

A New Departure in Irish Company Law: the Companies Act 2014 – an Overview

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Executive summary

The Companies Act 2014 (the ‘Act’), which is expected to come into force on 1 June 2015, is the first major review and consolidation of company law in Ireland in over 50 years. It brings about a significant reform of the Irish company law regime and, over the coming months, practitioners and businesses will need to assess the impact of the changes brought about by the Act on the practices and governing documents of existing companies.

Changes introduced by the Act include the move towards single-director companies, the removal of the objects clause for the new model private company, a new statutory merger regime, changes to the law on the provision of financial assistance for acquisition of own shares, the codification of directors’ duties and modifications to the system for the registration of charges.

Introduction

On 23 December 2014, the Companies Act 2014 was signed into law. Representing the largest substantive piece of legislation in recent Irish legal

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history, it is expected that the Act will come into effect on 1 June 2015. The purpose of the legislation is to simplify and modernise Irish company law and to provide a comprehensive framework for all Irish registered companies.

The Act is spread out over 25 parts and 17 schedules and comprises some 1,448 sections. It has the stated aim of making company law more accessible, coherent and reflective of business practice.¹ While consolidating 17 previous Companies Acts and 15 statutory instruments, together with codifying various provisions of the common law, the Act also introduces important reforms that will change the landscape of company law in Ireland.

The last major review and consolidation of Irish company law took place over 50 years ago, in the lead-up to the Companies Act 1963. An overhaul of the law was long overdue, particularly in light of reform in the United Kingdom, Hong Kong, Canada and New Zealand. A statutory body (the Company Law Review Group (CLRG)) was accordingly set up in 2000 to advise the Irish Government on the reform and modernisation of Irish company law.

The CLRG spent a number of years reviewing the existing company law regime, determining the provisions that should be carried over into the new law and recommending a variety of reforms. As part of this process, the CLRG examined the company law regimes of a number of other jurisdictions, in particular the UK, and took inspiration from changes introduced in those countries.

In general, the structure of Irish company law is closely modelled on that of the UK. The two jurisdictions share a common legal tradition with both case law and legislation from the UK influencing the Irish judiciary and legislators. Just as the current primary piece of company legislation in Ireland (the Companies Act 1963) closely resembles its UK counterpart (the Companies Act 1948), the Act is similar in many ways to the UK Companies Act 2006. However, there are important differences between the two acts and the Irish legislature has made considered decisions on occasion not to follow its closest neighbour in relation to company law policy.

Given the significant presence of foreign investment in Ireland, the changes brought about by the Act will be of interest not just domestically, but also to the international business community. In particular, this article will be of relevance to the many multinational groups that have subsidiary companies registered in Ireland. Recent figures show that there are over 3,300 foreign-owned firms based in Ireland and in 2013 Ireland was ranked

1 Deputy Richard Bruton, Minister for Jobs, Enterprise and Innovation, Dáil Deb, 23 April 2013, vol 800, no 3.

tenth in terms of foreign direct investment (FDI) project inflows globally.² Many of these firms operate through Irish registered companies and will be directly affected by the changes brought about by the Act.³

What's new?

While the new legislation largely re-enacts the pre-existing law, there are a number of significant innovations.

Structure of the legislation

The Act places the private company limited by shares at the heart of company law for the first time. For historic reasons, Irish company law has as its focus the public company and it was recognised that this situation was anomalous given that nearly 90 per cent of companies registered in Ireland are private companies limited by shares.

Therefore, volume 1 of the Act looks to ring-fence the law applicable to what will be the most common company type – the new model private company limited by shares. In line with the simplified structural concept of the Act, the provisions are arranged to reflect the life cycle of the company, beginning with how a company is set up, followed by the provisions that apply when the company is in operation and, finally, the provisions that are relevant to the winding down of the company. Volume 2 details how the law contained in volume 1 is applied, disapplied or varied for the other company types – namely the designated activity company, the public limited company, the guarantee company, the unlimited company, the unregistered company and the investment company.

New company types

The Act provides for the creation of two new company types: the new model private company limited by shares (LTD) and the designated activity company (DAC). The main difference between these two company types is that a DAC must have an objects clause whereas an LTD does not. In addition, of the two company types, only a DAC will be permitted to list debt securities. A DAC

2 Department of Jobs, Enterprise and Innovation, *Policy Statement on Foreign Direct Investment in Ireland* (July 2014) www.enterprise.gov.ie/en/Publications/Policy_Statement_on_Foreign_Direct_Investment_in_Ireland_PDF_689KB_.pdf.

3 In addition, numerous overseas companies operate branches or places of business in Ireland; such companies may be affected by reforms introduced by the Act in this area.

is the company type that most closely mirrors the existing private company limited by shares.

Following a transition period of 18 months, the existing private company limited by shares will cease to exist. During this transition period, existing private companies can elect to become an LTD or to opt out of that new regime and become a DAC.⁴

It is expected that most existing private companies limited by shares will elect to become an LTD rather than a DAC given the benefits associated with that company type. However, certain companies such as joint venture companies may wish to retain an objects clause and, as a result, may opt to convert to a DAC. Credit institutions and insurance undertakings are not permitted to be an LTD under the new law.

Objects clause and doctrine of ultra vires

As indicated above, an LTD will not have an objects clause, meaning that it will have the same legal capacity to do anything that a natural person may lawfully do.

Removing the need for an objects clause should both ease the administrative burden on companies and provide certainty to third parties, such as lenders, who will no longer be required to examine extensive objects clauses to determine whether a company is acting within its powers.

While all other company types must have an objects clause, the Act attempts to lessen the effect of the doctrine of *ultra vires* for these company types by providing that a party to a transaction with a company that has an objects clause is not bound to enquire as to whether such a transaction is permitted by that company's objects. However, a member of the company may bring proceedings to restrain the doing of an act that is contrary to the objects of the company. Proceedings cannot be brought in respect of any act to be done in fulfilment of a legal obligation arising from a previous act of the company. Acts beyond the capacity of the company may subsequently be ratified by special resolution of the shareholders.

While the Act sets out to lessen the effect of the doctrine of *ultra vires* by stating that third parties will not be prejudiced by *ultra vires* acts, it remains to be seen whether such parties dealing with companies (in particular, lenders) will decide that it is still prudent to examine the objects clause of a company (where it has one) to satisfy themselves that the company is not

4 An existing company is also entitled to convert to another company type provided for under the Act, provided it complies with the registration requirements for that company type (for example, a public limited company (PLC), a guarantee company or an unlimited company).

acting *ultra vires*. It may be that third parties will wish to avoid a situation, after spending time and effort preparing for a transaction, where members of the company then decide to bring an action to prevent the transaction from completing on the grounds that it is *ultra vires* the objects of the company. Accordingly, third parties may consider it best to determine at the outset whether the company has the power to enter the transaction in question to avoid complications further down the line.

One document constitution

As a result of the removal of the objects clause, the LTD will have a simplified one-document constitution. Currently, many existing private companies limited by shares include the extensive and detailed regulations contained in Schedule 1, Table A to the Companies Act 1963 in their articles of association. In the main, these regulations have now been incorporated into the legislation, with such provisions applying to a company unless its constitution provides otherwise. It is possible, however, for an individual company to disapply or modify most of these provisions in a manner that will suit its specific needs.

It is also possible for an individual company to include additional provisions in its constitution if it so wishes, provided they are not in conflict with a mandatory provision of the Act. In fact, there are certain provisions of the Act that will not apply by default and must be specifically authorised by the constitution of the company. Examples of such provisions include the authority to allot shares and the power to have a seal for use abroad.

All company types other than the LTD will continue to have a memorandum and articles of association, although these documents will now be collectively referred to as a 'constitution' under the new law.

Single-director companies

While allowing for single-member companies, Irish law had, until now, preserved the requirement for a company to have two directors. Under the Act, it will be possible to incorporate a company with just one director, reflecting the law already in place in other jurisdictions, including the UK, Australia, New Zealand and Canada. This new provision can only be availed of by the LTD company; all other company types will still be required to have a minimum of two directors.

It will no longer be necessary therefore to put a second director in place merely to fulfil a statutory requirement. In practice, the second director was often a director in name only and had little to do with the running of

the business. The CLRG was of the opinion that this served to devalue and trivialise the office of director of a company. It was felt that it was preferable that a director's liabilities be properly understood and complied with by a 'real' director rather than being foisted on a non-participator in the business.⁵ A further benefit associated with this change is that it will be easier to do business with a single-director company as it will not be necessary for third parties dealing with such companies to ascertain that a transaction or course of action has been approved by the board as a whole.

It was decided to maintain the office of company secretary and it is not permissible for a sole director also to occupy the position of company secretary. Therefore, a second person (or a body corporate) will be required even in the case of a single-member, single-director company in order to meet the statutory requirement of having a company secretary.

Simplified corporate governance

The Act introduces a number of provisions designed to simplify corporate governance for companies in general and the LTD in particular. For example, subject to certain conditions, an LTD may adopt written procedures in place of holding a physical annual general meeting (AGM). All other company types having more than one member must continue to hold physical AGMs. In addition to this, both the LTD and the DAC may now pass majority written resolutions, although the usefulness of this provision is somewhat diluted by the necessity to wait seven days (in the case of an ordinary resolution) and 21 days (in the case of a special resolution) for the resolution to take effect.

SUMMARY APPROVAL PROCEDURE

As part of the drive to make it easier for companies to do business, the Act sees the introduction of a universal procedure (known as the summary approval procedure), which can be used by most company types to authorise seven types of 'restricted activities'.⁶ These activities are:

1. the provision of financial assistance for acquisition of own shares;
2. reductions of company capital;
3. variations of company capital on reorganisations;
4. the treatment of pre-acquisition profits in a holding company's financial statements as profits available for distribution;
5. the provision of loans, quasi-loans, credit transactions, guarantees or securities to directors and connected persons;

⁵ Company Law Review Group, *First Report (2000–2001)*, 11.8.4–11.8.7.

⁶ PLCs may only use this new procedure in respect of items 4, 5 and 7.

6. the merger of Irish private limited companies; and
7. the commencement of a members' voluntary winding up.

The summary approval procedure is broadly modelled on the existing financial assistance whitewash procedure, that is, requiring shareholder approval and a directors' declaration of solvency for a restricted transaction to be validated. It removes the need to seek court approval for certain restricted activities and also removes the requirement to obtain an auditor's report in relation to the making of loans, quasi-loans and credit transactions to directors and connected persons, or the provision of guarantees (or other security) in respect of such loans, quasi-loans and credit transactions.

The content of the declaration of solvency will vary depending on the restricted activity in question and for certain restricted activities, an auditor's report will still be required. However, the practical difficulty in obtaining auditor's reports under the current law has been eased somewhat by removing the requirement that the auditor give an opinion as to whether the director's declaration is 'reasonable'. Instead, the auditor will now be required to opine as to whether the declaration is 'not unreasonable'. The representative body for accountants in Ireland has indicated that this change will assist them in providing the reports required to validate restricted transactions.⁷

The changes brought about by the introduction of the summary approval procedure will reduce the burden and expense for companies that previously would have had to go to court to obtain approval for various transactions. The procedure also serves to simplify and streamline the methods of validating these restricted transactions, which will be of assistance to practitioners advising in this area. However, a company will still be permitted to go to court to obtain approval for certain transactions should it so wish. Where a director is found to have made a declaration under the summary approval procedure without having reasonable grounds to believe the company was solvent, a court may order the director personally liable for all the debts of the company.

Directors' duties

As was the case with the UK Companies Act 2006, the Act contains a codification of directors' duties, bringing together duties from the common law, equity and statute for the first time in a concise manner.

The Act deals with a number of general duties that apply to directors, including the duty to ensure compliance with the Companies Act. On taking up office, a director will now be required to make a statement acknowledging his or her duties under the law.

7 Company Law Review Group, *Fourth Report (2006–2007)*, Chapter 7.

The Act goes on to enumerate the duties applying to directors as follows:

1. act in good faith in the interests of the company;
2. act honestly and responsibly in the conduct of the company's affairs;
3. act in accordance with the company's constitution and the law;
4. not use the company's property, information or opportunities for own/ other third party benefit;
5. not agree to restrict the director's power to exercise independent judgment;
6. avoid any conflict between director's duties and own interests;
7. exercise the care, skill and diligence that would be exercised by a reasonable person with the knowledge and experience a director is expected to have and that the director actually has; and
8. have regard to the interests of members, in addition to a general duty to have regard to the interests of employees.

If there is a breach of any of these duties (other than 2 and 8 above⁸), the director must account to the company for any gain that he or she has made from the breach. The director will also be obliged to indemnify the company for any loss or damage resulting from a breach of duty.

Viewed in the light of the current law, it would appear that these provisions do not significantly increase directors' duties. Rather, by codifying the duties, it is hoped that it will make it 'easier for directors to understand their responsibilities and more difficult to deny their existence'.⁹

DIRECTORS' COMPLIANCE STATEMENT

The Act, however, does see the introduction of a significant new director's duty in the form of the requirement to produce a directors' compliance statement on an annual basis for all PLCs and large private companies and guarantee companies.¹⁰ Unlimited companies and investment companies do not come within the scope of this new requirement. A form of directors' compliance statement was legislated for in the Companies (Auditing and Accounting) Act 2003, but the relevant provisions were never commenced owing to concerns over the disproportionate burden they would place on companies. Accordingly, the CLRG was requested to review the matter and

8 The statutory remedy to account for gain and the indemnity for losses incurred do not apply to these duties as they were not common law duties under the pre-existing law. However, other reliefs would be available for breach of those duties.

9 Deputy Richard Bruton, Minister for Jobs, Enterprise and Innovation, Dáil Deb 23 April 2013, vol 800, no 3

10 'Large company' in this context means one where the balance sheet total for the year exceeds €12,500,000 and the turnover for the year exceeds €25,000,000.

produced a report in 2005¹¹ recommending a more proportionate form of director's compliance statement, which is now found in the Act.

Under the new law, it will be necessary for directors of companies in scope to include a statement in the director's report on an annual basis acknowledging that the directors are responsible for securing the company's compliance with its 'relevant obligations'. 'Relevant obligations' means the company's obligations under the Act where a breach of those obligations is considered to be a serious offence¹² and the company's obligations under tax law. The directors must also confirm that the company has put in place a compliance policy statement, that appropriate arrangements or structures are in place to ensure compliance with the company's obligations and that a review of these arrangements or structures has taken place during the previous year. If the directors cannot provide these confirmations, they must then explain why the specified actions have not been carried out.

A failure to include a compliance statement in the director's report of a company in scope is a criminal offence.

Mergers and divisions

The Act introduces a statutory framework for mergers and divisions between private companies in a purely national context for the first time under Irish law. Under the current law, mergers between private companies may only be implemented if there is a cross-border element to the transaction, with the merger and division of PLCs being dealt with under a separate regime. The new statutory framework in the Act is modelled on the EU cross-border merger regulations, which are regarded as relatively straightforward to operate by the business and advisory community. Three forms of merger are provided for: merger by acquisition, merger by absorption and merger by formation of a new company.

A further innovation in this area is the availability of the summary approval procedure to effect a merger. This means it will not be necessary to obtain court approval for a merger, with the proviso that a unanimous written resolution of the members of each of the merging companies must be in place before the merger can proceed. It is open to the companies to elect to obtain court sanction for a merger rather than using the summary approval procedure if they so wish. While the provisions on divisions are somewhat similar to the provisions on mergers, it is not possible to use the summary

11 Company Law Review Group, *Special Report on the Directors' Compliance Statement* (2005).

12 Namely, category 1 and 2 offences under the Act and market abuse and prospectus offences, and for traded companies, transparency offences.

approval procedure to effect a division and it will still be necessary to obtain court approval for such a transaction.

Registration of charges

The Act introduces a number of changes aimed at simplifying the registration of charges and clarifying the rules of priority.

An expanded definition of charge has been included in the Act to provide that a charge means a mortgage or charge in a written or oral agreement created over an interest in any property of a company (including a judgment mortgage). The current legislation recited nine categories of charges that required registration, which the CLRG believed to be cumbersome and recommended that every charge (with the specific exception of the exclusions referred to below) should be subject to the requirement to register particulars publicly with the Companies Registration Office (CRO).

Under the Act, the only charges excluded from the requirement to register particulars with the CRO comprise a mortgage or charge in a written or oral agreement over an interest in cash, deposits, shares, bonds, debt instruments, units in collective investment undertakings or money market instruments or claims and rights in respect of any of the foregoing (such as dividends and interest), and as such these exclusions are in line with the provisions of the Financial Collateral Directive 2002/47/EC.

In its review of the law prior to the drafting of the Act, the CLRG identified a fundamental flaw in the current procedure for the registration of charges, which provides that particulars of a charge should be registered with the CRO within 21 days of creation.¹³ It noted that the present system can create anomalies as charges acquire their priority from the date they are created and not from the date they are registered. The CLRG was of the view that such a system was open to abuse, given that a lender, although taking all appropriate precautions to determine whether company property was already charged, may not attain a first-ranking charge where another lender had created a charge but had not yet registered it, having 21 days in which to complete the registration.

Accordingly, it was recommended that a new optional two-stage registration to 'lock in' priority be introduced, following a similar procedure already adopted in the United States, Canada and New Zealand. This procedure allows a filing to be submitted to the CRO prior to the completion of a transaction and the actual creation of the charge, provided a further filing evidencing the creation of the charge is filed within 21 days of the first filing

¹³ Company Law Review Group, *Second Report (2002–2003)*, 8.3.2–8.3.4.

of the intention to create a charge. The charge will then take effect as to priority on the date of the first preliminary filing. In the absence of a second filing within 21 days, the first filing lapses. Where the two-stage procedure is used, the first filing will contain all the required particulars of the charge, other than the date of its creation. The second filing will confirm the creation of the charge (specified in the first filing) and indicate its date.

It is thought that lenders will opt to utilise the new two-stage procedure for the registration of charges in order to secure priority at the earliest possible date. However, it is open to the parties to a transaction to continue to use the existing one-stage procedure to effect the registration of a charge should they so wish. Usefully, the Act clarifies that where not governed by another regime (for example, the requirement to register charges over real property with the Property Registration Authority), the priority of charges will be governed by reference to the date of receipt by the CRO of the particulars of the charge rather than the date of creation of the charge.

The UK has been considering making changes to its system for the registration of charges for a number of years to deal with the anomalies identified by the CLRG in this area. However, it has not yet taken the step to introduce a system akin to a two-stage registration process now utilised by a number of common law jurisdictions.

External companies

‘External’ companies are European Economic Area (EEA) or non-EEA bodies corporate with limited liability formed and registered outside the Irish State having a connection with Ireland.¹⁴ The current law deals with external companies by providing for both the EU recognised concept of a ‘branch’¹⁵ and the domestically recognised concept of a ‘place of business’.¹⁶ The generally accepted identifying feature of a branch is that it has the appearance of permanency and is physically equipped to negotiate business with third parties generally.¹⁷ In contrast to this, a ‘place of business’, although not defined by the legislation, is thought to mean an entity established outside Ireland, which is performing in Ireland activities ancillary or incidental to the company’s business. Both a ‘place of business’ and a branch are required

14 Unlimited external companies are therefore not governed by these provisions.

15 In Ireland, the concept of ‘branch’ is governed by the Branch Disclosure Regulations 1993, SI 395/1993, which implement Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another state.

16 As provided for by the Companies Act 1963, Pt XI.

17 *Etablissements Somafer v Saar-Ferngas* [1978] ECR 2183.

to register with the CRO; but while a branch must file its accounts, a place of business is not always required to do so.

Given the lack of concrete definitions for the terms ‘branch’ and ‘place of business’ in the legislation to date, there has been some uncertainty in Ireland as to whether a company should register as a branch or a place of business or not at all. To remedy this, the Act will abolish the concept of place of business and only provide for the EU recognised concept of a branch, applying to both EEA and non-EEA companies. The CRO has indicated that the registration of existing places of business in Ireland will lapse upon commencement of the Act. Accordingly, this would be a good juncture for external companies currently operating in Ireland as a place of business to determine whether they should correctly be registered as a branch going forward.

A branch is obliged to file with the CRO the accounts that are required to be prepared and publicly filed in its home state. In addition, there are certain other provisions of the Act that will apply to external companies. For example, the prohibition on an undischarged bankrupt acting as the director, secretary or being concerned in the management of a company is extended to external companies.

Importantly, under the Act, charges created by external companies over Irish property/assets must be registered with the CRO, but only where the external company has registered a branch with the CRO. Where the external company has established a branch but has not registered it, there is no ability for such a company to register a charge over Irish property/assets with the CRO.

The prohibition on non-registered branches filing charges effectively abolishes Slavenburg filings. Currently, the registration of charges applies to all external companies, regardless of whether or not such an external company has a branch registration in the state. Owing to the fact that external companies with no branch registration do not have a registration number, it was not possible for the CRO to register the charge in the usual manner. Instead, such charges were entered on a file called the ‘Slavenburg file’, which is available for inspection by the public.

In line with the changes brought about in the UK by the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009,¹⁸ the Slavenburg file will cease to exist following commencement of the Act. The CRO has suggested that the existing Slavenburg file (up to the date of commencement) is likely to remain open for public inspection in future. In contrast to the UK, Ireland has

18 SI 2009/1917.

not taken the additional step of completely removing the requirement to register any charge created by an overseas company.¹⁹

Categorisation of offences

The Act introduces a new four-tier categorisation of company law offences on the recommendation of the CLRG. For the sake of clarity, it was thought preferable that, subject to a small number of exceptions in the case of the most serious offences (for example, market abuse and transparency offences), all offences under the Companies Acts should be categorised according to this four-tier scheme.

Category 1 and category 2 offences are the most serious of the categorised offences under the Act and are the equivalent of the existing indictable offences under company law (ie, tried by a jury and in a higher court). At the higher end of the scale, following conviction on indictment, a category 1 offence carries a term of imprisonment of up to ten years and/or a maximum of a €500,000 fine. Category 3 and category 4 offences can only be tried summarily (ie, without a jury and in a lower court) and carry maximum penalties of a term of imprisonment of six months and/or a fine of €5,000.

Influences from the UK and other jurisdictions

In its research and discussions leading to the drafting of the Act, the CLRG reviewed a variety of provisions of company law in other jurisdictions, in particular the UK, to determine whether any of these provisions merited being carried over into Irish law.

Disqualification and restriction undertakings

For the first time in Irish law, the Act will allow persons to give and for the Director of Corporate Enforcement²⁰ to accept, disqualification and restriction undertakings. Under the current law, directors can be either disqualified or restricted in their future activities. The concept of restriction is not found in UK law and it effectively means that any companies in which a 'restricted director' becomes involved must be capitalised to a particular amount. A declaration of restriction or disqualification can only be made by order of the court, even where the director in question does not object to being so disqualified or restricted.

19 See the Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011, SI 2011/2194.

20 The Irish statutory company law enforcement office.

The introduction of disqualification and restriction undertakings was inspired by provisions contained in the UK Company Directors Disqualification Act 1986, as amended by the Insolvency Act 2000. During its preparatory work on the drafting of the Act, the CLRG observed that in the UK approximately 80 per cent of disqualifications were now made by way of the undertakings procedure.²¹ Given the significant take-up of these provisions in the UK, it was thought that Irish law would benefit from the possibility of a director agreeing to a disqualification or restriction undertaking. The changes mean that it will be possible to avoid a court appearance where the person concerned agrees to give an undertaking not to act in a manner as would be prohibited if that person were the subject of a restriction or disqualification order.

Reforms in relation to distributions

RELIEF FROM REQUIREMENTS AS TO SHARE PREMIUMS

New provisions have been included in the Act that are similar to the merger relief provisions found in the UK Companies Act 2006 (sections 611 to 614). The effect of these changes is to obviate the need to create a share premium account in certain circumstances.

DISTRIBUTIONS: BOOK VALUE VS MARKET VALUE

The CLRG observed there was a lacuna in the law relating to distributions in kind and uncertainty as to whether, for the purposes of determining whether the company has sufficient distributable reserves, the amount of such distributions should be determined by reference to the book value or market value of the assets in question. It was noted that this matter had been resolved in UK law as a result of section 845 of the UK Companies Act 2006 and the CLRG recommended that a similar provision be included in the Act.²² Accordingly, it is now clear that such distributions can be conducted by reference to book value rather than market value.

Both of these reforms in relation to distributions provide useful clarity to the law and will make it easier to conduct group reorganisations and reconstructions in future.

21 Company Law Review Group, *Fourth Report (2006–2007)*, 6.1.

22 Company Law Review Group, *Fifth Report (2008–2009)*, 4.1.

AUDIT EXEMPTIONS

In line with the UK, the Act introduces an audit exemption for dormant companies.²³ Presently, a stand-alone dormant company can avail of an audit exemption if its turnover, balance sheet and number of employees comes within the audit exemption thresholds laid down under the legislation.²⁴ However, the problem arises in the context of dormant companies in a group situation. It was argued that the necessity of providing individual audit reports in respect of dormant companies that were part of a larger group, when they were in any event subject to a larger group audit, represented an additional burden on business that could not be justified.²⁵

The CLRG noted that, in the UK, there was an exemption for all dormant companies, whether part of a group or not, and the term ‘dormant company’ was defined as meaning a company that has ‘no significant accounting transactions’ during the period. In drafting the Act, it was decided to follow the UK in not limiting the audit exemption to dormant companies in a group situation only. However, the CLRG advised that the term ‘dormant company’ be given a more restrictive definition in Irish law to address the issues of the assets and liabilities that may be carried on the balance sheet of a dormant company. Therefore, the term ‘dormant company’ is defined by the Act as being a company that had no significant accounting transactions that were required to be entered in the company’s records during the financial year *and* whose assets and liabilities consist solely of investment in or amounts owed to and due from other companies within their group.

The Act also extends the provisions on audit exemption to small groups. In addition, it is now only necessary to meet two of the three criteria laid down (turnover, balance sheet total and number of employees) to qualify for an audit exemption, thus bringing Irish law in line with other EU jurisdictions.

Directors’ statement on relevant audit information

The Act requires a statement in the directors’ report that so far as each director is aware, there is no relevant audit information that has not been disclosed to the company’s statutory auditors and that each director has taken all the steps that he or she ought to have taken in order to make himself or herself aware of any relevant audit information and to establish that the company’s statutory auditors have that information. While this provision is new, a similar statement is often required by audit firms in practice. This provision reflects section 418 of the UK Companies Act 2006.

23 Companies Act 2014, Ch 16.

24 Companies (Amendment) (No 2) Act 1999, s 32.

25 Company Law Review Group, *Fifth Report (2008–2009)*, 4.3.4.

Revision of defective financial statements

Provision is made for the voluntary revision of defective statutory financial statements in the Act. These provisions are new to Irish company law and were introduced as it was felt desirable to have a procedure to govern the revision of statutory financial statements, which, subsequently to being filed, were found to have been incorrect or deficient in some respects. These provisions are similar to requirements found in the UK Companies Act 2006.

Differences from UK law*Inspection of registers*

In its fifth report,²⁶ the CLRG considered whether provisions akin to sections 116 and 117 of the UK Companies Act 2006 should be carried over into Irish law. These provisions require an applicant for a copy of the register of a company to indicate the purpose for which it would be used, and allows the company to apply to court for an order directing the non-disclosure of the register if it is sought for an ‘improper’ purpose. In the UK, it was felt that an unfettered right of a member to obtain a copy of the register of a company was open to abuse and that there was evidence that people were becoming members of companies for the sole purpose of obtaining the statutory right to view particulars of the other members of those companies for purposes not originally intended by the legislature.

The CLRG accepted that the right to inspect company registers was open to the same potential abuse as in the UK, in particular in respect of public limited companies. However, it felt that changes to the law relating to the inspection of the register of members would, in isolation, not adequately deal with the matter since members of the public would still be in a position to view this information as filed with the CRO on an annual basis. Accordingly, no change was recommended, despite the CLRG expressing a concern that Irish registered companies would be at a disadvantage to UK registered companies with regard to this issue.

Company secretary

Since 2008, it is no longer a requirement for a private company in the UK to have a company secretary.²⁷ Under the Act, all Irish companies must have a company secretary. A company secretary may also be a director of

26 Company Law Review Group, *Fifth Report (2008–2009)*, 2.3.

27 Companies Act 2006, s 270.

the company, except in the case of a single-director company, which must appoint a separate person (or body corporate) as the company secretary.

In recommending that the office of company secretary be retained in Irish law, the CLRG noted that issues of corporate governance and compliance were becoming increasingly complex and important. They expressed a concern that it would be a step backwards to abolish the role of company secretary generally, particularly in the light of historically high levels of failure to comply with basic filing obligations on the part of companies.²⁸

Corporate director

It is currently permissible for certain companies to have a corporate director in the UK, although we understand the Small Business, Enterprise and Employment Bill 2014–2015 seeks to introduce an amendment to the Companies Act 2006 to require all directors to be natural persons and prohibiting the appointment of corporate directors.²⁹

Ireland has always maintained the ban on corporate directors and the position is no different under the Act. In its first report, the CLRG was very clear that a move to permit corporate directors would not be well received generally. It also felt that it would not assist in the drive for directors to be personally accountable for their actions and, therefore, recommended that the existing prohibition be retained.³⁰

Company seal

In the UK, companies are no longer required to have a company seal, in line with section 45(1) of the Companies Act 2006. In its fourth report, the CLRG considered the merits of retaining the requirement for a company seal in Ireland, given the recent changes to the law in the UK.³¹ The group was of the view that, on balance, given the small cost involved in maintaining a company seal and the uncertainty in practice that could attach to an abolition of the seal (particularly in relation to the authentication of documents) it was preferable not to introduce any change in the law in this area.

28 Company Law Review Group, *First Report (2000–2001)*, 11.8.9.

29 Accurate as at time of writing (February 2015).

30 Company Law Review Group, *First Report (2000–2001)*, 11.8.10.

31 Company Law Review Group, *Fourth Report (2006–2007)*, 3.2.2.

Directors' home addresses

In the UK, a director's home address is no longer published by Companies House. The information that is available to the public is a service address for the director and his or her country of residence.

In drafting the Act, it was decided that directors' home addresses should generally still be published by the CRO. However, following a recommendation from the CLRG³² a provision has been included in the Act (section 150(11)) that allows the minister to make regulations providing that the residential address of an officer of a company need not be made public if it is determined that circumstances concerning the personal safety or security of the person warrant an exemption. While not placing a complete ban on the publication of directors' home addresses, this power for the minister to make regulations should go some way to assisting directors who believe their personal safety may be compromised by the fact that their home address could be publicly available.

Financial assistance for acquisition of own shares

Since 2008, there has been no restriction on the provision of financial assistance for the purchase of own shares in the case of a private company in the UK. The financial assistance prohibition for public companies has been maintained, as required under EU company law.³³

While recognising that some improvements could be made to the law prohibiting financial assistance for the purchase of own shares, the Irish legislature has declined to follow the UK and fully lift the restriction on these types of transactions for private companies. In its deliberations on the matter, the CLRG noted that in many European jurisdictions of similar size to Ireland there was an absolute prohibition on the provision of financial assistance, for example in Denmark, Belgium, Finland and Norway.³⁴ The CLRG was mindful of the rationale for placing restrictions on a company giving financial assistance for the acquisition of its shares, specifically the requirement to protect the company's members and creditors as well as to ensure that the giving of financial assistance would not result in the company's insolvency

32 Company Law Review Group, *Fourth Report (2006–2007)*, 3.1.2.4 and Company Law Review Group, *Seventh Report (2012–2013)*, 6.3.

33 Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

34 Company Law Review Group, *Fourth Report (2006–2007)*, 7.3.1.

with loss to its members or creditors. Finally, the CLRG was of the view that the procedure to validate such prohibited transactions represented sound corporate governance and should be maintained.

However, the CLRG did acknowledge that some improvements could be made to the law to ensure a better functioning of the restriction on the provision of financial assistance. The formulation in the current law whereby financial assistance in connection with a purchase or subscription is restricted has been problematic, given the wide import of the term ‘in connection with’.³⁵ It was found that such language, in practice, could result in the validation procedure being complied with to avoid any doubt, notwithstanding that many such validated transactions would not have been perceived by the legislature as a transaction giving rise to financial assistance.

Accordingly, the CLRG recommended that the term ‘in connection with’ be dropped from the legislation and the restriction should only apply to financial assistance used directly or indirectly for the purpose of the acquisition of shares.³⁶

In addition, the CLRG recommended the inclusion of exemptions from the prohibition so that the giving of financial assistance in relation to the acquisition of own shares is not prohibited if:

1. the company’s principal purpose in giving the assistance is not to give it for the purpose of any such acquisition; or
 2. the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company,
- and the assistance is given in good faith in the interests of the company.

This subsection is drawn from section 153 of the UK Companies Act 1985 and sees the introduction of a ‘principal purpose’ exemption and a ‘larger purpose’ exemption into Irish law. The operation of these exemptions has been the topic of much debate in the UK over the years, with a narrow interpretation being placed on these terms by the courts. It remains to be seen whether the Irish courts will opt to interpret the provisions in a broader manner.³⁷

A further type of transaction that was, in practice, unintentionally caught by the restriction on the provision of financial assistance rules was a refinancing of an already validated financing. Validation for a refinancing was abolished by the Investment Funds, Companies and Miscellaneous Provisions

35 *Eccles Hall Ltd v Bank of Nova Scotia* (unreported, High Court, 3 February 1995).

36 Company Law Review Group, *Fourth Report (2006–2007)*, 7.3.3.

37 For a discussion of UK case law on this topic see Simon Mercouris, ‘The prohibition on financial assistance: the case for a commercially pragmatic interpretation’ (2014) 35(11) *Comp Law* 321–330.

Act 2005, but that legislation omitted reference to giving financial assistance by means of a guarantee, thereby rendering this reform of little use. The Act rectifies this omission by specifically stating that the provision of financial assistance by means of a guarantee to effect a refinancing will not be caught by the restrictions on the giving of financial assistance.³⁸

These changes are expected to reduce administration costs and the legal burden on companies in certain situations where financial assistance is given. However, it is possible that practitioners will take a cautious approach to these new provisions with regard to determining whether a validation of a provision of financial assistance for acquisition of own shares is necessary.

Revenue preference

In the UK, the preferential status given to debts due to Inland Revenue and Customs and Excise in a winding up was abandoned under the Enterprise Act 2002. In considering possible changes to the law of winding up in its fourth report, the CLRG undertook a detailed review of the status of debts due to the state in a winding up in a number of jurisdictions. It noted that the primary justification for abolishing the state preference was to provide greater equity among creditors and to promote a rescue culture in the area of insolvency generally. However, the CLRG decided to recommend that preferential status for Revenue debts in a winding up situation be maintained under the Act, representing a divergence from UK law on this matter.

What next?

The Act is expected to come into effect on 1 June 2015, meaning there will be a significant amount of activity in the legal and business world over the coming months in preparation for this deadline. Existing private companies limited by shares will be most affected by the new legislation as their current legal form will cease to exist following a transition period of 18 months after commencement. Such companies must decide whether to become an LTD or to retain their objects clause and become a DAC or another company type.

The conversion process is relatively straightforward. Companies wishing to convert to an LTD should pass a special resolution at any point during the transition period. Companies wishing to convert to a DAC can pass an ordinary resolution during the first 15 months of the transition period and a special resolution thereafter. If a resolution has not been passed to convert to an LTD or a DAC, the directors of the company are obliged to file a new constitution with

38 Section 82(6)(h) of the Companies Act 2014.

the CRO converting the company to an LTD. Companies that fail to take any action will automatically convert to an LTD at the end of the transition period.

It is important to note that companies that convert to a DAC will be required to change their name as the name of a DAC must end with the words ‘designated activity company’, ‘d.a.c.’, ‘dac’ (which abbreviations may be capitalised), or the Irish language equivalent of those words or abbreviations. This means that such companies will be obliged to update their company stationery and signage, and so on to reflect their new names.

Applicable law

During the transition period, the law that will apply to existing private companies limited by shares is the law applicable to the DAC, unless the company has converted to an LTD and in that case, the new law for the LTD will be applicable. The memorandum and articles of association of an existing private company limited by shares will continue to apply during the transition period, save to the extent that any of its provisions are inconsistent with a mandatory provision of the Act, in which case they will be disregarded.

The applicable law for all other company types will be law found in the parts relevant to those company types in volume 2 of the Act.

Preparation for commencement

At this juncture, it would be prudent for all existing Irish private companies limited by shares to consider whether they wish to convert to an LTD, a DAC or another company type.

Although the Act provides for an automatic default to an LTD, it is not recommended that existing private companies take no action and rely on the default provisions in the Act to convert to the new company type. In such circumstances, the directors will be in breach of their obligation to prepare a new constitution for the company as stipulated under the Act, although such a breach will not carry any specific sanction.

A further issue is that, if the company type is one whose activities cannot be carried out by an LTD (such as a credit institution, an insurance undertaking or a company that lists debt), the company will no longer be in a position to carry out those activities if it has not elected to convert to a DAC. In addition, certain optional provisions in the Act will apply to an LTD by default if they are not specifically excluded by the constitution of the company. A company may not wish these optional provisions to apply to it and must therefore take action to update its constitution.

Finally, as a matter of good housekeeping, companies may prefer to ‘tidy up’ their constitution to bring it in line with the new legislation.

If a company is deemed to convert to an LTD at the end of the transition period, then the memorandum and articles of association on the public record will be deemed not to include an objects clause, provisions preventing the alteration of the objects clause or provisions inconsistent with mandatory provisions of the Act. However, those provisions will not be physically redacted from the constitution as available on the CRO register. Therefore, it would be sensible to proactively make the required changes to the memorandum and articles of association of a company and file a new constitution with the CRO.

Conclusion

The Act represents a new departure in Irish company law, one that practitioners and businesses alike will wish to acquaint themselves with ahead of the June 2015 commencement date. Many of the innovations contained in the Act, particularly in relation to the private company limited by shares, will significantly modernise company law in Ireland and bring it into line with developments in other jurisdictions. The months leading up to commencement, and the following 18-month transition period, are likely to be a busy time for practitioners and Irish registered companies in dealing with the new legislation.