McCann FitzGerald

The Designated Activity Company (the "DAC")

COMPANIES ACT 2014

The Companies Act 2014 (the "Act") will come into effect on 1 June 2015 and will introduce significant reforms in company law in Ireland.

Under the Act, an existing private company limited by shares has to decide, within a transition period of 18 months from 1 June 2015 (likely to be to 31 December 2016), whether to opt into the new regime for private companies limited by shares (LTD) or within 15 months of the Act to opt out by becoming a designated activity company (DAC) or some other type of company. A DAC is a new type of private company and is the company type under the Act that most closely resembles the existing private company limited by shares.

Key Features

- The DAC is a private limited company.
- The constitution of a DAC comprises of two separate documents namely a memorandum of association and articles of association.
- The memorandum of association must set out the objects of the DAC and the DAC has the capacity to do any act or thing stated in the objects.
- The name of a DAC must end in "Designated Activity Company" or the Irish language equivalent but it may apply for an exemption.
- The DAC must have a minimum of two directors and a person may not be a director of more than 25 companies.
- The DAC can have from 1 to 149 members.
- The Act allows for the DAC to have debentures admitted to trading and all private companies that were previously permitted to list debentures can continue to do so by converting to a DAC.
- A DAC with one member has the right to dispense with an AGM but if the DAC has two or more members it does not have that right.
- The law relating to DACs applies to all existing private companies limited by shares until they re-register as another company type or up to the end of the transition period.

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(continued)

Preliminary

This briefing may be read in conjunction with the McCann FitzGerald briefings on LTDs and Migration of Existing Private Limited Companies.

Part 16 of the Act provides for the introduction of the DAC and as such, the sections within Part 16 of the Act, all of which relate to a DAC, represent new provisions within Irish company law. Parts 1 to 14 of the Act, which govern the LTD, apply to a DAC except to the extent that they are disapplied, modified or supplemented by Part 16.

There are two types of DAC, being a private company limited by shares and a private company limited by guarantee and having a share capital. There are currently only 50 companies registered with the Companies Registration Office (the "CRO") as a company limited by guarantee with a share capital so it can be expected that the private company limited by shares will be the more popular corporate form for a DAC. This briefing focuses on a DAC limited by shares. Any equivalent provisions specific to the DAC limited by guarantee are referenced in the footnotes.

Constitution

The Act requires the constitution of a DAC to accord with the form set out in the Act and that it comprise of a memorandum of association and articles of association.

Memorandum of Association

The memorandum of association must state whether the DAC is limited by shares[1] and that the liability of the members[2] of the DAC is limited. The memorandum must also set out the objects of the DAC and it is this requirement to include an objects clause that represents the main distinction between the DAC and the LTD.

The objects clause may be amended by special resolution. Holders of not less than 15 per cent of the DAC's issued share capital or debentures entitling holders to object to alterations to the DAC's objects are entitled to bring an application to the court for the alteration to the objects clause to be cancelled.

Articles of Association

The articles of association of a DAC may simply state that the provisions of the Act apply. Alternatively, they may exclude or modify the application of optional provisions contained within Parts 1 to 14 of the Act. In the event that the articles do not contain an express exclusion, the optional provisions contained within Parts 1 to 14 apply to the DAC. Subject to the requirements of the Act, the DAC can amend its articles of association by special resolution.

The DAC's Name

The name of a DAC must end with the words "designated activity company" or the Irish language equivalent of those terms. Use of "d.a.c." or "dac" is permitted after incorporation. A DAC may acquire an exemption from the requirement to include such a suffix at the end of its name if its objects are promotion of, *inter alia*, religion, education or charity, it is not-for-profit and it completes the necessary application to the CRO. In practice, many companies seeking an exemption from the requirement to include the equivalent "limited" suffix required under the previous Companies Acts also apply for charity status with the Revenue Commissioners. The Revenue requires such applicants to contain certain provisions in their memorandum and articles of association.

1 Or by guarantee and shares where it is a DAC limited by guarantee.

2 Membership of a DAC limited by guarantee is confined to subscribers to its memorandum or a person who is subsequently allotted a share in it.

Capacity

The Act provides that the validity of an act done by a DAC will not be compromised by virtue of anything contained within its objects. The doctrine of constructive notice has also been removed so that a third party is not bound to enquire as to whether the DAC is acting within its objects. Consequently, persons dealing with a DAC will not be prejudiced in instances where the DAC acts beyond the scope of its objects. A DAC may not be formed unless it carries on an activity in the State that is mentioned in its memorandum.

Corporate Governance

Directors

A DAC must have at least two directors (all aged at least 18) and a person may not be a director of more than 25 companies (one or more of which is a DAC). One of these directors is permitted to be the company secretary.

Proceedings of Directors

A director of a DAC may vote in respect of any contract, appointment or arrangement in which he or she is interested and will be counted in the quorum, unless the company's constitution provides otherwise. A DAC director may hold any such position (other than that of the statutory auditor of the company) in conjunction with his or her office of director for such time and on such terms as the company's directors may determine, unless the company's constitution provides otherwise.

Members

Unless its constitution provides otherwise, a DAC can avail of powers in the Act to pass unanimous and majority resolutions of members instead of holding physical meetings.

Auditing, Financial Statements and Accountability[3]

Audit Exemption

A DAC may avail of the audit exemption where at least two of the prescribed conditions in respect of the particular year are satisfied (*ie* (a) the balance sheet total of the company does not exceed €4.4m, (b) the amount of the turnover does not exceed €8.8m; and (c) the average number of persons employed by the company does not exceed 50.

Accountability

The Act provides that directors of a DAC, the balance sheet of which exceeds €12.5m and the turnover of which exceeds €25m, must prepare a compliance policy statement. The requirement for a corporate governance statement under the Act also applies to a DAC that has debentures admitted to trading.

Disclosure Obligations

The provisions of the Act, which deal with financial statements, annual return and audit, do not apply to a DAC which is a credit institution or insurance undertaking that is subject to alternative requirements.

A DAC is not required to file financial statements with its annual return if it has been formed for charitable purposes and it stands exempted from this requirement by an order of the Commissioner of Charitable Donations and Bequests for Ireland prior to the establishment, on 16 October 2014, and thereafter of the Charities Regulatory Authority.

Winding up

Upon the winding up of a DAC, the liability of members is limited to the amount unpaid on shares.[4] In limited circumstances past members will be liable upon the winding up of the DAC.

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3 A few provisions of the Act will commence on 1 June 2015 but will not apply to a company until its first financial year beginning on or after 1 June 2015. These provisions include:

- the obligation on every "large company" to establish an audit committee;
- the obligation on the directors of certain companies to prepare a directors' compliance statement; and
- the requirement on every director of a company the financial statements of which are being audited to confirm that all relevant audit information has been provided to the auditors.

4 In the case of the DAC limited by guarantee this will be the amount of the guarantee and the amount unpaid on the member's shares.

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Transition

Under the terms of the Act, an existing private company limited by shares has to decide, within a transition period (likely to be to 31 December 2016), whether to opt into the new regime for LTD or opt out by becoming a DAC or, indeed, some other type of company. The following are some points for consideration during the transition period.

Private company limited by shares

From 1 June 2015 until the expiry of the transition period, all existing private companies limited by shares are subject to the laws applying to the DAC limited by shares.

As mentioned, a DAC limited by shares is the closest corporate form under the Act to the existing private company limited by shares, primarily because of the continued existence of an objects clause in the DAC's memorandum. Accordingly, any private company limited by shares that wishes to continue in a relatively similar corporate form and retain its objects clause should elect to re-register as a DAC limited by shares during the transition period. Banks, insurers, semi-state companies and existing private companies limited by shares that have debentures listed on an exchange cannot become an LTD so many need to become DACs. Joint venture companies also favour a DAC to LTD structure.

The articles of a DAC may take the form of substantive regulations or a statement confirming that the provisions of the Companies Act 2014 are adopted. If adopting the former approach, it would not be advisable for a DAC to incorporate its existing articles into its constitution verbatim as provisions of existing articles may conflict with mandatory provisions in the Act.

Private company limited by guarantee and having a share capital

A private company limited by guarantee with a share capital may continue to use the word "limited" or "teoranta" at the end of its name for the transition period despite its change in status to a DAC limited by guarantee. After the expiry of the transition period and in default of the company having changed its name to include either of the required sets of words, the word "limited" or "teoranta" at the end of the company's name is automatically replaced with "designated activity company" or "cuideachta ghníomhaíochta ainmnithe" respectively.

The Act provides that all private companies limited by guarantee with a share capital that were previously registered with the CRO will on the commencement of the Act continue in existence and be deemed to be a DAC limited by guarantee. The existing memorandum and articles of such a company will remain in force (save to the extent that they are inconsistent with mandatory provisions of the Act).

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