McCann FitzGerald

Companies Act 2014

An Overview

COMPANIES ACT 2014

The Companies Act 2014 (the "**Act**") came into effect on 1 June 2015 and has introduced significant reforms in company law in Ireland. The Act has since then been amended and updated.

Key Features

The Act:

- provides for new types of company;
- codifies directors' fiduciary duties;
- permits mergers of most types of Irish company;
- permits divisions of Irish companies; and
- eases the prohibition on giving 'financial assistance'.

Overview

The Act consolidates the previous Companies Acts and many of the related statutory instruments into a single statute and introduces significant reforms to Irish company law[3]. The Act is intended to make it easier for a company to do business in Ireland, whether domestically or by using Ireland as a regional or a global base. Although the Act emphasises efficiency and simplicity, it is itself the largest piece of legislation in the history of the State.

Structure of the Act

The Act regards the private company limited by shares (the "**LTD**") as the paradigm type of company. The Act is drafted to apply primarily to an LTD, with modifications to that default law being made in respect of each other type of company, grouped together in a part of the Act dedicated to the relevant type of company. For example, the provisions dealing with the winding up of a company (Part 11) apply to an LTD and,

1 The threshold criteria are that a company, or a group of companies when aggregated, in both its / their most recent financial year and the immediately preceding one, meets the following criteria: (A) its / their balance sheet total for the year exceeds €25 million and (B) the amount of its / their turnover for the year exceeds €50 million.

2 *Ie* those of a PLC (other than an investment company), and the directors of an LTD, a DAC and a CLG the balance sheet of which exceeds €12.5m and the turnover of which exceeds €25m.

3 However, not all companies-related enactments are consolidated in the Act: some areas of legislation (such as the accounting rules for credit institutions and for insurance undertakings) remain in separate enactments.

unless modified by any other part of the Act, apply to each other type of company also. The modifications to the general provisions applicable to an LTD are then arranged in a part of the Act that deals only with a particular type of company, such as a public limited company (a "**PLC**") (Part 17) or a designated activity company (a "**DAC**") (Part 16).

Key Changes

The key changes include provision for new types of companies as well as changes to those companies' constitution, governance, capacity, organisation and procedures.

Company Types

The Act provides for several new types of company :

- an LTD (the new form of the private company limited by shares);
- a DAC (a company with restricted objects, including what was previously a company limited by guarantee and having a share capital);
- an unlimited company with a share capital (a "**ULC**");
- a public unlimited company with a share capital (a "**PUC**");
- a public unlimited company not having a share capital (a "**PULC**");
- a company limited by guarantee not having a share capital (a "**CLG**"); and
- the PLC continues to be recognised.

These company types will be indicated in new suffixes to company names, such as "NewCo designated activity company", replacing the familiar "Ltd" and "Teo". Slightly confusingly, an LTD uses the suffix "Limited"/"Ltd.", although under previous Companies Acts that designation meant what would now be a DAC.

Investment Companies

The Irish Collective Asset-management Vehicles Act 2015 was signed into law on 4 March 2015 and establishes a legislative framework in Irish law for open-ended investment companies. The provisions of the Act relating to investment companies are not affected.

Constitution

An LTD has a single constitutional document, effectively amalgamating the memorandum of association and the articles of association of an existing private limited company.

Single Member

The Act permits a company of any type to be incorporated with a single member (a company other than an LTD will continue to require at least two directors).

Membership

An LTD is permitted to have a maximum of 149 members (compared with 99 for a private limited company, under previous Companies Acts).

Governance

- **Single director:** An LTD is permitted to have a single director (the previous entitlement to have a single member is retained), but a sole director is not permitted to be the company secretary, therefore requiring a second person to perform that role.
- **Fiduciary duties of a director:** The Act places the fiduciary duties of a director on a statutory basis, but not all directors' duties. This is a significant qualification: while the Act brings the common law fiduciary duties into legislation, the many statutory duties (under previous Companies Acts and otherwise) that existed prior to the Act are not affected. The duties apply to all directors, whether or not appointed formally (*eg* including shadow directors). A director is subject to an objective standard of care, skill and diligence rather than by reference only to his or her actual knowledge and experience.

  The Act provides that, where a company director acts in breach of any of his or

her statutory fiduciary duties (with the exception of the duty to act honestly and responsibly in relation to the conduct of the affairs of the company), then the director is liable to account to the company for any gain which he or she makes directly or indirectly from that breach of duty and /or may be required to indemnify the company for any loss or damage resulting from the breach.

- **Director's personal details:** The Minister may by regulations provide that the usual residential address of a director or secretary need not appear on a company register or on a register kept by the Companies Registration Office ("**CRO**") if, following stipulated considerations, it is determined that the circumstances of the relevant officer's personal safety or security warrant such an exemption. Regulations have been made (SI 543 of 20154) which apply the exemption to the CRO register, the company's register of directors and secretaries and the company's members register. The exemption is currently limited to incoming directors.

- **Director's duty of disclosure:** The Act imposes a duty on a director of a company who is, in any way, whether directly or indirectly, interested in a contract or proposed contract with the company, to declare the nature of his or her interest at a meeting of the directors of the company. In the case of a proposed contract, the Act requires a director to make a declaration at the directors' meeting at which the question of entering the contract is first considered and, in the case of a director becoming interested in a contract after it being made, be made at the first meeting afterwards. The Act requires such declarations to be entered on to the register within three days of making or giving the declaration.

  The Act states that the duty to disclose does not apply in relation to an interest that is reasonably considered as not giving rise to a conflict of interest. In addition, the Act introduces a further exemption from disclosure of any contract the decision to enter which is taken or falls to be taken other than by the board of directors or by a committee of which the director is a member. It may be that the latter exemption is intended to curtail this broad obligation by excluding contracts of which the board of directors is already aware or which have previously been approved by the board or by a committee (for example, the audit or risk committee).

- **Powers of the board:** By default, the directors have a power to borrow money and to charge the property of the company as security.

- **Company secretary:** A company secretary is no longer obliged to ensure compliance with the Act, a change that appears to acknowledge that a company secretary lacks the powers and authority to ensure such compliance. Instead, the Act provides that the directors have a duty to ensure that the company secretary has the skills or resources necessary to discharge his or her statutory and other duties and includes the case of an appointment of one of the directors of the company as secretary.

  The statutory company law duties of a company secretary include co-signing with a director the annual return and the attached annual accounts. Other duties under company law include administrative duties such as maintaining the company's statutory registers, keeping minutes of board and general meetings and filing documents correctly with the CRO and the Revenue Commissioners. In addition, powers of and duties on the company secretary comprise those that may be delegated to the secretary by the directors. The Act continues to allow the appointment of another company as company secretary, so directors may seek to appoint a reputable corporate service provider as company secretary.

- **Compliance statement:** The Act provides that directors of a PLC (other than an investment company), and those of an LTD, a DAC or a CLG the balance sheet of which exceeds €12.5m and the turnover

of which exceeds €25m must prepare a compliance policy statement (the "**Statement**"). Unlimited companies are not subject to this requirement. The Statement must set out the company's policies (that, in the opinion of the directors), are appropriate to the company on its compliance with its obligations under the Act, the contravention of which is a category 1 or 2 offence, or a serious Market Abuse or Prospectus offence, and tax law (the "**Obligations**").

Directors of an in-scope company must include, with their directors' report for every financial year, a statement acknowledging that they are responsible for ensuring the company's compliance with the Obligations, confirming that the company has drawn up a Statement and has put in place appropriate structures to secure material compliance with the company's Obligations and reviews those structures during the financial year. If these actions have not been taken, an explanation of the reasons why must be provided. Failure to comply with these compliance statement-related obligations (separate from compliance with the underlying Obligations) is a category 3 offence.

In relation to putting in place the structures referred to above, the Act recognises that the advice of specialists (outside of the company) on compliance with the Obligations may be required. The structures must provide a reasonable assurance of compliance in all material respects with the Obligations.

The Obligations provide companies with an opportunity to promote and advertise their compliance with good corporate governance and are an improvement on the more onerous obligations (in the Companies (Auditing & Accounting) Act 2003) which, in face of opposition, were never brought into force.

- **Annual general meeting ("AGM"):** Subject to conditions, an LTD (whether having a single member or multiple members) is entitled to adopt written procedures in place of an AGM. Any DAC, PLC, CLG and unlimited company having not more than one member is allowed to dispense with the requirement to hold an AGM.
- **Disclosure of interests:** Directors and secretaries of a company are obliged to disclose certain interests in shares or debentures in the company and in associated companies. The Act eases this obligation and exempts de minimis interests from the requirement to disclose under the Act. This means that where shares held by a director or secretary (aggregated with those of connected persons, such as spouses and children) are in aggregate one per cent or less in the share capital of the relevant company's issued share capital of a class of shares carrying voting rights or where the shares or debentures do not carry a right to vote at general meetings (save a right to vote in specified circumstances), such interest need not be disclosed under the Act. The Act also extends the 'one per cent or less' threshold to apply to share options.
- **Disclosure of consideration:** There is an obligation to disclose any consideration paid to third parties for the services of directors.
- **Decision-making:** Subject to conditions, the members of an LTD are entitled to adopt majority written resolutions (both ordinary (>50% of the total voting rights) and special (>75% of the total voting rights)).
- **Legislating for governance:** The Act recasts many of the optional provisions that are suggested for the constitution of a company (often called "**Table A**" under the previous Companies Acts) as requirements of law.

Capacity

- **Objects:** An LTD is not permitted to have an objects clause, so that an LTD has the same unqualified legal capacity to do anything that a natural (ie a human) person may lawfully do. Therefore, the doctrine of *ultra vires* ("beyond the legal powers") no longer applies to an LTD, and an LTD is – by default – empowered to do anything lawful that its directors determine.
- **Ultra vires:** Where a company (necessarily other than an LTD) retains an objects clause, a third party dealing with the company will not be prejudiced if the company exceeds its capacity.
- **Corporate authority:** The Act introduces the optional requirement to register with the CRO the name of every person who has unqualified legal authority to bind an LTD and to authorise others to do so. Once authorised by the board of directors and registered with the CRO, a "registered person" is taken to be duly authorised until the CRO is notified to the contrary (notwithstanding any resolution by the board of directors).
- **Public offers:** An LTD is prohibited from offering securities (equity or debt) to the public. A DAC may offer debt securities to the public, but not equity securities.
- **Bearer shares:** A bearer instrument in relation to shares of a company ("**bearer shares**") entitles the holder of the instrument (for example, a share warrant) to transfer the shares specified in the instrument by delivery of the instrument. A public company can, if its articles of association expressly so provide, issue bearer shares.

  However, the concept of bearer shares challenges the essential restriction that may exist on membership of a private company. Therefore the Act prohibits bearer shares in respect of private companies. If a private company purports to issue a bearer instrument, the shares that are specified in the instrument are deemed not to have been issued or allotted and the amount subscribed for is due as a debt of the company to the purported subscriber. Comments in the debate stages of the Act suggest that this would enhance Ireland's reputation in respect of combatting money-laundering.

Organisation

- **Place of business:** The Act abandons the concept of a "place of business".
- **Group company relationships:** The Act combines the definitions of holding and subsidiary companies in section 155 of the Companies Act 1963 and the separate definitions of "parent undertaking" and "subsidiary undertaking" in the Group Accounts Regulations5 to produce complex new definitions of "holding company" and "subsidiary company". However, definitions in agreements existing on commencement of the Act and which incorporate by reference the previous Companies Acts definitions in section 155 of the Companies Act 1963 are not affected, unless the parties agree otherwise. A "wholly owned subsidiary" is defined for the first time in companies legislation.
- **Mergers and divisions:** The Act introduces procedures for the merger and division (within Ireland) of companies of most varieties. At least one of the merging companies must be a private company limited by shares. Under previous Companies Acts, this had been restricted to PLCs and, for private companies limited by shares, to a cross-border merger.

Liquidation

- **Members' voluntary liquidation:** If, in a members' voluntary liquidation, a copy of the directors' declaration of solvency is not delivered to the CRO within 14 days, the winding up will be invalid, subject to an application being made to the High Court to avoid this rule if the court determines that it is just and equitable to do so.

4 European Communities (Companies: Group Accounts) Regulations 1992 (SI 201 of 1992) (as amended).

- **Creditors' voluntary liquidation:** If a company resolves to commence a creditors' voluntary liquidation, it must within 14 days give notice of the resolution in Iris Oifigiúil.

- **Unclaimed dividends and balances:** Unclaimed dividends and unapplied balances in a winding up shall be lodged to the "Companies Liquidation Account" (nominated by the Minister by SI 219 of 20156) and shall be treated in a manner similar to unclaimed policies of life assurance, defaulting to the Exchequer after seven years but subject to any court order to restore the money to any person who satisfies the court that he or she is the rightful owner.

Practice and Procedure

- **Summary approval procedure:** The Act introduces a simplified written approval process (a "**whitewash**") by directors and/ or members, not requiring any court order, for certain transactions with a director, for example, a reduction in capital (see below), a members' voluntary winding-up or the use of pre-acquisition profits.

- **Financial assistance:** The Act relaxes the prohibition on giving financial assistance for the acquisition of a company's own shares by focusing on the provision of financial assistance for the purpose of an acquisition of shares in the company or of its holding company, rather than, as previously, prohibiting financial assistance "in connection with" such a purchase or subscription.

- **Charges and debentures:** The definition of a "charge" is modified (including removing from it a charge created over an interest in cash or in the balance of a financial account or a deposit and a charge over shares, bonds or debt instruments), and registration procedures have changed considerably. A single-stage procedure is similar to the previous system, but a new two-stage procedure permits a lender, by filing an advance notice with the CRO, to improve the priority of its security by the time that the detailed notice is filed (no later than 21 days after the date of receipt by the CRO of the advance notice). Also, unless the priority of a charge is governed by another legal regime (such as Property Registration Authority rules), the priority of a charge is determined by reference to the date on which the CRO receives the prescribed particulars.

Accounts and Auditing

- **Accounts (financial statements):** Accounts are referred to as "financial statements"; reference to proper books of account is to "adequate accounting records"; and "financial year" is defined (it is not permitted to exceed 18 months). The Act permits the voluntary revision of defective accounts ("**financial statements**"), and the audit exemption is extended to dormant companies and may be available in group situations.

- **Accounting:** In certain circumstances in which a company acquires another company through a share issue, it will not be necessary to create a share premium. In effect, this will be a form of merger relief and facilitates companies using merger accounting rules. It is possible to disapply the prohibition on a company using as its realised profits the profits of a subsidiary relating to the period before the subsidiary became a subsidiary of the relevant company.

- **Audit exemption (conditions):** An LTD and a DAC may avail of the audit exemption where two or more of the prescribed conditions in respect of the particular year are satisfied (ie (a) the balance sheet total of the company does not exceed €6m; (b) the amount of the turnover does not exceed €12m; and (c) the average number of persons employed by the company does not exceed 50).

  The Act obliges a company that has availed itself of the audit exemption in respect of a financial year to provide to the Director of Corporate Enforcement (the "**Director**"), if requested, such access to and facilities for inspecting and taking copies of the books and

documents of the company and to furnish to the Director any such information as the Director may reasonably require to satisfy himself that the company was entitled to avail of the audit exemption.

- **Audit Exemption (SPVs):** No "relevant securitisation company" may avail of the small company audit exemption.
- **Unlimited companies:** The statutory rules on distributions are disapplied in the case of an unlimited company, and the previous exemption for certain types of unlimited company from having to file accounts with the CRO has been severely restricted. For details see here.

Penalties

The Act provides for a new four-tier categorisation of offences for breaches of the Act, although even the least serious breach would carry a maximum penalty of a fine not exceeding €5,000.

Reduction of Capital

A reduction in the issued share capital of a limited company can be effected by employing the SAP (a PLC, however, may not use the SAP to approve a capital reduction) or by passing a shareholders' resolution that is to be confirmed by the court.

The reduction in capital can happen by extinguishing or reducing the liability of any of the members on any of its shares in respect of share capital not paid up or by paying off paid up share capital. Such a reduction is categorised by the Act, as a distribution and, as such, will have to be made out of profits available for that purpose (or distributable profits). The Act provides that, subject to any provision to the contrary in a court order or resolution or in the company's constitution, a reserve arising from the reduction of a company's company capital is to be treated as a realised profit.

Related Information

Other McCann FitzGerald briefings (available on the McCann FitzGerald website) address the following Companies Act topics:

- Companies (Accounting) Act 2017 in Force from 9 June 2017
- Companies (Accounting) Act 2017: Enacted
- The LTD
- The DAC
- Issues for Directors
- Issues for the Company Secretary
- Directors' Compliance Statement
- Summary Approval Procedure
- Meetings (General and Board)
- Unlimited Companies
- The CLG

McCann FitzGerald

For further information please contact

Paul Heffernan
Partner, Corporate

DDI +353-1-607 1326

EMAIL paul.heffernan@mccannfitzgerald.com

Peter Osborne
Consultant, Corporate

DDI +353-1-611 9159

EMAIL peter.osborne@mccannfitzgerald.com

Frances Bleahene
Senior Asssociate, Knowledge Team

DDI +353-1-607 1466

EMAIL frances.bleahene@mccannfitzgerald.com

Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.

Principal Office
Riverside One
Sir John Rogerson's Quay
Dublin 2
D02 X576

Tel: +353-1-829 0000

London
Tower 42
Level 38C
25 Old Broad Street
London EC2N 1HQ

Tel: +44-20-7621 1000

New York
Tower 45
120 West 45th Street
19th Floor
New York, NY 10036

Tel: +1-646-952 6001

Brussels
40 Square de Meeûs
1000 Brussels

Tel: +32-2-740 0370

Email
inquiries@mccannfitzgerald.com

www.mccannfitzgerald.com