

# Publishing of Annual Accounts by Unlimited Companies

FEBRUARY 2016

DIRECTIVE 2013/34 OF THE EUROPEAN UNION WAS SUPPOSED TO BE TRANSPOSED INTO IRISH LAW BY JULY 20<sup>TH</sup> 2015. THIS HAS NOT HAPPENED AND THE TRANSPOSITION IS NOW EXPECTED TO TAKE PLACE BEGINNING OF MARCH 2016. ONE OF THE ITEMS WHICH THE DIRECTIVE DEALS WITH IS THE FILING OF ANNUAL FINANCIAL STATEMENTS, CONSOLIDATED FINANCIAL STATEMENTS AND RELATED REPORTS OF UNLIMITED COMPANIES. ONCE IMPLEMENTED, THE LOOPHOLE WHICH ENABLES IRISH BUSINESSES WHICH USE ISLE OF MAN UNLIMITED COMPANY STRUCTURES TO AVOID FILING REQUIREMENTS WILL BE CLOSED THIS YEAR.

## OBLIGATION OF A LIMITED COMPANY TO FILE ACCOUNTS

Under the Companies (Amendment Act) 1986 (Section 7), a limited company registered in Ireland must file accounts with its annual return.

The main purpose of obliging a company to file annual accounts is so that creditors and other persons dealing with the company can inspect its financial information in the companies' registration office and can gain some picture of its creditworthiness. Often the shareholders (Proprietors) of a company operating in Ireland would rather that its financial information as disclosed in its accounts could be kept secret from employees, rivals and parties with whom the company does business. However, Proprietors would also wish to preserve the limit on liability which a limited company offers.

After Section 7 came into force, many Proprietors sought a means whereby they would avoid the obligation to file accounts but yet have the protection of limited liability which operating through a limited company bestows. Some Proprietors used unlimited companies or restructured into unlimited companies to avoid the obligation to file accounts but retained a limited company as a holding company within the ownership structure to protect themselves against unlimited liability.

## OBLIGATION OF AN UNLIMITED COMPANY TO FILE ACCOUNTS

Realising that the use of strategies for companies to avoid the filing of accounts had become widespread, the authorities took steps to change the situation.

With effect from 1 January 1994, under Regulations 6 and 7 (Regulations 6 and 7) of the European Communities (accounts) Regulations 1993 the application of Section 7 was extended to:-

*Unlimited companies and partnerships where all the members thereof who do not have a limit on their liability are*

- a. companies limited by shares or by guarantee, or*
- b. bodies not governed by the law of the State but equivalent to those in paragraph a, or*
- c. any combination of the types of bodies referred to in subparagraphs (a) and (b), and*

*Unlimited companies and partnerships where all the members thereof who do not have a limit on their liability are:*

- a. (i) Unlimited companies or partnerships of the type referred to in paragraph (1) that are governed by the laws of a member state, or*  
*(ii) Bodies governed by the laws of a member state that are of a legal form comparable to those referred to in paragraph (i), or*
- b. Any combination of the types referred to in subparagraph (a) and (b) of paragraph (1)”*

However, Regulations 6 and 7 have a loophole. They only refer to an unlimited company “governed by the laws of a member state” (of the EU) where there is no member with unlimited liability. Where an unlimited company is governed by the laws of a country that is not a member state of the EU and is not otherwise obliged to register and file accounts with the Companies Registration Office, Regulations 6 and 7 do not apply even if all of the members of that company have limited liability.

Not many jurisdictions provide for the incorporation of unlimited companies, but the Isle of Man, which is not within the EU, does.

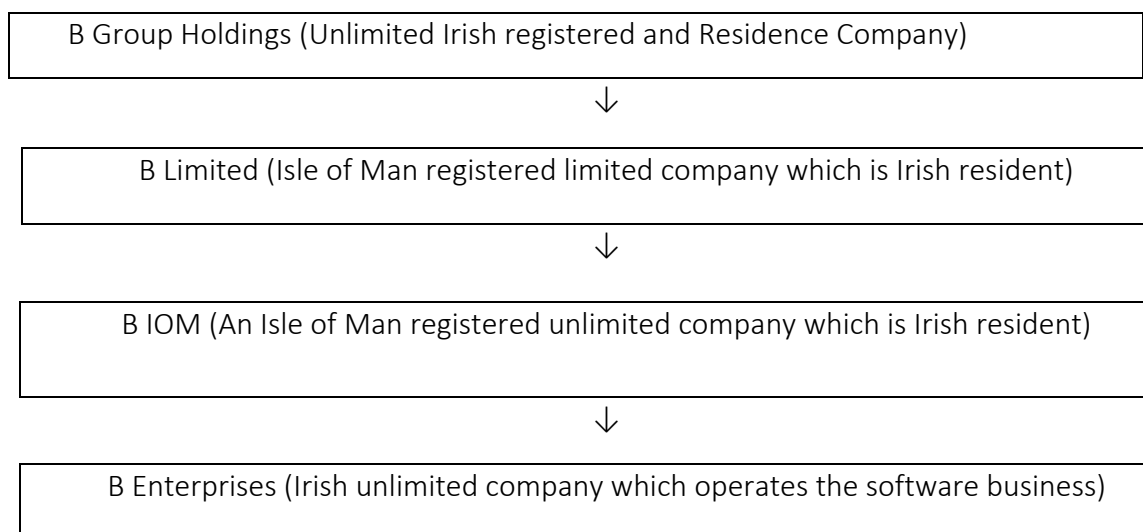
A company incorporated outside Ireland which acquires a place of business in Ireland must register on the external register of the Companies Registration Office and file annual accounts. However it is possible for a company incorporated in another country to change its centre of management to Ireland and be resident in Ireland for tax purposes but not to have a place of business in Ireland. Thus a company incorporated outside the EU, such as an Isle of Man company, can become Irish resident and because it does not have a place of business in Ireland or carry on any business in Ireland, it can avoid the obligations to register on the external register of the Companies Registration Office and file its annual accounts. The Isle of Man has a much more benign regime than Ireland in relation to the filing of accounts. There is no obligation on Isle of Man private companies to file their accounts.

## **AVOIDING THE OBLIGATION TO FILE ANNUAL ACCOUNTS**

Combining the features mentioned above, it is currently possible for Proprietors to avoid the obligation to file accounts.

**Example:**

Rory and Brendan own a company, B Enterprises Limited, which supplies cutting edge software to large stores and supermarkets. The software enables the stores and supermarkets to analyse customer activity and preferences. The company has been enormously successful and Rory and Brendan are concerned that if the stores and supermarkets with which it trades find out from an inspection of the published annual accounts of B Enterprises Limited that it is making significant profits from services supplied to them, they will put pressure on it to reduce prices considerably. To avoid the obligation to file accounts, Rory and Brendan adopt the following structure.



The following is an analysis of the filing obligations of the group, starting at the bottom company.

Because B Enterprises, the operating company, is a company where all the members (shareholders) do not have a limit on their liability, it is not obliged to file accounts under Section 7.

B IOM has no obligation to file accounts in Ireland and neither does B Limited as each of them is registered in the Isle of Man and has no place of business in Ireland.

B Group Holdings is an unlimited company and is exempt from the obligation to file accounts as all of its members (Rory and Brendan) have unlimited liability. Neither it nor the two Isle of Man companies carry on any trade or business so the issue of limited liability does not arise for any of their shareholders. Accordingly, Rory and Brendan have achieved confidentiality for the B Group's financial information plus limited liability for themselves.

## DIRECTIVE 2013/34 (The New Directive)

Once again, the relevant authorities have decided to suppress what is perceived to be an abusive avoidance of the obligation of a company to file accounts.

On 26 June 2013, the European Commission issued the New Directive, Section 6 of which provides as follows:

*“The scope of this directive should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from that scope (the filing obligation), by creating a group structure containing multiple layers of undertakings established inside or outside the union.*

Article 1 of the New Directive provides as follows:

*The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of undertakings listed:*

*(a) in Annex I;*

*(b) in Annex II, where all of the direct or indirect members of the undertaking having otherwise unlimited liability in fact have limited liability by reason of those members being undertakings which are:*

*(i) of the types listed in Annex I; or*

*(ii) not governed by the law of a Member State but which have a legal form comparable to those listed in Annex I.*

Annex II lists the following in relation to Ireland:

*Partnership, limited partnerships and unlimited companies.*

In essence, what relevant part of the New Directive appears to have as its target in these provisions is the avoidance by an unlimited company of filing obligations where the cloak of limited liability can apply for the Proprietors at any level.

## DEADLINE FOR THE IMPLEMENTATION OF THE NEW DIRECTIVE

Implementation was due by 20 July 2015. However, the Directive is still to be transposed by the forthcoming Companies (Accounting) Bill, drafting of which is at an advanced stage. Publication is expected beginning of March. It is likely that such legislation, when enacted, will oblige affected companies to file financial information with their annual returns.

## CONSEQUENCES FOR IRISH BUSINESSES USING THE IOM SCHEME

Proprietors should monitor developments in order to ready themselves for the transposition of the directive.

Proprietors who have availed of Isle of Man Company Group Structure and similar schemes while retaining a buffer company with limited liability, almost inevitably must resign themselves to the obligation to file accounts or find another means of sidestepping the obligation to do so.

For further information please do not hesitate to contact us.

#### CONTACT INFORMATION



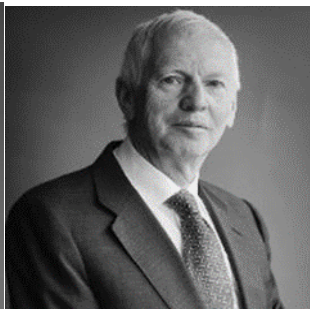
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