
CHAPTER 3

**The Simplification of
Irish Company Law**

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 uncertainties⁴ 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 purchase⁵). 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 2000¹¹ 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 protection²¹ 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 law²⁵ and statute²⁶ 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 A²⁷ 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 law²⁹ and statute³⁰ 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 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* ³⁴Blayney 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 dividends³⁵ 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;

- (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 constitution⁴² -

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 Directive⁴⁵ 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 registration⁴⁹

- 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 association⁵¹ and the use of statutory declarations⁵² 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 Consolidation⁵⁴

- 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 1972⁵⁵ (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.



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3.13 Summary of Recommendations

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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

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)**