Annual Report 2012

Company Law Review Group

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Chairperson's Letter to the Minister for Enterprise, Jobs and Innovation

Mr. Richard Bruton TD,
Minister for Jobs, Enterprise and Innovation
23 Kildare Street
Dublin 2

26 March 2013

Dear Minister,

It is my pleasure to present to you the Annual Report of the Company Law Review Group ('Review Group') for 2012.

Undoubtedly, the most important development in company law during 2012 was the publication on 21 December of the long-awaited *Companies Bill*. When enacted, the Bill can give Ireland a state-of-the-art company law code upon which to continue the rebuilding of our economy.

Your Department's officials deserve great credit for working with parliamentary counsel to bring the Review Group's scheme for the heads of bill through to publication. The Review Group will continue to make ourselves available to assist your Department's officials in their work on the Bill as it passes through the Houses of the Oireachtas.

I would like to acknowledge the superb work carried out by Mr. Conor Verdon on the Companies Bill before he was moved to other duties in the Department. I greatly welcome your decision to appoint Mr. Verdon as a member of the Review Group since this will preserve some of the knowledge and understanding of the Companies Bill which he has acquired over the last 10 years. Similarly, the stalwart of company law in the Department, Mr. Vincent Madigan, retired from the civil service in 2012. Again, his knowledge and understanding of Irish company law has been retained by his agreement to be appointed as your nominee to the Review Group and this is warmly welcomed by myself and the other members of the Review Group.

This year was also notable for some changes in the Review Group's membership. In particular, I would like to mark the retirement in August of Mr. Paul Appleby and thank him for his contribution over many years. Earlier in the year, you appointed some new members. They are very welcome and in the few months since their appointment have made an excellent contribution to the Review Group's deliberations.

I would also like to acknowledge with thanks the work of Mr. John P. Kelly who stepped down as Secretary to the Review Group following his retirement in 2012 and to welcome Ms. Sabha Greene who was appointed Secretary and who has already proven to be indispensable to the work and organisation of the Review Group.

During the year we made significant progress on the work programme you set us, including recommendations following our review of proposals to rescue viable small private companies which have, indeed, been incorporated in the Companies Bill.

Finally, I would also like to thank you Minister for the support and encouragement you give to the Review Group. Your decision to introduce the *Companies Bill 2012*, which substantially reflects our recommendations, and the personal interest you are taking in this project is greatly welcomed by the Review Group. The best reward for the members of the Review Group who voluntarily give of their time, knowledge and experience is for you to have regard to our recommendations in the formulation of Ireland's company law policy.

Yours sincerely,

Dr Thomas B Courtney

Chairperson

1 Introduction

1.1 The Company Law Review Group (the 'Review Group') was established under the Company Law Enforcement Act 2001 to advise the Minister for Jobs, Enterprise and Innovation (the 'Minister') on changes required in companies' legislation with specific regard to promoting enterprise, facilitating commerce, simplifying legislation, enhancing corporate governance and encouraging commercial probity. The Review Group is comprised of company law practitioners, business representatives, ICTU, IBEC and Government bodies, including the Revenue Commissioners, the Office of the Director of Corporate Enforcement (ODCE), the Central Bank, and the Irish Auditing and Accounting Supervisory Authority (IAASA).

1.2 The Minister appoints the members to the Review Group every second year. In 2012, there were a number of new appointments, namely Stephen Dowling, Brian Hutchinson, John O'Malley and Conor Verdon. There were also two retirements from the Group, namely Paul Appleby and the former Secretary, John P. Kelly. The full current membership is set out below.

1.3 The Minister also determines the programme of work to be undertaken by the Review Group every two years, although it remains open to him to add items if they arise in the meantime. The current Work Programme, which is for the period 2012 to 2014, was given to the Review Group in March 2012 and is set out below. Accordingly, this Report accounts for the first year of that Programme. A report covering both years will be published in 2014, when the current Work Programme comes to an end.

1.4 One of the two priority items of the 2012/2014 Work Programme is to provide advice on the preparation of the Companies Bill. This work reached a milestone with the publication of the Companies Bill 2012 on the 21st of December 2012. A full update on this is at chapter 2.

1.5 Alongside the preparation of the Companies Bill 2012, the Minister asked the Review Group to consider a number of other items and to make recommendations. Work on the second priority item, namely consideration of debt settlement arrangements for small and medium sized companies, was completed and the Review Group made recommendations to the Minister. The findings and recommendations on that topic are set out in Chapter 3 of this report. The Review Group has also established Committees to examine most of the remaining issues on the current Programme and most of these will report back in the course of 2013. Accordingly, the Review Group's findings and recommendations on those topics will be covered in the next annual report.

1.6 Finally, the Review Group maintains a website, www.clrg.org, where its membership, reports and other information are made available. It also provides an avenue for members of the public to send in queries or comments on company law to the Review Group's Secretariat, which is based in the company law section of the Department of Jobs, Enterprise and Innovation. Further information on the website is set out in chapter 4 of this report.

Members of the Company Law Review Group 2012/14

Dr. Thomas B. Courtney (Chairperson)	Ministerial nominee
Deirdre-Ann Barr	Ministerial nominee
Jonathan Buttimore	Office of the Attorney General
Jim Byrne	Revenue Commissioners
Marie Daly	Irish Business and Employers Confederation (IBEC)
Helen Dixon	Registrar of Companies
Mary Doyle	Irish Banking Federation
Stephen Dowling	Bar Council of Ireland
Ian Drennan	Director of Corporate Enforcement
Paul Egan	Minister's nominee
Mark Fielding	Irish Small and Medium Enterprises Association Ltd. (ISME)
Joseph Gavin	Central Bank of Ireland
Michael Halpenny	Services, Industrial, Professional and Technical Union (SIPTU)
Tanya Holly	Department of Jobs, Enterprise and Innovation
Brian Hutchinson	Ministerial nominee
William Johnston	Ministerial nominee
Brian Kelliher	Irish Funds Industry Association
Aisling McArdle	Irish Stock Exchange
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association (SFA)
Conall O'Halloran	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
John O'Malley	Irish Auditing & Accounting Supervisory Authority (IAASA)
Mark Pery-Knox-Gore	Law Society of Ireland
Nóra Rice	Companies Registration Office (CRO)
Jon Rock	Institute of Chartered Secretaries and Administrators (ICSA)
Noel Rubotham	Courts Service
Conor Verdon	Department of Jobs, Enterprise & Innovation

Sabha Greene (Secretary)	Department of Jobs, Enterprise and Innovation

Company Law Review Group - Work Programme 2012-2014

Priority Items

1. Provide ongoing advice to the Department of Jobs, Enterprise and Innovation on the preparation and drafting of the Companies Bill, including responding to queries raised by the Parliamentary Counsel and assisting the Department in advising the Minister in matters arising in the course of the initiation and passage of the Bill through the Houses of the Oireachtas.

2. Examine and make recommendations on the feasibility of amending the Companies Acts to introduce a new structured and non-judicial debt settlement and enforcement scheme for insolvent companies.

Other Items for Consideration

3. Examine and make recommendations on whether it is necessary or desirable to provide for amendments to the legislation transposing Directive 2005/56/EC on cross border mergers into Irish law.

4. Examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts.

5. Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

6. Examine and make recommendations on the need for amendments to the Companies Acts' provisions regarding the re-use of CRO information, having particular regard to –

    - Consideration of the interaction between data protection laws and the CRO's use of personal data
    - Examine possibilities for identity theft and other crimes using information gleaned from the CRO Register
    - Examine the onward sale of data to "bulk data customers" of the CRO taking into account the impact of the ECJ's decision in the *Compass Datenbank* case and the Re-Use of Public Sector Information Regulations

7. Provide ongoing advice to the Department of Jobs, Enterprise and Innovation on EU proposals, as requested by the Department.

2 Publication of the Companies Bill 2012

2.1 The Companies Bill 2012 was published on the 21st of December 2012. This was a significant milestone for the Review Group in particular as it had dedicated most of its efforts since its establishment to the making of the General Scheme of the Companies Consolidation and Reform Bill (published March 2007), on which the 2012 Bill is based, and, after that, to working with the Department and the Parliamentary Counsel on the drafting of the Bill. It is planned that the Bill will begin its passage through the Houses of the Oireachtas in the first half of 2013.

2.2 At the publication of the Bill in December 2012, Richard Bruton TD, Minister for Jobs, Enterprise and Innovation said –

> "This Government is determined to make Ireland the best small country in the world in which to do business, so that more businesses can start-up, grow and create the jobs we need, and a key part of our plan is implementing a series of changes to reduce the red tape and administrative burdens imposed by Government on business.
>
> The Companies Bill which we are publishing today is a groundbreaking piece of legislation. It will consolidate the 16 Companies Acts as well as the many statutory instruments and court judgments so as to make it easier for companies to know and understand their legal obligations. It will also implement a series of major reforms to reduce red tape and make it easier and cheaper to run a company in Ireland, and will make a real difference to our international competitiveness. It will save businesses across Ireland many millions of euro in reduced professional fees, compliance costs and red tape, and will ultimately make it easier to create jobs.
>
> In publishing this Bill, I am conscious of the enormously valuable input and assistance which has been contributed by the Company Law Review Group, the expert body which advises me on company law. This Bill started life as the General Scheme which was prepared, over the course of a number of years' work, by the CLRG, and during the drafting of the Bill the CLRG has remained available to my Department to provide the technical expertise necessary to progress a Bill of this complexity. I would like to acknowledge the contribution of all the CLRG members who have contributed to this project, led by their Chairperson, Dr. Tom Courtney."

Main Features of the Bill

2.3 The Companies Bill 2012 consolidates the existing 16 Companies Acts and 14 statutory instruments into a single Act. It runs to 1,429 sections and 17 Schedules and is divided into 25 Parts. It is, therefore, the largest substantive Bill in the history of the State.

2.4 The Bill is designed to provide significant benefits to companies by reducing red tape and making company law obligations easier to understand. For the first time in Irish company law, the most common type of company by far, the private company limited by shares, will be placed at the centre of the legislation. All of the law that applies to this type of company will now be contained together in Parts 1 to 15 of the Bill, and will be set out logically to follow the life cycle of a company, from incorporation through ongoing operation and ending with provisions on winding up. Each other type of company, such as PLCs, guarantee companies and unlimited companies, then has its own dedicated Part within the Bill, making it easier for anyone concerned with any of the possible company types to find the law that applies to their company more easily.

2.5 For the private company limited by shares, the Bill contains a number of significant reforms:

- It will now be possible for such a company to have only one director – there will no longer be a requirement to have a second director merely to comply with a requirement of the law
- The company will not be required to hold a "physical" AGM – instead, the business which is required to be carried out at the AGM can be completed by written procedure
- The company will be permitted to have a one-document constitution. The requirement under the current law for every company to draft detailed Articles of Association will no longer apply – instead the Bill will contain provisions which will apply by default, unless a company wishes to vary any of these provisions
- A company will no longer be required to have an objects clause, setting out what the company does and does not have capacity to do – the company will now have the same legal capacity as a natural person. This will mean that the old legal doctrine of *ultra vires* (related to a company's powers) will no longer apply to private companies limited by shares. This will aid commercial transactions, and companies' interactions with banks and lending institutions (the bank will no longer need to require a company to establish – usually at the company's own cost – that the company has the legal power to borrow money for the purpose of the activity which it wishes to carry out)
- A new "summary approval procedure" will allow companies to carry out certain activities by means of a directors' declaration and a shareholders' resolution, for activities which under the current law would require High Court approval (for example, certain transactions with directors, capital reductions, and solvent windings up)
- Private companies will be able, for the first time, to engage in mergers and divisions (under the current law, there is no facility for two Irish private companies to merge).
- The availability of the audit exemption will be extended to group companies, and to dormant companies
- Directors' duties will be codified in the Bill, thereby making the law in this area more transparent and accessible. Currently many of the legal and equitable duties of directors are set out over more than 150 years of case-law

- All offences under company law will now be streamlined and categorised into four categories, with category 1 being the most serious, and carrying a maximum fine of €500,000 or a maximum term of imprisonment of 10 years
- SMEs will be able to apply to the Circuit Court for examinership.

2.6 For other company types, innovations include:

- For the first time, each company type (for example, PLCs, guarantee companies, unlimited companies) will have its own dedicated Part within the Bill, thereby improving the accessibility and visibility of the law for all users
- Any company will be enabled to convert from its existing company type to any other company type which can be formed under the Bill. This will provide flexibility and greater options to companies which find a change in their circumstances.

3 Progress on Review Group's Work Programme 2012/2014

3.1 In addition to the substantial amount of work arising from advising on the preparation of the Companies Bill 2012, the Review Group's work this year was dominated by its work on a topic that was referred to the Group by the Minister on foot of commitments in the Programme for Government and in the Government's Action Plan for Jobs 2012. This topic, which is the second priority item on the Group's current Work Programme, concerned debt settlement arrangements for small and medium sized companies. In particular, the Minister asked the Review Group to examine and make recommendations on the feasibility of amending the Companies Acts to introduce a new structured and non-judicial debt settlement and enforcement scheme for insolvent companies.

3.2 The Review Group began its deliberations with a full plenary meeting in May 2012, where it hosted extensive presentations from three experts on the current state of insolvency law in Ireland, the practical experience of corporate insolvencies and the non-judicial commercial voluntary arrangements that operate in the UK. It then established a Committee, chaired by William Johnston, to look at the issues in more depth and report back to the full plenary. That Committee, which was made up of over half the membership of the Review Group, met 5 times over four months. Then, in September 2012, the full Review Group considered the Committee's report and adopted recommendations. A copy of the Review Group's complete findings and recommendations is included in this report at Appendix 1

3.3 In summary, the Review Group made five recommendations. The main conclusion was that there are some amendments that could be made to the examinership procedure that would reduce costs and make it more easily available to small private companies. The main element of this proposal was to amend the Companies Act to allow small private companies to apply directly to the Circuit Court (rather than first to the High Court). The Review Group believed that this proposal could be implemented in the short term and would lead to a noticeable reduction in costs. Other models for debt settlement and company rescue were reviewed, but the examinership process was considered the most appropriate template.

3.4 The Review Group went on to identify another possibility for easing access to examinership, which would dispense with the role of the courts in initiating an examinership. While this second possibility is legally possible, the Review Group said that it would require some further consideration for a number of reasons that are set out in detail in the Group's findings.

3.5 The Minister's terms of reference did ask the Review Group to direct attention to possible non-judicial schemes, such as those used in the UK. However, the Review Group found that it would not be viable to introduce a fully non-judicial debt settlement scheme in Ireland, as implementation of

such a scheme would require the consent of all creditors to any proposed restructuring. As the consent of all creditors would be unlikely in most cases and in recognition of the constitutional protections for private property, it did not see this as feasible.

3.6 On the 22nd of November 2012, the Minister announced his intention to accept the Review Group's main recommendation and amend the Companies Acts to allow small private companies to apply directly to the Circuit Court to have an examiner appointed. This will be done through the Companies Bill 2012. Announcing the change, Minister Bruton said –

"Small businesses employ over a third of all people working in Ireland today, and a major part of the Government's Action Plan for Jobs is aimed at supporting the growth of this sector. We are putting in place a streamlined support service for small and micro-businesses through reforms to the CEBs and local authorities. We have put in place a range of new funding mechanisms for SMEs including the €90million microfinance scheme and the €450million credit guarantee scheme.

"However we must also recognise that there are many viable businesses in this sector, employing large numbers of people and with the potential to employ many more, which are facing significant difficulties because of legacy debts. That is why we committed to putting in place better structures to enable these businesses to more easily restructure their debts, while giving proper consideration to other businesses and individuals owed money by them.

"Today's announcement that small companies will be able to apply to the Circuit Court for examinership will mean that is will be cheaper and easier for businesses to restructure their debts, meaning that more companies will be able to do so. This will mean that more businesses will survive their current difficulties, meaning crucially that more jobs will be saved and more jobs will be created in this hugely important part of the economy".

3.7 The Review Group has established Committees to look at the remaining items on the Work Programme 2012/2014 and these will report back to the full Review Group in the course of 2013 and early 2014. Findings and recommendations adopted on those items will feature in the Review Group's annual reports for 2013 and 2014.

4 Review of the Company Law Review Group Website – www.clrg.org

4.1 The Company Law Review Group website, www.clrg.org was launched in 2002 and has been used through the years as a means of disseminating information to the public and interested parties.

4.2 The website gives access to all the publications of the Review Group, lists its current members and also sets out the current and previous work programmes.

4.3 The CLRG Secretariat also receives numerous queries relating to the work of the CLRG and is happy to assist the public. Contact may be made either by email via the website or directly with the Secretary at -

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Department of Jobs, Enterprise & Innovation
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Lower Hatch Street
Dublin 2

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Appendix 1

Report of the Company Law Review Group on Proposals to reduce the cost of rescuing viable small private companies

1. EXECUTIVE SUMMARY OF FINDINGS AND RECOMMENDATIONS

Findings

1. The Review Group considers that examinership, in the form currently available to small private companies (SPCs), is inadequate by reason of the costs involved which are prohibitive.

2. The more effective a rescue system is in writing down debts owed by an ailing business, the more likely is it that other businesses (perhaps better managed and more deserving of survival) will receive less than they are owed such that their own solvency may be endangered.

3. It is essential that giving an unfair competitive advantage to companies through an examinership must be avoided. Although there will always be companies which fail - examinership is not a process to be used to prop up economically unviable companies. Winding up insolvent companies should always be the default position.

4. The test of a company's "reasonable prospect of survival" is considered essential to any corporate rescue regime.

5. Significant jurisprudence has been developed by the Superior Courts in relation to the interpretation and application of the Companies (Amendment) Act 1990.

6. In Ireland, our Constitution requires that any compulsory write down of debts for less than market value requires compensation for the loss, consent of the creditors or a court order whether by substantive approval of a scheme of arrangement or a right of objection to the Court for dissenting creditors.

7. Other jurisdictions that permit non-judicial procedures to compulsorily write-down third party debt may not be subject to the same constitutional restraints concerning the writing-down of property rights as are provided for by the Irish Constitution.

8. There are no constitutional, legal or conceptual obstacles to extending the jurisdiction of the Circuit Court to permit all aspects of examinership law for SPCs, as contained in the Companies (Amendment) Act 1990, to be brought and determined by the Circuit Court.

9. In considering a non-judicial mechanism for corporate rescue, it is possible to distinguish between the approval of a scheme of arrangement or compromise of debts (which requires *judicial sanction*)

from the initiation of an examinership through the appointment of an examiner (which can happen by administrative act) with limited judicial oversight.

10. Were it to be decided, in the case of an SPC, to allow the initiation of an examinership by the appointment of an examiner by administrative, instead of judicial act, some State agency would need to be charged with responsibility for that process.

11. While a number of agencies exist (ODCE, CRO, IAASA etc) the proposed *Insolvency Service* to be established by enactment of the Personal Insolvency Bill 2012 would, given its proposed purpose and functions, appear to be best suited to making an administrative decision that a particular SPC might have a reasonable prospect of survival were an examiner appointed to it. However it is understood that the proposed agency will face significant challenges in establishing capacity to carry out the remit envisaged for it in the Personal Insolvency Bill, that it also faces potentially significant challenges in meeting demand for the proposed new personal insolvency remedies, and that, by virtue of the State's commitments to the IMF and EU under the Programme of Financial Support for Ireland, priority attaches to the effective implementation of the reform of the personal insolvency regime.

Recommendations

1. **Amendment of existing examinership provisions for small private companies** – That small private companies, within the meaning of section 8 of the Companies (Amendment) Act 1986 should be able to apply directly to the Circuit Court to have an examiner appointed, and not be required to apply to the High Court although that should remain an option. This could be implemented as a stand-alone solution in a timely manner (as the legislative change required is not vast) and would have the immediate impact of lower costs and greater accessibility for SPCs in that it eliminates the requirement for any High Court involvement with associated costs.

2. **Introduction of simplified administrative initiation of examinership for small private companies** – That, subject to the identification of an appropriate agency, and further analysis and deliberation on the policy issues, it appears to the Review Group that it would be legally possible for small private companies to be given an alternative option to traditional examinership, whereby they can initiate the application to be placed into examinership by availing of a non-judicial administrative procedure. The simplified procedure should only extend to the appointment of an examiner. Any scheme or proposal formulated by the examiner must be approved by the Circuit Court.

3. **Possible extended role of new Insolvency Service –** That policy consideration should be given at an appropriate juncture to the

practicability of extending the role of the new *Insolvency Service*, proposed to be established following the enactment of the Personal Insolvency Bill 2012, to include the administrative determination as to the initial appointment of an examiner to an SPC, having regard to the priority requiring to be given to the mandate concerned for that agency under the Bill.

4. **Law applicable to small company examinerships** – That with certain limited exceptions (e.g. a shorter initial period of protection, a higher majority of creditors being required to agree to a scheme and possible right of appeal to the High Court of creditors with significant liabilities written down) the provisions of the Companies (Amendment) Act 1990 as interpreted and developed by the Superior Courts, should be applied, mutatis mutandis, to all other aspects of an examinership that is initiated by simplified administrative act.

5. **Examinership in the High Court** – That medium sized companies should continue to have the option of applying for the appointment of an examiner in the High Court.

The full Review Group met on 27 September 2012 to consider the recommendations of the Committee and by a significant majority, the ODCE and Revenue Commissioners expressing reservations, the Review Group approved this report. Revenue stated their view that the proposed approach (in recommendation 2) constitutes a new mechanism, entirely distinct from the established examinership process and, accordingly, that different considerations – including as regards the treatment of tax debts – should, in the view of Revenue, necessarily apply (see sections 7 and 13(10) below)

2. MINISTER'S REQUEST, THE TERMS OF REFERENCE AND THE APPROACH OF THE REVIEW GROUP

The Minister for Jobs, Enterprise and Innovation has requested the Company Law Review Group ('The Review Group') to examine the feasibility of introducing a new structured and non-judicial commercial debt settlement and enforcement system.

This request is made in the context of the commitment contained in the Programme for Government to introduce new legally binding voluntary commercial debt plan structures to allow small business to restructure debts without recourse to expensive court procedures.
Similarly, the Action Plan for Jobs, which was launched in mid-February, contains a commitment to examine the feasibility of introducing a new structured and non-judicial debt settlement and enforcement system to meet SME needs – this has been referred to as "Examinership Light".

In the context of advancing the commitments in the Programme for Government the Minister wished to have the considered views of the

Company Law Review Group as to the potential benefits or challenges from a company law perspective of advancing proposals in this regard. Accordingly, the Minister has asked the Review Group to examine the appropriateness of introducing a legally binding non-judicial commercial debt and enforcement system, to be used by small and medium sized businesses ("SMEs") into the Companies Acts, and set out a number of factors to be taken into account. The full terms of reference are in Appendix 1(a) to this report.

The Review Group approached its task by establishing a Committee chaired by Mr William Johnston. Membership of the Committee was open to all members of the Review Group who expressed an interest in this matter and the Committee met on five occasions from June 2012 to September 2012 to consider the matter set out in the Minister's terms of reference . The Committee included a number of alternate members and others with expertise of the area and its membership is set out in *Appendix 2*.

The full Review Group met on 27 September 2012 to consider the recommendations of the Committee and by a significant majority, the ODCE and Revenue Commissioners expressing reservations, the Review Group approved this report. Revenue stated their view that the proposed approach (in recommendation 2) constitutes a new mechanism, entirely distinct from the established examinership process and, accordingly, that different considerations – including as regards the treatment of tax debts – should, in the view of Revenue, necessarily apply (see sections 7 and 13(10) below)

3. BACKGROUND AND HISTORY OF EXAMINERSHIP

The Review Group approached the Minister's request mindful of the effects of the most serious economic downturn in the history of the State on business. When a business becomes insolvent, by definition there is insufficient money to go around and pay off its creditors. The default position in such cases is that it is wound up and its creditors are paid, if anything, so many cent for every euro owed by the company. Where rescue legislation, such as examinership, can be invoked, the company is allowed to continue in existence but the cost is that its creditors' debts are written down, such that they are owed less than they would otherwise be entitled to receive. Ironically, the more effective a rescue system is in writing down debts owed by an ailing business, the more likely is it that other businesses (perhaps better managed and more deserving of survival) will receive less than they are owed such that their own solvency may be endangered.

Whereas the process of court protection or examinership, first introduced by the Companies (Amendment) Act 1990, has operated effectively and has saved a number of ailing businesses, the compromising of lawful claims has come at a cost in the form of sometimes significant advisory fees (e.g. legal, accounting, etc) incurred by the creditors and others whose rights are to be impaired. The reality is that every creditor will

legitimately seek to ensure that the write-down of what is owed to them is minimised which requires them to retain advisors to advise on whether what is being proposed in the scheme is legal, fair, reasonable and proportionate.

The Minister's proposal for a legally binding non-judicial commercial debt and enforcement system was made in this context and the challenge faced by the Review Group was to determine whether such a system was legally and constitutionally possible in an Irish context.

The only report to consider the benefit or otherwise of examinership is the Company Law Review Group's report of December 1994 which states at paragraph 2.7:-

> "In looking at the examinership legislation and its application to date we sought to identify the justification for setting aside, in the hope of securing the future of an ailing company, normal commercial rights and interests. Examinership involves a cost which has to be borne, principally by creditors but also by competitors. The justification for the introduction of the legislation must lie within the concept of the public interest – that the benefit accruing to a wider group justifies the impairment of the rights of others".

The Review Group's Report of 1994 highlighted that of 64 companies having examiners appointed, 32 subsequently resulted in a receivership or liquidation (the figures excluded the three largest group of companies subject to examinership).

The Companies Registration Office has indicated that in 2008, 49 companies went into examinership of which 24 had a scheme of arrangement approved by the Court and then successfully emerged from the process, an almost identical ratio to the process of the early 1990s. However since 2008, the outcome of examinership has been more encouraging (notwithstanding that the figures do not take account of companies having come through the examinership process successfully, ultimately failing at a later stage):-

	Examinership	**Successfully exited Examinership**	**Success ratio**
2009	84	61	73%
2010	29	21	72%
2011	30	21	70%

The increased success ratio could in part be attributed to the recommendations of the 1994 Review Group as introduced by the Companies (Amendment) Act 1999, requiring an independent accountant's report to be prepared for the court to assist in its assessment whether the company (or part of it) by going into examinership has "a reasonable prospect of survival", rather than the less onerous requirement under the

1990 Act of a company (or part of it) requiring to show "some prospect of survival".

The recommendations in the 1994 report were prescribed in recognition of the presumption that creditors will have their debts written down to a greater, or lesser, extent in an examinership. This can have an adverse financial effect on suppliers, particularly the smaller ones who may, themselves, face insolvency if what is owed to them is written-down. In addition, the ability to write-down debts accrued in the course of running a business can distort competition with those competitors who discharge their liabilities in full being placed at a considerable disadvantage. The justification for examinership must, therefore, be founded in the presumption that saving the whole or part of the business involved accrues benefits for society as a whole, best exemplified by the protection of employment, that outweighs the costs suffered by creditors and competitors.

4. RELEVANCE OF EXAMINERSHP TO SMEs

Overall, the Review Group considered that there is a difficulty with smaller companies accessing the existing examinership procedures – primarily for cost reasons – and that there is scope for improving access for such companies to court protection and corporate rescue.
However, it is also recognised that any non-judicial debt settlement arrangements open to any category of companies carries the potential for significant loss to creditors whether they be employees, the Revenue Commissioners, local authorities, utility enterprises, lenders or trade creditors. This is clearly not desirable. The difficulty encountered in other jurisdictions in creating robust models highlights the need to ensure there are adequate safeguards, particularly where court oversight is diminished.
It is generally seen that SMEs, which are often family owned and managed, are less likely to attract new investment, which in many cases is essential for the continued viability for companies post examinership.
The Review Group heard anecdotal evidence that some companies which went into examinership did so solely to mitigate their debts. It is important to avoid the "phoenix company" scenario, bearing in mind that Part VII of the Companies Act 1990 was enacted to counter the "phoenix company". It is essential that giving an unfair competitive advantage to companies through an examinership must be avoided. Although there will always be companies which fail - examinership is not a process to be used to prop up badly managed or economically unviable companies. Winding up insolvent companies should always be the default position.

The principal issues which were identified, discussed and considered by the Review Group were:

- Difficulties in establishing the future viability of the whole or part of the business;
- Absence of any source of additional funding for the company;
- Absence of likely interest from new owners/managers to become involved in the business (possibly reflecting a reluctance on the part

of present ownership management to cede control of the business in some cases);

- Costs of the process.

These factors would apply to all companies in financial difficulty but may be more pronounced in the case of SMEs, especially when dealing with family owned businesses. The group identified cost as a particular obstacle for small businesses.

The option of replacing the management of the company for the duration of the examinership, or providing some external oversight was considered but is likely to work only in certain cases and may not be practical for most smaller, family run businesses. Related to this would be the option of having a temporary, non-executive director to sit on the board. However, it is considered unlikely to think that persons with the appropriate skills, experience and judgment would agree to become a director of a failing company in such circumstances. It could be made more attractive by absolving such persons from some of the personal liabilities for directors, but they would still be required to act responsibly. It is also likely that such persons would require to be reasonably remunerated for taking on such a role and that given the highly pressurised nature of the role and the attendant risks, a premium would be required on what would normally be charged in such circumstances. In proposing solutions for ailing companies, the Review Group is mindful of the shortage of finance.

The possibility of using a service akin to the Financial Services Ombudsman was considered. However, it was felt that a similar arrangement would still need a right of appeal/judicial review, which is costly. The possibility of re-establishing a state bank was discussed. However, it was indicated this was not favoured at the time examinership was brought into Irish law (when Foir Teoranta was wound down) and this could now give rise to EU State aid issues which could be resolved only on a case by case basis which would not be practical.

5. COSTS

While the Review Group was not in a position to review actual cost data for examinership, it was agreed that currently examinership is not generally a possibility for many SMEs due to the cost associated with the High Court procedure. Figures of up to €300,000 have been indicated for the cost of an examinership although there are also cases where costs came in at much less than that. The main reason for the extent of costs is the need for the preparation of an independent accountant's report, a number of High Court hearings during the examinership process and the costs of the examiner during the 70 or 100 day protection period. It was accepted that there will still be professional fees involved for the accountant's report and the examiner (and his or her advisors), but that if the fees are reduced by spending less time in court and being able to avail of the Circuit Court without first having to apply to the High Court (as is currently the position) and the maximum protection period reduced for SMEs, this could open up examinership to SMEs.

It was understood that costs could be reduced if the number of times a party has to apply to court was reduced. In particular, High Court hearings result in significant legal fees. It should be kept in mind that if costs are to be reduced, input from professional advisors and court involvement need to be curtailed – this could adversely affect the quality of examinerships.

The Review Group noted that the legislation already empowers the Circuit Court to oversee the examinership process. However, the application must first be submitted to the High Court and then be remitted to the Circuit Court. Furthermore, the case can be remitted to the Circuit Court only if the total liabilities of the company (taking into account its contingent and prospective liabilities) are less than €317,434.52 (though the draft Companies Bill envisages this threshold being increased to €500,000).

The Review Group considered that the costs of applications which are heard before the Circuit Court would, in all probability, be lower than if heard in the High Court. However, the group was not able to form a view on the extent of any such reduction in costs. Having regard to the fact that costs were identified as an obstacle to access to the examinership process, particularly for smaller companies, the Review Group was anxious to identify any opportunities to reduce costs while still not compromising the integrity of the process.

Against this background, the Review Group considered that the existing and, indeed, the revised threshold for access to the Circuit Court is too low. Rather than attempting to determine an appropriate level at which access should be possible, the Review Group agreed that it should recommend that access to the Circuit Court for examinership applications should be extended to all small private companies, as defined in the Companies Acts. Furthermore, the Review Group felt that the requirement for applications to be filed initially with the High Court should be dispensed with, as is considered further in point 12.

Although the Circuit Court does not currently have direct experience of corporate insolvencies, it was noted that it was planned to give the Court a role in the new personal insolvency regime. Accordingly, the Court could be expected to quickly build a level of expertise in the type of issues arising in insolvency proceedings.

6. THE NEED FOR JUDICIAL OVERSIGHT

It was noted that some other jurisdictions have dispensed with the need for court involvement (New Zealand) and others do not require court involvement to enter the process, but only to approve the proposals upon exiting examinership (Canada). It was noted, however, that compulsory interference with property rights which are expressly protected under the Irish Constitution and any compulsory write down of debts for less than market value requires either compensation for the loss, consent of the creditors or a court order whether by substantive approval of a scheme of arrangement etc. or a right of objection to the Court for dissenting

creditors. This is to ensure that there is a proportionate and objectively justified interference with the creditors' property rights in the interest of the common good and to respect the constitutional right to fair procedures. The advantage of court involvement is that there is a built-in judicial process for protecting the constitutional rights of debtors and creditors.

There need to be adequate safeguards and balances to protect the rights of both creditors and debtors in any system that compulsorily writes down debts. Any compulsory interference with property rights requires an objective policy justification in the first instance and then has to be assessed as to whether it is a necessary and proportionate means to achieve that purpose. Write down of debts without consent or court order could be regarded as an unjustified and disproportionate interference with property rights in contravention of Article 40. The main concern for any court in considering any constitutional challenge will be to:

(a) identify the extent to which minority secured creditors' rights who did not consent to the debts write down have been impaired

(b) establish whether there is an objective justification for this impairment, and

(c) assess whether there are adequate safeguards and protections in any legislative scheme to minimise the adverse impact that the scheme will have upon secured creditors' rights.

The crux of the impairment of minority secured creditors' rights is the possible requirement of a minority creditor to crystallise its security immediately and take a write-down of debt without Court involvement. A secured creditor adversely affected (in its view) by any scheme of arrangement which requires it to accept the immediate sale of the property of which it has a security and which requires it to accept a write-down of its debt (albeit to a sum no less than the value of its security) may challenge the constitutionality of such a system. It is noted that the courts have shown great willingness to interpret legislation to protect the constitutional and property rights of individuals and companies. It is not possible to predict with any certainty the attitude that the courts would take to this proposal and the facts of any particular case. This is emphasised by the fact that the Personal Insolvency Bill is not yet enacted nor has any model under the Bill been tested in the Courts. If the Review Group's proposal is accepted by Government for enactment, legal and drafting advice would be required from the Attorney General's Office on the final form of the proposal to ensure compliance with the Constitution.
It was considered that compulsory interference with property rights which are expressly protected under the Constitution and any compulsory write down of debts for less than market value requires either compensation for the loss, consent of the creditors or a court order whether by substantive approval of a scheme of arrangement etc. or a right of objection to the Court for dissenting creditors. This is to ensure that there is a proportionate and objectively justified interference with the creditors'

property rights in the interest of the common good and to respect the constitutional right to fair procedures. This interference with secured creditors' rights occurs not only on a compromise or scheme of arrangement at the conclusion of an examinership, but also at the commencement of an examinership where creditors' rights for the enforcement of debts owing to them are stayed. Thus court involvement is a pre-requisite both at the beginning and end of the protection period. The advantage of court involvement is that there is a built-in judicial process for protecting the constitutional rights of debtors and creditors. The court would not sanction an unconstitutional scheme of arrangement – i.e. one which infringes the rights of a party to the extent that it is excessive, disproportionate or unfair.

7. APPOINTMENT OF AN EXAMINER

A test of a company's "reasonable prospect of survival" was considered essential to any regime. There is a view that in a number of cases it has been too easy to pass the reasonable prospect of survival test at present. This appears to have arisen not from the approach of the Court but from the outcome and manner in which the independent accountant's report is prepared and presented. It was noted that a consequence of a company entering examinership is not only to give a temporary and hopefully long term reprieve for employees of the company but also a write down of debt owed to suppliers thereby putting the business and employees of suppliers at risk. If examinership is obtained by a company which would otherwise go into liquidation, the write off of debt owed to suppliers may ultimately be more significant if the company subsequently enters liquidation, as the company would have wasted its meagre resources on professional fees incurred in obtaining and going through an examinership.

It was also considered whether an event stipulated in a list of exceptional circumstances which may occur in an SME that could trigger examinership – e.g. collapse of major customer; death or incapacity of principal shareholder/director; sudden interruption of business etc. However, it was felt that it would be too difficult to prescribe these events in the legislation.

8. PRIORITY OF CLAIMS

Since the introduction of examinerships, the Courts have developed a consistent approach as to the extent and relative percentage write down of debts in approved schemes of arrangement. Different approaches have been developed for secured, preferential, unsecured and subordinated creditors. It is suggested this approach would continue for SMEs undertaking examinership through the Circuit Court.

However, the Revenue Commissioners disagreed on this point. They were strongly of the view that the Review Group proposal is for a new mechanism, entirely distinct from the existing examinership process. They see it as being, in reality, closely aligned to the debt settlement arrangements provided for in the Personal Insolvency Bill and contend that there is an overlap between the type of businesses that may have

recourse to the personal insolvency regime as sole traders and the small companies that may seek protection under this proposal. That being the case, the Revenue Commissioners argue that there should be similar treatment of debts under both arrangements. In particular, they consider that those debts that are specifically excluded from the personal insolvency arrangements (unless the relevant creditor agrees in writing to accept the compromise on offer) should be similarly excluded here. Excluded debts in that context would include taxes, duties, levies and other charges owed to the State.

The view of the majority of the Review Group's members was, however, that while it is suggested that the proposed *Insolvency Service* could play a role in the administrative decision to appoint an examiner, this was the only relevant similarity with the Personal Insolvency Bill 2012. The Review Group proposes that save in respect of the initial appointment of an examiner, with minor more restrictive modification the law applicable to the carriage of the examinership should be based on the existing law. A majority of the Review Group did not consider that there was any basis in principle to distinguish a scheme approved by the Circuit Court following the appointment of an examiner by administrative act from a similar scheme approved by the Circuit Court or High Court where the examiner is appointed following an application made to that court. Consideration of a new system of priority or increased preference for categories of creditors of insolvent companies whether for employees, the Revenue, local authorities, utility enterprises, lenders or trade creditors would be best undertaken by a separate review.

9. LICENSED OR QUALIFIED INSOLVENCY PRACTITIONER

The Personal Insolvency Bill introduces the concept of a licensed insolvency practitioner. On the other hand, the draft Companies Bill proposes to introduce a qualification regime for liquidators, and this qualification regime will apply also to examiners. The intention here is to ensure so far as reasonably possible that the independent accountant's report on the company filing for examinership (as well as the scheme ultimately proposed to creditors) is prepared in an appropriately objective manner to minimise the risk that the company will obtain protection on foot of a report which on its face appears adequate but which in fact gives a misleading picture as to a company's prospects of survival.

Concern was expressed that a licensing or qualification system which is primarily linked to membership of professional bodies, without a mechanism for investigation of competence and independence in the exercise of insolvency – specific functions, has its limitations as a means of enforcing standards in the specific field of insolvency practice.

It was noted that the new Companies Bill links examinership with the new qualification regime for liquidators. The view was expressed that effective regulation of insolvency practitioners requires that a designated regulator have the power to both authorise and strike off practitioners and, in that context, to investigate complaints from interested parties as to the extent

to which practitioners have fully discharged their responsibilities in individual cases. Regarding qualification/licensing arrangements, the accountancy profession has signalled that they may have to increase their fees if there is a qualification requirement.

The Review Group considered that a reduced court involvement may need to be balanced by additional protections, such as closer regulation of insolvency practitioners, in order to provide the assurance of independence and professional competence traditionally provided by court oversight of examinerships.

10. APPROACH OF OTHER JURISDICTIONS

In approaching the issues, the Review Group considered systems adopted in some other jurisdictions, which may be summarised as follows:-

Australia – A voluntary administration procedure may be initiated by the company without any court involvement. The administrator must be a qualified liquidator registered with the Regulator.

The administrator will put forward a proposal on which the creditors must vote at a meeting. A secured creditor is not required to be bound by the vote but if the secured creditor's dissent threatens the restructuring, the court may require the creditor to refrain from enforcing its security.

In many cases the court will have no involvement but it will intervene to prevent abuse.

Canada – This involves a licensed trustee in bankruptcy filing a proposal with the Office of the Superintendant of Bankruptcy whereupon creditors' claims are stayed. There is no court involvement for this stage.

A meeting of creditors is convened by the trustee at which the company will make its proposals for a debt settlement. If the proposal is accepted by the creditors it must then be approved by the court.

France – There are two procedures for insolvent companies. Under the conciliation procedure a conciliator is appointed to the company whose management remains in control. The role of the conciliator is to negotiate a voluntary arrangement with the creditors, all of whom must agree.

Under the redressement judicaire a petition is filed with the court. An administrator is appointed and has six months to devise a plan with a stay on creditors in the meantime with management remaining in control. The court approves the arrangement.

Hong Kong – The procedure involves a compromise between the company and its creditors which is subject to the sanction of the court. This is preceded by a court application for the holding of a creditors' meeting. These are new proposals which are designed to minimise court involvement and provide for greater involvement of creditors.

Malta - This involves the court placing a company under a company recovery procedure by appointing a special controller to manage and administer the company's business for up to 12 months with a possible extension for a further 12 months. The special controller will ultimately make a proposal to the court which if approved will be binding.

New Zealand - The first procedure is a compromise whereby the company proposes a compromise at a meeting of its creditors. The decision of a 75% majority will be imposed on the minority. It appears this procedure does not involve a stay on creditors.

The second procedure is a voluntary administration. The company appoints an administrator. During that time there is a stay on creditors' claims. For an arrangement to be agreed 75 per cent in value and 50 per cent in number of the company's creditors must agree. While the court can intervene, a voluntary administration can be conducted without court involvement.

Northern Ireland – The CVA is operated in Northern Ireland. A CVA is a Company Voluntary Arrangement which involves a private arrangement between the company and its creditors. It is not subject to any publicity and envisages creditors agreeing a debt settlement with the company. The proposal for a debt restructuring is set out by a Nominee at a meeting of creditors which if approved (by 75% in value of all creditors and 50% in value of unconnected creditors) is binding on all creditors. It can be challenged in court if there is a material irregularity or there has been unfair prejudice.

Norway – The approval here involves debt settlement procedures whereby an insolvent company files a petition with the court. The company comes under the control of supervision of the court. In a compulsory debt settlement, 75% in number and value of unsecured creditors must support this and unsecured creditors must receive at least 25% of their claim. It is understood that this procedure has encountered difficulties in practise.

South Africa – A new procedure has been established where the company makes a filing with the Commission. Affected persons may apply to court to set aside the appointment of a Business Rescue Practitioner (who must be licensed and is subject to regulation). A stay is put on creditors' proceedings, although set off is permitted. The proposal arrangement must be approved by 75% of creditors (in value) and 50% of independent creditors (in value).

The Review Group carefully considered whether any of the foregoing regimes might be capable of being adopted in Ireland. The Review Group had the benefit of the advice of its member representing the Office of the Attorney General and concluded that, absent the consent of all creditors, the compromise of third parties' rights, in Ireland, required judicial sanction. The Review Group is satisfied that the law already adequately facilitates the consensual compromise of debt.

The Review Group also considered that the experience from other jurisdictions indicated that it was necessary that an independent person should be responsible for the formulation of a scheme. In an Irish context, this role is currently fulfilled by an *examiner* and the Review Group saw no reason to create a new position in the context of formulating schemes for small companies.

Within the strictures of the constitutional requirement that the non-consensual compromise of third parties' claims requires judicial sanction, the Review Group still considered that the models in other jurisdictions provided a basis for developing a non-judicial aspect to the process. In this regard the Review Group distinguished between the *appointment of an examiner* from the *sanction of a compromise scheme*. Accordingly, the Review Group focussed its attention to developing recommendations based on:

- having less judicial involvement in the appointment of an examiner, and
- having no judicial involvement in the appointment of an examiner.

11. EXTENDING THE ROLE OF THE CIRCUIT COURT

At present, the Circuit Court can oversee the examinership process, but the application must first be submitted to the High Court and then be remitted to the Circuit Court. It was suggested that the role of the High Court could be removed to allow direct access to the Circuit Court. The current threshold for remitting a case to the Circuit Court is where the total liabilities of the company (taking into account its contingent and prospective liabilities) are less than €317,434.52, which is to be increased to €500,000 in the Companies Bill.

The Review Group considered that the "liabilities" test for qualifying to bring application in the Circuit Court, would be better replaced by a test based on more objective criteria. For this reason, the Review Group believes that the appropriate test should be that applicable to the requirement relating to the preparation of financial statements based upon whether companies are small, medium-sized or large private companies.

Of these, the Review Group considered that its focus should be on small private companies ("SPC"). An SPC is a company falling within section 8(1)(a) of the Companies (Amendment) Act 1986 and means a private company that, in a particular year and in the immediately preceding financial year, satisfies at least two of the following conditions:

— its balance sheet total did not exceed €4,400,000;

— its turnover did not exceed €8,800,000;

— its average number of employees did not exceed 50.

Although some concern was expressed by the ODCE that an SPC, as defined, could have liabilities of many millions of euro, it was thought that adequate protection would be afforded to all creditors by operation of a judicial process and that consideration might be given to providing that a creditor whose debts are written-down over a certain amount (e.g. €4,400,000) will have an automatic right of appeal to the High Court.

If the jurisdiction of the Circuit Court is extended, the Review Group is conscious that this would involve an increase in resources and requires consultation with the Department of Justice and the Courts Service. The need for any increased resources should be justified by extending the examinership process to companies which would otherwise fail and the beneficial impact on jobs, not only socially, but for increased tax revenue for the State would more than compensate for any additional resources required. Although the Circuit Court may not have direct experience to deal with examinerships, the proposal to include the Circuit Court in personal insolvencies should give a degree of critical mass to ensure reasonable familiarity with insolvency proceedings.

The High Court examinership process has worked. The jurisprudence that has been developed by the High Court has resulted in few creditors having a legitimate grievance after the approval of a court scheme of arrangement. The primary reason why it is not working for SPCs is because of the costs involved which are considered to be disproportionate to the resources of SPCs. While the Review Group believe that for some SPCs, even allowing an application to be brought completely within the Circuit Court structure will involve too much cost, it nevertheless feels it would be a lost opportunity to preclude SPCs from bringing a traditional examinership application in the Circuit Court.

The Review Group therefore recommends that SPCs should be able to apply directly to the Circuit Court to have an examiner appointed, and not be required to apply to the High Court although that should remain an option.
By section 8(3) of the Companies (Amendment) Act 1986, a private company qualifies to be treated as a 'medium-sized' company for any financial year if, both in that year and in the immediately preceding financial year, it satisfies at least two of the following conditions:

— its balance sheet total did not exceed €7,618,438;

— its turnover did not exceed €15,236,857;

— its average number of employees did not exceed 250.

These thresholds have only recently been revised upwards and are now at such a level that the Review Group concluded, with some reservations, that, given their new larger size, ailing medium-sized companies should continue to have only the option namely, to apply to the High Court for the appointment of an examiner.

12. PERSONAL INSOLVENCY BILL AND THE PROPOSED INSOLVENCY SERVICE

In considering a non-judicial mechanism for corporate rescue, as noted under point 10 above, the Review Group considered that it is possible to distinguish between the approval of a scheme or compromise (which requires judicial sanction) from the initiation of an examinership through the appointment of an examiner (which could happen on an administrative basis).

Were it to be decided, in the case of an SPC, to allow the initiation of an examinership by the appointment of an examiner by administrative, instead of judicial act, some State agency would need to be charged with responsibility for that determination.

The Review Group considered the Personal Insolvency Bill 2012 which it noted is stated to cover trade debt, and found that a number of provisions in the Bill may be usefully adopted for certain companies also. The Review Group, in particular considered that while a number of agencies exist (ODCE, CRO, IAASA etc) the proposed *Insolvency Service* to be established by the Personal Insolvency Bill 2012 would, given its proposed purpose and functions, appear to be best suited to making an administrative decision that a particular SPC might have a reasonable prospect of survival were an examiner appointed to it.

The Review Group is mindful, however, that the proposed agency will face significant challenges in establishing capacity to carry out the remit envisaged for it in the Personal Insolvency Bill, that it will also face potentially significant challenges in meeting demand for the proposed new personal insolvency remedies, and that, by virtue of the State's commitments to the IMF and EU under the Programme of Financial Support for Ireland, priority attaches to the effective implementation of the reform of the personal insolvency regime.

Accordingly, the Review Group recommends that consideration should be given to the practicability of extending the role of the new *Insolvency Service*, proposed to be established to include the administrative determination as to the initial appointment of an examiner to an SPC, having due regard to the priority requiring to be given to the mandate concerned for that agency under the Personal Insolvency Bill.

13. PROPOSAL FOR SIMPLIFIED INITIATION OF EXAMINERSHIP

The Review Group believes that a proportionate response to the difficulties faced by many SPCs is to provide such companies with an alternative, less expensive, option to the current initiation of an examinership which necessitates a court application.

The Review Group proposes that, subject to the identification of a suitable State agency, and further analysis and deliberation of the policy issues, it appears to the Review Group that it would be legally possible for the SPCs to be allowed to initiate examinership by non-judicial procedure. . The simplified procedure should only extend to the appointment of an examiner. Any scheme of arrangement or proposal formulated by the examiner must be approved by the Circuit Court.

By majority, the Review Group believes that the law applicable to the carriage of examinership and the determination of any compromise or scheme proposed by the examiner, should be that currently applicable to High Court examinership subject to the variations set out below. The Revenue Commissioners expressed a dissenting view arguing that the proposed approach would be an entirely new scheme requiring careful consideration on its own merits.

While carrying on business, the directors of a company which finds itself insolvent, or likely to become insolvent, have a duty towards creditors either to cease trading and wind up the company or, if they consider, with court protection the company or part of it, has a reasonable prospect of survival, should seek to put the company into examinership. An examinership may offer the prospect of recovery for the ultimate benefit of the company's employees, creditors (who are likely to have the debts already owing to them compromised) and shareholders (who may face dilution).

The Review Group considered that the existing examinership process is adequate for the needs of medium companies (within the meaning of Section 8(1)(b) of the Companies (Amendment) Act 1986) as well as larger companies. Accordingly, the Review Group considered that its proposal for administrative appointment of an examiner should be available only to small companies within the meaning of Section 8(1)(a) of the Companies (Amendment) Act 1986.

This new scheme would offer an alternative to the existing examinership process for small companies but would not prevent small companies opting for traditional examinership in either the Circuit Court or the High Court if they so wish.
The following was considered to be a possible way forward to enable SPCs that may not be able to afford the traditional examinership process to obtain protection for a limited period to restructure the company for the benefit of employees, creditors, shareholders and thus the economy as a whole.

(1) An SPC which is insolvent, or likely to become insolvent, whose directors or shareholders wish to seek court protection for the SPC has a report prepared by an independent expert (within the meaning of Section 501(2) of the draft Companies Bill) (the "Expert"). The primary function of the Expert is to assess the suitability of the company for entry to the process – this will include an assessment of the company's survival prospects as well as the likelihood of being able to formulate a successful proposal.

(2) The Expert files his/her report with the Insolvency Service (an office dedicated to companies but forming part of the Insolvency Service to be set up under the Personal Insolvency Bill) which, if satisfied that there is a reasonable prospect of survival of the company (or part of it), will issue a protection certificate and file it with the

Circuit Court, who will hear any application by a dissenting creditor against the issue of a protective certificate.

(3) On the filing of the certificate with the Circuit Court, in the absence of any contrary order, a stay is put on creditors' actions and any debt enforcement measures. Once a protection certificate has been issued, an examiner is appointed [by the Insolvency Service and notice of appointment is filed with the Circuit Court]ultimately to formulate a proposal for submission in the first instance to a creditors meeting.

(4) Recognising the potential for conflicts of interest, particularly given the limited court oversight involved, there was some support for requiring the examiner and the Expert to be different persons (and to be from different professional firms). On balance, the Review Group considered that it should be allowable for the examiner to be the same person as the Expert as this could save duplication of work and cost.

(5) Neither the Expert nor the Examiner should be a person who has a material connection with the SPC or any of its directors or shareholders.

However, because of the perception or otherwise that having the same person preparing both the Report and the proposal for creditors could be open to potential abuse arising from the absence of scrutiny by the Court, the Review Group considered there may be a case for Experts and examiners to be subject to regulation and/or for a creditor to be able to object to the same person taking on both roles if a creditor considered it inappropriate in any case.
Any new regulatory system would need careful consideration and should have regard, inter alia, to the restricted time scale available for the preparation of an Expert's report.

(6) The preferred protection period should be 70 days, which could on a successful application to the Circuit Court be stretched to 100 days. As the length of time taken to formulate a proposal is generally a cost factor, it would be envisaged an extension of an examinership to 100 days would be unusual unless there were compelling reasons for the extension. An SPC should generally be capable of being saved within 70 days or not at all.

(7) The Examiner would prepare a proposal for submission to a creditors' meeting. If approved by not less than 65% of unconnected creditors in value and not less than 50% in number in each case, the proposal is sent to the Circuit Court for approval, who will also hear any application by a dissenting creditor against approval.

(8) In view of the fact that for SPCs a successful examinership may result in the same directors remaining or the board of an SPC, and that the potential for abuse may be increased through diminished

court involvement, one of the Examiner's functions should be to examine the conduct of the SPC's directors and their fitness to continue as directors of the SPC into the future and to report their findings to creditors in advance of the vote on any proposal. In the course of such review, any material misrepresentation given by a director in the course of the preparation of the Expert's Report should result in such director incurring personal liability for the discount of the SC's debts permitted under the approved scheme of arrangement.

(9) Costs for an SPC seeking and going into examinership should be much reduced from the current levels due to the use of the Insolvency Service and the Circuit Court rather than the High Court as a result of a reduced number of court hearings as well as the reduced legal costs in the use of a lower court.

(10) The majority considered that the priority and level of write down of claims in the categories of secured, preferential, floating charge, unsecured, subordinated and shareholders should follow the current jurisprudence of the courts in approved schemes of arrangement of companies successfully exiting examinership to ensure a proportionate and objectively justifiable interference with the private property rights of creditors. The Revenue Commissioners disagreed on this point and, as set out at section 7 above, articulated the view that this is a new mechanism, entirely distinct from the existing examinership process but closely aligned to the debt settlement arrangements provided for in the Personal Insolvency Bill and, as such, that taxes and other debts should be treated in the same way as applies to those personal debt settlement arrangements. A majority of the Review Group did not consider that there was any basis in principle to distinguish a scheme approved by the Circuit Court following the appointment of an examiner by administrative act from a similar scheme approved by the Circuit Court or High Court where the examiner is appointed following an application made to that court.

The foregoing proposal is recommended as a possible way forward to enable SPCs to obtain protection for a limited period (at less cost than for a medium sized or large private companies or PLCs) to restructure the company for the benefit of employees, creditors, shareholders and thus the economy as a whole.

14. Conclusion

The Review Group considers that the task it faced raised very difficult, complex and in some cases irreconcilable issues of law, policy and principle which were not specific to company law. In attempting to guide the Minister on possible ways to assist small companies the Review Group has suggested the involvement of a State agency that has not in fact as yet been established. Accordingly, the Review Group acknowledges that its recommendations, in relation to the identity of the State agency which would make the administrative determinations, are necessarily tentative.

Moreover, should the Minister decide to pursue the proposals suggested by the Review Group, there would need to be a significant amount of inter-Departmental consultation and policy analysis required to draft appropriate heads of Bill.

The Review Group realises that its suggestions relating to the *Insolvency Service* will necessitate consultation with the Department of Justice and Equality and the Courts Service in view of the implications of those recommendations for their respective legislative remits.

By contrast, subject to establishing that the Circuit Court has the necessary resources available to it and the policy agreement of the Department of Justice, the Review Group believes that there is no other reason why the changes proposed to permit all SPCs to bring application directly to the Circuit Court cannot be quickly progressed.

28 September 2012

Appendix 1 (a)

Terms of Reference

The Minister asked the Review Group to examine the appropriateness of introducing a legally binding non-judicial commercial debt and enforcement system, to be used by small and medium sized businesses ("SMEs") into the Companies Acts, having regard in particular, but not exclusively, to the following factors:

1. The adequacy or otherwise for small and medium sized businesses of the procedures currently available in this regard under the Companies Acts, and in particular the existing examinership procedure;

2. Whether the particular needs of small and medium sized businesses could be catered for by introducing appropriate modifications to these existing procedures, for example by making greater use of courts below the High Court, or substituting alternative non-judicial safeguards for creditors, such as is proposed in the Summary Approval Procedure in the new Companies Bill;

3. The appropriate level of involvement, if any, of the courts in a non-judicial system, for example, whether there should be a confirmation of any proposal by the court, or a right of creditors to object, or no court involvement;

4. If a non-judicial system were to be introduced, whether its availability should be subject to a test comparable to the current "reasonable prospect of survival" test for examinership, and if so, by whom such an assessment could be made in the absence of court involvement

5. Potential issues regarding secured debts, and whether such security could legally be subject to the application of any non-judicial procedure;

6. Potential Constitutional issues, whether in relation to the possible writing-down of secured debts, or otherwise;

7. Potential cost issues, including the extent to which costs incurred under the existing procedures may be reduced by removing the involvement of the High Court, or any court, from those or any alternative procedures;

8. Potential competitiveness issues, including among competing participants in the same field of economic activity;

9. Potential implications for the willingness of credit institutions to lend to small and medium sized businesses if a non-judicial debt

settlement and enforcement system becomes available for such companies;

10. Potential implementation issues, for example, the extent of the availability of any new non-judicial procedure in group situations where some companies are sufficiently small to qualify for such a procedure, but related companies within the group are not so qualified.

Appendix 1(b)

Membership of the CLRG Committee on debt settlement (including alternates)

William Johnston	**Chairman**
Jonathan Buttimore	Attorney General's Office
Jim Byrne	Revenue Commissioners
Marie Daly	IBEC
Helen Dixon	Companies Registration Office
Mark Fielding	ISME
Noel Gaughran	Irish Banking Federation
Joseph Gavin	Central Bank of Ireland
Brian Hutchinson	UCD Centre for Commercial Law
Esther Lynch	ICTU
Ralph MacDarby	Institute of Directors
Vincent Madigan	CLRG
Kathryn Maybury	Small Firms Association
Tom Murphy	Collector General's Office
Theresa O'Connor	Central Bank of Ireland
Conor O'Mahony	ODCE
Mark Pery-Knox-Gore	Law Society of Ireland
Breda Power	Department of Jobs, Enterprise & Innovation
Kevin Prendergast	ODCE
Nóra Rice	Companies Registration Office
Conor Verdon	Department of Jobs, Enterprise & Innovation

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Appendix 2

Functions of the CLRG

Part 7, Company Law Enforcement Act, 2001

Section 67
Establishment of CLRG
There is hereby established a body to be known as the CLRG.

Section 68
Functions of the Review Group

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

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

Section 69
Membership of Review Group

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

membership of the Review Group.

Section 70
Meetings and business of Review Group

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

(2) Notwithstanding Subsection (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

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

(4) In the absence of the chairperson from a meeting of the Review Group, the members present shall elect one of their numbers to be chairperson for that meeting.

(5) A member of the Review Group, other than the chairperson, who is unable to attend a meeting of the Review Group, may nominate a deputy to attend in his or her place.

Section 71
Annual Report and provision of information to Minister

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

(2) A report under Subsection (1) shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—

(a) concerning the functions or activities of the Review Group, or
(b) referred by the Minister to the Review Group for its advice.