Companies Act 2014: Dawn of a Simpler Era – Part 1

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Introduction

The commencement of the new Companies Act is planned for 1 June 2015. In this, the first of two articles, I outline the background to the Companies Act 2014 (the "Companies Act") and examine its main features. The second article will consider the effects of the Companies Act on the types of corporate transaction that we deal with on a day-to-day basis, such as group restructurings, reorganisations and corporate lending.

Background to the Companies Act

The reasons why the Companies Act has been proposed are manifold and obvious. Irish company law was most recently consolidated in 1963, 55 years after the Companies Consolidation Act of 1908. The drafting of the 1963 Act basically comprised copying the UK's 1948 Act, as well as borrowing some ideas from the UK Jenkins Committee on Company Law, which had reported in June 1962.

Our companies legislation has not dovetailed with the UK for quite some time, as the UK, after consolidating its Acts in 1948, did so again in 1985 and 2006. This has meant that UK parent companies/acquirers of Irish companies are having to deal with issues (such as "financial assistance") that have been abolished in the UK.

What Will the Companies Act Achieve?

The Companies Act will repeal more than two dozen statutes, effectively, the entire of the Companies Acts 1963 to 2013, with the exception of EU-derived securities law, and will consolidate them in a single statute. For the most part, the Companies Act simply restates the existing law, but it is also a reforming statute that contains streamlining reforms in areas such as governance, legal capacity and mergers.

The unusual aspect of the Companies Act is that it will require a proactive step to be taken by existing companies: they will need, after its enactment, to prepare a new-form constitution and elect either to re-register as a "designated activity company" or register (or be deemed to register) as a new-form private company limited by shares.

Structure of the Companies Act

The Companies Act sets out the rules applying to all company types. "Pillar A" of the Bill had set out a full rulebook for the private company limited by shares (the "LTD").

The fourteen parts of the pillar were:

- Part 1: Preliminary and Interpretation
- Part 2: Incorporation and Registration
- Part 3: Share Capital
- Part 4: Corporate Governance
- Part 5: Directors and Other Officers
- Part 6: Financial Statements, Annual Return and Audit
- Part 7: Debentures and Charges
- Part 8: Receivers
- Part 9: Reorganisations and Takeovers
- Part 10: Examinerships
- Part 11: Winding-Up
- Part 12: Strike-Off and Restoration
- Part 13: Investigations, Compliance and Enforcement
- Part 14: Powers and Duties of Minister and of Regulatory and Advisory Bodies

Transition for Company Limited by Shares

Every Irish private limited company must prepare for these changes by deciding to register as either an LTD or a designated activity company (DAC) during the transition period.

The LTD is a simplified new-form private company limited by shares to which a range of streamlined governance reforms under the Companies Act will apply, such as the one-document constitution, the ability to have a single director and the power to dispense with the holding of annual general meetings (AGMs).

The DAC is a more familiar corporate form for a private company limited by shares. Its activities are limited by its objects clause, and its constitution comprises a memorandum and articles of association. Not all of the streamlined governance reforms will apply to the DAC. A DAC may be of use in certain structures such as aircraft financing structures, so a company's decision on whether to register as an LTD or a DAC will depend on whether its structure is suitable for the provisions and procedures that apply only to the LTD. For example, 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 LTD.

The primary difference between an LTD and a DAC is that a DAC remains governed by its objects clause. However, a majority of companies under the current legislative system adopt "catch all" objects in their memorandum, so this difference may amount to very little in practice.

Timeline

The commencement date is expected to be 1 June 2015. There will be a transition period of 18 months from commencement, during which existing private companies (EPCs) will have to convert to the appropriate company type. During this transition period, all EPCs will be treated as DACs, as the regulations pertaining to DACs most closely resemble the current company law provisions.

It is important to note that the EPCs cannot, therefore, avail of the features of the LTD until the conversion process has been completed.

The recommendation is that all EPCs should complete the conversion process as soon as possible so as to avail of the features of the LTD and also to have a properly drafted constitution and supplemental regulations (if applicable).

Based on the expected commencement date of 1 June 2015, the following timelines apply:

- No later than 30 September 2016, EPCs wishing to convert to a DAC must initiate or complete the conversion process.
- After 31 December 2016, an EPC that has not opted to convert to an LTD or a DAC will automatically be converted to an LTD. It is possible to convert from an LTD to a DAC after the transition period, but filing fees will apply.

All new companies incorporated on or after 1 June 2015 (the expected commencement date) will be incorporated as LTDs or DACs as appropriate, unless another company type is requested.

Conversion

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 (75% majority) of the members or
- by resolution (more than 50%) of the directors.

The form of a new-form constitution that can be adopted by resolution of the directors is strictly limited by the Companies Act. The directors may make only the minimum amendments to the company's existing constitution that are required to make it conform with the prescribed contents set out in s19 of the Companies Act.

Where no constitution is either adopted by the members or prepared and submitted by the directors of a company, the company will be deemed to have a constitution that is a short document and contains none of the modifications or disapplications of the voluntary company law rules that are usual in companies' articles of association.

Directors do not have the option of doing nothing, as where no action is taken, the company may be deemed to have a corporate form and constitution that do 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 LTD status in the courts, claiming prejudice under minority oppression rules on the basis of the directors' failure to act.

Fundamental Changes for the LTD

The most radical company law changes are made to the LTD. For example, the doctrine of *ultra vires* no longer applies to the LTD, as the LTD will have the same legal capacity as a natural person and no objects clauses will be needed. Nevertheless, the requirement to identify the purposes for which a company is incorporated remains. The doctrine of *ultra vires* is retained for all of the other company types, such as the DAC.

Private companies can now make limited offers of shares to the public. Under the Companies Act, the prohibition on offers to the public is no longer a defining feature of being a private company – the new limit is that the offer must be a type that would require the preparation of a prospectus.

Corporate Governance

The LTD will have the power to dispense with the requirement to hold an AGM. This will be a great convenience to companies and is a logical consequence of the existence of single-member companies. It is worth noting that the UK Companies Act 2006 has gone further, to retain the obligation to hold an AGM for public companies only.

The ordinary business of the AGM has long been fixed by custom and practice, but it is now set out explicitly. The nature of written resolutions is changed. Aside from some minor changes to the procedure for signing resolutions (such as specifically permitting the execution of a resolution in several documents), there is also a new procedure to allow majority written resolutions. This applies to the LTD only and can be used for both ordinary and special resolutions.

Directors' Duties

An understandable concern for prospective directors of Irish companies was gaining a full understanding of their duties as they are now codified in the Companies Act. This means that, for example, the duty to act in good faith in what the director considers to be the interests of the company, to act honestly and responsibly in relation to the conduct of the affairs of the company, and to act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law are now set in stone.

Table A

Table A was a slightly peculiar animal in that it listed certain voluntary provisions of company law for companies limited by shares, as well as replicating a number of provisions of general law. Some of these were ultimately at variance with modern commercial practice.

Table A is omitted from the new Companies Act, with its provisions either incorporated into the text of the Act or omitted completely:

- Some are included as voluntary provisions, using language such as "save to the extent that a company's constitution provides otherwise". Examples of this are provisions on the transmission of shares and on directors acting in a professional capacity for the company.
- Some are included as compulsory provisions, such as those on voting at general meetings and the entitlement to notice, in that all directors and the secretary have been added to the list of those entitled to notice of a general meeting.
- Some are omitted totally, including certain superfluous regulations allowing a company to give financial assistance for the purchase of its own shares, requiring that general meetings be held in the State and dealing with the shareholding qualification for directors.

Designated Activity Company

This may be an unfamiliar name, but it is not strictly a new company type. It comprises private companies limited by shares that have an objects clause and companies limited by guarantee having a share capital.

Many of the innovative features of the LTD will not apply to the DAC:

› the single-document constitution,

› the possibility of waiving the holding of an AGM,

› majority written resolutions,

› the one-director minimum and

› the removal of the *ultra vires* rule.

What other differences will exist between a DAC and an LTD?

Firstly, the DAC encompasses both private companies limited by shares and private companies limited by guarantee having a share capital. Secondly, the DAC is not prevented from offering securities to the public where those securities are debt securities. Consequently, the full market-abuse and prospectus rules will apply to it.

Company Limited by Guarantee

The company limited by guarantee and not having a share capital is used in property management companies and certain sports and social authorities. It is renamed by the Companies Act as the "company limited by guarantee" (CLG). The name of a CLG will be required to end with the words "company limited by guarantee", its Irish equivalent or an abbreviation of either.

Although in general the rules that apply to CLGs will be the same as those that currently apply to guarantee companies, there are a number of reforms in the area of governance.

All CLGs will be required to have at least two directors, who may hold no more than 25 directorships. All directors of a CLG will be required to retire by rotation (unless the constitution states otherwise). A CLG will be permitted to have, at a minimum, a single member and may specify in its constitutional documents the maximum number of persons who may become members. This removes the legal minimum of seven members that currently applies to guarantee companies and will avoid the consequences of non-compliance, which are that the members are severally liable for debts where the guarantee company carries on business with fewer than seven members.

The vast majority of the principal reforms to the governance of the new-form LTD will not apply to the CLG, such as the one-director minimum, the abolition of objects clauses, the removal of the *ultra vires* rule and the power to dispense with the requirement to hold an AGM.

Company Capital

Another conundrum that the Companies Act deals with is a company's share capital (renamed "company capital" in the Act). A company's share capital has for quite some time failed to represent genuinely the contribution by the shareholders toward the corporate objects of the company. The amounts pledged are very small, with only a public limited company having a minimum share capital requirement (€38,092.14).

The Companies Act retains the principle that shares must not be issued at a discount to their nominal value. Where shares are issued at a premium to their nominal value, the amount of the premium will continue – with important new exceptions – to be held in a separate account (the "share premium account"), where they continue to be unavailable for distribution and are subject to the rules on capital maintenance.

The Companies Act introduces a new global term, "company capital", which comprises:

› share capital (previously undefined, now defined as the aggregate amount or value of the nominal value of shares),

› the share premium account,

› the capital conversion reserve fund and

› the capital redemption reserve fund.

Another new global term, "denominated capital", is defined as the amount of the company capital that is in excess of the nominal value of the company's shares in issue (i.e. company capital minus share capital).

Thankfully, the existing (and often breached) requirement to convene a shareholders' meeting where a company's net assets are equal to or less than half of its called-up share capital (Companies (Amendment) Act 1983 s40) is now abolished.

In the second article, I will examine the effects of the Companies Act on corporate transactions.