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Irish Companies Act 2014

An Outline for Asset Finance Practitioners

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The Irish Companies Act 2014

The Companies Act 2014 was signed into law just before last Christmas and is planned to be commenced in all material respects on 1 June 2015.

At 1448 sections and 17 Schedules, it is the largest statute ever passed by the Irish parliament.

This volume highlights a selection of reforms and amendments relevant for bankers and financiers doing business in Ireland and in particular in asset and structured finance transactions involving Irish counterparties.

Contents

What does the Act do?

It repeals and consolidates, with several reforms, all the Irish Companies Acts of the past half-century (1963 to date). It also revokes and re-enacts statutory instruments transposing EU company law Directives.

In Ireland, the expression "Companies Acts" has historically encompassed the law that in the UK is contained in:

- the Companies Act;
- the Insolvency Act; and
- the Financial Services and Markets Act.

The new Irish Act continues to include insolvency law, insofar as it relates to companies (personal insolvency is dealt with by the Bankruptcy Act) but the securities and markets law that is in and organised under FSMA remains in Ireland in a series of separate statutory instruments.

Background

Irish company law has largely tracked that of the UK, incorporating EU directives usually by statutory instrument. In 2000, a Company Law Review Group was established in Ireland to look into Irish company law. The first report, published in 2002 advocated consolidation, setting out the design of what is now the Act.

The intervening years brought several other reports dealing with particular issues in Irish company and in 2007 the General Scheme of a Bill (akin to a white paper) was published. The financial crisis delayed progress, as resources were dedicated to enacting legislation to establish the National Asset Management Agency, to nationalise the old Anglo Irish Bank, to enact bank resolution and personal insolvency legislation. In 2011 a draft of the first 15 parts was published with the Bill proper being published in 2012. Following a lengthy but relatively uncontroversial passage through the Irish parliament, it was signed by the Irish President on 23 December 2014.

Structure

The Act is divided into Parts. Parts 1 to 15, the first group, contains the general company law provisions for all companies:

Part 1: Preliminary & General

Part 2: Incorporation and Registration

Part 3: Share Capital, Shares, Certain Other Instruments

Part 4: Corporate Governance

Part 5: Duties of Directors and other Officers

Part 6: Financial Statements, Annual Return and Audit

Part 7: Charges and Debentures

Part 8: Receivers

Part 9: Reorganisations, Acquisitions, Mergers, Divisions

Part 10: Examinerships

Part 11: Winding Up

Part 12: Strike Off and Restoration

Part 13: Investigations

Part 14: Compliance and Enforcements

Part 15: Functions of Registrar and of regulatory and Advisory Bodies.

The second group of Parts – Parts 16 to 25 –includes dedicated parts for companies other than private companies limited by shares – PLCs, guarantee companies, unlimited companies and a new class of companies, the designated activity company or DAC.

Part 16: Designated Activity Companies

Part 17: Public Limited Companies

Part 18: Guarantee Companies

Principal Changes

The key changes introduced by the Act are the following:

- The division of the current private company limited by shares into two new types of company – the 'LTD' (frequently referred to in commentaries until recently as the 'CLS' – company limited by shares) and the 'DAC' – the designated activity company. The distinguishing factor between the LTD and the DAC is that the LTD has no objects clause in its constitution: it has the contracting power of an individual. The DAC will continue to have an objects clause.

- For the new LTD:
    - the ability to have one director only: a sole director cannot be the company secretary;
    - the ability to dispense with AGMs: a written resolution procedure can be used instead.

- The abolition of Table A. Instead of the mélange of optional, tautological and historical provisions as to internal governance of a company being set out in model Articles, the optional provisions are now contained in their legal context in the body of the Act.

- The simplification of share capital rules, enabling the increase or reduction of par value of shares. This is done by movements between share capital and share premium (and capital redemption reserve fund): as long as the aggregate amount remains the same, there is complete freedom to change share capital.
- The introduction of merger relief. A company need not create a share premium on issue of shares, largely along the lines of the UK law.

- The liberalisation of share capital maintenance rules for private companies, so as to permit share capital reductions, three-party share for undertaking transactions and the distribution of pre-acquisition profits without the need for a Court sanction.

- The abolition of bearer shares. The only exception is for provisional letters of allotment in a rights issue.

- The ability for two or more Irish companies to merge with each other by means of a "true" merger by which a company acquires all of the assets and liabilities of another company and that other company is dissolved without going into liquidation. This can be done without a Court sanction in the case of private companies.

- The ability for the holders of 50% of the voting shares of a company to convene an EGM, bypassing the Board.

- The ability for the requisite majority of shareholders to pass resolutions by resolutions in writing, bypassing the need for a shareholders' meeting.

- The ability for the Board to convene AGMs outside Ireland without shareholder consent.

- A codification of directors' duties.

- A change in the rules regarding registration of charges.

- A relaxation in the financial assistance regime.

Directors

The Act codifies the fiduciary duties of directors. The rationale for this was to provide context for the statutory provisions flowing from those duties relating to conflicts of interest and self-dealing.

Directors must

- act in good faith;
- act honestly and responsibly;
- act in accordance with the company's constitution;
- not use the company's property, information or opportunities for the director's own or anyone else's benefit;
- not agree to restrict the director's power to exercise an independent judgement;
- avoid any conflict between the director's duties to the company and the director's other interests;
- exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person in the same position with the same knowledge; and
- have regard to the interests of its employees and of its members as a whole.

Ireland did not follow the UK 2006 Act, which included the following matters that directors can have regard to:

- the likely consequences of any decision in the long term
- the need to foster the company's business relationships with suppliers, customers and others
- the impact of the company's operations on the community and the environment
- the desirability of the company maintaining a reputation for high standards of business conduct.

When approving accounts, directors must state in report of the directors:

- so far as each director is aware, there is no "relevant audit information" of which the company's statutory auditors are unaware, and
- each director has taken all the steps that he ought to have taken as a director in order to make himself aware of any

relevant audit information and to establish that the company's statutory auditors are aware of that information.

Directors of companies having turnover of €25m+ and a balance sheet total of €12.5m+ must:

- acknowledge that they are responsible for securing compliance with relevant company law and tax law; and
- confirm that they have:
    - drawn up of a compliance policy statement setting out the company's policies (that, in the directors' opinion, are appropriate to the company) respecting compliance by the company with its company law and tax law
    - put in place appropriate arrangements or structures that are, in the directors' opinion, designed to secure material compliance with that law; and
    - conducted a review, during the financial year of those arrangements and structures.

      Directors may rely on the advice of company employees or advisers, if they appear to the directors to have the requisite knowledge and experience to advise the company on compliance with that law.

Undertakings can be accepted by directors to be bound by restriction (a quasi-conditional disqualification) or disqualification rather than for there to be a requirement for a court order. A defence to a restriction now requires that director has cooperated with the liquidator as well as proving that he or she has acted honestly and responsibly.

The directors of a company must, when appointing the company secretary, ensure that the person appointed has the skills necessary so as to enable him or her maintain (or procure the maintenance of) the records (other than accounting records) required to be kept under the Act in relation to the company.

Finally, although the law relating to loans with directors has become slightly easier to navigate, there are strict new rules concerning loans by directors to companies. Where there is no document in place, the loan is presumed to be a gift to the company, subject to the presumption being rebutted. Similarly, where the document is ambiguous, the loan is presumed to be interest free and subordinated.

Transacting with an Irish Company

At present, the ultra vires rule is modified for all Irish companies by section 8(1) of the Companies Act 1963:

> "Any act or thing done by a company which if the company had been empowered to do the same would have been lawfully and effectively done, shall, notwithstanding that the company had no power to do such act or thing, be effective in favour of any person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company, but any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof."

The difficulty for third parties trying to rely on this has been that if one individual in an organisation actually knows of a limitation in corporate capacity (e.g. a junior bank official who has read the memorandum and articles of association of a company) then the whole organisation has been held to know.

For private and public companies limited by shares, Regulation 6 of SI 163/1973, transposing the First Company Law Directive, provides:

> "(1) In favour of a person dealing with a company in good faith, any transaction entered into by any organ of the company, being its board of directors or any person registered under these regulations as a person authorised to bind the company, shall be deemed to be within the capacity of the company and any limitation of the powers of that board or person, whether imposed by the memorandum or articles of association or otherwise, may not be relied upon as against any person so dealing with the company.
>
> (2) Any such person shall be presumed to have acted in good faith unless the contrary is proved.
>
> (3) For the purpose of this Regulation, the registration of a person authorised to bind the company shall be effected by

> delivering to the registrar of companies a notice giving the name and description of the person concerned."

The practical issue that arose with this provision is that very few companies ever registered a person for the purposes of this regulation and the Irish Companies Registration Office did not have a standard form.

The 2014 Act changes the law significantly.

In the case of a LTD, section 38(1) provides that:

> "a company shall have, whether acting inside or outside of the State—
>
> (a) full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction; and
>
> (b) for the purposes of paragraph (a), full rights, powers and privileges."

In the case of a DAC sections 972 and 973 provide:

> 972(1) A DAC shall have the capacity to do any act or thing stated in the objects set out in its memorandum.
>
> (2) For the purposes of subsection (1)—
>
> (a) the reference in it to an object includes a reference to anything stated in the memorandum to be a power to do any act or thing (whether the word "power" is used or not),
>
> (b) … the capacity of the DAC extends to doing any act or thing that appears to it to be requisite, advantageous or incidental to, or to facilitate, the attainment of that object and that is not inconsistent with any enactment…
>
> Capacity not limited by a DAC's constitution
>
> 973(1) The validity of an act done by a DAC shall not be called into question on the ground of lack of capacity by reason of anything contained in the DAC's objects.

(5) A party to a transaction with a DAC is not bound to enquire as to whether it is permitted by the DAC's objects.

Sections 1011 and 1012 repeat this formula for PLCs, sections 1182 and 1183 for companies limited by guarantee and sections 1239 and 1240 for unlimited companies.

Sections 39 and 40 of the Act re-enact Regulation 6 in clearer language. Section 38 provides for the registration of a registered person:

> "Where the board of directors of a company authorises any person as being a person entitled to bind the company (not being an entitlement to bind that is, expressly or impliedly, restricted to a particular transaction or class of transactions), the company may notify the Registrar in the prescribed form of the authorisation and the Registrar shall register the authorisation."

Note that this registration is not possible where the authority is "expressly or impliedly, restricted to a particular transaction or class of transactions". Accordingly a power of attorney is not per se registrable. This section enables only the registration of plenipotentiary powers.

Section 40 then provides:

> "(1) For the purposes of any question whether a transaction fails to bind a company because of an alleged lack of authority on the part of the person who exercised (or purported to exercise) the company's powers …
>
> (a) the board of directors of the company; and
>
> (b) any registered person,
>
> shall each be deemed to have authority to exercise any power of the company and to authorise others to do so.
>
> (2) Subsection (1) applies regardless of any limitations in the company's constitution on the board's authority or a registered person's authority …"

This rule is disapplied where the transaction is with:

(a) a director or shadow director of the company or of its holding company;

(b) a person connected with such a director;

(c) a registered person; or

(d) a person connected with a registered person,

A person is connected with a director of a company if the person (not being himself or herself a director of the company) is—

(a) that director's spouse, civil partner, parent, brother, sister or child;

(b) a person acting in his or her capacity as the trustee of any trust, the principal beneficiaries of which are that director, the spouse (or civil partner) or any children of that director or any body corporate which that director controls; or

(c) in partnership with that director.

Corporate Transactions

A number of changes have been made to the law as it affects share capital and capital maintenance generally, all of which will enable transactions to be conducted more easily.

First, there is a new concept called "company capital". This is the aggregate of share capital and "undenominated capital". "Undenominated capital is the aggregate of share premium, capital redemption reserve fund and (arising from conversion of Irish pounds to Euros) the capital conversion reserve fund.

The Act provides that as long as the figure for company capital remains the same, it will be possible for there to be movements back and forward between share capital and undenominated capital. Accordingly the par value of shares can be reduced or increased more easily. This is of particular relevance where e.g. a company goes for a second round of funding from investors and the par value of the shares is greater than the subscription price. It will be possible for the par value of existing shares to be reduced as necessary in order to have a new share issue at the desired subscription price.

Secondly the Act has a streamlined corporate procedure called the "summary approval procedure". This is modelled on the procedure used to date to validate financial assistance – the directors make a declaration as to the post-transaction solvency of the company entering into a transaction and the transaction is approved by special resolution. Transactions that can be carried out by this method in a private company include:

- a reduction of share capital;
- a three-party share for undertaking transaction, whereby a company transfers assets to a NewCo, with consideration shares being issued to the shareholders of the company rather than to the company;
- a merger whereby two or more Irish companies can merge with each other where a company acquires all of the assets and liabilities of another company and that other company is dissolved without going into liquidation;

- the distribution of pre-acquisition profits;

- loans, quasi-loans and credit transactions to or for the benefit of directors and their connected persons and guarantees of such transactions. This will in particular assist companies controlled or owned by the same individuals but not forming part of a group, to enter into transactions where such companies guarantee liabilities of, or provide debt support for, each other.

Financial Assistance

The breadth of the financial assistance prohibition is changed in two ways. First, it is made clear that financial assistance issues arise on any acquisition of shares. Historically it arose only where there was a purchase of or subscription for shares in the company or the company's holding company.

More importantly, the law now applies only where the financial assistance is "for the purpose of" – and not also as is the case now "or in connection with" – the acquisition of shares.

Section 82 states the prohibition in these terms:

> "(1) In subsection (2) "acquisition", in relation to shares, means acquisition by subscription, purchase, exchange or otherwise.
>
> (2) It shall not be lawful for a company to give any financial assistance for the purpose of an acquisition made or to be made by any person of any shares in the company, or, where the company is a subsidiary, in its holding company."

Section 82(5) provides that the prohibition does not apply where

> "(a) the company's principal purpose in giving the assistance is not to give it for the purpose of any such acquisition; or
>
> (b) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company,
>
> and the assistance is given in good faith in the interests of the company."

The whitewash procedure of a directors' declaration of solvency and special resolution remains, now called the "Summary Approval Procedure"

Registration of Charges – Secured Lending

The 2014 Act provides that all charges created by a company are registrable, except for those that are excluded. This is done by its redefinition of the word "charge".

"Charge" is defined in section 408 as:

> "a mortgage or a charge, in an agreement (written or oral), that is created over an interest in any property of the company (and … includes a judgment mortgage) but does not include a mortgage or a charge, in an agreement (written or oral), that is created over an interest in—
>
> (a) cash,
>
> (b) money credited to an account of a financial institution, or any other deposits,
>
> (c) shares, bonds or debt instruments,
>
> (d) units in collective investment undertakings or money market instruments, or
>
> (e) claims and rights (such as dividends or interest) in respect of any thing referred to in any of paragraphs (b) to (d);"

Once the 2014 Act is commenced, all registrations of charge will have to be made on line – there will be no facility for the delivery of paper forms.

In addition, there will be two methods of registration – the one-stage procedure and the two-stage procedure.

- the one-stage procedure means the delivery to the CRO of prescribed particulars of the charge no later than 21 days after the date of the charge's creation.

- the two-stage procedure means the following steps:
    - the delivery to the CRO of a notice of the company's intention to create the charge followed by;
    - the delivery to the CRO of a notice stating that the pre-notified charge has been created.

Priority of charges will henceforth not be regulated by date of the charge but by date of registration (in the case of the one-stage procedure) and date of pre-notification (in the case of the two-stage procedure).

New rules as to computation of time apply such as to permit the delivery of particulars to the CRO on the first working day after the 21st day where the 21st day falls at a weekend on a public holiday.

Finally, the Slavenburg register will be discontinued. Charges will only be registrable against companies appearing on the register, whether Irish or non-Irish, with a registered branch.

What does the Act not do?

The statutory instruments transposing EU securities law and markets Directives are unrepealed, in particular:

- SI 324/2005, transposing the EU Prospectus Directive 2003/71/EC;
- SI 342/2005, transposing the EU Market Abuse Directive 2003/6/EC and its Level 2 measures;
- SI/255/2006, transposing the EU Takeover Bids Directive 2004/25/EC;
- SI 277/2007, transposing the EU Transparency Directive 2004/109/EC; and
- SI 286/2007 transposing the Consolidated Admissions and Reporting Directive 2001/34/EC.

However, the criminal law infrastructure in order to enforce the Prospectus, Market Abuse and Transparency regime is contained in the Act.

Some important general company law is excluded:

- SI 220/2010, transposing the EU Audit Directive 2006/43/EC; and
- the full transposition of EU restated Accounting Directive 2013/34/EC, which in particular will remove the Irish exemption for certain unlimited companies with ultimate limited liability owners from filing accounts. That is planned to be dealt with in a Companies (Accounting) Bill in summer 2015.

In addition, the EU directly-applicable Regulations on SEs, insolvency, EEIGs and short selling continue parallel with but outside the Act.

Miscellaneous

Although Irish company law remains very similar to that of the UK, the following points are relevant to those entering a transaction with an Irish company:

- Irish companies continue to have a company secretary.

- Irish companies continue to have a common seal: for companies incorporated since 1 April 1964, the norm is for the seal to be countersigned by two directors or a director and the secretary (or other authorised person) but it a company can provide for the seal to be countersigned by one person (or more than two persons) and that person (or persons) need not be a company officer.

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