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## The Companies Act 2014 – The New Forms of Limited

### Company and How to Convert

The Companies Act 2014 (the Act) came into force on 1 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 action needs to be taken to convert to these new corporate forms?

#### *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 of that Act is that it 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 be whether to convert to a LTD or a 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 legal capacity</li><li>• May dispense with requirement to hold a physical AGM</li><li>• May not offer its debentures/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>• Legal capacity limited by objects clause</li><li>• Must hold a physical AGM (unless it is 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 (LTD)*

One of the key features of the LTD is that it does not have 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 (these are called optional provisions). If these provisions are not dis-applied or varied 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 set out any supplemental regulations which it is adopting.

**Designated activity company (DAC)**

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 wish to have their debentures listed on a debt market and the DAC is the appropriate type of company to cater for this as opposed to the LTD. 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 hold physical AGMs if it has more than one member and it 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 must 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 or listed on a market of debentures must convert to a DAC within the transition period.

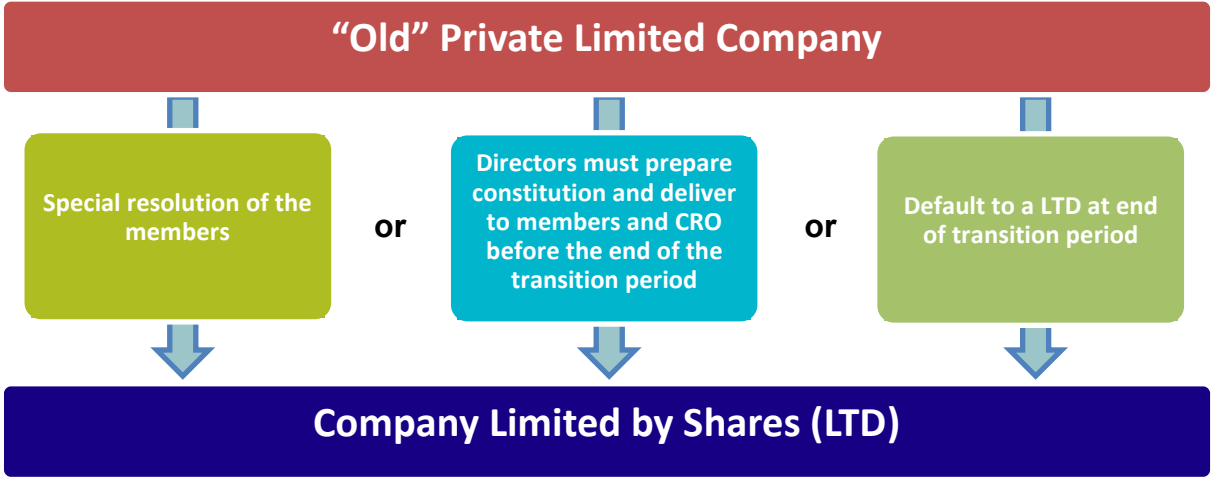
**Transition period – the default position**

The Act provides for an 18-month transition period, which began on 1 June 2015.

**During this transition period**, all existing private limited companies will be deemed to be DACs unless they take action to convert to a LTD 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**



The first option shown in the chart above is for the members to pass a special resolution resolving to convert the company into a LTD and adopt a new one-document constitution to replace the company's memorandum and articles of association. The new constitution must be delivered to the Registrar of Companies for registration, who will issue a new certificate of incorporation to the company upon the completion of the process. Once the new constitution has been registered, the law in Parts 1 to 14 of the Act that applies to the LTD will apply to the company.

If the members do not pass a special resolution resolving to convert to a LTD within the transition period, the directors have a duty to prepare a new constitution and to deliver it to the Registrar of Companies and to the members before the end of the transition period. A constitution prepared by the directors in satisfaction of this duty must consist solely of the provisions of the existing memorandum and articles of association, other than the objects clause and any provision which prohibits the alteration of the memorandum and articles of association. This ensures that the existing rights of the shareholders are preserved.

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 memorandum and articles of association 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.

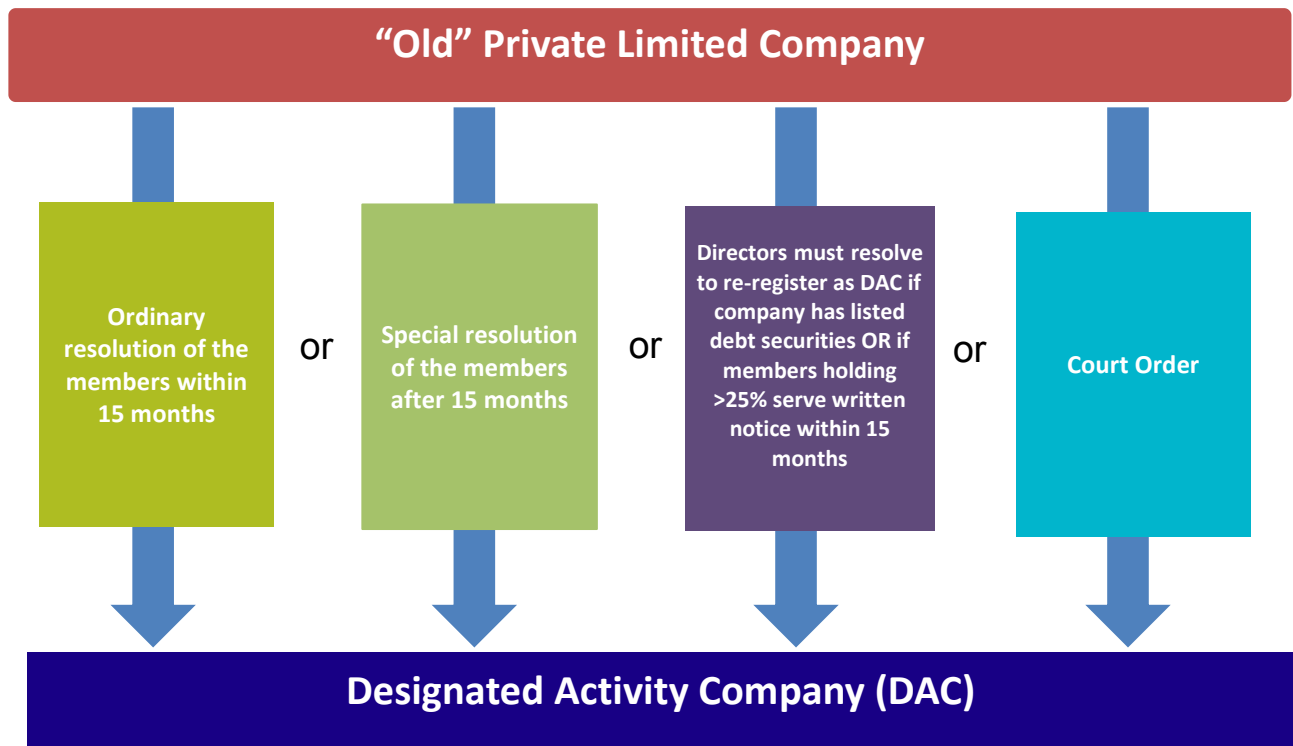
As mentioned above, the Act contains optional provisions which can be disapplied or modified in the constitution of a company. The Act also contains mandatory provisions which cannot be so disapplied or modified. It is important to remember that, where there is a conflict between the constitution of the company and a mandatory provision of the Act, the mandatory provision will prevail. Therefore, it is advisable for companies to examine their existing memorandum and articles of association to ensure there is no conflict with any mandatory provision of the Act.

### ***Possible challenges***

Care should be taken in dealing with minority shareholders, who have the right to apply to court 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 and file a new constitution by the end of the transition period in circumstances where the members themselves have not passed a resolution to convert the company, there is a rebuttable presumption that the directors exercised their powers in an oppressive manner. This places a high burden on directors to ensure that they comply with the requirement to prepare and file a 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 which entitle the holders to object to the alteration of the company's objects, are also entitled to apply to court for relief if the proposed new constitution or the conversion of that company into a LTD prejudices any of their interests (as long as they have a legal or equitable right to that interest).

## Converting to a DAC



The members of an existing private company limited by shares may resolve to convert to a DAC by ordinary resolution in the first 15 months of the transition period or by special resolution thereafter. Alternatively, within the first 15 months of the transition period, members holding at least 25% of the total voting rights may call on the company to convert to a DAC by way of a notice in writing under. In such circumstances, the directors of the company are obliged to pass a resolution dealing with the conversion.

If an existing private company limited by shares does not re-register as a DAC before the expiry of the transition period it will automatically convert to a LTD, unless (i) members holding not less than 15% in nominal value of issued share capital of the company, 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, apply to court for an order directing the re-registration of the company 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 a new corporate structure – LTD or DAC.
- 2) Review existing memorandum and articles of association to identify any provisions that conflict with 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.