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CHAPTER 17

Consolidation

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17.1 Introduction

17.1.1 Consolidation of the Companies Acts will be the third major consolidation in recent years of bodies of law impacting substantially on commercial activity. The advantages of consolidating significant bodies of legislation are set out cogently in the introduction to the Government proposals for the Taxes Consolidation Bill 1997.[1] These are:

(i) All direct (tax) legislation will be available in a single up-to-date Act, in a coherent, orderly and more simplified format.
(ii) The legislation will be more accessible and user friendly.
(iii) As part of the process, a significant amount of deadwood and obsolete material will be eliminated and there will be considerable simplification in content.
(iv) All future amendments will be capable of being slotted into the Consolidation Act by amendment.
(v) Our legislation will become more coherent to foreign investors and their advisers.
(vi) The task of future simplification will be facilitated.

These same objectives apply to the Companies Acts, *mutatis mutandis*. Since the taxes consolidation proposals were published we have seen consolidation of the Taxes Acts (1997) and of the Stamp Duty Acts (1999).

17.1.2 The Review Group considers that the particular case for consolidation of the Companies Acts is compelling. The facts speak for themselves. The 1963 Act, by law the Principal Act, remains nominally the main Companies Act in Ireland today, but does not anymore provide a comprehensive statement of the law. Since 1977 it has continually been amended. The 1990 Act contains 262 sections of law and the 2001 Act contains 114 sections, although the Principal Act contains only 399 sections. The need for a consolidating Act is greater than ever in that nine amending Acts of the Oireachtas and numerous statutory instruments have substantially changed the Principal Act.[2] In addition, the opportunity has been taken to amend the Companies Acts by other statutes, for example, the Safety, Health and Welfare at Work Act 1989, the Finance Act 1990, the Investment Intermediaries Act 1995, the Electoral Act 1997, and the Economic and Monetary Union Act 1998.

17.1.3 The context to the Government decision of 9 March 1999 to consolidate the Companies Acts is set out at 3.12.1. The Review Group also outlines in Chapter 3 our analysis on how to achieve consolidation in a way which is complementary to the significant reform agenda put forward in this report.

17.2 Consolidating the Companies Acts, post simplification

17.2.1 As set out in 3.12.3 *et seq*, the Review Group considered the optimum approach to take to consolidation. In effect, the scale and nature of the changes proposed in the Review Group's report were the determinant of which should come first: review or consolidation. The Group's conclusion was that amendment following review should precede consolidation. Central to this decision was the Group's overall vision for the framework of the companies legislation.

New model company

17.2.2 To establish the cornerstone of simplification in the companies code the Review Group proposes that the new model company type should be the private company limited by shares, i.e. the CLS. What is envisaged, to be mapped out in the Company Law Review Bill, i.e. the Bill to enact the Review Group's recommendations as approved by Government, and implemented in the consolidated Companies Act which will follow on from enactment of the Review Bill, is probably the most far-reaching conceptual change in company law since the

1 Minister for Finance, 16 April 1997.
2 See table following 17.8.

introduction of statutory provision for private companies in the Companies Act 1907. The main consequence of this approach would be the ring-fencing of the law applicable to private companies limited by shares (CLS) from that applicable to PLCs and all other company types and bodies corporate regulated by the Companies Acts. That approach – and the changes it outlines – is in effect the preconsolidation element of the Group's report and an essential stage in achieving a consolidated and restructured Companies Act. The proposed layout of the consolidated Companies Act is set out below.

Layout of consolidated Companies Act: Framework

	Group A ***The law applicable to the private company limited by shares (CLS)***
Part 1	Definitions for the purposes of the law applicable to CLSs
Part 2	Incorporation and Registration
Part 3	Management and Administration
Part 4	Duties of Directors
Part 5	Accounts and Audit, including European Communities (Companies: Group Accounts) Regulations 1992 Law proposed in expected Auditing Bill
Part 6	Share Capital and Membership
Part 7	Debentures and Charges
Part 8	Compliance, Enforcement and Investigations, including Company Law Enforcement Act 2001
Part 9	Reconstructions
Part 10	Examinerships
Part 11	Receiverships
Part 12	Winding-up
Part 13	Dissolution and Reinstatement

Group B

The law applicable to companies and bodies corporate other than CLSs

Part 1	Definitions for the purposes of the law applicable to: Private companies limited by guarantee and that have a share capital; Private unlimited companies that have a share capital; PLCs that are limited by shares; PLCs that are limited by guarantee and that have a share capital; PLCs limited by shares that have a variable share capital; Public companies limited by guarantee that do not have a share capital; Public unlimited companies that have a share capital; Public unlimited companies that do not have a share capital; Other bodies corporate.
Part 2	Public Limited Companies (PLCs) Application/ disapplication of the laws in Group A to PLCs Application of additional laws to PLCs
Part 3	Public Offers and Listing of Securities, including 1984 Stock Exchange Regulations 1992 Prospectus Regulations
Part 4	Takeovers of public limited companies, incorporating Irish Takeover Panel Act 1997[3]
Part 5	Guarantee Companies Application/disapplication of the laws in Group A to guarantee companies Application of additional laws to guarantee companies
Part 6	Unlimited Companies Application/disapplication of the laws in Group A, to unlimited companies; Application of additional laws to unlimited companies
Part 7	Overseas Companies Registration of branches and established places of business of overseas companies Application/disapplication of the laws in Group A to overseas companies; Application of additional laws to overseas companies
Part 8	Unregistered Companies Application/disapplication of the laws in Group A, to unregistered companies; Application of additional laws to unregistered companies
Part 9	Conversion and Re-registration Limited to unlimited, private to public, vice versa
Part 10	Miscellaneous Bodies Corporate Application/disapplication of the laws in Group A, to miscellaneous bodies corporate; Application of additional laws to miscellaneous bodies corporate

3 Published by the Department of Enterprise, Trade and Employment in September 2001.

Group B

The law applicable to companies and bodies corporate other than CLSs

Part 11	Special Accounting Requirements, including European Communities (Credit Institutions: Accounts) Regulations 1992 European Communities (Insurance Undertakings: Accounts) Regulations 1996
Part 12	Miscellaneous

17.2.3 Once the Companies Acts are reconfigured in a way which makes the private company limited by shares the model company, the Group of Parts of the consolidated Companies Act applicable to all other types of company – Group B may be safely ignored by private companies limited by shares and their users. The detailed rationale for this change is set out in Chapter 3 but the most salient reason for the change can be gleaned from statistics provided by the CRO and set out in the Companies Report 2000.[4] These figures indicate that, of the 137,654 companies on the Register of Companies at end 2000, 122,228 or 88.8%, were private companies limited by shares.

Evolution of companies code

17.2.4 The Review Group acknowledges that the companies code is never going to be simple but it can be made less complex. It seems self-evident to the Group that the base model for a company should be a model reflecting the vast bulk of companies. The statistics cited above speak for themselves. It is also worth making the point that the companies code is not, and should not be, a standard set in stone. The core principles of shareholder protection and creditor protection are constants but the forms of company organised for the transaction of business and the ways in which business is done are not. At any given time the companies code has to respond to current forms of commercial organisation and activity. This evolutionary aspect to company law is clearly seen from such landmarks as the:

- introduction of the privilege of incorporation by registration by the Joint Stock Companies Act 1844;
- introduction of limited liability by the Limited Liability Act 1855;
- unequivocal judicial recognition in the seminal *Salomon v A Salomon & Co Ltd* judgment in 1897 of the principle that in law a company has a legal personality separate from its members;
- first introduction of the private company in the Companies Act 1907;
- harmonisation of company law in Ireland with the law of the European Union.

17.3 Structure of consolidated Companies Act

Types of companies to be provided for in the consolidated Companies Act

17.3.1 The Review Group recognises that provision for all existing types of company has to be made in the consolidated Companies Act. To that end the Group has identified the following types of company:

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

4 Significant developments arising from membership include introduction of the term public limited company (plc) by the 1983 Act and introduction of single member private limited companies by the European Communities (Single-Member Private Limited Companies) Regulations 1994.

(vi) PLCs that have a variable share capital;[5]
(vii) Public companies limited by guarantee that do not have a share capital;
(viii) Public unlimited companies that have a share capital;
(ix) Public unlimited companies that do not have a share capital.

17.3.2 The Review Group envisages the consolidated Companies Act as being structured so that company type number (i) above, the private company limited by shares, becomes the model company. The Group envisages that the layout of the consolidated Companies Act will be composed of two Groups of Parts, A and B, see Table at 17.2.2. The First Group of Parts, Group A, will be composed of sections which apply in their totality to the model company, i.e. the private company limited by shares. The First Group of Parts will also be set out on the life cycle basis of a company, from incorporation to winding-up. No other provisions of the Act will apply to private companies limited by shares. In consequence, no stakeholder in a CLS – company officer, member, creditor or employee – need have regard to the sections of the Act set out in the Second Group of Parts, i.e. Group B.

17.3.3 The Review Group deliberated at length to arrive at this recommendation. It considered whether the model company should be the private company regardless of whether that company was limited or unlimited and if limited whether by shares or by guarantee. No other model offered the level of simplicity provided by adoption of the CLS as the base model company.

17.3.4 In the consolidated Companies Act each of the other types of company will be dealt with as a separate Part in Group B, with application and disapplication of the sections in Group A to these companies as appropriate. Moreover, each Part will also contain provisions exclusively applicable to that company type.

17.4 Sequencing of amendment, review and consolidation

17.4.1 The Review Group believes that the substantial changes for the reorganisation and restructuring of the Companies Acts proposed in this report demonstrate that the appropriate sequence is to enact the recommendations of the Group and then consolidate the Companies Acts. The reverse approach would see the Companies Acts consolidated on the basis of the existing Principal Act, the 1963 Act. If such a consolidation were to be followed immediately by amendment, the consolidated Act would be out of date almost instantly.

17.5 Consolidation or restatement

17.5.1 As outlined at 3.12.6 above the Review Group considered the option of a restatement rather than a consolidation of company law. A Bill to provide for restatements of bodies of law is currently (December 2001) before the Oireachtas. Restatement is, in effect, an administrative consolidation, with the important proviso that the restatement is not in the form of an Act passed by the Oireachtas but is instead a statement of existing law in a single text certified to be the law by the Attorney General. A restatement is merely laid before the Oireachtas rather than enacted by it. The Review Group concluded that restatement would not achieve the radical restructuring of the Companies Acts proposed. Once the Companies Acts are correctly structured, as the Review Group recommends, then restatement will be of significant assistance in presenting subsequent variations of the law in their correct context.

5 With the exception of funds related provisions which the Review Group believes should be redesignated as funds legislation and hived off in a separate piece of legislation, see 16.7.4.

17.6 Provisions for inclusion in consolidated Companies Act

The Companies Acts 1963 to 2001

17.6.1 The Review Group considered what should be included in the consolidation. It is clear that all of the Companies Acts and Companies (Amendment) Acts since the last consolidation of company law in 1963 should be included.

Statutory instruments under the European Communities Act 1972

17.6.2 Much of the law derived from Ireland's membership of the European Union has been applied domestically by statutory instruments. Because of the centrality and authority of EU-derived law and its impact on existing and future legislation there is a strong case for including it in the consolidation despite it being in secondary legislation. For that reason the Review Group sought the advice of the Office of the Attorney General who confirmed that it is appropriate to include statutory instruments made under the European Communities Act 1972, as amended.[6] This is dealt with in more detail at 3.12.7 and 3.12.8.

Statutory instruments under the Companies Acts

17.6.3 Substantive legislation contained in statutory instruments made under the Companies Acts should also be included in the consolidation process. The Review Group acknowledges that, unlike the EU Regulations, these cannot be consolidated without first being enacted in primary legislation. The Group recommends that the Uncertificated Securities Regulations[7] be enacted in primary legislation and then included in the consolidation process.

Irish Takeover Panel Act 1997

17.6.4 The Irish Takeover Panel Act 1997, and the Takeover Rules and Substantial Acquisition Rules made under that Act regulate the conduct of takeovers and offers of "relevant companies" within the meaning of s 2 of that Act. These are at present Irish-incorporated and registered public limited companies whose securities are listed on the Irish Stock Exchange, the London Alternative Investment Market (AIM), the German Neuer Markt, EASDAQ and NASDAQ. In the same way that the securities law (the law relating to prospectuses and admission to listing) is embodied in companies legislation, the Review Group considers that this Act, which governs offers for companies, the transfer of shares and the duties of company directors in relation to such offers and transfers ought properly be part of the consolidated companies legislation.[8]

17.6.5 An issue of even more complexity *vis a vis* consolidation is what to do about the housing in the Companies Acts of inappropriate provisions. The most significant example of this is Part XIII of the 1990 Act (ss 252 to 262) dealing with investment companies. Part XIII enables the incorporation of companies with no-par-value shares, for the purposes of collective investment in any kind of property. Unlike UCITS investment companies (and unit trusts) which are regulated by the "UCITS Regulations"[9] (as amended), these Part XIII companies can invest in property other than transferable securities. The 1989 Regulations also provide for investment companies being incorporated with variable and/or no-par-value capital, but do not expressly amend the Companies Acts for this purpose.

17.6.6 A clear case can be made for the retention of provisions governing the activities of particular companies in the Companies Acts. This is the reason why, in the first place, such legislation was made part of the Companies Acts. On the other hand, however, investment companies have very particular needs which will frequently be very different to the needs of so-called "ordinary" companies. Changes have been required to the general companies legislation as applies to all companies, in order to facilitate a tiny number of companies that are, however, hugely important to the economy.[10] The piecemeal amendment of the general companies' legislation in order to

6 When implementing this consolidation, the opportunity can be taken to implement consolidation in relevant EU legal provisions; see 9.1.1(ii)

7 Companies Acts 1990 (Uncertificated Securities) Regulations 1996 (SI No 68 of 1996).

8 The proposed 13th Directive on "company law" is concerned with the regulation of the takeovers of public companies.

9 European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (SI No. 78 of 1989)

10 See, for example, s 93 of the 2001 Act which amends s 213 of the 1963 Act, dealing with the winding-up of companies.

facilitate developments in the international practice of investment companies has the result that the general law is made more complex and wordy. Such an approach is certainly not conducive to simplification or the ring-fencing of the law applicable to the model company, the private company limited by shares.

17.6.7 The Review Group considers that there is a stronger argument for a separate legislative code for investment funds, particularly given the extent of regulation of such entities. Such a code would govern the establishment and operation of investment funds, irrespective of legal form and of whether they are UCITS or non-UCITS, and would facilitate the operation and regulation of such different entities in a consistent manner. The Group recommends, therefore, that the establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. The general issue of investment companies is dealt with in detail in Chapter 16.

17.6.8 In restructuring the Companies Acts so as to create the paradigm envisaged in Chapter 3 and set out again at 17.2.2, Part XIII of the 1990 Act would be placed within a Part of Group B of the consolidated Companies Act. The Review Group sees considerable merit in the hiving-off of that Part into a stand-alone piece of legislation. To the extent that it is possible, the Review Group recommends that the pre-consolidation element of the Amendment and Review Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies Acts) would facilitate this hive-off and lay the basis for two resulting Bills: the consolidated Companies Bill and the Collective Investment Schemes Bill.

17.7 Miscellaneous

17.7.1 The Review Group considered whether there was a basis for consolidating bodies of statute law which related to but did not form part of the Companies Acts in the consolidated Act. The Partnership Act 1890 and the Limited Partnerships Act 1907 were, in particular, considered. Partnerships and limited partnerships are business enterprises like the majority of companies, and the Companies Acts already interact with partnership law, e.g. in relation to the number of partners there can be.[11] Limited partnerships are registered with the Registrar. However, the key difference between partnerships and companies is that partnerships are not bodies corporate. In addition, the director/shareholder relationship does not feature in a partnership. For these reasons, the Review Group does not recommend that partnership law be consolidated with company law.

17.7.2 It appears possible that the Review Group may be requested to look at the issue of partnership law, including the area of limited liability partnerships.[12] The Group considers that, if and whenever such a review occurs leading to new partnership legislation, there would be an advantage in consolidating all partnership law at that stage in its own distinct consolidated Partnership Act. The Group recommends that this exercise should follow on after, and not earlier than, the conclusion of the company law consolidation process.

17.7.3 The Review Group is particularly conscious of the amount of work involved in deciding the location of existing provisions of the Companies Acts in the new structure proposed by the Group for the consolidated Companies Act. The Review Group would wish to offer in the early part of 2002, as a key aspect of its second work programme, its ongoing assistance to the Department with the organisation of the structure of the consolidated Companies Act.

11 See s 376 of the 1963 Act.

12 Dáil Debates, 25 October 2000.

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17.6 Summary of Recommendations

17.8 Summary of recommendations

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

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

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

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

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

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

- The establishment and operation of all forms of investment funds (whether investment companies, unit trusts or investment limited partnerships and whether UCITS or non-UCITS) should be provided for by means of a Collective Investment Schemes Bill. **(17.6.8)** *(This recommendation is also set out at 16.7.3)*

- To the extent that it is possible, the pre-consolidation element of the Amendment and Review Bill (which will be necessary to create the legislative infrastructure required to give effect to the Group's recommendations on the restructuring of the Companies acts) would facilitate the hiving-off of Part XIII of the 1990 Act into a stand-alone piece of legislation and lay the basis for two resulting Bills: the Consolidated Companies Bill and the Collective Investment Schemes Bill. **(17.6.7)** *(This recommendation is also set out at 16.7.4)*

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

THE COMPANIES ACTS, 1963 TO 2001 – SUBSTANTIVE PROVISIONS FOR INCLUSION IN CONSOLIDATED COMPANIES ACT

- Companies Act, 1963.
- European Communities (Companies) Regulations, 1973.
- Companies (Amendment) Act, 1977.
- Companies (Amendment) Act, 1982.
- Companies (Amendment) Act, 1983.
- European Communities (Stock Exchange) Regulations, 1984.
- Designated Investment Funds Act 1985, s 6.
- Companies (Amendment) Act, 1986.
- European Communities (Mergers and Divisions of Companies) Regulations, 1987.
- Companies (Amendment) Act, 1990.
- Companies Act, 1990.
- European Communities (Stock Exchange) (Amendment) Regulations, 1991.
- European Communities (Companies: Group Accounts) Regulations, 1992.
- European Communities (Stock Exchange) (Amendment) Regulations, 1992.
- Companies Act, 1990 (Auditors) Regulations, 1992.
- European Communities (Credit Institutions: Accounts) Regulations, 1992.
- European Communities (Branch Disclosures) Regulations, 1993.
- European Communities (Accounts) Regulations, 1993.
- European Communities (Stock Exchange) (Amendment) Regulations, 1994.
- European Communities (Single-Member Private Limited Companies) Regulations, 1994.
- European Communities (Stock Exchange) (Amendment) Regulations, 1995.
- European Communities (Insurance Undertakings Accounts) Regulations, 1996.
- European Communities (Public Limited Companies Subsidiaries) Regulations, 1997.
- Irish Takeover Panel Act 1997.
- Companies Act, 1990 (Uncertificated Securities) Regulations, 1996.
- Companies (Amendment) Act, 1999.
- Companies (Amendment) (No. 2) Act, 1999.
- Companies Act, 1963 (Ninth Schedule) Regulations, 1999.
- Companies Act, 1963 (Section 377(1)) Order, 1999.
- Company Law Enforcement Act, 2001.