Ibec

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The Companies Act 2014

A guide for member companies

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The Companies Act 2014

Ibec has produced this booklet to assist member companies to identify and understand the implications for them of the major new Companies Act 2014. It is not meant to be definitive or indeed to cover all the new changes and so should not be relied upon as an alternative to professional advice.

We'd like to acknowledge and thank Arthur Cox and the ODCE for their contributions and support.

Introduction

The last time Irish company law got an overhaul was in 1963 with the then Companies Act. It was of its time. Largely modelled on the UK's post-war 1948 Companies Act, it was designed to regulate the large PLCs – mostly colonial in the case of the UK, mostly non-existent in our case. While adapted to Irish circumstances, the 1963 Act remained rooted in Victorian Britain.

We've come a long way since and the Companies Act 1963 has at times struggled to keep up and adapt to the changing economic and political landscape. It has had to incorporate new European requirements, new economies, new technologies, new means of doing business, new governance demands and new company structures. We have grafted on another 14 Acts and 17 statutory instruments to the original 1963 mother Act to cope with all this and to fill some of the legal vacuums as they arise. That's meant that our company law has become complicated, dispersed, and plain lacking at times. It was in need of an overhaul.

The Company Law Review Group has picked over, analysed, critiqued and ultimately reshaped company law as we've known it and the new Companies Act 2014, the largest Act in the history of the State, is the end result. It's taken 14 years to come to fruition. Unfortunately the Irish economy shuddered for a while as we approached the final hurdle and that threw the timetable for implementation. But we now finally have it and it will come into effect on the 1st June 2015.

Yes, the new law is good for business. Ibec has had a place at the CLRG table and has actively participated to ensure the needs of business are reflected in the new Act. It is tailored to and modelled on the needs of the typical small to medium sized Irish business and its core principles reflect that shift in emphasis away from the PLC model. It means simpler constitutional documents, simpler processes, better governance, clearer roles for stakeholders, sensible exemptions and new opportunities.

This booklet sets out the key changes for Ibec member companies under 4 different headings – What is means for Company Owners, What it means for Directors, What it means for Creditors and What it means for the Enforcer. It is meant to act as a signpost and does not contain detailed advice but it should guide you to at least identify the changes that are important to you – whether in your role as a director or manager, in your dealings with other companies or in your role as a creditor.

Abbreviations used in this booklet

AGM = Annual General Meeting
CLG = Company Limited by Guarantee
CLRG = Company Law Review Group
CRO = Companies Registration Office
DAC = Designated Activity Company
PLC = Public Limited Company
EGM = Extraordinary General Meeting
IAASA = Irish Auditing and Accounting Supervisory Authority
LTD = private limited company under the new Act
Members = company owners, shareholders
ODCE = Office of the Director of Corporate Enforcement
UC = Unlimited Company

The Companies Act 2014 – What it means for Company Owners

Company owners are (as referred to in the legislation) the members (being, in the case of a company limited by shares, the shareholders) of a company.

Existing private companies must make a decision

The Companies Act 2014 (the "**Act**") is expected to be commenced on 1 June 2015. Private companies limited by shares make up the vast majority of existing companies, and this company type will be replaced by two new company types:

- the new model private limited company (referred to here as an 'LTD'), which will be subject to the new regime set out in Parts 1 to 15 of the Act; and

- the designated activity company ('DAC'), which will be subject to Part 16 of the Act, and Parts 1 to 14 as supplemented, modified or disapplied by Part 16.

The major difference between an LTD and any other type of company (including the private company limited by shares under the Companies Acts 1963 to 2013) is that the LTD will have the same full and unlimited capacity as a natural person and so will not have an objects clause; by contrast, the DAC will continue to have an objects clause.

Other differences arise from the fact that the DAC will generally not benefit from all of the reforms in the Act to the same extent as the LTD, but rather the law applying to DACs will be closer to that applying to existing private companies limited by shares; to cite a few examples:

- **The LTD will have a one-document constitution, whereas the DAC will have a two-document constitution comprising its memorandum and articles of association;**

- **An LTD may have just one director, but a DAC will be required to have a minimum of two directors;**

- **An LTD can waive the right to hold an AGM (by meeting certain conditions) even if it has more than one member; a DAC can only waive that right if it has just one member.**

Options available to existing private companies

Following the commencement of the Act, every existing private company limited by shares will have to become either an LTD or a DAC. As set out below, it will be in the interests of owners and directors to ensure that the company acts proactively to take a decision. The options set out in this regard are as follows:

(a) the company can, within the 18 months following enactment, 'opt in' to the new regime and decide to become an LTD;

(b) the company can, during the 15 months following enactment, 'opt out' and decide to become a DAC or, indeed, some other type of company;

(c) if the company fails either to opt in or opt out it will, at the end of the 18-month period, be deemed to have become an LTD.

During the aforementioned 18-month "transition period", or until it opts to become some type of company other than a DAC, an existing private company will be subject to the law applicable to DACs.

Although the Act provides for a default at the end of the transition period whereby an existing private company will be deemed to have become an LTD, there are a number of reasons why it is not advisable for a company or its directors to allow the transition period pass without the company itself taking the necessary steps to become an LTD or a DAC:

(a) If a company wishes to become an LTD, it would seem preferable that it would choose to do so as soon as possible so as to avail of the advantages of being an LTD;

(b) The Act obliges directors to take action; if the company does not take action during the transition period so as to be deemed to have become an LTD, the directors will be in breach of that obligation;

(c) For companies, such as joint ventures, which may want to opt out and retain their objects clauses and avoid re-negotiating their already bespoke articles of association, it is important to take action and opt out to prevent the application of the default form of constitution and the deletion of the objects clause.

Action to be taken in converting to an LTD or a DAC

As set out above, every existing private company limited by shares will be required to make a decision as to whether it is to become an LTD or a DAC. An existing private company limited by shares can become an LTD as follows:

(a) the members may, by special resolution passed in accordance with the company's existing memorandum and articles of association, adopt a new constitution in the prescribed form and deliver that constitution to the CRO for registration;

(b) if the members should fail to adopt a constitution, and the company is neither proceeding nor required to re-register as another type of company, the directors are obliged to draft a one-document constitution in the prescribed form based on the existing memorandum and articles of association, and to deliver a copy of it to each member and to the CRO for registration; or

(c) where neither the members nor the directors take any action, then on the expiry of the transition period, the company will be deemed to have a one-document constitution comprising its existing memorandum and articles (except its objects clause and any clauses which prevent their alteration) and to have become an LTD.

Where an existing private company limited by shares wishes to become a DAC, the necessary actions are:

(a) the members may pass an ordinary resolution that the company be re-registered as a DAC;

(b) alternatively, without waiting for the directors convene an EGM to consider the issue, a member or members holding more than 25% of the voting rights in the company can serve a notice in writing on the company requiring it to re-register as a DAC.

Additionally, where a private company limited by shares does not re-register as a DAC before the end of the transition period, a member or members holding not less than 15% in nominal value of its issued share capital (or of any class thereof), or one or more creditors holding not less than 15% of its debentures entitling them to object to alterations in its objects clause, may apply to court for an order directing the company to re-register as a DAC.

Alternatively, if the members fail to act, and the company is neither proceeding nor required to re-register as another type of company, the company will become an LTD, either through the actions of the directors, or by the transition period ending and the default provisions taking effect. If the members wish for the company to become a DAC rather than an LTD, it is clearly in their interests to take the necessary action.

Rights of certain members to force conversion to DAC

A minority of members holding a certain proportion of the voting rights of an existing private company limited by shares will have the right to require that the company re-register as a DAC, as follows:

(a) a member or members holding more than 25% of the voting rights in the company can serve a notice in writing on the company requiring it to re-register as a DAC; or

(b) where an existing private company limited by shares does not re-register as a DAC before the end of the transition period, a member or members holding not less than 15% in nominal value of any class of its issued share capital (or in certain cases creditors holding not less than 15% of its debentures) may apply to court for an order directing the company to re-register as a DAC. In such a case the court shall, unless cause is shown to the contrary, make the order sought, or make such other order as seems just.

Of course the members may also apply to the court for an order if they consider that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any of the members, or in disregard of the interests of any of the members.

However although members are protected by being given such rights under the Act, it is clearly preferable that the company would take the decision preferred by the members without having to either serve notice in writing requiring the directors to take action, or taking proceedings to court. Therefore it is in the interest of members, as well as being in the interest of directors, that the members act proactively and ensure that the directors are aware of their preferred course of action.

Changes to audit exemption

The Companies Acts currently allow that private companies limited by shares which fall below specified thresholds in terms of size may avail of an exemption from having their financial statements audited. However a protection is put in place for members, in that a company may not avail of the exemption if a member or members holding at least one-tenth of the voting rights in the company serves notice in writing on the company stating that they do not wish the exemption to be available to the company in respect of a particular financial year.

The new Act provides for an audit exemption in certain cases, and largely retains the above protection for members, but makes a number of important changes in this area.

Firstly, currently a company that is a parent undertaking or a subsidiary undertaking may not avail of the exemption. The Act however allows that the audit exemption will be available to a holding company and its subsidiaries, where the holding and subsidiary companies taken as a whole do not exceed the relevant thresholds.

In addition, as well as applying to LTDs, DACs and private unlimited companies, these exemptions will also be available for the first time to a CLG. The Act provides for even greater protection for the members of such companies, by providing that a CLG may not avail of the exemption in a specified financial year where any one member of the CLG serves written notice on it that that member does not wish the audit exemption to be available to the CLG in that year. It should also be noted that CLGs which have charitable tax exempt status may continue to be required by the Revenue Commissioners to produce audited financial statements.

Other existing restrictions will remain in force. Public companies (whether PLCs or public unlimited companies) will still not be permitted to avail of an exemption, nor will a company with securities admitted to trading on a regulated market in an EEA State. Secondly, the requirement that a company file its annual return on time to be entitled to avail of an audit exemption will remain in force; and where the exemption is to apply to a holding company and its subsidiaries, the annual returns of all companies must be filed on time for the exemption

The Act also introduces a new ‘special’ audit exemption, which may be availed of by a ‘dormant’ company – a company which has no significant accounting transactions during the year, and which has only intra-group assets and liabilities. Dormant LTDs, DACs, CLGs or UCs that are part of a group of companies which does not qualify for the standard exemption can claim the ‘special’ exemption. However it should be noted that the definition of dormant company is very restrictive.

The Companies Act 2014 – What it means for Directors

As explained earlier, the initial option falls to the members (company owners) to pass a resolution that the company become either an LTD or a DAC. However should the members fail to do so, the directors will be obliged to amend the company's memorandum and articles of association so that it shall become an LTD.

There is a risk for the directors that members could claim that the directors had adversely affected their rights by their actions in this respect. In addition, should the directors take the necessary steps to have the company re-registered as an LTD, there is a risk that members may even take costly court proceedings to have the company instead re-registered as a DAC.

Therefore the directors should look to initiate a conversation at an early stage with members, to ascertain to whether they wish for the company to become an LTD or a DAC, and should arrange for the appropriate action to be taken.

Duties of directors

The directors of a company owe fiduciary duties to the company, in that they act as agents for the company, and as quasi-trustees in respect of its property. Until now, these duties have derived from case law and have not been set out in the Companies Acts. However the Act sets out – for the first time in statute – eight principal fiduciary duties which are owed by directors (including shadow and de facto directors) to the company, and can be seen to place a new focus on these duties. These duties are that a director of a company:

(a) act in good faith in what the director considers to be the interests of the company – this is a subjective test requiring a director to act in what he or she believes to be the interests of the company; it is implied that directors can have different (valid) opinions as to what is in a company's best interests.

(b) act honestly and responsibly in relation to the conduct of the affairs of the company – this was not a common law duty per se but has often arisen in the context of applications to have directors restricted.

(c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law – this requires directors to be aware of the company's constitution and of relevant legal provisions.

(d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless this is expressly permitted by the constitution or approved by resolution of the members in general meeting – this provision reflects that directors are quasi-trustees, in that they control the company's property. Directors may not use or benefit from property (including business opportunities) of the company. Companies can, of course, relax or release directors from this duty, and may choose to do so to facilitate the normal use of company property by directors.

(e) not agree to restrict the director's power to exercise an independent judgment unless this is expressly permitted by the company's constitution or the director believes in good faith that it is in the interests of the company to fetter his or her discretion – directors must bring an independent judgment to decisions facing the company. It recognises, however, that in some cases it will be in the company's interests to agree to do, or refrain from doing, something at a future point in time and permits this.

(f) avoid any conflict between the director's duties to the company and his or her other interests (unless the director is released from this duty by the constitution or by a members' resolution) – in particular, directors must avoid acting in their own interests against those of the company. Again, the company can release directors from this duty in particular circumstances.

(g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person both having the knowledge and experience that may reasonably be expected of a person in the same position as the director and having the knowledge and experiences of that director. This is thus a quasi-objective test: a director must exercise the same care, skill and diligence as a reasonable person would exercise, but that reasonable person is to be taken to be someone with that director's knowledge and experience.

(h) in addition to the general duty owed to employees, have regard to the interests of its members - this requires directors to have regard to members' interests, members being the owners of the company. This duty establishes that it is permissible to have regard to the interests of other parties but still be required to act in the best interests of the company. Directors may have regard to other peoples' interests, provided that they first and foremost act in the interests of the company.

Duty on directors of companies other than LTDs to act within objects clause

In addition, new provisions relating to a company's objects clause impose a duty on the directors of companies other than LTDs. This duty does not apply to the directors of an LTD as an LTD will not have an objects clause.

Under the Act, the validity of an act done by a company (save where it was in favour of a director or a connected person) may not be questioned on the basis that it was outside the scope of the company's objects clause. However the directors have a duty to act within their powers, which derive from the objects clause, and so if the directors allow the company to act beyond its capacity (i.e. its objects clause), they will be in breach of that duty.

Directors' compliance statement

The Act imposes a new obligation on the directors of:

(a) All public limited companies ('PLCs') (except for investment companies (i.e. those funds companies currently known as "Part XIII companies")); and

(b) LTDs, DACs and guarantee companies ('CLGs') which are 'large', i.e. which have both a balance sheet total exceeding €12.5m and a turnover exceeding €25m.

LTDs, DACs and CLGs which fall below either of these thresholds, and unlimited companies (UCs) (irrespective of their size), are not subject to this obligation.

The obligation is that the directors of companies within scope make a statement in the directors' report which forms part of their financial statements:

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations (as defined below); and

(b) with respect to each of the following matters, confirming that it has been done, or explaining why it has not been done.

(i) drawing up a compliance policy statement, setting out the company's policies (that in the directors' opinion, are appropriate to the company) respecting compliance with its relevant obligations;

(ii) putting in place of appropriate arrangements or structures (which may include relying on professional advice) designed (in the directors' opinion) to secure material compliance with the company's relevant obligations; and

(iii) conducting of a review, during the financial year to which the compliance statement relates, of any such arrangements or structures that have been put in place.

The term "relevant obligations" means (and is confined to):

(i) any obligation under the Act where a failure to comply would be a category 1 or category 2 offence (i.e. the most serious offences);

(ii) a serious Market Abuse, Prospectus or (where the company has traded securities) Transparency offence;

(iii) obligations under tax law, including the Customs Acts, statutes relating to excise duties, the Tax Acts, the Capital Gains Tax Acts, the VAT Acts, the Capital Acquisitions Tax Consolidation Act, the Stamp Duties Consolidation Act and instruments made under these Acts or otherwise relating to tax.

The scope of the directors' compliance statement is therefore targeted both in terms of what companies it applies to, and the obligations that are in scope.

Obligation on certain companies to establish audit committee

Large companies, and PLCs that are not already required to do so, will be required either to establish an audit committee, or to explain why they have decided not to do so (this is therefore a “comply or explain” type obligation).

“Large” has a different meaning here than it does in the context of the directors’ compliance statement, and means that, in each of the most recent, and the immediately preceding, financial year, either the company or the group has a balance sheet exceeding €25 million, and a turnover exceeding €50 million (i.e. double the thresholds applicable to the directors’ compliance statement).

Certain PLCs (being credit institutions, insurance undertakings and those with securities listed on an EEA market) are already required to have audit committees; this will continue to be the case as an absolute obligation, and the above “comply or explain” obligation will not apply to these PLCs, but it will apply to all other PLCs (except investment companies).

The obligation applies to all other large companies, whether LTDs, DACs, CLGs or UCs.

The audit committee must include at least one non-executive director of the company who possesses the requisite degree of independence (in general terms, has not had a material business relationship or position of employment with the company over the preceding three years), and who has competence in accounting or auditing.

The responsibilities of the audit committee shall include:

(a) the monitoring of the financial reporting process;

(b) the monitoring of the effectiveness of the large company’s systems of internal control, internal audit and risk management;

(c) the monitoring of the statutory audit of the large company’s statutory financial statements; and

(d) the review and monitoring of the independence of the statutory auditors and in particular the provision of additional services by the auditors to the large company.

Obligation to ensure that auditors are aware of relevant information

The directors' report of every company – regardless of size or company type – must contain a statement to the effect that, in respect of each director:

(a) so far as the director is aware (when approving the report), there is no relevant audit information of which the company's statutory auditors are unaware; and

(b) the director has taken all the steps that s/he ought to have taken as a director in order to make himself/herself aware of any relevant audit information and to establish that the company's statutory auditors are aware of that information.

"Relevant audit information" is defined as information needed by the statutory auditors in connection with preparing their report. As this will clearly only be definitively known to the company's statutory auditors, it will be necessary that the directors communicate with the statutory auditors on an ongoing basis to ensure that this obligation is met.

A director will be regarded as having "taken all the steps that he or she ought to have taken as a director" for the purposes of paragraph (b) above if he or she has —

(a) made such enquiries of his or her fellow directors (if any) and of the company's statutory auditors for that purpose, and

(b) taken such other steps (if any) for that purpose,

as are required by his or her duty as a director of the company to exercise reasonable care, skill and diligence.

Obligation to work with liquidators

If a company is wound up insolvent, the court shall order that each director of that company shall be restricted for a period of 5 years from acting as a director of a company, save where the company in respect of which s/he is to act meets certain requirements, unless the court is satisfied that:

(a) the director in question has acted honestly and responsibly in relation to the conduct of the affairs of the company in question; and

(b) the director in question has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding-up; and

(c) there is no other reason why it would be just and equitable that the director would be subject to the restriction in question.

The second requirement is new, and therefore imposes a new obligation on directors where a company is being wound up insolvent.

The Companies Act 2014 - What it means for Creditors

Introduction

The CLRG is a statutory body which monitors and reviews Irish company law to ensure it is effective, up to date and robust. The Group has produced 14 reports since it began in 2000 and the Companies Act 2014 is the culmination of a progressive and major overhaul by it of Irish company law. It overhauls Ireland's relatively old fashioned and increasingly fragmented company law which concentrated largely on the regulation of the relatively few public limited companies. The new Companies Act 2014 reverses this and concentrates primarily on regulating the smaller companies (which make up almost 90% of Irish companies) and then adapts those laws to the bigger and alternative companies as needed. That in itself simplifies numerous procedures and reduces the administrative burden on smaller Irish companies in particular. It also brings a change in emphasis towards improved governance and clearer guidance on what directors and other stakeholders are obliged to do. Importantly, it gives creditors a bigger voice and a better chance in the insolvency process.

Creditor Protection

Creditor protection is enhanced in a myriad of ways throughout the new Act. Some, as set out in more detail in later paragraphs, are either targeted at or work specifically to help creditors. Others, including those set out in bullet format below, are targeted at better governance or enforcement but in doing so enhance creditor protection. These are covered in the sections dealing with Directors and Enforcers elsewhere in the booklet and include:

- A requirement for large private companies to have an Audit Committee, or else explain why they do not
- Strict criteria for Audit Exemption
- Statutory codification of Directors' Duties
- Enhanced powers for the ODCE

This puts creditor protection to the forefront of company law.

Abolition of Ultra Vires doctrine for most companies

One of the main features of the new Act is the abolition of the ultra vires doctrine for the new model company, the company limited by shares, or “LTD” which is likely to be the most popular type of company. Under this doctrine companies could only do as permitted under the ‘objects clause’ in their registered constitutional document, the Memorandum of Association. This put the onus on lenders and creditors to ensure the company had the capacity to deal with them. This will no longer be needed as the company is now given the same legal capacity as an individual. Compliance will rest with the directors to ensure the company operates correctly.

This is good news for creditors.

Priority of Charges

The current system of registration of charges against a company can be unfair and unreliable. A charge created over the assets of a company needs to be registered to secure priority. Where there is a delay in registering it then another lender will be unaware of it and may lend further monies which will rank behind the first unregistered charge. This causes difficulty for subsequent lenders and is open to abuse. The new Act seeks to correct and simplify this by giving priority to charges according to when they were registered rather than when they were created.

There will now be a two stage process for registering charges:

- A preliminary notice of the creation of a charge can be filed and
- can then be followed by the formal registration of the charge provided it is done within 21 days. If it not registered within that time the preliminary notice lapses and the charge will operate from whatever day it is subsequently registered.

This gives more transparency, equity and reliability to the registration of company charges

Changed thresholds for deciding when a company is unable to pay its debts

The thresholds for deciding when a company is unable to pay its debts have been raised. Under the new Act, when a creditor is owed €10,000 (the comparable amount under the current law is less than €2,000) or more then he/she may serve notice on the company requiring payment of the debt within 21 days. The legislation is now changed to allow two or more creditors owed €20,000 or more to group together on this. If the debt remains unpaid then the company is deemed unable to pay its debts and insolvency proceedings may then begin.

This will allow a number of small creditors to group together to take action where this might not currently have been possible.

Liquidators

Liquidators and examiners must now be qualified. That means they must either be:

- Members of one of the 9 prescribed accountancy bodies in Ireland (ICAI, ACCA, CIMA, AIA, CIPFA, ICAEW, ICAS, ICPAI or IIPA) or
- a practising solicitor
- a member of another professional body recognised by IAASA or
- are qualified in another EEA member state
- has practical experience and knowledge of winding ups and is thereby 'grandfathered' to act by IAASA as liquidator

As part of a general tidy up, the powers of liquidators are now the same across all three types of company wind up (members' voluntary winding up, creditors' voluntary winding up and Court compulsory winding up).

Liquidators now interact less with the High Court and more with and under the scrutiny of creditors (more detail below).

This means better standards for the liquidation process and more creditor visibility

Greater Creditor involvement in Insolvencies

This is one of the key new improvements of the new Act.

The Company Law Review Group was of the opinion that there was too much High Court involvement in the administration of the liquidation of insolvent companies. This was adding to overall costs and delays and while meant to be a protection to creditors was often counterproductive. Reducing those costs and delays without compromising oversight was made possible by the introduction of a requirement that liquidators would now have to be appropriately qualified and experienced. That together with beefed up enforcement powers to the Office of the Director of Corporate Enforcement means the original oversight role of the High Court can now be reduced considerably and scaled back – which is what the new Act provides for.

The Act encourages greater creditor involvement in the settling of the insolvency process. As it is the High Court must order a meeting of creditors and then later in a separate hearing, approve of any settlement between the liquidator and creditors. Now such a meeting may be called by the directors of a company providing they advertise it in two daily newspapers.

Also new is that a notice to creditors must now list the names of all other creditors. This allows creditors to contact each other and set up a committee of inspection which, until now, was a function of the liquidator. If the directors fail to call such a meeting then the Court may step in; however there is an incentive for the directors to comply as a liquidator will ultimately have to report to the ODCE on the director's behaviour when winding up the company. No longer will it be sufficient for directors of insolvent companies to show that they acted "honestly and responsibly" in order to avoid being restricted. Now, on an application to restrict such directors they will also "have to show that when they were requested to do so by the liquidator, they cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company. Co-operation therefore with the liquidator will help avoid any restriction order which they ODCE may otherwise seek to impose on directors who fail creditors.

Committees of Inspection

A Committee of Inspection of up to 8 members may be established by creditors themselves. Such a committee is usually established by the liquidator and that right will remain, but no longer solely with the liquidator.

The Committee may be made up of creditors or others put forward by creditors to act on their behalf. Although not obligatory, it is likely that this will include professional advisors. Where the creditors set up the Committee of Inspection then they will now agree the liquidator's remuneration and will have also have the power to appoint, remove or replace the liquidator.

The liquidator is currently subject to High Court oversight and much of that oversight will now be taken over by the Committee of Inspection who can authorise the liquidator to carry on the business if beneficial to do so, to compromise or pay in full certain creditors and to take legal action as required. If there is no Committee of Inspection set up then the liquidator will be obliged to consult all creditors for much of his/her authorisations. It should therefore be better for all to have a Committee of Inspection set up by creditors.

The professionalising of the liquidator and potentially, also to some extent at least, of the Committee of Inspection allows for reduced High Court involvement and thus potentially means more monies ring-fenced earlier and available to creditors.

Valuation of Creditor Claims

There will now be a fixed valuation date now for valuing claims. It will be the date of commencement of the wind up.

Creditor wishes

Notably, a liquidator must now take account of creditors' wishes. While he/she is not bound by them he/she must at least consider them. Bearing in mind that creditors will now have the ability to remove a liquidator, the liquidator will need a robust reason not to do as the bulk of creditors suggest.

Unfair Preference

Transactions in favour of connected persons made within two years of a company being wound up will now be deemed an 'unfair preference' rather than a 'fraudulent preference'.

Examinership

Examinerships are meant to give a company which is in difficulty, but which otherwise has a real prospect of survival, some breathing space to trade through its difficulties while restructuring itself and its debts. It has proved useful to several companies and is generally cost effective and speedy as it is generally limited to 70 days (this can be extended to 100 if need be).

Examinership applications may now be brought to the Circuit Court on foot of recommendations of the Company Law Review Group on '*examinership lite*', a mechanism to assist small companies dealing with examinership. The Companies (Miscellaneous Provisions) Act 2013 gave effect to these recommendations but that Act will be repealed and replaced on the commencement of the Companies Act 2014.

Under the Companies Act 2014, an examinership application may now be brought to the Circuit Court where the company liabilities are less than €500,000. Under a new provision, the Act provides that the Court cannot approve the application where it would have the effect of impairing the interest of the creditors in a manner which unfavourably favours the interest of creditors of related companies. This avoids potential abuse whereby a group uses examinership for one of its companies to protect other group companies who had supplied to it.

Receivership

Receiverships are normally initiated by a bank or other large creditor under a debenture previously entered into by the company in return for finance. They are there first and foremost to recover as much of the debt as possible for the debenture holder. Until now Irish law set out the duties of the receiver but the debenture set out the receiver's powers and authority.

Under the new Act, receivers are given statutory operational powers, modelled largely on Australian law. This gets round the issue of poorly drafted debentures which sometimes restricted a receiver from taking certain actions which, while protecting the debenture holder, may have given the business and other creditors a better chance. Those powers include the right to take possession of company property and to repair, renew, convert, lease, let, sell or carry on any business it and also to insure or borrow against it. Other powers include the right to acquire or lease, to employ or to appoint an agent or professional advisor and to call up any unpaid capital.

Wind Up in the Public Interest

The ODCE has now been given the power to wind up a company if it is in the public interest to do so.

Directors

Directors' Compliance Statement

The Directors' Compliance Statement will apply to PLCs, and to larger private limited companies having a turnover in excess of €25m and a balance sheet of over €12.5m. On appointment a Director will now acknowledge his/her duties and obligations. Thereafter annually directors will either confirm compliance with company and tax law obligations or will explain any non-compliance.

Directors' Loans

Loans to directors must now be properly documented. If they are not then they are deemed repayable on demand and with interest. Loans by directors to their companies must also now be in writing or will lose interest and will lose priority if the company later goes into insolvency.

Summary Approval Procedure

This new procedure allows a company to do certain things otherwise prohibited outright or otherwise prohibited subject to having to apply to Court for approval. This reduces costs by avoiding High Court hearings and all they entail – good news generally for creditors. Instead the board of directors may take the decision subject to certain conditions.

The types of action for which the new procedure can be used include:

- Reducing or varying its share capital (which it may want to do in order to merge with another company)
- Giving loans to directors

- Giving financial assistance in connection with the acquisition of its own shares
- Dealing with pre-acquisition profits or losses
- A decision to voluntarily wind up a solvent company
- A decision to merge

There are reasonably onerous conditions, which protect stakeholders including creditors, where a board of directors wishes to use the Summary Approval Procedure involving:

1. Getting 75% or more shareholder approval (unanimous in the case of a proposed merger)
2. A report and Declaration of Solvency by the directors
3. A report of an independent person (most likely the auditor) for certain matters

Moreover, where the company becomes insolvent and the directors are shown not to have reasonable grounds for making their declaration of solvency, they can be made personally liable for some or all of the company's debts.

Takeovers and Acquisitions simplified

As the economy improved there is evidence of significant merger activity. The value of Irish mergers increased by almost 40% from 2012 to 2013 with the largest number happening in the latter part of 2013 – most likely as a result of us exiting the bail-out.

As well as being good for the economy, mergers and takeovers usually significantly improve the prospect of companies surviving and thriving. They are thus generally good for creditors and often increase the prospect of further and more secure business.

However these mergers have, until now, been confined largely to the PLCs or mergers reaching across a European border. Now for the first time, Irish private companies will also be able to merge without having to make an expensive application to court for approval of a scheme of arrangement. No longer the preserve of the PLCs or cross border companies, a Court application will not be required in all cases as the new Summary Approval Procedure enables the Boards of the merging private companies to do it for themselves (PLCs will still require Court involvement) where there is unanimous shareholder approval. At least one of the merging companies must be a private company limited by shares.

A merger of Irish private companies can now take place by one of three means:

1. By acquisition
2. By absorption or
3. By formation of a new company

This is good news for growing businesses as the Irish economy moves forward.

The Companies Act 2014 - What it means for the Enforcer

In the context of the work of the Office of the Director of Corporate Enforcement (the ODCE), there have already been significant changes in the Enforcement landscape brought about by previous legislation, which where appropriate has been incorporated into the Act. The most significant changes in company law were contained in the Companies (Amendment) Act 2009, in brief they allowed for the seizure of certain electronic information in circumstances where it could not be separated from other non-relevant electronic information, also the seizure of certain books and documents from third parties, and required enhanced disclosures of directors' loans from licensed banks.

Further expansion of Enforcement powers was contained in the Criminal Justice Act 2011, which applied to a range of offences, broadly defined as "white collar crime" offences. That Act increased the powers of arrest and interview for officers of an Garda Síochána, placed an obligation on third parties to provide witness statements, and also placed a general obligation on all citizens to report where they had information relating to an offence contained in the Schedule. As this Act does not constitute company law but is a creature of the Department of Justice, its specific provisions are not reflected in the Act.

Retained powers

Right to seek the appointment of an Inspector

For companies that are classified as small or medium sized, parties now need only apply to the Circuit Court. Where third parties are making an application they are now also under an obligation to give the Director 14 days' notice of the application, and the Director is entitled to appear and be heard at the nearing of the application.

Access to company records

This power is maintained, and is increasingly one which is being used by the ODCE, currently it is enacted under section 19, Companies Act 1990. However an interesting expansion of its use is that a new ground has been added, where the "affairs of the company are being or have been conducted in an unlawful manner." This considerably broadens its potential application.

Other retained powers

The other most commonly used powers are retained with little or no amendment, including the broad right of search and seizure under a warrant from the District Court. This includes the seizure of electronic information, the inclusion of which was provided for in the Companies (Amendment) Act 2009 as already discussed. Similarly, the power to require an individual or company to comply with obligations under the Act, and the power to inspect a Liquidator's books and records, both relatively commonly used powers by the Office in practice, are both retained.

New Powers

Additional powers are not necessarily ground-breaking but do reflect some practicalities in how current powers are being or may be utilised.

Section 763 – Right to appoint an Inspector for certain share dealing

For example, there is an additional ground for the appointment of an Inspector by the Director which relates to share dealing, as distinct from the already available share ownership which has been a power of the Director since the inception of the Office. This extended power relates to share dealing by directors and related parties.

Section 794 – Power to require production of books and records of third party companies

This straightforward power, which is available to the Director, DPP, and a Superintendent of An Garda Síochána, effectively crystallises what was in practice a useful power as regards third party information which was obtainable but in a more awkward manner under current law.

Section 800 – ODCE power to seek disclosure order regarding shares and debentures

This power, which has been available to interested parties since 1990, has now been extended to the Director.

Section 335 – Power to ascertain entitlement to audit exemption

The ODCE now has the capacity to demand access to company records that would support the company's entitlement to audit exemption, where that exemption is claimed.

Insolvency

Some of the most interesting areas in which there has been an extension to the powers of the Office have been in the area of insolvency. There are now expanded powers available to the Office to seek to put a company into liquidation.

Just and equitable

Section 761 allows the Director to petition to wind up a company if in the opinion of the Director it is just and equitable, based on information obtained by the Director in the performance of his duties. While the Director had such a power previously, it was available on a much more limited basis.

Public interest

Similarly, the Director also has the power, under section 569, to seek to have a company wound up in the public interest. This replicates a power that has been available, and utilised, in the United Kingdom for a number of years.

Restriction

The financial requirements for restricted directors are now €100,000 for private companies and €500,000 for PLCs. Companies limited by guarantee will require a guarantee of €100,000 for a restricted director to act. There is now a new ground for restricting a director, namely non-cooperation with the liquidator.

Liquidators

The Act introduces new requirements for any person who wishes to act as a liquidator, where until now there were no limitations on anyone carrying out that role. A liquidator will need to be an accountant or a solicitor, or have significant experience already in the field. They will also be required under law to take out professional indemnity insurance.

Disqualification

Previously, any director convicted on indictment of "any offence in relation to a company" was automatically disqualified. This will now apply to such offences as are prescribed by the Minister, which will provide clarity on what is an offence "in relation to a company." Also new, where a director is disqualified abroad, this triggers change of status which must be notified to the CRO. Failure to do so renders the individual automatically disqualified.

Undertakings

A significant change is that under the Act, where an individual accepts a proposed restriction or disqualification, the process can be completed without the need to go to the High Court through the signing of an appropriate statutory form. This should bring a considerable saving in time and expense for all parties.

Categorisation of offences

The new provisions relating to offences are set out in section 871 of the Act. A recent innovation in company law which has been carried over into the new legislation is interaction with the Fines Act, which should ensure that lower level fines are in future amended in a manner consistent with other criminal legislation.

The most serious offences are now classified as Category 1 offences. These carry a tariff on indictment of up to ten years' imprisonment and fines of up to €500,000. The penalty on summary prosecution is a Class A fine under the Fines Act (currently (€5,000) and up to one years' imprisonment.

Category 2 offences incur a fine of up to €50,000 per offence and a sentence of up to five years. On summary conviction, again a Class A fine and/or up to 12 months imprisonment is the sanction.

Category 3 and 4 offences are summary only, and both incur a Class A fine, the difference being Category 3 offences also have a potential penalty of up to six months 'imprisonment, while Category 4 offences have no imprisonment term.

This new approach will allow practitioners to much more easily advise their clients of both the perceived seriousness of an offence as well as the potential penalties for non-compliance. Categories 1 and 2 offences are also those offences in respect of which a reporting obligation rests on auditors should they have reasonable grounds for believing that an offence has been committed.

It should also be borne in mind that the much higher penalties attaching to European Directives are retained.

Daily penalties

A further innovation is the introduction of daily fines for continued breaches of the law. Each day of continued breach following conviction constitutes an offence, and the penalties range from fines of up to €5,000 per day for a Category 1 offence prosecuted on indictment, down to €50 per day for Categories 3 and 4 offences.

Codification of Directors Duties and the ODCE

The codification of the fiduciary duties of directors in the Act is welcome, and has been explained in detail by a fellow speaker. However, for the absence of doubt, it is important to emphasise that this codification in no way alters the practical application of these duties. In particular, the ODCE continues to play no role in their enforcement, the taking of such civil actions is a matter for companies, having obtained appropriate legal advice. In general, companies should continue to consider such decisions carefully, due to the potentially very large costs that can ensue in such cases.

ODCE Enforcement Strategy

Insolvency

The changes with the potential for the most significant impact for the Office are in the area of insolvency, primarily the winding up provisions which now give the ODCE new powers to apply to the courts. Also, the proposed introduction of disqualification and restriction undertakings will hopefully result in a much reduced need to attend at court for such proceedings.

Offences remain

The most common offences that the Office sees and deals with are for the most part retained in the Act. These include the failure to keep proper books and records, the actions of unqualified auditors, and the penalties for breach of restriction and disqualification orders.

One potentially significant change is the availability of the Summary Approval Procedure to validate loans from companies to their directors. While this has the potential to legalise the most commonly reported offence to the Office, it is presumed that directors will consider carefully whether the potential for unlimited personal liability for all the debts of the company should the relevant statutory declaration be made without reasonable grounds should give them pause for thought.

Overall strategy

The Office’s overall Enforcement Strategy continues to be a focus on more high level crime, where referrals of files to the DPP for potential prosecution on indictment will play an increasing part. This approach of necessity requires the Office to examine alternative methods of dealing with low level offending, and that policy has already commenced, with parties invited to consider self-correction rather than criminal prosecution. As has been the situation to date, the vast majority of reports to the Office will continue to be dealt with in an administrative manner.

Contributories

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