

# The Unlimited Company

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.

Although some of the law relating to an unlimited company is unchanged by the Act, there are some notable reforms.

## **Key Features**

- unless specifically exempted, the name of an unlimited company must end with either “unlimited company” or “cuideachta neamhtheoranta”;
- no restriction on a company previously re-registered from limited to unlimited (or vice versa) subsequently reverting to its previous status;
- new rules with respect to the capacity of an unlimited company, mirroring those applying with respect to a designated activity company and a public limited company;
- unlimited company permitted to be a single-member company;
- statutory distribution rules disappplied with respect to an unlimited company (although insolvency rules will remain);
- a reserve arising from a reduction of capital of a ULC or a PUC treated as a realised profit;
- new provisions facilitating reorganisations, mergers and divisions of companies apply to an unlimited company in the same way as to a private company limited by shares (however, in the case of a merger or division, one of the companies involved must be a private company limited by shares).

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### Preliminary

The Act provides for three types of unlimited company:

- (a) a private unlimited company (“ULC”);
- (b) a public unlimited company (with a share capital) (“PUC”); and
- (c) a public unlimited company (without a share capital) (“PULC”).

### Formation

An unlimited company can be formed by means of registration or re-registration as an unlimited company or by means of a merger or division.

### Change of Status

Under previous rules, an unlimited company, which previously had changed its status from limited to unlimited, was restricted from reverting to limited liability status. The Act removes this restriction. Likewise, a limited company, which has previously changed its status from unlimited to limited, may revert to unlimited status without restriction.

### Company Name

Irrespective of the type of unlimited company, the name of an unlimited company must end with either “unlimited company” or “cuideachta neamhtheoranta”. This is a new requirement. After registration the words “unlimited company” and “cuideachta neamhtheoranta” can be abbreviated to “uc” and “cn” as the case may be.

In special circumstances, the Minister may, subject to such conditions as he may think fit, grant, in writing, an exemption from this obligation.

An existing unlimited company may omit the words during the 18-month transitional period (ending on 30 November 2016).

Relevant boards will appreciate the need to change stationery to reflect the addition of “unlimited company”, “uc”, “cuideachta neamhtheoranta” or “cn” to the end of the company’s corporate name unless the exemption has been obtained.

### Constitution

As in the case of other types of company, the provisions with respect to the constitution of an unlimited company reflect changes from the previous law.

Like a designated activity company (“DAC”), the constitution of an unlimited company must be in the form of a memorandum and articles of association. The Act sets out the prescribed format and those matters to be dealt with in the memorandum of association for each type of unlimited company.

As in the case of a DAC, the articles of association of an unlimited company may contain regulations in relation to the company. To the extent that optional provisions in the Act are not modified or excluded, those provisions apply. In the case of a ULC or a PUC, the articles of an unlimited company may consist solely of a statement to the effect that the provisions of the Act will apply while in the case of a PULC, the articles must also state the number of members with which the company proposes to be registered. The Act continues the existing memorandum and articles of association of an unlimited company save to the extent that those provisions are inconsistent with a mandatory provision of the Act.

### Capacity

Rules with respect to the capacity of an unlimited company are new and are consistent with the rules which will apply with respect to a DAC and a public limited company.

By way of summary:

- (a) an unlimited company has the legal capacity to do any act or thing stated in the objects set out in its memorandum of association or any act or thing which appears to it to be requisite, advantageous or incidental to or to facilitate the attainment of those objects;

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- (b) an act done by an unlimited company will not be invalidated on the ground of lack of capacity by reason of anything contained in the company's objects;
- (c) a member may bring proceedings to restrain the doing of an act which would be beyond the unlimited company's capacity but no such proceedings will lie in respect of any act to be done in fulfilment of a legal obligation arising from a previous act of the company;
- (d) directors must observe any limitation on their powers flowing from the objects and any action taken by the directors which would otherwise be beyond the company's capacity may only be ratified by the company by special resolution;
- (e) ratification will not absolve the directors of any liability unless a separate special resolution of the company for such relief expressly provides;
- (f) a third party to a transaction with an unlimited company need not enquire as to whether an action is permitted by the company's objects;
- (g) an unlimited company may alter its memorandum of association by special resolution; and
- (h) minority shareholders holding more than 15% in nominal value of the unlimited company's share capital (or members or holders of debentures above equivalent thresholds) can in certain circumstances apply to the court to cancel an alteration. The application must be brought within 21 days from the date of the relevant special resolution.

## **Number of Shareholders/Share Capital**

An unlimited company is permitted to be a single-member company. The previous requirement for a minimum number of members, being two in the case of a ULC and seven in the case of a PUC or PULC, has been removed. This ability to have a single-member unlimited company means that it is possible to dispense with arrangements whereby one or more shares are held by other group companies as nominees for the principal shareholder.

The Act provides that a ULC or PUC can, by special resolution, vary or reduce its share capital in any way save to the extent that its constitution otherwise provides.

Statutory pre-emption rights continue to apply with respect to both a ULC and a PUC, although the rules with respect to a ULC are aligned with those of a private company limited by shares ("LTD"). The rules with respect to a PUC are aligned with those applying to a PLC.

Subject to certain exceptions, an unlimited company is not permitted to offer securities to the public or to apply to have, or have, securities admitted to trading or listed on any market. In certain circumstances, however, a PUC or PULC may apply to have debentures (or interests in them) admitted to trading on any market.

## **Maintenance of Capital/Distributions/ Financial Assistance**

The distribution rules in the Act are disappplied with respect to an unlimited company. This represents a significant change to, and removes what many commentators regarded as an anomaly in, the previous law.

The Act provides that a reserve arising from a reduction of capital of a ULC or a PUC is to be treated as a realised profit. Former UK technical guidance on accounting treatment of profits, which is still relied upon in Ireland, appears to limit the circumstances in which a credit to reserves of an unlimited

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company (as distinct from a limited company) may be treated as a realised profit. Under these rules, the nature of the consideration from which the credit is derived will determine whether the resulting reserve is regarded as a realised or unrealised profit.

The Act also confirms the previously understood position that common law rules with respect to the making of distributions out of a company's assets did not apply to an unlimited company.

The rules concerning the prohibition on giving of financial assistance for acquisition of shares continue to apply with respect to an unlimited company. The common law insolvency rules will also continue to apply.

## **Reorganisations, Mergers, Divisions etc**

The provisions of the Act which facilitate reorganisations, mergers and divisions of companies apply to an unlimited company in the same way as to an LTD. However, in the case of a merger, one of the merging companies, and, in the case of a division, one of the companies involved in the division, must be an LTD.

## **Dispensing with Annual General Meetings ("AGMs")**

Unless it is a single-member company, an unlimited company, like a DAC, may not dispense with the holding of AGMs (insofar as an unlimited company can have a single member and, as such, can dispense with the holding of an AGM, this represents a change to the previous law).

## **Written Resolutions**

Like a DAC, the provisions of the Act, which entitle members to pass unanimous resolutions in writing, can be disapplied by the constitution of an unlimited company (representing a slight difference to the previous law).

The provisions of the Act, which provide for the passing of majority written resolutions, are disapplied with respect to an unlimited company.

## **Meetings**

In most part, the provisions in the Act dealing with members' meetings apply to an unlimited company subject to the alive exceptions (see McCann FitzGerald Briefing on Members' Meetings) as do the provisions on Directors' Meetings save that an unlimited company requires two directors (see McCann FitzGerald Briefing on Directors' Meetings).

## **Preparation of Financial Statements**

The provisions of Part 6 of the Act which deal with preparation and formatting of financial statements apply to all unlimited companies. This represents a change to the previous law. However, some 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"<sup>1</sup> to establish an audit committee;
- the obligation on the directors of certain companies<sup>2</sup> 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.

## **Audit Exemption**

A ULC, but not a PUC or a PULC, can avail of the audit exemption provisions contained in the Act. This represents a change from the previous law under which audit exemptions applied to a (private) limited company only.

<sup>1</sup> 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.

<sup>2</sup> I.e. 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. Unlimited companies are exempt from this requirement.

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## **Exemption from Filing Financial Statements**

Certain types of ULC (non-designated ULCs) will not be required to annex their audited financial statements to their annual return. This reflects the previous law, with the definition of a “designated ULC” mirroring that used in Regulation 6 of the European Communities (Accounts) Regulations 1993.

By way of example, a ULC which has as a member an individual or an unlimited company (or equivalent) incorporated outside the EU (for instance, Isle of Man or Jersey) will continue to benefit from this exemption. Likewise, the exemption will cover a ULC which has as a member an Irish or other EU unlimited company which has in turn as a member an Irish or EU unlimited company.

This exemption does not extend to a PUC or PULC (which again reflects previous law).

The above exemption is likely to be substantially removed on transposition into Irish law of Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Council Directives 78/660/EEC and 83/349/EEC 02/10. The Companies (Accounting) Bill is expected to be published shortly as the Directive is required to be transposed into Irish law by the end of July 2015.

## **Filing Obligations for Non-Designated ULCs**

Although a non-designated ULC is not required to annex its financial statements to its annual return, its auditors must prepare and furnish to the directors of that ULC a separate report (a “Report”) which confirms that they audited the financial statements of the company and that Report must include within it their report on those financial statements. A true copy of the Report and a certificate of a director and the secretary certifying that it as a true copy of the original must be attached to the annual return of the non-designated ULC when filing the return in the CRO. Although the Act contains more detail, it substantially restates previous law.

## **Directors’ Compliance Statements**

The provisions in the Act obliging directors of certain companies to include a directors’ compliance statement in their Directors’ Report do not apply to an unlimited company.

## **Summary Approval Procedure**

The summary approval procedure (being a streamlined procedure to authorise certain types of activities) can be availed of by an unlimited company. (See McCann FitzGerald briefing on Summary Approval Procedure).

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*For further information please contact*

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

This document is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting or refraining to act on any of the matters discussed.

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