years. A number of submissions suggested that a minimum age be stipulated at age 18.

11.9.2 Ireland is not alone in failing to stipulate a minimum age for directors or other officers. Most European countries, including the UK, do not have a minimum age. A number of countries have specified a minimum age, usually 18, such as Australia, Canada, Denmark, Malaysia and Sweden. The majority of countries do not specify a minimum age for company officers. However, those that do usually specify the age of majority. In view of the serious responsibilities and potential liabilities of company directors, the Group considered seeking to fix an age as a minimum age.

11.9.3 For the purpose of considering what ought be the minimum age, relevant ages under other codes of law were examined by the Group.

Criminal law

11.9.4 *Seven years and under*: there is an irrebuttable presumption that a child of seven or younger is incapable of knowing right from wrong *(doli incapax)*.

Over seven and under 14 years: there is a presumption that a child of this age has not reached the age of discretion, which may be rebutted by proof that the child was able to distinguish between right and wrong and that he knew what he was doing was morally wrong. It is a question of the individual child's level of understanding and judgment.

14 years and over: any incapacity of children to commit crime ceases on reaching the age of 14, which is the age of full criminal responsibility. A child of 14 or older is presumed to be capable of distinguishing right from wrong and is subject to the same rule as adults.

Contract law

11.9.5 Under the Age of Majority Act 1985, an individual attains the age of majority at 18 years or upon marriage, if earlier. Contracts made by a minor are either void or voidable, the exceptions to this rule being contracts for necessaries or beneficial contracts of service, which are valid. The purpose of this law is to protect minors. The contracts which will be void are contracts of loan, contracts for goods (other than necessaries) and accounts stated.

11.9.6 Under the law of agency, all persons of sound mind, including minors and other persons with limited or no capacity to contract on their own behalf, are competent to act or contract as agents. A minor director will

45 See Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).
46 Worker Participation (State Enterprises) Acts 1977 and 1988.
47 Transnational Information and Consultation of Employees Act 1996.
48 e.g. Partnership 2000, Programme for Prosperity and Fairness.
49 COM(2001) 296 final, 1998/0315 (COD).
50 Council Directive 2001/86/EC of 8 October 2001.

therefore be able to bind a company to a transaction, provided that he has sufficient understanding to consent to the agency and to do the act required, in circumstances where the contract could not be enforced against him personally if he had entered into same on his own behalf.

Wills

11.9.7 Section 77 of the Succession Act 1965 provides that a will must be made by a person who has attained the age of 18 years or is or has been married and is of sound disposing mind.

Land law

11.9.8 If a minor holds land, even freehold land, it is deemed to be settled land, within the meaning of the Settled Land Acts. In the Land Registry, the minor's name appears as the registered owner, but he is described as "infant", so that third parties will be aware that the powers under the Settled Land Acts 1882 and 1890 may be exercised on the minor's behalf by the trustees of the settlement.

Employment law

11.9.9 The Protection of Young Persons (Employment) Act 1996 prohibits the employment of children, who are defined for the purposes of the Act as persons under the age of 16 or the school leaving age, whichever is the higher. The Minister of State at the Department of Enterprise, Trade and Employment may licence individual children, and make regulations in respect of children over 13 years, in cultural, artistic, sports and advertising activities which are not harmful to safety, health or normal development and are not likely to interfere with attendance at school. It is necessary to obtain the written permission of the parent or guardian when employing a child.

Law of torts

11.9.10 While proceedings in respect of a civil wrong may be maintained in respect of a cause of action accruing to a minor, it is a procedural requirement that a minor must sue by his "next friend". On attaining the age of 18, if the proceedings are still ongoing, the title must be amended to reflect the fact that the plaintiff is suing in his own right. Minors over the age of seven are generally liable in tort, as for instance for defamation, trespass or conversion, but a minor is not answerable for a tort directly connected with any contract upon which no action will lie against him.

Capacity to vote

11.9.11 An individual is entitled to vote on attaining the age of 18 years.

Minimum age for company directors

11.9.12 The Review Group gave serious consideration to setting the minimum age of directors at the age of 16. Examples of entrepreneurial flair at that age were cited. If the minimum age for directors were to be set at the age of 16, one would be facilitating employment, but not quasi self-employment, as a proprietary director, at the age of 16. If a minimum age of 18 were set, it would potentially affect teenagers who for example during their transition year might begin small businesses. However, it was felt that it was fundamentally anomalous to have a situation where the general law imposes restrictions on the contracting power of a minor until the age of 18, and this could be circumvented by the use of a company. Public policy, as expressed by the Age of Majority Act 1985 prevented minors from being capable of being contractually bound until the age of 18. If it were proposed that there be a lower age, logic would suggest that the principle of contractual capacity itself at 18, as opposed to 16, ought to be looked at, rather than just the entitlement to manage and direct a company. Finally, limited liability in particular was a legal privilege that the law ought not make available to minors. Being a director carries responsibilities and duties, and it is necessary that those who are accountable and answerable are of an age that will understand these duties.

11.9.13 The Review Group therefore recommends that:

(i) No individual shall become a director or secretary of a company unless such individual has attained the age of 18 years.
(ii) Any purported appointment of an individual before his having attained the age of 18 years shall be ineffective and void as between the company and the individual under 18. However, third parties would not be required to enquire as to the age of a director and the rules of ostensible authority of an individual to represent a company would apply.
(iii) The implementing legislation should provide for an 18-month time period within which directors would be obliged to ensure that all directors are aged 18 years or more.

Maximum age for directors

11.9.14 The Group is of the view that there is no pressure to change the law to provide for a maximum age for directors. The only arena where views about the maximum age of directors have been discussed is in the case of quoted public companies, and in that event it was open to the companies themselves to provide in their articles of association for such a maximum, should they feel the need. Great Britain and Northern Ireland expressly provide in their legislation that directors of PLCs must vacate office at the annual general meeting following their 70th birthday, unless the articles of the company provide otherwise. The re-election of persons over 70 requires special notice (28 days) stating the age of the candidate for re-election.

11.9.15 In the UK's current review of company law[51] the removal of the age limit and its replacement with a requirement to disclose the age of directors to shareholders prior to appointment or confirmation of appointment is recommended. The Review Group considered this suggestion, but concludes that this is essentially an issue of capacity, rather than of age. Accordingly, the Group makes no recommendation to change the law on this subject.

11.10 Disclosure of interests in shares, debentures and options

11.10.1 A number of submissions were received by the Review Group concerning the requirement under Part IV of the 1990 Act for directors and secretaries to notify the company of which they are director or secretary, as the case may be, of acquisitions and disposals of shares. In particular, it was submitted that the level of compliance was slight, and that the level of complexity in the law was disproportionate to the aim of the law in the vast majority of cases. It was argued that the UK had exemptions for what can loosely be called "remunerative" share and option entitlements and that Ireland ought to follow that precedent.

11.10.2 The background to the present law is found in s 190 of the 1963 Act. Under this section, companies were obliged to maintain a register of interests of directors and secretaries in company shares and debentures. The public policy underpinning the law is that persons having dealings with a company ought to be aware of the interest that the company's officers have in the company.

11.10.3 In view of the perception of non-compliance with this section, and with a view to encourage better record-keeping by companies, the 1990 Act for the most part put the primary disclosure obligation on the director, with the company having a consequential record-keeping obligation. This public policy imperative was emphasised in the 1990 Act with the introduction of a novel procedure (in that it was not, like the rest of Part IV of the 1990 Act, based on UK legislation) enabling persons with an interest to apply to court for disclosure of ownership of shares in private companies.

51 *Modern Company Law for a Competitive Economy: Developing the Framework*, p58, para 3.108 (Company Law Review Steering Group. Final Report p140, para 6.18.)

11.10.4 Under the 1990 Act a director (or shadow director) must, within five days after becoming aware that he or a person with a connection to him has acquired or disposed of an interest in shares or debentures, notify the company of that fact, along with specified information. This arises whether the shares or debentures are in the company of which he is a director, or a holding company or a subsidiary of such holding company. The purchase or sale price must be disclosed. Failure to notify means that rights attaching to the shares – e.g. the right to vote or to sell – are not enforceable save by leave of the High Court.[52] Interests in existence before 1 August 1991, the operative date of the sections, were to have been notified by midnight on 14 August 1991. The level of compliance with this law appears to be low.

11.10.5 There are a number of anomalies:

(i) A director's salary will be disclosed, in the aggregate, some months following the financial year's end. On the other hand, share options or the acquisition or disposal of shares go (or at least are meant to go) on the public record immediately.

(ii) The delivery of a stock transfer form is considered insufficient notification of an interest – the notification must state that it is being made for the purposes of s 53 of the 1990 Act.[53] Therefore a director and a company may honestly disclose the identity of the directors and their shareholdings in the register of directors and register of members respectively, but because of failure to make an otiose notification under this law, the rights attaching to the shares are unenforceable.

(iii) A notification cannot be made on the day of acquisition – it must be on the day after or during the four business days after that date.[54]

(iv) An honest failure to notify an interest in shares is remediable only by applying to the High Court to restore enforceability of rights attaching to shares.[55]

11.10.6 A number of submissions suggested that there should be an exemption for disclosure of interests where the director is a director of an Irish subsidiary company holding shares in the foreign holding company. The Review Group is of the view that to allow this would defeat one of the main aims of the legislation – to procure disclosure of the financial interest of company officers in companies (including through an interest in a holding company) and, accordingly, cannot recommend it. The possibilities of use of such an exemption to avoid disclosure of interests altogether would be immense.

11.10.7 The Group, however, is of the view that where a director has a quasi-remunerative interest only – e.g. share options or insignificant shareholdings, it appears overly bureaucratic to require that every movement in such interests should have to be notified. If the public policy imperative is to ensure that directors' and secretaries' interests are made known to the world, then there is an argument that, at low percentage levels, that alone is what should be disclosed, rather than fine detail.

11.10.8 The Review Group recommends that a number of amendments be made to the law, the effect of which will be to disapply the existing law from the vast majority of private companies limited by shares. The recommendations are:

(i) The obligation of a director or secretary to make a notification under Part IV of the 1990 Act should be disapplied where the interest of a director or secretary falls short of 1% of issued share capital or debentures of the company in which the holding is (whether that company is the company itself, its holding company or a subsidiary of a holding company). In such event, a director or secretary ought to be required merely to disclose the fact of such an interest to the company of which he is a director, along the lines of a general disclosure as to interest in company contracts under s 194 of the 1963 Act. This

52 1990 Act, s 58(3).
53 1990 Act, s 53(8).
54 1990 Act, s 56(1).
55 1990 Act ,s 58(3).

disapplication should apply whether the company is private or public. Law and regulation applicable to public companies quoted on various markets will operate to provide more detail.

(ii) What is and is not an interest in shares should be defined in a clear and comprehensive fashion. Insofar as it is possible, there should be a common definition of an interest in shares for the purposes of this law and the law requiring the disclosure of substantial interests in voting capital of PLCs (so that, at the very least, the differences can be apparent to users of the law).[56]

(iii) Directors and secretaries should be exempted from notifying where an original or a copy of a stock transfer form is delivered to the company, which on its face identifies the director, secretary or a connected person as purchaser or seller of the shares and the purchase price, within a period of 30 days following the transfer.

(iv) Notification of interests should be permitted on the day of acquisition or disposal also, as well as in the five days following.

(v) For a period of eighteen months after enactment of the amending law, a company should be empowered by a combination of (a) an ordinary resolution of the members and (b) a board resolution, to reinstate the enforceability of rights attaching to shares of any director, without the need for the director or secretary to apply to court, where the director-shareholder or secretary-shareholder makes an affidavit for or representation to the company that the failure to make the notification was inadvertent, and where the board is satisfied with that explanation.

(vi) Rights attaching to shares of directors and secretaries (and persons controlled and connected to them, etc.) should be enforceable where the information required in the register of interests in shares has appeared in a register or a combination of registers of the company from no later than 30 days following the director or secretary concerned acquiring the shares or debentures in question. So, for example, if the register of members identifies a holder of shares and the purchase price and the register of directors identifies the holder of the shares as a director, then the enforeceability of rights on such director's shares would not be affected by the 1990 Act.

56 See also 6.9.4(iii).

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11.11 Summary of Recommendations

11.11 Summary of recommendations

- The fiduciary duties of a director to his company primarily as identified by the Irish courts should be stated in statute law. This statement should be in general rather than specific terms, derived from principles established by the courts and on the basis that the statement of duties is not exhaustive. Ultimately, in the consolidated Companies Act, the statement of the director's fiduciary duties should introduce other provisions of the Companies Acts touching on directors' fiduciary responsibilities, such as the provisions at present found in ss 186 to189 of the 1963 Act and Part III of the 1990 Act. **(11.3.6/11.3.7)**

- Upon notification of appointment as a director (on the Form B10 or Form A1) and, in due course, on registration as a director, a would-be director's signature should appear below a statement: "I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Acts, other statutes and at common law" **(11.3.8)**

- Where a director is appointed by reason of an entitlement of a shareholder so to appoint the director under the articles or by a shareholders' agreement, the director's fiduciary duties to the company should be varied to the extent that they may have co-existing duties to third parties e.g. in the case of a nominee director, their appointors. This clarification of the law is best effected by insertion of an appropriate paragraph in the statement of directors' duties set out in this Report at 11.3.7. **(11.4.6)**

- No distinction should be made between the duties of executive and non-executive directors. **(11.5.2)**

- Section 200 of the 1963 Act ought to be amended to provide:

  (i) that a company can take out and fund directors' and officers' insurance;
  (ii) that such policies of insurance cannot be avoided by reason of the other provision of s 200; and
  (iii) all existing policies of insurance where the parties have agreed not to invoke s 200 should be recognised as being and always to have been unaffected by s 200. **(11.6.4)**

- The Companies Acts should provide that:

  (i) The duties of the secretary of the company will, without derogating from their own responsibility, be such duties as are delegated by the board of directors acting as a whole.
  (ii) The directors will in their appointment of a secretary have a duty to ensure that the person appointed as secretary has the necessary skills to maintain (or to procure the maintenance of) the records (other than accounting records) required to be kept under the Companies Acts.
  (iii) Upon notification of appointment as a director (on the Form B10 or Form A1) the secretary-designate's signature should appear below a statement stating "I acknowledge that, as a secretary, I have legal duties and obligations under the Companies Acts and other enactments". **(11.7.11)**

- The office of company secretary should be retained. **(11.8.9)**

- The existing prohibition on corporate directors should be retained. **(11.8.10)**

- It should be possible for a private company limited by shares (i.e. the proposed CLS) to have one director only with a requirement that there be a separate company secretary. Sole directors should not also be the company secretary. The existing requirement for two directors should remain for all other companies. **(11.8.11)**.

- No individual should be capable of becoming a director or secretary of a company unless such individual has attained the age of 18 years. **(11.9.13(i))**

- Any purported appointment of an individual before his or her having attained the age of 18 years should be ineffective and void as between the company and the individual under 18 years. However, third parties would not be required to enquire as to the age of a director and the rules of ostensible authority of an individual to represent a company would apply. **(11.9.13(ii)**)

- The implementing legislation should provide for an 18 month time period within which directors would be obliged to ensure that all directors are aged 18 years or more. **(11.9.13(iii)**)

- The obligation of a director or secretary to make a notification under Part IV of the 1990 Act should be disapplied where the interest of a director or secretary falls short of 1% of issued share capital or debentures of the company in which the holding is (whether that company is the company itself, its holding company or a subsidiary of a holding company). In such event, that director or secretary ought to be required merely to disclose the fact of such an interest to the company of which he is a director, along the lines of a general disclosure as to interest in company contracts under s 194 of the 1963 Act. This disapplication should apply whether the company is private or public. This is without prejudice to listing requirements. **(11.10.8 (i))**

- What is and is not an interest in shares should defined more clearly, to the extent, if possible, of aligning the definition with that for disclosure of substantial interests in voting capital of PLCs (so that at least the differences can be more apparent to users of the law). **(11.10.8 (ii))**

- Directors and secretaries should be exempted from notifying where an original or a copy of a stock transfer form is delivered to the company, which on its face identifies the director, secretary or a connected person as purchaser or seller of the shares and the purchase price, within a period of 30 days following the transfer. **(11.10.8 (iii))**

- Notification of interests should be permitted on the day of acquisition or disposal also, as well as in the five days following. **(11.10.8 (iv))**

- For a period of eighteen months after enactment of the amending law, a company should be empowered by a combination of (i) an ordinary resolution of the members and (ii) a board resolution to reinstate the enforceability of rights attaching to shares of any director, without the need for the director or secretary to apply to court, where the director-shareholder or secretary-shareholder makes an affidavit for or representation to the company that the failure to make the notification was inadvertent, and where the board is satisfied with that explanation. **(11.10.8 (v))**

- Rights attaching to shares of directors and secretaries (and persons controlled and connected to them, etc.) should be enforceable where the information required in the register of interests in shares has appeared in a register or a combination of registers of the company from no later than one month following the director or secretary concerned acquiring the shares or debentures in question. **(11.10.8 (vi))**

12

CHAPTER 12

Corporate Litigation

twelve

12.1 Introduction

12.1.1 In its first work programme the Review Group was asked to look at the case for establishing a Companies Court, i.e. a dedicated forum for dealing with company law within the legal system. The Group approached this issue through consideration of two interlinked objectives: (a) the case for dedicated treatment of company law within the High Court system; and (b) the case for improved management of dispute resolution in the area of company law.

12.2 Approach of Review Group

12.2.1 The focus of the Review Group's interest in this chapter is on business-to- business and business-to-State litigation. As such, the Group's concern is exclusively on the administration of civil law in the High Court. The Group considers the area of criminal acts and omissions under the Companies Acts in Chapter 8. Summary offences under the Companies Acts have usually been prosecuted by the Minister[1] and by the CRO (for filing offences) in the District Court. It is also relevant to note, for example, that the 1999 (No 2) Act gives the Registrar and creditors the right to apply to the Circuit Court rather than the High Court for the restoration of a company that has been struck off.[2]

12.2.2 It is important to note that the Review Group is not proposing reforms to this area because of a general perception of problems and inadequacies currently applying. The Group received no submissions which referred in specific terms to inefficiencies in the courts regarding delays or process. Neither did the Group receive any submissions reflecting concerns about the lack of specialised company law expertise in the administration of justice. Some anecdotal comments were offered by the IBEC representative on the Review Group which reflected some perceptions in business that, in dealing with company law issues, the Irish courts were less consistent than in other jurisdictions and that unforeseen delays sometimes happened during the progress of cases.

12.2.3 The Review Group does not, however, see its task of evaluating the best approach to corporate litigation as being concerned solely with the solving of current problems. The Group takes the view that Ireland, to complement its world-class economy, should have both a world-class companies code and legal structures and processes geared to efficient dispute resolution. It is from this perspective that the Review Group approached the issue of corporate litigation.

12.2.4 The context is that Ireland has, since 1997, experienced the fastest and most sustained period of growth in its history.[3] The economy has undergone structural change and an enormous increase in economic activity, much of it of a complex and sophisticated nature and much also having a strong international dimension. This will inevitably lead to a greater incidence of commercial/company law disputes presenting before the courts for resolution. Moreover, the increasing use of e-commerce makes it even more imperative that disputes are resolved in a timely manner.

12.2.5 The Group wishes to make a case for improving the efficiency of commercial dispute resolution for companies already established in Ireland. The Group considers such can be viewed as an economic activity in itself, leading over time to a more frequent choice of the Irish courts as a forum for commercial litigation, particularly by those international firms which have set up in Ireland.

1 With very limited exceptions, summary offences which were prosecuted by the Minister will in future be prosecuted by the Director on foot of the 2001 Act.

2 See s 46 of the 1999 (No 2) Act which repeals and substitutes ss 12, 12A, 12B, 12C and 12D of the 1982 Act.

3 Irish GNP has grown by 9.4% in 1997, 7.9% in 1998, 8.2% in 1999 and 10.4% in 2000. Estimated GNP growth for 2001 is 5.2% (Source: Department of Finance Monthly Economic Bulletin, February 2002).

12.3 The organisation of the courts

12.3.1 Article 34 of the Irish Constitution, *Bunreacht na hÉireann*, makes provision for the administration of justice "in courts established by law by judges appointed in the manner provided by the Constitution." Article 38 of the Constitution provides that the existing courts and judges are to exercise the same jurisdiction as heretofore "unless otherwise determined by law." The Courts (Establishment and Constitution) Act 1961 gives effect to the provisions of Article 34 by establishing a Court of Final Appeal and Courts of First Instance. Provision was made for the establishment of five courts, namely, a Supreme Court, a High Court, a Court of Criminal Appeal, a Circuit Court and a District Court. The Act sets out the constitution of these courts and makes provision in relation to their organisation. Section 10(3) of the Courts (Supplemental Provisions) Act 1961 as amended, provides that "it shall be the function of the President of the High Court to arrange the distribution and allocation of the business of the High Court."

12.3.2 The number of ordinary judges of the High Court is fixed from time to time by Act of the Oireachtas. There are currently 26 High Court judges being the President of the Court and 25 ordinary judges. Of this number, 22 are in the High Court (having regard to the various tribunals and a Commission). Eighteen judges are currently assigned by the President of the High Court to civil work and four judges are assigned to criminal work. There are a number of legislative provisions for jurisdiction in certain matters to be vested in the President of the High Court and for assignment by the President of a judge or judges to particular areas of the work of that court. *The Rules of the Superior Courts*[4] provide for the assignment by the President of a judge or judges to certain areas of the work of that court, e.g. on chancery, company law matters, bankruptcy, winding-up matters and examinerships.

12.3.3 Although separate divisions are no longer provided for in legislation, the High Court conducts its business through cases being heard in a number of lists. In practice, it appears that until the end of the 1970s judges were assigned particular areas of work and there was very little interchangeability. The fast changing jurisdictional landscape has meant that whilst the business of the High Court is still conducted through various lists, judges are now more frequently rotated. All judges are now required to deal with all kinds of litigation. It can be argued that a system without divisions and permanent assignments allows for flexibility in the allocation of judges where and when needs are perceived, and allows for judges to gain a range of experience. On the other hand, from the litigator's point of view the greater specialisation of judges in complex areas (such as company law) is more likely to be seen as an advantage.

12.3.4 Many changes in society, legislation and the economy have occurred in the past twenty years. These have been reflected in the type and volume of the business of the High Court and have affected the way business is conducted. The many problems that have beset the courts in this period are detailed in the Reports of the Working Group on a Courts Commission (WGCC), which was established in October 1995. The changes that occurred during this period include the huge increase in the volume of litigation, new areas of litigation and increased complexity of many areas of litigation. In the area of company law, the lengthy recession of the 1980s lead to a marked increase in insolvency matters, mortgage suits and applications by financial institutions for possession of lands. This situation was met by setting up a separate *Examiner's court motion list*[5] and a separate *Chancery special summons list*. Noteworthy also is the appointment of extra judges to the Supreme Court and the resultant reduction in times for hearing of appeals. Currently, two Supreme Courts can, and frequently do, sit simultaneously.

4 Rules of the Superior Courts 1986 (SI No 15 of 1986).

5 The Examiner referred to is the Examiner of the High Court, a High Court official, not an examiner appointed to a company under the 1990 Amendment Act. See also 12.5.13.

12.4 The Working Group on a Courts Commission

12.4.1 The complex issues which have arisen in law and the administration of justice over the past few decades were set out by the WGCC in its concluding report (November 1998):

> "The problems for the court today are not simply the result of the cases having become lengthier and more complex, although that is undoubtedly a factor. In recent decades whole new fields of law have opened up and inevitably, the Supreme Court, as the final court of appeal, has been deeply involved in the relevant law. This has been particularly the case in relation to constitutional law, family law, judicial review, European Union law, competition law, employment law and anti-discrimination law."

12.4.2 Apart from the development of these areas of the law, there has been an enormous increase in the number of cases coming to the courts in traditional areas of the law, i.e. criminal law, personal injuries and commercial and chancery cases. To cope with this greatly increased volume of cases, the number of High Court judges has increased fourfold in the past twenty years and the volume of appeals coming to the Supreme Court has also increased correspondingly.

12.4.3 The case for dedicated treatment of particular matters in the court is always complex, having regard to concerns about specialisation and continuity on the one hand and flexibility on the other. The WGCC did not deal specifically with the case for a dedicated commercial court. It did consider the issue of a dedicated court in the family law area and recommended that a Family Law Division should be set up in the High Court, the Circuit Court and the District Court. The WGCC also recommended the introduction of a full system of case management in this area, and that judges should be assigned by the Court Presidents to the Family Law Divisions on the basis of their experience, legal knowledge, inclination and temperament. Each judge should be prepared to spend at least one law term in the Family Division, but judges should not be assigned permanently to family law. Judges should be enabled to attend meetings and seminars, particularly in regard to newly enacted legislation, in the family law area. The Courts Service Strategic Plan 2000 to 2003 sets out strategies to develop and implement short, medium and long-term plans for the provision of family law court services.

12.4.4 It is also of relevance to note that the WGCC in its report on *Case Management and Court Management* (July 1996) concluded that serious consideration needed to be given to the creation of a Division of the High Court (the WGCC used the term "small Division") to deal with bankruptcy, company liquidations and matters arising from the Examiner's List. The Commission felt that this Division could be created as a pilot scheme. The report noted the efficacy of the "specialised modern caseflow management system" in modernising the operation of the Examiner's Court. Currently, insolvency matters are heard in the Chancery lists, the Examiner's court motion list and the bankruptcy list. In practice, insolvency matters, whether motions, petitions or substantive hearings are usually heard by a small number of judges.

12.4.5 The report of the WGCC noted the proposals for case management in the UK in the Woolf Report (1996) *Access to Justice*[6] and drew the conclusion that pursuing such an approach in Ireland would, inter alia, entail consideration as to whether:

> "… the High Court should sit in specialised divisions (commercial, chancery, insolvency, judicial review, personal injuries and family law) with a senior judge in each division exercising the case management responsibilities for that division."

12.4.6 It is clear that the WGCC was prepared to consider the creation of Divisions within the High Court on the basis of the merits of such Divisions. This is despite the fact that separate Divisions are no longer provided for by legislation.

6 HMSO, 1996.

12.5 Current organisation: chancery/commercial/company law matters[7]

12.5.1 Each of the lists set out below has either a chancery/commercial/company law or insolvency law content. A number of these lists are linked to each other either by reason of content or procedure or by virtue of currently having the same judge assigned to two or more of these lists. The Review Group recognises that the assignment of specific judges to take charge of specific lists has brought benefits of consistency and continuity. The lists are:

(i) the non-jury list;
(ii) the judicial review list;
(iii) the Chancery lists (1 and 2);
(iv) the Chancery special summons list;
(v) the Examiner's court motion list;
(vi) the bankruptcy motion list

Company law matters

12.5.2 A very extensive range of company law matters is heard in the Chancery Courts. These include applications for the appointment of provisional liquidators and examiners to companies, the hearing of petitions to wind up companies, and applications to confirm reduction of share capital, to restore a company to the register, or to sanction a compromise or arrangement. Companies Acts matters are initiated by petition or originating notice of motion.

12.5.3 Currently there are two "main" Chancery lists, *Chancery 1* and *Chancery 2*. A *Monday list*[8] is held in both of these courts. This list usually comprises:

(i) matters for mention;
(ii) petitions pursuant to the Companies Acts (usually creditors' petitions for winding up);
(iii) motions/ Companies Acts matters where direction is required; and special summonses.

12.5.4 From Tuesday to Friday of each week these Courts are mostly concerned with the hearing of actions. Lengthy or complicated matters not suitable for the *Monday list* are also heard from Tuesday to Friday. If deemed sufficiently urgent, such matters can be adjourned from the *Monday list* to the following Thursday to see if a hearing date can be given within the next week, otherwise such motions are transferred into the next list to fix dates (see below). The practice has been to allocate Revenue matters to *Chancery 1* and matters relating to intellectual property rights including patents matters to *Chancery 2*. The Chancery Courts hear a combination of "pure" chancery matters, company law matters and "commercial" type matters where equitable relief is one of the remedies sought. Proceedings in the Chancery Courts or where equitable relief is sought are initiated by petition, summons or originating motion. Orders, which provide for the taking of accounts and inquiries by the Examiner (other than in mortgage suits), are also usually made in these lists.

The non-jury list

12.5.5 The *non-jury list* is presided over by a specifically-assigned senior judge. The bulk of the business of this list consists of cases, which would elsewhere be described as "commercial" cases. Other matters heard in this list include matters relating to planning and development and certain probate matters. Similar to practice in the Chancery lists, there is a *Monday list* and from Tuesday to Friday cases and motions not suitable for the *Monday*

7 For the purpose of clarity, it is important to distinguish between "company law" cases (which term is usually used in this jurisdiction to denote applications under the Companies Acts) which are dealt with in the Chancery lists, and commercial cases. In England and Wales, Northern Ireland and Scotland, which have dedicated Commercial Courts, the term "commercial case" is generally used to indicate a case relating to the supply or exchange of goods or services, banking, insurance or other financial services, and the carriage of goods, in which the principal remedy sought is the common law remedy of damages. These types of cases also make up the bulk of our non-jury list. In Northern Ireland, in cases where injunctive or other equitable relief is sought, the case may be dealt with in the Commercial List or in the Chancery List as the parties or the presiding judge decide. In this jurisdiction, commercial and company lists are dealt with in separate lists, but where a "commercial" case requires equitable relief it is usually dealt with in the Chancery list.

8 In weeks where there is a public holiday on a Monday, the *Monday list* is deferred to the following Monday.

list are heard. The *non-jury list* is at present combined with the judicial review list and presided over by the same judge. Currently, this list is supported each week (Tuesday to Friday) by three other judges assigned by the President.

Current practice in the Chancery and non-jury lists

12.5.6 Each law term, a hearing for a *list to fix dates* takes place in each of these lists in which cases in the list are allocated dates for hearing the following term. This list is comprised of: (i) actions which have been set down for hearing and are accompanied by a certificate of readiness from counsel or solicitor; and (ii) motions and other matters, e.g. special summonses in the case of the Chancery lists, are transferred into the lists for hearing.

12.5.7 The *certificate of readiness* takes the form of a letter from counsel certifying that the case is ready for hearing. This means that all preliminary matters such as discovery have been dealt with, that outstanding issues such as motions or orders have been disposed of or complied with and that the pleadings have closed. This certificate is filed in the Central Office of the High Court and placed with the papers which were lodged in the Central Office when the case was set down for hearing. The case is then transferred into a master list of certified cases to await the next *list to fix dates* and the assignment of a hearing date.

12.5.8 At the *list to fix dates* hearing, counsel is required to indicate to the court the length of time the trial will take and other relevant matters, e.g. whether the trial is on all issues or simply an assessment of damages. The advance notice of the holding of a *list to fix dates* and the list of cases therein is published in *The Legal Diary* approximately two weeks in advance of this date. Once the list for hearing has been fixed for the following term the list is published in *The Legal Diary*, together with the day and date assigned to each case and the estimated time each case will take (the latter piece of information having been supplied by counsel to the court at the fixing of the list).

12.5.9 Once a trial date has been given, the possibility of settlement is increased and a "back-up" case from further down the list will also be fixed for each date. The parties to this case will be aware that they will only be heard if the case ahead of them settles on the day. (Judicial review cases and cases stated do not have the same potential for settlement as other cases).

12.5.10 Periodically, a call-over of uncertified cases is held in relation to each of these lists. "Uncertified" means that the case has been set down, that the pleadings are closed but that for various reasons senior counsel is not ready to certify it as ready for hearing. The current practice of the court is to ask for an indication of when the case will be certified and to seek an explanation of why it was set down, if not ready for trial. For a number of years past it has been the practice to have a combined call-over of both *Chancery lists*, an innovation that has increased the efficient administration of both of these lists.

12.5.11 The weekly management of the *non-jury* and *Chancery lists* is dealt with by a call-over of each of these lists on Thursday mornings by the judge having charge of the lists. As a general rule, all matters which are ready for hearing in these lists are currently being allocated dates in the following term.

12.5.12 The High Court rises for approximately 15 weeks of the year, including all of August and September. During these vacations, the capacity to deal with litigation is reduced with one or two duty judges sitting to hear urgent matters.

Examiner's court motion list – bankruptcy list – Chancery special summons list

12.5.13 The Examiner's Office is attached to the High Court and is mainly concerned with chancery and company law matters. The Examiner deals in the main with court liquidations and associated matters. In the mid-1980s an *Examiner's court motion list* was established to deal with the increasing volume and complexity of cases in this

area. *The bankruptcy list* has also been assigned to the judge having charge of *Examiner's court motion list*. These two lists have benefited from a great degree of constancy in the judges assigned to them. The *Examiner's court motion list*, since its inception as a separate list, has only been assigned to a small number of judges sequentially. In the event that the assigned judge was unavoidably absent and unable to take the list it has invariably been assigned to a judge similarly experienced in chancery and company matters.

12.5.14 A third Chancery list, known as the Chancery special summons list was also established in the mid-1980s in response to an unprecedented increase in proceedings by mortgagees seeking sale and/or possession of lands. For the past number of years this list has been assigned to the judge assigned to take the *Examiner's court motion list* and the *bankruptcy list*.

12.6 Courts Service

12.6.1 The key recommendation of the WGCC, in its concluding report, was for the establishment on a statutory basis of an independent and permanent body, the Courts Service, to manage a unified court system. This has been done on foot of the Courts Service Act 1998, which provides for the establishment of an independent Courts Service with a unified organisation and structure to manage the courts. The functions of the Courts Service are to:

(i) manage the courts;
(ii) provide support services for the judges;
(iii) provide information on the courts system to the public;
(iv) provide, manage and maintain court buildings; and
(v) provide facilities for users of the courts.

The Courts Service manages the courts under the direction of its Board, which determines policy.

12.6.2 The Review Group appreciates that the Courts Service has been established relatively recently and, in consequence, is not yet in a position to provide the range and degree of data which is available from jurisdictions with longer-established Courts Services. Such data would allow the Group to draw more definitive conclusions. In a lecture to the Law Society of University College Cork on 23 March 2001 Chief Justice Ronan Keane noted that it is difficult to get accurate and up to date material on court delays. The Chief Justice pointed out that in a civil case "a delay of a year or more can lead to drastic changes in circumstances and considerable hardship." In this context, the Group notes and welcomes the establishment of an information office within the Courts Service which includes a statistics unit. The Group, moreover, very much welcomes the commitment of the Courts Service to:

> "[T]he production of statistics which will assist the public, the media and professionals in understanding the range of cases being dealt with through the Courts, allow for the evaluation of changes evident from the statistics and enable policy makers as well as the [Courts] Service to be proactive in dealing with such changes."[9]

12.6.3 The Review Group welcomes the fact that in its strategic plan the Courts Service identifies "willingness to change" as one of its values. To that end, the Service commits itself :

> "[T]o constantly and honestly review the performance of the organisation and the quality of the service [the Courts Service] provide and embrace and promote the necessary change to ensure our ongoing effectiveness."

9 Courts Service Strategic Plan 2000 – 2003 (published November 2000). The Courts Service is required by s 7 of the Courts Service Act 1998 to prepare a strategic plan for submission to the Minister for Justice, Equality and Law Reform for approval and, after approval, laying before the Houses of the Oireachtas. The Strategic Plan reflect a process of public and user group consultation. A new plan will be prepared and issued every two years.

12.6.4 It is a matter of particular interest to the Group that the Courts Service has undertaken :

> "[T]o assess and examine the need for the establishment of a commercial court and advise the Minister for Justice, Equality and Law Reform accordingly."

Recent developments

12.6.5 Consistent with the above, the Review Group notes that the Committee on Court Practice and Procedure[10] is currently considering the case for a commercial court. The Group hopes that the views expressed in this report – which draw on a wide range of users of the court services for commercial litigation purposes and their experience - can be of assistance to the Committee in formulating its conclusions. The Group remains willing to be of further assistance if required. The Courts Service has already established a statistics unit and the first annual report dealing with its work was published in earlier this year. The Courts Service is also developing a template for the collection of Companies Acts statistics.

12.6.6 The Review Group welcomes the establishment by the Courts Service of a Working Group on the Jurisdiction of the Courts with terms of reference to carry out a root-and-branch examination of the organisation of the courts system and to recommend any necessary changes to allow for the fair, expeditious and economic administration of justice - including the creation of new, or the alteration of existing, jurisdictions. The work of the Group will be carried out in three modules: criminal law; civil law; and general changes in structures required as a result of recommendations in civil law and criminal law.[11]

12.7 Other common law jurisdictions

12.7.1 The Review Group notes that, generally speaking, company/commercial law is treated distinctly from other areas of civil law in most common law jurisdictions:

England and Wales	Chancery Division, Companies Court, Commercial Court within the Queen's Bench Division
Australia	17 Standing Committees assist in administration of Federal Court; one of these Committees deals with Corporations
New Zealand	Separate Commercial List in High Court
Delaware, USA	Chancery Court

England and Wales

12.7.2 As in Ireland, the structures in other jurisdictions can be complex. For example, in England and Wales the principal business of the Chancery Division[12] comprises corporate and personal insolvency disputes, business, trade and industry disputes, the enforcement of mortgages, intellectual property matters, copyright and patents, disputes relating to trust property and contentious probate actions. The major part of the Chancery Division caseload involves business disputes of one kind or another. The Companies Court is a part of the Chancery Division. Applications in the High Court under the UK Companies Act 1985, the UK Insurance Companies Act 1982 and the UK Insolvency Act 1986, in relation to companies registered in England and Wales, must be commenced in the Companies Court. The Companies Court deals predominantly with the compulsory liquidation of companies and other matters under the UK Insolvency Act 1986. Registrars deal with most proceedings in the Companies Court but certain proceedings are heard by judges. The Commercial Court within the Queen's Bench Division is largely concerned with matters regarding contracts relating to ships, insurance, carriage of

10 The Committee on Court Practice and Procedure is an advisory committee to the Minister for Justice, Equality and Law Reform on the operations of the courts.

11 Courts Service press release 10 January 2002

12 The Chancery Division is one of the three parts, or Divisions, of the High Court of Justice; the other two being the Queen's Bench Division and the Family Division.

cargo and the construction and performance of mercantile contracts. Other matters dealt with involve banking, international credit, contracts relating to aircraft, the purchase and sale of commodities and the practice of arbitration and questions arising from arbitrations.

12.7.3 In England and Wales, there has been an interesting recent development in respect of the Commercial Court. The Lord Chancellor,[13] Lord Irvine, commissioned a *Commercial Court Feasibility Study* to examine the potential for establishing a new Commercial Court in London to handle a wide range of high value and international commercial litigation and to develop Britain's role as a global centre for dispute resolution.[14] The study set out to assess the feasibility of a new way to deal with commercial disputes using the latest information technology and international communications, capable of attracting legal business from around the world. The study also explored the scope for any new court to be self-financing, drawing no subsidy from any other part of the civil justice system. The study includes work currently dealt with by the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Patents Court and the Companies Court. The study explored:

- the scale and type of commercial litigation in England and Wales;
- the broad size of the world market;
- the prospects for growth of the market;
- the scope for attracting an increased share of the world market;
- factors which determine litigants' choices of jurisdictions;
- costs and funding options of developing and operating a new court;
- the benefits to court users and the to UK economy;
- the benefits to the public purse;
- the impact on commercial litigation outside London.

The study programme in the UK and abroad involved consultation with the (British) Court Service, the judiciary and the legal profession and with commercial interests including those with extensive international operations.

12.7.4 *The Commercial Court Feasibility Study* was completed in February 2001.[15] It is worth noting that a substantial concern of the report is to maintain or improve the UK share of the global commercial disputes resolution market. The study found that the market wants a reduction in the total cost of litigation and an improvement in the user-friendliness and accessibility of the system as a whole, while retaining its current strengths around the quality and enforceability of judgments. One of the options considered in the report focuses on delivery by the state of an integrated High Court litigation service to businesses, whether domestic or international. The study proposes the creation of a common infrastructure to support the operation of the courts providing services to business, i.e. the Commercial, Admiralty and Technology and Construction Courts in the Queen's Bench Division and the Patents and Companies Court in Chancery. The intent would be to provide a model of operation that is suitable for all business-to-business and business-to-State civil litigation. As such, the focus is on underlying business processes and technologies used to support the operation and management of the courts. Distinct listings and, indeed, existing Divisions would continue. Alternative options put forward were : (a) to focus on constructing a purpose-built (physical) commercial court and back-up facilities available for business litigation; and (b) the creation of an integrated dispute resolution centre covering litigation, arbitration and alternative dispute resolution (ADR).

Scotland

12.7.5 In Scotland, an interesting model for the transaction of commercial litigation was set up in the Court of Session[16] in 1994. In broad terms, the objective is to enable specialist judges to handle commercial cases quickly and

13 The Lord Chancellor is responsible for the effective management of the courts, the appointment of judges, magistrates and other judicial office holders, the administration of legal aid, the oversight of a varied programme of Government civil legislation and reform in such fields as family law, property law, defamation and legal aid.

14 Press release (Lord Chancellor's Department, 9 November 2000).

15 Commercial Court Feasibility Study, (Lord Chancellor's Department, February 2001).

16 The Court of Session is the Scottish equivalent of the High Court.

flexibly. The impetus for this initiative was the report of a working party, which had consulted widely among commercial interests. The objective is to meet the recognised demand for a procedure which enables such litigation to be dealt with expeditiously and without undue technicality, with an appropriate level of expertise, and in a manner consistent with fairness and the proper consideration of the issues.

12.7.6 In the Scottish system, three judges have been nominated as commercial judges, for whom commercial business will have priority. One of the three is available full time for commercial work. The other two have their programme of work arranged so that one of them is available for commercial business if required. The rules of procedure are adapted in such a way as to give the judges an active role in progressing the cases and in determining how the issues are to be addressed.

12.7.7 New commercial rules have been drafted on the basis that parties should recognise that there is a joint interest in securing the efficient disposal of business and with a view to developing a co-operative approach in practice. In the exercise of their extended role, the judges are required to proceed on information given to them by the parties, for example, as to the time needed for preparation. From the court's perspective it is essential that the judges should be given accurate information to enable reasonable and realistic allowances to be made: the corollary is that the parties will be expected to adhere to what is fixed by the judge in the light of the information provided.

12.7.8 Generally, the rules have in view disputes of a business or commercial nature, in the ordinary sense of those expressions, relating to matters such as the supply or exchange of goods or services, banking, insurance and other financial services and the carriage of goods. In the first instance, the procedure is elective but the court has power to resolve differences of opinion between parties.

12.7.9 The court encourages a free flow of information and views between the court and the business community about the practical operation of the commercial court. A users' committee allows discussion of the issues. Its members include the commercial judges, representatives of the legal profession and representatives from commerce and industry.

Australia

12.7.10 In Australia, company law has been complicated by the respective competences of federal and state governments. Uniformity has been achieved with the Corporations Act 1989 and the Australian Securities Commission Act 1989 and the subsequent passage of legislation by each state applying these federal statutes as their own law. There was a cross-vesting of jurisdiction giving the Federal Court of Australia and each state Supreme Court jurisdiction with respect to civil matters arising under the Corporations Law of all jurisdictions.[17]

Victoria, Australia

12.7.11 The individual Australian States are more appropriate comparator jurisdictions to Ireland than the Commonwealth (federal) legal system as regards history, size and volume of litigation. In Victoria, for example, with effect from 1 February 2000 the judges and masters of the Supreme Court of Victoria (equivalent to the High Court of Ireland) have operated in three Divisions:

(i) the Commercial and Equity Division;
(ii) the Criminal Division; and
(iii) the Common Law Division.

17 This solution has been complicated by the judgment of the High Court of Australia in *Re Wakim* [1999] HCA 27 (17 June 1999). The High Court of Australia decided that the cross-vesting provisions of the Commonwealth Corporations Act and the various state Corporations Acts that purported to give the Federal Court jurisdiction to hear and decide cases arising under the Corporations Law were unconstitutional. The High Court held that the Federal Court did not have the power to decide matters that were exclusively within the jurisdiction of the states. Since the Corporations Law is legally state legislation this decision meant the Federal Court could not hear or decide Corporations Law cases.

The express purpose of this change was to increase the efficient use of judges and masters of the court, to improve the system for litigants and their lawyers and to provide greater specialisation within the court. It is intended that this system will tap the particular expertise of judges and materially improve the efficiency of caseflow management. Judges have been allocated to these Divisions for an initial period of three years. There will be, however, some exchange of judges between Divisions. The area of competence of the Commercial and Equity Division includes Corporations Law and matters arising principally out of ordinary commercial transactions.

New Zealand

12.7.12 In New Zealand, the High Court has jurisdiction over major crimes and civil claims involving more than NZ$200,000 (€93,288 approx.). It also deals with judicial reviews of administrative action and admiralty proceedings. In the past few years a number of initiatives have been implemented with the aim of improving the court's efficiency, effectiveness and accessibility. These include the establishment of a separate Commercial List for faster resolution of commercial matters. This list deals with proceedings of a general commercial nature, including disputes relating to intellectual property, arbitration and construction of documents disputes.

Delaware, USA

12.7.13 In Delaware in the United States, the Chancery Court has a national reputation among the US business community and is responsible for developing case law in Delaware on corporate matters. It is the only court in the United States that is devoted almost exclusively to the resolution of corporate law cases. The Chancery Court has five judges. The judges are each appointed for a 12-year term and sit individually. There are no juries, no punitive damages and its jurisdiction is limited (no crimes, no torts). It largely adjudicates business problems: contracts including licensing agreements, partnership agreements, corporation law matters and fiduciary duties generally. The Chancery Court provides fast, expert adjudication in subject areas requiring expertise in its special jurisdiction areas. It is not unusual for the validity of a hugely complex corporate decision to be determined in Chancery within 60 days and the appeal decided in another 60 days.[18] The courts do not take vacations comparable to those in Ireland. There is both a highly-developed corporation law and a large body of judgments, which together help to bring predictability and reasonable certainty to legal interpretations. The existence of this dedicated business court and its attendant established body of laws is commonly cited as one of the incentives for companies to incorporate in Delaware. More than half of the Fortune 500 companies and half of the companies listed on the New York Stock Exchange are incorporated there. The highly-developed case law with written precedents brings a significant degree of predictability which is helpful to corporate planning and decision-making. The income derived by Delaware from corporations franchise tax and the employment resulting from incorporation-linked services means that the state legislature places a high priority on keeping its corporations statute current and related administrative and support services efficient and effective.

Northern Ireland

12.7.14 The Queen's Bench Division in Northern Ireland has a Commercial List, the operation of which has been described by Brian Kerr J as follows:[19]

> "The Commercial List was established in 1992 by the introduction to the Rules of the Supreme Court (Northern Ireland) 1980 of Order 72[20]…The introduction of Order 72 was prompted – to a significant extent at least – by representations made by the commercial community in Northern Ireland about the cumbersome and protracted nature of commercial litigation in our jurisdiction. This Order and its implementation have been the legal community's reaction to those representations and its own acknowledgement of the need to streamline and adapt traditional proceedings – particularly at the preparatory or interlocutory stage – to cater for the particular requirements of commercial action."

18 Source: Delaware, the Corporate Choice, (Delaware Department of State).

19 Case management in the Commercial List in the Queen's Bench Division as described by Mr Justice Brian Kerr, Judge of the High Court, Northern Ireland, at a Conference on Case Management held by the Working Group on a Courts Commission in November 1996.

20 Order 72, Rule 1(2) of the rules of the Supreme Court (Northern Ireland) includes within the definition of a commercial action such diverse matters as building contracts, insurance, banking, sale of goods and shipping.

Kerr J continued:

> "As a matter of practice, actions enter the Commercial List by two routes. Firstly and usually, parties will apply to me through the Commercial Office to have an action included in the List. Less commonly, the Registrar of the Commercial List will carry out a trawl of actions, which have been set down in the Queen's Bench List and identify actions, which are clearly commercial. These will then be taken into the Commercial List."

12.7.15 The aim of the Commercial List of the Queen's Bench Division, Northern Ireland, has since been set out in Practice Direction 1/2000, as follows:

> "[T]o provide those engaged in commercial litigation with a venue and procedures by means of which their disputes may be justly and expediently resolved. The commercial court specifically recognises the importance to the commercial community of economy, efficiency and the maintenance of good business relationships and, accordingly, the court is anxious to encourage serious attempts by the parties to enter into productive negotiations with a view to achieving a mutually satisfactory resolution of the litigation or, at the very least, identification and reduction of disputed issues at an early stage in the proceedings."

12.7.16 Commercial actions are said to include any cases related to business or commercial transactions and, although the rules offer a detailed list of such matters, the commercial judge may include such other causes as he thinks fit to enter. There is a perception that litigating parties elect for the Commercial List because of the expertise built up there. Case management is a key component of the administrative strategy of the Commercial List.

12.7.17 To advise on the operation of the Commercial List the commercial judge is assisted by a commercial liaison committee with two nominees each from the Bar Council and the Law Society. There is also a Commercial List users' panel, drawn from professional bodies, e.g. architects, accountants, and chartered surveyors.

Court structures in the foregoing jurisdictions

12.7.18 The following is a tabular summary of the court structures in selected jurisdictions:

Jurisdiction	Structure	Matters dealt with	No of Judges	Case Management
England & Wales	High Court Chancery Division	Major part of caseload is concerned with business disputes, including: -corporate & personal insolvency -business, trade & industry disputes	17	Yes
Scotland	Court of Session Commercial Action	Any transaction or dispute of a commercial or business nature e.g., banking & insurance transactions, contracts for sale or supply of goods or services	1 full- time 2 part-time	Yes
New Zealand	High Court Commercial List	Proceedings of a general commercial nature, including intellectual property, arbitration & construction of documents disputes	4	Yes
Victoria, Australia	Supreme Court of Victoria Commercial & Equity Division	Mainly corporations matters & matters arising out of ordinary commercial transactions	6	Yes
Delaware, USA	Chancery Court	Business law, corporations law, contracts, fiduciary duties	5	Yes
Northern Ireland	Commercial List, Queen's Bench Division, High Court.	Commercial actions, broadly defined	1 full- time 2 part-time	Yes

12.8 Case management

12.8.1 Case management is a term used to describe processes involving the control of movement of cases through a court or the control of the total workload of a court. Case management in courts is often, but not always, performed by judges. The progress of cases before the courts has always been "managed" in one sense, but traditional adversarial case management left the pace of litigation primarily in the hands of legal practitioners. The court's role was simply to respond to processes initiated by practitioners. In recent years, case management by judges and quasi-judicial officers such as registrars has been evolving rapidly in common law jurisdictions, e.g. the United States and Australia. These forms of case management typically involve the court managing the time and events involved in the movement of cases from commencement to disposition.

Case management in England and Wales

12.8.2 Ireland is not the only common law jurisdiction which has been reviewing both the ways and means of delivering justice. A major reform has taken place in England and Wales on foot of the enquiry by the Rt. Hon. Lord Woolf M.R. into the civil justice system. In his final report, entitled Access to Justice ("*the Woolf Report*"), Lord Woolf identified many defects in the civil justice system; in particular, that civil justice was too expensive and too slow and that there was inequality where parties had different resources. The aim of the civil justice reforms, proposed by the *Woolf Report*, was to remove those defects and to improve access to justice through quicker, cheaper and more proportionate justice. As an integral part of the reforms, the intention is that cases will be more closely monitored through to trial by the judiciary and that differences between High Court and County Court procedures will be removed.

12.8.3 The new unified civil procedure rules derived from the *Woolf Report* recommendations, along with the practice rules which supplement them, came into force on 26 April 1999. To achieve the aims identified in the *Woolf Report*, all procedural decisions will, in future, be guided by the overriding objective stated in Civil Procedure Rule 1.1:

> "The Court must deal with a case justly and dealing justly with a case is to include, so far as practicable, ensuring the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the sum at stake, the importance of the case, its complexity and each party's financial position, ensuring expedition and fairness and allotting to each case an appropriate share of the court's resources."[21]

12.8.4 An important principle articulated in the *Woolf Report* is that the structure of the courts and the deployment of judges will be designed to meet the needs of litigants. In Ireland, this would similarly be a key objective from the perspective of the Review Group, with its mandate of simplification and modernisation. It would also be consistent with the strategic management initiative underway in the public service with its focus on quality customer service.

12.8.5 A key objective of the *Woolf Report* is that ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the courts. This means a focus on a managed system of dispute resolution and in particular on the development of judicial case management. The *Woolf Report* recommended that the courts must: (a) decide what procedure is appropriate for each case; (b) set realistic timetables; and (c) ensure that procedures and timetables are complied with.

12.8.6 One year after introduction of the new rules, the UK media reported that a number of surveys had indicated the overall verdict as positive; the reported feedback being that litigation is quicker and more likely to lead to early settlement than a courtroom contest. *The Times*[22] quoted the head of litigation at a corporate law firm that conducts an annual access to justice survey as saying:

21 *Chancery Guide*, UK Courts Service website (www.courtservice.gov.uk).

22 2 May 2000.

> "The UK legal system historically has been plagued by unsatisfactory delays and expense. The style of dispute resolution is changing as a result of the Woolf reforms; people no longer seek aggressive uncompromising lawyers but those who look for commercial solutions."

12.8.7 In taking account of developments on foot of the Woolf reforms the Review Group would, however, note that these are of limited relevance to the Irish system. It is not, in any event, the function of the Group to propose reforms to the Irish civil justice system as a whole. Nonetheless, the Group is of the view that a reform initiative which leads to litigation in the commercial area becoming quicker to resolve and more likely to lead to early settlement would be a very positive development.

Case management in Northern Ireland

12.8.8 A key aspect of the Commercial List in Northern Ireland is that the judge is familiar with all the cases, and with the progress of all the cases, on the list. *A Review of the Civil Justice System in Northern Ireland* was published in June 2000. The Group on the Administration of Justice (GAJ), which prepared the report, noted that :

> "... evidence from the County Courts, the commercial list and the Chancery Division has persuaded the Group that appropriate case management can serve to promote efficiency in litigation and greater parity between opposing parties."

12.8.9 It is relevant to note that whilst the GAJ viewed the principle of judicial case management positively, it also pointed out that :

> "The GAJ sought to adopt an approach that would see active judicial intervention only where it is necessary."

12.8.10 The GAJ concluded that within the Queen's Bench Division in Northern Ireland only the Commercial List may be said to be subject to a high degree of active judicial case management, under the separate listing and administrative system for dealing with commercial actions introduced in 1992. The GAJ noted that, during 1997, a total of 135 cases in the commercial list were disposed of, as compared with 2,134 in the general list. It was further noted that such actions were often factually complicated, technical and "paper heavy" and that strong management of these actions was a necessary tool for narrowing the issues and promoting efficiency.

12.8.11 Case management within the Northern Ireland Commercial List as set out in *A Review of the Civil Justice system in Northern Ireland* is as follows:

> "A copy of every pleading (including notices for particulars and replies, interrogatories and replies and lists of documents) must be furnished to the Registrar of the Commercial List not later than two days from service on the other parties. Moreover, as soon as practicable after the close of pleadings, the Registrar refers the action to the Commercial Judge for directions as to the conduct of the case. The Commercial Judge may give directions without a hearing, may receive written proposals from the parties or may hear the parties as he thinks fit. Any party may, at any stage and at his or her volition, make an application for directions as to the conduct of the action. The date for hearing is fixed by the Registrar in consultation with the Commercial Judge, and the Judge may receive written or oral proposals from the parties as to listing. The Commercial Judge also exercises an element of control over the use of expert evidence and may order a party to disclose to the other parties at any time the expert evidence, which it is intended to adduce. The Registrar receives any such furnished evidence no later than two days after disclosure. A further measure of control is exercised over interlocutory proceedings, with all such matters being determined by the Commercial Judge himself, unless he directs otherwise."

Case management in Ireland

12.8.12 In Ireland, the Second Report of the WGCC was concerned with case management and court management. With regard to judicial case management, the WGCC noted that, if introduced :

> "[I]t would signal a significant transfer of responsibility for the management of civil litigation from the litigants and their legal advisers to the courts."

12.8.13 The WGCC also considered administrative case management. Whilst both aspects of case management are now issues to be advanced, primarily by the Courts Service and the judiciary, having regard to the concerns of other stakeholders, it is important to note the current situation. There is at present in operation a system of list management in all of the High Court lists and an extensive range of Practice Directions. In some areas, a degree of judicial and administrative case management already operates.

12.8.14 The Review Group notes the commitment of the Courts Service to case management systems which is timely having regard to the comments of the Chief Justice concerning case management in his judgment in *Orange Communication v. The Director of Telecommunications Regulation and Meteor Mobile Communications Ltd.*[23]:

> "The case has occupied a wholly inordinate amount of court time, both in the High Court and in this Court, it took 51 days in the High Court and 17 days in this Court. This was due in part at least to the absence of appropriate case management structures in the High Court at the time of the hearing. The Working Group on a Courts Commission in their sixth report, having reviewed their previous work on administrative case management, concluded that it should now be regarded as being within the remit of the Courts Service. This case demonstrates that the problem can be indeed acute. If and when the issues had been identified in pleadings and that discovery limited to those issues duly made, a preliminary conference between the judge, counsel and the solicitors should have insured that the issues were clearly understood and that the judge was provided well in advance of the hearing with the relevant documents – so as to avoid the immensely time consuming process of documents being read in court during the opening and indeed throughout the giving of evidence. No doubt it is easier to see with the benefit of hindsight the problems which arose and how they might have been resolved but it may well be that the substantial parties in commercial litigation having access to the best legal advice may be best placed to adopt newer procedures and illustrate their benefits for others."[24]

12.8.15 The Review Group understands that the Presidents of the various courts in Ireland and the Board of the Courts Service are keeping under review international developments in the areas of court and case management, including alternative dispute resolution and the need for appropriate technological litigation support systems. The Civil Procedure Rules of the Courts of England and Wales and the arrangements for hearing and processing commercial litigation in Northern Ireland and Scotland have been the subject of particular scrutiny by the Courts Service. The advance use of information technology for litigation and court administration purposes in other jurisdictions including Singapore and courts in the US is also currently being reviewed. As already mentioned, the Courts Service has set up a Statistics Unit. The statistics available under the present system do not extend, for example, to the provision of information on the duration of company law/commercial cases from initiation to final judgment in the High Court.

12.8.16 The comments of the Chief Justice, as set out above, regarding the absence of case management structures illustrate the concerns about commercial litigation that can arise at present. As referred to above, the Review Group welcomes the intention of the Courts Service to implement a civil case management system. The Group further notes that such reforms will need to be adequately resourced as regards personnel, expertise and information technology hardware and software.

Recent developments

12.8.17 Recommendations on case management are currently being considered by the Superior Courts Rules Committee. A subcommittee is currently devising rules to facilitate the new court procedures introduced by the 2001 Act.

12.9 Conclusion

12.9.1 The current impetus for reform both domestically and in comparator jurisdictions is striking. In the opinion of the Review Group, there is a convincing case for the dedicated treatment of commercial/company law cases in order to achieve efficient and effective dispute resolution. The Group has already referred to the increase in the volume of cases arising for judgment due to the huge increase in economic activity. There is, in addition, a very tangible

23 Supreme Court of 18 May 2000.
24 *ibid.* at page 147 of judgment.

reason for a pending significant increase in the volume of company law cases due, for example, to the likely increase in the number of applications to be made under s 150 of the 1990 Act (restriction of company directors) to the High Court by the Director following the commencement of s 56 of the 2001 Act.

12.9.2 One of the two principal issues for the Review Group's consideration in the area of corporate litigation is whether there should be a dedicated treatment of company law matters within the High Court. The Group is of the clear view that this should happen and recommends accordingly.

Commercial Division

12.9.3 The Review Group is aware that the method of treatment of disputes (which, while not strictly company law disputes, are disputes of an essentially commercial nature) is a matter of considerable interest to the commercial sector generally. It is striking, looking at the Table provided at 12.7.18, to see how court structures have been developed and refined in recent years in other jurisdictions to facilitate the resolution of disputes of a commercial nature generally as well as of company law simpliciter. It is of interest, for example, to note the establishment of the Commercial and Equity Division in the Supreme Court of Victoria. In the UK, in at least one of the options put forward for a commercial court, the intention is to provide a model of operation that is suitable for all business-to-business and business-to-State civil litigation.

12.9.4 It is the opinion of the Review Group that there is a case for the establishment of a Commercial Division within the High Court which would deal with a *Companies list* as well as other commercial cases and we recommend that this should be established.

Companies list

12.9.5 Within the Commercial Division the Review Group recommends that a dedicated companies list should be established in the High Court, with a named judge assigned to the list with overall responsibility for that list, and a number of judges named as dedicated back-up. Such a *Companies list* would combine elements of the present *non-jury* and *Chancery lists*. The *Companies list* would facilitate the consideration of company administration and share capital issues in an integrated way.

Improved management of dispute resolution

12.9.6 So far as the second principal issue is concerned, improved management of dispute resolution in the area of company law, the Review Group recommends that the judges assigned to the Commercial Division (and within this Division to the *Companies list*) should be encouraged to engage and assist in case management (for example, similar to the Northern Ireland model set out above at 12.8.11), subject to the principle of active judicial intervention only where necessary.

12.9.7 The Review Group also recommends that the relevant bodies be asked to put in place the appropriate rules and practice directions to implement this process.
The main arguments in favour of this approach are:

(i) it would deal with the expressed concerns of Irish business for a dedicated forum for resolving business disputes;
(ii) it would facilitate the continuing enhancement of written jurisprudence in this area;
(iii the existence of this specialist Division, and of a specialised *Companies list* within it, would enhance the sustained development of greater levels of specialised expertise and a greater concentration of such expertise;
(iv) this should lead to the development of Ireland as an attractive forum for the resolution of commercial and corporate disputes.

12.9.8 The Review Group envisages that on foot of establishing a Commercial Division of the High Court, the President of the High Court would assign overall responsibility for the Commercial Division to a named judge with particular knowledge of the area. Other judges would be assigned to the Division each of whom would in turn assume responsibility for the Companies list as well as such other lists as might be appropriate to such a Division (e.g. a *Competition list*). Whilst the length of any such assignment would be a matter for the President of the High Court, the Review Group believes it is appropriate that the assignment would be for such a period as would allow for the development over time of a settled mode of practice and procedure as well as a body of law.

12.9.9 It would also appear appropriate that there should be practice directions and rules of court intended to promote efficiency in litigation, and designed to deal with cases expeditiously and without undue technicality. In order to achieve these aims there should, in the opinion of the Review Group, be a developing degree of case management, subject again to the principle of active judicial intervention only where necessary. Common sense suggests that existing good practice with regard to specialisation, list management and practice directions should be built on. All of the matters above would obviously require adequate resourcing; notably additional judges, appropriate administrative and support staff, research facilities and aids. The Chief Justice's comments in Cork, which have as a theme the general streamlining of court structures and reform of the existing boundaries within the Irish court system ("a more rational and less cumbersome court system"), make the case for a greater allocation of resources to the courts. In his address the Chief Justice said:

> "We do not have enough judges in Ireland to cope with the hugely increased volume and complexity of litigation today. The number of judges per head of the population in Ireland is one of the lowest – perhaps the lowest - in the European Union. That remains a problem which must be dealt with by the executive and the legislature."

Other issues

12.9.10 It is also the opinion of the Review Group that there are a number of other issues which would certainly facilitate the efficiency of commercial litigation and would also help with the wider goal of developing Ireland as a forum of choice for commercial litigation. Because these are somewhat wider than our mandate the Group has not gone into these in detail but we do believe it is relevant to note that progress on these would allow for the transaction of commercial litigation in an optimally efficient and effective way. These issues are:

(i) Consideration should be given to the provision by the Courts Service of an integrated service to commercial litigants analogous to current proposals being considered in the UK, briefly described at 12.7.3 and 12.7.4.

(ii) Even if commercial litigation is streamlined, delays can arise in the event of an appeal. The provision of an Appeals Court for commercial cases distinct from the Supreme Court would greatly enhance the delivery of timely judgments.

(iii) Consideration should also be given to a dedicated commercial court building, as a physical centre for an integrated commercial court service and the commercial courts. Over time it may also be possible to develop alternative dispute resolution or mediation as one element of the service offered to commercial litigants.

12.9.11 The Review Group fully recognises that a decision to establish a Commercial Division would raise issues of policy, organisation and resource allocation in the administration of justice which are beyond the remit of the Group. These issues are matters for consideration by the Courts Service in the first instance and by the Department of Justice, Equality and Law Reform. It seems clear in any event that the Courts Service, in its consideration of the case for a commercial court, is likely to do so having regard to wider issues such as divisionalisation of the High Court.[25] It is in this context of examining the best approach for the future with regard to both structures and modus operandi that the Review Group puts forward this set of recommendations as affording the best model for excellent service in resolving disputes in the company/commercial law area.

25 See 12.6.6.

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12.10 Summary of Recommendations

12.10 Summary of recommendations

- A Commercial Division should be established within the High Court which would deal with all business-to-business and business-to-State civil litigation. **(12.9.4)**

- Within the Commercial Division a dedicated Companies list should be established in the High Court, with a named judge assigned to the list with overall responsibility for that list, and a number of judges named as dedicated back-up. Such a Companies list would combine elements of the present non-jury and Chancery lists. The Companies list would facilitate the consideration of company administration and share capital issues in an integrated way. **(12.9.5)**

- Judges assigned to the Commercial Division (and within this Division to the Companies list) should be encouraged to engage and assist in case management (for example, similar to the Northern Ireland model set out at **12.8.11**), subject to the principle of active judicial intervention only where necessary. **(12.9.6)**

- Relevant bodies should be asked to put in place the appropriate rules and practice directions to implement the process of setting up the Commercial Division.**(12.9.7)**

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CHAPTER 13

The Regulation of Insolvency Practitioners

13.1 Introduction

13.1.1 Among the issues the Review Group was asked to consider was the licensing and/or regulation of insolvency practitioners in Ireland. Current figures from the CRO indicate that there are 1,220 liquidators carrying out a total of 4,541 liquidations between them. Most liquidators are engaged in a single liquidation, with a relatively small proportion engaged in multiple liquidations.[1] Only 80 individuals are liquidators to ten or more companies. It is difficult to ascertain the average duration of liquidations or even the amount of funds held in liquidations although it should be noted that all liquidators of liquidations of more than two years' duration are required to file accounts of receipts and payments in the CRO. In addition to liquidators, the regulation of insolvency practitioners would also extend to examiners and receivers. The Group approached the issue of whether a licensing system and/or regulation should be introduced in Ireland with an open mind.

13.2 Approach of the Review Group

13.2.1 The Review Group received a number of submissions on the regulation of insolvency practitioners generally and of liquidators in particular. Most submissions call for statutory or statute-backed licensing for insolvency practitioners. There is also some support for utilising recognised professional bodies in a regulatory capacity as in the UK. The Group notes that many of the calls for regulation come from what might be termed "suppliers" to the market, and because of this submissions were the subject of rigorous scrutiny.

13.2.2 The Revenue Commissioners also made the case to the Review Group for licensing insolvency practitioners and for a bonding system to cover all liquidations, not just court appointed ones.

13.2.3 In the course of the Review Group's deliberations on mitigating the effects of strike-off for creditors[2], considered in Chapter 15, the Group came to the conclusion that the lack of a State-funded public interest liquidation service gave rise to a number of problems, which would otherwise be dealt with by such a service, and could exacerbate the consequences of other problems such as strike-off. Accordingly, the Review Group recommends that it be charged with considering the establishment of such a service in its second work programme 2002 to 2003.

13.3 Regulation and competition

13.3.1 In approaching the issue of regulation, the question posed by the Review Group was whether competition alone was a sufficient regulator of insolvency practitioners. The Group is aware that a regulatory framework, with consequent establishment of a standard with which practitioners must comply, and restriction of the right to practise, could increase the costs of a winding-up.

13.3.2 The broader issue of regulation versus competition has been, and continues to be, the focus of examination by the OECD.[3] It is the case that all OECD countries regulate the activities of certain occupations, either directly or by delegating regulatory powers to professional associations. Typically, these regulations govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities and (often) the organisational structure of professional firms. In many countries concerns have been raised that professional regulation has the direct or indirect effect of restricting competition in the market for professional services, raising costs and limiting variety and innovation.

1 An example of the scale of such multiple-liquidators is seen in *Re CB Readymix Ltd; Cahill v Grimes*, High Court July, 2001 (Smyth J) where the respondent, an engineer, was disqualified from acting as a liquidator, receiver or examiner of a company for seven years under s 160 of the 1990 Act. In the course of the judgment Smyth J cited the respondent as being "on his own averment liquidator of some fifty companies." It should be noted that this decision is under appeal.

2 The Review Group considered the situation of creditors in the context of strike-off of companies for failure to file annual returns with the CRO.

3 See OECD paper DAFFE/CLP(2000) 2.

13.3.3 Concerns arise that regulation restricts competition more than is appropriate or necessary, raising the price and limiting innovation in the provision of professional services. In addition, where a professional association is delegated certain regulatory powers, such as the power to discipline its members, concerns arise that professional associations may use these powers as a tool to restrict entry, fix prices and enforce anti-competitive co-operation between its members. In the absence of regulation, however, consumers of a service may be unable to assess the quality of the service being provided to them. The OECD report concluded that as a general rule regulation of professional markets should address market inadequacies using means which least restrict competition.

13.3.4 Sophisticated commercial purchasers of professional services are in a position to assess their own needs and to assess the services they purchase and consequently have less need for regulation of professional services. This is particularly true in the case of receivers who are almost invariably appointed by financial institutions to act on their behalf in the realisation of security granted by companies to be applied in repayment of monies owing. Different considerations apply, however, to both liquidators and examiners. When a liquidator or examiner is needed for reasons of insolvency that company can hardly be said to be operating at its most efficient. In the event of liquidation, corporate or institutional shareholders may be able to look after their own interests. It is, however, the case that regulation should focus on the need to protect small consumers and there is a strong case to be made that the interests of small creditors and shareholders are in need of greater protection. After all, liquidators of companies are fiduciaries who are in control of other persons' money.

13.3.5 When a company is being wound up, the beneficial owners of the company's assets (its creditors and, if solvent, its shareholders) are thought entitled to the legitimate expectation that the person charged with the orderly realisation and distribution of assets in accordance with law possesses the necessary professional expertise to comply with what are, by any standard, sophisticated legislative provisions. There are certain functions that it is reasonable to assume can only be competently performed on a consistent basis by persons with appropriate knowledge and experience. For example, the State could not countenance persons who have no formal medical qualification offering their services to the public on the grounds that the public can choose to avail of their services or those of a qualified medical practitioner.

13.3.6 The Review Group considered whether there was an alternative to regulation through information disclosure. The argument would be that a liquidator would be obliged to provide information on his training and experience and this would, of itself, facilitate an informed choice. The Group concluded, however, that this did not protect small creditors or shareholders sufficiently, as they would not usually be in a position to significantly influence the choice of liquidator. Moreover, unless creditor and shareholder consent is unanimous, can it ever be right that a majority (whether bare or qualified) can agree to the appointment of an insolvency practitioner who lacks the necessary formal qualifications?

13.4 Issues arising in the proposed regulation of insolvency practitioners

13.4.1 The submissions received on the regulation of insolvency practitioners were more concerned with standard-setting than with citing specific issues where liquidations, receiverships or examinerships had not worked effectively. Since no nationwide historical survey which would have led to the compilation of empirical data on these specific issues has occurred to date, the Review Group had of necessity to rely to some extent on the experience of its members in the legal and business worlds and in public administration as well as on the submissions received. However, with regard to liquidators, for example, the perception available to the Group (inter alia from the Revenue Commissioners) is that currently, while the majority of liquidators act in an appropriate manner, concerns can arise about the following issues:

(i) Failure by the liquidator to complete the liquidation, or the taking of an inordinate amount of time to complete the liquidation.
(ii) Liquidators who appear to take on too many cases.
(iii) Liquidators who appear to act in the directors' interests rather than in an independent fashion.
(iv) Failure to comply with the reporting requirements of the Companies Acts.
(v) Seeking fees in excess of what appears reasonable.
(vi) Lack of particular knowledge and skills required to undertake the role effectively.

13.4.2 While the circumstances listed above would arise only in a limited number of cases the absence of a guaranteed level of professional expertise can in itself give rise to misgivings about professional competence.

13.4.3 The recent High Court decision in *Re CB Readymix Ltd; Cahill v. Grimes*[4] illustrates just how badly wrong a liquidation can go. In that case Smyth J stated he was satisfied that the particular liquidator, in respect of whom a disqualification order was sought, had:

> "(a) Failed to act in an impartial manner. (b) Destroyed the books and records of the company. (c) Failed to act in the interests of the creditors of the company and, in particular, of the Revenue."

Smyth J also stated that he was satisfied and found as a fact that:

> "…the respondent has, notwithstanding being well seasoned as a personal litigant, sought to justify a course of conduct which displays a most serious lack of commercial probity. To seek, as the respondent sought in this case, to argue that 'the books and records were not destroyed, they were just dumped' displays a sense of gross negligence or total incompetence, and on the facts a complete failure to appreciate the gravity of the action taken."

Smyth J disqualified the respondent from being concerned in the management of a company as a liquidator, receiver or examiner for a period of seven years. The Review Group is conscious of the dangers of generalising from the particular. Nevertheless, it is the case that the liquidator in that case was not regulated by, or a member of, the recognised accountancy bodies[5] or the Law Society of Ireland.

13.4.4 The Review Group accepts that a greater degree of regulation of insolvency practitioners is in the public interest. Unlike the UK and most other common law jurisdictions Ireland does not have a State-funded public interest liquidation service.[6] The McDowell Report recommended against the establishment of such a service. It was pointed out that:

> "For historical reasons of economy and scale, the Oireachtas did not provide, when enacting the Companies Act, 1963, any parallel to the functions of the Official Receiver in Britain. The function of liquidations and the enforcement of the law relating to insolvency was left in private hands, assisted by the supervisory role of the High Court's judges and officers. The result has been that there is little tradition or experience in the public enforcement by public officials of the civil or criminal law relating to serious non-registration type breaches of the Companies Acts."[7]

13.4.5 The cost of such a service to the Exchequer, relative to the size of the Irish economy, appears to be the primary factor against the establishment of a state-funded public interest liquidation service. If such a service was in existence, the Review Group considers that it may be easier to establish a regulatory and supervisory regime for insolvency practitioners. However, the Group considered that because of the McDowell Report's relatively recently reached conclusion, the focus would, in the first instance, be upon considering the possibility of improving the regulatory system, short of recommending such a large-scale change. This is a matter that the Group believes should be considered in its second programme.

4 High Court, 20 July 2001 (Smyth J). It should be noted that this decision is under appeal.
5 See 13.8.5.
6 The Report of the Government Advisory Committee on Fraud December 1992 made the point that no qualifications were necessary to act as receiver, liquidator, or examiner and recommended that receivers, liquidators and examiners should be licensed and bonded. That Committee noted that : "A licensing system for insolvency practitioners was introduced in the United Kingdom in the 1986 Insolvency Act. Since the introduction of that Act there is a general view that the quality of those appointed and also the quality of their work has improved dramatically."
7 At para 2.3.

13.4.6 Although the Companies Acts are clear as to the duties of liquidators they are silent as to appropriate qualifications. It is clear that for appointment as a voluntary liquidator one needs at least to enjoy the confidence of the company's creditors (s 267 of the 1963 Act). Sections 300 and 300A of the 1963 Act set out the circumstances in which a person is disqualified from appointment as a liquidator (s 300 of the 1963 Act specifies that a body corporate cannot be appointed as a liquidator). The Companies Acts do not set out any professional qualification as necessary to be held by a liquidator, receiver or examiner.[8] Nor is delegated regulation by a recognised professional body of these occupations provided for as applies for example to the regulation of auditors by recognised accountancy bodies (ss 191 and 192 of the 1990 Act). It should, of course, be recognised that professional standards and codes of conduct apply to liquidators and other insolvency practitioners who are members of professional bodies.

13.5 Regulation – general principles and issues

13.5.1 As a general principle, the Review Group accepts that all liquidators, examiners and receivers should be:

(i) competent to undertake insolvency work and knowledgeable of the Companies Acts;
(ii) independent of the parties and able to act impartially;
(iii) insured or bonded against loss through fraud, or malpractice;
(iv) subject to some form of oversight and monitoring both generally and in relation to individual cases to assure continuing competence and the propriety of actions and decisions;
(v) knowledgeable about the nature and scope of the duties to be performed and, where necessary, specialised in the business of the debtor;
(vi) diligent, meticulous and scrupulous in their work, and possessed of a sense of urgency in the performance of their duties; and
(vii) able to assess risk, and conduct their affairs in a cost-effective way.

The Group believes that the justification for requiring insolvency practitioners to possess such skills is because their work will involve them in situations where they are required to realise and distribute assets that are beneficially owned by others, whether creditors or shareholders.

13.5.2 The Review Group considers it essential that, through an accountancy or other qualification or degree or through experience, a liquidator is able to demonstrate a competence in the legal, accounting and business issues likely to be involved in an insolvency. In the absence of such demonstrable competence, there can be no rational confidence that a person will be able to exercise properly the powers conferred on him or to discharge his statutory and common law functions, duties, responsibilities and accountabilities. The Group accepts that this indicates the likelihood of a need for an insolvency qualification for liquidators where knowledge and practical understanding is tested by study, examination and experience.

13.5.3 Ideally, authorisation or licensing should follow from attainment of a professional qualification and the maintenance of probity and professional standards. This in turn suggests monitoring or supervision by a regulatory body. The regulatory body may be a government department or agency; a separately constituted body; a professional body (or bodies); or a combination, provided that their respective roles, duties and responsibilities are clearly spelled out. It is particularly important where a professional body is involved in the regulation of insolvency practitioners that independence from its members is clearly demonstrated through its constitution, mechanisms and processes and through its staff. This may require a legislative framework or statutory supervision – rather than involvement in individual matters – by a government department/agency or separately constituted body to give assurance of that independence.

8 Section 237 of the 1990 Act permits the Minister to make regulations stipulating who shall not be qualified for appointment as liquidator, receiver (and by extension, examiner). No such regulations have been made.

13.6 Regulation in other jurisdictions

13.6.1 In some jurisdictions, e.g. Australia, Canada and the USA, registration and regulation of insolvency practitioners is the function of government: the UK has a statutory framework requiring authorisation/licensing of office holders, with the power to grant, and remove, authorisations/licences delegated to recognised legal and accountancy bodies within that framework. Finland does not have an authorising/licensing system but an independent regulator oversees the administration of cases.

13.6.2 It is instructive to consider how the Insolvency Service in the UK operates. The Service operates principally in England and Wales. It administers compulsory individual and corporate insolvencies, pursues fraud and misconduct through prosecution and disqualification, regulates the private sector insolvency profession, and manages insolvency funds. Under the UK Insolvency Act 1986, only *authorised* persons may act as insolvency practitioners. Persons are authorised on the basis of experience and competence, they are subject to regulations and must hold a security bond for the proper performance of their duties. Authorisation may be granted by the Secretary of State or by a professional body recognised by the Secretary of State which regulates the conduct of its members and may withdraw licences. The seven recognised professional bodies (RPBs) in Great Britain account for some 95% of all authorisations. The bodies currently recognised are:

(i) the Institute of Chartered Accountants in England and Wales;
(ii the Insolvency Practitioners' Association;
(iii) the Law Society of England and Wales;
(iv the Institute of Chartered Accountants of Scotland;
(v) the Association of Chartered Certified Accountants;
(vi) the Institute of Chartered Accountants in Ireland; and
(vii) the Law Society of Scotland.

13.6.3 On foot of a review of the insolvency practitioner regulation, an Insolvency Practice Council has been established composed of five lay members and three insolvency practitioners. The Council has an agenda setting and review role in relation to ethical and professional standards within the insolvency practitioner profession.

13.6.4 There is much to be said for the British system where, in the main, insolvency practitioners are members of recognised professional bodies. Above all, this recognises that insolvency practitioners come to specialise in this area of work from a professional background either in accountancy or law. It also has the advantage that the persons concerned are subject to the professional and ethical standards of their own professional bodies.

13.7 Objectives of regulation

13.7.1 The Review Group believes that there are four key arguments that support better regulation of liquidators in Ireland. First, the stakeholders of companies being wound up, in receivership or under the protection of the courts have a right to expect that the person responsible for protecting their interests and distributing their money will have received formal training in law or accountancy. Second, where there is no recognised professional standard, creditors and other relevant persons may have difficulty in making an informed choice about liquidators. Third, the consequences of poor insolvency administrations may impact severely on a large number of persons, including secured and unsecured creditors, directors, employees and shareholders. However, not all of the affected persons have any direct influence on the selection or supervision of the liquidator. Protection of the interests of those persons supports a system of regulation of liquidators. Finally, a system of regulation provides a mechanism to address the maintenance of professional independence and the integrity of all liquidators.

13.7.2 The Review Group believes that a system for regulating insolvency needs to have the confidence of the general public, creditors, shareholders and of the courts. That requires the setting of clear standards for the regulatory body and that these are maintained through systems of accountability and openness and of oversight on behalf of the general public. The Review Group is conscious that neither independence within the body nor oversight of it requires multilevels of bureaucracy imposing substantial costs on insolvency practitioners (and therefore on creditors) or on government.

13.7.3 A regulatory framework providing for the setting, testing and monitoring of standards should provide for: (a) greater confidence in the capability of liquidators to undertake the administration of insolvencies; (b) greater confidence in the proper exercise and discharge of powers; and (c) greater assurance against abuse and misuse of the system. The key principle is that a regulatory framework should provide assurance as to the necessary level of competence of those administering insolvencies, to ensure the efficiency, effectiveness and integrity of, and confidence in, the insolvency system.

13.7.4 Ideally, the regulatory framework should provide for:

(i) establishing professional and ethical standards and guidance for insolvency practice;
(ii) setting requirements as to suitability (fit and proper), competence and integrity of office holders and as to continuing professional education/experience;
(iii) setting requirements as to insurance or bonding;
(iv) monitoring liquidators' conduct, competence and compliance with legislation, standards and other requirements, and investigating complaints;
(v) taking effective action in relation to incompetent or dishonest office holders, including investigating and reporting suspected fraud or other offences or misconduct and/or having the power to institute proceedings. In some jurisdictions, the regulatory body has power to intervene by way of, for example, applying to the court where it has serious concerns about the administration of a case.

13.8 Regulation – developments in Ireland

13.8.1 It is worth noting that present statutory provisions on insolvency designed to deal with "scorched earth" situations[9] are contained in s 251 of the 1990 Act. This section relates to companies which are not being wound up but which are insolvent and the court is satisfied that the insufficiency of assets is the reason why they are not being wound up. Section 251 applies to such companies several sections of the 1963 and 1990 Acts which relate to companies being wound up. This section was amended by s 54 of the 2001 Act. That amendment provides, inter alia, that s 251 of the 1990 Act will now also apply to s 149 of the 1990 Act (restriction of directors) and provides for the Director of Corporate Enforcement to apply to court for restriction under any of the sections which apply. There is also an amendment introduced by s 53 of the 2001 Act which relates to the supervision of receivers and which will also make the Director aware of cases where applications pursuant to s 54 would be appropriate. With regard to a suitable regulatory framework, there are two important recent developments of particular relevance to the question of the regulation of insolvency practitioners.

The Director of Corporate Enforcement and the 2001 Act

13.8.2 The 2001 Act establishes on a statutory basis the Office of the Director of Corporate Enforcement. The Director has been given the powers formerly assigned to the Minister under the Companies Acts to: (a) initiate and undertake company investigations; and (b) prosecute on a summary basis all breaches of the Companies Acts by companies, directors and other parties. Part V of the 2001 Act deals with Winding-Up and Insolvency. It

9 A "scorched earth" situation arises where the company directors so deplete a company's assets as to result in there being insufficient assets left even to justify the winding-up of the company. See the McDowell Report at para 4.42.

amends a number of existing company law provisions concerning insolvency and winding-up. It aims to address the "phoenix syndrome" whereby companies go out of business leaving substantial debts, yet their directors immediately start new enterprises doing the same business without having to account for their previous failures. The powers necessary for the Director to discharge his role in respect of the supervision of insolvency practitioners are also provided for in Part V of the Act.

13.8.3 Section 48[10] of the 2001 Act requires persons to notify the Registrar of their appointment as liquidator of a company within 14 days of such appointment. The Registrar must forward a copy of such notification to the Director. Section 50[11] provides that the Director may apply to the court for company directors, officers, liquidators, receivers or examiners to be brought before the court with a view to assessing damages where any such person has misapplied or retained any property of the company or has been guilty of a breach of duty or trust in relation to the company. Section 52[12] requires a receiver to file a statement with the Registrar as to whether, in his opinion, the company is solvent at the end of the receivership and the Registrar is required to copy every such statement to the Director. This is intended to allow the Director to monitor the state of companies that have undergone receiverships. (Receiverships often precede liquidations.) Section 52 also provides for a requirement that the Registrar inform the Director of the appointment of receivers notified to the CRO. This is intended to allow the Director to discharge his general supervisory function in respect of receivers. Section 53 empowers the Director to require a receiver to produce his books and answer any questions in relation to them or to the conduct of a particular receivership or receiverships.[13]

13.8.4 Similarly, s 57 of the 2001 Act empowers the Director to require a liquidator to produce his books and answer any questions in relation to them or to the conduct of a particular liquidation or liquidations. These sections will allow the Director to investigate complaints or allegations of misconduct against receivers and liquidators. Section 56 imposes a requirement on liquidators of insolvent companies to make reports to the Director in a form to be prescribed and to make applications for the restriction of the directors of such companies, unless relieved of that obligation by the Director in specific cases. Pursuant to the Act the report of the liquidator will include information on the circumstances in which the company became insolvent and the extent to which the action of the directors lead to the insolvency. This information will allow the Director to determine if an application for restriction under s 150 of the 1990 Act should be made to court in respect of directors of such companies. Where the Director decides it is appropriate to make such an application, it will be the responsibility of the liquidator to do so.

13.8.5 Section 58 of the 2001 Act requires a disciplinary committee or tribunal of a prescribed professional body whose members conduct liquidations or receiverships to notify the Director where it finds that the member has not maintained proper records or where it suspects that the member may have committed an indictable offence under the Companies Acts. This provision is to allow the Director to discharge his general supervisory role in respect of liquidators and receivers and also his role of investigating offences under the Companies Acts. It is understood that the bodies initially prescribed under this section will be those recognised by the Minister under s 187 of the 1990 Act, whose members may qualify for appointment as auditors. These bodies are:

(i) The Institute of Chartered Accountants in Ireland (ICAI).
(ii) The Institute of Certified Public Accountants in Ireland (ICPAI).
(iii) The Association of Chartered Certified Accountants (ACCA).
(iv) The Institute of Incorporated Public Accountants Ltd (IIPA).
(v) The Institute of Chartered Accountants in England and Wales (ICAEW).
(vi) The Institute of Chartered Accountants of Scotland (ICAS).

10 Amending s 278 of the 1963 Act.
11 Amending s 298 of the 1963 Act.
12 Amending s 319 of the 1963 Act.
13 Amending s 323 of the 1963 Act.

Given that some solicitors act as liquidators (and could act as receivers) the Review Group recommends that the Law Society of Ireland should be a prescribed professional body. The Review Group further recommends that s 58 be extended to include persons appointed as examiners under the 1990 Amendment Act.

The Oversight Board to supervise accountancy bodies

13.8.6 The second major development of relevance is the proposed establishment, on foot of the July 2000 report of the Review Group on Auditing,[14] of a statutory Oversight Board to supervise the accountancy bodies.[15] The Oversight Board will have statutory responsibility for:

(i) the recognition of accountancy bodies, including the amendment of the conditions of recognition;
(ii) the approval of each body's constitution and amendments thereto;
(iii) the approval of and requiring changes to each body's ethical code and professional rules;
(iv) working with the accountancy bodies and other parties on the development of auditing and accounting standards and practice, including in particular the approval of auditing practice notes and bulletins;
(v) making arrangements for examining the validity of material departures from accepted accounting standards and practice by PLCs;
(vi) supervision of the performance of each recognised body in the area of monitoring (quality review), including the approval of the body's annual monitoring plan and the power to undertake an independent review of an auditing practice;
(vii) supervision of the investigation, discipline and appeals arrangement within each body, including the power to obtain access to documentation and to explanations from each of the recognised bodies in respect of its exercise of its delegated supervisory duties;
(viii) sanctioning each accountancy body where supervisory failures occur, e.g. by way of private admonition, public censure and/or financial penalties up to £100,000 (€126,973.81) in addition to costs;
(ix) arranging for the supervision of individually authorised auditors by the recognised accountancy bodies;
(x) the transmission and receipt of confidential information to/from specified authorities as far as is legally possible and subject to appropriate safeguards;
(xi) acting as a specialist source of advice to Government and other parties on auditing and accounting matters;
(xii) the approval of regulatory/business plans, the development of performance indicators and determining and evaluating the content of the annual report which each of the recognised bodies should be required to submit to the Board.[16]

13.9 Regulation and standard setting

13.9.1 With regard to liquidators, examiners and receivers, the Review Group believes that there is an argument to be made for seeing how effectively the Director can apply the supervisory powers being accorded to him under the 2001 Act and for reviewing this in due course. However, this raises the question of establishing *a priori* standards for those who undertake insolvency work.

14 The Review Group on Auditing was chaired by Senator Joe O'Toole. That group was set up by the Minister on foot of the recommendation by the Public Accounts Committee (PAC) of Dáil Éireann in December 1999 that the Department of Enterprise, Trade and Employment should establish a Review Group to examine in detail a number of matters, including auditor independence, the auditing of financial institutions and the role of the external auditor in ensuring statutory compliance. The background to this was the finding by the Comptroller and Auditor General that evasion of DIRT (Deposit Interest Retention Tax) was pervasive. The Minister established a Review Group on Auditing with 12 terms of reference, dealing with self-regulation in the auditing profession as well as with the issues raised by the PAC Report.

15 The Government has since approved the drafting of legislation to give effect to the recommendations of the Review Group on Auditing. The "Oversight Board" will be called the Irish Auditing and Accounting Supervisory Authority (IAASA).

16 Report of the Review Group on Auditing July 2000 p 126, recommendation 8.2. It is important to note that the Review Group on Auditing recommended overall "that the recognised accountancy bodies should continue to regulate their members within a reformed framework of supervision comprising some persuasive external influence."

13.9.2 Section 55 of the 2001 Act sets out the onus for the recognised accountancy bodies to report to the Director company law offences (which come to the body's attention) committed by their members while acting as liquidators or receivers. The recognised accountancy bodies are:

(i) The Institute of Chartered Accountants in Ireland (ICAI).
(ii) The Institute of Certified Public Accountants in Ireland (ICPAI).
(iii) The Association of Chartered Certified Accountants (ACCA).
(iv) The Institute of Incorporated Public Accountants Ltd (IIPA).
(v) The Institute of Chartered Accountants in England and Wales (ICAEW).
(vi) The Institute of Chartered Accountants of Scotland (ICAS).

Similarly, there is a requirement in the 2001 Act for these bodies to report to the Director instances where, on the basis of a disciplinary investigation of a member acting as auditor, they have reasonable grounds for believing that an indictable offence under the Companies Acts has been committed. The Review Group recommends that s 55 be extended to include members acting as examiners.

13.9.3 The Group understands that the forthcoming legislation setting up IAASA will place an onus on these bodies to report to IAASA on all disciplinary investigations. This would include offences under the Companies Acts committed while a member of a recognised accountancy body was acting as auditor, liquidator or receiver. Thus, IAASA could, in principle, be the supervisory board for insolvency practitioners as well as for accountants and auditors or at least could be the supervisory body for accountants and auditors when these act as insolvency practitioners. In the view of the Review Group this approach provides a strong protective mechanism for creditors.

13.9.4 Given the establishment of IAASA and the intention to supervise members of the recognised accountancy bodies more effectively on foot of legislation to give effect to recommendations in the Report of the RGA, it is likely that the penalties applied by the disciplinary committees will be more stringent than those applied in the past. Notable among these penalties is the serious penalty of withdrawing a practising certificate for a period of time. While it is clearly a very serious matter to be disqualified from acting as an insolvency practitioner it is, in the opinion of the Review Group, an even more serious matter to be disqualified from practising as an accountant or auditor because of fraud or malpractice in carrying out a liquidation if that is one's primary occupation. Even short of this degree of penalty, the Group has been informed by one of the accountancy bodies that complaints, particularly of inaction, are often enough in themselves to precipitate action by a respondent short of bringing the respondent before a disciplinary hearing.

13.9.5 This raises the core issue of whether the functions of liquidator, receiver and examiner should be restricted to persons with a qualification from one of the recognised accountancy bodies. There is an inherent logic to this, particularly with regard to s 55 of the 2001 Act. After all, if an individual is not a member of a recognised body (especially if he is not a member of any professional legal or accountancy body), there is less likelihood of the offence being detected and the Director notified. Creditors and members of a company should be mindful that, in principle, it would be better to choose a liquidator who is a member of a recognised body. It is also relevant to point out that in the UK members of the Law Societies, as well as of accountancy bodies, can be recognised as insolvency practitioners. Similarly in Ireland it would be appropriate, if we go down the road of recognised professional bodies, that the Law Society of Ireland should be one of these.

13.9.6 The recognised accounting bodies already have both ethical guidelines and practice guidance for members involved in insolvency practice.[17] The ICAI is the biggest single recognised professional accountancy body in Ireland. The Institute's Handbook SIP gives guidance as to best practice to be adopted by insolvency practitioners

17 See, for example, Statement 2 and Section S Statements of Insolvency Practice (SIP) of the Handbook for members of the Institute of Chartered Accountants in Ireland (ICAI).

having regard to relevant legislation. SIP already apply in Ireland (being a modified version of those applying in Northern Ireland and the rest of the UK) even in the absence of a system of State regulation of insolvency practitioners.

13.9.7 It is further noted that whilst in the UK (generally speaking) an individual must be a member of a recognised professional body in order to practise as an insolvency practitioner he must also hold a qualification in insolvency, achieved on foot of examination. In Ireland, if the right to practise as a receiver, liquidator or examiner is to be restricted to members of recognised professional bodies it would seem to be an appropriate *quid pro quo* that these bodies should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such.

13.9.8 The Review Group believes that the appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and recommends accordingly. An indicative list of RPBs would be composed of the six accountancy bodies, identified at 13.9.2 above, and the Law Society of Ireland. It should be noted that the Group believes that a facility should be provided whereby recognition could be granted to other professional bodies,[18] where appropriate, by IAASA. In return for this those bodies should be required to devise an examinable standard for the specialisation of insolvency practitioner within their professions. The Minister and/or the Director should facilitate the development of this standard and IAASA should be involved in monitoring the regulation by the accountancy bodies (and the Law Society of Ireland) of their members when acting as liquidators, receivers or examiners in the same manner as it will monitor members of the recognised accountancy bodies when acting as auditors. Provision for this (and for inclusion of the Law Society of Ireland among recognised bodies for the purpose of regulating liquidators, receivers and examiners) should, if feasible, be included in the Bill currently being drafted to establish IAASA. Arrangements would have to be made not to exclude from their livelihood, persons currently practising as liquidators, receivers or examiners.[19] On balance, the Review Group concludes it is preferable that a licensing system on the lines set out above should be introduced sooner rather than later. For a creditor or member of a company involved some additional costs might arise through professionalisation of the function of insolvency practitioner. The trade-off would be that all insolvency practitioners and their regulators will be subject to supervision by IAASA.

13.9.9 As previously noted, there is an argument for waiting to see how the exercise of the Director's powers impacts on the conduct of insolvency practitioners and for awaiting the outcome of this Group's likely future consideration of a State-funded public interest insolvency service it may be premature to implement. Hence all of the recommendations in this chapter at this point of time. Indeed, strong views in this regard were expressed by members of the Group in the course of discussions on the matter. The introduction of such a system would set standards to be followed prospectively. This is more desirable than the retrospective establishment of standards on a piecemeal basis in a primarily court-based, sanction-focused context. The Review Group also believes that the introduction of such a system would assist in providing a powerful incentive to the relevant professionals to adopt, and act in accordance with, the highest standards. In a sense the introduction of such a system should be seen as complementary to the powers to be exercised by the Director. In any event, the efficacy of the powers for regulating liquidators, receivers and examiners being accorded to the Director will need to be reviewed after they have been in operation for some years. In the circumstances, the Review Group concluded that there should be no delay in introducing a system which it believed likely to be of benefit. While the Review Group accepts that the introduction of such a regulatory system may, in certain instances, prove to be a disincentive to the appointment of any liquidator to an insolvent company, it concluded, on balance, that the

18 For example, organisations such as ICSA (whose members have for some time been involved in the conduct of members' voluntary liquidations) might well apply for and be considered suitable for inclusion in this regard.

19 For example, members of ICSA who currently carry out members' voluntary liquidations.

absence of a liquidator was no worse than an unqualified liquidator. Either way there will remain a significant number of cases where noone is willing act as a liquidator to a company which is hopelessly insolvent, i.e. devoid of resources to pay the liquidator. While this is a separate issue from the issue of regulation, the Group believes that it is an issue of some importance, which merits consideration in a future programme of the Review Group.

13.10 Bonding and indemnity insurance

13.10.1 The Review Group also considered the issue of bonding or indemnity insurance for insolvency practitioners. At present there are no statutory requirements for insolvency practitioners to obtain, or maintain, professional indemnity insurance. It is arguable that insolvency practitioners, like other professionals, have an incentive to maintain arrangements which would enable them to meet possible liabilities in order to protect their own assets. From this perspective there would be no need to regulate for these matters. However, the contrary view is that some professionals may choose to protect their interests not by taking out insurance, but by declining to hold any significant assets in their own names. As a consequence, the substance of any recovery for personal liability may be limited in the event that there is a successful action. The Review Group concluded that there is a legitimate need to regulate for some kind of compensation mechanism. The question then arising is whether bonding or professional indemnity insurance offers a better compensation mechanism.

13.10.2 As a general principle, issuers of performance bonds would, in most circumstances, require the person whose performance they are guaranteeing to provide them with a secured counter-indemnity. For example, a bank issuing a bond may require the insolvency practitioner concerned to provide security in the form of mortgages over property or third party guarantees which the institution may enforce in the event of the bond being called on. At present in Ireland, the High Court determines the level of security to be given by a liquidator on his appointment.[20] The court usually delegates the fixing of the amount of such security and the time within which it is to be entered into to the Examiner. The accounting requirements of official liquidators and their obligation to lodge all funds to a specific branch of the Bank of Ireland are also provided for by court order. Other liquidations are not covered by bonds.

13.10.3 By contrast, the level of professional indemnity insurance cover is limited primarily by the amount of the premium a practitioner is required to pay. This is liable to provide a greater level of protection in terms of quantum than bonding, even though claimants may have to bring a successful court action in order to obtain the benefit of professional indemnity insurance. In addition, non-court liquidations would be covered by professional indemnity insurance. The recognised professional bodies have professional indemnity rules applying, e.g. for the ICAI the professional indemnity insurance regulations are set out in the rules of professional conduct and apply to members in practice and to authorised firms. Under these regulations "a firm must: (a) take such steps as may reasonably be expected of it to secure that it is able to meet claims against it arising out of professional business; (b) arrange cover for itself which meets the limits specified."[21] By insisting that liquidators, examiners and receivers must be members of or regulated by existing RPBs or the Law Society of Ireland then all such persons could readily be obliged to have in force professional indemnity insurance.[22] The Review Group accordingly recommends that insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover.

20 See s 228(a) of the 1963 Act and Rules of the Superior Courts Orders (Order 74, Rules 31 – 33).

21 See Regulation 510 Rules of Professional Conduct of the ICAI.

22 In relation to solicitors, to the extent (if any) that existing professional indemnity insurance policies do not envisage the solicitor acting as a liquidator, examiner or receiver, the Law Society of Ireland might be required to insist that solicitors who act as such effect appropriate insurance cover.

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13.11 Summary of Recommendations

13.11 Summary of recommendations

- The Law Society of Ireland should be a prescribed professional body. **(13.8.5)**
- Section 58 of the 2001 Act should be extended to include persons appointed as examiners under the 1990 Amendment Act. **(13.8.5)**
- Section 55 of the 2001 Act should be extended to include members acting as examiners. **(13.9.2)**
- The appropriate route to take with regard to regulating liquidators, examiners and receivers is to provide for regulation through the medium of recognised professional bodies (RPBs) and the Review Group recommends accordingly. On balance, the Review Group concludes that it is preferable that a licensing system on the lines set out above should be introduced without delay. **(13.9.8)**
- RPBs should be required by the Minister to devise a specialised standard/qualification in insolvency practice in order to practise as such. **(13.9.8)**
- Insolvency practitioners should be required (whether by statute or the internal requirements of their RPBs) to have sufficient professional indemnity cover. **(13.10.3)**

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CHAPTER 14

Auditors

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14.1 Background

14.1.1 When the Minister set up the Review Group in February 2000, among the issues it was asked to consider was the regulation and duties of auditors from the perspective of company law. However, this task was overtaken by events.

14.1.2 In Autumn 1999 as a continuation of the inquiry into evasion of deposit income retention tax (DIRT), the Subcommittee on *Certain Revenue Matters* of the Dáil Éireann Public Accounts Committee (PAC) held public hearings at which representatives of a number of financial institutions, State authorities and other relevant parties (including auditors of the relevant financial institutions) were examined on oath. The PAC's subsequent report in December 1999[1] recommended, inter alia, that the Department of Enterprise, Trade and Employment establish a Review Group to examine in detail a number of matters, including auditor independence, the auditing of financial institutions and the role of the external auditor in establishing statutory compliance. The Minister established such a group, the Review Group on Auditing (RGA), to examine the issues raised in the PAC report and the additional issue of self-regulation in the auditing profession. The RGA completed its report in July 2000.[2]

14.1.3 Mindful of the fact that the RGA was a dedicated review body for the auditing profession with a broader area for examination than company law, the Company Law Review Group believed that the most appropriate approach to take in discharging its own task was to offer its views on the RGA recommendations as part of the consultation process which took place following publication of the RGA report. The intention of this consultation process was to help shape the legislation that will ensue from the RGA report. In considering that report the Company Law Review Group concentrated on recommendations in Chapters 11 to 14 of the RGA report, as these are the issues of particular relevance to company law. The Company Law Review Group focused on implementation rather than policy issues, as it did not see its role as producing an alternative to the RGA report. Consistent with the duration set for consultation on that report, the Company Law Review Group gave its comments on the recommendations in the RGA report to the Minister on 3 November 2000. Because the comments are a response to the recommendations in the RGA Report they are set out in tabular form and are attached as an Appendix to this chapter.

14.1.4 In considering the RGA recommendations, the Company Law Review Group was mindful of its brief to simplify company law. For that reason the Company Law Review Group expressed concern to the Minister that small companies, especially those exempt from the audit requirement, should not be imposed upon or unduly burdened by the legislation which will result from the RGA report. This was adverted to in particular with regard to recommendation 14.1 of the RGA report.

14.1.5 The Company Law Review Group also noted that at the time it made its comments to the Minister there were three separate proposals requiring that corporate abuse be reported to the authorities. These were set out in the then Company Law Enforcement Bill 2000, the Criminal Law (Theft and Fraud Offences) Bill 2000 and in the RGA report. The Company Law Review Group took (and strongly maintains) the view that it was important that the requirements of the three items of proposed legislation should be both consistent and enforceable.

14.1.6 The legislation arising from the RGA report will reflect the process of consultation which took place, including consultation with the Company Law Review Group. The legislation is currently being drafted and is expected to be published early in 2002. The main outcome from the RGA report will be the establishment of the Irish Auditing and Accounting Supervisory Authority (IAASA) as a new supervisory body.

1 Parliamentary Inquiry into DIRT – First report by the Committee of Public Accounts Pn. 7963.

2 Stationery Office Pn. 8683.

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Comments on Recommendations in the Report of the Review Group on Auditing

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Chapter 11: Other Regulatory Shortcomings			
Recommendation 11.1			
The Companies Acts should be changed: • to compel individually authorised auditors either to become members of recognised accountancy bodies or at a minimum to be regulated by them; • to provide for the suspension or revocation by the Oversight Board of an individual authorisation for failure to comply with or to meet the body's competency and other standards for the conduct of audit work following a transition period of three years.	Amendment to Companies Acts Include in Work Programme of Oversight Board	Department of Enterprise, Trade and Employment in consultation with Accountancy Bodies	This is desirable and will clear up an existing anomaly.
Recommendation 11.2			
The Companies Acts should be changed to prohibit persons holding themselves out as an auditor, regulated auditor or registered auditor for the purposes of the Companies Acts, without being qualified to do so.	Amendment to Companies Acts	Department of Enterprise, Trade and Employment	Desirable.
Recommendation 11.3			
The Oversight Board should, from time to time, review: • the extent to which accountancy and related services are being provided by persons who are not subject to its remit; • whether this is having any material adverse impact on the overall effectiveness of the regulatory framework; and • if so, make recommendations to the Minister for Enterprise, Trade and Employment for any appropriate remedial action.	Include in Work Programme of Oversight Board	Oversight Board	It would be useful to spell out in more detail that what is envisaged is a complaints procedure rather than regulation; the intention being that the Oversight Board could take appropriate action where systemic problems came to its attention. It would be appropriate to spell out whatever monitoring the board will do.
Recommendation 11.4			
Appropriate legal or other co-operation arrangements should be sought with EU and other relevant jurisdictions to enable auditors who are not in the State to be brought to account for any breaches of the Companies Acts or similar legislation.		Department of Enterprise, Trade and Employment	The matter to be raised in the EU Committee on Auditing (via letter to Commission in advance of Committee meeting in November).

Recommendations	Follow up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 11.5			
The Review Group recommends that: • the Registrar of Companies should permanently display an up-to-date list of qualified auditors on the CRO Website; • each recognised accountancy body should maintain on its website or in hard copy form an up-to-date list of members, identifying, inter alia, the status of each member and the nature of the activity which each is authorised to undertake.	Action by CRO and Accountancy Bodies	CRO and Accountancy Bodies	With regard to both of these recommendations there needs to be a degree of flexibility on the time limits; CRO to be absolved from possibility of being sued on foot of errors in published list. The Oversight Board should have the power to specify what the Accountancy Bodies must display on their websites as regards the status of members, e.g. recognised auditor (or registered insolvency practitioner, should that become regulated). There should be a legal obligation on recognised bodies to supply the information.
Recommendation 11.6			
The Registrar of Companies should, as a matter of urgency, arrange that his Office: • institute a systematic checking of the annual returns of companies to ensure that the person who signs the audit report attached to those returns is a qualified auditor registered on the register of auditors maintained by his Office under section 198 of the Companies Act 1990; • inform the proposed Office of the Director of Corporate Enforcement of the identity of any non-qualified person who has acted as auditor to a company, so that enforcement action under section 187 of the 1990 Act can be considered.	Action by CRO	CRO and Director of Corporate Enforcement	Desirable. It is noted that a resource issue arises for the CRO. The CRO to be protected from suits on foot of errors in checking. In the event of a non-qualified person signing the report there should be a requirement on the CRO to inform the company directors (and, if relevant, the professional body to which the non-qualified person claimed to belong) as well as the Director. The purpose of this would be to have the company directors get a proper audit done.
Recommendation 11.7			
The Companies Acts should require that the annual audit reports for unlimited companies (and for other exempted companies as defined in section 2(1) of the Companies (Amendment) Act 1986) be promptly filed with the Registrar of Companies after the end of their financial year.	Amendment to Companies Acts	Department of Enterprise, Trade and Employment/CRO	Desirable. The annual return for unlimited companies should contain a statement by the directors confirming that accounts have been prepared and audited. There should, in addition, be a requirement to include a consent statement from the auditor approving the filing of the audit report with the annual return to CRO. No objection would be seen to applying audit exemption to unlimited companies at the same level as it applies to limited companies.

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 11.8			
Section 194(2) of the Companies Act 1990 should be reviewed, in order to establish if more precise guidance can be provided to auditors on when company directors have taken (or not taken as the case may be) the necessary steps to comply with section 202 of the 1990 Act which requires, inter alia, the keeping of proper books of account.	Company Law Review Group to undertake review and if necessary amendment to Companies Acts	If necessary, Department of Enterprise, Trade and Employment	There is no evidence that legislative amendments are necessary at this point It is noted that the Accountancy bodies are wary about trying to specify "necessary steps" in law.
Recommendation 11.9			
All recognised accountancy bodies should adopt a risk-based approach to the selection of members/member firms for monitoring visits, with those members in larger practices or having audit clients in higher risk categories (e.g. those operating in the financial area) receiving more frequent scrutiny.	Accountancy Bodies amend monitoring/ quality review systems	Accountancy Bodies	Desirable.
Chapter 12: Auditor Independence			
Recommendation 12.1			
There is a need to introduce additional safeguards to protect the independence of an auditor of a client company from the threat posed by the provision of non-audit services to the client company. This is best achieved through the development and maintenance of a framework for auditor independence.	Recs 12.1 to 12.9 outline how the framework will be developed and introduced	Department of Enterprise, Trade and Employment Accountancy Bodies Oversight Board	It is noted that there is a lot of debate internationally about this issue – particularly in the US and at EU level. It is important that whatever is done in Ireland is consistent with international developments.
Recommendation 12.2			
Non-audit fees paid by a company to their audit firm and the nature of the services provided should be disclosed and analysed in adequate detail in the annual financial statements.	Amendment to Companies Acts	Department of Enterprise, Trade and Employment Accountancy Bodies: Develop practice note that provides guidance to ensure consistent delineation between audit/non-audit fees	Further consideration would be useful in order to determine the services which fit with audit services. For example, it is noted that the list of non-audit items in the EU recommendation is much more discursive than that used by the SEC.

Recommendations	Follow up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 12.3			
When the non-audit fee earned by an audit firm from a client company exceeds the audit fee then the audit committee of the client company must set out in the annual report to shareholders the reasons why the non-audit services were obtained from the audit firm and confirm that it is satisfied that this does not compromise the independence of the auditor.	Amendment to Companies Acts	Department of Enterprise, Trade and Employment	Feasible. The question of auditors' independence should be a matter for judgment by the Audit Committee and not something for which criteria should be set down in legislation. It is desirable that the Audit Committee should set a broad policy in advance for engaging work from the auditors. The Committee could agree a budget for non- audit fees (without specific contract by contract approval) but with a requirement for advance approval of particularly significant contracts or a contract or contracts in excess of the audit contract. A "reasonably satisfied" obligation on the Audit Committee would be preferable to a "satisfied" obligation.
Recommendation 12.4			
The maximum allowable proportion of overall fee income contributed by any one client company or group of client companies to the total portfolio of the audit firm should, at most, be limited to 10%. A lower limit of 5% should apply in the case of listed companies, financial institutions and public interest companies and more formal monitoring for compliance with this requirement should be put in place.	New audit standard	Accountancy Bodies to develop audit standard Oversight Board to monitor	Rules should be applied sensibly, to include associated and affiliated firms, and should be based on like for like comparisons. Above all there will be a need to prevent avoidance of this provision through separate incorporation. The Company Law Review Group considered appropriate definitions for groups but concluded that on balance it would not be helpful to come up with further definitions. The definitions as provided for in Company Law or regulations should be adhered to.

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 12. 5 The Review Group recommends that the following principles apply in relation to non-audit services: • audit firms should not audit their own work; • audit firms should not provide non-audit services to an audit client that affect the numbers in the financial statements such as valuation; • audit firms should not provide internal audit services. A professional standard should be developed (in the manner outlined in Chapter 8 Section 2.4) that prohibits the provision of specified non-audit services by an audit firm to an audit client company. The Oversight Board should be empowered to impose a professional standard, prepared by the Oversight Board, on the professional accountancy bodies to address this issue. However, this power should only be exercised where an undue amount of time is being taken to develop the standard.	Auditing standard to be developed that will list in more detail the type of valuation services that are not permitted. Company Law Review Group could consider the type of valuation services that should not be permitted.	Accountancy Bodies to develop audit standard Oversight Board to impose standard if the Accountancy Bodies fail to develop standard within reasonable timescale	Desirable. It should be ensured that the implementation of this recommendation agrees with the forthcoming EU Recommendation on Auditor Independence. The EU Directive of itself may not enable exemption for small and medium sized companies as recommended by the Report on Auditing. There is a difficulty in getting a clear definition of valuation services which are considered inappropriate. The Company Law Review Group also questioned the ban on internal audit given that at present the EU proposes to permit it in certain circumstances and the SEC is likely to permit certain internal audit services. Particular care is advised in the drafting of the legislative provision banning the auditing of own work . For example, the provision should not prevent auditors from giving advice on bookkeeping improvements.
Recommendation 12. 6 The audit engagement partner and staff of a firm should be presumed to know everything relevant to the audit of a client company that other partners in the firm or an associated firm are aware of in relation to the company. A firm appointed as auditor of a company needs to have in place appropriate procedures to ensure that the partner responsible for the audit function is made aware of any other relationship which exists between any department of the audit firm and the company when that relationship could affect the audit firm's responsibilities as auditors.	Auditing standard	Accountancy Bodies	Desirable. It is presumed that this recommendation is to operate on a single client basis. Information learned about a client in the course of an audit for another client will not be covered.
Recommendation 12.7 Audit firms should be required to set out their general policy concerning risks to auditor independence and to document how risks to auditor independence are dealt with in relation to individual client companies during an audit. The general policy of the firm towards the identification and management of risks to audit independence should be set out in the letter of engagement. Information relevant to the management of risk during the audit engagement should be included in the management letter or a separate letter addressed to the Audit Committee.	Amendment to Ethical Guidelines of Accountancy Bodies	Accountancy Bodies	Desirable.

Recommendations	Follow up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 12.8			
The audit contract should be awarded on an annual basis in an open and transparent manner. This should include consideration by audit committees on an annual basis whether to put the audit contract out to tender. The audit committee should justify its decision in its recommendation to shareholders on the appointment of auditors as outlined in Recommendation 13.4.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Feasible. Important that the Audit Committee should have regard to the quality of the audit.
Recommendation 12.9			
The Oversight Board should undertake, within three years, a review of the level of non-audit fees and should make known its judgment as to whether or not any new rules are required to safeguard auditor independence.	Include in work programme of Oversight Board	Oversight Board	Desirable.
Chapter 13: Corporate Governance Structures and the External			
Audit **Recommendation 13.1**			
Boards of Directors of PLCs, financial institutions and public interest companies should be required by legislation to establish audit committees the membership of which is made up of non-executive directors.		Department of Enterprise, Trade and Employment	PLCs : Only listed PLCs ought to be included. If other PLCs are to be included, then there should be exclusions for IFSC licensed companies and PLCs with less than 50 members, so as to exclude special purpose vehicles and companies which are subsidiaries of groups. Financial Institutions : The application of the recommendation to all financial institutions is not desirable. IFSC licensed companies ought not to be covered as they are already heavily regulated by the Central Bank and as they tend to be wholly-owned subsidiaries of large public companies. Similarly, investment funds established in the form of PLCs should not be included. Smaller financial institutions should also be exempt, e.g. small and medium-sized credit unions. Public Interest Companies: The Company Law Review Group recognizes that there is a particular difficulty in attempting to compile an exhaustive definition of public interest companies to embrace all the entities targeted by the Review Group on Auditing. Financial institutions can be dealt with as such (see above).

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 13.2			
Audit committees should have regular meetings each year.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Feasible, but the Company Law Review Group queries whether this should more appropriately be done via a Code rather than legislation, e.g. the Stock Exchange rules, if Recommendation 13.1 only applies to listed companies.
Recommendation 13.3			
Each audit committee should have a formal written charter, approved by the Board of Directors, that specifies the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, processes and membership requirements.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Feasible. Should be done via a Code of Practice.
Recommendation 13.4			
Shareholders should approve the appointment of auditors and set their fees, based on a recommendation from the audit committee rather than management, as is currently the case. This should include a consideration on whether it is appropriate, or not, in any given year to change auditors or to send the audit contract out to tender as outlined in Recommendation 12.8.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable. It is important to reinforce the need for quality in audits.
Recommendation 13.5			
In its charter, the audit committee should be given the following responsibilities: • ensuring receipt from the external audit firm of a formal written statement outlining all current and relevant previous business and personal relationships between the audit firm and the company; • for actively engaging in a dialogue with the audit firm so that all relationships that may impact on the objectivity and independence of the auditor are fully disclosed; • approving the procedures for the appointment of the audit firm to provide any other services; • assessing and approving in advance all contracts with the audit firm having regard to all business and personal relationships between the company and its audit firm; • monitoring the number of former employees of the audit firm currently employed in senior positions in the company and assessing its impact on auditor independence;	Amendment to Company Law	Department of Enterprise, Trade and Employment	In the Company Law Review Group's view a Code of Practice is more appropriate than legislation. A code is more easily amended. Such a code should be drawn up by the Director of Corporate Enforcement and prescribed by Minister. A breach of the code could not of itself constitute an offence but the court could take account of such a code in proceedings before it. The Director should have a role in enforcement. The inclusion of a requirement to monitor the incidence of former employees of the auditor being employed by the client firm is questioned. Such a provision would require significant record-keeping on individuals and would be unique to Ireland.

Recommendations	Follow up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
• reviewing the audit firm's statement concerning their general policy to risks to independence (see recommendation 12.7); • approving in advance any contracts with the audit firm payment of which will be made on a contingency basis.			
Recommendation 13.6 Audit committees of companies should meet their external auditor a number of times each year, both in the presence of management and independent of management. Such meetings must be held at both the planning stage of the audit and following the completion of the audit.	Amendment to Company Law	Department of Enterprise, Trade and Employment	To be dealt with in Code of Practice.
Recommendation 13.7 Management letters from auditors to the Board of Directors should refer to the existence of any other audit related letters (e.g. letters of detail) and should make these available to the Board and the audit committee on request. Management letters should be available to the Board and the audit committee in advance of approval of the financial statements. Given the tight reporting deadlines, a preliminary draft containing all issues but possibly excluding some management responses is acceptable. Audit committees should establish a time frame within which management responses should be received in respect of management letters, internal audit reports and any other audit related letters (e.g. letters of detail).	Amendment to Company Law	Department of Enterprise, Trade and Employment	To be dealt with in Code of Practice.

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Recommendation 13.8			
All PLCs, financial institutions and public interest companies should have a properly resourced internal audit function set up independently of management and the external auditor.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable, but note definition and size issues raised at 13.1.
Recommendation 13.9			
Audit Committees should meet the internal auditors regularly at times without management present.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Feasible, should be applied through Code of Practice.
Recommendation 13.10			
The internal auditor's appointment should be endorsed by the audit committee and internal audit reports to the Board and to the audit committee should be retained for six years.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable.
Recommendation 13.11			
Internal audit programmes, and all internal audit reports and findings, should be made available to the external auditor at the earliest possible opportunity.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable.
Recommendation 13.12			
Audit Committees should prepare an annual report for presentation to the shareholders. This should include their view on the Directors' compliance report. (Recommendation 14.1)	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable.
Recommendation 13.13			
The above recommendations concerning the duties of audit committees and their relationships with external auditors and internal auditors should be set out in legislation for PLCs, financial institutions and public interest companies.	See above	Department of Enterprise, Trade and Employment	Some of the recommendations are more appropriate for a Code of Practice.

Recommendations	Follow up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
Chapter 14: Compliance with Statutory Provisions: The Role of the External Auditor			
Recommendation 14.1			
Directors of a company should be required to report on an annual basis to the shareholders on the company's compliance with its obligations under company law, taxation law or other relevant statutory or regulatory requirements. The report should confirm that any instances of non-compliance have been reported to the relevant regulatory authority and that in all other respects the company has complied with its obligations under company law, taxation law and other relevant statutory or regulatory requirements. The report should be appended to the annual financial statements.	Amendment to Company Law Company Law Review Group could provide advice concerning the relevant statutory or regulatory requirements.	Department of Enterprise, Trade and Employment Detail guidance could be in form of auditing standard	With regard to recommendations 14.1 and 14.2 it is important to achieve a sensible and operable form of compliance. In particular, the emphasis ought to be on the identification for reporting purposes of non-compliance that is both material in nature and serious in form. Proposed offences specified in the Company Law Enforcement Bill 2000, the Criminal Justice (Theft and Fraud) Bill 2000 and to be included in Bill which will give effect to the Review Group on Auditing were noted. Penalties and procedures should be consistent across all three Bills. Given potential "vast range of offences" there is a case for spelling out a limited number of specified serious offences which would give rise to the disclosure obligation. An even more limited number could be specified for small and medium enterprises. It may be useful to ask a small task force to examine possible interaction between the three Bills and possibilities for a targeted approach to reporting requirements in the interest of effective and coherent regulation. In general, the Company Law Review Group considered that company law and taxation law were the appropriate areas and the only areas on which companies should report. Any reporting requirements for financial institutions should be addressed as set out in Chapter 15 of the report of the Review Group on Auditing, which basically establishes a protocol for reporting. Reporting should cover the period of the annual report. The reporting obligation should be at the level of the group of companies rather than on each subsidiary in tandem with audit committee obligations. It might be appropriate to attain the desired ends of Chapter 14 through Turnbull-style guidelines on corporate controls. It is also noted that disclosure to shareholders could be damaging to company profitability and might affect the raising of capital abroad. The issue was raised as to whether reporting to members should be done only if the Director of Corporate Enforcement or other regulator was not notified of non-compliance. It is noted that the Review Group on Auditing did not recommend an exemption from this requirement for small or medium sized companies,

Recommendation	Follow-up/Action	Responsible Department/Bodies	Comments of Company Law Review Group
			or for companies exempt from audit requirements. It is suggested that companies exempt from audits should be exempt from these reporting requirements and indeed that consideration be given to excluding all SMEs from this provision. In the event that SMEs are not excluded consideration should be given to allowing directors in these companies to delegate reporting obligations to a nominated and appropriately qualified individual acting under the supervision of a specified director (Section 203(2) of the 1990 Act may provide something of a precedent).
Recommendation 14.2 The external auditors should report as to whether, in their opinion, the Directors' report of the company's compliance with its obligations is reasonable. • In making their report, the auditors should specifically address whether the directors have made appropriate disclosure concerning any circumstances of which the auditors are aware that give reasonable grounds to believe the company has not, or may not have, fulfilled its obligations. • Where they consider that any such circumstances have not been so disclosed by the directors, and the directors have not amended their report, the auditors should include relevant information in their report. This report should be appended to the annual financial statements.	Amendment to Company Law	Department of Enterprise, Trade and Employment	See comments at 14.1 above.
Recommendation 14.3 In situations where the Directors have not issued the report referred to in Recommendation 14.1 within a specified time frame then the external auditors will have a duty to report that failure to the Director of Corporate Enforcement.	Amendment to Company Law	Department of Enterprise, Trade and Employment	Desirable.
Recommendation 14.4 As part of the continuing professional development programme for their auditing members, each of the recognised accountancy bodies should include refresher courses on auditors' statutory obligations under the Companies Acts (including the additional obligations outlined in Recommendation 14.2 and 14.3) and similar legislation in addition to their duties under the body's code of ethics.	New training modules to be developed and introduced to training programmes of Accountancy Bodies.	Accountancy Bodies	Desirable.

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CHAPTER 15

Mitigating the Effects of Strike-off for Creditors

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15.1 Background

15.1.1 In 1999 the CRO began an intensive process of enforcing compliance with the requirement of companies to file annual returns. On foot of this process there has been a dramatic improvement in the proportion of companies filing a current annual return – up from 44% (of those due to file) in 1998 to 98% in 2000.[1] One of the main reasons why the rate of compliance has increased so much has been the deterrent effect of strike-off from the register of companies. The CRO has been striking-off the companies register all companies in arrears with their filing requirements. There were approximately 33,000 such strike-offs in 2000.[2] The Review Group examined issues raised as a consequence of strike-off in the light of submissions about the effects of strike-off on creditors. The Revenue Commissioners also drew attention to the difficulties in this regard. The focus of the Review Group was to identify measures that would minimise the effect of strike-off on creditors.

15.1.2 In its consideration of the issues involved with regard to strike-off the Review Group had regard to existing relevant provisions of company law which might be utilised by creditors, to the powers conferred on the Director of Corporate Enforcement in the 2001 Act and also to proposed changes in CRO procedures following the enactment of the 2001 Act. These aspects of strike-off are discussed below.

15.2 The absence of a State-funded public interest liquidation service

15.2.1 The greater use of strike-off can give rise to circumstances which are certainly more problematical for creditors than they would be if there was a State-funded public interest liquidation service in existence. Unlike the UK and a number of other common law jurisdictions Ireland does not have an official receiver or insolvency trustee. The Review Group notes that the McDowell Report recommended against the establishment of such a service. Although the McDowell Report did not set out an analysis on which this conclusion was based, the Group understands that the rationale for recommending against the establishment of such a service was: (a) the cost to the taxpayer of establishing such a service; and (b) that the scale of the Irish economy would not warrant such a service.[3]

15.2.2 The Review Group noted that the absence of a State-funded liquidation service meant that specific solutions often have to be devised to particular problems arising which in other jurisdictions are dealt with by an official receiver. For example, within the McDowell Report it had been observed that company directors could avoid personal consequences from the appointment of a liquidator by running the company into debt so that there would be insufficient funds to remunerate a liquidator. Such action would ensure that directors would not run the risk of being brought to task by subsequent court action. On foot of changes to the law implemented by the 2001 Act, as a result of recommendations by this Group, the Director can apply to court to have such persons disqualified[4] from being a director of any other company or to have them made liable for fraudulent or reckless trading.[5]

15.2.3 Notwithstanding the enhanced protections provided by establishment of the ODCE and the awarding of substantial powers of investigation and prosecution to the Director, the Review Group considers that the absence of a public liquidation service raises such fundamental and complex issues with regard to the application of company law and the protection of creditors and shareholders that this is an issue which the Review Group believe should be assigned to it for consideration in its second two-year work programme.

1 Current Position at the Companies Registration Office (15 March, 2001), p 2.
2 *ibid.*
3 See 13.4.3.
4 Part 4 of the 2001 Act empowers the Director to apply for to court for the restriction and disqualification of directors.
5 Part 5 of the 2001 Act empowers the Director to apply to court to make persons liable for fraudulent and reckless trading.

15.3 Current developments on strike-off

15.3.1 The Review Group understands that the CRO wishes to move to a position whereby the strike-off process would be used only in rare cases but would be a powerful deterrent against non-filing of returns. In this context a clear distinction is envisaged between a company that has genuinely ceased to trade without leaving debts and a company that refuses to comply with its statutory responsibilities.

15.3.2 While the CRO reserves the right to use the enforcement provisions of the legislation in any manner necessary to meet a changing compliance environment, it proposes to pursue the following procedures on foot of the implementation of the 2001 Act,[6] viz.:

(i) allow the late filing fee to run for six months;
(ii) use the "on-the-spot" fines provisions and prosecutions for any repeat late filings;[7]
(iii) commence the strike-off process after six months. The Registrar will also write to the directors at their home address (per CRO records) at the initiation of the strike-off process enclosing a copy of the strike-off notice which is being sent to the company at its registered office.

15.3.3 Given the extensive enforcement measures contained in the 2001 Act, the CRO is hopeful that implementation of this procedure will render strike-off for non-filing of annual returns the enforcement weapon of last resort. It should be noted in this regard that the strike-off campaign designed to address the long-standing problem of non-compliance with the obligation to file annual returns with the CRO is almost at an end. The campaign targeted the very large volume of non-compliant companies on the CRO register. For the future, it is envisaged that most strike-offs will arise from requests from the Revenue Commissioners pursuant to s 12A of the 1982 Act.[8] Under s 12A, the Revenue Commissioners can request the Registrar to activate the strike-off process against any company which has failed to deliver a statement to the Revenue pursuant to s 882 of the Taxes Consolidation Act 1997. This requirement was introduced to combat the problem of Irish-registered non-resident companies. The resultant strike-off procedures will not impact to any significant extent on the problems complained of by creditors.

15.3.4 Strike-off is also designated as an appropriate enforcement mechanism where a company fails to comply with the requirement (pursuant to s 43 of the 1999 (No 2) Act) to have at least one resident director, or where a company has no director recorded for the time being at the CRO consequent upon a Form B69 being filed pursuant to ss 195(11A) and 195(11B) of the 1963 Act. To date, no companies have been struck off as a result of the foregoing breaches, but, depending upon the level of compliance, it may prove to be necessary in the future to run "strike-off lists" as an enforcement mechanism. The CRO, however, does not expect such lists to contain large numbers of companies.

15.4 Legal consequences of strike-off

15.4.1 A summary of the law governing strike-off and the legal consequences is set out below.

Strike-off

15.4.2 The Registrar may strike off companies which are not carrying on business[9] and companies which have failed to make an annual return.[10] A further ground for strike-off is the failure to deliver certain information to the Revenue Commissioners[11] under the provisions designed to combat the Irish registered non-resident company problem.

6 Part 6 of the 2001 Act contains wide-ranging measures to improve compliance with filing obligations.

7 Section 66 of the 2001 Act enables the Registrar to impose fines for default in the delivery, filing or making of a return or document to the Registrar in accordance with the requirements of the Companies Acts. The section further refers obliquely to prosecutions for "an offence to which this section applies" but does not expressly create an offence of default in delivery; the offence is created in ss 125 and 127 of the 1963 Act as amended by ss 59 and 60 of the 2001 Act.

8 Inserted by s 46 of the 1999 (No 2) Act.

9 See s 311 of the 1963 Act as amended by s 11 of the 1982 Act and s 8 of the 1983 Act.

10 See s 12 of the 1982 Act as amended by the 1999 Act.

11 See s 12A of the 1982 Act as inserted by s 46 of the 1999 No 2 Act.

Companies can be struck off where they do not have an Irish resident director[12] or for not having any director.[13] The procedure for strike-off involves written notice to the company followed by a notice in *Iris Oifigiúil* giving the company a further month to comply. If the default persists the company will be struck off the register and a notice of strike-off will be published in *Iris Oifigiúil*.[14]

Restoration of a company to the register

15.4.3 Companies may be restored in two ways. First, application to the Registrar[15] involves making an application within 12 months of dissolution. Only a member or officer of the company may make such an application, and the company must make good any default in relation to all outstanding returns.

15.4.4 Secondly, an application can be made to court.[16] The most common strike-off process is under s 12 of the 1982 Act for failure to make returns. Where a company has been struck off in this way, any member, officer or creditor of the company may make an application to court for restoration within 20 years of dissolution.[17] In the case of an application by a creditor the application may be brought in the Circuit Court, otherwise it must be brought in the High Court. Notice of the application must be given to the Registrar, the Revenue Commissioners and the Minister for Finance.

General position – effects of strike-off/restoration

15.4.5 When a company is struck off: (a) the company is dissolved and ceases to exist as a legal person; and (b) the initiation of legal proceedings by creditors to recover debts due to them by the company or the continuation of existing legal proceedings is not appropriate as a defendant to proceedings must have legal capacity on the date upon which those proceedings are being heard by the relevant court.

15.4.6 When a company is restored, it is deemed to have continued in existence as if its name had not been struck off the register.[18] However, the Circuit Court or the High Court (as appropriate) may order that one or more of the officers of the company shall be liable for the whole or a part (as the court thinks just) of a debt or liability incurred by or on behalf of the company during the period when it was struck off.[19]

15.5 Existing remedies for creditors

15.5.1 The Review Group recognised that there are a number of provisions in the Companies Acts which provide some protection or redress for creditors. These are:

(i) section 297 of the 1963 Act which provides for the concept of fraudulent trading;
(ii) the 1990 Act, which enables creditors to petition for a company to be placed under court protection;
(iii) provisions in the 1990 Act, which permit a court, in the course of winding up a company or of a petition for examinership, to withdraw the protection of limited liability from directors;
(iv) possibly the most high profile provision is s 138 which introduced the concept of reckless trading and introduced a civil liability whereby an officer of a company responsible for continuing to operate in this manner can be made liable by the courts for the debts or other liabilities of the company;
(v) section 204 of the 1990 Act which provides for personal liability where a company is wound up and has not maintained proper books of account and such contraventions are considered by the court to have contributed to the company's inability to pay all of its debts, or have resulted in substantial uncertainty as to its assets and liabilities or have impeded the orderly winding up thereof.

12 1999 (No 2) Act, s 43(15).
13 1999 (No 2) Act, s 48.
14 The dissolution occurs on the publication of the notice in *Iris Oifigiúil*: see s 12(3) of the 1982 Act, as amended.
15 The procedure is set out in s 311A of the 1963 Act and s 12C of the 1982 Act as amended by the 2001 Act.
16 The procedure is set out in s 12B of the 1982 Act as amended by the 2001 Act.
17 The date of publication in *Iris Oifigiúil* is the reference date.
18 See ss 12B(3) and 12C(2) of the 1982 Act as inserted by s 46 of the 1999 (No 2) Act.
19 *ibid*., s 12B(4),

15.5.2 Creditors have been slow to use these provisions and it may be that they are unwilling to take this route because taking a court action can be expensive with no certainty as to the outcome. The Review Group sought to identify a simple and cost-effective avenue for creditors of companies struck off the register.

15.5.3 Section 54 of the 2001 Act gives the Director extended powers under s 251 of the 1990 Act to deal with companies whose directors are effectively running them into the ground with no assets available to pay the creditors, i.e. "the scorched earth syndrome". (see 13.8.1) The new provisions will enable the Director to take a number of different actions against the directors of such companies, including applying to have them made personally liable for fraudulent or reckless trading or failure to keep accounts.

15.6 Mitigating effect of strike-off for creditors

15.6.1 The Review Group examined ways of minimising the effect of strike-off on creditors. The Group discussed this issue at length, noting the difficulty in coming up with proposals that would improve the real position of creditors having regard to company assets and legal costs. The Group considered whether a company could be deemed to continue in existence so that creditors could continue to pursue debts against it but concluded that this would not make sense in light of the fact that the effect of strike-off was to remove the company's legal existence. The Group then explored the possibility of allowing creditors to pursue directors in respect of the debts of a dissolved company. The effectiveness of the restoration process was also examined.

Contingent transfer of companies' debts to directors

15.6.2 Under the current procedures creditors do not have any way of collecting debts from a dissolved company without first applying to have the company restored to the register. The Review Group considered whether it would be worthwhile to allow collection to proceed against the directors. The proposal would involve: (a) an application by a creditor to Court (High Court, Circuit Court or District Court) to substitute the directors as defendants in place of the company in proceedings to recover a debt due by the company; and (b) the court making an order declaring the director personally responsible in respect of a particular debt for as long as the company remains dissolved. It was envisaged that protection would be built in for directors, as follows: (a) CRO to notify them by registered letter one month before strike-off; (b) the court would decline to make an order if it considered that an individual director acted honestly and responsibly; (c) directors would be permitted to seek an adjournment of the proceeding to allow them time to have the company restored; and (d) the court would put a further stay on any order for one month to allow further time for restoration.

15.6.3 The arguments in favour of this procedure were that it would provide a simple avenue for a creditor to pursue debts of a dissolved company since the procedure would be integrated into the ordinary debt collection process and that the procedure would be less expensive from the creditor's point of view. Such a procedure would ensure that a creditor's right to litigate would not be affected by a technical failure on the part of companies to comply with their obligations under the Companies Acts.

15.6.4 The debt collection process involves standard costs which are usually awarded against the plaintiff where judgment is made in favour of the creditor. In applying for restoration the creditor takes a risk that restoration costs might be awarded against him. The minimum costs of restoration for the creditor would amount to some £1,500 (€1904.61). Notice parties and the company would also incur costs. There is no guarantee that the creditor would be awarded costs as these are within the discretion of the court and further costs may arise if the taxation procedure[20] has to be invoked.

15.6.5 Following a full consideration of this proposal the Group decided against recommending it as a solution. It was considered to involve a far more fundamental change in the company law principle of limited liability than it was

20 Assessment of legal fees and expenses by a court official.

prepared to recommend. To impose the sanction against each director could be disproportionate in the particular circumstances. Failure to lodge a return might not necessarily be evidence of deliberate failure that should result in the loss of limited liability. Instead, the Group recommends that power be given to the Director to enable him to pursue individual directors as appropriate (see below).

Simplification of the restoration process

15.6.6 The Review Group considered that the most appropriate way for a creditor to pursue debts of a dissolved company is through the restoration process. An amendment to the law in 1999[21] permits an application by a creditor to the Circuit Court to have a dissolved company restored. Previously these cases could be heard only in the High Court. Until recently there was no large-scale demand from creditors for company restorations. For this reason there are no clearly defined procedures and this causes confusion particularly for the smaller creditor. As already pointed out, creditors take a risk that fairly substantial costs of restoration may be awarded against them. The Review Group considers that procedures should be introduced to make the restoration process more user-friendly to creditors. Legislation is required to ensure that the costs of restoration are borne by the company concerned and not by the creditors.

15.6.7 The Review Group recommends that:

(i) the Circuit Court Rules Committee should draw up rules (a) to simplify procedures for applications to have a company restored; and (b) to facilitate a reduction in the costs of restoration by the establishment of a scale of measured costs.

(ii) section 311(8) of the 1963 Act and s 12(B)3 of the 1982 Act should be amended to provide that the court shall award the applicant the costs of restoration against the company unless to do so would be in breach of the constitutional rights of any person.

Disqualification of directors where company is struck off

15.6.8 The Review Group came to the conclusion that there should be some sanction for directors who permit their companies to be struck off the register leaving creditors unpaid. Accordingly, the Group recommends that the Director of Corporate Enforcement should be given discretion to bring cases to court for the disqualification of such directors. A provision to this effect is contained in Part 4 of the 2001 Act.

15.6.9 The Review Group recommends that the Registrar should notify the Director of the names of persons who were recorded in the CRO as being directors of a company as at the date of initiation of the strike-off procedure under s 12 of the 1982 Act, where the name of that company was subsequently struck off the register pursuant to s 12(3).

15.6.10 The Director has the power to apply to have those directors disqualified in accordance with the terms of s 160 of the 1990 Act.[22] It would be a matter for the Director of Corporate Enforcement in his discretion to determine whether it was appropriate to bring the matter before the court. He would exercise a role similar to that proposed regarding the requirement that a liquidator must apply to the court for a restriction order under s 150 of the 1990 Act "unless the Director has relieved the liquidator of the obligation to make such an application". Accordingly, the Director would not be obliged to apply for a disqualification order in respect of each and every director of a company which was struck off and dissolved pursuant to s 12(3). The Director would be guided by the need to satisfy the court that he had good cause and he may decide not to proceed against individual directors, depending on the circumstances.

15.6.11 An important point to emphasise in this respect is that it will be the intention of the CRO to notify company directors that the strike-off procedure is likely to be commenced if a company does not file its annual returns,

21 See s 12B(8) and (9) of the 1982 Act as inserted by the 1999 (No 2) Act.

22 2001 Act, s 42.

and that the CRO will bring that matter to the attention of the Director of Corporate Enforcement which may result in an application for disqualification. The stark message that this will convey to directors of such companies may be such that they will take the action necessary to avoid being struck off, i.e. they will file returns. On the one hand, it is acknowledged that the quality of the returns that may be filed may be less than adequate, but if that is the case then the CRO will take action for that offence. If they do not file the necessary returns and they are struck off then action for disqualification can be taken. The net effect will be that it is likely that directors will no longer consider the option of pursuing a "scorched earth" policy seeking to use up all the assets of the company to ensure that no liquidator is appointed, because they will then run the risk of either being disqualified from being a director of any other company or they will run the risk that the Director may take an action against them for fraudulent or reckless behaviour. The likely consequence will be to bring about a situation where advisers to companies will convey the message that if a company is getting into difficulty it would be better either to have an examiner appointed to see if the matter could be redressed or to have it wound up.

Personal liability of a director where a company is struck off

15.6.12 A constant consideration in the Review Group's assessment of remedies for creditors in the event of strike-off was if, to what extent and in what circumstances the principle of limited liability should be deemed to be superseded by the personal liability of directors. In dealing with this issue the Group was conscious that limited liability is the cornerstone of company law and that it is essential to retain a sense of proportionality with regard to appropriate penalties. Nonetheless, the Group noted that the court can remove limited liability in instances of fraudulent and reckless trading and where proper books of account have not been maintained and this gives rise to serious consequences. The Group concluded that the circumstances of strike-off and the contributions of individual directors to strike-offs were so particular that it would not be appropriate to have an across-the-board application against all the directors of a company. However, the Group also considers that it would be important to accord to the Director powers such that in the event of strike-off he could require each person who was a director of the company at the time of strike-off to produce a statement of affairs as at the date preceding the strike-off and on foot of this decide if an investigation and consequent application to court for disqualification or loss of limited liability was warranted. The Group recommends accordingly.

Encourage companies which cease to trade to liquidate

15.6.13 The lack of an orderly system for the winding up of companies which cease to trade causes difficulties for creditors and the Registrar. The costs of liquidation are prohibitive for those directors in general business failures who might be anxious to do the right thing. As indicated above the Review Group is conscious of difficulties caused by the absence of a State liquidation service. Accordingly, the Review Group recommends that the case for and against a State-funded liquidation service should be assigned to it as an issue for consideration in its second work programme 2002 to 2003

15.7 Debts incurred post strike-off

15.7.1 The Review Group considered if any issues arose for creditors in pursuing debts in the post strike-off period. While creditors may be confused about the status of companies post strike-off the law is clear. Company directors or other officers who continue to trade can be pursued for any debts arising in the post strike-off period. These debts may revert to the company if the company is restored. However, when seeking a judgment against the company directors or other officers prior to restoration, a creditor may request the court to order that such judgment would not be affected by a subsequent restoration of the company.

15.7.2 The Review Group noted that s 98 of the 2001 Act sets out a replacement s 381 of the 1963 Act which provides a means whereby the court may issue an injunction against persons trading under a name ending with the word "limited" when not duly incorporated with limited liability. The application for such an injunction may be made by the Director or the Registrar prohibiting them from continuing so to trade.

15.8 Other developments

15.8.1 The 2001 Act introduces a number of important measures with regard to the failure of a company to file returns. Section 66 of the Act provides a means whereby the Registrar may levy fines in respect of a failure to file returns without institution of court proceedings. The section enables the Registrar to impose specified payment in respect of failure to file returns without denying the person accused of an offence the right to be heard in court. The section provides that the Registrar may give to a person, who has failed to file a return, a notice to the effect that the offence is alleged against him and that, unless a fine is paid within 21 days and the return is filed, proceedings will be instituted.[23] This gives the accused the option of settling the specified payment and avoiding a court case and possible conviction. The responsibility for proving that a specified payment imposed under this section has been paid is placed on the defendant in any subsequent proceedings.[24] This is to ensure that a defendant cannot simply rely on the defence that he remitted the relevant amount and that it is up to the Registrar to prove the contrary.

15.9 Provisions for "voluntary" strike-off

15.9.1 The CRO has introduced new requirements for the voluntary strike-off of a company pursuant to s 311 of the 1963 Act. These requirements are:

(i) a declaration by the directors that the company has no assets or liabilities;
(ii) the placing of a notice in a national newspaper that the company proposes to apply to be struck off;
(iii) all annual returns and accounts to be filed up-to-date; and
(iv) a letter of agreement from the Revenue Commissioners.

The Review Group welcomes the introduction of this policy.

15.10 Right of company to seek extra time to file

15.10.1 It should be possible to have some mechanism to cater for the truly difficult problems a company might have in completing accounts or preparing the annual return. There will be significant late filing fees and severe penalties if struck off. It would be beneficial to put in place a formal system to allow a company more time in deserving cases. To that end, on foot of a recommendation of the Review Group, a provision permitting the court to extend the time for filing was inserted into s 127(3) and (4) of the 1963 Act, by s 60 of the 2001 Act.

15.10.2 This provision affords an important protection for companies which have genuine difficulties with compliance. Such cases can arise, for example, due to the death of a director or a dispute between company officers so that it is simply not possible to prepare accounts or to complete returns in a reasonable time-scale. If the court were persuaded of the merits of the case, automatic sanctions, such as the late filing fee, would not arise.

15.11 Preparing annual accounts for dissolved companies

15.11.1 Where a company that has been struck off the register of companies seeks to be reinstated, it will most commonly be required to file outstanding annual returns, including company accounts. One of the difficulties for the directors and the auditors is that, although an application for reinstatement may ultimately be successful whereby the company will be deemed never to have been struck off, at the time of the preparation of the accounts (before the reinstatement) the company will not in fact exist.

23 2001 Act, s 66 (1).
24 2001 Act s 66(3).

15.11.2 The Review Group accepts that it is implicit from s 311(3) of the 1963 Act that the company has an implicit shadow existence (and its directors have implicit shadow office) for the purpose of achieving restoration. The Group is, however, of the view that such an implicit position be made explicit in the application for restoration process. Accordingly, the Group recommends that it be expressly provided in statute that all actions necessary to restore a company to the register may be taken on the basis that the company is treated, for this purpose only, as if it has an existence. Such permitted actions should include directors' preparing or arranging for the preparation of the company's annual accounts, the approval and auditing of those annual accounts and the preparation and submission of outstanding annual returns to the CRO.

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15.12 Summary of Recommendations

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- The Circuit Court Rules Committee should draw up rules: (a) to simplify procedures for applications to have a company restored; and (b) to facilitate a reduction in the costs of restoration by the establishment of a scale of measured costs. **(15.6.7)**

- Section 311(8) of the 1963 Act and s 12(B)(3) of the 1982 Act should be amended to provide that the court shall award the applicant the costs of restoration against the company unless to do so would be in breach of the constitutional rights of any person. **(15.6.7)**

- The Registrar should notify the Director of the names of persons who were recorded in the CRO as being directors of a company as at the date of initiation of the strike-off procedure under s 12 of the 1982 Act, where the name of that company was subsequently struck off the register pursuant to s 12(3). **(15.6.9)**

- The Director should be accorded the powers such that in the event of strike-off he could require each person who was a director of a company at the time of strike-off to produce a statement of affairs for the company as at the date of strike-off and on foot of this decide if an investigation and consequent application to court for adisqualification order under s 160 of the 1990 Act or some other order under s 251 of the 1990 Act to have the directors made personally liable for the company's debts was warranted. **(15.6.12)**

- The case for and against a State-funded public interest liquidation service should be considered in the Review Group's second work programme. **(15.6.13)**

- It should be expressly provided in statute that all actions necessary to restore a company to the register may be taken on the basis that the company is treated, for the limited purpose of achieving restoration, as if it has an existence. Such permitted actions should include directors preparing or arranging for the preparation of the company's annual accounts, the approval and auditing of those annual accounts and the preparation and submission of outstanding annual returns to the CRO. **(15.11.2)**

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CHAPTER 16

Investment Companies

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16.1 Introduction

16.1.1 The Review Group recognises the importance of the international investment funds industry to the Irish economy. The Group also acknowledges the complexity of the legislation and regulation under which the industry operates, as outlined below, and, perhaps most importantly, the need to ensure a timely and regular review of the legal and regulatory regime in the light of market and other developments. Such review will assist in maintaining Ireland's competitive position *vis-á-vis* other jurisdictions. In addition, the Group considered whether the Companies Acts represents the best home for the law relating to investment companies in particular and funds in general. In recognition of these factors, the Review Group sets out a number of recommendations in this chapter dealing specifically with investment companies.

16.2 The international investment funds industry in Ireland

16.2.1 The development of the international funds industry in Ireland began in 1989, with the implementation of the EU UCITS Directive.[1] This was followed shortly afterwards by the enactment of a number of legislative initiatives which were designed to ensure that the full range of fund products familiar to international promoters was available in Ireland. In 1989, also, a special tax regime for International Financial Services Centre (IFSC)[2] funds was introduced. This regime provided for exemption from corporation tax of Irish-authorised investment funds subject to the conditions that (i) the fund was managed by a company with an IFSC certificate and (ii) Irish tax residents would not be permitted to invest in the fund. The first of these requirements was usually satisfied either by the establishment by a fund promoter of its own IFSC management company or by the appointment of a third party fund administrator in Dublin which held an IFSC certificate. In some cases, fund promoters set up their own stand-alone operations in Ireland.[3]

16.2.2 The initiatives described above have resulted in the development of Ireland as a significant international centre for the establishment of investment funds. There are 925 investment funds authorised in Ireland. Of these, approximately two-thirds are investment companies. The bulk of the remainder are unit trusts, with only two investment limited partnerships currently authorised. At 30 September 2001, the total net asset value of Irish funds was €243.6 billion.[4] There are, approximately, 9,000 people employed, whether directly or indirectly, in the investment funds industry in Ireland. From this point of view alone, the development of the international funds industry is generally regarded as one of the key successes of the IFSC.

16.3 Investment funds – structure and regulation

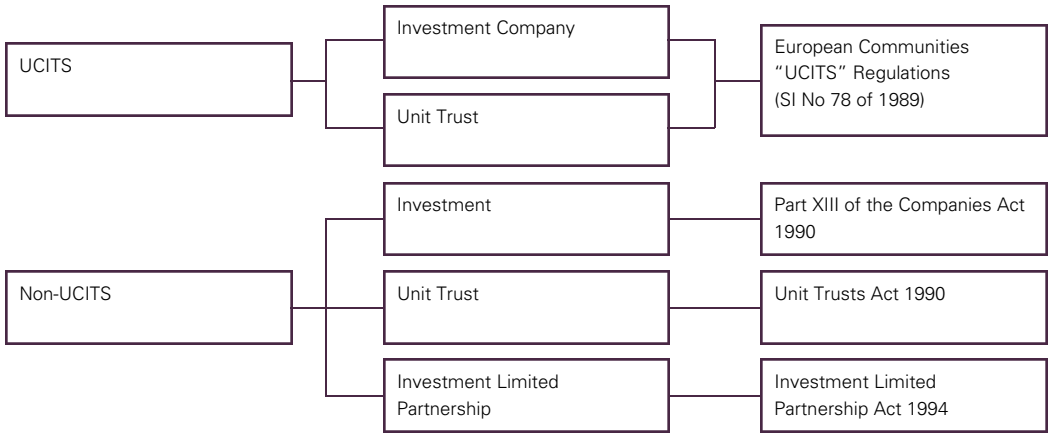
16.3.1 The bulk of Irish investment funds are established as investment companies. The choice of legal structure for a fund can depend on a number of factors, including promoter and investor preference. The principal enactments governing investment companies ("investment funds in Ireland") are set out in the diagram below:

1 European Communities (Undertakings for Collective Investment in Transferable Securities) Directive 85/611/EEC, implemented in Ireland by the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (SI No 78 of 1989).

2 The IFSC was set up in 1987 in a designated area around the Custom House Docks in Dublin. A special low rate of tax, 10%, applied to companies in the designated area offering financial services to international clients. Such companies were granted a tax certificate, commonly referred to as an "IFSC certificate". This concession generally applies until 2005.

3 The Irish Government reached agreement in 1998 with the EU Commission that the IFSC certification regime would be phased out, with the last certificates being issued in 1999. Companies holding IFSC certificates will generally continue to enjoy the 10% corporate tax rate until 2005. The Government also attained Commission approval that the standard rate of corporate tax would be gradually reduced over four years, leading to a standard rate of 12.5% effective January 2003. Companies would no longer be required to locate in the IFSC or fulfil any of the other "IFSC" requirements to benefit from the reduced rate of tax.

4 Source: Central Bank of Ireland.



16.3.2 Because investment funds constituted as companies generally have very distinct forms of company organisation and objectives, it is often inappropriate to treat them in the same way as the generality of companies. The most notable distinction is, perhaps, the fact that investment companies have a variable capital, which has resulted in the relaxation of the normal capital maintenance rules. Sections of the Companies Acts have frequently been disapplied from investment companies. Other provisions, notably Part XIII of the 1990 Act and certain provisions of the UCITS Regulations, apply only to such companies.

16.3.3 In addition to different legal structures, investment funds in Ireland may be established under different provisions of the Companies Acts depending on whether or not they come within the scope of the EU UCITS Directive. (Investment funds not coming within the UCITS Directive are generally known as "non-UCITS"). UCITS are governed by the UCITS Directive, which was implemented in Ireland by the UCITS Regulations, and may be established as either investment companies or unit trusts. Non-UCITS may be established as investment companies (under Part XIII of the 1990 Act), unit trusts (under the Unit Trusts Act 1990) or investment limited partnerships (under the Investment Limited Partnerships Act, 1994).

16.3.4 Under all of these enactments, the Central Bank of Ireland (the "Central Bank") is designated as the regulator.[5] The primary concern of the Central Bank in its capacity as regulator is investor protection and to ensure compliance with relevant law. All investment funds established in Ireland must be authorised by the Central Bank and the investment manager of the fund must be approved as such by the Central Bank. In addition, the other service providers to the fund, notably the fund administrator and custodian, must be based in Ireland and must be approved by the Central Bank to act as such.

16.3.5 Pursuant to the legislation, the Central Bank has power to make regulations relating to the initial authorisation and ongoing supervision of investment funds. In this regard, the Central Bank has issued a series of "Notices" for both UCITS and non-UCITS funds and, in addition, periodically issues guidance notes. It is interesting that the Central Bank's Notices and guidance notes do not distinguish between the different legal forms of investment funds except where the context specifically requires.

16.3.6 The Central Bank Notices cover issues relating to the detailed operation of authorised investment funds, such as investment and borrowing restrictions, prospectus contents and reporting requirements.[6] In the case of non-UCITS, the nature of the requirements depends on the category of authorisation being sought, i.e. whether the fund will be marketed to retail or "sophisticated" investors. Because non-UCITS are not subject to the constraints of an EU Directive, they allow for a much wider and more flexible range of investment and borrowing strategies than are permitted under the UCITS Regulations.

5 In February 2001 the Government decided on the establishment of a unified regulator of financial services, the Irish Financial Services Regulatory Authority (IFSRA), operating under a proposed new Central Bank of Ireland and Financial Services Authority Board. IFSRA will be responsible for the licensing and prudential regulation of all financial services providers.

6 See www.centralbank.ie/supervision.html.

16.4 Undertakings for collective investment in transferable securities ("UCITS")

16.4.1 The term "UCITS" is used to describe funds authorised by the UCITS Directive. The intention behind the UCITS Directive was to have an investment product subject to the same regulation in each EU Member State. The product could, once authorised in one Member State, be sold to the public in each Member State without further authorisation. All that is required is registration with the local regulator, which cannot refuse permission to market once a fund is duly authorised in another Member State and complies with the local marketing rules. The types of fund which can be established under the UCITS Directive are relatively limited and the reality of a pan-European market for investment funds has fallen short of the vision. The EU Council of Finance Ministers, in December 2001, adopted two further Directives which will amend the original UCITS Directive both by extending the range of investment products available and introducing specific rules pertaining to the infrastructure and capitalisation of UCITS. The Review Group understands that the Irish Government intends to proceed with the early implementation of these Directives.

16.5 Investment companies

16.5.1 For the purposes of this report, the Review Group is concerned only with investment companies, i.e. companies operating under either Part XIII of the 1990 Act or the UCITS Regulations. The UCITS Regulations introduced a new type of company, the variable capital company. Section 252 of the 1990 Act introduced a similar form of company for non-UCITS. This form applies only to companies incorporated in accordance with one or other of those enactments and regulated by the Central Bank. Such companies are structured to facilitate the periodic repurchase of the shares of the company at the option of the shareholder and are generally known as open-ended companies. (Section 80 of the Investment Intermediaries Act 1995 extended many of the provisions of Part XIII of the 1990 Act to closed-ended investment companies, i.e. investment funds in which shareholders do not have an automatic right to redeem their shares).

16.5.2 Investment companies must be established as PLCs. The provisions of Part XIII of the 1990 Act apply to an *investment company,* defined at s 253(2) of the 1990 Act as:

> …a company limited by shares (not being a company to which the UCITS Regulations apply)-
>
> (a) the sole object of which is stated in its memorandum to be the collective investment of its funds in property with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds; and
> (b) the articles or memorandum of which provide-
> (i) that the actual value of the paid up share capital of the company shall be at all times equal to the value of the assets of any kind of the company after the deduction of its liabilities, and
> (ii) that the shares of the company shall, at the request of any of the holders thereof, be purchased by the company directly or indirectly out of the company's assets.

16.5.3 The definition was further amended by the Investment Intermediaries Act 1995 and, subsequently, by the 1999 (No 2) Act. Section 253(2A) now reads:

> Notwithstanding subsection (2)(b)(ii), this Part shall also apply to a company to which subsection (2) otherwise applies, the articles or memorandum of which do not provide that the shares of the company shall, at the request of any holders thereof, be purchased in the manner therein provided, to the extent as may be approved and subject to such conditions as may be applied by the [Central] Bank.

16.6 The IFSC Funds Group

16.6.1 As part of the Government's policy to promote international financial services in Ireland, a number of working groups, which incorporate both industry and State experts, operate under the aegis of the Department of the

Taoiseach. The purpose of these groups is to advise the Government on policy and technical (legal/regulatory/tax) matters designed to ensure the continuing competitiveness of Ireland as an international centre for financial services. In this context, the IFSC Funds Group has identified a number of legislative provisions, relating to both UCITS and non-UCITS, which it considers are impeding the efficient operation of Irish-authorised investment funds, and has made proposals for amendments relating thereto. These are largely of a technical nature and are designed to facilitate the efficient operation of investment funds in Ireland and, in some cases, to streamline the law relating to UCITS with that for non-UCITS. This law has, in certain respects, become inconsistent, primarily because the two types of funds operate under different legislative provisions. The overriding objective is to ensure that Ireland remains competitive with other jurisdictions within its commitments under European company law and fund law Directives, while providing appropriate investor protection.

16.6.2 The Review Group has examined the proposals of the IFSC Funds Group in the particular context of company law principles as established over the years. The Review Group accepts the proposals of this expert group and recommends that they be implemented as part of the implementation of the overall recommendations contained in this report.

16.7 Complexity of the situation and principal proposals

16.7.1 An important issue with regard to investment companies is whether the Companies Acts are the most appropriate means of facilitating the operation of such companies or whether they should, together with unit trusts and investment limited partnerships, operate under a separate legislative code.

16.7.2 A clear case can be made for the retention of provisions governing the activities of particular companies in the Companies Acts. This is the reason why, in the first place, such legislation was made part of the Companies Acts. On the other hand, however, investment companies have very particular needs which will frequently be very different to the needs of so-called "ordinary" companies. Changes have been required to the general companies' legislation as applies to all companies, in order to facilitate a tiny number of companies that are, however, hugely important to the economy.[7] The piecemeal amendment of the general companies' legislation in order to facilitate developments in the international practice of investment companies has the result that the general law is made more complex and wordy. Such an approach is certainly not conducive to simplification of company law.

16.7.3 The Review Group considers that there is a stronger argument for a separate legislative code for investment funds, particularly given the extent of regulation of such entities by the Central Bank. Such a code would govern the establishment and operation of investment funds, irrespective of legal form and of whether they are UCITS or non-UCITS, and would facilitate the operation and regulation of such different entities in a consistent manner. The Group recommends, therefore, that the establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. The Group recognises, however, that, pending a commitment to draft and enact such a dedicated Bill, to the extent to which the Companies Acts apply to investment companies, a number of changes are required to be made. The principal amendments that have been proposed by the IFSC Funds Group, which are endorsed by the Review Group, are outlined in 16.8 below.

16.7.4 In restructuring the Companies Acts so as to create the paradigm envisaged at 3.7.3, Part XIII of the 1990 Act would be placed within a Part of Group B of the consolidated Companies Act. The Group sees considerable merit in the hiving-off of that Part into a stand-alone piece of legislation. To the extent that it is possible, the Review Group recommends that the pre-consolidation Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies Acts) would facilitate this hive-off and achieve two resulting Bills: the consolidated Companies Bill and the Collective Investment Schemes Bill.

7 See, for example, s 93 of the 2001 Act which amends s 213 of the 1963 Act, dealing with the winding-up of companies.

16.8 Other proposals for amendment to the Companies Acts

UCITS Regulations

16.8.1 The Department of Enterprise, Trade and Employment is currently working on the implementation of a number of amendments to the UCITS Regulations recommended by the IFSC Funds Group. There may, however, be a serious legal difficulty in implementing some of these amendments by way of Regulations under the EC Act, as is the intention, if the amendments proposed cannot be seen to be specifically required for the purpose of implementation of the UCITS Directive. In such circumstances, it will be necessary to give effect to the amendments by means of primary legislation, and the Review Group recommends that any such amendments be included in the Bill which will give effect to the overall recommendations contained in this report.

Limited duration companies

16.8.2 Currently, under s 251(1)(a) of the 1963 Act, even where a period has been fixed in a company's articles of association for the duration of the company, a shareholders' resolution is still required for the company to be wound up on a voluntary basis. This requirement creates certain foreign tax inefficiencies in the context of investment funds. In particular, the requirement to have a resolution to effect the termination of a company brings Irish funds outside certain preferential tax treatment in the USA. The removal of the requirement for the passing of a resolution overcomes these tax inefficiencies and it is recommended, accordingly, that s 251(1)(a) be amended to allow for what is known in the international funds industry as "limited duration companies".

16.8.3 Certain consequential amendments flow from this amendment as a voluntary winding-up process is predicated on the assumption of a shareholders' meeting at which a resolution is passed to wind up the company. In the present context, it is envisaged that a shareholders' resolution would solely be required to approve the appointment of a liquidator. Sections 252(1), 253, 256(2) and 266(1) of the 1963 Act clearly envisage a meeting of shareholders being held for the purpose of passing a resolution to wind up and these sections, at least, will also have to be amended, insofar as they relate to investment companies, to facilitate limited duration investment companies.

1986 Act

16.8.4 A number of provisions of the 1986 Act relating to the format and content of company accounts are not appropriate for investment companies. For example, the format of company accounts prescribed in the 1986 Act is not suitable for umbrella funds,[8] where each share class or "sub-fund" effectively operates as a separate fund.

16.8.5 The Fourth Directive, on which the 1986 Act is based, permitted Member States to exempt open-ended investment companies from the requirements of the Directive. (Closed-ended investment companies must, however, comply with these requirements.) The 1986 Act, in implementing the Directive, did not, however, allow for the exemption.

16.8.6 The fact of open-ended investment companies being made subject to the requirements of the Directive may mean that such companies are at a disadvantage *vis-á-vis* not only Irish unit trusts and investment limited partnerships but also funds established in other EU Member States which have availed of the Fourth Directive exemption. Given the development of the investment funds industry in Ireland and in view, also, of the fact that the Central Bank prescribes the contents of accounts for all investment funds, the Review Group recommends that open-ended investment companies be exempted from the 1986 Act.

Section 53 of the 1990 Act

16.8.7 Section 53 of the 1990 Act requires directors who acquire shares in a company to notify the company secretary within five days of the relevant acquisition; a failure to notify resulting in the shares losing their voting rights.

8 An umbrella investment company is a company that can issue shares of different classes, each of which relates to a separate pool of assets, which can be described as a "sub-fund" or a "portfolio". A company prescribes a separate investment objective and policy for each sub-fund and the assets held in that portfolio are professionally managed with the aim of meeting this objective.

This section was specifically disapplied from UCITS investment companies by s 55 of the 1990 Act and, the Review Group recommends, should similarly be disapplied from non-UCITS investment companies.

16.9 Cross-investment by umbrella investment companies

16.9.1 The funds industry is currently seeking to have certain sections of the UCITS Regulations and of Part XIII of the 1990 Act amended in order to allow for cross-investment between sub-funds of both UCITS and non-UCITS umbrella investment companies. There is a wide range of circumstances where it can be beneficial for a sub-fund to invest in another sub-fund rather than take investment exposure directly. For example, a sub-fund could use cross-investing to take exposure to smaller asset classes in order to create efficiencies in the portfolio management, portfolio operations and fund accounting areas. It is not possible at present for investment companies to do this because of the interpretation of ss 254 and 255 of the 1990 Act (although it is possible in a unit trust).

16.9.2 The IFSC Funds Group is currently examining this issue to identify the amendments which need to be made to the Companies Acts to facilitate cross-investment and a specific study has been commenced to examine and report on any potential conflicts with EU law or generic principles of domestic company law. In the interest, again, of ensuring that Ireland remains competitive *vis-á-vis* other investment funds jurisdictions, where cross-investment is generally permitted, the Review Group recommends that the amendments proposed be given priority attention.

16.10 Protected cell companies

16.10.1 Investment funds may be established in the form of umbrella funds, under which a number of sub-funds are created within a single corporate entity. This is a popular and efficient type of investment vehicle. Generally, however, the company is legally liable for all of the debts of the company, including debts occurring at sub-fund level. A number of amendments would be required to Irish company law to allow the creation of umbrella investment companies where the liabilities of the individual sub-funds is limited, through the creation of individual cells. From a prudential viewpoint, such structures have merit and are important for the protection of investors. Whilst the likelihood that the individual sub-funds could fail to meet their liabilities is remote in the context of retail funds (where borrowing is limited), there are other funds, particularly those investing in derivatives and using leverage, where such eventualities could arise.

16.10.2 The key feature of a protected cell company ("PCC") is that although the company remains a single legal entity, it has separate and distinct "cells". The assets and liabilities of each cell are segregated and protected from those of the other cells. They are also separate and distinct from a PCC's non-cellular assets.

16.10.3 The objective is to ensure that the assets of one cell are only available to those creditors of the company who are creditors in respect of that cell and that the assets of one cell are protected from the creditors of the company who are not creditors in respect of that cell and who accordingly are not entitled to have recourse to the assets of that cell. A PCC enables assets to be ring-fenced within the company's individual cells pursuant to a statutory framework.

16.10.4 One method of dealing with the issue of cross liability between sub-funds is for the company to establish separate trading subsidiaries for each sub-fund, thus isolating liability at the level of the subsidiary. This is, however, a cumbersome structure to create and to operate.

16.10.5 Segregation of liability between sub-funds is possible in a unit trust. It is also possible in a number of other jurisdictions where special protected cell legislation has been introduced. The absence of this facility for investment companies puts Ireland at a disadvantage *vis-á-vis* its competitors. This is an issue that requires further examination.

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16.11 Summary of Recommendations

16.11 Summary of recommendations

- The establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. **(16.7.3)**

- In restructuring the Companies Acts so as to create the paradigm envisaged at 3.7.3, Part XIII of the 1990 Act should be placed within a Part of Group B of the consolidated Companies Act. To the extent that it is possible, the pre-consolidation Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies Acts) would facilitate this hive-off and achieve two resulting Bills: the consolidated Companies Bill and the Collective Investment Schemes Bill. **(16.7.4)**

- If the amendments to the UCITS Regulations recommended by the IFSC Funds Group cannot be effected by secondary legislation, they should be included in the Bill which will give effect to the overall recommendations contained in this report. **(16.8.1)**

- Sections 252(1), 253, 256(2) and 266(1) of the 1963 Act should be modified in their application to investment companies so as to dispense with the requirement for a shareholders' resolution in the voluntary winding-up of an investment company and to facilitate limited duration investment companies. **(16.8.3)**

- Open-ended investment companies should be exempted from the 1986 Act. **(16.8.6)**

- The disapplication of s 53 of the 1990 by s 55 of the 1990 Act in the case of UCITS investment companies should be extended to non-UCITS investment companies. **(16.8.7)**

- In the interests of ensuring that Ireland remains competitive vis-á-vis other investment funds jurisdictions where cross-investment is generally permitted, amendments proposed by the IFSC Funds Group should be given priority attention. **(16.9.2)**

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CHAPTER 17

Consolidation

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17.1 Introduction

17.1.1 Consolidation of the Companies Acts will be the third major consolidation in recent years of bodies of law impacting substantially on commercial activity. The advantages of consolidating significant bodies of legislation are set out cogently in the introduction to the Government proposals for the Taxes Consolidation Bill 1997.[1] These are:

(i) All direct (tax) legislation will be available in a single up-to-date Act, in a coherent, orderly and more simplified format.
(ii) The legislation will be more accessible and user friendly.
(iii) As part of the process, a significant amount of deadwood and obsolete material will be eliminated and there will be considerable simplification in content.
(iv) All future amendments will be capable of being slotted into the Consolidation Act by amendment.
(v) Our legislation will become more coherent to foreign investors and their advisers.
(vi) The task of future simplification will be facilitated.

These same objectives apply to the Companies Acts, *mutatis mutandis*. Since the taxes consolidation proposals were published we have seen consolidation of the Taxes Acts (1997) and of the Stamp Duty Acts (1999).

17.1.2 The Review Group considers that the particular case for consolidation of the Companies Acts is compelling. The facts speak for themselves. The 1963 Act, by law the Principal Act, remains nominally the main Companies Act in Ireland today, but does not anymore provide a comprehensive statement of the law. Since 1977 it has continually been amended. The 1990 Act contains 262 sections of law and the 2001 Act contains 114 sections, although the Principal Act contains only 399 sections. The need for a consolidating Act is greater than ever in that nine amending Acts of the Oireachtas and numerous statutory instruments have substantially changed the Principal Act.[2] In addition, the opportunity has been taken to amend the Companies Acts by other statutes, for example, the Safety, Health and Welfare at Work Act 1989, the Finance Act 1990, the Investment Intermediaries Act 1995, the Electoral Act 1997, and the Economic and Monetary Union Act 1998.

17.1.3 The context to the Government decision of 9 March 1999 to consolidate the Companies Acts is set out at 3.12.1. The Review Group also outlines in Chapter 3 our analysis on how to achieve consolidation in a way which is complementary to the significant reform agenda put forward in this report.

17.2 Consolidating the Companies Acts, post simplification

17.2.1 As set out in 3.12.3 *et seq*, the Review Group considered the optimum approach to take to consolidation. In effect, the scale and nature of the changes proposed in the Review Group's report were the determinant of which should come first: review or consolidation. The Group's conclusion was that amendment following review should precede consolidation. Central to this decision was the Group's overall vision for the framework of the companies legislation.

New model company

17.2.2 To establish the cornerstone of simplification in the companies code the Review Group proposes that the new model company type should be the private company limited by shares, i.e. the CLS. What is envisaged, to be mapped out in the Company Law Review Bill, i.e. the Bill to enact the Review Group's recommendations as approved by Government, and implemented in the consolidated Companies Act which will follow on from enactment of the Review Bill, is probably the most far-reaching conceptual change in company law since the

1 Minister for Finance, 16 April 1997.
2 See table following 17.8.

introduction of statutory provision for private companies in the Companies Act 1907. The main consequence of this approach would be the ring-fencing of the law applicable to private companies limited by shares (CLS) from that applicable to PLCs and all other company types and bodies corporate regulated by the Companies Acts. That approach – and the changes it outlines – is in effect the preconsolidation element of the Group's report and an essential stage in achieving a consolidated and restructured Companies Act. The proposed layout of the consolidated Companies Act is set out below.

Layout of consolidated Companies Act: Framework

Group A
The law applicable to the private company limited by shares (CLS)

Part 1	Definitions for the purposes of the law applicable to CLSs
Part 2	Incorporation and Registration
Part 3	Management and Administration
Part 4	Duties of Directors
Part 5	Accounts and Audit, including European Communities (Companies: Group Accounts) Regulations 1992 Law proposed in expected Auditing Bill
Part 6	Share Capital and Membership
Part 7	Debentures and Charges
Part 8	Compliance, Enforcement and Investigations, including Company Law Enforcement Act 2001
Part 9	Reconstructions
Part 10	Examinerships
Part 11	Receiverships
Part 12	Winding-up
Part 13	Dissolution and Reinstatement

Group B

The law applicable to companies and bodies corporate other than CLSs

Part 1	Definitions for the purposes of the law applicable to: Private companies limited by guarantee and that have a share capital; Private unlimited companies that have a share capital; PLCs that are limited by shares; PLCs that are limited by guarantee and that have a share capital; PLCs limited by shares that have a variable share capital; Public companies limited by guarantee that do not have a share capital; Public unlimited companies that have a share capital; Public unlimited companies that do not have a share capital; Other bodies corporate.
Part 2	Public Limited Companies (PLCs) Application/ disapplication of the laws in Group A to PLCs Application of additional laws to PLCs
Part 3	Public Offers and Listing of Securities, including 1984 Stock Exchange Regulations 1992 Prospectus Regulations
Part 4	Takeovers of public limited companies, incorporating Irish Takeover Panel Act 1997[3]
Part 5	Guarantee Companies Application/disapplication of the laws in Group A to guarantee companies Application of additional laws to guarantee companies
Part 6	Unlimited Companies Application/disapplication of the laws in Group A, to unlimited companies; Application of additional laws to unlimited companies
Part 7	Overseas Companies Registration of branches and established places of business of overseas companies Application/disapplication of the laws in Group A to overseas companies; Application of additional laws to overseas companies
Part 8	Unregistered Companies Application/disapplication of the laws in Group A, to unregistered companies; Application of additional laws to unregistered companies
Part 9	Conversion and Re-registration Limited to unlimited, private to public, vice versa
Part 10	Miscellaneous Bodies Corporate Application/disapplication of the laws in Group A, to miscellaneous bodies corporate; Application of additional laws to miscellaneous bodies corporate

3 Published by the Department of Enterprise, Trade and Employment in September 2001.

Group B

The law applicable to companies and bodies corporate other than CLSs

Part 11	Special Accounting Requirements, including European Communities (Credit Institutions: Accounts) Regulations 1992 European Communities (Insurance Undertakings: Accounts) Regulations 1996
Part 12	Miscellaneous

17.2.3 Once the Companies Acts are reconfigured in a way which makes the private company limited by shares the model company, the Group of Parts of the consolidated Companies Act applicable to all other types of company – Group B may be safely ignored by private companies limited by shares and their users. The detailed rationale for this change is set out in Chapter 3 but the most salient reason for the change can be gleaned from statistics provided by the CRO and set out in the Companies Report 2000.[4] These figures indicate that, of the 137,654 companies on the Register of Companies at end 2000, 122,228 or 88.8%, were private companies limited by shares.

Evolution of companies code

17.2.4 The Review Group acknowledges that the companies code is never going to be simple but it can be made less complex. It seems self-evident to the Group that the base model for a company should be a model reflecting the vast bulk of companies. The statistics cited above speak for themselves. It is also worth making the point that the companies code is not, and should not be, a standard set in stone. The core principles of shareholder protection and creditor protection are constants but the forms of company organised for the transaction of business and the ways in which business is done are not. At any given time the companies code has to respond to current forms of commercial organisation and activity. This evolutionary aspect to company law is clearly seen from such landmarks as the:

- introduction of the privilege of incorporation by registration by the Joint Stock Companies Act 1844;
- introduction of limited liability by the Limited Liability Act 1855;
- unequivocal judicial recognition in the seminal *Salomon v A Salomon & Co Ltd* judgment in 1897 of the principle that in law a company has a legal personality separate from its members;
- first introduction of the private company in the Companies Act 1907;
- harmonisation of company law in Ireland with the law of the European Union.

17.3 Structure of consolidated Companies Act

Types of companies to be provided for in the consolidated Companies Act

17.3.1 The Review Group recognises that provision for all existing types of company has to be made in the consolidated Companies Act. To that end the Group has identified the following types of company:

(i) Private companies limited by shares;
(ii) Private companies limited by guarantee and that have a share capital;
(iii) Private unlimited companies that have a share capital;
(iv) PLCs that are limited by shares;
(v) PLCs that are limited by guarantee and that have a share capital;

4 Significant developments arising from membership include introduction of the term public limited company (plc) by the 1983 Act and introduction of single member private limited companies by the European Communities (Single-Member Private Limited Companies) Regulations 1994.

(vi) PLCs that have a variable share capital;[5]
(vii) Public companies limited by guarantee that do not have a share capital;
(viii) Public unlimited companies that have a share capital;
(ix) Public unlimited companies that do not have a share capital.

17.3.2 The Review Group envisages the consolidated Companies Act as being structured so that company type number (i) above, the private company limited by shares, becomes the model company. The Group envisages that the layout of the consolidated Companies Act will be composed of two Groups of Parts, A and B, see Table at 17.2.2. The First Group of Parts, Group A, will be composed of sections which apply in their totality to the model company, i.e. the private company limited by shares. The First Group of Parts will also be set out on the life cycle basis of a company, from incorporation to winding-up. No other provisions of the Act will apply to private companies limited by shares. In consequence, no stakeholder in a CLS – company officer, member, creditor or employee – need have regard to the sections of the Act set out in the Second Group of Parts, i.e. Group B.

17.3.3 The Review Group deliberated at length to arrive at this recommendation. It considered whether the model company should be the private company regardless of whether that company was limited or unlimited and if limited whether by shares or by guarantee. No other model offered the level of simplicity provided by adoption of the CLS as the base model company.

17.3.4 In the consolidated Companies Act each of the other types of company will be dealt with as a separate Part in Group B, with application and disapplication of the sections in Group A to these companies as appropriate. Moreover, each Part will also contain provisions exclusively applicable to that company type.

17.4 Sequencing of amendment, review and consolidation

17.4.1 The Review Group believes that the substantial changes for the reorganisation and restructuring of the Companies Acts proposed in this report demonstrate that the appropriate sequence is to enact the recommendations of the Group and then consolidate the Companies Acts. The reverse approach would see the Companies Acts consolidated on the basis of the existing Principal Act, the 1963 Act. If such a consolidation were to be followed immediately by amendment, the consolidated Act would be out of date almost instantly.

17.5 Consolidation or restatement

17.5.1 As outlined at 3.12.6 above the Review Group considered the option of a restatement rather than a consolidation of company law. A Bill to provide for restatements of bodies of law is currently (December 2001) before the Oireachtas. Restatement is, in effect, an administrative consolidation, with the important proviso that the restatement is not in the form of an Act passed by the Oireachtas but is instead a statement of existing law in a single text certified to be the law by the Attorney General. A restatement is merely laid before the Oireachtas rather than enacted by it. The Review Group concluded that restatement would not achieve the radical restructuring of the Companies Acts proposed. Once the Companies Acts are correctly structured, as the Review Group recommends, then restatement will be of significant assistance in presenting subsequent variations of the law in their correct context.

5 With the exception of funds related provisions which the Review Group believes should be redesignated as funds legislation and hived off in a separate piece of legislation, see 16.7.4.

17.6 Provisions for inclusion in consolidated Companies Act

The Companies Acts 1963 to 2001

17.6.1 The Review Group considered what should be included in the consolidation. It is clear that all of the Companies Acts and Companies (Amendment) Acts since the last consolidation of company law in 1963 should be included.

Statutory instruments under the European Communities Act 1972

17.6.2 Much of the law derived from Ireland's membership of the European Union has been applied domestically by statutory instruments. Because of the centrality and authority of EU-derived law and its impact on existing and future legislation there is a strong case for including it in the consolidation despite it being in secondary legislation. For that reason the Review Group sought the advice of the Office of the Attorney General who confirmed that it is appropriate to include statutory instruments made under the European Communities Act 1972, as amended.[6] This is dealt with in more detail at 3.12.7 and 3.12.8.

Statutory instruments under the Companies Acts

17.6.3 Substantive legislation contained in statutory instruments made under the Companies Acts should also be included in the consolidation process. The Review Group acknowledges that, unlike the EU Regulations, these cannot be consolidated without first being enacted in primary legislation. The Group recommends that the Uncertificated Securities Regulations[7] be enacted in primary legislation and then included in the consolidation process.

Irish Takeover Panel Act 1997

17.6.4 The Irish Takeover Panel Act 1997, and the Takeover Rules and Substantial Acquisition Rules made under that Act regulate the conduct of takeovers and offers of "relevant companies" within the meaning of s 2 of that Act. These are at present Irish-incorporated and registered public limited companies whose securities are listed on the Irish Stock Exchange, the London Alternative Investment Market (AIM), the German Neuer Markt, EASDAQ and NASDAQ. In the same way that the securities law (the law relating to prospectuses and admission to listing) is embodied in companies legislation, the Review Group considers that this Act, which governs offers for companies, the transfer of shares and the duties of company directors in relation to such offers and transfers ought properly be part of the consolidated companies legislation.[8]

17.6.5 An issue of even more complexity *vis a vis* consolidation is what to do about the housing in the Companies Acts of inappropriate provisions. The most significant example of this is Part XIII of the 1990 Act (ss 252 to 262) dealing with investment companies. Part XIII enables the incorporation of companies with no-par-value shares, for the purposes of collective investment in any kind of property. Unlike UCITS investment companies (and unit trusts) which are regulated by the "UCITS Regulations"[9] (as amended), these Part XIII companies can invest in property other than transferable securities. The 1989 Regulations also provide for investment companies being incorporated with variable and/or no-par-value capital, but do not expressly amend the Companies Acts for this purpose.

17.6.6 A clear case can be made for the retention of provisions governing the activities of particular companies in the Companies Acts. This is the reason why, in the first place, such legislation was made part of the Companies Acts. On the other hand, however, investment companies have very particular needs which will frequently be very different to the needs of so-called "ordinary" companies. Changes have been required to the general companies legislation as applies to all companies, in order to facilitate a tiny number of companies that are, however, hugely important to the economy.[10] The piecemeal amendment of the general companies' legislation in order to

6 When implementing this consolidation, the opportunity can be taken to implement consolidation in relevant EU legal provisions; see 9.1.1(ii)

7 Companies Acts 1990 (Uncertificated Securities) Regulations 1996 (SI No 68 of 1996).

8 The proposed 13th Directive on "company law" is concerned with the regulation of the takeovers of public companies.

9 European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (SI No. 78 of 1989)

10 See, for example, s 93 of the 2001 Act which amends s 213 of the 1963 Act, dealing with the winding-up of companies.

facilitate developments in the international practice of investment companies has the result that the general law is made more complex and wordy. Such an approach is certainly not conducive to simplification or the ring-fencing of the law applicable to the model company, the private company limited by shares.

17.6.7 The Review Group considers that there is a stronger argument for a separate legislative code for investment funds, particularly given the extent of regulation of such entities. Such a code would govern the establishment and operation of investment funds, irrespective of legal form and of whether they are UCITS or non-UCITS, and would facilitate the operation and regulation of such different entities in a consistent manner. The Group recommends, therefore, that the establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. The general issue of investment companies is dealt with in detail in Chapter 16.

17.6.8 In restructuring the Companies Acts so as to create the paradigm envisaged in Chapter 3 and set out again at 17.2.2, Part XIII of the 1990 Act would be placed within a Part of Group B of the consolidated Companies Act. The Review Group sees considerable merit in the hiving-off of that Part into a stand-alone piece of legislation. To the extent that it is possible, the Review Group recommends that the pre-consolidation element of the Amendment and Review Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies Acts) would facilitate this hive-off and lay the basis for two resulting Bills: the consolidated Companies Bill and the Collective Investment Schemes Bill.

17.7 Miscellaneous

17.7.1 The Review Group considered whether there was a basis for consolidating bodies of statute law which related to but did not form part of the Companies Acts in the consolidated Act. The Partnership Act 1890 and the Limited Partnerships Act 1907 were, in particular, considered. Partnerships and limited partnerships are business enterprises like the majority of companies, and the Companies Acts already interact with partnership law, e.g. in relation to the number of partners there can be.[11] Limited partnerships are registered with the Registrar. However, the key difference between partnerships and companies is that partnerships are not bodies corporate. In addition, the director/shareholder relationship does not feature in a partnership. For these reasons, the Review Group does not recommend that partnership law be consolidated with company law.

17.7.2 It appears possible that the Review Group may be requested to look at the issue of partnership law, including the area of limited liability partnerships.[12] The Group considers that, if and whenever such a review occurs leading to new partnership legislation, there would be an advantage in consolidating all partnership law at that stage in its own distinct consolidated Partnership Act. The Group recommends that this exercise should follow on after, and not earlier than, the conclusion of the company law consolidation process.

17.7.3 The Review Group is particularly conscious of the amount of work involved in deciding the location of existing provisions of the Companies Acts in the new structure proposed by the Group for the consolidated Companies Act. The Review Group would wish to offer in the early part of 2002, as a key aspect of its second work programme, its ongoing assistance to the Department with the organisation of the structure of the consolidated Companies Act.

11 See s 376 of the 1963 Act.
12 Dáil Debates, 25 October 2000.

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17.8 Summary of Recommendations

17.8 Summary of recommendations

- The consolidated Companies Act should be structured so that the private company limited by shares (i.e. the proposed CLS) becomes the model company. The Group envisages that the layout of the consolidated Companies Act will be composed of two Groups of Parts, A and B. The First Group of Parts, Group A, will be composed of sections which apply in their totality to the model company, i.e. the private company limited by shares. The First Group of Parts will also be set out on the life cycle basis of a company, from incorporation to winding up. No other provisions of the consolidated Act will apply to private companies limited by shares. **(17.3.2)**

- The Companies Acts should be amended on the basis proposed in this report *before* being consolidated. **(17.4.1)**

- The Companies Acts and Companies (Amendment Acts) since the 1963 Act (and including that Act) should be included in the consolidation. **(17.6.1)**

- Statutory instruments made under the European Communities Act 1972, as amended, should be included in the consolidation. **(17.6.2)**

- The Uncertificated Securities Regulations should be enacted in primary legislation and then included in the consolidation process. **(17.6.3)**

- The Irish Takeover Panel Act 1997 should be included in the consolidation. **(17.6.4)**

- The establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. **(17.6.8)** *(This recommendation is also set out at 16.7.3)*

- To the extent that it is possible, the pre-consolidation element of the Amendment and Review Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies acts) would facilitate the hiving-off of Part XIII of the 1990 Act into a stand-alone piece of legislation and lay the basis for two resulting Bills: the Consolidated Companies Bill and the Collective Investment Schemes Bill. **(17.6.7)** *(This recommendation is also set out at 16.7.4)*

- A distinct consolidated Partnership Act should follow on from conclusion of the company law consolidation process. **(17.7.1 / 17.7.2)**

THE COMPANIES ACTS, 1963 TO 2001 – SUBSTANTIVE PROVISIONS FOR INCLUSION IN CONSOLIDATED COMPANIES ACT

- Companies Act, 1963.
- European Communities (Companies) Regulations, 1973.
- Companies (Amendment) Act, 1977.
- Companies (Amendment) Act, 1982.
- Companies (Amendment) Act, 1983.
- European Communities (Stock Exchange) Regulations, 1984.
- Designated Investment Funds Act 1985, s 6.
- Companies (Amendment) Act, 1986.
- European Communities (Mergers and Divisions of Companies) Regulations, 1987.
- Companies (Amendment) Act, 1990.
- Companies Act, 1990.
- European Communities (Stock Exchange) (Amendment) Regulations, 1991.
- European Communities (Companies: Group Accounts) Regulations, 1992.
- European Communities (Stock Exchange) (Amendment) Regulations, 1992.
- Companies Act, 1990 (Auditors) Regulations, 1992.
- European Communities (Credit Institutions: Accounts) Regulations, 1992.
- European Communities (Branch Disclosures) Regulations, 1993.
- European Communities (Accounts) Regulations, 1993.
- European Communities (Stock Exchange) (Amendment) Regulations, 1994.
- European Communities (Single-Member Private Limited Companies) Regulations, 1994.
- European Communities (Stock Exchange) (Amendment) Regulations, 1995.
- European Communities (Insurance Undertakings Accounts) Regulations, 1996.
- European Communities (Public Limited Companies Subsidiaries) Regulations, 1997.
- Irish Takeover Panel Act 1997.
- Companies Act, 1990 (Uncertificated Securities) Regulations, 1996.
- Companies (Amendment) Act, 1999.
- Companies (Amendment) (No. 2) Act, 1999.
- Companies Act, 1963 (Ninth Schedule) Regulations, 1999.
- Companies Act, 1963 (Section 377(1)) Order, 1999.
- Company Law Enforcement Act, 2001.

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