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Companies Act 2014

The introduction of the Companies Act 2014 marked the most significant change in company law in Ireland since 1963. After 15 years of preparation the Companies Act 2014 was enacted on 23 December 2014. The 2014 Act consolidates several separate pieces of legislation introduced since the Companies Act 1963, the former cornerstone of Irish company law. It also introduced two new company models – see page 2. The majority of the provisions of the new Act came into force on 1 June 2015.

The Companies Act 2014 contains 25 separate parts, 1,500 sections and 17 schedules, making it the largest and one of the most complex pieces of legislation ever introduced in Ireland.

Types of businesses

The five most common types of business entities operating in Ireland are:

1. Sole trader – a person who works for themselves, for example, painters, builders, hairdressers. There is no company involved in a sole trader operation.
2. Partnership – a group of people working together in the same business, each owning a piece of that business. Partnerships are generally used by groups of professionals, for example, solicitors, vets, doctors. Partnerships are also used by individuals who make investments together. A partnership is not a separate legal entity and is governed in statute by the Partnership Act 1890 and by any partnership agreement which defines the specific terms between the parties. Two or more companies can also form a partnership or they may choose to incorporate a new company for the joint venture.

3. Private company limited by shares – this type of business provides its owners, also known as “members” or “shareholders”, with “limited liability”. This means that the company is treated as a separate entity in law from the owners or directors of the company. Limited liability means that the assets, debts and liabilities of the company belong to the company only and not to the members, except in exceptional circumstances. Limited liability allows people to start a company without taking on all of the risks of the company personally. This type of company accounted for almost 90% of the companies incorporated in Ireland in 2014. The Companies Act 2014 focuses on this type of company in particular – see ‘New company models introduced by the 2014 Act’ below.
4. Public company limited by shares (PLC) – this type of business entity is often used by large multi-national corporations. The shares of these companies can be bought by members of the public through a stock exchange. As the shares are publicly available the companies are not “private”.
5. Company limited by guarantee (CLG) – this type of entity is often used for charities or clubs. These companies benefit from limited liability but instead of having shares, the company is owned by its members who will guarantee the liabilities of the company up to a nominal value, usually 1 euro each.

New company models introduced by the 2014 Act

The Companies Act 2014 introduced two new types of private company limited by shares - an LTD (private company limited by shares) and a DAC (designated activity company).

Private company limited by shares

An existing private company is defined by the Companies Act 2014 as a private company limited by shares incorporated under any former enactment relating to companies. All companies in existence before the commencement of the Companies Act 2014 were created with two documents, the memorandum of association and the articles of association.

The memorandum of association contained the objects clause of the company which listed the activities the company was allowed to engage in, for example, to lend money, or to carry out the business of a wholesaler. The objects clause would prevent a company from doing something it was not authorised to do. If a company acted outside of its objects clause, it was said to have acted *ultra vires* (beyond the powers).

The articles of association contain the broad rules by which a company may conduct its internal business such as appointing directors, allotting shares to new or existing owners and holding AGMs.

Under the Companies Act 2014, these types of companies will be known as LTDs and DACs. LTDs will have a single document constitution instead of the memorandum and articles of association. DACs will also have a single document constitution but it will include an objects clause.

Transitioning from a pre-existing private limited company to an LTD or DAC

The Companies Act 2014 was commenced with a transition period of 18 months which began on 1 June 2015 and ends on 30 November 2016. During the transition period all pre-existing private companies limited by shares must convert to either an LTD or a DAC. New companies created (incorporated) since 1 June 2015 will automatically be created in compliance with the 2014 Act.

On 1 June 2015, every existing private company limited by shares (EPC) automatically became a DAC limited by shares (as opposed to a DAC limited by guarantee). As every EPC was subject to the objects clause in their memorandum of association, the DAC limited by shares is the only new model of company available to such companies where the objects clause would remain enforceable.

During the transition period all private companies limited by shares have the option to either continue as a DAC or to convert to an LTD. At the end of the transition period if a company has not taken any steps to convert to one of the new models, it will automatically become an LTD. If a company is required by statute to have an objects clause it will continue as a DAC. Where a company is automatically designated an LTD it shall be deemed to have adopted the template constitution provided by the Companies Act 2014. This situation may be unsuitable for many companies and so it would be preferable for any such company to decide for themselves whether they wish to be a DAC or an LTD and what the contents of their constitution should be.

Conversion to an LTD

The Companies Act 2014 provides a template constitution for LTDs including articles which all companies can use and adapt to their specific circumstances. Where a company's existing articles of association include all or any of the regulations contained in the old articles of association as prescribed under the Companies Act 1963 (which almost every company will have adopted) those regulations will continue to apply despite the 1963 Act being repealed. This is unless they are inconsistent with the mandatory provisions of the Companies Act 2014.

An existing company (EPC) may, by special resolution, adopt a new constitution under the Companies Act 2014. The special resolution must be passed in accordance with the company's existing memorandum and articles. It can be passed at an extraordinary general meeting of the company or, if authorised by the existing articles, it can be done by a written resolution.

The directors may convert the company to an LTD provided it is not required to become a DAC and provided that the members have not already adopted a constitution. The directors must prepare a constitution in the form prescribed by the 2014 Act and deliver a copy to each member and to the Companies Registration Office for registration. This constitution must consist solely of the provisions of the existing articles of association other than the objects clause or any provisions which provide for or prohibit the alteration of all or any of the provisions of the memorandum and articles of association.

Conversion to a DAC

An EPC may re-register as a DAC by passing an ordinary resolution at least three months before the expiry of the transition period. Alternatively a notice in writing may be served on the company by the member(s) holding more than a quarter of the voting rights of the company at least three months before the expiry of the transition period.

If, before the expiry of the transition period, a company has not re-registered as a DAC, the holders of more than 15% of the nominal value of the company, or one or more creditors of the company who hold not less than 15% of the company's debts (which entitles the creditor(s) to object to alterations in its objects), may apply to the court for an order directing that the company re-registers as a DAC.

Other issues to consider when converting to an LTD or DAC

EPCs were required to have at least two directors. This requirement saw a lot of small, family-owned companies having a husband and wife appointed as directors where only one person actually acted as a director. This practice was unsatisfactory as the person who was director in name only was still subject to all the obligations and duties of a director. Under the Companies Act 2014, an LTD may now operate with only one director. However, every company is still required to have a company secretary and the company secretary cannot also be the sole director.

The 2014 Act allows LTDs to dispense with the need to have a formal annual general meeting (AGM) where the board would have to meet and make the necessary annual decisions about the company. AGM decisions can now be made by way of written resolution.

Main differences between the new LTD and DAC models:

Company limited by shares (LTD)	**Designated activity company (DAC)**
Company name must end with Limited or LTD or the Irish equivalent	Company name must end with Designated Activity Company or DAC or the Irish equivalent
Minimum of one director, separate from the company secretary	Minimum of two directors
No objects clause – full and unlimited capacity or ability to act as for an individual	Capacity limited to the objects clause in the company constitution
Company secretary cannot be the sole director	Company secretary may be one of the directors
May dispense with holding the AGM in favour of written resolution	Must hold the AGM
No requirement to have an authorised share capital	Must have an authorised share capital
Cannot be a credit institution or an insurance undertaking	Can be a credit institution or an insurance undertaking

Directors' duties under the Companies Act 2014

A company director is the person appointed, usually by the members of the company, to manage the company on their behalf. The directors of a company are collectively called the board. In larger companies the directors may not be involved in the day-to-day running of the company's business, this may be the remit of the chief executive or general management. However, in smaller or family-owned businesses the directors often also work as employees of the company attending to many of the day-to-day matters. These companies are the most common in Ireland.

Before the Companies Act 2014, the duties and liabilities of directors were based on the rules established by common law (case precedents) together with the provisions of the company's articles of association. The Companies Act 2014 sets out the statutory duties and obligations of company directors for the first time in Irish legislation. It should now be clear not only to directors themselves but to shareholders, customers, investors and the general public, what is expected of directors and what the consequences are for directors who fail to act appropriately.

Directors' duties are listed under the new Act and include that:

- All company directors must be over 18 years old
- Directors are required to act honestly, responsibly and in good faith, in line with the company's constitution and in the company's best interests
- Directors must not use the company's property, information or opportunities for their own personal benefit unless this is disclosed beforehand and approved at a general meeting or the company's constitution permits it and where to do so will not restrict the director's independent judgment in respect of company-related decisions
- Directors must avoid conflicts of interest between the company's interests and those of the director personally
- Directors must exercise the same due skill, care and diligence as a reasonable person would in the same circumstances if they had both the knowledge and experience of the director or which could reasonably be expected of a person in the same position
- Directors must have due regard for the interests of the company members and employees
- Directors must ensure their company complies with the Companies Act 2014
- Directors must sign a statement stating that they acknowledge that as a director, they have "legal duties and obligations imposed by the Companies Act, other statutes and at common law"
- Directors have statutory duties relating to the company's responsibilities. These include keeping adequate accounting records, preparing annual financial statements, maintaining registers and certain company administration and making certain filings with the Companies Registration Office
- Directors also have very strict duties and obligations if a company becomes insolvent, including being held personally liable for any debts of the company incurred due to trading while the company was insolvent

There are a variety of consequences for a director where they have failed to carry out their duties satisfactorily including:

- A director may be removed from their position by ordinary resolution of the members, unless the constitution provides that the director is a "director for life", in which case there is a more extensive procedure which must be gone through
- Where the director of an insolvent company fails to satisfy the Director of Corporate Enforcement that they acted honestly and responsibly, they may be restricted from acting as a director for up to five years, or in more serious cases, they may be disqualified by the courts from acting as an officer of a company for a period the court deems fit
- Directors may be found guilty of certain criminal offences both on summary conviction and on indictment. Such convictions may also carry automatic orders of restriction or disqualification.

Company law enforcement under the Companies Act 2014

Companies Registration Office

The Companies Registration Office (CRO) is the central repository of public statutory information on Irish companies and business names. Every company incorporated in Ireland (including those incorporated elsewhere but operating in Ireland under a licence) are required to register with the CRO.

The office is responsible for the following functions:

- Registration of newly incorporated companies and new business names

- Receipt and registration of post-incorporation documents, for example, annual returns, amendments to the company constitution, changes to the board of directors
- Enforcement of the Companies Act 2014 in relation to the filing obligations of companies
- To make information available to the public

The CRO has a significant role in the enforcement of the provisions of the Companies Act 2014. The measures open to the CRO where a company fails to meet its filing obligations include prosecution of the company directors or striking the company off the register. In 2014, 6,840 companies were struck off the register for their failure to file annual returns.

Office of the Director of Corporate Enforcement

The Office of the Director of Corporate Enforcement (ODCE) is responsible for ensuring company law is being observed.

The specific functions of the ODCE include:

- Enforcing and encouraging compliance with the Companies Acts
- Investigating suspected company law offences
- Supervising receivers and liquidators as necessary

The ODCE may do anything necessary or expedient in carrying out these functions.

The ODCE enforcement unit is responsible for receiving and responding to allegations of company law breaches. The office will investigate and assess the severity of the breach. It has a range of potential responses to a breach including rectifying it through litigation or referring more serious matters to the Director of Public Prosecutions for criminal prosecution. In 2014, the ODCE secured the disqualification of 22 directors together with the restriction of 177 directors. The ODCE also secured 19 criminal convictions in the District Court for breaches of the Companies Acts.

Insolvency

The methods and procedures for dealing with insolvent companies have been altered by the Companies Act 2014. Insolvent companies are companies that are unable to pay their debts as they fall due.

The most common insolvency processes are:

- Receivership
- Examinership
- Members' voluntary winding up
- Creditors' voluntary winding up
- Compulsory liquidation

The end of a company under the Companies Act 2014

A company may cease to operate for a variety of reasons. A company can be terminated either through liquidation or through strike off.

Receivership

A receiver is appointed by a creditor over an asset of a company. Once appointed the receiver is then entitled to deal with the property however they think fit in order to achieve the best return for the creditor. An example of this is where a company borrows money from a bank (the creditor) and subsequently fails to repay that borrowing (a debt). The contract between the bank and the company will include a charge or debenture (written loan agreement). This debenture will contain a condition that the creditor is entitled to appoint a receiver over the property (the subject of the borrowing) if the loan repayments are not met.

Once a receiver has been appointed over the property of a company, the following must be done:

- All invoices and correspondence from the company and its website must state that a receiver has been appointed – the company name will have the suffix "in receivership"
- Where a receiver of the whole or most of the property of the company is appointed under a floating charge (a charge over all or most assets of the company) the company must provide a statement of the assets and liabilities of the company to the receiver
- The receiver must file statements with the CRO detailing the assets and liabilities of the company and their dealings with same including any proceeds of sale, and expenses incurred etc
- Where the CRO becomes aware of the appointment of a receiver, the CRO will inform the Director of Corporate Enforcement
- When the receiver ceases to act as receiver of the property they shall file a statement together with an opinion as to whether or not the company is solvent. A copy of this opinion will be forwarded to the Director of Corporate Enforcement.

The powers and duties of the receiver include:

- To take possession and control of a property
- To lease or sell a property
- To repair a property, insure it, borrow money against it
- To engage or discharge employees on behalf of the company
- To obtain the best price possible in the sale of any company property
- To report any officer of the company that appears to the receiver to be guilty of an offence in relation to the company to the Director of Corporate Enforcement

Examinership

Examinership is a procedure for the rescue of companies in financial difficulties. An examiner is appointed where a company is or is likely to become insolvent in the near future. A petition is made to the court to grant a period of protection (usually 70 days) for the company to restructure its debts. During this period no liquidation or receivership can take place.

The court will only grant the application for examinership if:

- There is a reasonable prospect that the company will survive as a going concern after the protection period
- A petition is accompanied by an independent expert's report, usually the company auditor stating the company can survive
- A receiver has not been appointed over the assets of the company for a continuous period of three months or more
- Each creditor of the company who wishes to be heard by the court on the matter has been heard before an order is made
- The court is satisfied that the petitioner or the independent expert has acted with the utmost good faith

The examiner has a large number of powers including:

- To convene, set the agenda for and preside at meetings of the board of directors and general meetings of the company
- To take whatever steps are necessary to halt or prevent any sale or contract regarding the company's debts and assets
- To receive all assistance from the officers of the company in connection with the examiner's functions and to examine such officers under oath or otherwise in respect of the company's affairs

A period of examinership shall end where a "compromise" or "scheme of arrangement" has come into effect. This is an agreement between the company and its creditors as to how or if the company's debts will be discharged.

Members' voluntary winding up

Winding up is the procedure used where a company will cease to exist. A members' voluntary winding up is only available to companies which are solvent, that is, where the debts and liabilities are not forcing the company to close.

This procedure will generally be carried out as follows under the Companies Act 2014:

a) Members will carry out the new "Summary Approval Procedure" where they pass a resolution stating that the company will be able to pay all its debts and liabilities
b) Within 14 days of passing the resolution, the company will give notice of the resolution by advertisement in *Iris Oifigiúil*. Failure to do this is an offence.
c) Where a creditor is concerned that a debt due from the company will not be paid before the proposed winding up, then the creditor may apply to the court to have the winding up processed on the basis of a creditor's voluntary winding up instead
d) The company shall appoint a liquidator for the purposes of winding up the affairs of the company and distributing the assets of the company
e) If the liquidator thinks that the company will not be able to pay its debts and liabilities in full within the notice period they shall call a creditors' meeting and make a statement about the affairs of the company. From then on the winding up will be treated as a creditors' voluntary winding up.

Creditors' voluntary winding up

This is the process of winding up used where the company is insolvent or where a members' voluntary winding up is converted to a creditors' voluntary winding up.

This procedure will generally be carried out as follows under the Companies Act 2014:

a) The process usually begins with a resolution of the members at a general meeting of the company that it cannot continue in business due to its outstanding liabilities
b) A creditors' meeting is arranged where a full statement of the company affairs and a full list of the creditors and their claims are laid out

c) The creditors will have the option of appointing a liquidator who will carry out the winding up to completion

Compulsory liquidation

The courts also have the power to wind up a company. A petition to wind up a company is brought by the company's creditors or its members. Regardless of who the petitioner is, the court will have regard to the wishes of the company's creditors or contributors. If the court sees fit, it may direct that such interested parties conduct a meeting of their own in an attempt to reach a consensus which can be presented to the court before any order is finalised. The court may then appoint a liquidator to the company where there are significant assets and liabilities to deal with.

A company may also be wound up by the court in circumstances where:

- The company has resolved to do so by special resolution
- The company does not commence business within 12 months of incorporation or suspends its business for a year
- The company is without a single member
- The company is unable to pay its debts
- The court believes it is just and equitable to have the company wound up
- The company's affairs or the directors' powers are being exercised in a manner which is oppressive to any member and it is just and equitable to wind up the company
- On petition of a director to the court that it is in the public interest to wind up the company

The role of the liquidator

Usually a liquidator is appointed to conduct an orderly winding up of a company. This involves the realisation and distribution of company assets so the company's debts are met as appropriately as possible or if the company is solvent, that the debts are cleared and the profits distributed to the members accordingly.

Liquidators' functions and powers include:

- To take custody of the company seal, statutory books and registers and all property which the company owns or is entitled
- To invalidate a floating charge created over company assets within 12 months prior to the commencement of the winding up unless it is proved the company was solvent immediately after the creation of the charge
- To invalidate any act done within a period of six months prior to the commencement of the winding up which would prefer one creditor over other creditors
- To invalidate any conveyance, mortgage, or payment, for example, made in favour of someone connected with a director of the company in the two-year period prior to the commencement of the winding up

Any right of a creditor to collection of company property on foot of a judgment shall not be enforceable after the company commences winding up. The court has the power to order the return of company property where the company is now in liquidation and the court is satisfied that the effect of the transfer was to perpetrate a fraud on the company, its creditors or members.

The debts of an insolvent company on winding up are required to be paid in a particular order of preference as laid out in Section 621 of the Companies Act 2014.

Strike off

A company may be struck off the register of companies either voluntarily or involuntarily by the Companies Registration Office (CRO). The effect of striking off a company is that the company no longer benefits from the protection of limited liability and the assets of the company become the ownership of the State. A company or a creditor of a company that has been struck off can apply to have the company put back on the register if required.

The most common reasons the CRO will strike off a company are:

- The company has failed to make an annual return
- The Revenue Commissioners have requested a strike off based on a company breaching certain tax requirements
- There are no persons recorded with the CRO as being directors of the company

A company may be voluntarily struck off by its own members where the following conditions are met:

- The Registrar has reasonable cause to believe the company has ceased trading or has never traded
- The company has passed a special resolution within the last three months such that it wishes to be struck off and that, while waiting for the CRO's decision to allow the strike off of the company, it will not trade or carry on any business or incur any liabilities

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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- The company's filings including annual returns are up to date
- The company certifies its assets and liabilities are less than €150 and it is not a party to any ongoing or pending litigation
- The consent of the Revenue Commissioners has been obtained
- The company has advertised its intention to be struck off in a national newspaper within 30 days of the application being made

Consequences of strike off

If a company is struck off, the liability of the officers and members will continue as if the company had not been dissolved. The courts still have the power to wind up a company that has been struck off.

The Director of Corporate Enforcement may request the directors of a struck off company to provide a statement of affairs. This is a sworn document that contains the details of all assets and creditors of the company.

A company may be restored to the register on application and subject to certain requirements.

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