**Advice given in 1994 and 1995 regarding Chapter 2 of Part IV of the Companies Act 1990**

The following is a summary of what I can now recall of the legal reasoning which gave rise to advice to the DCC Group in 1994 and again in 1995 that an intra-group sale and transfer (in 1994) and an intra-group sale (in 1995) did not require to be notified under Chapter 2 of Part IV.

That advice related to circumstances where the transfer or sale was between wholly owned companies within the DCC Group and was a transfer/sale of shares constituting more than 10% of the share capital of the listed company ("Relevant Shares"), the ownership of which had previously been notified to the relevant listed company and to the Stock Exchange.

I should say that while I have made a careful search of all the relevant files, I have not been able to locate all the papers relating to the consideration of this issue other than in the context of the Fyffes transaction (which were retained because of the litigation). The file relating to the 1994 intra-group transaction in Flogas shares no longer exists. Accordingly there may have been other points either for or against which affected the advice which have now been forgotten. I should also say that I am still to some extent working from memory of a matter that occurred more than 14 years ago and which was not at the time, a major transaction or issue for me or I believe for the client. The giving of net pieces of advice (whether over the phone or confirmed in a short letter) was a regular occurrence for me over that period and until the matter came into focus in the Fyffes/DCC litigation it was not an issue which loomed large in my mind. Nevertheless, I have done the best I can to recall all the factors which led to the advice we gave. Furthermore, in so far as it is possible, I have tried to set out the position as best I can recall as of the specific time and without regard to subsequent developments.

**Factual Background**

I believe that the initial legal analysis as to the application of Chapter 2 to an intra-group transfer was originally carried out by William Fry in 1994 in relation to shares in Flogas and that the conclusions reached were repeated when the same issue arose the following year in relation to Fyffes shares.

The factual background, in both cases, was that the relevant plc and the Stock Exchange had already been notified in accordance with Chapter 2 that the full ownership of the Relevant

Shares rested with DCC Plc and its wholly owned subsidiaries so that in effect no other entity had any notifiable interest in the Relevant Shares.

The provisions of Chapter 2 had come into force in 1991. In general terms, those provisions were relatively complex and technical and addressed factual circumstances which arose relatively infrequently. By 1994, the provisions had not been subject to any judicial consideration. We, in William Fry, however, had had cause to review the provisions on behalf of a number of clients when the Act first came into force. In the case of the DCC Group, this resulted in the relevant DCC companies making notification to Fyffes plc and Flogas plc and the Exchange in respect of its then shareholdings in those companies. Similarly these provisions fell to be addressed again some time later when S&L Investments Limited subsequently acquired further shares in Fyffes plc. The provisions were again addressed in 1994 when DCC itself became a listed company and wrote to its then 5%+ shareholders alerting them to the need to formally notify DCC plc of their holdings under the 1990 Act. On each of these occasions however what was involved was a first notification of a substantial holding on the occasion of the Act first having application to that holding or a first notification by reason of a new acquisition of a substantial holding from a third party.

Accordingly, when the query arose regarding an intra-group transaction in 1994 involving shareholdings (in Flogas plc) which had been previously notified, the point involved was a novel net point. Neither we nor our clients had encountered any previous example of a notification having been made to a listed company or to the Stock Exchange of a transfer of interests in Relevant Shares within a wholly owned group of companies. Although drawing conclusions from the absence of notifications of intra-group transfers is of course seeking to prove a negative, nevertheless I think it is fair to say that it was unlikely that intra-group transactions in listed shares had not taken place since 1991. The initial intuitive feeling on the part of those involved in William Fry was that such an intra-group transfer of interests should not involve a new notification as no apparent purpose or policy would appear to be served by doing so.

**Legal Review in 1994**

An initial review of Chapter 2 confirmed that the "person" who was required to notify an interest in certain circumstances could either be an individual or a company. In the context of a group of companies, one of which was interested in Relevant Shares, Section 72(2) and

72(3) operated to treat any other company which held 30% or more of its voting rights as being similarly interested in the Relevant Shares and so on upwards through a chain of companies. The Act required notification of the fact that an interest was held but did not require that particulars of the nature of the interest be given. An interest was widely defined and was not confined to legal or beneficial interests in the shares. Rather surprisingly, however, on a literal interpretation, the "interests" required to be notified appeared to be confined to direct interests in the Relevant Shares and did not extend to indirect interests. Thus for example where the Relevant Shares were held within a group of companies by a subsidiary, X Limited, (and that interest had been previously notified), no new notification obligation arose in respect of acquisitions or disposals of or subscriptions for shares in X Limited provided the acquirer/subscriber did not acquire more than 30% of the voting rights in X Limited. Thus it appeared that, on a literal interpretation of the provisions, the economic interest in the Relevant Shares could be indirectly acquired by third parties without any notification obligation arising; this appeared to render the legislation somewhat ineffective to achieve its apparent purpose.

In the context of the movement of interests in a previously notified holding of Relevant Shares within a wholly owned group of companies, the provisions of Section 72(2) and (3), when taken with Sections 68(4) and 71(6), appeared, on a literal interpretation, to produce somewhat anomalous results. Thus a company in a Group acquiring an interest in Relevant Shares from one of its subsidiaries would not be obliged to make a new notification as that company was deemed under Section 72 to have had an interest in the shares from the outset. Similarly, it appeared that if the disposing subsidiary retained an interest in the shares (such as the legal title) it too would not be obliged to make a new notification. Thus it appeared that on a literal interpretation no new obligation to notify on the occasion of an intra-group transfer might arise if the interest was moving upwards through a chain of subsidiaries leading up to the parent of the wholly owned Group (e.g. from the immediate shareholding subsidiary up to DCC plc) but would arise if the interest was moving downwards (e.g. from DCC plc to a subsidiary). The fact however that the Act through Section 72 sought to ensure disclosure of the identity of the ultimate owner suggested that the focus of the Act was to ensure disclosure of the identity of the true owner of the shares in the plc, being the person who was ultimately able to exercise the voting rights in that company.

The apparent anomalies referred to above caused us to consider in greater detail the EU Directive on which the provisions were based, namely Directive 88/627 EC. In general terms

that Directive required Member States to enact laws under which persons who acquire or dispose of listed shares were to notify the listed company and the Stock Exchange where in consequence of the acquisition or disposal that person's holding moved above or below a threshold of 10% (and certain stated larger percentages) of the voting rights in the company. Article 3 of the Directive entitled Member States to impose requirements which were stricter than or additional to the requirements of the Directive.

It appeared to us that Chapter 2 of the 1990 Act sought to implement the terms of that Directive while at the same time expanding its ambit to refer to any interest in the listed shares and not simply "voting rights". It also imposed the notification obligation at the lower 5% level. While Section 89 specifically provided that only the later sections of Chapter 2 (Sections 90 to 96) were for the purpose of giving effect to the Directive, it was clear that one would have to adopt the same basis of interpretation in respect of the whole of Chapter 2, particularly as Section 91 (4) stated that the earlier provisions of the Chapter regarding "interests" and the manner of their notification should apply in the same way to notifications to the Exchange under Sections 90 to 96.

We were aware that the High Court had held that, for the purposes of interpreting EU Directives and Regulations and Irish legislation implementing same, the proper approach was the continental purposive or teleological approach (Lawlor -v- the Minister for Agriculture 1988). There was at the time, in 1994/1995, considerable discussion in legal circles about this method of interpretation of legislation and it was believed to be the approach which was increasingly being adopted by the Courts. (I have since become aware of a High Court decision around that time known as the Bosphorus Case which approved the view adopted in the Lawlor case and that may have been the reasons why the purposive approach was such a prominent topic in legal circles in 1994 and 1995 although I cannot now say that I was conscious of having been aware of the actual decision in the Bosphorus Case at the time).

While I recall that our advice in 1994 and 1995 that a purposive interpretation of Chapter 2 was appropriate was heavily influenced by the fact that Chapter 2 was based on an EU Directive and by the apparent objectives of that Directive, I cannot say that I now recall the precise provisions of the Directive which we considered particularly relevant when we looked at the issue in 1994.

From a review now of the terms of the Directive, the following appear to be provisions relevant to the issue we were then considering:-

(a) The opening recital to the Directive stated that a policy of adequate information of investors in the field of transferable securities was likely to improve investor protection, to increase investors confidence in securities markets and thus to ensure that securities markets function correctly and went on to provide that, to that end, investors should be informed of major holdings and of changes in those holdings in Community companies the shares of which were officially listed. Article 1 refers to persons who acquire such holdings directly or through intermediaries. It appears from these provisions that the general purpose of the Directive was to ensure that a listed company and the Stock Exchange were made aware of who were the true ultimate holders of substantial shareholding interests in a listed company.

(b) Articles 6, 7 and 8 of the Directive addressed the question of interests in Relevant Shares which were held within a Group of companies:-

(i) Article 6 provides that if an interest in Relevant Shares is acquired by a company which is within a group of companies which under EEC law is required to draw up consolidated accounts, then that company is exempt from the notification obligation if its parent undertaking makes the notification. Directive 83/349/EEC defines at length precisely which companies are required to draw up consolidated accounts (by reference to the level of control by the parent company) but there is no doubt that DCC Plc and its subsidiaries are required to draw up such accounts. In the case that we were considering DCC plc, being the parent company, had already made the notification;

(ii) Article 7 provides that for the purposes of determining whether a person is required to notify under the Directive, a person would be regarded as holding the voting rights (or in the language of the Act having the "interests") held by, inter alia, any undertaking controlled by that person or entity.

(iii) Article 8 then defines a controlled undertaking in terms which embraces all wholly owned subsidiaries of the parent and Section 2 of Article 8 goes on to provide that the interest of a parent company in Relevant Shares will include the

rights of any of its controlled undertakings or of any controlled undertaking which is controlled by one of its controlled undertakings.

It appeared to us in 1994 that in the context of a consolidated group such as the DCC group the Directive sought to treat the interests of controlled undertakings as those of the parent undertaking and to impose the notification obligation on the parent and to exempt the subsidiaries in circumstances where the parent performed that obligation.

It appears that, at the time, we concluded that the intent of the Directive was that no further notification was required until the parent undertaking and its controlled undertakings taken together ceased to have the interests which it had previously notified. This made some sense since the object of the Directive seemed to be to ensure that the listed company had knowledge of who it was that was ultimately entitled to its shares rather than how that interest was held.

At the time, the extent to which a purposive approach to interpretation should be taken was based entirely on the developing case law (I know now that the Interpretation Act of 2005 subsequently made explicit statutory provision for purposive interpretation). We were, if anything, reluctant to adopt a purposive interpretation as it was not the traditional approach in common law countries. However, we concluded at the time that the purposive approach was what the case law required us to adopt in the circumstances of Chapter 2 and it appeared to produce a result which was more sensible and effective than that which would appear to result from a literal interpretation of the provisions and also produced a result in line with market practice so far as we could ascertain it. I recall that we felt that we would be quite uncomfortable adopting a literal interpretation of those provisions if asked to advise on a transaction with a third party outside the Group where a literal interpretation would not give rise to any obligation to notify the acquisition (for example, it seemed that no obligation to notify an acquisition would arise on a literal interpretation if a third party subscribed for new non-voting shares in that subsidiary, even where the new shares conferred the right to receive all income or capital generated by the subsidiary from its investments (i.e. all the dividends and sale proceeds derived by the subsidiary from the listed companies' shares)).

It appeared to us therefore in 1994 that a purposive interpretation was to be preferred based on the apparent intention of the Directive and we advised DCC Group on that basis. It is most

likely that the legal reasoning behind the advice was documented in one or more file memos by myself or by one of my then assistants.

**1995**

When the matter was raised by phone with us again in 1995, we gave the same advice based on the same reasoning and confirmed it in a brief fax; it was raised initially without any context and it was only later that we were informed that the context was a tax mitigation exercise being contemplated involving Fyffes shares.

I believe that by then I had become aware of the case of Mulcahy -v- The Minister for Marine (1994) in which the purposive approach was again adopted by the High Court even notwithstanding that the relevant legislation was not derived from EU or other continental type legislation. I have in fact a clear memory of being aware of that case. (In the context of the High Court application to appoint the Inspector, it was suggested that the purposive approach was not known to Irish law; I was alarmed at this and when searching for information, I was able to locate a copy of the unreported judgement in that case in my personal office). If anything this would have reinforced my belief in 1995 that the purposive approach was the correct one.

It is apparent from the papers available that the reasoning adopted in the Flogas transaction in 1994 was not recorded in writing at any length in the context of the Fyffes transaction. At this remove, I can only speculate as to why that was. The initial query was by phone and we confirmed by fax the view we had expressed in that phone call (which was the same view as adopted the previous year). It may be that when I was asked for a letter which would go with the board papers to the directors, I sought to make the advice more understandable to the directors by focussing on the conclusion reached (i.e. not notifiable based on a purposive interpretation) rather than on the legal reasoning for that conclusion.

At the time, we would have entirely accepted that if one were to adopt a literal interpretation and were to assume that the provisions of E.U. Directive 88/627 EC were irrelevant, Lotus Green Ltd would have to notify because it was acquiring an interest in the Relevant Shares from DCC plc and S&L Investments and was a new company at a level below them in the Group. In addition certain of the companies in the Group above them would also have to notify because Lotus Green Limited was held through a different chain of 100% subsidiaries than S&L Investments Limited was. The notification would be to the effect that such

companies had an interest in the Relevant Shares alongside S&L Investments Limited and DCC plc.

In contrast however, S&L Investments Limited and DCC plc would not have any notification obligation. In the case of S&L Investments this was because it had already notified that it had an interest in those shares and it continued to be interested in them, as the legal owner and registered holder, and Section 71(6) provided that a person who at any time has an interest in Relevant Shares which is notifiable is to be regarded as continuing to have a notifiable interest until he comes under an obligation to make a notification stating that he no longer has a notifiable interest in those shares. Similarly DCC plc would not on a literal interpretation have been required to notify the transaction with Lotus Green Limited for the same reason (i.e. it remained the legal owner and registered holder of the shares) but also because under Section 72(2) and Section 72(3) DCC plc was to be taken to remain interested in the Relevant Shares by reason of the fact that Lotus Green Limited was interested in them and Lotus Green was a body corporate in which DCC plc or one of its subsidiaries had more than 30% of the voting power.

I do recall considering the possible consequences if our view proved to be incorrect and Lotus Green Limited (and certain companies above it in the Group) should have notified that it also was interested in the Fyffes shares alongside DCC plc and S&L Investments.

We were aware that a failure to notify was a breach of the Act for which, as with all other provisions of the Companies Acts, a prosecution could be brought. Quite apart from our views as to the substance of the advice, we felt that there would be no real prospect of prosecution in circumstances where the parent company had already made notification that the Group companies held all interests in the Relevant Shares so that the listed company and investors on the Stock Exchange were fully aware that DCC plc and its wholly owned subsidiaries were the full owners of the shares in question and where there was considered legal advice, whether right or wrong, that no further notification obligation arose. Again this was probably influenced by the fact that there had been no notification of an intra-group transaction and our view that the notification of such a transaction was not the object of the provision.

Similarly, it appeared to us that the civil sanction provided in the Act did not sit well with the facts of the particular case we were considering; that sanction was that the interest held by

Lotus Green Limited in the Relevant Shares would not be enforceable by it by action or legal proceeding. In the particular case of the Fyffes shares, the registered shareholders were DCC plc and S&L Investments Limited both of whom had duly notified their interest in the Relevant Shares; DCC plc and S&L Investments Limited were the only persons who had rights as shareholders in Fyffes plc or who could seek to enforce them against Fyffes and the civil sanction provided for in the Act could not apply to them. Lotus Green Limited could only seek to enforce its contractual rights against its parent company and its fellow subsidiary and, even if those rights were indeed affected by the Act, it appeared inconceivable that it would ever need to enforce those rights by legal action against fellow group companies.

I should emphasize that I am not seeking, in this note, to positively assert the correctness (in hindsight) of the advice given in 1995. In 2004/2005 when I had occasion to look at the advice again when it appeared in the discovery documents in Fyffes plc v. DCC plc and others, I could see that there was force in the contrary view. Accordingly, the purpose of this note is simply to set out as best I now can the reasoning process that led to the conclusion which was expressed in 1995.

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Alvin Price,
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