

81st Plenary Meeting of the Company Law Review Group

Date: 13th June 2017

Time: 9:30am – 11:30am

Venue: National Emergency Coordination Centre,
Agriculture House, Kildare Street, Dublin 2.

Chairperson: Dr Thomas B. Courtney.

Attendance: Sinead Boyle, Adrian Brennan, Barry Cahir, Eleanor Daly, Marie Daly, Gráinne Duggan, Paul Egan, Bernice Evoy, Mark Fielding, Michael Halpenny, William Johnston, Mary Hughes, Gillian Leeson, Irene Lynch Fannon, Aine McCarthy, Ralph MacDarby, David McFadden, Vincent Madigan, Kathryn Maybury, Salvador Nash, Lynn O’Sullivan, Maureen O’Sullivan, Noel Rubotham, Andrew Whitty.

Secretary: Síona Ryan.

In attendance: Helen Curley, Colm Forde, Sabha Greene, Breda Power, Jim Walsh.

Observers: Robert Bourke, Simon Halpin, Darren Lynch, Lisa Maher.

Apologies: Deirdre Ann Barr, Jonathan Buttimore, Jeanette Doonan, Ian Drennan, Paul Egan, Brian Hutchinson, Brian Kelliher, John Loughlin, Deirdre O’Higgins, Eadaoin Rock.

The Chair welcomed Adrian Brennan from the ODCE attending on behalf of Ian Drennan; Mary Hughes from the Revenue Commissioners attending on behalf of Jeanette Doonan; Aine McCarthy from the Irish Funds Industry Association attending on behalf of Brian Kelliher and Andrew Whitty from the Central Bank attending on behalf of Eadaoin Rock.

Agenda

1. Minutes and Matters Arising

The minutes of the meeting of 28th March 2017 were circulated on the 10th April and again on 24th May 2017. No requests for amendment were received by the secretariat. The minutes were adopted.

Matters Arising:

The Annual Report of the Company Law Review Group for 2016 submitted to Minister Mitchel O’Connor on 30th March and approved on 6th April 2017. The Report was then brought to the Government at the Cabinet meeting of 2nd May and subsequently laid before the Houses of the Oireachtas on 8th May 2017.

In her letter to the Chairperson acknowledging receipt of the Annual Report, Minister Mitchell O'Connor asked him to extend her personal thanks to each and every member of the Company Law Review Group for their commitment and dedication to the work of the Group. The Minister acknowledged the progress already made and the continuing efforts underway to deliver on the important matters contained CLRG Work Programme 2016-2018.

2. Update on accounting and audit legislation

- Update from Ms. Sabha Greene, Department of Jobs, Enterprise & Innovation

The Companies (Accounting) Act 2017 was enacted on 17 May 2017 and commenced on Friday 9 June 2017 by S.I. 246 of 2017. The Act applies to financial years that began on or after 1 January 2017 with respect to financial statements and related reports. For those companies that wish to adopt for earlier financial years, they may avail of the provisions in section 14.

Section 80 of the Companies (Accounting) Act 2017 has not yet been commenced (see S.I. 250 of 2017). This is due to the situation that an external company would have to register within 30 days and it is considered to be too short a period for a company to adapt. Ms. Greene confirmed that the Department is considering how to address this to ensure that there is sufficient time for these companies to prepare. A new commencement order relating to section 80 will be made in the near future.

The Act and the commencement orders in force are available on the Department's website www.djei.ie. There are some additional Regulations to be made and consist of the next steps post enactment and commencement. These are –

- Forms Order for country by country reporting, UCITS and AIFMs.
- Prescribe the FRC as the standard setter for accounting standards.
- Partnership Regulations.

Also, IAASA will make Regulations on the application forms and fees for authorisation as a liquidator.

Ms. Greene mentioned that the experience of bringing the Companies (Accounting) Act through the Oireachtas had highlighted a few issues that may be of interest to the Group. In particular, she had been struck by an apparent lack of appreciation of the necessity for, and the practical importance of, corporate transparency. Given that transparency is one of the main principles underpinning the Companies Act 2014, she suggested that the CLRG might consider how it could be promoted.

The Companies (Amendment) Bill 2017 was published on 5 April 2017 and enacted on 7 June 2017. It extends the deadline in section 279 of the Companies Act 2014 for the use by holding companies whose securities are registered with the SEC of the United States of

America of US accounting standards by a further 10 years, to 31 December 2030 but closes it off to new entrants. The Act is expected to be commenced shortly.

Drafting is advancing on the Statutory Audits Bill and it remains on track for publication in summer 2017.

The Chairperson thanked Ms. Greene for updating the CLRG and for the significant progress on the audit and accounting legislation in recent months.

Ms. Greene left the meeting.

3. The European Union (Anti-Money Laundering: Central Register for Beneficial Ownership of Companies and Industrial and Provident Societies) Regulations 2017 arising from the transposition of the 4th Money Laundering Directive

- Proposed SI for consideration and observations

A copy of the draft European Union (Anti-Money Laundering: Central Register for Beneficial Ownership of Companies and Industrial and Provident Societies) Regulations 2017 was received from the Department of Finance and circulated to CLRG members on 24th May 2017 for discussion at the meeting.

The Department of Finance had been in contact with the Chairperson prior to this and a copy of his preliminary observations to the Department of Finance was also circulated to the Membership for consideration. The Chairperson warmly welcomed the willingness of the Department of Finance to engage with the CLRG on this issue.

The Chairperson advised the CLRG that the Department of Finance had provided the Secretariat with an update on the proposed European Union (Anti-Money Laundering: Central Register for Beneficial Ownership of Companies and Industrial and Provident Societies) Regulations 2017 which were due to be transposed by the 26th June 2017. While legal and technical work to launch this register is at an advanced stage, July 2016 proposals to amend the 4th Anti Money Laundering Directive (the 5th Anti Money Laundering Directive proposals) have prompted further consideration of the issue of public access to beneficial ownership registers and the privacy implications of such access. The outcome of the ongoing debates is critical, both to the approach Ireland takes to the registers and to the timeframe for implementation.

Consequently, the Department of Finance had told the Secretariat that these considerations have had an impact on the legislative drafting process and this means that the original 4th Anti Money Laundering Directive transposition date of 26 June 2017 is no longer achievable. However in order to ensure that the registers are established quickly after the 5th Anti Money Laundering Directive comes into force, the Department of Finance has indicated that development work on the registers shall continue under the following revised timelines:

- the Register of Beneficial Ownership for Companies and I&PS is now expected to be launched in Q4 2017; more definite information will be provided in early September;
- there will be an extended time-frame (minimum 3 months) for companies and I&PS to make their beneficial ownership filings which will commence after the expected Q4 launch of the register.

Following a brief exchange in relation to:

- criminal liability for presenters,;
- data protection concerns;
- a perceived disconnect between the data that a company can legally request and what is intended for delivery by the company to the Registrar.

It was agreed to submit any comments to the secretariat for onward transmission to the Department of Finance.

4. Draft CLRG Report on Protections for employees and unsecured creditors (Item 4 of the Work Programme)

- Overview of Report from Ad-Hoc Committee Chair
Mr. Vincent Madigan

The Chairperson commended Mr. Vincent Madigan, for his leadership of ad-hoc committee for protections for employees and unsecured creditors as well as the members of the ad-hoc committee. The committee held the first of its fourteen meetings in February 2016 to discuss and review the broad range of matters which were contained in the initial request from Minister Bruton to review company law and the wider legal code to ensure better safeguards for a company's employees and unsecured creditors.

Mr. Madigan described how the ad-hoc committee undertook a comprehensive trawl of the 2014 Act to identify all sections which could be potentially relevant to the issues at hand. He then gave an overview of the proposed report for CLRG adoption and its recommendations to the Group:

- Chapter 1 sets out the general legal landscape.
- Chapter 2 addresses directors' duties.
- Chapter 3 looks at lifting the corporate veil.
 - Section 140 of the 1990 Act (now section 599 of the 2014 Act) was assessed in detail.
 - Section 599 was compared with the original New Zealand law on which it was based and how the final version on the Irish statute book differed from that in New Zealand.
 - Ultimately, the majority of the sub-committee concluded that it was fit for purpose, but there were some alternative views.
- Chapter 4 considers liquidation.

- The report recommends that the provisional liquidator should only be permitted to terminate an employee's employment with the permission of the court.
- The sub-committee also considered the interaction between section 604 of the 2014 Act (unfair preference) and section 608 (fraudulent transfer). It was decided that, rather than recommend a change in section 604 to substitute "effect" for "intent", the matter would instead be put back to a plenary session of the CLRG for further consideration.
- A proposal for a self-appointed liquidation (SAL) scheme was also considered. The sub-committee had a number of discussions with the Department of Social Protection regarding this proposal. They advised that in many situations, employees are being denied full protection because their employing company does not go through the full liquidation process due to a lack of funds. The SAL, which would be available in very limited circumstances, could allow the directors to proceed to dissolve the company directly. It was noted, however, that further, more detailed consideration of the SAL would be required and that it was proposed that this would be undertaken by the standing committee on winding up, etc.
 - Chapter 5 sets out 19 sections of the 2014 Act which were considered by the sub-committee, deemed to be fit for purpose and the relevance of these sections for employees and unsecured creditors outlined.
 - Chapter 6 explores a number of avenues that are open to employees and creditors in a liquidation.
 - The nine appendices provide further information on appropriate issues including previous reflection by CLRG on relevant matters.

Mr. Madigan stated that the Report was comprehensive and it shows that there is a great amount of law there which can be used to protect the rights of employees and unsecured creditors. Where there were diverging views, the Report reflects this given the diverse parties which were involved in the work of the ad-hoc committee. He thanked the members of the ad-hoc committee for their commitment and dedication and also thanked the secretariat for the legal research and drafting assistance which was of great benefit in the production of the draft Report.

The Chair remarked that it was significant that there were a small number of recommendations contained in the draft Report which indicated that fact that the law was already broadly fit for purpose. The Chair stated that the preparation of the report had been an extremely important exercise which provided balance and perspective to the mistaken suggestion that company law is deficient in its protection of creditors and employees. The Chair stated that there was often a misunderstanding as to what the law can do and in this case, the key issue and reason for an absence of litigation following the liquidation of companies is down to funding. If there are no funds available to fund an action, then an action will not be brought, regardless of the legal provisions in place. Similarly, cases for a breach of directors' duties will not be brought unless one of the directors is a 'mark'. This is evidenced by the case law in this area which almost always involves an unlawful transfer of assets to directors as opposed to a simple breach of duty by directors. Cases involving the

unlawful diversion of assets to directors are pursued because there are, by definition, assets there to be reclaimed. The Chair stated that this was an extremely pertinent issue and that he would set this out in his letter to the Minister accompanying the Report.

There was discussion on the measures set out in the Report, specifically in relation to:

- Whether there is a need for a hierarchy in relation to the interaction of directors' duties with one another.
- Whether the codification of the directors' duty to creditors should reflect that, in a number of jurisdictions, the effect of the breach of duty is to also void the transaction.
- At what point should the proposed directors' duty to creditors be triggered.
- Whether a process should be also recommended for implementation in relation to the recommendation for deemed restriction.
- Whether the proposal for a direct cause of action for employees, which was not adopted in the report, required further attention.
- Whether section 599 should be reformulated to resemble the provision as it exists in New Zealand, which was not adopted in the report.

Following these discussions the following matters were agreed:

- That the Self-Administered Liquidation recommendation would be further explored by the CLRG subcommittee on Corporate Insolvency.
- Regarding the proposed deemed restriction recommendation, it is the shareholders rather than the directors who have the power to appoint a liquidator and that the recommendation should be reformulated to reflect this.
- Regarding sections 604 and 608, the interaction between two sections should remain as is based on the fact that the latter (fraudulent transfer) involves unlawful and improper conduct and so the intention does not matter. In section 604 (unfair preference), intent was an important aspect to maintain and it should not be changed.
- The recent Supreme Court decision in Persona Digital is significant and that while the CLRG would not make recommendations regarding maintenance and champerty, the report would, however, note the content of the Supreme Court decision and that it is for the Law Reform Commission to propose legislation in this area.

The Chairperson asked all members to provide any comments to the secretariat by Friday, 23 June and that a final report will be circulated for adoption by Friday, 30 June. He then concluded by thanking the secretariat and the Department of Jobs, Enterprise and Innovation for its support for the work of the ad-hoc committee.

5. Update from CLRG Subcommittees on work in progress

a) Corporate Governance

Mr. Ralph Mac Darby confirmed that the Corporate Governance subcommittee held its first meeting just prior to the last plenary meeting and has met five times in total to date. It has 15 members with broad representation across the relevant sectors. The Corporate Governance subcommittee has been actively reviewing submissions received by the Department as well as submitted from a variety of relevant bodies with about 30 submissions and proposals currently under review. The submissions consist of a mixture of actual practical problems being experienced by practitioners in relation to the operation of the Companies Act 2014 and some are closer to suggestions. Mr. MacDarby extended his compliments to the secretariat for supporting the work of the subcommittee. He confirmed that arising out of the subcommittee's deliberations, it is intended to submit the recommendations of the Corporate Governance subcommittee to the next plenary meeting of the Company Law Review Group.

b) Compliance and Enforcement

The secretary, on behalf of the subcommittee chair Mr. Ian Drennan, confirmed that the Compliance and Enforcement subcommittee is continuing its review of the enforcement of company law arising from matters raised in the Discussion Document previously discussed at CLRG Plenary meetings. It has most recently discussed the matter of reckless trading with a revised and more detailed exploration of the topic has been drafted and is to be tabled for further discussion at its next meeting.

c) Corporate Insolvency

Mr. Barry Cahir, Chair of the Corporate Insolvency subcommittee affirmed that the subcommittee is due to continue its meetings in Q3 with the completion of the work of the ad-hoc committee with which there was a significant overlap of membership. The secretariat is engaged in preparatory research and the production of the relevant documentation to assist the subcommittee and background work on this is ongoing. It is intended to progress the consideration of the UNCITRAL Model Law on Cross Border Insolvency and the review of winding up at its next meeting.

The Chairperson asked a representative from the Department whether it is intended that any recommendations recently adopted or forthcoming from the CLTG would be proposed for inclusion in the Statutory Audits Bill. It was confirmed that the Department's intention is to bring a separate bill to deal with the recommendations as soon as is practicable.

6. AOB

There was no other business.

The meeting then ended.