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The Irish Companies Act 2014—Tax Aspects

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The Irish Companies Act 2014 came into force on June 1, 2015 and introduced a number of significant changes. This article discusses the amendments to Ireland's corporate law regime relating to tax matters.

I. Introduction

The Irish Companies Act 2014 (the "Act"), which came into force on June 1, 2015, consolidates and simplifies existing company law in Ireland in a user-friendly and accessible manner. It also introduces some significant changes, many of which will be of benefit to Irish registered companies and other businesses. This article examines some of the changes brought about by the Act as they relate to tax matters.

II. Directors and Regulation of Proceedings/ Corporate Governance

One of the most significant innovations in the Act is that it is now possible for a private company limited by shares ("LTD") to have a single director, as the minimum number of directors for an LTD has been reduced from two to one. Many corporate lawyers have welcomed this departure as it recognizes the practical realities for smaller companies and should reduce the incidence of inactive second directors for LTDs at least.

Certain formalities relating to the holding of directors' meetings, which had become a matter of standard practice but required specific amendments to be made to a company's articles of association, have been given a statutory footing in the Act and will therefore apply automatically to a company, unless specifically disapplied by that company's constitution. For example, directors will not have to be physically present at the same location for board meetings and will be able to participate in board meetings by telephone or other electronic communication. A meeting so held would be deemed to take place either a) where the largest group of those participating is assembled or, if there is no such group, where the chairperson of the meeting is; or b) if neither of those apply, in such a location as the meeting itself decides.

This is all very well but for tax purposes it will be important to ensure that board meetings at which the sole director or a majority of directors are physically present are held in Ireland. In this regard, by having a sole director, a company may keep costs down but if that sole director is not tax resident in Ireland and has little or no desire to travel to Ireland to hold board meetings, this could lead to a situation where the Irish company is considered non-Irish tax resident because the central management and control of the company does not abide in Ireland.

III. Directors' Duties Codified

The Act codifies directors' duties for the first time, drawing together both existing statutory rules on transactions involving directors and also various common law duties developed by the courts.

In line with the approach adopted in the U.K., the Act introduces for the first time in Irish law a list of the principal fiduciary duties owed by the director of an Irish company. The key fiduciary duties are:

- act in good faith in interest of company;
- act honestly and responsibly in conduct of company's affairs;
- act in accordance with company's constitution and the law;

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- do not use company's property, information or opportunities for own/other third parties' benefit;
- do not restrict directors' power to exercise independent judgement;
- avoid any conflict between director's duties and own interests;
- exercise the care, skill and diligence that would be exercised by a responsible person with knowledge and experience a director is expected to have and that director actually has; and
- have regard to interest of members, in addition to general duty to employees.

IV. New Directors' Compliance Statement Requirement

In respect of financial years commencing on or after June 1, 2015, directors of private limited companies and guarantee companies that have, in a particular financial year, a balance sheet of over 12.5 million euros and turnover in excess of 25 million euros will be required to make a compliance statement in the directors' report accompanying the company's financial statements each year. Directors of all public limited companies (other than investment companies governed by Part 24 of the Act) are also required to make compliance statements regardless of balance sheet or turnover figures. There is no requirement to produce a directors' compliance statement for unlimited companies.

A form of directors' compliance statement was legislated for in 2003 but the relevant provisions were never commenced owing to concerns over the disproportionate burden they would place on companies. Accordingly, the Company Law Review Group was requested to review the matter and produced a report in 2005 recommending a more proportionate form of directors' compliance statement, which is now found in the Act.

There is no group exemption as regards the requirement to include a directors' compliance statement in the financial statements—i.e., even where TopCo includes one, an individual subsidiary which is a public limited company ("PLC") or a "large private company" is also subject to the obligation as each company has its own separate legal personality, may have different directors and is subject to the Act in its own right.

In essence, the directors of the board must include a statement that acknowledges that the directors are responsible for securing the company's compliance with its "relevant obligations": i.e., any provisions of the Act the contravention of which is a category 1 or category 2 offense (these are the most serious offenses under the Act), market abuse and prospectus requirements (where applicable) and more importantly, in the author's view, tax law.

"Tax law" means:

- the Customs Acts;
- the statutes relating to the duties of excise and to the management of those duties;
- the Tax Acts;
- the Capital Gains Tax Acts;
- the Value Added Tax Acts;
- the Capital Acquisitions Tax Consolidation Act 2003 (as amended);
- the Stamp Duties Consolidation Act 1999 (as amended); and
- any instruments made under an enactment referred to in any of the above or made under any other enactment and relating to tax.

The directors' report must confirm that the directors have: a) drawn up a "compliance policy statement" setting out the company's policies that, in the directors' opinion, are appropriate to the company with respect to compliance with its "relevant obligations"; b) put in place appropriate arrangements or structures that are designed to secure "material" compliance with the company's relevant obligations; and c) conducted a review during the financial year to which the report relates of the arrangements or structures put in place.

If these statements, confirmations and reviews have not been made or carried out, the directors must specify by way of note in the directors' report in the financial statements the reasons why not.

Directors and companies should note that the directors' compliance statement is not designed to be an assurance that a company is fully compliant with its relevant obligations. Rather, it is an express acknowledgement by the directors of their responsibilities as the officers of the company and a confirmation that the directors believe there are appropriate checks and balances in place to secure material compliance for those obligations.

In practice, the author anticipates that the vast majority of relevant companies (and in particular PLCs) will adopt a compliance policy statement. Where a company chooses to draw up a compliance policy statement, the author would recommend that it is done as early as possible in the relevant financial year so that the directors have an adequate opportunity to carry out their review of the relevant arrangements and structures so that they will be comfortable giving the directors' compliance statement in the annual financial statements. In group situations, companies may decide to draw up a compliance policy statement at TopCo level and adopt that for other companies in the group. In any case an explanation would be required in the financial statements where subsidiaries are PLCs or large private companies in their own right.

As regards the form of compliance policy statement, clearly this is a new requirement and it remains to be seen how it is dealt with in practice but the author recommends that the compliance policy statement is a brief document setting out the company's policies in respect of compliance with its relevant obligations and summarizing the arrangement and structures the company uses to ensure compliance. This will be an internal company document which is not required to be disclosed to shareholders.

Concerning the putting in place of appropriate arrangements or structures designed to secure material compliance with the company's relevant obligations, the directors can rely on the advice of one or more persons employed by the company or retained under a contract for services, who appear to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obliga-

tion. This is likely to put an increased emphasis on the need for directors to seek financial, tax and legal advice.

The directors' report, including the compliance statement, must be annexed to the company's return publicly filed with the companies' registration office.

Each director who fails to comply with this new requirement shall be guilty of a category 3 offense (i.e., a criminal offense).

V. Mergers

The Act introduces into Irish law the concept of a domestic merger for private companies facilitating the merger of two or more Irish private companies so that the assets and liabilities (and corporate entity) of one company can be transferred by operation of law to the other, with the first company then being dissolved.

Cross-border mergers at the European Union/European Economic Area ("EU/EEA") level (i.e., a merger involving an Irish company and a company from another EU/EEA Member State) have been possible for some time, subject to obtaining the approval of the Irish High Court. The Act takes many of the concepts conceived by the EU cross-border merger regime and applies these concepts in a domestic context to facilitate, for the first time, the merger of Irish private limited companies.

A merger can only be carried out under Part 9 of the Act if at least one of the companies involved is a private company limited by shares ("LTD") or a designated activity company and none of the companies involved is a PLC. The three types of merger provided for in the Act are as follows:

- Merger by absorption: on being dissolved and without going into liquidation a company (the "Transferor Company") transfers all of its assets and liabilities to another company (the "Successor Company") which holds all of the Transferor Company's issued shares.
- Merger by acquisition: a company (the Successor Company) acquires all the assets and liabilities of one or more other companies that is or are dissolved without going into liquidation (the Transferor Companies) in exchange for the issue to the members of the Transferor Companies of shares in the capital of the Successor Company.
- Merger by formation of the new company: one or more companies, on being dissolved and without going into liquidation (the Transferor Companies) transfer all of their assets and liabilities to another company that the Transferor Companies form (the Successor Company) in exchange for the issue to the members of the Transferor Companies of shares representing the capital of the Successor Company with or without any cash payment.

The taxation, audit, accounting and regulatory implications of any potential merger or division will also need to be considered. In the author's experience, where clients require certainty in their tax affairs they have, in the context of the cross-border merger regime, sought a ruling from the Irish Revenue in respect of specific tax concerns which they had in respect of cross-border mergers. Absent Irish Revenue issuing guidance notes on the tax treatment of domestic mergers, clients may similarly wish to obtain such a ruling in the context of a merger between private companies under the Act. That said, provided the domestic merger is structured correctly it should be possible to ensure that the merger is carried out in a tax neutral manner.

VI. Final Comments

The Act codifies and simplifies various Companies Acts from 1963 to 2013 and related statutory instruments. There are many areas of corporate law that overlap in the tax sphere and the author has only mentioned the above as noteworthy examples of changes to Ireland's corporate law regime as they relate to tax matters.

Although directors can be held personally liable for certain tax defaults of the company, it is perhaps not surprising in an era of increased supervision and regulation that the requirements to prepare a compliance statement have finally been introduced. Time will tell if this particular area of corporate law will be effective and enforced.

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