Companies Act 2014 – One Year On

It is just over one year since the Companies Act 2014 (the "Act") came into force, significantly altering the corporate legislative framework in Ireland. Practitioners and companies alike have been getting to grips with the new law, and a number of issues in particular have required the attention of companies and their boards since the commencement of the Act on 1 June 2015.

Conversion to a LTD or DAC

Under the Act, all existing private companies limited by shares must convert to one of the new company types (LTD or DAC) during the transition period which ends on 30 November 2016.

Companies that have not applied to the Companies Registration Office (CRO) to be converted to either a LTD or a DAC during the transition period will be automatically converted to a LTD by the CRO after 1 December 2016. Companies wishing to convert to:

- **a DAC** must either pass an ordinary resolution to convert by 31 August 2016 or convert by special resolution thereafter; or
- **a LTD** should pass a special resolution during the transition period ending 30 November 2016.

If the members of an existing private company do not pass a resolution dealing with the conversion of the company, the directors have a duty to prepare a new constitution and to deliver it to the CRO and to the members before the end of the transition period.

We recommend that a company be proactive as regards their conversion, rather than relying on the default conversion provisions in the Act. If a company automatically converts to a LTD, the memorandum and articles of association on the public record will be deemed to exclude the objects clause and any other 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, which may cause confusion.

In addition, if the company automatically converts to a LTD at the end of the transition period the directors will be in breach of their obligations under the Act, although this breach does not carry any specific sanction.

CRO registration

It is expected that the CRO will become backed-up with conversion filings towards the end of the transition period. It is currently taking approximately 3 weeks to register a conversion with the CRO. The CRO will not guarantee that applications received late in the transition period will be registered by 30 November 2016. We would encourage companies to consider this matter at the earliest opportunity and take the necessary steps to begin the process.

Consider whether there are any dormant/unnecessary companies in your group which could be wound up/struck off. This will save time and the cost of converting such companies to a LTD or a DAC.

For further information on the conversion process, please see our publication *The Companies Act - The New Forms of Limited Company and How to Convert* here.

Wide definition of *"credit institution"*

The Act provides that a LTD cannot carry on the activity of a "credit institution" meaning that any company coming within this definition that wishes to be a private company limited by shares must be a DAC rather than a LTD.

Unfortunately, the term "credit institution" as it stands under the Act is very broad, and includes companies *"engaged in the business of accepting deposits….. **or** granting credit for its own account"*. This potentially encompass a wide variety of companies that are not carrying out traditional banking activities – for example, treasury companies in a group situation which are primarily used for intra-group lending.

The indication is that the legislature did not intend that such a broad scope of companies would be caught by the prohibition on being a LTD and that it was only intended that "pure" credit institutions (i.e. companies with a banking licence) would be obliged to be a DAC. It is understood that an amendment will be introduced to the Act in the coming months to narrow the scope of the definition of "credit institution" for the purposes of determining whether or not a company can be a LTD.

In the meantime, if there is uncertainty as to whether an existing private company limited by shares is a "credit institution", it may be best to delay the conversion (or incorporation) of that company until the proposed amendment to the Act is published, if at all feasible. However, this should be kept under review and if the law has not been amended by the end of August, it may be necessary to convert the company to (or incorporate it as) a DAC, and subsequently re-register it as a LTD once the law has been clarified.

Directors' compliance statement

The Act imposes a new obligation on directors of all PLCs and large[1] private companies to make an annual compliance statement in the directors' report (the "Directors' Compliance Statement"), for all financial years commencing on or after 1 June 2015, acknowledging that they are responsible for securing the company's compliance with its "relevant obligations". "Relevant obligations" are Companies Act provisions the breach of which is a serious criminal offence and *all* tax laws. In addition to the acknowledgment of responsibility, the directors' report must confirm that the company has:

(i) put in place a policy statement setting out the policies of the company regarding compliance with its relevant obligations (the "Compliance Policy Statement");
(ii) established arrangements and structures to secure company compliance with its relevant obligations; and
(iii) reviewed those arrangements and structures during the financial year in question.

If the confirmations cannot be given, the directors must give reasons as to why not.

It is important that the Compliance Policy Statement (which is different to the Directors' Compliance Statement) and the compliance arrangements and structures described at point (ii) above are in place now so that they can be reviewed before the current financial year end.

A more detailed analysis of the new rules on directors' compliance statements can be found on our website here.

It is important to note that there is no provision in the Act for a composite group directors' compliance statement. For example, where the top holding company in a group prepares a directors' compliance statement, each subsidiary which is a PLC or a large private company must also have a separate annual directors' compliance statement.

[1] In this context, "*large*" means gross assets exceeding €12.5 million and turnover exceeding €25 million for the financial year in question.

Certain subsidiary companies are exempt from the requirement to file their financial statements with the CRO, by virtue of a guarantee given by the parent company (previously known as a "section 17 guarantee"). However, the existence of such a guarantee does not exempt a subsidiary from the requirement to *produce* a directors' compliance statement in its annual financial statements, where it is in scope. The exemption only extends to the *filing* of those financial statements with the CRO.

Audit committee

There is a new requirement for all PLCs and large companies of a certain scale[2] to either appoint an audit committee or formally decide not to do so. Previously, requirements in relation to audit committees only applied to "public interest entities" (i.e. listed companies, credit institutions and insurance undertakings).

If a decision is made not to appoint an audit committee, the reasons for that decision must be stated in the directors' report. Where established, an audit committee must have at least one non-executive director who has competence in accounting or auditing, is not engaged in the daily management of the company and is sufficiently independent to contribute effectively to the work of the committee.

Companies should assess whether they will be affected by the provisions of the Act dealing with the establishment of audit committees.

Change of name

Certain company types are required to change their corporate name by virtue of new provisions in the Act.

In a departure from the old requirements, the name of a guarantee company (CLG) must now end with the words "company limited by guarantee" or "cuideachta faoi theorainn ráthaíochta". The abbreviations "CLG", "C.L.G", clg", "c.l.g" (or the Irish equivalent) can be used after the registration of the company.

In addition, the name of an unlimited company (UC) must end with the words "unlimited company" or "cuideachta neamhteoranta". The abbreviations "UC", "U.C", uc", "u.c" (or the Irish equivalent) can be used after the registration of the company.

These new requirements take effect from the end of the transition period (30 November 2016). During the transition period, the company may pass a resolution to change its name but if no action is taken, upon expiry of the period, the CRO will issue a new Certificate of Incorporation to the company which will include the words "company limited by guarantee" or "unlimited company" as appropriate at the end of its name.

Where a CLG has been granted an exemption from the requirement to use the words "limited" or "teoranta" under the previous law, that exemption will be carried over. Existing CLGs without an exemption and newly formed CLGs will be permitted to dispense with the requirement to use the words "company limited by guarantee" (or the Irish language equivalent) where its objects are the promotion of commerce, art, science, education, religion, charity or another prescribed object and where it does not trade for profit.

With regard to an exemption for unlimited companies, the Minister for Jobs, Enterprise and Innovation may, in special circumstances and subject to whatever conditions he or she thinks fit, grant an exemption from the obligation to use the words "unlimited company".

Existing private companies limited by shares converting to a DAC should note the requirement to include the suffix "designated activity company" or "cuideachta ghníomhaíochta ainmnithe" in its name. The abbreviations "DAC", "D.A.C.", "dac" or "d.a.c." (or the Irish equivalent) can be used following the conversion of the company.

Companies should bear in mind the knock-on effects associated with a change in corporate name. For example, updates to company stationary and signage and the company seal will be required.

[2] A company with a balance sheet total in excess of €25m and turnover in excess of €50m in the most recent and immediately preceding financial years, taken individually or on an aggregate basis with its subsidiary undertakings

WILLIAM FRY

How can we help?

The William Fry team is happy to help with any queries in relation to the Companies Act 2014.

In particular, we can:

- Advise on conversion options for existing private companies limited by shares
- Provide new constitutional documentation where required
- Draft the necessary shareholder resolutions to convert to a new company type and deal with Companies Registration Office filings
- Review existing memorandum and articles of association
- Advise directors on their new obligations under the Act
- Assist with the annual directors' compliance statement process

William Fry has published a more extensive booklet on the Act which is available on request on our website here.

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