MAMMOTH task

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PIC: BLUE SKY STUDIOS/GAZETTE STUDIO

at a glance

- Most existing private companies will become private companies limited by shares. The other form of private company will be a designated activity company
- The act makes some very important changes in the laws in relation to directors and their duties
- Other important changes are introduced to the rules on companies giving security
- Four new categories of offences are introduced for *Companies Act* offences

The *Companies Act 2014* – comprising nearly 1,500 sections – is the largest piece of legislation ever passed by the Oireachtas. In the first of a series, Paul Keane and Neil Keenan start dissecting the mammoth

The *Companies Act 2014* sets out our law in a coherent fashion and introduces many welcome improvements. It also imposes additional responsibilities and liabilities on directors and others. The legislation is a challenge, but also an opportunity. The Business Law Committee is focused on arming the profession with the knowledge of company law required to retain our preeminent role as advisers to business and business people. This article is the first of a series that will examine the changes of greatest relevance to solicitors. Readers must check the detail of the legislation in any particular case.

Structure of the act

Unlike earlier legislation, the act takes, as its cornerstone, the private company limited by shares. Volume 1 (parts 1-15) describes, in a structured and accessible manner, the life, activities and demise of that company. Parts 16 to 19 deal with other types of company,

FOCAL POINT

five main types of companies

Private company limited by shares (LTD)

- A simplified single-document constitution,
- Unlimited capacity,
- No objects clause,
- Board (or person registered for this purpose) may bind the company,
- Need only have one director (with a different secretary) and one member,
- May avoid holding AGM, and
- May not offer securities (shares, debt, and so on) to the public or list securities.

Designated activity company (DAC)

- Very similar to an existing private company,
- Objects clause,
- *Ultra vires* does not invalidate transactions with third parties,
- Remedies for members/liability for directors if acting beyond capacity,
- Limited by shares,
- Minimum two directors,
- May avoid holding AGM only if a single-member company, and
- May list certain debentures.

Company limited by guarantee (CLG), public limited company (PLC), and unlimited company (UC)

- The minimum number of members is one,
- Objects clause and *ultra vires* – see DAC,
- Existing law largely restated (but see subsequent articles in this series), and
- CLG may avail of audit exemption.

Names

An LTD must have 'Limited' or 'Ltd' as part of its name. Every other company must include its type of company or the appropriate abbreviation. This can be in capitals. Thus, existing companies that become DACs, CLGs or UCs will need to adjust their names on stationery and elsewhere.

We refer to the company types by the permitted abbreviations, in capitals: LTD, DAC, CLG, UC and PLC.

adopting and adapting the general rules to the requirements of the particular company type. Other parts deal with regulatory, administrative and miscellaneous topics.

Conversion of existing private companies

Most existing private companies will become LTDs. The other form of private company will be a DAC. A DAC will be suitable for companies that must, by law, confine their activities to those objects designated in its constitution, to carry on an activity not permitted to an LTD (such as listing debentures), or where the members wish to limit the company to specific objects.

A key innovation is that the LTD will have full capacity to carry on and undertake any business or activity, or to do any act or enter any transaction. The doctrine of *ultra vires* will no longer be a concern to third parties in transactions with LTDs.

DACs, CLGs, UCs and PLCs will continue to have objects clauses. The shareholders will have remedies, and the directors may have liabilities, if the company strays beyond its objects. However, even in relation to these companies, *ultra vires* has had its day in relation to transactions with third parties.

Moreover, for all companies, the board of directors (and any other person registered for that purpose) is deemed to have authority to exercise any power of the company (other than a power to be exercised by the members and, in the case of a registered person, a power of management) to bind the company in dealings with unconnected parties. This applies regardless of any limitations in the company's constitution.

Constitution

The LTD will have a single-document constitution. It will not have an objects clause or memorandum of association. The constitution may consist of:

- A document with the name,
- The fact that it is a company limited by shares,
- The share capital,
- The fact that the shareholders' liability is limited, and
- The subscription and signature of the subscribers.

'Table A' currently sets out the model regulations of the company, which apply in default of any variation in the specific articles of the company. Table A is no more, save for existing private companies that do not adopt a new constitution. Approximately 150 optional rules are now set out in the relevant parts of the act.

The constitution of the LTD may include supplemental regulations that dis-apply, or vary the optional provisions, or deal with other matters. Examples would include provisions in relation to the offer-round of shares or indemnities in favour of directors.

> For the first time, private companies can avail of a statutory procedure to effect mergers and divisions of companies. This was previously only available to public companies engaging in cross-border transactions

Transition arrangements

It is expected that the act will be commenced on 1 June 2015.

Private companies can choose to convert to an LTD or to a DAC. There will be a transition period of at least 18 months after the commencement of the act that allows the conversion arrangements to become effective with minimum disruption.

Private companies have a number of options.At the end of the transition period, an existing private company will be deemed to have become an LTD, unless it is required to be a DAC or it converts earlier to a DAC. Until the end of the transition period, such a company will be bound by the rules applicable to a DAC.

If the company has not converted prior to the end of the transition period, the directors are obliged to file an amended constitution to reflect the new rules. They may not make any other change. In most cases, this will mean no more than deleting the objects clause and renumbering the subsequent paragraphs. If the directors fail to do so, the existing memorandum and articles of association will continue to have effect, with the exception of the objects clause. The articles will continue to refer to Table A. Though workable, this would be an untidy result.

By special resolution, the company may convert either to an LTD or (if passed before the last three months of the transition period), by ordinary resolution, to a DAC.

The conversion to LTD will require the adoption of a new form of constitution in compliance with the act. This is likely to involve considering what parts of the existing articles are now set out satisfactorily in the optional rules of the act, what variation of the optional rules is desirable, and what further supplemental regulations are required.

In the case of conversion to a DAC, the constitution must be changed so that its name reflects its new status and that the memorandum and articles are presented as a single document. Of course, the members may, by passing a special resolution, make more radical amendments.

Shareholder(s) holding more than 25% of the voting rights may, by notice to the company, insist that the company reregister as a DAC.

Shareholders/creditors holding 15% or more of the company's share capital/debentures may seek an order of court to direct reregistration as a DAC.

A company of one type may reregister as another (for example, LTD to DAC or UC) at any time by passing a special resolution and complying with the statutory requirements.

Directors' duties

The act makes some very important changes in the laws in relation to directors and their duties. Companies and their directors should be made aware of these changes.

It will now be explicit that a director has to be at least 18 years of age. An LTD can have a single director, but a DAC must have at least two directors. Unlike Britain, corporate directors will not be permitted.

Directors' duties – which are currently set out in common law – have been codified, with eight key statutory directors' duties set out in section 228 of the act.

FOCAL POINT

carpe diem

- Tell your clients about the act. Use or adapt the specimen 'client alert' available for download from the 'precedents' section of the Business Law Committee's page on the Law Society's website.
- Follow the series of articles to be published in the *Gazette* over the next few months.
- Attend the major CPD conference on 25 March 2014 that will provide a comprehensive briefing on the act.
- Avail of the specimen new forms of company constitution that will be made available by the Law Society for use by solicitors.

It is now expressly stated that a breach of directors' duties can result in the director having to personally indemnify the company for loss or damage resulting from the breach and to compensate for direct or indirect gains made by the director.

The act provides that a court judgment that is wilfully disobeyed by a company may be enforced by attachment against personal assets of a director if the relevant court order so provides.

There is a specific duty imposed on directors to ensure that auditors have all relevant audit information (for those companies that are subject to audit).

Larger private companies (those with a balance-sheet total of greater than €25 million and turnover of greater than €50 million) must have an audit committee with at least one non-executive director with relevant experience, or explain why not.

The audit exemption for smaller companies has been extended so that it will apply to a wider range of companies and will also now be available to groups and CLGs. Dormant companies may now also be exempt.

Compliance statement

All public limited companies and larger private companies (those with a balance-sheet total of greater than €12.5 million in the relevant financial year and turnover of greater than €25 million) must include in their directors' report a statement on compliance with tax law, company law (those offences that carry the two higher categories of breach), and certain other laws, such as market abuse and prospectus law. The directors must be able to demonstrate that the company has a policy on compliance and has in place structures and arrangements to ensure compliance, or explain why not. These statements are expected to be required with respect to financial years commencing after the commencement of the act.

Directors' interests

The provisions currently contained in part IV of the *Companies Act 1990* on disclosure of interest in shares have been amended and an attempt made to simplify them. Interests of less than 1% of share capital are disregarded, but options over this threshold must be disclosed. There is a procedure that will apply for 18 months after commencement of the legislation to cure inadvertent breach of the old disclosure requirements. The form of notification to the company has been clarified.

The current provisions on directors' loans (section 31 of the 1990 act) have not changed hugely, but it will be possible to use the summary approval procedure (see below) to approve a direct loan and credit transaction, which is not the case under the 1990 act. An auditor's report will not be required, which is also a change from the current position.

If loans from a director to a company and vice versa are not evidenced in writing, the loan will be deemed to be on terms that are very adverse to the director concerned.

It will be a duty of the directors to ensure that the company secretary has the requisite skills and resources to discharge their statutory and other duties (including the maintenance of all non-accounting records). Directors are now going to have to consider whether their secretary has the necessary skills and resources.

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Summary approval

A summary approval procedure is introduced for effecting various restricted transactions, such as a voluntary winding-up, approval of financial assistance, statutory merger, loans to directors and a reduction of capital (the procedure does not apply to the division of companies). The procedure can differ depending on the transaction involved but, generally speaking, it involves a declaration of solvency, shareholders' special resolution (and, for some transactions, an auditor's report). Directors should note that giving the declaration without reasonable grounds can expose them to responsibility without limitation of liability for all of the liabilities of the company and not just those caused by the transaction in question.

Borrowings and security

Some very important changes are introduced to the rules on companies giving security. The priority of security will be by reference to the time of filing in the CRO rather than the date of the charge. There will be a procedure for those taking security from a company to notify their intention to create a charge that will lock in priority until the particulars of the charge are filed in the normal way. A wider range of charges (such as charges over cash) will also have to be filed.

An LTD will no longer be required to have an authorised share capital. In addition, a reduction in issued share capital can be effected through the summary approval procedure rather than an application to the High Court, which is the case at the moment. Other important changes are that the requirement that at least 10% of the issued share capital be non-redeemable is being removed. The requirement to have a 21-day period for inspection of a contract for the purchase by a company of its own shares will also be removed.

Another significant change is that it will be possible to have ordinary and special resolutions passed in writing by a majority of shareholders (or three quarters in the case of a special resolution) – currently, written resolutions have to be unanimous. The resolutions will not take effect until the requisite periods, which would otherwise apply for a meeting to pass such resolutions, have expired.

The LTD can dispense with the requirement to have annual general meetings, even if it has more than one member. In addition, AGMs do not have to be in the State as long as shareholders in the State are given facilities to participate electronically.

For the first time, private companies can avail of a statutory procedure to effect mergers and divisions of companies. This was previously only available to public companies engaging in cross-border transactions.

The financial assistance provisions have been reformed in particular, to remove the words 'in connection with', which will bring a lot of transactions outside of the financial assistance net.

Enforcement

Liquidators and examiners will need to have appropriate qualifications.

Four new categories of offences are introduced for *Companies Act* offences: category 1 is the most serious (carrying fines of up to €500,000 and up to ten years in prison), with category 4 being the least serious.

There will be a procedure for directors of insolvent companies to voluntarily elect to have a restriction or disqualification order imposed on them without the need to go to court.

look it up

Legislation:

- *Companies Act 1990*
- *Companies Act 2014*