

## Companies Act 2014 – Impact on Irish Investment Fund Industry

On 23 December 2014, the long awaited Companies Bill 2012 was signed into law and enacted as the Companies Act 2014. The Commencement Order, which was signed on 1 May 2015, confirms that, as expected, the vast majority of the Act will come into operation on 1 June 2015.

While the exercise in consolidating and updating over 13 separate acts into one piece of legislation with over 1440 sections was immense, the impact for the Irish Investment Funds industry will be limited.

Set out below are summaries of some of the key provisions as they impact the Irish investment fund industry.

### UCITS Management Companies and Alternative Investment Fund Managers

The Act gives the option to existing private limited liability companies (the legal form UCITS management companies (Mancos) and alternative investment fund managers (AIFMs) take) to convert to either (i) a private company limited by shares (LTD) or (ii) a designated activity company (DAC).

#### Features of the two new types of Company

Private Company Limited by Shares (LTD)	Designated Activity Company (DAC)
<ul style="list-style-type: none"> <li>• Minimum of one director</li> <li>• Simple constitution</li> <li>• Unlimited capacity</li> <li>• May dispense with requirement to hold a physical AGM</li> <li>• Name to end in “limited” or “teoranta”</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum of two directors</li> <li>• Memorandum and Articles of Association</li> <li>• Capacity limited by objects clause</li> <li>• Must hold a physical AGM (unless a single member company)</li> <li>• Name to end in “designated activity company” or “cuideachta ghníomhaíochta ainmhithe”</li> </ul>

#### Private Company Limited by Shares

One of the key features of the LTD is that it does not require an objects clause. It therefore has full and unlimited legal capacity to carry on and undertake any business or activity, to do any act or to enter into any transaction. This is a key change to Irish company law and follows the practice adopted in the UK. As a LTD will have unlimited legal capacity, there is no longer any need for a memorandum of association setting out a company’s objects and as such a LTD is only required to have a simple one document constitution. Another significant change which applies to a LTD is the ability to have only one director. However, this is of little benefit to Mancos and AIFS, which are required to have a minimum of two Irish-resident directors and, to the extent that a Manco has adopted the IFIA’s voluntary corporate governance code, it will be required to have a minimum of three directors on the board.

The Act contains standard provisions which apply to a LTD. Certain of these provisions can be dis-applied or varied in the constitution of a LTD. If these provisions are not dis-applied or waived in the constitution of the company, the default provisions contained within the Act will apply to that company. The Act provides

that the constitution of a LTD must state the company's name, that it is a private company limited by shares, the particulars relating to share capital and any supplemental regulations which it is adopting.

## **Designated Activity Company**

A DAC is the closest type of company to the existing private company limited by shares. The regime for a DAC is largely the same as the current regime for a private company in that it must have two directors, it must have physical AGMs if it has more than one member and can have no more than 149 members.

## **Which type of Company to choose?**

It is likely that Mancos and AIFMs will opt for the LTD structure (in the absence of any Central Bank requirement to do otherwise).

The DAC is likely to appeal to minority shareholders, investors and venture capitalists who will want to ensure that the company in which they have invested continues to only carry on the business it was intended to carry on rather than having unlimited legal capacity to carry on any other business as would be the case with a LTD. Interestingly, insurance undertakings and credit institutions which are currently structured as companies limited by shares will have to convert to a DAC if they wish to remain a private company limited by shares as they are not allowed use the LTD structure.

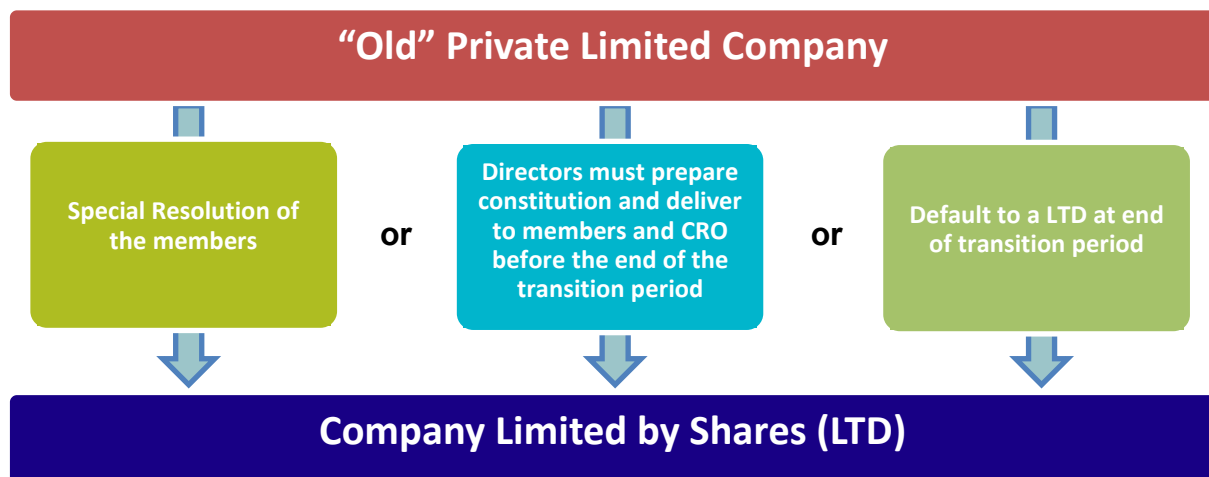
## **Transition Period – the Default Position**

The Act provides for an 18-month transition period, which will begin on the commencement of the Act.

During this transition period, all existing private limited companies will be deemed to be DACs unless they take the requisite action and will therefore continue to be bound by their objects clauses.

Following the transition period, if neither the members nor the directors have taken steps to convert to a DAC or another type of company, the company will default to a LTD.

## **Converting to a LTD**

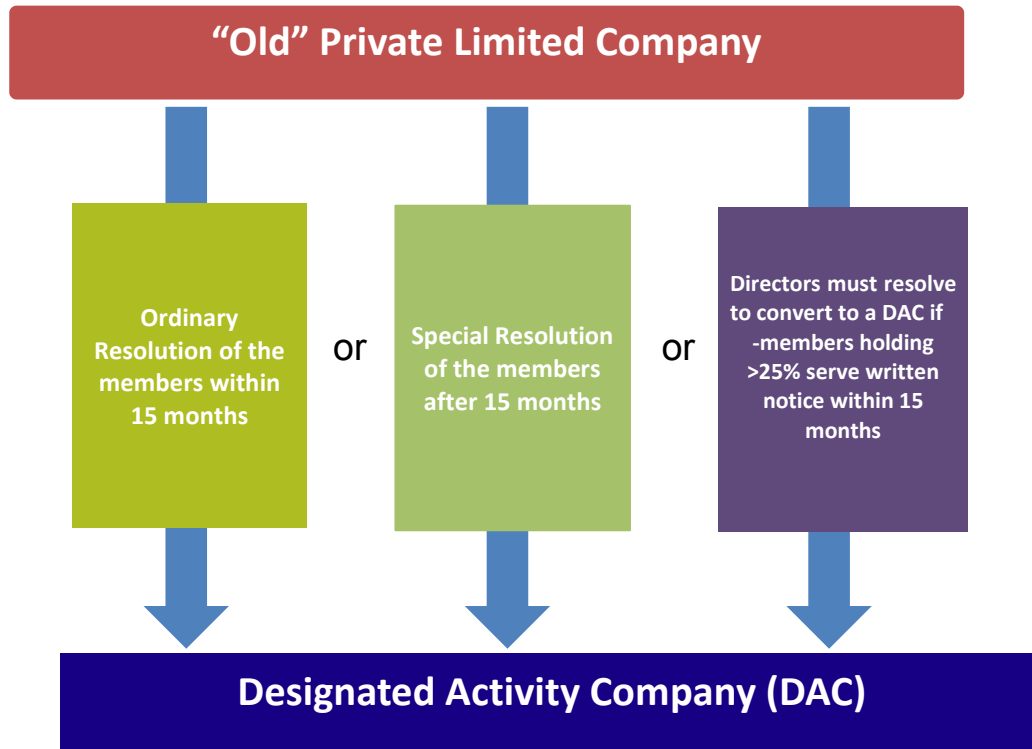


If the members of a private company limited by shares do not pass a special resolution resolving to convert to a LTD during the transition period, the directors have a duty under the Act to prepare a new constitution, which must consist solely of the provisions of the existing M&A other than the objects clause, delete any provision prohibiting the alteration of the M&A and be renumbered accordingly. This revised constitution must be delivered to the Companies Registration Office (CRO) and to the members.

If the directors have not prepared and delivered a new constitution by the end of the transition period, the company automatically transitions to a LTD and its existing M&A will effectively be deemed to have been amended by the deletion of the objects clauses and the deletion of any provision which prohibits the alteration of all or any of the provisions of its memorandum or articles. It should be noted however, that in

such circumstances, the directors will be in breach of their obligation to prepare a new constitution, although the Act does not lay down any specific sanction for the breach of this obligation.

## Converting to a DAC



The members may resolve to convert to a DAC by ordinary resolution in the first 15 months of the transition period or by special resolution thereafter. Directors must resolve to convert to a DAC if members holding greater than 25% serve written notice within 15 months of the transition period. If an existing private company limited by shares does not convert to a DAC before the expiry of the transition period it will automatically convert to a LTD.

## New Compliance Statement Obligation

For certain larger Mancos or AIFMs (i.e. companies that have, in a particular year, a balance sheet total exceeding €12.5 million and turnover in excess of €25 million) they will be required to include a compliance statement in the Directors' Report.

This compliance statement will include an acknowledgement that the directors are responsible for securing the company's compliance with its relevant obligations which are described as:

- Provisions of the Act, the contravention of which, is:
  - A category one or two offence (these are the most serious offences under the Act)
  - A serious offence under market abuse or prospectus law
- Tax law

In addition, the Directors' Report must confirm that the directors have:

- Drawn up a compliance policy statement setting out the company's policies regarding compliance with its relevant obligations
- Put in place appropriate arrangements or structures that are designed to secure material compliance with relevant obligations
- Conducted a review during the financial year of the arrangements and structures put in place

If these statements, confirmations and reviews have not been made or carried out, the directors must specify the reasons why not (i.e. comply or explain basis).

It should be noted that the requirement to produce a compliance statement only applies for financial years beginning on or after 1 June 2015.

## **Investment Companies**

The Act is largely a re-statement of the existing law as regards investment companies.

The Act provides that existing investment companies will continue in existence after the commencement of the Act but will be deemed to be an investment company regulated by the Act (i.e. there are no re-registration requirements).

## **Constitution**

Investment companies established under the Act will also have a one-document “constitution” which will take the form of combined M&As. However, the M&A of an investment company that is in existence before the commencement of the Act will continue to apply except to the extent that its provisions are incompatible with the mandatory provisions under the Act.

## **Codification of Directors’ Duties**

It is worth noting that the Act consolidates the existing statutory duties of directors in one statute and codifies for the first time the principal fiduciary duties which have applied to company directors.

A new initiative is that the Act imposes a requirement that directors of newly incorporated companies and directors newly appointed to existing companies following the commencement of the Act acknowledge in writing their duties as set out in the Act.

## **What next?**

- 1) Decide on the corporate structure – LTD or DAC.
- 2) Review existing Memorandum and Articles to identify any provisions that conflict with any mandatory provisions in the Act.
- 3) Pass a special resolution (to convert to a LTD) or an ordinary resolution (to convert to a DAC within the first 15 months of the transition period) and adopt a new constitution so that there is no ambiguity as to the governing provisions of the company.

Contributed by Ross Little.