

# LAW SOCIETY SUBMISSION

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**BREXIT, CREST, THE CENTRAL SECURITIES DEPOSITORIES REGULATION  
(REGULATION (EU) NO 909/2014) ("CSDR") AND THE IRISH EQUITY  
SECURITIES MARKETS**

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION (DBEI)

JULY 2019

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## ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

The Law Society of Ireland (“the Law Society”) wishes to make the following submission in relation to Brexit, CREST, the Central Securities Depositories Regulation (Regulation (EU) no 909/2014) (“CSDR”) and the Irish equity securities markets.

## 1. Introduction

- 1.1 The CREST system of facilitating the recording of ownership and effecting transfers of shares in Irish incorporated companies has been in use by Irish companies whose shares are traded on either market of Euronext Dublin or on the London Stock Exchange for over 20 years. Euroclear UK & Ireland Limited (“EUI”) as the operator of CREST was authorised as an “operator” under the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996 (S.I. No. 68 of 1996) (“**1996 CREST Regulations**”) under the then applicable Companies Acts by the Minister for Enterprise and Employment enabling it to provide the system in use for dematerialised transfers of shares. The 1996 Regulations were continued in force after the enactment of the Companies Act 2014 (“**2014 Act**”) and may be amended or revoked under Section 1086 of the 2014 Act by the Minister for Business, Enterprise and Innovation.
- 1.2 EUI is currently in the process of seeking authorisation as a Central Securities Depository from the Bank of England under the Central Securities Depositories Regulation (EU) No 909/2014 (CSDR). CSDR has applied to EUI since 1 January 2015 and the Law Society understands that, so long as the United Kingdom remains within the EU or has the benefit of the transition period in the Withdrawal Agreement post a “soft” or agreed terms Brexit, Recital 81 and Article 69(4) of CSDR continues to apply to Irish CREST.
- 1.3 A Commission Implementing Decision (EU) 2018/2030 of 19 December 2018 has resolved that until 30 March 2021 for the purposes of Article 25 of Regulation (EU) No 909/2014, the legal and supervisory arrangements of the United Kingdom of Great Britain and Northern Ireland consisting of the Financial Services and Markets Act 2000 and the European Union (Withdrawal) Act 2018 applicable to central securities depositories already established and authorised in the United Kingdom of Great Britain and Northern Ireland shall be considered to be equivalent to the requirements laid down in Regulation (EU) No 909/2014. This is reflected in the ESMA announcement of 1 March 2019<sup>1</sup> (although this latter announcement does not make reference to a transition period expiring on 30 March 2021).
- 1.4 The Law Society understands that a decision has been made<sup>2</sup> in relation to the ultimate post-Brexit solution to move to the continental structure of immobilisation such that transactions in underlying securities of participating issuers would be settled using

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1 In this announcement, ESMA stated that, in the event of a no-deal Brexit, the Central Securities Depository (CSD) established in the United Kingdom (UK) – Euroclear UK and Ireland Limited – will be recognised as a third country CSD to provide its services in the European Union under Articles 25 of CSDR.

2 This position has been made clear in a number of interactions between industry participants and representatives from the Central Bank of Ireland (CBI) and relevant Government departments.

Euroclear Bank book-entries where Euroclear Bank is the issuer-CSD. A solution along these lines has been devised for Irish issuers with the assistance of Euroclear Bank and we note that a White Paper has been published which gives further details of this solution. We will assume for the purposes of this submission that the Department of Business, Enterprise and Innovation (“**DBEI**”) is familiar with the proposed solution rather than outline it in any detail here. It is notable that this situation has arisen because Ireland is the only member state of the EU not to have a domestic CSD for its listed companies and has relied on EU as operator of CREST. We understand that a decision not to establish an Irish CSD has already been made. It is regrettable that more consultation did not occur in regard to this decision.

- 1.5 As the proposed solution will involve a system which is very different to the CREST system (participants will hold fungible Belgian law contractual rights, also governed by Belgian statute, which relate to underlying shares held by a depository) this has a number of implications for Irish company law and the continued administration of the equity securities market which in the Law Society’s view requires clarification by amending legislation<sup>3</sup> in the interests of ensuring order and eliminating anomalies<sup>4</sup>.
- 1.6 One “structural” concern that the Law Society would like to point out is the potentially anomalous situation which will arise from the proposed domicile of the Euroclear nominee in the United Kingdom post-Brexit. This will result in the registered shareholder in Irish issuers being domiciled in a third country (the UK) resulting in potential conflicts of law issues arising. This seems anomalous and inappropriate having regard to the necessity to move from the current UK based CREST system post Brexit.<sup>5</sup>

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3 As explained below, much of this can be achieved by a statutory instrument under section 1086 of the Companies Act 2014.

4 We understand that the Euroclear Bank model is used for all securities currently settled through Euroclear Bank (including Irish government debt) and cannot be changed in respect of the settlement of Irish equity securities and accordingly no change is warranted or possible with respect to Irish equity securities. This is a matter for consideration by the DBEI after taking appropriate advice and discussion between DBEI and Euroclear Bank if considered necessary by the DBEI. In its CSDR Q&A [www.esma.europa.eu/sites/default/files/library/esma70-708036281-2\\_csd\\_r\\_qas.pdf](http://www.esma.europa.eu/sites/default/files/library/esma70-708036281-2_csd_r_qas.pdf), ESMA explain that “Article 23(3) of CSDR relates to the provision of notary and central maintenance services in another Member State. Its paragraph (e) specifically provides that “where relevant, [a CSD shall communicate to the NCA of the home Member State] an assessment of the measures the CSD intends to take to allow its users to comply with the national law referred to in Article 49(1)” i.e. the corporate law of the Member State under which the securities are constituted. National laws referred to in Article 49(1) of CSDR govern the relationship between issuers and holders of such securities or any third party, such as ownership rights, voting rights, dividends and corporate action, which for the sake of clarity, is not the national law of the home NCA that will receive this communication. Therefore, to assess that these measures allow its users to comply with the applicable securities law, the CSD should not only communicate the measures it intends to take and the procedure it intends to follow, but should also provide actual evidence that the proposed measures ensure compliance. To that end, independent legal opinions may be requested in order to certify that the rules and procedures set out by the CSD allow their users to comply with each applicable national law.

5 It is also not clear to us that use of a UK incorporated nominee with an English law trust deed will be compliant with the EU Settlement Finality Directive 98/26/EC. In Euroclear Bank’s paper entitled “Rights of Participants to Securities deposited in the Euroclear System – July 2017, it is noted that although Belgian conflict of law rules will point to Belgian law as the *lex concursus*, it may not be excluded that enforcement proceedings are brought before a foreign court (for instance in case of securities that have been sub-deposited with a foreign depository) and that conflict of law rules applicable in that jurisdiction point to another law than Belgian law. We understand that Euroclear Bank will obtain UK onshored settlement finality recognition, ensuring the finality integrity of its arrangements, including those involving the nominee. This is a matter on which DBEI may wish to seek advice.

- 1.7 The Law Society would also point out that it will be a necessity for the reasons identified at Section 2 below to introduce legislation and accordingly an opportunity should be taken to address the other issues raised in this submission in the face of this necessity. In addition, legislation will be required to ensure that Ireland is fully compliant with its obligations under CSDR and to facilitate the transition to the Euroclear Bank solution. As there are Irish companies in other CSDs, any legislation should be generally applicable to all CSDs.
- 1.8 The Law Society understands that the priority is to facilitate implementation of the Euroclear Bank solution. Where we have highlighted legal issues, we believe that this can be accommodated so that they should not, in our view, endanger implementation and do not result in procedural burdens for Euroclear. However, further consultation with Euroclear should take place. Further information is required in regard to the details of the actual steps which Euroclear expect companies to undergo in order to move from CREST to Euroclear Bank. Without this information, it is not possible to comment in any detail on the sort of legislation that might be needed.

## **2. The need for legislation**

- 2.1 In order to make the Euroclear solution operable, it will be necessary to effect a transfer out of CREST and into the relevant nominee. Subject to the capacity of the Courts and the scope to effect such schemes so that migration of all companies could occur simultaneously in line with Euroclear's requirements and the necessity for maintenance of orderly markets, this could potentially be done by means of individual schemes of arrangement of the 56 companies listed on 24 June 2019 on Euronext Dublin's website<sup>6</sup>. However we are strongly of the view that migration to Euroclear Bank by means of individual schemes of arrangement would give rise to unacceptable levels of uncertainty and disruption and would also make simultaneous migration very difficult to achieve and accordingly it should be facilitated by implementing legislation as referred to in the recommendations set out at Section 3 below. For the sake of clarity, while we suggest that a solution to achieving this may be achieved by means of a statutory instrument, this is the single most important matter to manage for the benefit of the integrity of the Irish equity securities markets and DBEI should prioritise this over any other matter mentioned in this submission, including by means of proposing migration specific primary legislation if considered appropriate. The matters mentioned in the following paragraphs of this section 2 are secondary to this main consideration and should not delay a solution to the migration issue.
- 2.2 The Law Society believes that the DBEI, as the Department with responsibility for Irish company law will wish to ensure that the Euroclear Bank system's interface with Irish company law is mandated by either new primary legislation or new regulations adopted

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6 The list is maintained here: <https://www.euronext.com/listings/euronext-dublin/product-directory>

under section 1086 Company Act 2014<sup>7</sup> as opposed to being left to variable contractual arrangements/rights governed by Belgian statute which may change between the relevant companies, Euroclear Bank and the system members.

- 2.3 Forthcoming dematerialisation obligations also necessitate legislation. Article 3(1) CSDR requires Irish listed PLCs to arrange for their securities to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form. This obligation applies from 1 January 2023.
- 2.4 Currently there is no provision of Irish law that gives Irish listed PLCs the right to force certificated shareholders into a CSD so that only new shares issued after 1 January 2023 will be issued as a direct issuance in dematerialised form.
- 2.5 Article 4(1) CSDR requires that the Central Bank of Ireland (“CBI”) shall ensure that Article 3(1) is applied.
- 2.6 Currently there is no provision of Irish law that gives the CBI any power to ensure that Article 3(1) is applied.
- 2.7 Article 3(2) CSDR requires that where brokers undertake a transaction in transferable securities on a trading venue the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded. Following 1 January 2025 this requirement applies to all transferable securities.
- 2.8 Article 4(2) CSDR requires the CBI to ensure that Article 3(2) is applied where the relevant securities are traded on Euronext Dublin.
- 2.9 While the Stock Exchange Act 1995 gives the CBI certain powers to approve the rules of Euronext Dublin, it will probably need a new rule to be adopted by Euronext Dublin in order to ensure that Article 3(2) is applied.
- 2.10 Currently there is no provision of Irish law that gives the CBI any power to ensure that Article 3(2) is applied.

### **3. Issues & Recommendations**

- 3.1 A non-exhaustive table of issues arising under Irish Company law that should be considered in the context of the Euroclear Bank CSD solution and Ireland’s compliance with its obligations under CSDR is set out at Annex 1.

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<sup>7</sup> Issues under Section 1087(1)(a) of the 2014 Act will not arise as each participating company can be expected to amend its Constitution by a special resolution so that the holding of shares will be CSDR compliant.

- 3.2 The Law Society understands that it is likely that certain UK listed Irish companies (whether exclusively listed in London or otherwise) will seek to put in place a facility for CREST Depository Interests in order to accommodate those shareholders who currently hold shares in CREST and may wish to continue to do so. Indeed it is possible that this will be a widely followed solution for issuers with UK listings. Irish incorporated issuers will still need to migrate to Euroclear Bank however and utilise the EUI CSD link arrangement.
- 3.3 We also understand that it is likely that certain other currently listed Irish companies may not wish to migrate to the new Euroclear system as their shares are already immobilised in at least one other existing CSD. It is important that any new legislation does not have the effect of making these positions impossible to maintain.
- 3.4 The recently published Euroclear White Paper of May 2019 relies heavily on the Belgian Royal Decree number 62 on the Deposit of Fungible Financial Instruments and the Settlement of Transactions involving such Instruments, Law of 2 January 1991 on the market in public debt securities and monetary policy instruments, Law of 22 July 1991 on commercial paper and certificates of deposit, and the Belgian company code.
- 3.5 Euronext Dublin, DBEI and the CBI should consider taking both Belgian law and UK Law advice on the proposed solution and the implications of which are beyond the scope of this submission. The Law Society suggests that such advice might extend to ensuring that Belgian bank secrecy laws do not pose any issues for Irish stakeholders in the Euroclear solution<sup>8</sup>.
- 3.6 Other matters on which relevant advice might be taken include:
- 3.6.1 how the new arrangements will comply with the legislation which was to have been enacted by 10 June 2019 in order to implement Directive (EU) 2017/828 (“SRD2”)<sup>9</sup>;
  - 3.6.2 certain Irish regulatory bodies needing to take enforcement action in Belgium under legislation relating to anti-money laundering, such as the Criminal Assets Bureau, the ODCE and the Irish Takeover Panel, under tax legislation, under legislation regulating ownership of credit institutions, insurance companies and airlines and under legislation relating to data protection, by way of example, which no doubt DBEI and other relevant departments and the CBI will have considered; and
  - 3.6.3 jurisdictional and enforcement issues which may also arise should the Euroclear nominee continue be domiciled outside of the EU<sup>10</sup>.

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8 For instance, Euroclear Bank is a Belgian authorised bank and is presumably subject to Belgian Bank secrecy laws. Euroclear Nominee Limited is a UK incorporated company and, in the proposed solution, will become the majority shareholder in 57 Irish public companies

9 In Euroclear Bank’s paper entitled “Rights of Participants to Securities deposited in the Euroclear System – July 2017 it is noted that the right to vote and receive dividends as well as the participation in the winding up of an issuer applies at least with respect to Belgian issuers. For other issuers, the paper notes that the application of this principle will depend on whether the law of the issuer recognises such rights.

3.7 Implications in relation to stamp duty and other taxes are also beyond the scope of this submission. Nevertheless, the DBEI and the Department of Finance have an interest in ensuring that other financial instruments (primarily debt instruments) which are transferable pursuant to Belgian Royal Decree number 62 do not inadvertently become subject to stamp duty.

#### 4. Conclusion

- 4.1 The Law Society is of the view that the orderly continuity of the Irish equity securities market depends on certainty being achieved with respect both to migration to the preferred Euroclear Bank solution and a seamless integration of this migration with existing company law. The Law Society accordingly requests the DBEI to consider and implement the recommendations set out at Annex 1.
- 4.2 The Law Society hopes that the DBEI will find the above comments constructive and helpful and is available to engage further with the Department if required.

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<sup>10</sup> In Euroclear Bank's paper entitled "Rights of Participants to Securities deposited in the Euroclear System – July 2017, it is noted that although Belgian conflict of law rules will point to Belgian law as the *lex concursus*, it may not be excluded that enforcement proceedings are brought before a foreign court (for instance in case of securities that have been sub-deposited with a foreign depository) and that conflict of law rules applicable in that jurisdiction point to another lower than Belgian law.



## Annex 1

### Issues and Recommendations

Issue	Comment	Recommendation
<p>1. Transfer of shares out of the names of CREST participants into the name of Euroclear Nominee Limited (the “<b>relevant nominee</b>”).</p>	<p>In order to make the Euroclear solution operable, it will be necessary to effect a transfer out of CREST and into the relevant nominee.</p> <p>Voluntary transfers may be effected by means of individual schemes of arrangement but the imposition of the cost and disruption involved in this on all Irish quoted PLCs must be avoided, together with the risks which would be associated with effecting an orderly transfer at a particular point in time, assuming all approval thresholds and sanctions were received and no challenges were raised.</p> <p>Section 1086(5) Companies Act 2014 provides that the regulations shall contain such safeguards as appear to the Minister for Business, Enterprise and Innovation appropriate for the protection of investors and for ensuring that competition is not restricted, distorted or prevented. Issues under Section 1087(1)(a) of the 2014 Act will not arise as each participating company can be expected to amend its Constitution by a special resolution so that the transfer of the shares will be CSDR compliant.</p>	<p>Should DBEI receive advice from the Attorney General’s office that enabling provisions may be introduced by Statutory Instrument under Section 1086 of the 2014 Act, then this should be done. If that advice is that this is not possible, then primary enabling legislation should be introduced.</p> <p>The Law Society understands that discussions are in progress with Euroclear with respect to a legislative mechanism for the migration of title to securities by operation of law. This would provide for the transmission by operation of law of legal title to existing securities which are uncertificated securities in the CREST system to Euroclear Bank’s nominee on a designated date subject to:</p> <p>(a) the approval of a special resolution of shareholders at a general meeting of the participating issuer; and</p> <p>(b) the right of shareholders to opt out of the application of the provision (i.e. for title to their shares not to be transmitted and for the securities to remain outside of the Euroclear Bank system) prior to the designated date by</p>

		<p>removing their securities from CREST prior to that date.</p> <p>Whichever method is chosen to facilitate a migration without the necessity of individual schemes or more individual bespoke solutions (specific primary legislation or a new SI), we support this initiative and strongly urge the DBEI to facilitate its implementation.</p>
<p>2. Notification obligations under Transparency Regulation and CBI Transparency Rules.</p>	<p>The transfer of shares out of the names of CREST participants into the name of the relevant nominee is notifiable to each company. Without UK law and Belgian law advice, it is not possible to assume that existing exemption contained in Regulation 14(5)(b) of the Irish Transparency Regulations can be relied upon.</p>	<p>A statutory exemption should be implemented so that shareholding of an EU CSD is ignored. This would avoid the necessity for all shareholders moving through the notification thresholds solely as a consequence of migration to submit notification obligations as part of migration.</p> <p>The Law Society recommends that any doubts be removed by an amendment to the Irish Transparency Regulations/ or by provisions in new Irish CSD Regulations to expressly disregard any interest in securities held by Euroclear Bank or any CSD and its nominee or that the CBI should be requested to issue guidance on the topic. This should be done in consultation with Euroclear Bank to ensure that any such changes do not have operational implications for Euroclear Bank which we are informed are not possible to tailor for the Irish market.</p>

<p>3. Notification obligations under the 2014 Act in the case of Euronext Dublin Growth Market/AIM companies.</p>	<p>The transfer of shares out of the names of CREST participants into the name of the relevant nominee is notifiable to each company. Without UK and Belgian law advice, it is not possible to assume definitively that the existing exemption contained in Section 260(a)(ii) of the 2014 Act can be relied upon.</p>	<p>A statutory exemption should be implemented so that shareholding of an EU CSD is ignored. As above.</p>
<p>4. Formalities of transfer of securities</p>	<p>Article 3(1) CSDR requires Irish listed PLCs to arrange for their securities to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form. This obligation applies from 1 January 2023</p>	<p>Amend section 94 of the 2014 Act to disapply the requirement for a proper instrument of transfer to a CSD (note that there are currently no clear proposals as to how transfers of title to shares outside a CSD will work following implementation of the dematerialisation requirements in 2023/2025).</p> <p>This should be addressed in new primary legislation or new regulations adopted under section 1086 Company Act 2014.</p> <p>Issues under Section 1087(1)(a) of the 2014 Act will not arise as each participating company can be expected to amend its Constitution by a special resolution so that the transfer of the shares will be CSDR compliant</p>
<p>5. Prohibition on issue of certificates.</p>	<p>It is assumed that a CSD will not wish to hold a physical share certificate.</p> <p>Article 3(2) CSDR requires that where brokers undertake a transaction in transferable securities on a trading venue the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they</p>	<p>Amend section 99(2) of the 2014 Act to disapply the requirement where shares are to be allotted or transferred to an authorised CSD or its nominee.</p>

	have already been so recorded. This will not be possible if shareholders remain entitled to insist on share certificates	
6. Failure/refusal to identify ultimate owner of shares.	<p>The Euroclear Bank solution is based on a CSD which has handled bonds and which appears to have no experience with legal issues associated with shares in a traded plc. Belgian bank secrecy and other issues arising from having a CSD located abroad makes it important that jurisdiction can be reasserted back to Ireland where there are instances of non-compliance with Irish legal obligations regarding the disclosure of the ultimate owner of shares.</p> <p>A CSD participant should not be able to require a CSD to vote on his behalf, if the person has failed to notify the company of his interest in the securities as required by the 2014 Act or the Transparency (Directive 2004/109/EC) Regulations 2007 or any regulation made thereunder.</p>	Euroclear has explained that its contractual framework allows it to implement disenfranchisement of the proportionate holdings of participants on receipt of appropriate notification from participating issuers. To the extent that this does not occur there should be legislation to provide for stock withdrawal mechanism (which is exempt from stamp duty) so that a company can require the shares to be evidenced in certificated form where there has been a failure/refusal to identify ultimate ownership of the shares. Note that Euroclear Bank's stance on this is that its model cannot operationally accommodate a provision which allows issuers to force withdrawal from the Euroclear Bank system.
7. Closing of registers and record dates.	Subject to what the Minister deems as the appropriate cut off time <sup>11</sup> , each company must be capable of agreeing with its CSD the timing of the closing of the register for the purpose of determining voting rights at meetings in accordance with the rules of the CSD. The existing 48 hour period does not appear to be feasible under the current CSD technology.	New legislation to delimit the closing of the register and the setting of record dates.

<sup>11</sup> Lawyers for Ryanair Holdings plc (which must comply with a requirement of majority EU ownership in order to maintain its operating licence) have pointed out that a longer period of time before a meeting will facilitate reconciliation of the nationality declarations of the underlying shareholders with the shares voted.

8. Conversion of securities into certificated form.	Withdrawals from the Euroclear Bank system should not have to be accompanied by the issue of a new share certificate as in many cases such withdrawal will be for regulatory reasons or for the purpose of a subsequent deposit into another CSD.	New legislation to define how shares can be withdrawn from a CSD.
9. Transfer of dissenter shares and section 457 of the 2014 Act	Clarity is needed in regard to the transfer of dissenter shares and section 457 of the 2014 Act as the service of such notices can occur while a company remains subject to CSDR for the reason that the listing of its shares has not been cancelled. After 2015, listed companies will not have share certificates and written stock transfer forms will no longer be effective	New legislation to allow the service of the section 457 notice to be effective if served on the CSD
10. Majority in number test in a court approved scheme of arrangement.	This test is no longer operable in a CSD system such as the Euroclear Bank system given that the Euroclear Bank nominee will count as a single holder.	Primary legislation required to abolish test.
11. Miscellaneous	The entry of the name of the CSD or the name of any CSD nominee on the issuer register of members shall be disregarded when applying any of the shareholding thresholds in the regulations set out in the Schedule	To be covered in new regulations

## **Annex 2**

### **SCHEDULE OF RELEVANT LEGISLATION**

Rules 8, 9, Irish Takeover Panel Act 1997, Takeover Rules, 2013.

Rules 3, 4 and 5 Irish Takeover Panel Act 1997, Substantial Acquisition Rules, 2007.

Regulation 54(1)(c) European Union (Capital Requirements) Regulations 2014 (S.I. No. 158 of 2014).

Regulation 59 and 60 European Union (Insurance and Reinsurance) Regulations 2015 (S.I. No. 485/2015).

Sections 40, 41 Stock Exchange Act 1995.

Sections 7, 89(1), 178(2), 178(3), 189(1), 211(3), 256 to 269, 1126, 1013(3), 1046 to 1070, 1032(6), 1064(1), 1159(9), 1287(1) Companies Act.