Companies Act 2014 – Summary Overview at Chapter Level

VOLUME 1

Part 1

PRELIMINARY AND GENERAL

Part 1 consists of 14 sections and is largely devoted to house-keeping and defines terms which are used throughout the Act.

Section 9 explains the significant structural concept of the Act, whereby in effect all of the law which applies to the most common company type in Ireland, the private company limited by shares, is contained in *Parts 1* to *15* of the Act. The law for all other company types is then set out in *Parts 16* to *25*.

One significant innovation of this Part is the combination of the definition of "subsidiary company" which is defined in the Companies Act 1963 for general purposes with the definition of "subsidiary undertaking" which is defined in the European Communities (Companies: Group Accounts) Regulations 1992 for the purposes of group accounts so that there will be a common definition. The terms used here are "subsidiary company" and "holding company". A company is defined as another's holding company if that other is its subsidiary. Moreover, a wholly-owned subsidiary is a subsidiary that has no members except the holding company, or companies that are wholly owned subsidiaries of the holding company, or nominees of either or a mixture of the foregoing.

Finally, this Part contains standard provisions usually contained in Acts of the Oireachtas - for example, the power for the Minister for Jobs, Enterprise and Innovation to make regulations under the Act and the allowing of expenses incurred by the Minister to be paid out of moneys provided by the Oireachtas and sanctioned by the Minister of Finance.

Part 2

INCORPORATION AND REGISTRATION

Part 2 of the Act comprises of 50 sections across 6 Chapters. It makes provision for the incorporation and registration of the new model private company limited by shares.

It begins with a number of definitions used throughout *Part 2,* including the definition of "transition period". This period regulates the transition of existing companies to the new model company provided for in the Act. The transition period means the period expiring 18 months after the commencement of *section 15.* The Minister is given the power to extend the transition period to a maximum of 30 months. During the transition period, the law applicable to an existing private company limited by shares will be that applicable to a Designated Activity Company, which is a new type of company similar to the existing private company limited by shares and dealt with in *Part 16* of this Act.

Chapter 2 sets out the way in which a company is incorporated. In accordance with the recommendation of the Company Law Review Group (CLRG) in its First Report, any one or more persons may form a new model private company limited by shares. *Chapter 2* abolishes the distinction between a memorandum of association and articles of association for the new model company type and these two documents are combined into a single document called a "constitution". The significant innovation here is that the constitution will not contain an objects clause. At present, companies tend to draw up exhaustive objects clauses, to be certain that they have power to do the things which they wish to do. This can in some cases lead to legal disputes as to whether a company actually had power to undertake a certain transaction or activity. Removing the need for an objects clause in the constitution of the model private company limited by shares will ease the administrative burden on these companies and will provide certainty to third parties dealing with companies (such as lenders) who will no longer have to examine extensive objects clauses to determine whether the company is acting within its powers or not.

The requirement for a statutory declaration to be furnished on the incorporation of a company has been replaced by a requirement for an unsworn declaration. This reflects the recommendation in the First Report of the CLRG to move away from the requirement of a statutory declaration as currently exists in order to facilitate e-filing of documents with the Companies Registration Office. Another innovation in this Chapter is an increase in the maximum number of members of a company. This maximum number has increased from 99 to 149 as a result of the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012.

Chapter 3 governs corporate capacity and authority. Under this Chapter, a company has "full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction and for those purposes has full rights, powers and privileges". Therefore, a private company now has no limit on capacity although it is, of course, still required to act within the law. This new provision and is aimed at enhancing clarity and certainty in relation to the authority of the board of directors to bind the company and gives added protection to persons dealing with the company. The law applicable to powers of attorney is clarified.

Chapter 4 deals with contracts and other transactions. It is provided that the company may have more than one common seal and the company is permitted to have an official seal for use abroad.

Chapter 5 governs the company name, registered office and legal proceedings. A company may use as its registered office, the office of an agent approved for that purpose and in the event that the agent changes address, the notice of change of address to the Registrar must be delivered by the agent rather than the company. This Chapter alters the law as it applies to security for costs in legal proceedings. Current law provides that the judge in a case may require "sufficient" security as to costs. The word "sufficient" has been deleted here. The effect of this will be to give the court discretion as to the amount of security that is required.

Chapter 6 provides for the conversion of an existing private company limited by shares to a new model private company limited by shares. Following the enactment of this Act, existing private companies limited by shares will have to decide whether to opt in to the new regime for private limited companies or to opt out by becoming a Designated Activity Company or other company type. Companies that do not elect to opt into the new regime will not be able to avail of the many advantages associated with the new model private company limited by shares, such as the ability to have only 1 director, the one-document constitution and the possibility to avoid having a "physical" AGM.

There are 3 ways in which an existing private company limited by shares can become this new model company type. The first and easiest option is for the members of the company to adopt a new constitution by special resolution in substitution of the existing memorandum and articles of association of the company. The form of the constitution for the new model private company limited by shares is set out in *Schedule 1* to the Act, which will assist the company in taking this course of action.

The second option arises where the shareholders have not adopted a new constitution or where the company has opted not to re-register as a DAC or other company type. In these circumstances, the directors of an existing private company limited by shares are required to prepare a constitution for the company, deliver a copy to each member and deliver a copy of it to the CRO. This must be done before the expiry of the transition period.

It is envisaged that there may be cases where the members do not take any action and the directors, in breach of their obligations, fail to prepare a new constitution. This is the third way in which an existing company can become a new model private company. In such cases, upon the expiry of the transition period, an existing company shall be deemed to have a constitution as required under the Act. The provisions of its existing memorandum and articles of association will be retained, with the exception of its objects clause, and also with the exception of any provisions of its constitution which would be inconsistent with a mandatory provision of the Act. Certain members or creditors may apply to the court for relief if they consider that their rights have been prejudiced by the adoption of this deemed constitution, particularly if the failure of the directors to adopt a new constitution has resulted in their rights being prejudiced.

As mentioned, a company is entitled to opt out of the new regime and can do so by converting to a DAC (or other company type). Certain companies that require bespoke articles of association and objects clauses (such as joint venture companies) are likely to do this. A company may convert to a DAC by passing an ordinary resolution, not later than 3 months before the expiry of the transition period, resolving that the company be so registered and the provisions of *Part 16* will apply to it accordingly. Therefore, an existing private company effectively has a period of 15 months from the commencement of the Act to pass such a resolution to become a DAC. This Chapter also *requires* an existing private company to re-register as a DAC if a member or members who hold more than 25% of the voting rights in the company serve a notice in writing requesting the company to do so. The rationale for this provision is that such a majority could, under the existing law, block any change to the objects of the company (as a special resolution, requiring 75% approval, is required to make such a change), and accordingly there is a justification that this majority should be able to require the company to retain its objects clause, by becoming a DAC (the alternative would be that the company would lose its objects clause were it to become a new model private company limited by shares).

Members (holding 15% of the company's issued share capital) or creditors (holding 15% of the company's debentures) have a right to apply to the court for an order requiring the company to re-register as a DAC under this Part.

Part 3

SHARE CAPITAL, SHARES AND OTHER INSTRUMENTS

Part 3 consists of 7 chapters and codifies all existing law relating to shares, share capital and certain other instruments. At present, this law is set out across the Companies Act 1963 (in particular Table A of the First Schedule thereto), the Companies (Amendment) Act 1983 and the Companies Act 1990. Many provisions from Table A of the First Schedule to the Companies Act 1963, which are commonly inserted into the articles of association of a company, are now incorporated into the text of the Act and apply unless the company's constitution provides otherwise. This reduces the amount of detail required in the constitution of the company as issues normally dealt with in the articles of association of the company will now be contained in the legislation and will apply to companies by default.

Chapter 1 is concerned with interpretation provisions and incorporates present defined terms concerning share capital along with new defined terms required in view of amendments to the current law made by the Act. "Company capital" is a new term – it comprises the company's share capital, share premium, capital conversion reserve fund and capital redemption reserve fund. "Undenominated capital" is another newly introduced term – it comprises the excess of company capital over the nominal value of issued shares.

Chapter 2 contains the general prohibition on the new model private company limited by shares making any offer of securities to the public where the offer is to 150 persons or more. The model private company limited by shares may not have securities or interests in them admitted to trading on a regulated market. Currently, private companies may list debt securities however, under the Act private companies wishing to have debt securities listed must re-register as DACs, with an objects clause.

Chapter 3 brings together the various provisions in the current law relating to the allotment of shares. It deals with the payment of shares, providing that the amount paid in excess of the nominal value of a share (i.e. share premium) is credited to the undenominated capital. The distribution to members of amounts that would otherwise stand to the credit of share premium account created by reason of an acquisition is enabled in cases of mergers and group reconstructions. This Chapter contains the prohibition on the provision of financial assistance by a company in connection with the acquisition of its own shares, and outlines specific exemptions from that prohibition. The existing exemption to the prohibition is re-formulated and provides that financial assistance given in accordance with the new Summary Approval Procedure is permitted. This Summary Approval Procedure contains a requirement for a statutory declaration of solvency from the directors of the company together with a special resolution of the shareholders.

Chapter 4 contains provisions enabling the variation of capital of a new model private company limited by shares whether by increase or reduction. The existing provisions regarding the increase, consolidation, division, cancellation and conversion of shares are gathered together. To this is added the ability to increase or reduce the nominal value of shares using or crediting, as the case may be, undenominated capital. A new model private company limited by shares will be able to convert any of its shares to redeemable shares, save where its constitution provides otherwise. It permits a new model private company to reduce its share capital, again save to the extent that its constitution provides otherwise. This may be effected by special resolution approved by the court, as is the case at present, or by the new Summary Approval Procedure. If using the Summary Approval Procedure to effect a variation of capital, a report from an auditor must be obtained stating the opinion that the statutory declaration of solvency of the directors is not unreasonable.

Chapter 5 deals with the transfer of shares, gathering together provisions found throughout the Companies Acts and the model regulations of the First Schedule to the Companies Act 1963. It gives statutory effect to the common law rule whereby the power to decline registration of a share must be actively exercised within 2 months or will lapse. It deals with certification of shares and the issue of share certificates, rectification of dealings and personation of shareholders.

Chapter 6 gathers together the various provisions describing how a company may acquire its own shares – by gift, forfeiture, cancellation, court order, redemption or purchase. There are special provisions where the new model private company is a subsidiary of a public company. The rule requiring 10% (in nominal value) of a company's shares to at all times be non-redeemable has been removed. It is also provided that the proceeds of issue of new shares may now be used for payments incidental to acquisition. This Chapter sets out the formalities of share purchase by a new model private company limited by shares by re-enacting the existing law more clearly.

Chapter 7 deals with distributions, re-enacting those provisions of Part IV of the Companies (Amendment) Act 1983 which affect the existing private company limited by shares, along with provisions of Table A of the First Schedule to the Companies Act 1963 concerning dividends and reserves.

Part 4

CORPORATE GOVERNANCE

Part 4 provides for the duties and responsibilities of directors and other officers as regards their appointment and proceedings in relation to the company and its members. In particular, *Part 4* sets out the ways in which the activities of the company on a day-to-day basis are conducted. Other than the individual areas of change described below, the process of consolidation and simplification of the current law is mainly adhered to by incorporating the procedures for corporate governance currently contained in the standard articles of association for a company limited by shares (as set out in the First Schedule to the Companies Act 1963 in Table A, Parts I and II) into the body of the Act. Provision is made throughout this Part for the new model private company limited by shares to adopt in its constitution such additional powers or restrictions as the company may require, so long as these provisions do not conflict with the main body of law in the Act.

Chapter 1 deals with the practicalities of access to various company documents referred to throughout *Part 4* - such documents would include registers of directors, secretaries and members and minutes of company meetings. All the relevant documents must be available for inspection during business hours for not less than 2 hours in each day. Once this requirement is complied with, a company may, in general meeting, impose such reasonable restrictions in relation to the inspection of documents as it sees fit.

Chapter 2 contains provisions regarding directors and secretaries. A single director is now permitted in a model private company limited by shares. Although a director will still be permitted to act as secretary to the company, a separate secretary is required if a person is appointed as sole director. The prohibition on the appointment of a corporation to serve as company director remains. A new age restriction for directors is introduced and any director under the age of eighteen years will cease to be a director on the commencement of *section 132(1)*. Undischarged bankrupts will continue to be prohibited from acting as officers. If the Director of Corporate Enforcement is of the opinion that a person acting as director is an undischarged bankrupt in any jurisdiction, he or she may initiate court proceedings to disqualify such a person. The prohibition on a person simultaneously acting as director and secretary in any transaction continues.

The recent amendments made by the Companies (Amendment) Act 2009 which require residence of one director in a member state of the EEA and clarify the methods by which a company can prove that it has a link with economic activity in the State have been brought forward here. The restriction on the number of directorships a person can hold is continued – namely 25 directorships, not including directorships of PLCs. The provisions for the removal of directors remain substantially unchanged from the Companies Act 1963. The provisions formerly contained in Table A regarding vacation of office have been incorporated into the text of the Act, including the provision that the absence of a director from meetings for 6 months terminates his or her office. The constitution of a private company limited by shares may make alternative provisions in this regard. The existing provisions regarding the maintenance of registers of directors and secretaries are re-enacted.

In *Chapter 3,* it is provided that the remuneration of the directors of the company will be determined by the board of directors unless the constitution of the company provides otherwise. This departs from Model Regulation 76 of Part I of Table A to the Companies Act 1963, which had provided that remuneration of directors would be determined by the company in general meeting, unless the articles of association of the company stated otherwise. The reason for the change in the default position here is to reflect the fact that the vast majority of companies disapplied this Model Regulation from their articles of association. In this Chapter, tax-free payments to directors continue to be prohibited as in the current legislation.

In *Chapter 4,* the provisions of Table A regarding the general powers of management and delegations by directors have been incorporated, with the power to adjust these in the individual company's constitution. Table A provisions regarding managing directors as well as meetings of directors and committees of directors have been incorporated and remain substantively unchanged. *Chapter 4* also contains the requirement for boards of directors to establish audit committees, which is carried over from the current law. An audit committee is only required in the case of a private company limited by shares where that company qualifies as a "large company" – namely with a yearly balance sheet total exceeding €25,000,000 and a yearly turnover exceeding €50,000,000. All public limited companies are required to set up an audit committee, regardless of the size of the company.

Chapter 5 deals with the register of members and existing law in this area has been substantially re-enacted. Provisions in relation to the inspection of the register and stipulating where the register must be kept are now provided for in *Chapter 10* of this Part.

Chapter 6 addresses the recommendations in the First Report of the Company Law Review Group (2001) regarding the conditions applying to the holding of a general meeting and the recommendation that a written procedure, once agreed unanimously by the members, could be an alternative to an AGM. The applicable conditions are further simplified by allowing a general meeting to be held outside the State or in multiple locations. A new power of the court to order meetings at the request of interested parties (including personal representatives) has been inserted.

The existing concept of "ordinary" and "special" business at AGMs has been removed and the matters that shall be included in the agenda of the AGM are set out, with the freedom to omit or alter any of these matters in the constitution of the company. The regulations regarding the proceedings and voting at a general meeting based on Table A of the Companies Act 1963 are incorporated also. As existing statute law did not define an ordinary resolution as such, the Act addresses this and proceeds to identify categories of resolution whether passed in general meeting or by written resolution. Pursuant to the recommendations in the First Report of the CLRG, unanimous written resolutions are now provided for thus allowing a company to pass resolutions, including special resolutions, in writing. Since there may be dissenting members, majority written resolutions, although allowed, require new provisions that provide that all members must be advised of the contents of such resolutions and receive notification of when they were passed by the requisite majority. A time lapse before such resolutions are deemed passed must be allowed for in order to give dissenting members the opportunity to initiate an action if they so wish.

Chapter 7 sets out the new Summary Approval Procedure and deals with certain transactions under the prior Companies Acts that require statutory declarations of directors, special resolutions of members and in certain instances, an independent person's report in order to be deemed valid. The new Summary Approval Procedure as set out in this Chapter will now apply to these transactions, which are described as "restricted activities". These activities include the giving of financial assistance for the acquisition of shares, making reductions in company capital, varying company capital and giving loans to directors and connected persons. This change in the procedure to be followed gives effect to the recommendations of the Company Law Review Group that a streamlined validation procedure be introduced, with minor variations depending on transaction type.

The Summary Approval Procedure is defined as a procedure where a special resolution of the company has been passed and the required declaration of the directors has been made. The contents of the declaration will vary depending on the restricted activity for which approval is being sought. In each case, a copy of the declaration must be delivered to the Registrar of Companies not later than 21 days after the date on which the carrying on of the restricted activity is commenced. Where a director makes a declaration for the purposes of validating a restricted activity without having reasonable grounds for the opinion he or she expresses therein, that director may be declared personally responsible for all the debts or liabilities of the company.

Chapter 8 gives protection to minority shareholders in that they may apply to the court for an order under this Chapter if they feel the affairs of the company or the powers of the directors are being exercised in a manner oppressive to him or her or in disregard of his or her interests as a member of the company. The court is entitled to order, among other things, the payment of compensation, the purchase of the any shares of any members of the company or the cancellation or variation of any transaction. These remedies for shareholders in case of oppression are based on section 205 of the Companies Act 1963.

Chapter 9 derives from the current law and deals with the form in which registers, minutes and other company documents must be kept, along with how such documents may be stored electronically.

Chapter 10 is new and contains harmonised procedures for the inspection of registers and company documents and sets out where such registers and documents are to be kept. The Chapter also provides for the charges for the inspection of registers and documents in certain circumstances and the service of notices under this Act on members.

Part 5

DUTIES OF DIRECTORS AND OTHER OFFICERS

Part 5 codifies, for the first time in Irish law, all the duties of directors and other officers of the company. Up until now, these duties were to be found in the common law and in various statutory provisions. They are set out now in their entirety for the sake of clarity and it is thought that this innovation in company law will promote compliance with such duties by directors and company officers.

Chapter 1 contains a number of definitions that relate primarily to transactions involving companies and their directors. There are also definitions of both "shadow directors" and "*de facto* directors". The statutory label *de facto* director is new and relates to a person who occupies the position of director but who has not been formally appointed as such. The significance of these definitions is that the persons who fall to be either shadow directors or *de facto* directors will be treated for the purposes of *Part 5* as if they were formally appointed directors and will, for example, be subject to the same fiduciary and other duties as formally appointed directors. Persons who will be considered to be connected with directors are also defined in this Chapter.

Chapter 2 details the general duties of directors and secretaries. The duty of each director to ensure compliance with the Companies Acts is set out and will apply equally to shadow directors and *de facto* directors. Furthermore, directors are required to have regard, in the performance of their functions, to the interests of the company's employees in general as well as the interests of its members.

Section 226 contains the form of the Directors' Compliance Statement, which is now being introduced into law as recommended in the report of the Company Law Review Group on Directors' Compliance Statements. The requirement in this section applies to all public limited companies (except investment companies) and to all other large limited companies with a balance sheet total of €12,500,000 and a turnover of €25,000,000. It places on obligation on directors to make an annual statement in their Directors' Report, acknowledging that they are responsible for securing the company's compliance with its "relevant obligations" and confirming that certain things have been done or, if they have not been done, explaining why they have not been done. Failure to prepare a Director's Compliance Statement will constitute an offence under the Act.

Elsewhere in this Part, the duties of a company secretary are addressed. In accordance with the CLRG's recommendation in its First Report, the office of company secretary as a separate office is retained. This section also seeks to distinguish between directors and secretaries in terms of their ability to achieve compliance with the Companies Acts. This section reflects the fact that a secretary is appointed and can be removed by the board of directors and will have such duties (for example, to secure the company's compliance with the Companies Acts) only where delegated by the board of directors. Directors and secretaries are required to acknowledge their legal duties and obligations imposed by the Companies Acts.

The codification of directors' fiduciary duties is one of the most significant changes proposed by the Act and is contained in *section 228* of this Part. The duties are owed to the company and are enforceable by the company. The provenance of the duties is the common law and equity and the statutory duties should be interpreted and applied in the same way as the common law duties and equitable principles. The actual duties are detailed in *section 229*. The requirement to act "honestly and responsibly in relation to the conduct of the affairs of the company" re-states section 150 of the Companies Act 1990 in positive terms and provides that directors who have not so acted will be restricted in their directorships.

A new provision has been inserted at *section 233* which concerns directors' liability to account to their companies for gains made and to indemnify their companies for losses caused as a result of their breach of duty. This provision is modelled on remedies currently available in Part III of the Companies Act 1990 where directors act in breach of their duties. A necessary mitigating provision is included which gives the court the power to grant relief from liability to officers of the company where it is satisfied that a director has acted honestly and reasonably.

Chapter 3 of *Part 5* contains two sections concerning evidence of loans made **to** directors and **by** directors. Where a loan or quasi-loan is made **to** a director by a company and the terms are not in writing, or are in writing but are ambiguous, there is a presumption until the contrary is shown that it is repayable on demand and that it bears interest. Where a loan or quasi-loan is alleged to have been made **by** a director to a company and the terms are not in writing it shall be presumed that it was not a loan or quasi-loan. Where it is proved that such a loan was made, if the terms are ambiguous there will be a rebuttable presumption that the loan bears no interest, that it is not secured and that it is subordinated to all other creditors. This provision has been introduced on foot of advice from the Office of the Director of Corporate Enforcement after it noticed that, in windings-up, directors often claim to be creditors of the company by having made unsubstantiated loans to their companies. This new provision will seek to address this.

Chapter 4 substantially reproduces existing statutory regulation of transactions between directors and their companies that involve a conflict of interest. The prohibition on loans to directors is found here, together with a number of other matters including provisions relating to substantial property transactions, contracts of employment with directors and approval for the making of a payment to a director or a director's dependants for loss of office.

Chapter 5 substantially reproduces what is currently Part IV of the Companies Act 1990 and concerns the disclosure of interests in shares and debentures reflecting the reforms recommended by the Company Law Review Group in its First Report. The most significant change in the law provided for here is an exception from what is a disclosable interest in a case where the shares held amount to less than 1% of the issued share capital, or where the shares or debentures do not carry a right to vote at general meetings (save in specified circumstances). All companies are required to have a register of interests for the purposes of disclosure of interests in shares and debentures.

Chapter 6 deals with officers' responsibilities and sets out provisions explaining the meaning of the term "officer in default" and presumptions regarding that matter.

Part 6

FINANCIAL STATEMENTS, ANNUAL RETURN AND AUDIT

Part 6 contains provisions regarding the accounting records to be kept by companies, the financial statements to be prepared by them, the periodic returns to be made by companies to the Registrar of Companies and the auditing of financial statements of the companies. It also covers other matters related to auditors, particularly rules governing the appointment of statutory auditors and their removal from office. This Part pulls together the various requirements of different Acts in relation to accounting records, financial statements and the audit of those financial statements. The requirements in the past were contained in the Companies Act 1963, the Companies (Amendment) Act 1986 and the Companies Act 1990. To a large extent, the requirements are unchanged from existing law, however, the relevant provisions have been redrafted in order to make them easier to understand which will enhance compliance with the law on financial statements and audit.

Chapter 1 contains interpretation provisions that are specifically relevant to this Part of the Act. Many of the interpretation provisions exist in the current law, although there are some newly defined terms introduced. The term “financial statements” is now being used throughout the Act instead of the term “accounts”, which is the term which has been in use to date. The reason for this change is to differentiate between “accounts”, which is a commonly used term and applies to any summary or extract from the accounting records, and “financial statements” which meets the criterion of “true and fair” which is a much higher standard. The reason why the definitions have been split into two parts is to permit a reader of the definitions on financial statements to read logically through the meaning of balance sheet and profit and loss account in order to help understand the definitions and the interaction with the financial reporting frameworks.

Section 273(2) of this *Chapter 1* provides that financial statements must be prepared either in accordance with *Schedule 3* or *4* to this Act or in accordance with international financial reporting standards, commonly abbreviated to “IFRS”. If the financial statements are prepared in line with *Schedule 3* or *4*, they will be called “Companies Acts accounts” and if they are prepared in accordance with international financial reporting standards they will be called “IFRS accounts”. This Chapter also gives the Minister the power to specify which accounting standards should generally be used in the preparation of financial statements in the jurisdiction in cases where the company is not preparing its financial statement in accordance with IFRS or US Accounting Standards. The use of US Accounting Standards (US GAAP) is permitted in certain limited cases. The Chapter also gives the Minister power to recognise, by Regulation, other internationally accepted accounting standards for a particular transitional period. This comes from the current law and allows flexibility for the Minister to provide for the use of standards other than US GAAP, in the event that there was a demand for this, and that it was considered appropriate to so do.

Chapter 2 contains provisions relating to the preparation and retention of accounting records. The content of this Chapter is effectively the re-enactment of section 202 of the Companies Act 1990. That section has been broken down into its constituent parts and reworded slightly to deal more fully with records kept in computerised form. Section 202 of the Companies Act 1990 refers to the requirement that companies keep “proper books of account”. This Chapter modernises this term to read “adequate accounting records”.

Chapter 3 introduces a new term “financial year”. A financial year of a company is the accounting period that falls between two balance sheet dates. Previously, section 148 of the Companies Act 1963 required accounts to be drawn up within 18 months of incorporation and thereafter, each calendar year. This Chapter defines a financial year and requires that a company’s first financial year must be within 18 months of its date of incorporation and thereafter, should generally be for a period of 12 months or 52 weeks. It introduces a requirement that a holding company should try to align the financial year end dates of the subsidiary undertakings in the group with the financial year end date of the holding company. This Chapter also includes a power for a company to change its financial year end date by notice in a prescribed form given to the Registrar of Companies. This power, except in certain limited circumstances, may only be exercised once every five years.

Chapter 4 requires statutory financial statements to give a true and fair view of the assets, liabilities, financial position and profit or loss of the company. The composition of the financial statements is set out in *section 292*, together with the provisions with which they must comply. This Chapter also incorporates the obligation to prepare entity and group financial statements in the form of Companies Act financial statements or IFRS financial statements. These provisions derive from the current law but have been reworded and restated for the sake of clarity and to promote compliance.

Chapter 5 sets out the exemption from the requirement to prepare consolidated financial statements where a group of companies meets certain size criteria and is preparing Companies Act group financial statements. This re-enacts the exemption currently available in the European Communities (Companies: Group Accounts) Regulations 1992. This Chapter also contains other exemptions and exclusions in relation to group financial statements as carried over from the current law.

Chapter 6 brings together the various provisions requiring disclosure of financial information relating to directors, whether remuneration, credit transactions, or arrangements in which they have a material interest. This Chapter is essentially a re-enactment of the requirement in section 191 of the Companies Act 1963 to disclose director's remuneration and of the requirements set out in section 41 to 45 of the Companies Act 1990 regarding loans, quasi-loans and credit transactions with directors.

Chapter 7 sets out disclosure requirements to be given in the notes to the financial statements of a company. The information is currently required by various enactments and these have been amalgamated and brought together in one place in order to make the preparation of financial statements clearer. The main matters which are required to be disclosed are:

- information on related undertakings;
- particulars of staff;
- details of authorised share capital, allotted share capital and movements therein;
- financial assistance for purchase of own shares;
- holding of own shares or shares in holding undertaking. The definition of treasury shares has also been extended to agree with the new requirements in *Part 3* of the Act;
- disclosure of accounting policies;

- disclosure of remuneration of auditor;
- information on arrangements not included in balance sheet.

Chapter 8 deals with approval and signing of statutory financial statements by the board of directors. This Chapter comes from sections 156 and 157 of the Companies Act 1963 and has been slightly amended to provide for a company that only has a single director.

Chapter 9 deals with the content of the directors' report that is required to be prepared for every financial year, the approval and signing of the directors' report and the obligation to lay it before the members in a general meeting. This Chapter derives from the current law. This Chapter also includes a requirement to provide information on the acquisition or disposal of own shares and on directors' interests in shares and debentures. The Chapter also introduces a new requirement for directors, in that they now have to make a statement to the effect that they have provided all relevant audit information to the auditor in respect of that financial year. False statements in this regard will constitute an offence under the Act.

Chapter 10 sets out a clear obligation to have the statutory financial statements for each financial year audited by a statutory auditor, save where the audit exemption set out in *Chapters 15* and *16* is availed of. The Chapter provides that members holding 10% of the voting rights in a company may require that it not avail of the audit exemption. Finally, it is provided that a statement must be included in the balance sheet of the company where the audit exemption is availed of detailing that fact.

Chapter 11 deals with the preparation, content and signing of the statutory auditors' report and sets out the items to be addressed in it.

Chapter 12 deals with publication of financial statements. The Chapter requires that every member of the company be circulated with a copy of the statutory financial statements, directors' report and statutory auditors' report each year before they are laid before the members in general meeting. It also deals with the right of members to demand copies of financial statements and reports and permits companies to meet this demand by using electronic communications. The Chapter also clarifies that statutory financial statements must always be accompanied by the relevant directors' report and statutory auditors' report. However, if a company publishes non-statutory financial statements (i.e. any form of abbreviated financial statements), they must also publish a statement indicating that they are not statutory financial statements, stating where the statutory financial statements may be obtained and giving the opinion expressed in the report of the auditor on those statutory financial statements.

Chapter 13 deals with the requirement for each company to make an annual return to the Registrar of Companies and with the documents that must be annexed to it. This Chapter is an amended re-enactment of various different requirements in existing company law regarding annual returns, annual return dates, and documents to be annexed to annual returns. While there has been substantial rewording of the requirements, there is no significant difference between the existing requirements and the requirements contained in this Chapter of the Act. In brief, this Chapter requires that a company has an annual return date in each year and within 28 days of that annual return date, it must lodge an annual return with the Registrar. The documents that must be attached to this annual return include the statutory financial statements, the directors' report and the statutory auditors' report thereon. Other documents may need to be attached where the company has availed of certain exemptions set out in this Part. The obligation to deliver an annual return is removed during winding-up or voluntary strike-off.

Chapter 14 deals with exemptions from public disclosure of financial information in certain circumstances. There are sections dealing with the identification of small and medium-sized companies and provisions that permit such companies to file abridged financial statements rather than full financial statements with the Registrar. The threshold for small companies has been increased in line with the recent European Union (Accounts) Regulations 2012 (S.I. No. 304 of 2012) so that a small company is now one for which the turnover does not exceed €8.8million and the balance sheet total does not exceed €4.4million. The threshold for average number of employees of the company remains at not more than 50. Section 17 of the Companies (Amendment) Act 1986 is substantially re-enacted which provides an exemption for subsidiary undertakings from filing their statutory financial statements where a holding undertaking provides a guarantee covering all of the liabilities of the subsidiary.

Chapter 15 deals with companies that qualify for an audit exemption. This Chapter mainly re-enacts the current law but does make a change in that it extends the availability of the audit exemption to a group situation. The Chapter identifies the companies that can avail of an audit exemption and those that cannot. In order to avail of the exemption, the company must be a small company or must be a group of companies that, taken together, fall below the threshold requirements for a small company (namely a balance sheet total of less than €4.4million, a turnover of €8.8million and an average number of employees of less than 50). Credit institutions, insurance undertakings or entities listed in *Schedule 5* to the Act cannot avail of the exemption, regardless of their size. A company must have filed its latest annual return in time in order to qualify for the audit exemption. It is made clear that, in a case where the exemption applies, at least 10% of the members of the company may still request that an audit take place.

Chapter 16 is new and contains a special audit exemption for dormant companies. It provides that companies that have had no significant accounting transactions in a financial year, and the assets and liabilities of which comprise only permitted assets and liabilities, will not be required to carry out an audit for that financial year. This new provision follows recent law in the UK and removes an unnecessary burden on companies that do not need to be subject to the extra scrutiny of an audit seeing as they are not carrying out any significant transactions during the financial year in question.

Chapter 17 deals with the voluntary revision of defective statutory financial statements. This entire Chapter is new to Irish company law. It is similar to requirements found in the UK Companies Act 2006. Prior to this, there was no mechanism in Irish company law whereby the directors, if they became aware of a deficiency in their latest statutory financial statements, or directors' report, could revise the reports filed with the Registrar. The Chapter sets out the procedures available to the directors to remedy deficiencies and where the company has a statutory auditor appointed, the statutory auditor is required to report on the revised financial statements and revised report. The Chapter also contains procedures for the revision of abridged financial statements filed by small and medium companies.

Chapter 18 deals with the appointment of statutory auditors to a company and substantially re-enacts the current law. Once appointed, statutory auditors continue thereafter unless they have indicated their unwillingness to be reappointed, they are not qualified for reappointment, a resolution has been passed at a general meeting appointing someone else or the company becomes eligible to avail of the audit exemption.

Chapter 19 deals with the rights, obligations and duties of statutory auditors. This Chapter is substantially a re-enactment and restatement of the current requirements set out in sections 193 to 197 of the Companies Act 1990. The Chapter provides for the offence of making false statements to a statutory auditor and obliges statutory auditors to act with professional integrity. Under this Chapter, auditors are required to report to the Registrar of Companies and the ODCE where they form the opinion that a company is not keeping adequate accounting records. Auditors are similarly required to inform the Registrar and the ODCE where they are of the view that there are reasonable grounds to believe that an officer or agent of the company has committed an offence.

Chapter 20 deals with the removal and resignation of statutory auditors. This Chapter is a substantial re-enactment and restatement of requirements currently set out in sections 160 to 161 of the Companies Act 1963 and sections 184 to 186 of the Companies Act 1990.

Chapter 21 requires auditors and the company to notify the Irish Auditing and Accounting Supervisory Authority (IAASA) where they either resign, or are removed, from office during the period between AGMs. The Chapter also prohibits a person who is subject to a disqualification order from being involved in the audit of a company.

Chapter 22 deals with false statements in returns, financial statements etc. This Chapter re-enacts section 37 of the Companies (Amendment) (No. 2) Act 1999, stating that if any person knowingly makes a false statement in any return, statement, financial statement or other document required by this Part, they shall be guilty of a category 2 offence. The penalties have been increased here and a person prosecuted on indictment for false statements will be liable to a fine of not more than €50,000 or a prison term not exceeding 5 years or both.

Chapter 23 contains a transitional provision to allow existing companies to opt to prepare financial statements in accordance with the provisions of the Sixth Schedule to Companies Act 1963 for a financial year which begins before, but ends after, the commencement of this provision.

Part 7

CHARGES AND DEBENTURES

Part 7 contains provisions regarding debentures and charges and introduces a number of changes to the current law. The thrust of the changes is to simplify the registration and de-registration of charges while clarifying the rules for the priority of charges.

Chapter 1 is new and is intended to give effect to recommendations of the Company Law Review Group in its Second Report. The expression "charge" (which includes a mortgage under the current law) is now expressly stated not to include a mortgage or charge over an interest in cash, accounts in financial institutions or any other deposits, shares or other financial instruments. This is in accordance with the exception to the registration requirement envisaged under Directive 2002/47/EC on Financial Collateral Arrangements.

Chapter 2 deals with the registration and priority of charges and introduces some major changes in this regard. Two separate procedures for the registration of charges are now envisaged – the one-stage procedure and the two-stage procedure. The one-stage procedure is similar to the procedure under the current law, namely that particulars of all charges created must be delivered to the Registrar of Companies within 21 days of their creation. The proposed two-stage procedure provides that an initial notice can be sent to the Registrar stating the intention of the company to create a charge followed up by a further more detailed notification within 21 days of the creation of the charge, stating that fact. In this way, it is envisaged that lenders may be more willing to advance funds if they can achieve an enhanced security priority over a company's assets.

The rules governing the priority of charges have also been significantly changed in that where the priority of charges is not governed by some other regime (e.g. Property Registration Authority rules etc.) such priority will be determined by reference to the date of receipt by the Registrar of the prescribed particulars. This is in contrast to the current position whereby, although not stipulated in the legislation in force, priority is deemed to be governed by date of creation of the charge. The Company Law Review Group was of the view that this practice was unfair as it resulted in a situation where a charge created earlier but filed later would take priority over a charge created later but filed earlier. It was recommended that priority be given to the creditor who files first in time in order to minimise the potential for fraudulent abuse and thereby protecting providers of finance.

Chapter 3 contains provisions as to debentures and substantially re-enacts sections 94 to 97 of the Companies Act 1963. The liability of trustees for debenture holders is described, the concept of perpetual debentures is dealt with and the power of the company to re-issue redeemed debentures is laid down.

Chapter 4 is newly inserted and provides that, other than pursuant to an investigation initiated by the ODCE (*Part 13*), or a disclosure order (*Part 14*), the Registrar has no jurisdiction to accept or register an order of any authority affecting a shareholder or debentureholder of the company, or any notice of the making of such an order. This Chapter was inserted on foot of a recommendation from the Company Law Review Group in its 2011 Report that the requirement in recent years that the CRO register charging orders over shares was of little purpose and not consistent with obligations elsewhere.

Part 8

RECEIVERS

Part 8 of the Act deals with receivers. It substantially re-enacts the current law on receivership as contained in the Companies Act 1963, as amended.

Chapter 1 provides interpretation for the Part as a whole.

Chapter 2 details the notifications and information that must be provided once a receiver is appointed. The contents of the statement as to the affairs of the company are described and the disqualification, resignation and removal of receivers are provided for. The requirement to publish a notice of the appointment of a receiver, or of a receiver ceasing to act, in at least one daily newspaper has been replaced with a requirement to publish in the CRO Gazette, which is freely available online.

Chapter 3 contains new provisions and sets out the powers and duties of receivers. Receivers are now given certain specific powers in this Chapter in addition to those conferred on them by court order or the instrument under which they were appointed. Conferring statutory powers on receivers is intended to alleviate many of the problems which may arise from poorly drafted debentures.

Chapter 3 also deals with the receiver's liability on contracts, the duty of the receiver to get the best price reasonably obtainable when selling property and the treatment of preferential payments when a receiver is appointed under a floating charge.

Chapter 4 provides for the regulation of receivers and the enforcement of their duties. The court is granted the power to make orders in relation to the return of assets improperly transferred and is entitled to set the remuneration of the receiver. A receiver can be compelled to make outstanding returns and the court can end or limit a receivership on application from a liquidator where the company is in liquidation. It has been clarified that the provisions on receiver remuneration do not affect the right of the receiver to an indemnity out of the assets of the company.

Part 9

REORGANISATIONS, ACQUISITIONS, MERGERS AND DIVISIONS

Part 9 contains provisions relating to the reorganisation, acquisition, merger and division of companies. For the first time in Irish law, it will be possible to effect a merger between two private Irish companies. The division facility provided for is also entirely new.

Chapter 1 deals with schemes of arrangement. The Company Law Review Group (CLRG) examined the procedures for effecting a scheme of arrangement under the current law and noted that there were two principal shortcomings in the procedure, namely the initiation of two separate legal proceedings to convene the scheme meetings and to approve the scheme and, secondly, the fact that the matter had to be brought before the court three times in all in convening the scheme meeting, seeking direction as to advertising the petition and obtaining approval of the scheme. Therefore, the current law has been amended in accordance with the recommendations of the CLRG in its First Report that the procedure for effecting a scheme of arrangement be streamlined.

Changes have been introduced so that court approval is no longer required to convene scheme meetings of members or creditors, where the proposed meetings are convened by the directors of the company. Such an amendment removes one of the two sets of legal proceedings as well as one of the court hearings. However, the court involvement is retained where the directors have not convened the scheme meeting and the court is given a discretion to order scheme meetings to be summoned in such a manner as it directs.

The circumstances in which the compromise or arrangement becomes binding on the creditors or members concerned are set out here. The necessity for a second court hearing (to advertise the passing of the scheme resolution and presentation of the scheme petition to the participants in the scheme) has been removed in most cases. This requirement to advertise is now satisfied by advertising in two daily newspapers circulated in the district where the registered office or principal place of business is located.

Chapter 2 deals with acquisitions, the word “acquisitions” now being used as opposed to “takeovers”. This Chapter allows for the compulsory purchase of minority interests and lays down certain conditions for this right to buy out to apply. The Company Law Review Group in its First Report noted the complexity of descriptions applying to the entities involved in acquisitions and takeovers and recommended that the terms “offeree” and “offeror” replace the terms “transferor” and “transferee” respectively. Furthermore, it was recommended that an offeror (previously a transferee), which currently must be a company to obtain rights under section 204 of the Companies Act 1963, should be capable of being an individual. Hence, all references to an offeror include persons and companies, whereas references to an offeree apply to companies only. For this reason references are to “offerors” and “offeree companies”.

This Chapter enables the acquisition by an offeror of all the shares of an offeree (i.e. target) company, where the offeror has obtained acceptances of its offer in respect of 80% or more of the shares of the offeree company (or where the offeror and/or its subsidiaries already own shares in the target company, 80% of the shares in the target company not owned by the offeror).

Additional requirements for the right to buy out to apply are set out and these provisions amend the existing section 204 CA 1963 in line with the recommendations of the CLRG. The CLRG noted an anomaly within these provisions of the 1963 Act in that they failed to include shares of a holding company or a sister company of the offeror company and instead these were regarded as shares held independently of the offeror company for the purposes of those sections. Thus, existing shareholders of the offeror company or its subsidiary were free to restructure in a new corporate entity in order to avoid the more stringent requirements. This Chapter 2 remedies this in that it applies where shares in the offeree company are already in the beneficial ownership of either the offeror (whether an individual or a body corporate) or the offeror and any group company or companies of it (where the offeror is a body corporate). The value of the beneficial ownership of the shares must be greater than 20 per cent of the aggregate value of those shares and the shares affected. Where this is the case, the assenting shareholders must hold not less than 80 per cent in value of the shares affected and must be not less than 50 per cent in number of the holders of those shares.

Chapter 3 concerns mergers and is new. The Act provides, for the first time in Irish law, a statutory mechanism whereby two private Irish companies can merge so the assets and liabilities (and corporate identity) of one are transferred by operation of law to the other, before the former is dissolved. A further innovation is that a merger can be affected without the necessity for a High Court order. Where a merger meets the requirements of the legislation, it is proposed that the Summary Approval Procedure (as set out in *Chapter 7* of *Part 4* of the Act) can be utilised to effect the merger, which can be expected to result in a significant saving of time and money. The provisions have been based on Cross-Border Merger regime, as laid down in the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008), while re-modelling the cross-border element to apply in a domestic context.

Chapter 4 on divisions is also entirely new and now makes it possible for a private Irish company to be “divided” so that its undertaking is split between two other Irish companies. It has been drafted to mirror the corresponding provisions in *Chapter 3* on mergers.

Part 10

EXAMINERSHIPS

Part 10 of the Act contains the provisions in relation to examinership. It largely reproduces the existing law on examinerships as contained in the Companies (Amendment) Act 1990, as amended. Examinerships were introduced into Irish law under that Act as a mechanism for the rescue of ailing companies that still have a reasonable prospect of survival. The company comes under the protection of the court and is shielded from the claims of creditors. An examiner is appointed to try to formulate a scheme of arrangement and typically may have to find new investors to inject capital into the company. The protection of the court is offered for a period of 70 days, which can be extended by application to the court to 100 days. Once a scheme of arrangement is confirmed by the court, it then becomes binding on all members and creditors of the company.

A recent innovation in examinership law has been carried in the Act. On foot of a recommendation from the CLRG, the Companies (Miscellaneous Provisions) Act, 2013 introduced a change to the law in order to facilitate the access by small private companies (as defined in *section 351* of the Act) to the examinership process. Small private companies may apply directly to the Circuit Court to have an examiner appointed, and not be required to apply to the High Court first, as is currently the case. Small private companies will still have the option to apply to the High Court directly for examinership if they so wish.

Chapter 1 contains provisions to aid in the interpretation of this Part. New definitions have been added in order to create a comprehensive list of the defined terms in accordance with the recommendation of the Company Law Review Group (CLRG) in its First Report that the new legislation should make a greater use of defined terms. The independent accountant will now be known as the “independent expert”.

Chapter 2 details how an examiner is appointed. The circumstances in which the court may appoint an examiner on the application to it of a petitioner are set out and it is still the case that, in order to appoint an examiner, the court must be satisfied that the company has a reasonable prospect of survival. The persons who may present a petition to the court are specified and provision is made for the independent expert’s report which must accompany the petition. It is provided that an examiner must be qualified to act as such, and the qualification regime is the same as the one that has been put in place for liquidators under *Part 11* of the Act, save that an examiner will not be required to obtain professional indemnity insurance.

The provision in the current law for the remission of an examinership hearing from the High Court to the Circuit Court for companies with liabilities of under €317,000 has been removed as it is envisaged that such companies will now apply directly to the Circuit Court as small private companies as outlined above.

This *Chapter 2* also describes the effect of the petition to appoint an examiner on the creditors of the company and other parties and provides for what may or may not happen in relation to a company during the period of court protection. The statutory moratorium on creditor action is contained in *section 521* and effectively prohibits creditor action against the company during the protection period without the consent of the examiner.

Chapter 3 lays down the powers of an examiner and also prohibits the examiner from repudiating a contract that has been entered into by the company prior to the period of court protection (with an exception being provided for in relation to so called "negative pledges" in contracts). There are rules concerning the production of documents and evidence and the court is given a wide discretion to transfer some or all of the functions and powers of the directors of the company to the examiner. The examiner is permitted to incur liabilities so that the company is enabled to continue to trade and an application may be made to the court by the examiner for an order that he or she be permitted to dispose of company property. The obligations for advertisement and notification of the examiner's appointment are set out and there is an obligation that websites and emails sent by or on behalf of the company must contain a statement that the company is "*in examination under Part 10 of the Companies Act*".

Provisions governing the court's consideration of the examiner's proposals are set out in this Chapter and the circumstances in which the court cannot confirm these proposals are detailed. An amendment to the current law has been introduced in that the proposals must now have the effect of impairing the interests of the creditors of the company in such a manner as to “unfairly” favour the interests of the creditors or members of any company to which the company is related.

A newly inserted provision allows the court to authorise a reduction of capital in a scheme of arrangement or compromise. This provision was included to deal with the judgment in *Re McEnaney Construction Limited* [2008] IEHC 43 which held that a court could not so authorise a reduction in capital unless the legislation specifically allowed for it to do so. A proviso is included to the effect that a reduction cannot result in an amount of company capital which is “manifestly inadequate”.

Chapter 4 deals with the liability of third parties for debts of a company in examination. The provisions in this Chapter all derive from section 25A of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999. The provisions have been split up into a number of sections for the sake of clarity. In brief, this Chapter ensures that proposals in a scheme of arrangement or compromise cannot affect the liability of a guarantor, notwithstanding the fact that the primary liability of the company itself is being compromised by the proposals.

Chapter 5 is concerned with the conclusion of the examinership. It governs how the period of court protection ceases, how examiners recoup their costs and expenses and how the court can order the return of assets which have been improperly transferred. There are other provisions in relation to the publication of orders under this Part, the possibility of holding a hearing otherwise than in public and the obligation on professional bodies to report to the Director of Corporate Enforcement regarding members of those bodies acting as examiners in an improper manner.

Part 11

WINDING UP

Part 11 consolidates and modernises the law relating to the winding up of companies. In the first instance, the law relating to winding up has been re-ordered in a more logically coherent way. *Part 11* also seeks to introduce greater consistency between the three different methods of winding up (members' voluntary, creditors' voluntary and court ordered). This is most evident in the changes to the court-initiated mode of winding up (court ordered liquidation). Broadly, the approach has been to place court ordered windings-up on a similar footing to creditors' voluntary windings-up once the order for winding up is made, thereby reducing the court's supervisory role in favour of greater involvement for creditors.

Chapter 1 contains interpretation provisions for this Part as a whole and states that this Part is subject to the Insolvency Regulation. The Chapter explains that winding up can be court ordered or voluntary and the various bars to a members winding up are set out. It is provided that the court with jurisdiction to wind up a company is the High Court. Finally, specific provisions of the Companies Acts are applied to companies not in liquidation where the court decides that the principal reason for the company not being wound up is the insufficiency of its assets.

Chapter 2 deals with winding up by the court. An application to the court for the winding up of a company can be made by the company itself, any creditor of the company or any contributory of the company. The Director of Corporate Enforcement is now being granted the right to petition the court to have a company wound up on the grounds that it is in the public interest to do so. The minimum amount of indebtedness to entitle a creditor to serve a statutory demand on a company is increased to €10,000 from the current amount of €1,269.74. Further to a recommendation of the CLRG in its second report in 2004, large numbers of small creditors are now permitted to jointly petition for the winding up of a company where the combined debts total €20,000 or more. Such small creditors would otherwise be unable to petition individually due to costs associated with presenting a petition to the court.

Chapter 3 is concerned with members' voluntary winding up. Such a winding up can only be commenced where the directors have made a statutory declaration as to the ability of the company to pay its debts as they fall due. In all but the most unusual cases a members' voluntary winding up will now be commenced in accordance with the Summary Approval Procedure. Where a company has passed a resolution for its voluntary winding up, it must publish notice of that resolution in the CRO Gazette within 14 days of its passing. Protections and remedies for shareholders are contained here in cases where a declaration of solvency is made by the directors of the company. If a certain proportion of the creditors feel that the company is not in fact solvent, they may apply to the court to seek the conversion of the liquidation to a creditors' voluntary winding up. Such application can only be made within 30 days of the advertisement of the resolution for the voluntary winding of a company.

Chapter 4 deals with the resolution for and commencement of a creditors' voluntary winding up. This type of winding up is commenced by the company in general meeting where it feels that it will not be able to pay its debts to creditors. Alternatively, this type of winding up will be reverted to where a company has attempted to commence a members' voluntary winding up but is found to be insolvent. Under a creditors' voluntary winding up, the company is obliged to hold a creditors meeting and the creditors are entitled to nominate a liquidator for the winding up of the company.

Chapter 5 deals with the conduct of a winding up whether voluntary or court ordered. There is a requirement to notify the CRO where a winding up order is made and in a voluntary winding up, the liquidator must give notice of his or her appointment to the Registrar of Companies within 14 days of the date of his or her appointment.

Chapter 6 is concerned with the realisation of assets and related matters. The liquidator's entitlement to custody of the company's property and the circumstances in which floating charges can become invalid are set out here. Unfair preferences in favour of creditors where a company is deemed insolvent are dealt with and the liabilities and rights of persons who have been unfairly preferred are set out. A personal liability is imposed on officers of the company where adequate accounting records are not kept and the civil liability of officers of the company for fraudulent or reckless trading is provided for. This Chapter gives the court the power to assess damages against directors of a company's holding company. The directors can be obliged on an examination of their conduct to repay or restore money to the company or to make a contribution by way of compensation.

Chapter 7 concerns the distribution of the assets of the company among the creditors. The priority of costs, charges and expenses properly incurred by the liquidator is set out. This is now a provision common to all modes of winding up. The claimants which are preferential in a winding up are listed, repeating section 285 of the Companies Act 1963. The limit for wages and salary is increased to €10,000 in respect of any one claimant and the four month limit is retained.

Chapter 8 deals with the duties, powers, qualifications and remuneration of liquidators and provides for the first time a requirement for qualification to act as liquidator of a company. A provisional liquidator will only have such powers as are provided for by the court appointing him or her. Five categories of people may be appointed as liquidator. The categories are a member of a prescribed accountancy body, a practising solicitor, a member of another professional body recognised by IAASA or persons with practical experience of windings-up. New requirements are set out for professional indemnity insurance to be maintained by a liquidator.

Chapter 9 governs the area of contributories. The liquidator is given increased powers in this Chapter. For example, the liquidator now has the power to settle the list of contributories and to make calls on contributories in respect of the debts and liabilities.

Chapter 10 deals with committees of inspection. *Section 667* is new and provides for the committee of inspection in a court winding up to be established on the initiative of the liquidator or a minimum proportion in value of the creditors, without requiring court sanction.

Chapter 11 contains the miscellaneous powers of the court in a winding up, for example the power to annul or stay a winding up, the power to compel attendance of officers of a company at meetings and the power to order delivery of property of the company to the liquidator.

Chapter 12 contains other necessary provisions supplemental to the conduct of a winding up, for example the power of the ODCE to compel the liquidator to call meetings, the obligation of the liquidator to apply for a restriction of the directors and the obligation on disciplinary committees of prescribed professional bodies to report misconduct by liquidators to the ODCE.

Chapter 13 sets out the general rules as to meetings of members, contributories and creditors of a company in liquidation. It incorporates a number of provisions which are currently contained in the Rules of the Superior Courts.

Chapter 14 deals with the completion of a winding up. *Section 705* is new and deals with the dissolution of a company by the court. The method of dissolution required in a creditors' voluntary winding up is also applied to a court ordered winding up unless the court orders the liquidator to return to the court at the end of the winding up.

Chapter 15 contains provisions related to the Insolvency Regulation. This largely reproduces the relevant provisions of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

Chapter 16 sets out the offences by officers of companies in liquidation, offences of fraudulent trading and certain other offences including referrals to the Director of Public Prosecutions.

Part 12

STRIKE OFF AND RESTORATION

Part 12 contains 3 Chapters and 21 sections of law. It combines into one Part the many diverse provisions of the current law regarding the strike off and restoration of companies. The new provisions set out in one place all of the reasons why a company may be struck from the register and in another, the procedures for restoration to the register.

Chapter 1 distinguishes between voluntary and involuntary strike off, and makes clear that the Registrar may only strike a company off the register where one or more of the relevant grounds exist, and the appropriate procedure is followed. Previously the grounds for strike off were spread across more than one enactment and there was no distinction between involuntary and voluntary strike off.

In the case of involuntary strike off, the Registrar is now obliged, at the start of the process, to write to the directors of the company at their home address (as contained in CRO records) enclosing a copy of the strike off notice which is being sent to the company at its registered address.

A company may take a "remedial step" in order to avert the strike off process. Such a step will involve the company responding in a manner appropriate to the reason for the initiation of the strike off.

The concept of voluntary strike off has now been placed on a statutory footing, laying down certain conditions to be met before the process can commence. In particular, the company must pass a special resolution to seek the strike off of the company. The other provisions follow the main outline of the current non-statutory voluntary strike off process.

In line with the recommendation of the Company Law Review Group (CLRG), the Director of Corporate Enforcement is now empowered to require the directors of a company being struck off to produce a statement of affairs. Upon examination of such statement, the Director of Corporate Enforcement can then decide to make an application to court to require the director of the company to appear before it and answer on oath any question relating to the statement.

Chapter 2 governs the process of restoration of the company to the register. What was previously known as “administrative restoration” is now referred to as restoration on application to the Registrar. Such application must be made within 12 days of the date of the strike off, with an additional 3 months being provided for all of the documentation necessary for the restoration to be prepared and filed.

Restoration on application to the court can be made within 20 years of the date of dissolution and a new provision has been added so that the court may order the company to change its name upon making the restoration order. This is to cater for the possibility that a new company may have been incorporated while the company was struck off, with a name that is the same or similar to the name of the struck off company.

Chapter 3 is entitled “Miscellaneous” and contains a provision to ensure that the Revenue Commissioners have the necessary authority to communicate information to the Registrar which it has in relation to making, or failure to make, returns under the Taxes Consolidation Act 1997, without breaching its obligations to confidentiality contained in other legislation.

Part 13

INVESTIGATIONS

Part 13 substantially re-enacts, without any significant amendments, the law regarding the appointment of inspectors to companies and seeks to codify all law relating to the investigation of companies.

Chapter 1 provides interpretation for the Part as a whole.

Chapter 2 governs inspections by court appointed inspectors. This Chapter is drawn from the existing provisions which regulate investigations under the Companies Acts. The court may appoint one or more inspectors to a company, on the application of a variety of persons (including the company) to investigate the affairs of a company and to report on those matters. The court may give such directions as it considers expedient in relation to the investigation and the inspector may, if approved by the court, investigate the affairs of (and report upon) a related body corporate. Officers or agents of a company under investigation, or any other person as are so directed by an inspector, may be required to produce books or documents or give assistance and directors may be required to provide additional information in respect of banking transactions. The inspector has the power to examine officers and agents of a company and other persons. The inspector must produce a report on foot of the investigation to the court and the court must provide a copy of this report to the Director of Corporate Enforcement.

Chapter 3 concerns investigations initiated by the Director of Corporate Enforcement and derives from the current law as amended by the Company Law Enforcement Act 2001, which established the Office of the Director of Corporate Enforcement. The ODCE may appoint an inspector where there are circumstances suggesting a contravention of the rules regarding disclosure of interests in shares and debentures or to determine the true ownership of a company. If the Director of Corporate Enforcement considers that there is any difficulty in finding out the relevant facts about any shares in connection with an investigation, the Director may impose restrictions on those shares – for example, non-exercise of voting rights. The Director, or the court, may lift those restrictions and the court may order the sale of those shares. It is provided that certain actions in relation to restricted shares shall constitute a category 2 offence.

Chapter 4 contains miscellaneous provisions relating to this Part. It sets out the circumstances in which the Director of Corporate Enforcement may require a company or a third party to produce books or documents for the purposes of an investigation and allows for a Court order to be obtained requiring production of documents where a third party has failed to comply with a request from the ODCE. In addition, a District Court judge has the power under this Chapter to issue a search warrant if he or she is satisfied that reasonable grounds exist for suspecting that material information is to be found on any premises. *Section 796* contains a saving for privileged information so that in general, nothing in this *Part 13* shall compel the disclosure by any person of privileged legal material. However, the disclosure of material that is thought to be privileged may be compelled where the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the information is actually privileged legal material.

Part 14

COMPLIANCE AND ENFORCEMENT

This Part brings together the various compliance and enforcement provisions found in the existing legislation.

Chapter 1 deals with compliance and protective orders. The court may make an order to compel a company or any officer thereof to comply with the provisions of this Act. The court is also permitted under this Chapter to make a Mareva-type injunction to prevent the dissipation of the company's assets. The circumstances in which an injunction can be granted are now limited to cases where the primary cause of action also arises under this Act. Alternatively, the cause of action must arise under the provisions of the constitution of the company or relate to the holding of an office of the company.

Chapter 2 regarding disclosure orders re-enacts, with slight amendments, the existing provisions under which persons who have a financial interest in a company may apply to the court for an order compelling the disclosure of certain information about interests held by other persons in shares or debentures of a company. Specific provisions in relation to disclosure orders in cases of share acquisition agreements are included in this Chapter.

Chapter 3 deals with the restriction of directors of insolvent companies. Conditions are placed on the involvement in corporate life of those who have acted as directors of a company that has become insolvent. The restriction is not automatic – an application will have to be made to the court by the Director of Corporate Enforcement, the liquidator of the insolvent company or a receiver of the property of the company for a restriction order which will apply for a period of 5 years. To avoid being restricted, a director may avail of the defence of having acted honestly and responsibly in relation to the conduct of the affairs of the company. A director relying on that defence must now also show that they have, when requested to do so by the liquidator, cooperated as far as could reasonably be expected in relation to the conduct of the winding up.

A restricted director may act in relation to a company, provided that the company meets the capitalisation requirements as laid down in this Part. Regarding capitalisation requirements, the law has been clarified so that if, when restricted, a person becomes a director of a guarantee company without a share capital, one of the members of the company is now required to give a guarantee of not less than €70,000.

A director may apply for relief from a restriction order. This provision removes the existing limitation in the 1990 Act under which a relief application may only be brought within one year of the person being restricted – the application may be brought at any stage during which the person is restricted. The Director of Corporate Enforcement must now also be included as a notice party in any application for relief.

Finally, a new provision is inserted whereby a company is prohibited from utilising the Summary Approval Procedure where that company has a restricted person.

Chapter 4 sets out general provisions relating to disqualification, which is a sanction that involves a total ban on the involvement of the disqualified person with companies for the period of the disqualification order. Disqualification as a sanction is not limited to directors only – it can also apply to promoters, officers, statutory auditors, receivers, liquidators and examiners. Disqualification can either be automatic, which lasts for 5 years or such other period as the court sees fit, or court ordered for such period as the court sees fit. As with the provisions above in relation to restriction, a disqualified person may apply for relief from a disqualification order.

Chapter 5 is newly introduced and will allow persons to give and for the Director of Corporate Enforcement to accept, disqualification and restriction undertakings. This means that it will be possible to avoid a court appearance where the person concerned agrees to give an undertaking not to act in a manner as would be prohibited if that person were the subject of a restriction or disqualification order. This process has been introduced in accordance with the recommendation of the Company Law Review Group in its 2007 Report following consideration of similar UK law provisions.

Chapter 6 deals with enforcement in relation to disqualification and restriction orders and lays down the criminal and civil sanctions that flow from acting in a prohibited manner while restricted or disqualified. Included in this Chapter is the offence of acting on the instructions of a person who is disqualified or prohibited from acting. Provision is also made here for a register of disqualified persons, which is to be maintained by the Registrar of Companies.

Chapter 7 contains provisions relating to offences generally. The existing provision under which all summary prosecutions under the Companies Acts may be brought by the Director of Public Prosecutions or the Director of Corporate Enforcement is re-enacted. A number of specific offences may also be prosecuted by the Registrar of Companies – however, the number of these offences has been reduced in the Act so as to include only those offences which can be prosecuted on the basis of evidence obtained directly from internal CRO records or court orders.

Under this *Chapter 7*, a new four-tier categorisation of offences is introduced. This follows on from a recommendation of the CLRG and it is proposed that, subject to a small number of exceptions in the case of the most serious offences (for example prospectus and market abuse offences), that all offences under the Companies Acts should be categorised according to this four-tier scheme. At the higher end of the scale, category 1 offences carry, following conviction on indictment, a term of imprisonment up to 10 years and/or a €500,000 fine. A summary prosecution for a category 1 offence will result in a Class A fine (as defined in the Fines Act 2010 – currently up to €5,000) and/or a term of imprisonment up to 12 months. A category 2 offence carries a similar penalty for a summary conviction and for a conviction on indictment, will result in imprisonment of up to 5 years and/or a €50,000 fine. Category 3 is a summary offence only, attracting a term of up to 6 months imprisonment and/or a Class A fine. Category 4 offences can also only be tried summarily and are punishable by imposition of a Class A fine.

A further new provision has been introduced which provides that, following a conviction for an offence under this Act, the trial court may order that the convicted person should remedy any breach of the Act in respect of which they were convicted.

Chapter 8 contains additional general offences, including the improper use of the words “limited” or “teoranta” and the destruction, mutilation or falsification of a book or document relating to the property or affairs of the company.

Chapter 9 deals with how answers given to inspectors may be used in evidence, how certain documentation may be given to a jury and presumptions as to signature, content and admissibility of company documentation.

Part 15

FUNCTIONS OF REGISTRAR AND OF REGULATORY AND ADVISORY BODIES

Part 15 contains provisions relating to the Registrar of Companies, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Director of Corporate Enforcement and the Company Law Review Group. For the first time, the powers and duties of both the Minister and these bodies are brought together in one coherent group of legislative provisions.

Chapter 1 contains the provisions concerning the powers and duties of the Registrar of Companies. It re-enacts a number of provisions contained in existing Companies Acts.

Chapter 2 is concerned with the Irish Auditing and Accounting Supervisory Authority (IAASA) and largely re-enacts the provisions of the Companies (Auditing and Accounting) Act 2003 which govern the powers and duties of the Authority. Funding for IAASA continues to be provided jointly by the government (40%) and the accountancy bodies (60%), subject to approval of its work programme. There is a provision allowing IAASA to seek additional funding (the 'reserve levy') from companies in particular circumstances.

Chapter 3 effectively re-enacts sections 7 to 18 of the Company Law Enforcement Act 2001, which outline the powers and duties of the Director of Corporate Enforcement. The Office of the Director of Corporate Enforcement was established under that Act and was given general responsibility for the enforcement of company law. The Director is appointed by the Minister following the selection of a suitable candidate through a competition held by the Commission for Public Service Appointments. The Director has a separate legal identity as a corporation sole with perpetual succession. This allows for continuity in the operation of the office of Director notwithstanding changes in the holder of the office. The term of appointment of the Director of Corporate Enforcement is five years or less and such appointment may be renewed for further periods, of up to five years each, at the discretion of the Minister.

The general functions of the Director of Corporate Enforcement are set out in this Chapter and can be summarised as follows—

- to enforce and encourage compliance with the Companies Acts, including by the prosecution of offences by way of summary proceedings;
- to investigate instances of suspected offences under the Companies Acts;
- to refer cases to the Director of Public Prosecutions for prosecution on indictment;
- to exercise a supervisory role over the activities of liquidators and receivers in the discharge of their functions under the Companies Acts.

Chapter 4 deals with the Company Law Review Group and re-enacts sections 67 to 71 of the Company Law Enforcement Act 2001. The Group was set up under that Act to monitor, review and advise the Minister on company law matters. Its membership includes all relevant stakeholder interests, with members from Government Departments; the professions (solicitors, barristers and accountants); employer and business interests; regulatory bodies; trade union interests and individual legal and finance practitioners. The Group undertakes a work programme every 2 years and must submit an annual report on its activities during the year to the Minister by the end of March.

Part 16

DESIGNATED ACTIVITY COMPANIES (DAC)

Part 16 of the Act makes provision for a type of private company to be known as a designated activity company or "DAC". There will be two types of DAC under the Act - a private company limited by shares and a private company limited by guarantee, having a share capital. The primary defining feature of a DAC will be the continued existence of an objects clause in the constitution of the company. This is in contrast to the new model private company limited by shares dealt with in Volume 1 of the Act, the constitution of which will no longer contain an objects clause.

The DAC limited by shares will be the closest type of company to the existing private company limited by shares under the current law, and during the transition period, existing private companies may elect whether to opt into the new regime for private companies or alternatively, to retain their objects clause by converting to a DAC. This conversion process is provided for in *Chapter 6* of *Part 2* of the Act. An existing private company that does not want to opt-in to the new regime can do so easily by following the procedure laid down in *section 64* of the Act. However, a DAC will not benefit from the reforms applicable to the new model private company limited by shares, such as, for example, the one document constitution and the possibility of having only one director.

It is envisaged that entities which would welcome the continued availability of a private company limited by shares and having an objects clause include special purpose companies – for example those incorporated for joint ventures or for use in a financing transaction. However, the Act does not restrict the availability of DACs to persons engaged in such activities and it is open to any company to incorporate or convert to a DAC.

A DAC limited by guarantee and having a share capital should be contrasted with the company limited by guarantee (CLG) provided for in *Part 18* of the Act. A CLG does not have a share capital and is a "pure" guarantee company, as such.

Chapter 1 of this *Part 16* deals with preliminary matters and definitions for the purposes of this Part. The provisions of *Parts 1* to *14* of the Act are applied to DACs, except to the extent that they are disapplied or modified by the Table to *section 966,* or any other provision of the Part.

Chapter 2 contains provisions in relation to the incorporation of DACs and other consequential matters. The key features of a DAC (as compared to the new model private company limited by shares) are as follows:

- There are 2 types of DAC – limited by shares or limited by guarantee and having a share capital.
- A DAC has a 2 document constitution comprised of a memorandum (containing an objects clause) and articles of association. A sample form of the constitution can be found in *Schedules 7* and *8* to the Act.
- The corporate capacity of a DAC is not limited by its constitution. This new formulation of the doctrine of *ultra vires* does not prejudice persons dealing with a DAC that is acting *ultra vires* but the directors of the DAC may be held to account for causing a DAC to take such *ultra vires* action. This will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. The doctrine of constructive notice has been removed by providing that a person is not bound to enquire as to whether an activity is *intra vires.*
- A DAC must have a minimum of 2 directors – the option of only having 1 director is confined to the new model private company limited by shares.
- A DAC must hold an AGM, unlike the new model private company limited by shares (unless it is a single member company as provided for in *section 197* of the Act and then it is entitled to dispense with the holding of an AGM).

A DAC may be formed for any lawful purpose by any person or persons subscribing to a constitution and complying with the provisions of the Act. The liability of the members of the company will be limited to any amount unpaid on shares (and if applicable the amount of the guarantee) and a DAC can have from 1 to 149 members excluding certain persons. The name of a DAC must end with the words “designated activity company”, or the abbreviation “DAC” (whether capitalised or lower case, and with or without punctuation marks) or the Irish equivalent. However, an exemption may be obtained from the requirement to use these words if the company has a charitable object, is not-for-profit and has made the appropriate application to the CRO.

Chapter 3 contains the provisions relating to the share capital of a DAC. This Chapter adapts *section 69* of the Act and provides that the prohibition on the making of offers to the public does not extend to debentures and other debt instruments. Therefore, a DAC may (unlike the new model private company limited by shares) have its debentures (or interests in them) listed or traded, but shall not be permitted to have other securities (or interests in them) listed or traded. In this way, all private companies that are currently permitted to list debentures and debt securities can continue to do so by converting to a DAC.

Chapter 4 deals with corporate governance and provides that every DAC must have at least two directors, thus distinguishing it from the model private company limited by shares which is permitted to have only one director appointed. This Chapter also adapts *section 176(3)* and *(4)* of the Act to DACs, meaning that a DAC may not dispense with the holding of an AGM. However, single member DACs will still be permitted to dispense with the holding of an AGM by virtue of *section 197*.

Chapter 5 adapts for DACs the provisions of *Part 6* of the Act on financial statements, annual return and audit. The requirement in *Part 23* of the Act to prepare a corporate governance statement will apply to a DAC that has debentures admitted to trading on a regulated market on an EEA state. Further, a DAC may not avail of the audit exemption where it has debentures admitted to trading, or where it or its holding company is a credit institution or insurance undertaking.

Chapter 6 provides that, in the event of a DAC being wound up, the members shall be liable as contributories, but that liability is limited to the amount (if any) unpaid on their shares, or, in the case of a DAC limited by guarantee, the amount of the guarantee. In certain limited circumstances, past members may also be liable for contributory payments in a winding up.

Chapter 7 applies *section 511* of the Act on the bringing of a petition for examinership, with certain necessary modifications for a DAC.

Chapter 8 applies *Chapters 1*, *2* and *4* of *Part 23* of the Act on public offers of securities, prevention of market abuse and transparency to DACs.

Part 17

PUBLIC LIMITED COMPANIES (PLC)

Part 17 of the Act is concerned with Public Limited Companies (PLCs). The law in *Parts 1* to *15* of the Act applies to PLCs as it does to the new model private company limited by shares, subject to the exceptions set out in the Table of disapplications contained in *section 1002* and any other adaptations made in this Part. The key difference between public limited companies and private companies is that only PLCs will be permitted to list their shares on a stock exchange and offer them to the public.

Many of the provisions in this Part are necessitated by EU law - namely Directive 77/91/EEC (known as the 2nd Company Law Directive) on the formation of public limited liability companies and the maintenance and alteration of their capital (as amended by Directive 2006/68/EC), which was given effect in Irish law by the Companies (Amendment) Act 1983. The general aim of this Part has not been to reform the law, but rather to gather it from its dispersed sources and set it out with more clarity of presentation and wording.

It should be noted that the law on market abuse, public offer of securities and transparency which applies to listed PLCs has been housed in its own Part of the Act for the sake of clarity and ease of reference - see *Part 23*.

Chapter 1 sets out a number of definitions that are used for the purposes of this Part. It is provided that the authorised minimum issued share capital of a PLC must be at least €25,000 or such greater amount as the Minister may specify by order. This Chapter explains that, although an investment company is a type of PLC, the provisions of *Part 24* of the Act will apply to investment companies rather than the provisions of this *Part 17*. The provisions of *Parts 1* to *14* of the Act that do not apply to PLCs are set out in the Table to *section 1002* of the Act. It is stated that a Societas Europae (SE), which is a type of European company, is to be regarded in Ireland as a PLC under this *Part 17*.

Chapter 2 of this Part deals with incorporation and consequential matters and corresponds in general with *Part 2* of the Act which concerns the incorporation of the model private company limited by shares. A PLC may be formed for any lawful purpose by a person subscribing to a constitution and complying with the provisions of the Act. A PLC is now permitted to have as few as 1 member and there is no maximum number on the membership of such a company. The name of a PLC must end with the words "public limited company", or the abbreviation "PLC" (whether capitalised or lower case, and with or without punctuation marks) or the Irish equivalent.

Chapter 3 contains provisions relating to the special share capital requirements for PLCs, which derive from the Companies (Amendment) Act 1983, without any major amendments. A PLC (unlike the other private company types) shall have the capacity to offer, allot and issue any securities (including shares) to the public. A PLC may not allot securities unless authorised to do so by ordinary resolution of the company or by the constitution of the PLC. Such authority must not exceed 5 years.

The requirement for a PLCs shares to be paid up as to 25% of their nominal value (and all of any premium) is to be found in this Chapter, together with the requirement for experts' reports for non-cash consideration for the allotment of shares, and the general prohibition on the giving of financial assistance by the PLC in connection with the acquisition of shares in itself or its holding company.

Chapter 4 is concerned with the disclosure of interests in shares in the case of individual or group acquisitions and has been modelled on Chapter 2 of Part IV of the Companies Act 1990. The circumstances in which a person will be obliged to notify a PLC of his or her interest in shares in the company are set out and where a person's spouse, civil partner or child, or a body corporate in which that person has a specified interest, has an interest in shares in a PLC, that interest will be attributed to the person. Parties to a share acquisition agreement are obliged to keep each other informed of their interests in shares, as each party is regarded as having the interests of all the other parties in the shares of the PLC. There are sanctions set out to deal with circumstances where the notification requirement is not complied with. Under this *Chapter 4*, a PLC must maintain a register of notifications received.

Chapter 5 allows for the acquisition by a PLC of its own shares in certain circumstances and lays down the particular rules to be adhered to in both market and off-market purchases. These provisions derive from Part XI of the Companies Act 1990. The consideration for the purchase must come solely from distributable profits, and the result of a purchase must not be to reduce the nominal value of non-redeemable issued share capital below one-tenth of the nominal value of the total issued share capital.

Chapter 6 regulates the making of distributions by a PLC, thereby re-enacting the relevant provisions of Part IV of the Companies (Amendment) Act 1983. A PLC may not make a distribution where this will result in its net assets being less than the aggregate of its called-up share capital and undistributable reserves.

Chapter 7 provides the statutory basis for transfers of uncertificated securities and gives the Minister the ability to require all PLCs to procure the creation of shares and the registration of transfer of shares in electronic form. This is in line with the amendments to section 239 of the Companies Act 1990 effected by section 12 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Chapter 8 is concerned with corporate governance and includes provisions distinguishing the PLC from the new model private company limited by shares. In particular, a PLC must have at least 2 directors. It also deals with voting arrangements for shareholders of PLCs and in this regard, contains provisions from the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009). A PLC is obliged to establish an audit committee and certain corporate governance provisions for PLCs that have shares admitted to trading on a regulated market are set out.

Chapter 9 outlines the duties of directors and other officers of PLCs, which are taken from the current law. Directors of a PLC must convene an EGM if the net assets of the company drop below one-half of its called-up share capital. The directors of a PLC are also obliged to ensure that the person appointed as secretary has the necessary skills to discharge the duties associated with that post, and that the person appointed as secretary meets certain conditions – for example have 3 years' experience as a company secretary or being a member of a recognised professional body.

Chapter 10 adapts the provisions of *Part 6* of the Act on financial statements, annual return and audit to the context of a PLC. One of the provisions of this Chapter allows directors of a PLC to prepare and circulate a summary financial statement to shareholders instead of full annual accounts. However, the shareholders may still request a copy of the full annual accounts from the company if they so wish. The financial statements of a PLC must be audited.

Chapter 11 contains provisions concerning registers of debenture holders, with the obligations only applying to series of debenture stock. This re-enacts sections 91 and 92 of the Companies Act 1963.

Chapter 12 adapts the provisions of *section 511* of the Act to apply for a PLC in order to allow the bringing of a petition for examinership.

Chapter 13 is concerned with reorganisations and provides that, where an offeror has become bound, under *Chapter 2* of *Part 9* (on acquisitions) or Part 5 of the Takeover Regulations 2006, to acquire the shares or securities of a dissenting shareholder or security holder, the PLC must enter the offeror in its register of securities as the holder of the uncertificated securities concerned.

Chapter 14 deals with strike-off and provides for an additional case, whereby the Registrar may apply for the strike off of a PLC which has not been issued with a trading certificate within one year of its registration as a PLC. This expands on section 8 of the Companies (Amendment) Act 1983. A company which has been dissolved may not be restored as a PLC unless it was a PLC immediately before its dissolution.

Chapter 15 adapts *section 748(2)* of the Act on investigations to apply to a PLC so that the minimum number of members who may apply for the appointment of an inspector to a company under *Part 13* of the Act in respect of a PLC shall be 100, as opposed to 10 for a private company limited by shares.

Chapter 16 and *Chapter 17* deal with mergers and divisions respectively for PLCs. These provisions differ from the corresponding *Chapters 3* and *4* of *Part 9* of the Act on mergers and divisions of private companies limited by shares. These *Part 17* provisions are instead based mainly on the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

Chapter 18 applies *Chapters 1*, *2* and *4* of *Part 23* on public offer of securities, prevention of market abuse etc. to PLCs.

Part 18

COMPANIES LIMITED BY GUARANTEE

Part 18 of the Act makes provision for companies limited by guarantee, not having a share capital. Such companies are known as CLGs. Guarantee companies that have a share capital will be private companies and as such will be considered to be designated activity companies (DAC) under *Part 16* of the Act.

Since Guarantee Companies do not have a share capital, members of such companies do not have a distinct economic interest in their capital. It is for this reason that CLGs are a popular type of company for charities, sports and social clubs and management companies.

Chapter 1 deals with preliminary matters and definitions for the purposes of *Part 18.* The provisions of *Parts 1* to *14* of the Act are applied to CLGs except to the extent they are disapplied or modified by the Table in *section 1168* or any other provision of *Part 18.* In a Guarantee Company, the members' liability is limited to such amount as they undertake in the constitution of the company to contribute to assets of the CLG in event of its winding up.

Chapter 2 contains provisions in relation to the incorporation of CLGs and other consequential matters. A CLG may have a minimum of 1 member (compared with the current minimum of 7) and has a 2 document constitution, consisting of a memorandum and articles of association. A sample form for this constitution can be found in *Schedule 10* to the Act. The name of a CLG must end with the words "company limited by guarantee", or the abbreviation "CLG" (whether capitalised or lower case, and with or without punctuation marks) or the Irish equivalent. A CLG will be exempt from the requirement to use such a suffix to its name if it has a charitable object, is not-for-profit and has made the appropriate application to the CRO. At end of the transition period (which is 18 months from commencement), the name of an existing guarantee company shall be deemed to be altered by replacing "limited" with ''company limited by guarantee'' (or the Irish equivalent where appropriate); transitional arrangements are set out if during the transition period the company has already made that change.

Chapter 3 has the title "Share Capital", although a guarantee company does not actually have a share capital. However, a CLG may offer debentures to the public. *Section 115* (which deals with the acquisition by a subsidiary of shares in its holding company) is adapted here to apply to a guarantee company.

Chapter 4 deals with corporate governance and it applies most of the provisions of Volume 1 to the guarantee company in this regard. However, a CLG, unlike the model private company limited by shares, must have at least 2 directors and must hold an AGM.

Chapter 5 contains provisions relating to financial statements, annual return and audit and adapts certain provisions of *Part 6* of the Act to CLGs. The audit exemption is now being extended to guarantee companies under the Act. It is thought that this will benefit the many guarantee companies that are charities or sports clubs etc. If the balance sheet of the company is less than €4.4million, the turnover is less than €8.8million and the average number of employees is less than 50, it may then avail of the audit exemption under *Part 6* of the Act. Any one member of the company is entitled to object to the use of the exemption and thus force a company to carry out an audit.

Chapter 6 concerns liability of contributories in a winding up. In a winding up, there being no share capital, the liability of members is confined to the guarantee sum provided for in the constitution of the CLG and includes former members whose membership ceased within one year of the winding up.

Chapter 7 deals with petitions for examinerships in the case of a CLG.

Chapter 8 deals with investigations and removes reference, in respect of persons who may

apply to court for appointment of inspector to a CLG, to persons holding one-tenth or more of share capital, as this is not applicable in context of CLG.

Chapter 9 applies *Chapters 1, 2* and *4* of *Part 23* (which relate to prospectus law, market abuse law, and transparency law*)* to CLGs.

Part 19

UNLIMITED COMPANIES

Part 19 of the Act makes provision for unlimited companies.

This Part is structured in such a way that it covers both private unlimited companies and public unlimited companies. In this regard three different types of unlimited companies are being catered for – the private unlimited company with a share capital (ULC), the public unlimited company with a share capital (PUC) and the public unlimited company that has no share capital (PULC).

Chapter 1 begins with a number of definitions used throughout *Part 19* and provides that the term "unlimited company" (UC) may refer to any of a ULC, PUC or PULC. The architecture of the law applicable to UCs is that the law applicable to a model private company limited by shares (i.e. *Parts 1* to *14*) will apply to a ULC, PUC or PULC, save to the extent disapplied, modified or supplemented by any provision of *Part 19.*

Chapter 2 contains provisions in relation to the incorporation of unlimited companies and other consequential matters. It sets out the manner in which unlimited companies may be formed and registered and distinguishes between an unlimited company with or without share capital. In both instances the unlimited nature of the liability of the members is catered for.

Chapter 3 makes provision for the share capital of unlimited companies and is intended to mirror current law.

Chapter 4 deals with corporate governance. *Section 1249* provides that an unlimited company, unlike the new model company limited by shares, must have at least 2 directors.

Chapter 5 adapts, to the context of an unlimited company, the provisions of *Part 6* of the Act on financial statements, annual return and audit. Unlimited companies will, under this Act, prepare their financial statements pursuant to *Part 6* and Schedules 3 and 4 of the Act, as opposed to the 6th Schedule to the Companies Act 1963 as that Schedule is not being carried over into the new law.

Chapter 6 deals with winding up of an unlimited company. In the event of a winding up, every present and past member shall be liable to contribute an amount sufficient for payment of the debts and liabilities of the company, and any costs, charges and expenses of the winding up, and for the adjustment of the rights of contributories among themselves.

Chapter 7 applies *section 511* of the Act on petitions for examinerships to unlimited companies with certain modifications.

Chapter 8 deals with investigations and sets out the minimum number of members who may apply for the appointment of an inspector to an unlimited company.

Chapter 9 applies the provisions of *Part 23* of the Act (which deals with public offers of securities, financial reporting by traded companies, prevention of market abuse, etc.) to unlimited companies.

Part 20

RE-REGISTRATION

Part 20 of the Act makes provision for re-registration of companies. A company will generally be permitted to re-register as another type of company subject to complying with the requirements applicable to that other company type. Re-registration will involve the passing of a special resolution and the delivery of certain documents, including a compliance statement, to the CRO; additional requirements may apply depending on the type of company following re-registration.

Chapter 1 sets out the interpretation of terms used throughout the Part.

Chapter 2 contains the general provisions applicable to all re-registrations. The new approach permits a registered company to re-register as any other company type, the formation of which is provided for under the Act. Under existing law, a company may re-register as another company type only if there is an express provision in the Act authorising the re-registration of that particular company type as the other company type. This means that certain company types (for instance, companies limited by guarantee without a share capital) cannot re-register, as provision is not made for such company types to re-register as any other company type. Neither can any other company type re-register itself as a company limited by guarantee. This Part provides that a company is entitled to re-register as any other type by passing a special resolution to that effect.

A copy of the resolution, with an application in the prescribed form, must be delivered to the Registrar of Companies, together with a statement of compliance from a director or secretary of the company. Such company will also have to comply with the requirements in *Chapter 3* in relation to the company type to which it is converting. The focus will be on complying with the requirements which the Act sets out in respect of the other company type to which the company is seeking to convert.

Chapter 3 sets out the special requirements for re-registration depending on the destination company type in question. A certificate of incorporation on re-registration issued by the Registrar to the applicant company will be conclusive evidence that the requirements of *Part 20* have been complied with.

Part 21

EXTERNAL COMPANIES

Part 21 of the Act makes provision for the registration and disclosure requirements of external companies (also referred to as foreign companies or overseas companies) which have been formed and registered outside the State but which have a connection with Ireland. The Company Law Review Group has proposed that the law in relation to external companies be modified from the current position which provides for both the concept of "place of business" and the concept of "branch", to a position where the new law would provide only for the "branch" concept. Ireland is required to provide for the "branch" concept under EU law, but we are not required by EU law to provide for "place of business" – the latter arises only under current Irish domestic law.

The concept of "place of business" is currently governed by Part XI of the Companies Act 1963. Place of business is not defined under that Act but is generally thought to mean an entity established outside Ireland which is performing (in Ireland) activities ancillary or incidental to the company's business. Where an external limited liability company establishes a place of business within Ireland, it must register as such with the CRO and must provide a copy of its memorandum and articles of association. The CRO will then issue to that company an external company number. The main feature of a place of business is that it does not have to file accounts with the CRO. This creates an incentive for companies to remain defined as "a place of business" as long as possible, and to avoid becoming a branch.

The concept of "branch" is governed by the Branch Disclosure Regulations 1993 (S.I. 395 of 1993) which implement the EU Branch Disclosure Directive 1989 (the 11th Company Law Directive, 89/666). As with a place of business, the Directive does not provide a definition for branch. However, European case law has indicated that a branch has the appearance of permanency and is physically equipped to negotiate business with third parties directly. Where a branch is a limited liability external company, it must register with the CRO. It is given an external company number and it must file its accounts in Ireland.

By not retaining the concept of "place of business", it is hoped to remove the uncertainty in the current law whereby it can be unclear whether a particular company is a branch or a place of business. The consequence of this will be that external companies will have to elect to register as a branch (and thus be required to file accounts) or will not register at all (and thus will not receive an Irish Company Registration number). It is expected that this will give greater clarity to third parties who are dealing with such companies.

Chapter 1 contains definitions for the purposes of the Part. Certain provisions of *Parts 1* to *14* are applied to external companies having a branch in Ireland. The provisions in *Part 7* in relation to the registration of charges will apply to external companies which have registered in Ireland. However, an external company which does not register with the CRO will neither be required nor permitted to register a charge. An undischarged bankrupt will be barred from being a director or secretary of an external company.

Chapter 2 deals with the filing obligations of external companies. External companies (both EEA and non-EEA) must file their constitutional documentation and certain other information with the CRO within 30 days of establishing a branch in the State. Such companies must also nominate a person entitled to accept service on their behalf and authorised to ensure compliance with this Part. EEA companies with a branch in Ireland must register their accounting documents with the Registrar to the same extent to which they are so required to disclose them to the public in their home state. Non-EEA companies must file either (i) the accounting documents that the external company is required to file in its home state, or (ii) accounts prepared and audited in accordance with EU law or IFRS. A non-EEA company must also deliver to the Registrar a statement indicating the amount of its called-up share capital, unless this information is included in its accounting documents.

Chapter 3 provides that an external company must, on every letter and order form, give particulars of its place of registration and registration number; the name of the company (if different from the name of the branch), its legal form and its registered address; (if applicable), that it is being wound up; the registration number in Ireland of the branch; and any reference to the share capital of the company must be to the paid-up share capital of the company. It is also provided that all documents in a foreign language must have annexed to them a certified translation in Irish or English.

Chapter 4 provides that documents will be sufficiently served on an external company if sent to a person notified to the Registrar as entitled to accept service on behalf of that external company; or where no such person is notified, by leaving it at or posting it to any Irish branch of that external company.

Chapter 5 concerns compliance and states that the duty of securing compliance by an external company with the provisions of this Part will fall upon the persons authorised by the company in that regard.

Part 22

UNREGISTERED COMPANIES

Part 22 deals with unregistered companies and joint stock companies and the application of the Act to companies formed or registered under previous Acts. It also provides a mechanism for an unregistered company to register as a PLC. The most important unregistered company in Ireland is the Governor and Company of the Bank of Ireland.

Chapter 1 derives from section 377 of the Companies Act 1963 (as amended) and deals with the application of the Act to unregistered companies. Certain provisions of the Act, listed in *Schedule 14* shall apply to unregistered companies and the Minister has the power to make regulations to add or subtract from that list of provisions.

Chapter 2 concerns the registration of certain bodies (other than joint stock companies) as companies. An unregistered company under may register as a new private company limited by shares, a DAC, a PLC, a CLG or an unlimited company if a majority of its members assent to the registration, and a copy of this resolution and of a statement (certified by an officer of the company) setting out details of the company are sent to the Registrar. Additional requirements must be met for registration as a PLC.

Chapter 3 deals with the winding up of an unregistered company. It largely re-enacts (with some minor modifications) sections 344 to 349 of the Companies Act 1963. An unregistered company may be wound up under *Part 11* of the Act and the 4 cases in which an unregistered company shall be deemed to be unable to pay its debts are set out. The parties who will be deemed to be contributories in a winding up are listed.

Chapter 4 addresses the application of the Act to companies formed or registered under former acts. This largely re-states the provisions of Part VIII of the Companies Acts 1963. Provisions as to companies registered under the Joint Stock Companies Acts are also included.

Chapter 5 broadly re-states the provisions of Part IX of the Companies Act 1963, but has been amended to apply primarily to joint stock companies. A joint stock company is a company that has a permanent paid up share capital of a fixed amount divided into shares, also of fixed amount and/or held and transferable as stock. Such a company is formed on the principle that its members shall comprise only the holders of those shares/stock, and when registered with limited liability under this Chapter, this company type will be deemed to be a company limited by shares. A joint stock company may at any time register as a new private company limited by shares, a DAC, a company limited by guarantee or an unlimited company. To do so, it must deliver the relevant documents to the Registrar, those documents being verified by a declaration of any 2 or more principal officers of the company, and any additional evidence required by the Registrar as to the nature of the company. A company registered under this Chapter may substitute a memorandum and articles of association for its old deed of settlement.

Part 23

Public Offers of Securities, Financial reporting by Traded Companies, Prevention of Market Abuse etc.

This *Part 23* contains the provisions relating to prospectus law, market abuse law, and transparency law. In particular, provisions are set out regarding the consequences of a breach of a measure forming a part of any of these, and requiring a company with traded securities to prepare a corporate governance statement. It was decided, for the sake of clarity, to house these provisions in a stand-alone Part rather than in *Part 17* of the Act on PLCs, as originally envisaged in the General Scheme.

Chapter 1, concerning public offers of securities, provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Prospectus Directive (2003/71/EC). The provisions in this Chapter are taken from Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Chapter 2 on market abuse law provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Market Abuse Directive (2003/6/EC). This Chapter re-enacts Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Chapter 3 lays down the requirement for a corporate governance statement to be included in the directors' report of a traded company. It also deals with the application of certain provisions of *Parts 5* and *6* of the Act where the company is a traded company.

Chapter 4 deals with the transparency obligations of publically quoted companies and provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Transparency Directive (2004/109/EC). This Chapter derives from Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

Part 24

INVESTMENT COMPANIES

Part 24 of the Act makes provision for the establishment of companies as investment companies, currently provided for under Part XIII of the Companies Act 1990 ("Part XIII Companies"). These Part XIII Companies are commonly referred to as non-UCITS investment companies, as distinct from those established under the EU UCITS Directives regime, which is transposed into Irish law through the Minister for Finance's UCITS Regulations (S.I. 352 of 2011). In order to be permitted to operate, Part XIII Companies must be authorised by the Central Bank. Such companies are a key constituent of the set of legal structures under which the international collective investment funds industry operates in Ireland.

With a small number of exceptions, Part 24 is a re-statement of the existing law as it applies to Part XIII Companies. An investment company is a type of PLC – this is provided for in *section 1001* of *Part 17* of the Act. That provision explains that *Part 17* only applies to PLCs that are not investment companies and that it is *Part 24* that contains the provisions in relation to investment companies. An investment company cannot be an SE which is a type of European public company.

Chapter 1 defines an 'investment company' as a PLC that is permitted to have variable capital, its sole object being, as stated in its memorandum of association, the collective investment of its funds so as to spread investment risk and give its members the benefit of the results.

Chapter 2 describes how an investment company can be incorporated and contains provisions in relation to its authorisation and supervision by the Central Bank.

Chapter 3 contains provisions specific to the share capital of an investment company and deals with the purchase of own shares.

Chapter 4 allows an investment company to opt to prepare its financial statements in accordance with a body of accounting standards other than IFRS. These standards can be USA, Canadian or Japanese GAPP or authorised standards from any other state or territory prescribed by the Minister. It also applies *Chapter 3* of *Part 23* regarding the corporate governance statement of investment companies whose shares are admitted to trading on regulated markets in an EEA State.

Chapter 5 provides for the winding up of an investment company by the court and lays down circumstances for winding up additional to those found in *section 570* of *Part 11* of the Act. These provisions take account of the roles of the trustee and the management company.

Chapter 6 provides that an investment company that has been struck off may apply to the court to be restored to the register within 2 years of the date of dissolution of the company. This contrasts to a period of 20 years for other company types under the Act.

Chapter 7 applies certain provisions of *Part 23* of the Act (Prospectus, Market Abuse etc.) to investment companies, in so far as these provisions are applicable to companies other than PLCs that fall within *Part 17*.

Chapter 8 provides a mechanism by which segregated liability will apply to umbrella funds, that is, that the assets of one sub-fund within an umbrella fund will be protected from claims arising against other sub-funds. Section 256A(2) to (5) and sections 256B to 256D of the Companies Act 1990, as inserted by section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, in relation to applying segregated liability to sub-funds trading before 10 June 2005 are now housed in *Schedule 17* to the Act for the purposes of clarity.

Chapter 9 contains provisions allowing investment companies to move their head office into or out of the jurisdiction without having firstly to wind up. The mechanism is subject to specified requirements and conditions.

Part 25

MISCELLANEOUS PROVISIONS

The final Part of the Act, *Part 25*, contains miscellaneous provisions that do not naturally "fit" in any of the preceding Parts of the Act.

Chapter 1 deals with foreign insolvency proceedings, including those covered by the EU Insolvency Regulation. The term "insolvency proceedings" refers to proceedings opened under Article 3 of the Insolvency Regulation in a Member State, other than the State and Denmark, where the proceedings relate to a body corporate. In addition to windings-up, the provisions of this Chapter also apply to receiverships, reorganisations, acquisitions, mergers and divisions and examinerships.

This Chapter allows for the recognition of winding up orders from non-EU states and Denmark by the High Court. It then goes on to re-enact the provisions that gave effect to the Insolvency Regulation (not including provisions already found in *Chapter 15* of *Part 11* of the Act). These provisions deal with, among other things, the registration of judgments given in insolvency proceedings, the enforcement of such judgments, the interest payable thereon and other procedural matters relating to costs, venue and language of claims.

Chapter 2 re-enacts certain miscellaneous provisions from the existing Companies Acts, dealing with a variety of matters, from a prohibition on partnerships with more than 20 members to the eligibility to act as public auditor to an Industrial and Provident Society or a Friendly Society.

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