



## WILLIAM FRY

### The Companies Act 2014 – the new forms of limited company and how to convert

The long awaited Companies Act 2014 (the Act) has finally been enacted and the commencement order is likely to be for June 2015. While the Act contains a number of significant reforms to Irish company law, the main question directors and shareholders are initially asking is what are the new forms of private company and what do we need to do?

#### A new type of company

The vast majority of companies currently registered in Ireland are private companies limited by shares. One of the key structural reforms is that the Act proposes two new forms of private company to replace all existing private companies limited by shares. The new company types are a private company limited by shares (LTD) and a designated activity company (DAC). The LTD is adopted as the model company for the purposes of the Act.

While the Act caters for many different forms of company which we are all familiar with (public limited companies, guarantee companies, investment companies, etc.), for most Irish companies limited by shares, the question will therefore be whether to convert into a LTD or 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>• May not offer its debentures or shares to the "public"</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>• May list debentures on a debt market</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. The Act has retained the requirement for a separate company secretary and where a company has only one director, that director cannot also act as company secretary.

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. Certain companies may require an objects clause or may have or wish to have their debentures listed on a regulated market and, in summary, the DAC is a new type of company to cater for this. 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 most companies will opt for the LTD structure.

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. 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. It is important to note that any existing private companies which have debentures admitted to trading must convert to a DAC within the transition period.

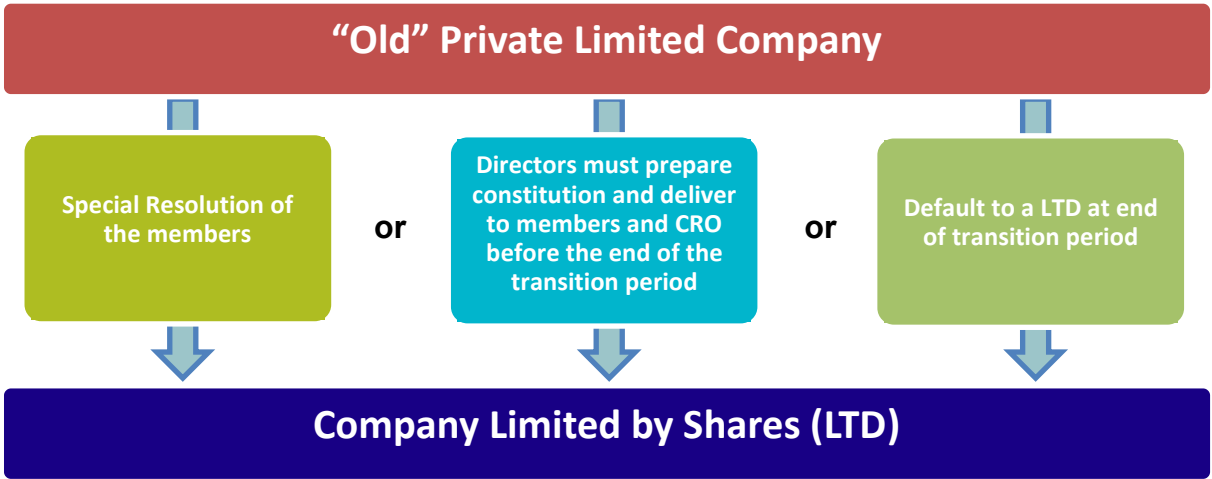
**Transition Period – the Default Position**

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 any provision which prohibits the alteration of all or any of the provisions of its memorandum or articles. It should be noted however,

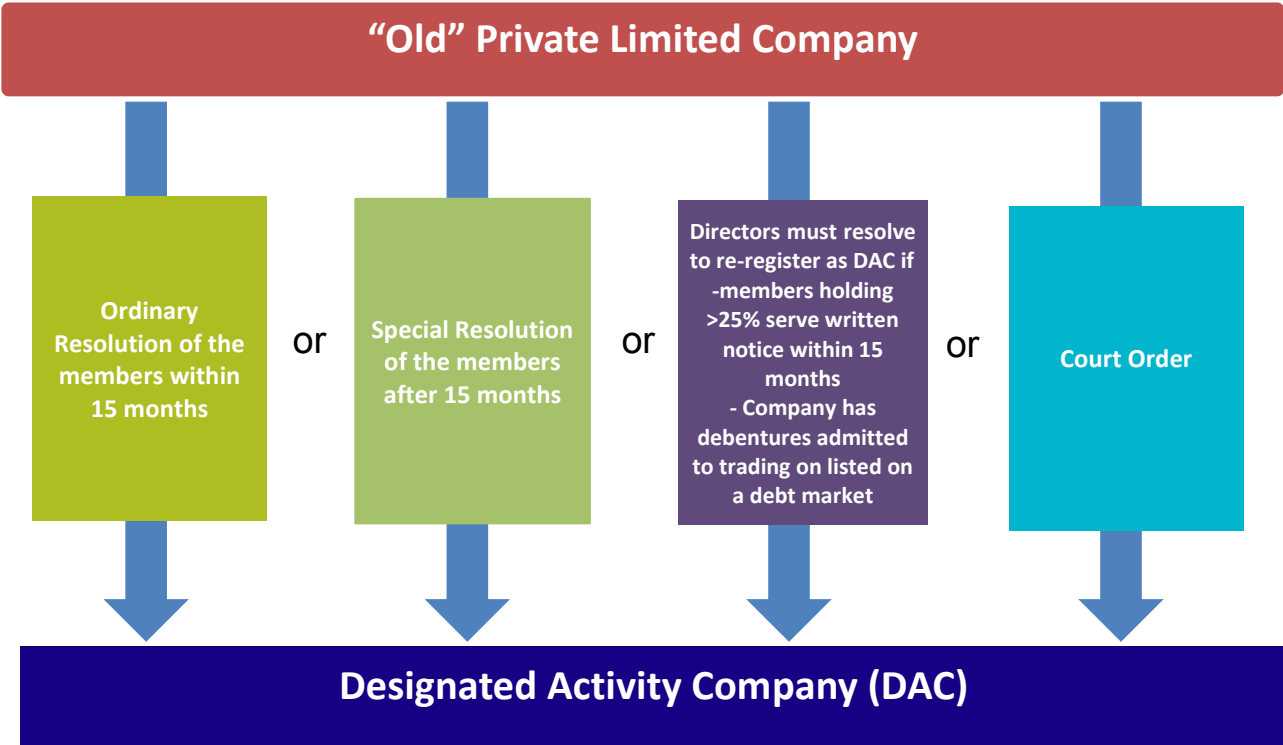
that in such circumstances, the directors will be in breach of their obligation to prepare a new constitution, although the Act does not lay down any specific sanction for the breach of this obligation.

In both the situation where directors prepare the constitution and where the company automatically transitions to a LTD at the end of the transition period, the constitution must be read as if the mandatory provisions of the Act applied. So for example, if the existing provisions of the Articles prohibit a company giving a power of attorney, this will conflict with a mandatory provision of the Act which allows a company give a power of attorney and as such will be disapplied. This is likely to give rise to confusion until such time as the default constitution is amended by the members.

**Possible Challenges**

Care should be taken in dealing with minority shareholders, who have the right to apply to Court under Section 212 of the Act if they feel that their rights have been oppressed by the exercise or non-exercise of rights in relation to the conversion, or non-conversion of the company. Where such an action is taken on foot of the directors failing to prepare a new constitution as required by Section 60 of the Act, there is a rebuttable presumption that the directors exercised their powers in an oppressive manner. This places a high burden on the directors to ensure that they comply with the requirement to prepare and file the new constitution during the transition period. In addition, one or more creditors of the company who hold, or who together hold, not less than 15% of the company’s debentures entitling the holders to object to the alteration of its objects are also entitled to apply to the Court for relief if the new proposed constitution prejudices any of their interests (as long as they have a legal or equitable right to that interest).

**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. If an existing private company limited by shares does not re-register as a DAC before the expiry of the transition period it will convert to a LTD and (i) members holding not less than 15% in nominal value of issued share capital, or (ii) creditors of the company holding not less than 15% of the company’s debentures entitling the holders to object to alterations of its objects, may apply to Court for an order directing re-registration as a DAC. The Court will make an order directing conversion to a DAC (or such order as it thinks fit) unless cause is shown to the contrary.

***What to do?***

- 1) Decide on the corporate structure – LTD or DAC.
- 2) Review existing Memorandum and Articles.
- 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.