

NEW COMPANIES LAW – WHAT YOU NEED TO KNOW

After 15 years of preparation, consultation and revision, a comprehensive new Companies Act was enacted on 23 December 2014. With nearly 1,500 sections and 17 Schedules, this is the largest piece of legislation ever enacted by the Oireachtas. It is expected that the bulk of the legislation will become effective on 1 June 2015.

This note sets out a summary of some of the key changes that may be of relevance to you. You will need to take specific advice on how the legislation affects you and your business.

Focus on the Private Company

Up to now, our company law was based on the needs of large public limited companies, but the great bulk of Irish business is done by small private companies. The new law focuses on the private limited company with shares and simplifies the law.

Company Law as you have known it, but made easier

The law in relation to companies remains substantially the same, but there are some significant changes. All directors, and all secretaries who are individuals, will have to be at least 18 years of age. Directors also have new obligations and exposures.

Transition Period and obligation to convert your company

There will be a transition period of 18 months, after the law comes into effect. During that time, all existing private companies with shares must choose to become either a company limited by shares (“CLS” or “LTD” type) or a Designated Activity Company (“DAC”), or another type of company (e.g. a PLC). The form most likely to be chosen is a CLS type company.

It may be useful to convert prior to the end of the transition period (as the more restrictive law on DAC’s apply to existing companies until they convert) and that option is available.

In the great majority of cases, unless the company has converted earlier to a CLS, the company will be deemed to be a CLS at the end of the transition period, and the directors will be required to prepare a new constitution in accordance with the new Act, to give it to the shareholders and to file it in the CRO.

Companies limited by shares

The CLS company type will have a number of advantages:-

- full capacity (the existing rule of ultra vires whereby companies cannot act outside of their objects will no longer apply);
- needs only one director and shareholder (but it must also have a secretary if it has only one director);
- a simplified constitution;
- need not have an authorised share capital if so desired;
- no need to change the company name or stationery (it will continue to include “Limited” or “Ltd”).

Accordingly in many cases conversion to a CLS type may be the best option for you.

Designated Activity Companies

Some companies will have to, or may choose to, become a Designated Activity Company, where the company is or needs to be limited to carrying on a specific activity.

Simplified Procedures

The formalities associated with a great number of transactions will in many cases be easier: written majority resolutions, approval of some transactions (such as loans to directors or the company giving financial assistance for purchases of its own shares), and the ability for the CLS or LTD company type (as well as certain other companies, if they have a single member) to avoid having to hold an AGM and instead deal with the relevant business in writing. However, this is balanced with increased exposure for directors where the new approval procedures are used.

Directors' duties codified

Judges have, over the years, decided what are the fiduciary and care duties of directors. These are now restated and codified in eight rules. These include the obligation to act in good faith in what the director considers to be the interests of the company and to act honestly and responsibly. The Act imposes an objective standard of care, skill and diligence on a director. There are also a number of rules dealing with the diversion of the company's property, proprietary information or opportunities and conflicts of interest. Usefully, however, the Act allows the company to relax certain elements of these rules.

The constitution of a company will need to be properly drafted, if it is desired to take advantage of these options.

Directors' Loans

We have become familiar with the restrictions on companies making loans, in favour of directors or connected persons. There is a new simplified procedure for approving or whitewashing such loans.

However, it is important that properly drafted loan agreements are put in place, because, under the new rules, undocumented loans between a company and a director/connected person, or loans which contain ambiguous terms, are to be treated adversely.

Directors' Report

Each director will be required to confirm in the directors' report that all relevant audit information of which they are aware (having made reasonable enquiries) has been conveyed to the auditors. This is a significant additional responsibility and it will be an offence to knowingly or recklessly make a false statement. Directors will need to take advice on what steps they need to take to ensure they comply.

Compliance Statements and Audit Committees

The directors of a company with a balance sheet total of €12.5m and turnover of €25m will have new obligations for securing the company's compliance with (1) certain company law provisions imposing serious penalties (being category 1 and 2 offences) for non-compliance and (2) tax law. These include the directors drawing up a compliance policy statement and reporting on what has been done to secure compliance. For even larger companies (balance sheet total €25m, turnover €50m), the directors must consider the establishment of an audit committee and address the issue in their directors' report.

If you think any of this applies to you, please talk to us about what needs to be done.

Secretary

The Directors have a duty to ensure that the person appointed as secretary has the skills necessary to maintain (or procure the maintenance of) non accounting records which have to be kept under the Act and to ensure that the secretary has the skills or resources necessary to discharge the statutory and legal duties to which the secretary is subject and such other duties as may be delegated.

Mergers and Divisions

There are new arrangements which will make it easier to merge companies or to split the business of an Irish company. This may be a useful device in dealing with family succession or in the disposal of part of the business conducted by a company.

Insolvency

There are some changes in insolvency law, for the first time liquidators must have an appropriate qualification. It is also possible for an Examination to be conducted in the Circuit Court for companies that fall within the audit exemption criteria (this change is already in place).

What you should do

- Decide whether or not you are happy to convert to a CLS or a DAC, and remember some companies may be obliged to convert to DACs- we can advise further if required.
- With your advisers, review your Memorandum and Articles of Association and consider how the standard constitution should be adjusted to suit your requirements.
- Consider whether the secretary has the necessary skills or resources to allow the Directors to fulfil their duties when appointing a secretary.
- Put proper agreements in place to document directors' loans to or from the company.
- Put in place a system to show that directors have made proper enquiries to identify relevant audit information and to disclose that information to the auditors.
- Check your agreements to see if changing the company's constitution will require the consent of other parties.
- Check if there has been any breach of the obligations under Section 53 of the 1990 Companies Act to disclose interests in shares as the Act usefully provides a transitional period of 18 months to remedy an inadvertent default
- Consider whether you are up to speed on your duties as a director or owner of a company and contact us if you need an update.

We are happy to discuss how the new legislation will affect your business.