Observations & Recommendations

on the

Companies Bill 2012

Interim Submission

July 2013

Introduction

The Irish Congress of Trade Unions (ICTU) is the representative voice of workers and their trade unions on the island of Ireland. There are 49 unions affiliated to Congress with a total membership of 778,136, of whom 566,336 are in the Republic of Ireland and 211,800 are in Northern Ireland.

The crisis has underscored the need for stronger regulation

The financial crisis has revealed severe shortcomings in Ireland's corporate governance framework. Existing standards and laws along with inadequate enforcement meant that the necessary checks and balances were not in place. Ireland's corporate culture and, in particular, the structure of bonus and reward systems, played a central role but so did light touch regulation, voluntary codes and a regulatory regime focused on 'comply or explain' rather than comply or face enforcement backed up with genuinely dissuasive sanctions.

Bill continues to lean in the direction of 'light touch' regulation

When the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton, TD published the Companies Bill in late 2012 he outlined the Governments' determination to 'make Ireland the best small country in the world in which to do business.'

Congress supports that aim. However, we believe that delivering accountability should be an objective for the legislation. In addition, we do not believe that light touch regulation is the only way to achieve a company law regime that is supportive of small business. The rationale underpinning many of the changes proposed in the Bill was put forward, discussed and drafted by the Company Law Reform Group (CLRG) during the Celtic Tiger years - before the devastating impact of 'light touch' regulation on the economy became all too clear.

Unlike other countries, there has been no Inquiry into the causes of the banking and economic crisis in order to establish deficiencies in the areas of Director's responsibilities, auditing and accounting rules, company law or corporate governance generally. The Bill's light touch, focus on business' interest, does not take proper account of the wider public interest or the interests of affected third parties, many of whom are likely to be small businesses suppliers or employees.

CONGRESS' OVERARCHING MESSAGE IS THAT PROCEEDING TO IMPLEMENT A PRE-CRISIS PLAN WITHOUT ANY CLEAR IDEA OF WHAT ROLE COMPANY LAW PLAYED IN THE CRISIS IS NEITHER PRUDENT NOR DOES IT SERVE THE PUBLIC INTEREST.

The Bill will have far reaching and possibly unintended consequences

There is a danger that the sheer size of the proposed legislation - the Companies bill is the largest piece of legislation ever introduced into the Oireachtas - combined with the technical complexity of the Bill (there are 1,429 sections and 17 schedules) will mean that far reaching and unintended changes may be introduced without sufficient discussion during the Bill's passage through the Houses of the Oireachtas. Indeed it is difficult to see how the main objective of simplification has been achieved.

One of the most striking, but largely unremarked upon changes is (section 38) to give companies (i.e. a 'legal person') the same capacity and authority as a natural (i.e. a human) person. The idea behind the change is to remove the danger of ultra vires and the necessity for lengthy objects clauses. But is giving 'full an unlimited capacity' to 'carry on and undertake any business or activity, do any act or enter into any transaction' and having the 'full rights, powers and privileges' as a human being going too far?

It is difficult to determine the ultimate use that Companies and their Directors will make of this provision. In the US this type of right has resulted in companies claiming a breach of their 'human rights' when they are, for example, required to allow inspections of the workplace or that their human right to free speech is infringed by advertising rules or that laws on unfair labour practices (such as holding anti-union meetings with their work force) are contrary to their enjoyment of their human rights. Could this provision also muddy the waters in connection with the human rights obligations on those companies to whom state services have been outsourced?

While these would unarguably be unintended consequences it would be naïve not to anticipate the possibility that companies will attempt to take every advantage of their new found full and unlimited capacity, rights and privileges and seek to maximise these in their favour.

Congress is recommending

1. ***that section38 be referred to the Human Rights Commission for their assessment and recommendation;***
2. ***that section 38 be amended to clarify the limited nature of the rights and duties of a company and in the case of a clash of 'rights and privileges' a natural human being's rights and privileges would always take precedence over the company's.***

No realistic solution offered to deal with abuse of limited liability

Trade unions are reporting an increase in the number of tactical insolvencies and situations of abuse of limited liability. A common scenario is as follows:

> *An employer, comprising two Directors, establishes a number of companies to operate their enterprise. For this example let us imagine a local pub.*
>
> *The employees are employed through company A and the assets of the company are held by company B and the operational, day to day activities are run through company C. The existence of these distinct companies is not obvious to the naked eye. The employees, suppliers and customers all think they are dealing with company C after all it's the one pub we are talking about.*

It is only when the employees are let go and seek the payment of their unpaid wages or other redress such as redundancy or unfair dismissal that they discover, eventually, after some years, when the Sheriff attempts to seize goods to enforce the payment of the Court Order that their employer had in fact a company A, B and C. Moreover there are no assets in company A to seize. In addition company A is not 'insolvent' in line with definitions used by the Department of Social Protection's Insolvency Payment Scheme as the employer makes a return of €0.00 to the Companies Office every year so the employees suffer a double injustice of being denied assistance under this vital safety net.

Although the employer is the Director of company A, B and C the law will continue to operate in such a way that the 'corporate veil' cannot be lifted and the truthful reality of the situation is ignored.

The injustice of this situation is compounded when the employer uses their ex -employees' unpaid wages as seed capital to establish a new company D through which a new and unsuspecting workforce is employed.

There are a number of layers to this problem and a number of changes can be made to address the deficits:

Provide for situations of 'deemed insolvency'

The Minister for Social Protection will only make payment from the Insolvency Payment Scheme in respect of circumstances where the employer has properly wound up the company. This means that employees in the unfair situation outlined have an entitlement but they cannot access it sue to the action or inaction of the employer.

Congress believes this refusal to grant access to the scheme is contrary to the EU Directive (Directive 80/987 [1980]) relating to the protection of employees rights in the event of insolvency of the employer. That Directive requires member states to include within the concept of insolvency other 'informal' insolvencies.

The rules must recognise circumstances of 'deemed insolvency'. A 'deemed insolvency' can defined as situations 'where payments have de facto been stopped on a permanent basis' as is set out in the EU Directive. 'Permanent basis' can be defined as 'periods no longer than six weeks' in line with existing practice in employment law cases.

Congress Recommendation

1. ***amend the rules of the Insolvency Payment fund to recognise situations of 'deemed insolvency' thus allowing the payments to be made to the workers and***
2. ***ensure that the debt transfers to the Minister, who would have the capacity to stand in the shoes of the employee and continue to pursue payment from the employer and Director(s).***

Congress would like to highlight that this amendment can be made by means of Regulation. However if the preferred route is through legislation, this (Companies) Bill or an earlier Bill such as the Finance and Social Welfare Bill in respect of Budget 2014 could be used.

Allow employees petition to wind up a company in the District Court

- Chapter 1 of the Bill provides that a company can be wound up in a number of ways. While each method provides a possible avenue of redress in every circumstance the applications are to the High Court where costs are frankly enormous and well out of the reach of the majority of employees. Congress view is that this court should be lowered to the District Court, in circumstances where the petitioner is the employee (s).

  This would greatly reduce the cost to employees petitioning to wind up a company. It would make it easier for former employees, to liquidate a company such as outlined in the example above where it has ceased trading. Petitioning the District Court will enable access and justice for the employee-creditor with the protection that it can be sent on to the High Court if necessary.

In relation to the winding up application the following sections of the Bill are also relevant;

- There is a significant change being made in section 571 specifically that the minimum amount of indebtedness entitling a creditor to petition to have a company wound up is increasing from €1,269.74 to €10,000. At the moment, anyone owed more than €1,269.74 can petition to wind up a company. This amount is being increased to €10,000. This will impact unfairly on low paid employees who at €10,000 will be written out of the procedure. There is another provision which provides that a large number of small creditors with a combined debt of more than €20,000 can jointly petition the court to wind up the company. This would help in some situations where there are large numbers of employees, although the appropriate court is the High Court, which involves large costs. Congress is recommending that in addition to allowing employees to petition in the District Court that the current amount of €1,269.74 be maintained when the petitioners are employees.
- In relation to the winding up of a company section 572(2) sets out clearly that in relation to hearing such a winding up petition by a creditor, security for costs must be given until such time as the court is satisfied a prima facie case has been established. Costs in the District Court would be much lower and when the creditor in question is the employees there is every danger that access to justice will be denied because the hurdle of costs is too high.
- A members' voluntary winding up is dealt with in chapter 3 of the Bill. This involves a requirement for a declaration of insolvency from the directors which has not been forthcoming in number of high profile cases such as the Connolly Shoe situation so this does not provide a satisfactory solution.

Restriction and disqualification of Directors

Restriction and disqualification of directors are dealt with in Part 14 of the Bill under compliance and enforcement. Where a company is not officially insolvent/wound up and multiple companies are being formed/name changes/changing registered offices etc. in an attempt to not pay employees or other creditors, there are procedures in place for dealing with this, albeit in the High Court and again, if the jurisdiction of the court was lowered it would be more accessible. Congress is of the view this application should be capable of being brought in the Circuit Court, which would make it much more accessible to challenge rogue directors.

Other applications

Part 4 (Section 138) provides for a bond of €25,000 in circumstances where there is no Director resident in Ireland. A more realistic approach would set €25,000 as a minimum and 2% of company turnover or 2% of wages bill, whichever was higher. A bond is particularly relevant in the context of circumstances where employees are left with unpaid wages which could be as much as two months plus redundancy.

Directors still avoid being held properly to account

Part V of the Bill sets out Director's duties. The regime proposed by the Bill is, in Congress view a weaker regime than was originally provided for under section 45 of the Companies (Auditing and accounting) Act 2003. It is worth recalling that holding Directors to account was a key recommendation of the Public Accounts Committee DIRT inquiry specifically they recommended – '*that company directors should report annually on the companies compliance with its obligations under company law, tax law and other relevant statutory or regulatory requirements'* and *'that the companies external auditors should report as to whether, in their opinion, the directors report of the company's compliance was reasonable*'.

Regrettably this piece of legislation was enacted but in the face of severe opposition from corporate interests was never commenced, despite the strong arguments made in its favour by the Revenue, the Director of Corporate Enforcement (ODCE) and the ICTU.

Congress is recommending the following changes:

- Firstly, the Bill intends that Directors Compliance Statements only apply to companies (other than PLCs) with a balance sheet of €12,500,000 and a turnover of €25,000,000 (section 226). Companies that do not reach these thresholds are exempt as a result the obligations will apply to a fraction – less than 10% of Irish-registered companies. Given the benefit of incorporation, i.e. the ability to avoid liability it is only reasonable that all companies comply with making a statement of their obligations regardless of their balance sheet or turnover. Congress is therefore recommending that the thresholds be removed or if a threshold is retained it would be reduces to a turnover of €500,000 and where Directors control a number of companies their cumulative turnover would apply.

- Secondly, compliance reporting relates to company law and tax law, while these are essential other obligations should not be capable of being ignored. As the body responsible for compliance with all laws including environment, health and safety, employment and other public interest laws it is unacceptable to omit reporting on these obligations in the legislation, especially as non-compliance in one area often leads to non-compliance in another and non-compliance in areas other than company law can materially affect the company's financial situation.

  http://www.clrg.org/publications/report-on-directors-compliance-statement/clrg-report-on-dcs.pdf

Other concerns

General Offence of Reckless Trading

Echoing concerns elsewhere in the public domain (i.e. the recent remarks of Mathew Elderfield) further consideration should be given with regard to the general offence , criminal or civil, of reckless trading, and in particular , with regard to a financial institution.

Individual responsibility of those in senior positions

As well as dealing with the issue of DCS's as dealt with above and summarised below, the bill should examine ways of ensuring that individual responsibility is attached to senior individuals, especially in financial institutions, for their actions and omissions in company law.

Sanctions for braches of the Bill

A re-examination is required of the sanctions available under the bill, particularly for serious breached of Company law.

Nominee and Shadow Directors (Parts 4 &5)

The areas of Nominee and Shadow directors should be tightened up in the light of on-going concerns in the public domain with regard to "tax havens " .

Directors Loans (Part 5)

The provisions in relation to Directors loans should also be re-examined in the light of recent concerns in this area

Audit provisions (Part 6)

The Bill should be re-examined to ensure that provisions of Part 6 are sufficiently robust to ensure compliance with the duty of auditors to provide a "true and fair" view of a company's financial position.

Similarly the provisions with regard to the issue of "prudence" in the reporting of a company's financial position

Recommendations in summary

1. **Congress is concerned that proceeding to implement a pre-crisis plan leaning heavily in the direction of 'light touch' regulation, without any clear idea of what role company law played in the crisis, is not prudent.**

2. **There is a danger that far reaching changes will not be properly scrutinised. We are calling for the 'human personality' proposals (section38) to be referred to the Human Rights Commission for their assessment and recommendation;**

3. **We are seeking amendment of section 38 to clarify the limited nature of the rights and duties of a company and to provide that in the case of a clash of 'rights and privileges' a natural human being's rights and privileges would always take precedence over a company's.**

4. **We are seeking an amendment of the rules for access to the Insolvency Payment Fund to recognise situations of 'deemed insolvency' thus allowing the payments to be made to the workers and that the debt would then transfer to the Minister (Social Protection) who would have the capacity to stand in the shoes of the employee and continue to pursue**

payment from the employer and Director(s). This can be achieved by means of Ministerial Regulation or by amending the legislation using this Bill or the Finance Bill made in respect of Budget 2014.

5. **We are seeking amendments to allow employees petition the District Court to wind up a company.**
6. **We do not agree to the increase in the minimum amount of indebtedness (when the creditor is an employee) increasing from €1,269.74 to €10,000.**
7. **We are seeking an increase in the bond for circumstances where there is no Director resident in Ireland to be set at 2% of turn over or 2% of wages bill subject to a maximum of €250,000.**
8. **The obligation to provide Directors Compliance Statements should apply to all companies not just PLCs or those with a balance sheet of €12,500,000 and a turnover of €25,000,000.**
9. **Directors should be obliged to reporting on other material obligations including environment, health and safety, employment and other public interest laws, such as the proposed lobbying legislation when enacted.**
10. **The company's external auditors should report as to whether, in their opinion, the directors' report of the company's compliance was reasonable.**
11. **We highlight a number of other provisions such as inadequate sanctions on Directors, reckless trading, the issue of Directors Loans, inadequate measures to combat tax havens, and the obligations on auditors that need to be re-examined in light of the crisis.**

Ends

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