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CHAPTER 2

Executive Summary of Recommendations

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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 33 1/3% 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)**