

# THE NEW COMPANIES ACT

AFTER A PREPARATION PERIOD OF 15 YEARS, ON 1 JUNE 2015 THE NEW COMPANIES ACT 2014 (THE ACT) FINALLY CAME INTO EFFECT. THIS ACT REFORMS THE IRISH COMPANIES LAW FUNDAMENTALLY BUT ALSO CONSOLIDATES EXISTING LEGISLATION.

## MAIN CHANGES

Three of the main changes introduced by the Act are:-

- Two new types of a private company limited by shares will replace the existing type of company;
- The duties of a director and a secretary are clarified;
- New methods of restructuring a private company are provided.

## OLD REGIME COMPANY

Up to 31 May 2015, a private company limited by shares (Old Regime Company) was created under the Companies Act 1963 or its predecessors. The memorandum of association of an Old Regime Company contains an objects clause which states the purposes for which the company was formed and the legitimate activities which it can pursue. If an Old Regime Company purports to enter into a transaction which is not permitted by the objects clauses in its memoranda of association, such a transaction will be void (the ultra vires rule). The objects clauses in the memoranda of association of most Old Regime Companies have been drafted so widely that lack of capacity does not generally give rise to problems. From 1 June 2015, an Old Regime Company can no longer be established. Instead, two new types of private companies limited by shares – the LTD and the DAC as explained below, became available.

The transition period ends for conversion to LTD or DAC on 30 November 2016. If an Old Regime Company fails to reregister by that date, it will automatically be converted into a LTD from 1 December 2016 (unless the transition period for reregistration is extended).

## NEW PRIVATE COMPANY LIMITED BY SHARES (LTD)

A LTD is a new type of private company limited by shares created under the Companies Act 2014. It has the contractual capacity of a natural person so the ultra vires rule does not apply. It has a constitutional document which replaces the need for a memorandum and articles of association. It has limited liability and limited share capital. The constitution states the name of the LTD, the fact that the company is a private company limited by shares and any additional regulations which the company may wish to specify. The share capital information and takes the form set out in Schedule 1 of the Companies Act 2014.

The other main features of a LTD are:-

- The number of members may not exceed 149;
- It can have a single director but it must have a separate secretary;
- At least one of the directors must be a natural person;
- It can pass majority written resolutions (special and ordinary);
- It may dispense with the obligation to hold a physical AGM;
- It may claim audit exemption where appropriate;
- The constitution of a LTD can be changed by special resolution.

#### DESIGNATED ACTIVITY COMPANY (DAC)

A DAC is a private company limited by shares with the capacity, including the power, to do only those acts or things set out in its constitution. Accordingly, the ultra vires rule may still apply in the case of a DAC.

The other main features of a DAC are:-

- The DAC must have at least two directors. One of them may also be secretary;
- It may have up to 149 members;
- An AGM must be held. But if the DAC has only one member it may dispense with the obligation to hold a physical AGM;
- A DAC can also claim eligibility for audit exemption;
- The constitution of a DAC can be changed by special resolution;
- If the constitution does not state it otherwise, it can pass majority written resolutions.

#### THE DUTIES OF A DIRECTOR AS STATED IN THE ACT

The Act codifies directors' duties as follows:-

- To act in good faith in what the director considers to be the interests of the company;
- To act honestly and responsibly in relation to the conduct of the affairs of the company;
- To act in accordance of the company's constitution and exercise his or her powers only for the purposes allowed by law;
- Not use the company's property, information or opportunities for his or her own benefit;
- Not to agree to restrict the director's power to exercise an independent judgement;
- To avoid any conflict between the director's duties to the company and the director's other interests;
- To exercise the care, skill and diligence that would be exercised by a reasonable person with knowledge and experience a director is expected to have and that director actually has;
- To have regard to interests of members, in addition to general duty to employees.

The breach of any of these duties may entail personal liability by the director to the company, but will not of itself affect the enforceability of any contract.

A director who has an interest in a contract with the company, must declare his/her interest. Directors of private limited companies and guarantee companies that have, in particular year, a balance sheet value of over € 12.5 m and turnover in excess of € 25 m must make a compliance statement in the Director's Report.

Where the loan made by the director to the company is not in writing, it is regarded in law as neither a loan nor a quasi-loan. In the case of a loan from the company to the director which is not in writing, it is presumed that the loan is repayable on demand and that the unpaid amount of the loan is subject to interest.

### THE DUTIES OF A COMPANY SECRETARY

The duties of a secretary are essentially administrative and not managerial. They are the duties delegated to the secretary by the directors. There is no section in the Act covering what this will entail.

As with other officers of a company, the secretary has wide responsibilities in law. The following are some points of note relating to the office of secretary:-

- The secretary may be one of the directors of the company;
- A body corporate may act as secretary to another company, but not to itself;
- A LTD which is a single-director company must have a separate secretary;
- A company secretary must be over the age of 18 years;
- A secretary must have the skills or resources necessary to discharge his or her statutory and other duties.

### MERGERS AND DIVISIONS

Under the Act, it is possible for a private limited company to be involved in a merger or division. In the case of a merger, one of the companies must be an LTD.

The following are the types of merger which are available:

- Merger by acquisition is where a company, without going into liquidation, is dissolved and its assets and liabilities are transferred to a company in exchange for shares in the acquiring company with/without any cash payment.
- Merger by absorption is where a company, without going into liquidation, is dissolved and its assets and liabilities are transferred to a company that is the holder of all of the shares representing the capital of the dissolving company.
- Merger by formation of a new company – one or more companies, without going into liquidation, is/are dissolved and the assets/liabilities are transferred to a company in exchange for shares in the new company with or without any cash payment.

Merger can be achieved by means of a summary procedure or a court approved scheme.

A division of a private limited company so that the company is split between two or more companies is also possible with court approval.

**DISCLAIMER**

The above is intended as a general guide to the law only. It is not intended as a full statement of the law on any point. No responsibility will be accepted for any person acting or failing to act on the basis of this paper. Before taking action in relation to any matter, full professional advice should be obtained.

For further information please do not hesitate to contact us.



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