

Companies Bill 2012

Preparing Private Companies for Transition

Introduction

Irish companies are beginning to prepare for transition into the new regime, the Companies Bill 2012 (the "Bill"). The Bill is built around the private company limited by shares and, unlike previous company law enactments, the Bill places a requirement on existing private companies to take certain steps during a statutory transition period after commencement. The transition period is a period of 18 months¹ (which can be extended by the Minister for a further 12 months)² from commencement, during which the directors and members of an existing private company must elect either to register as a designated activity company ("DAC") or to register (or be deemed to register) as a new-form company limited by shares ("CLS").

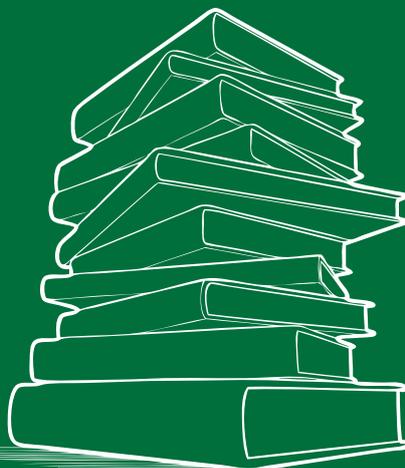
The CLS is a simplified new-form private company limited by shares to which the full range of streamlined governance reforms under the Bill will apply, such as the one-document constitution, the ability to have a single director and the power to dispense with the holding of AGMs.

The DAC is a more familiar corporate form. It remains restricted by its objects and has constitution that comprises a memorandum and articles of association. In these and other respects, the DAC is the corporate form that is most similar to an existing private company limited by shares.

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¹ Section 15, Companies Bill 2012

² Section 16, Companies Bill 2012



CLS or DAC?

A company's decision on whether to register as a CLS or DAC will depend on whether the company law provisions and procedures that apply only to the CLS are suitable in its case. In addition, it will not be possible for certain types of company, such as a licensed bank or a company that has debt securities listed or admitted to trading on a market, to register as a CLS.

The primary difference between a CLS and a DAC is that a DAC remains limited by its objects. However, modifications of the legal rule which restricts a company to act within its objects both under the Companies Act 1963 and the Bill combined with the fact that a majority of companies adopt "catch-all" objects in their memorandum means that this difference may amount to very little in practice.

As noted, the CLS and DAC also differ in the way that certain reforms in the Bill apply to them. For example, a multi-member DAC is not empowered to dispense with the holding of an AGM by passing a written resolution and will not be able to avail of the one-director minimum.

One further difference is that, upon registration as a DAC, a company must alter its name to substitute the words "designated activity company" or "cuideachta ghníomhaíochta ainmnithe" (which can be abbreviated as "dac" or "cga" respectively) for the word "limited" or "teoranta" in the company's name.

However, it should be emphasised that the number of differences between the application of the Bill to the CLS and DAC are very few. Other headline reforms in the Bill, such as the codification of directors' duties, the ability to pass majority written resolutions and the availability of mergers to facilitate group reorganisations will apply equally to the CLS and DAC.

On the foregoing basis, it is anticipated that a majority of existing private companies will elect to register as a CLS during the transition period. Even where it is important to restrict the activities of a company, such as in a joint venture, it is far more likely that such restrictions will be imposed via a shareholders' agreement or the company's articles than via the objects stated in its memorandum.

Transition

Existing private companies are required to take action during the transition period. If the company has not already registered as a CLS or DAC under the provisions of Chapter 6 of Part 2 of the Bill by the end of the transition period, then the directors must prepare a new-form constitution and register it as a CLS.

No offence is specified for a failure by directors to prepare a new-form constitution. However, it should be noted that the directors' failure to do so would amount to a breach of the directors' general duty to ensure that the Act is complied with by the company³, which may be actionable either in its own right or in connection with an application by a member or creditor for relief.⁴

During the transition period, the applicable law for existing private companies will be the Bill as it applies to a DAC.⁵

In summary, the three options for existing private companies during the transition period are:

- registering as a CLS by submitting a new-form constitution;
- registering as a DAC or another form of company; or
- doing nothing and registering as a CLS by default.

³ Section 224(1), Companies Bill 2012

⁴ Section 63, Companies Bill 2012

⁵ Section 59(1), Companies Bill 2012



These options are discussed in more detail below.

(i) Registration as a CLS

A company may choose to register an existing private company by registering a new-form constitution that has been adopted in either of the following ways:

- by special resolution of the members⁶; or
- by resolution of the directors.⁷

The form of a new-form constitution adopted by directors' resolution is strictly limited by the Bill. The directors may only make the minimum amendments to the company's existing constitution that are required in order to make it conform with the prescribed contents set out in Section 19 of the Bill.

The members have greater scope to update an existing company's constitution when they adopt a new-form constitution by special resolution (i.e. in the usual way). A new-form constitution that is adopted in this manner can contain updated references to the Bill and can disapply or modify additional optional provisions of the Bill that would otherwise apply by default (a constitution adopted by directors will remain bound by the existing options in its articles of association, such as those set out in the Model Regulations of Table A to the Companies Act 1963).

Where a new-form constitution is adopted in either manner, the company must deliver it to the Companies Registration Office for registration together with a Form N1 before the expiry of the transition period.⁸ The company will then be issued with a new certificate of incorporation by the CRO. The name of the company will not change after registration, and the suffix "Limited" or "Ltd." (or their Irish language equivalents) will continue to apply.⁹

(ii) Registration as a DAC

An existing private company may register as a DAC during the transition period in any of the following ways:

- voluntarily, by ordinary resolution¹⁰; or
- compulsorily, either:

- on notice by a shareholder holding more than 25% of the total voting rights in the company¹¹;
- by reason of the company's non-compliance with the limitation on offers of securities to the public¹²; or
- pursuant to a court order on application by certain qualifying members or creditors.¹³

A copy of the amending resolution together with a copy of the new memorandum and articles of association are required to be filed with the CRO, as well a Form N2.¹⁴ The memorandum and articles of association must remain unchanged, save for the alterations prescribed by law. If a DAC wishes to update its constitution to accommodate the new regime, it must do so in the ordinary way.

The suffix of the company will change from "limited" to "designated activity company" or "dac" (or their Irish language equivalents).

(iii) Doing nothing

Where a company takes no action, the company will be deemed to have become a CLS on the expiry of the transition period.¹⁵ The physical form of the company's constitutional documents (its former memorandum and articles of association) will be unchanged, but it will be deemed to have a new-form constitution that complies with Section 19 of the Bill in their place. This means that its existing memorandum and articles of association will be interpreted as its constitution with the exception of the objects clause and any provision that prevents alteration of the articles. The CRO will issue a certificate of incorporation stating the company to be a CLS.¹⁶

It should be noted that where no action is taken, the company may be deemed to have a corporate form and constitution that does not serve the company's requirements. Certain members and creditors who would prefer to see the company re-registered as a DAC may also challenge the company's CLS status in the courts claiming prejudice on the basis of the directors' failure to act.¹⁷

⁶ Section 60(1), Companies Bill 2012

⁷ Section 61(2), Companies Bill 2012

⁸ Section 60(1), Companies Bill 2012

⁹ Section 26(1), Companies Bill 2012

¹⁰ Section 57(1), Companies Bill 2012

¹¹ Section 57(2), Companies Bill 2012

¹² Section 57(3), Companies Bill 2012

¹³ Section 58(1), Companies Bill 2012

¹⁴ Section 64(4), Companies Bill 2012

¹⁵ Section 56, Companies Bill 2012

¹⁶ Section 62(2), Companies Bill 2012

¹⁷ Sections 58 and 63, Companies Bill 2012

Redress for Members/Creditors

Section 58 of the Bill provides that certain members or creditors may apply to the High Court to direct the company to re-register as a DAC where a company has not been re-registered as a DAC during the period up to three months before the expiry of the transition period. Eligible members and creditors are as follows:

- eligible members refers to a member or members holding at least 15% of the nominal value of the companies issued share capital or any class thereof; and
- eligible creditors refers to a creditor or creditors holding not less than 15% of the company's debentures entitling the holders to object to alterations of its objects.

Section 63 of the Bill permits a member to apply to the Court under section 213 of the Companies Act 1963 (the equivalent to the current section 205 application) where he considers his rights or obligations to have been prejudiced. If the directors have failed to register a new-form constitution, there is a rebuttable presumption of oppression.

Additional steps

Where the company re-registers as a DAC, the directors must ensure that its new name is reflected in various ways, for example by:

- obtaining a new company seal;
- altering the company's name as it appears on stationery, on its website and as painted or affixed at its registered office;
- ensuring that any registers of shares or debentures held by the company are written up to reflect the change;
- submitting amendments to any registers, such as property registers in other countries, such as registers of intellectual property; and
- amending share certificates.

For more information on transition to the new company law regime, please contact David Mangan at dmangan@mhc.ie or 01 614 5807.

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