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<tr><th colspan="3">Regulatory Impact Analysis (RIA)</th></tr>
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<tr><td colspan="3">Related Publications:<br><br>Directive 2013/34/EU (on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings) :<br><br>eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0034&from=EN<br><br>Regulatory Impact Analysis of the Companies (Accounting) Bill 2016 (dated July 2016)(available on D/JEI website)<br><br>Companies (Accounting) Bill 2016 (available on Oireachtas website)<br><br>Transcript of Second Stage [Dáil] Debates, 3 and 16 November 2016 (available on Oireachtas website)<br><br>Transcript of Committee Stage [Dáil] Debates, 22 November 2016 (available on Oireachtas website)</td></tr>
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**Part 1: Description of issue and policy objectives**

**Background: The liability of members of companies and the obligation to disclose financial information**

One of the main benefits of company law is the ability to limit the liability of the members, who are the owners, of companies. In this way, company law provides that the personal assets of a company's owners and the assets of that company are separate and cannot be considered as available to meet the debts of each other. This is considered an important benefit for the economy as it encourages entrepreneurs to take risks, knowing that their personal assets are not at stake if the company fails.

The limited liability company form is the most popular corporate form across the EU. Consequently, EU company law, including the law on financial disclosure, focusses on the limited liability company.

A consequence of limited liability is that the only safeguard that such a company offers to third parties is the amount of its own net assets. In that context, it can be seen that knowledge of a company's financial position is a key protection. Information on the company's financial position enables people outside the company, such as employees and suppliers to assess whether it is reasonable to engage with that company. As that information is the only way for third parties to know what those net assets are, and therefore what is available to meet the company's debts, EU and Irish company law obliges a limited liability company to disclose its financial position. Moreover, the law requires this disclosure to be made annually and in public, so that the information is timely, meaningful and easily available to anyone considering doing business with the company. For these reasons, a fundamental rule in EU and Irish company law is that companies with limited liability file annual financial statements in public. In the case of Ireland this filing is with the Companies Registration Office (the CRO).

In Ireland, most registered companies are "limited liability companies" in one form or another. However, some companies choose an unlimited liability form, usually the private unlimited company, referred to in the Companies Act 2014 as an 'ULC'.

Recent figures from the CRO (October 2016) show the following:

| Company Type | Number on Irish Register of Companies |
|---|---|
| Private Limited | 180,600 |
| Public Limited | 1,443 |
| Limited by Guarantee | 15,603 |
| Unlimited | 4,526 |

It can be seen from these figures that the vast majority of companies registered in Ireland are limited liability (197,646). It is notable that the number of companies registered as unlimited in Ireland is almost the same number as are registered as unlimited in the UK, where there are far more companies registered overall.

The main feature of an unlimited company, as against a limited company, is that the assets of the owners of the company are available to meet the debts of the company. As a result, a third party is able to assess what assets are available to meet the unlimited company's debts by looking at the assets of the owners of that company. For these reasons, EU law does not in general require disclosure of financial statements by an unlimited company. Similarly, section 1274(1) of the

Companies Act 2014 exempts the ULC from the obligation to file financial statements with the CRO (referred to hereafter as the "exemption").

Given the significant and practical difference between limited and unlimited liability, much of EU and Irish company law takes the distinction between the two as its starting point. In particular, as can be seen from the above, it determines the appropriate level of disclosure by reference, in the first instance, to whether a company is limited or unlimited.

**<u>The policy problem to be addressed</u>**

It is open to people to establish ownership structures and/or groups of companies that include both limited liability and unlimited liability companies. According to the arrangements that are put in place, such companies and groups may qualify for the exemption from filing financial statements that is available to ULCs. However, this is not appropriate in a number of circumstances. Accordingly, the scope of the exemption for ULCs has attracted concern among regulators as well as negative attention from some stakeholders and in the press (see Part 3). In the context of preparing the Companies (Accounting) Bill 2016, the financial reporting obligations of companies have been reviewed. The filing exemption for ULCs forms part of that review.

The three main areas of concern with respect to the scope of the exemption are –

> The lack of transparency of companies whose owners have de facto limited liability but qualify for the exemption from filing financial statements by virtue of being registered as ULCs
>
> The gap in transparency of groups of limited liability companies where the holding company is an ULC
>
> The impact on Ireland's international reputation

The Office of the Director of Corporate Enforcement has indicated to the Department that it would support proposals to tighten the exemption to ensure that companies and groups of companies that are in effect the same as limited liability companies or groups of limited liability companies, regardless of how they are registered, cannot avail of the exemption.

As well as addressing these concerns with existing Irish company law, the EU Accounting Directive must be transposed into Irish law. That Directive obliges limited liability companies and some unlimited liability companies to prepare and file financial statements according to the provisions in the Directive. The deadline for that transposition was 20 July 2015 and the Commission has initiated infringement proceedings against Ireland.

***Lack of transparency of companies whose owners have de facto limited liability***

With respect to the first concern, under current Irish law, people may establish companies in such a way that they get the benefits of both limited and unlimited company forms.

For example, a company can be incorporated and registered as an unlimited company but in reality the ultimate owners of that company have limited their liability with respect to that company. This is a company that is a limited liability company in all but name, yet it will qualify for the exemption from filing its financial statements as it is registered as an unlimited company. The company may have very few or no assets at all to meet its debts, but that information will not be publicly available

because the company qualifies for the exemption. In the event that a third party needs to enforce a debt against the company, they cannot identify what assets, if any, the company has to meet those debts. Instead, they will find that the assets of the owners, which they had considered would be available to settle debts on the basis that the company is registered as unlimited, are in fact shielded from any action against the company.

This is a gap in the law that allows companies whose owners have de facto limited liability to withhold financial information, contrary to the policy of the Companies Act 2014 that the benefit of limited liability comes with financial disclosure obligations.

The first attempt to address this gap at EU level was in 1990 (with Directive 90/605/EEC) and, in Ireland, in 1993 with the European Communities (Accounts) Regulations 1993. Regulation 6 of those Regulations was intended to apply the accounting and disclosure requirements of EU accounting law (under Directives that have now been replaced by Directive 2013/34/EU) to any unlimited company or partnership in which there was not a person who ultimately has unlimited liability for the debts of the business. The main effect was that an unlimited company whose owners were not unlimited became required to file financial statements with the CRO. However, not all ownership structures were encompassed by Regulation 6.

The Companies Acts 1963-2009 (General Editors: Lyndon McCann and Thomas B. Courtney) includes an explanatory footnote to Regulation 6 of the 1993 Regulations as follows –

> "**Unlimited companies**: An unlimited company will be caught by the provisions of these Regulations [i.e. it will be required to file financial statements] if all its members are –
>
> (a) Irish and/or foreign limited companies; or
> (b) unlimited companies incorporated in the state or in another member state, whose members are in turn all Irish and/or foreign limited companies, or
> (c) a combination of (a) and (b).
>
> "The regs will not apply, however, if there is at least one member who is an individual, since he will have unlimited liability in the true sense of the phrase. Nor would the regs seem to apply to an Irish unlimited company all of whose shares are held by an unlimited company incorporated in a country other than a member state of the European Union, and whose shares are held by an unlimited company incorporated in a country other than a member state of the European Union, and whose shares are in turn held by a limited company which is likewise incorporated outside the European Union. So, for example, an Irish unlimited company which is a wholly owned subsidiary of an unlimited company incorporated under the laws of the Cayman Islands which is in turn owed by a limited company incorporated under the laws of the British Virgin Islands, would appear to be exempt from having to annex a copy of its accounts to the annual return."

More recently, an article posted on the Law Society of Ireland's website on 4 July 2014, entitled "Publishing of annual accounts by unlimited companies" sets out the position as follows -

> "At present, it is possible for an unlimited company incorporated in Ireland not to publish its accounts in the Companies Registration Office by virtue of the provisions of regulation 6 of the European Communities (Accounts) Regulations 1993 [……]Accordingly, where an Irish unlimited company has a member that is a limited company incorporated outside the EU and at least one member that is an unlimited company incorporated outside the EU, that Irish unlimited company may avoid having to publish its accounts. This exemption is

available notwithstanding the fact that shares in the unlimited company incorporated outside the EU may be wholly owned by a limited company incorporated outside the EU, thus affording the benefit of limited liability within the group structure."

A practice has grown in Ireland of establishing such corporate structures that are referred to colloquially as "non-filing structures". These are structures with a few companies, some registered as limited some as unlimited, and some registered in jurisdictions outside the EEA. The effect is that the ultimate owners of the Irish registered company have limited liability. However, as that Irish registered company is registered as unlimited, there is no obligation to file financial statements with the CRO.

Although legally entitled to avail of the exemption from financial disclosure, such structures undermine the principle at the heart of Irish company law that companies with limited liability must file financial statements in public. This lack of transparency for these companies also has a negative effect on Ireland's reputation (which is dealt with in more detail in Part 3 of this RIA).

A similar issue arises in respect of companies that are registered outside Ireland and establish branches within Ireland. In some cases, these companies may have similar ownership structures as those outlined above. However, their Irish branches are not obliged to file financial statements with the CRO because the company of which they are a part is registered as an unlimited company. Branches of external companies that are limited companies are obliged to file financial statements with the CRO. It would be discriminatory to address the situation with respect to Irish registered companies but not with respect to non-Irish registered companies with operations in Ireland.

***Gap in transparency for groups with unlimited holding companies***

The second concern stated above is related to an ULC that is a holding company of a group. In this situation the holding company will qualify for the exemption from filing in two ways. Firstly, it will be exempt from filing financial statements for itself and, secondly, it will be exempt from filing group financial statements for the group of companies that it holds. It may be the case that the liability of each of the ultimate owners of the holding ULC is in fact unlimited. However, as the ULC is a holding company, other considerations apply in assessing whether such a company should file financial statements. Two issues arise.

Firstly, if the unlimited holding company owns limited liability subsidiaries, this is a group of limited liability companies. However, as the holding company is registered as unlimited, there is no obligation on that group to file group financial statements. In most of the examples of this type of group that the Department has considered, all of the trading activities of the group are conducted through the limited liability subsidiaries. The holding company is administrative. So, this group is no different in reality from a group of limited liability companies with a limited liability holding company. Yet, financial statements for this group will not be publicly available while the same group of companies with a holding company that is registered as limited liability will be obliged to file group financial statements with the CRO.

A group's financial statements are important because they give an overall picture of that group. Without them, third parties must rely only on the individual financial statements of each limited liability entity in the group. As a result, they only get parts of the picture and not the meaningful overall view. The separate financial statements of each entity do not give a comprehensive picture of the performance of any one company in the group or of the entire business of the group. Also, the picture of any one subsidiary given by its filed entity financial statements may well not correspond to economic reality; for example all of the staff might be formally employed by one company while

most of the property might be in the name of another. For this reason, it is a general requirement of company law that holding companies file group financial statements.

However, a consequence of the exemption from filing for an ULC means that a holding company that is an ULC is exempt from the obligation to file group financial statements as well as being exempt from filing its own entity financial statements. It allows a group of limited liability subsidiaries to decide to incorporate its holding company as an ULC in order to avoid the obligation to file group financial statements.

It is also likely that an ULC holding company of limited liability subsidiaries would not in fact be exposed to its own unlimited liability. All of the contracts, whether credit agreements, contracts of employment or other types of contracts, may be with the limited liability companies in the group. So, all of the activity that could give rise to a call on the assets of a company in the group will be conducted by a company with limited liability. The holding company need not have activities of its own that would give rise to significant liabilities of its own. It is difficult to see how there would be a call on its assets. It is arguable that the owners of that holding company are not actually unlimited in the true meaning of the concept. In this regard they are similar to the type of ULC described earlier in this Part of the RIA.

***The exemption for ULCs and Ireland's international reputation***

In a letter to the Secretary General of the Department (dated 2 December 2016), the Chairman of the Revenue Commissioners indicated the Revenue's support for sections 76 and 78 of the Bill. He said –

> "As you are aware, sections 76 and 78 of the Bill are designed to tighten that exemption [for ULCs] and ensure that companies or groups of companies that are *in effect* the same as limited liability companies or groups of limited liability companies, regardless of how they appear on the companies register, cannot avail of the exemption. This clearer, more robust, specification of the exemption is necessary to ensure an appropriate level of transparency to protect the variety of third parties concerned.
>
> "Revenue is particularly concerned that the current weaknesses in the legislation are enabling companies to be exempted from filing financial statements in circumstances that, in effect, involve limited liability – the companies benefitting from such artificial arrangements are not, in substance, in different circumstances to which the exemption does not apply. This has given rise to difficulties in meeting our international commitments in relation to exchange of information with other national Tax Authorities. The Tax Authorities concerned, very reasonably, find it difficult to understand why some large companies are treated differently to others, in the absence of substantive differences in circumstances. The resulting lack of transparency may damage our international standing.
>
> "Any alleged benefits arising from the current weaknesses in the legislation are questionable. The continuation of the present situation will endanger Ireland's status as a jurisdiction committed to meeting international standards in relation to transparency."

**Policy objectives**

The first policy objective is to ensure that all companies whose owners enjoy limited liability file financial statements with the CRO, even where those companies appear on the companies register as private unlimited companies. This will address the gap in the law that has allowed so-called "non-filing structures" to come into being. To ensure equal treatment, this should extend to companies registered outside of Ireland with operations in Ireland insofar as possible.

The second policy objective is to ensure that group financial statements are publicly available for all groups of limited liability subsidiaries, even if the holding company is an unlimited company.

The third policy objective is to transpose the EU Accounting Directive (Directive 2013/34/EU).

The fourth policy objective is to support Ireland's international reputation as a country committed to meeting international standards of transparency.

Finally, it is a policy objective that the exemption for unlimited companies will remain, albeit redefined so that it is more closely aligned to the true extent of the liability of the company's owners or of the group as a whole.

## Part 2: Identification and description of options

The Department has identified 3 possible options to address the issues and meet the policy objectives set out in Part 1. Since the publication of the Companies (Accounting) Bill 2016 in August 2016, representations have been made to the Department proposing alternative approaches. These are mainly, if not all, variations on Option 2 below. All are dealt with in more detail in Parts 3 and 5 of this RIA.

### The "designated ULC" and the mechanics for each Option

Section 1274 of the Companies Act 2014 already provides that not all private unlimited companies ("ULCs") qualify for the exemption from the obligation to file financial statements with the CRO.

Section 1274(1) provides the general exemption for ULCs from the obligation to file financial statements with the CRO. Then, section 1274(2) goes on to provide that not all "ULCs" qualify for that exemption and refers to this subset of "ULCs" as "designated ULCs". In other words, a "designated ULC" must file financial statements with the CRO. The term "designated ULC" is defined in section 1274(2), in essence, as a company that is registered as unlimited but where there is not a person who ultimately has unlimited liability for the debts of the business.

A "designated ULC", therefore, is a company that is registered as unlimited but does not qualify for the exemption from filing financial statements.

As a result the method for obliging a particular type of ULC to file financial statements is to amend the definition of "designated ULC" to ensure that the definition captures that particular type of ULC. Each of the Options below uses that method.

### Option 1 – No change to the definition of "designated ULC" in section 1274 of the Companies Act 2014

Option 1 is analogous to a "do nothing" option as it means leaving Irish company law as it is. That said, it should be noted that pursuing this option would require an amendment to the Companies (Accounting) Bill 2016 to delete Sections 76 and 78 in their entirety.

As currently drafted, the definition of a "designated ULC" in section 1272(2) of the Companies Act 2014 does not cover all the situations that are within the scope of Directive 2013/34/EU. Therefore, pursuit of Option 1 would not meet Ireland's obligation to transpose the full scope of the Directive.

Option 1 would also maintain the gap in Irish company law that allows some companies that are registered as unlimited, but whose ultimate owners enjoy limited liability to not file financial statements with the Companies Registration Office. It would also maintain the gap that allows unlimited holding companies of groups of limited liability subsidiaries to not file group financial statements with the CRO.

For these reasons, Option 1 is not appropriate.

In light of the above and given that no stakeholders have called for this Option, this Option is not assessed any further in this RIA.

**Option 2 – Redefine "designated ULC" in the Companies Act 2014 in line with Article 1 of the EU Directive**

Directive 2013/34/EU applies primarily to limited companies but it can also apply to unlimited companies where such companies are used to carry on a business but the ownership structure is such that the ultimate beneficial owners enjoy de facto limited liability. As the scope of the Directive does extend to such unlimited companies they must file statutory financial statements and a directors' report (where applicable) with the CRO.

There was an equivalent provision in the previous Directive but it was susceptible to avoidance. The new Directive aims to rectify this by providing in Article 1 that certain unlimited companies are within the scope of the Directive. These are unlimited companies where all of the direct or indirect members of the unlimited undertaking are themselves limited liability undertakings. In other words, the Directive applies to an unlimited company where the unlimited company is owned by limited liability undertakings.

Option 2, then, is to amend the definition of "designated ULC" in section 1274 to mirror the wording that is in Article 1 of the Directive. This would require the deletion of parts of section 76 as it is currently drafted in the Companies (Accounting) Bill 2016.

However, mirroring the wording of Article 1 would mean that only unlimited companies where all of the direct or indirect members are limited liability undertakings would be defined as "designated ULC" and, therefore, covered by the obligation to file financial statements. This would not take account of the situation where the majority of the members are limited liability undertakings while a minority have unlimited liability. In such a situation, the company would not be obliged to file financial statements as not all of the members have limited liability. However, it is the majority who own the greater part of the company and has the main influence on the activities of the company. Furthermore, the minority shareholder may be an individual with insufficient assets to meet any debt of the company.

Requiring that all of the members have limited liability sets a high threshold. The Department has seen examples of ownership structures that would not meet that threshold but still raise the same concerns. Using the threshold in Article 1 would not be effective, therefore, in meeting the policy objective.

Secondly, Article 1 does not necessarily address an unlimited holding company with limited liability subsidiaries. In particular, where the ownership of the holding company does not seem to have placed limits on its own liability, but the overall picture of the group means that the holding company is in effect a limited company as any activity that might give rise to a call on its liability is conducted by the limited liability subsidiaries. Moreover, an unlimited holding company that owns limited liability subsidiaries is, in effect, a group of limited liability subsidiaries. If the holding company were a limited liability company, company law would oblige the holding company to file group financial statements. However, as the holding company in this example is registered as unlimited, there is no such obligation. This is an example of a group of limited liability companies that is not obliged to file group financial statements, contrary to the policy expressed in the Companies Act that group financial statements should be publicly available for groups of limited liability companies.

Using the wording of Article 1 of the Directive would not cover the possibility of discrimination between some unlimited companies that are registered in Ireland and companies with the same structures, but are registered outside Ireland. As companies registered outside Ireland are not

governed by Irish law, it is not possible to place identical obligations on companies that are registered abroad as are on Irish registered companies. However, it is possible to impose disclosure obligations on Irish branches of those companies. Taking up Option 2 would not do that, which would discriminate between Irish registered and non-Irish registered companies.

Moreover, this approach does not take account of Recital 6 of the Directive, which explains the Directive's scope further. It says that –

> "The scope of this Directive should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from that scope by creating group structure containing multiple layers of undertakings established inside or outside the Union."

The principles referred to there include the principle of transparency and the principles that underpin limited liability. So, the EU legislator's intent is that the Directive would be transposed with those principles in mind.

It is arguable that giving proper effect to those principles, as Recital 6 proposes, would go beyond the minimum that is required to transpose Article 1 of the Directive. Or, to put it another way, transposing the essential requirements of Article 1 would not give effect to the spirit of the Directive.

As the transposition is being done in primary legislation, it is open to the Oireachtas to go beyond the strict requirements of the Directive and put more effective provisions in place.

Option 2 does not address the full range of the issues or meet all the policy objectives set out in Part 1 of this RIA. It also does not give effect to the scope of the Directive as expressed in Recital 6. Therefore, Option 2 is not proposed.

**Option 3 – Amend the definition of "designated ULC" in the Companies Act 2014 to include all ULCs controlled by limited liability owners or with limited liability subsidiaries and make related amendments to cover Irish branches of external unlimited companies**

The definition of a "designated ULC" in section 1274(2) of the Companies Act 2014 is inspired by the European Communities (Accounts) Regulations 1993. As a result, it maintains the gap in the law that means that there are some types of corporate structures where the ultimate owners do not have unlimited liability but still qualify for the exemption as they are outside the definition of "designated ULC". These include structures that are within the scope of the Directive. Similarly, an unlimited holding company of a group with limited liability subsidiaries is not encompassed by the definition of a "designated ULC".

Option 3 is, firstly, to redefine "designated ULC" in section 1274 of the Companies Act 2014 so that it encompasses the following –

- Any Irish registered unlimited company where the ultimate owners have limited liability, howsoever that is achieved.
- Any Irish registered unlimited company that is a holding company with limited liability subsidiaries.

In this way, such companies will be obliged to file financial statements with the CRO.

The main expression of Option 3 is set out in the text of section 76 of the Companies (Accounting) Bill 2016. It is based on wording from the UK legislation, which has been in place since at least 1989. In effect, an ULC will be a "designated ULC" if it is a subsidiary of a limited company. In addition, an ULC that is not in fact a subsidiary will be regarded as a subsidiary, and therefore a "designated ULC", if its members include a number of limited companies which, if they were a single company, would be its holding (parent) company.

With respect to the unlimited holding company, the relevant part of section 76 is also based on UK legislation. In this case an ULC that owns one or more limited liability subsidiaries will be a designated ULC. The objective here is to oblige the ULC to file group financial statements in respect of the group of which it is the holding company.

Option 3 also addresses the situation with respect to branches of certain unlimited companies that are registered outside Ireland. Part 21 of the Companies Act 2014 provides for the obligations on limited companies registered outside of Ireland, referred to as "external companies", that establish branches in Ireland. These include the obligations in section 1303 (in the case of an EEA company) and in section 1305 (in the case of a non-EEA company) to file certain financial information with the CRO. In order to meet the objectives set out above with respect to companies registered outside of Ireland, Option 3 also redefines "EEA company" and "non-EEA company" in section 78 of the Bill so that companies that would qualify as "designated ULCs" if they were registered in Ireland, will be required to file financial statements with the CRO in line with the provisions of Part 21 of the Companies Act 2014.

While section 78 is not modelled on UK law, this provision is considered an important anti-avoidance measure and key to ensuring equal treatment of companies with similar structures.

As Option 3 addresses the issues and meets all of the policy objectives, it is the preferred option.

## Part 3: Views of stakeholders

The exemption for unlimited companies from the obligation to file financial statements has been raised in the last few years, including being mentioned during the Dáil debates on the Companies Bill 2012 (now the Companies Act 2014)[1]. It has also been the subject of comment in the press[2]. These views have all been concerned with the exemption for unlimited companies and have looked for improvements in the transparency of those companies.

Since the publication of the Companies (Accounting) Bill 2016 on 5 August 2016, the Department has received representations supporting the continued availability of some of the 'non-filing structures'. In particular, these representations have called for amendments to sections 76 and 78, with a view to reducing their scope. On the other hand, in the course of the Second Stage [Dáil] Debate on the Bill, the provisions of sections 76 and 78 were welcomed.

What follows is a summary of those views.

**Impact on competitiveness of certain Irish SMEs**

The Department received representations from a few companies (some companies contacted the Department directly while others contacted Enterprise Ireland who, in turn, relayed those concerns to the Department), mainly SMEs, some of whom are aiming to achieve critical scale, who submitted that there are a series of competitive disadvantages for them if these non-filing structures are no longer available. This primarily stems from the requirement to disclose certain financial information which up to now has been possible to avoid using the non-filing structures. These are set out in summary below;

1. SMEs at a disadvantage compared to very large competitors who can now identify profit margins and use other information to compete against the SME including by 'price dumping' and/or to initiate an unfriendly takeover.
2. Other SMEs may enter the product/service market if they can identify profit margins and compete on price.
3. Suppliers may demand increased prices for supply chain goods and services.
4. Any consequent reduction in profits for SMEs undermines their ability to invest in innovation.
5. Increased wage demands or threats to personal security of owners due to visibility of strong balance sheets.
6. While the Directive has been transposed in other EU countries, the enforcement of other rules such as filing rules means that the impact of the new transparency requirements will be less than in Ireland.
7. EU companies are disadvantaged compared to US companies.

[1] Deputy Mick Wallace raised concerns with the lack of transparency of unlimited companies during the Committee Stage [Dáil] Debate on the Companies Bill 2012, which took place on 6 November 2013.

[2] In particular article by Richard Curran, entitled "Privacy loophole might just cost Irish business its good reputation", Irish Independent 24 January 2014. Also there are regular examples of articles on performance or tax payments of specific companies that refer to the fact that financial statements for a particular company are not available as that company is an unlimited company.

One argument often used in favour of exemptions from competition law is need for protection from competition to reach 'critical scale'. The arguments presented above have a similar basis.
In relation to the first four points, while it is not possible to predict if the SMEs concerned will experience the impacts set out, to continue to permit certain non-filing structures would mean in effect sheltering these entities over other competitor firms, including other Irish SMEs. Furthermore, there is no evidence of a specific market failure that needs to be addressed on foot of the concerns set out by stakeholders.

There is no doubt that fierce competition exists in domestic and international markets. However, sheltering certain companies over other EU or Irish companies runs counter to EU rules and the long standing principle of maintaining open, competitive markets which produce the most efficient outcomes.

There are significant Government supports available for companies at different stages of development as well as research and development tax credits which can be accessed by all companies. These supports aim to address in a targeted way issues of scaling and innovation by Irish companies while avoiding any distortion of competition.

Similarly, in relation to point 5, sustaining national competitiveness and driving productivity growth are essential to creating sustainable economic growth. However, the impact of wage demands on competitiveness and productivity is more appropriately considered as part of a wider economic analysis.

On personal security, the Companies Act 2014 introduced a new provision to protect the address of individuals where there is evidence of a threat to personal safety of an officer of a company. However it is worth noting that key transparency initiatives such as the forthcoming Register of Beneficial Ownership arising from the 4th Anti Money Laundering Directive, where the Government may make similar information publically available in the future as is the case in the UK.

Regarding point 6, perceived differences in the enforcement of required EU policy across Member States is not a justification to adopt one approach in Irish national law over the other. Moreover, Irish company law has fostered a culture of compliance over the last 2 decades, including in relation to the filing of annual returns. This is considered important in order to enhance Ireland's reputation as a place to do business, to support the minimisation of business risks, to support sound competitive enterprise and to protect business and Government revenue.

Finally point 7 is primarily a matter for the EU and all its Member States and not individual national legislators.

**Impact on Ireland's international reputation**

With the significant and growing focus on transparency of financial and other reporting at EU and international level, Ireland's aim is to be best in class. There is a risk that in allowing this gap to persist, such non-filing structures and their inherent lack of transparency will reflect negatively on Ireland's international reputation, in particular as there is an expectation that with the transposition of the Accounting Directive any such gaps should now be closed.

**Impact on FDI Companies**

A representative group for FDI companies that made submissions to the Department on this issue expressed concern with the timing of the changes rather than the substance of it.

**Period for adaptation**

The timing of the changes was an issue for all those who made representations to the Department on sections 76 and 78. As the full scope of sections 76 and 78 would not have been clear to companies prior to the publication of the Bill in August 2016, it is reasonable to allow a period of time for the affected companies to adjust.

Accordingly, the policy is to provide in the Commencement Order for the Companies (Accounting) Bill that the first financial statements to be filed will be in respect of financial years beginning on or after 1 January 2017.

## Part 4: Proposals to amend sections 76 and 78 of the Bill

As well as the views put forward by some SMEs and their representatives, which are set out in Part 3 above, the Department received specific representations to amend section 76 and delete section 78 of the Companies (Accounting) Bill 2016. Those proposals and the Department's assessment of them are set out in this Part.

**Three proposals to amend section 76**

The Department received representations to amend section 76 in 3 ways.

The first of these proposals seeks to amend the text of new section 1274(2)(a) as inserted by section 76 of the Bill by replacing the words "at any time during the relevant financial year" (at line 9, page 45 of the Bill) with the words "at the end of the relevant financial year". The arguments in favour of this proposal were –

- That this provision of section 76 is not required by the Directive
- That it is unfair to compel an unlimited holding company to file if it holds a limited subsidiary for even one day during the year
- The effect of this provision is that an unlimited group that buys an existing limited company must still file accounts even if the group converts that limited company into an unlimited company immediately after the acquisition.

The use of the phrase "at any time during the financial year" is deliberate and is modelled on a virtually identical phrase in section 448(2) of the UK Companies Act 2006. If these words were replaced as suggested, for example, an unlimited holding company could circumvent the provision by transferring ownership of its limited liability subsidiaries immediately before the end of the financial year and transfer it back immediately afterwards. The Department considers that the importance of financial statements for third parties and the risk of this type of activity to avoid the obligation to file financial statements justify the extent of this provision. It also has the benefit of clarity. It will be clear to any ULC that acquires or already owns a limited liability subsidiary that it will be required to file group financial statements as a consequence of that purchase or ownership. The Department also considers that this requirement is necessary if we are to address the principles and situations referred to in Recital 6 of the Directive.

To delete the words "at any time during the financial year" as proposed would open a loophole in the law.

The second proposal is to delete new section 1274(2)(a)(iii), which provides that an ULC will be obliged to file financial statements if it "has been a holding company of an undertaking which was at that time limited". The arguments in favour of this proposal were –

- It is not required by the Directive
- Having a limited liability subsidiary (which is itself required to file in the country in which it is incorporated) should not create a filing obligation for its unlimited holding company where the ultimate shareholders do not have limited liability protection.
- Many Irish head-quartered groups have foreign subsidiaries – in many countries it is not possible to form unlimited companies. This means that groups have no choice but to have foreign limited subsidiaries.

The main purpose of this part of section 76 is to meet the policy objective that a holding company of limited liability subsidiaries should file group financial statements. It is similarly intended to ensure that filing obligations cannot be avoided by carrying on a single business through a number of small limited companies all of which are owned by an ULC, the result of which is that group financial statements will not be available for that single business.

It is true, as argued by the proposers of this amendment, that each limited liability subsidiary is likely to be obliged to file entity financial statements. But, these are not sufficiently meaningful without group financial statements, which give the overall picture of the whole business. It is common practice for businesses to structure themselves so that different activities are conducted by different, and separate, companies. Without the group financial statements, the economic reality of that business as a whole is not clear. Moreover, in the scenarios submitted to the Department it is clear that they contemplate the trading of the group being conducted through the limited liability subsidiaries and not the unlimited holding company. Such a group is, in reality, the same as a group of limited liability companies and should, therefore, file group financial statements.

The text of this part of section 76 is similar to section 448(2) of the UK Companies Act 2006.

All of these proposals run the risk of creating a new loophole or other unintended consequence.

The third proposal is to delete section 1274(2)(d) as inserted by section 76 of the Bill. This part of section 76 provides that “an ULC, the direct or indirect members of which comprise any combination of ULCs and bodies referred to in paragraph (c) such that the ultimate beneficial owners enjoy the protection of limited liability” is a “designated ULC” and therefore obliged to file financial statements.

The arguments in favour of this proposal to delete are –

- It is not required by the Directive
- It is more onerous than the UK rules
- It uses new terminology which is not defined or explained and is therefore difficult to interpret

This subsection is intended, in particular, to support the provisions of the previous subsection, subsection 1274 (2)(c). Without this provision, the Department considers that it would be easy to circumvent the provisions of 1274(2)(c) by simply having shares in an ULC held by a combination of types of company. This would render 1274(2)(c) virtually worthless.

The wording here is inspired by the Directive and existing Irish law, with some novelty. The phrase “direct and indirect members” draws on the wording of Article 1(1)(b), while the existing wording of section 1274(2)(a)(iii) of the Companies Act 2014 addresses combinations to a similar end. The use of the any new wording, such as “enjoy the protection of limited liability”, is sufficiently clear to be understood and has been approved by the Parliamentary Counsel, who drafted the Bill.

The Department considers that acceptance of any one of these proposals for section 76 would render the text unfit for purpose as it would not meet the policy objectives.

**Proposal to delete section 78**

The Department received representations to delete section 78 from the Bill.

Section 78 expands the definitions of "EEA company" and "non-EEA company" in section 1300 of the Companies Act 2014, for the purposes of Part 21 of that Act, which provides for external companies. As things stand the branches of external companies that are registered abroad as limited liability companies are obliged to file certain financial information. However, if the external company is registered abroad as an unlimited company, then it is outside the scope of this obligation. In this way, it is similar to an Irish ULC that qualifies for the exemption from filing. As the Bill is changing the criteria for Irish ULCs to qualify for the exemption, it is considered appropriate to make similar changes to the criteria for external companies. In other words, if the liability of an external company means that it would not qualify for the exemption if it were an Irish registered ULC, then the Irish branches of that external company should not qualify for the exemption either. This is intended to treat Irish registered and external companies in an equal fashion, although it is only legally possible to extend the disclosure obligation with respect to the branches of external companies. Deleting section 78 would allow non-Irish companies to not disclose whereas their Irish equivalents would be obliged to disclose. It would also maintain a gap between non-Irish companies that are registered as limited in their home country and those that are registered as unlimited in their home country. The former will continue to be obliged to file financial statements in respect of their Irish branch, but the latter will not even where the owners of that latter company have limited their liability in reality.

Moreover, without section 78, it would be possible to circumvent the provisions in section 76 of the Bill by transferring the business of an Irish ULC to a foreign unlimited company that was in turn owned by a foreign limited company. The foreign unlimited company would then operate the Irish business as an Irish branch. That Irish branch would not be subject to the Branch Disclosures Directive (Directive 89/666/EC) (which is transposed by art 21 of the Companies Act 2014) and would not have to file financial statements with the CRO. At the same time, the ultimate beneficial owners of the Irish business would continue to enjoy de facto limited liability as before.

## Part 5: Analysis of Costs, Benefits and Impacts of Options

**Option 1:**

As mentioned in Part 2, this Option is not viable so is not being assessed any further.

**Option 2:**

This will involve only a negligible cost to the unlimited companies involved, though their owners may have incurred significant costs in putting in place the structures that enabled them to avoid filing statutory financial statements without being personally exposed to liability for the debts of the unlimited companies.

Unlimited companies are already obliged to prepare financial statements in line with the provisions of Part 6 of the Companies Act 2014. The form and content of those financial statements are the same as those for a limited company. Moreover, unlimited companies are already obliged to file an annual return with the CRO. The only additional element as a result of Option 2 will be the obligation to annex the financial statements and, where applicable, a directors' report to the company's Annual Return filed with the CRO. As a result, the cost for a company of Option 2 is limited to the cost of annexing the financial statements to the annual return form. This is negligible.

As can be seen from Part 3 of this RIA, some of the companies affected consider that financial disclosure will result in significant costs for them. However, the EU Directive must be transposed into Irish law and that necessitates closing off the exemption for some unlimited companies that currently qualify. If a company considers that the cost of disclosure outweighs the benefit of limited liability, it may decide to meet the criteria of an unlimited company. Any unlimited company that does not meet the criteria of a "designated ULC" will continue to qualify for the exemption from filing.

The main benefits are that creditors and potential creditors of the unlimited companies in question will have the same access to financial statements as they would if the companies were limited companies; this is beneficial for those parties given that the ownership structures of the unlimited companies in question are such that creditors have, in reality, no recourse to the personal assets of the beneficial owners of those unlimited companies.

As for impacts, Option 2 will have an impact on national competitiveness in that the competitors of the unlimited companies in question will have access to the filed financial statements of those companies. This is already the case for limited companies and the vast majority of companies in Ireland are registered as limited companies.

Option 2 will have no impact on the environment, the rights of citizens, North-South and East-West relations or on socially excluded and vulnerable groups. There are no compliance burdens other than the cost of annexing financial statements to the company's Annual Return.

**Option 3:**

The only difference, with respect to impact, of Option 3 over Option 2 is that more unlimited companies will become "designated ULCs" as a result of Option 3 and, therefore, more companies will no longer qualify for the exemption from filing financial statements.

There is no difference between Option 2 and Option 3 with respect to the costs for the companies affected.

Option 3 has all the same benefits as Option 2 and more. As Option 3 will provide that holding companies of limited liability groups must file group financial statements, transparency of those groups will be enhanced. This is a benefit for third parties employed by or doing business with those groups as they will have access to the same range of financial information as they would if they were doing business with a similar group of limited liability subsidiaries but with a limited liability holding company.

Option 3 has the benefit of clarity. A company will be able to easily identify whether it is an ULC, qualifying for the exemption, or a designated ULC, which does not qualify.

As Option 3 improves the transparency of companies, it will benefit our international reputation and demonstrate that Ireland is committed to international standards in this area.

Option 3 will have no impact on the environment, the rights of citizens, North-South and East-West relations or on socially excluded and vulnerable groups. There are no compliance burdens other than the cost of annexing financial statements to the company's Annual Return.

## Part 6: Enforcement, Compliance and Review

No additional enforcement, compliance or review mechanisms are required. The Companies Act 2014 already provides for failure to annex financial statements to Annual Returns.