

Directors and Officers Liability in Ireland: Ireland's New Companies Act

Full implementation is set to begin soon for the Irish Companies Act 2014, landmark legislation that potentially impacts every director and officer of Irish incorporated companies¹.

As the transition stages of the Act end, businesses should review areas where action may be necessary, including around new duties and requirements. Designed to create a modern company law regime, the Act is clear evidence of the Irish government's continued commitment to making Ireland a leading location to do business.

The Act came into force in the Republic of Ireland on June 1, 2015, replacing all previous Irish Companies Acts and consolidating the legislation into a single statute.

To a large extent the act restates previous legislation, but it does bring in some reforming measures in the areas of governance, legal capacity, and mergers.



ARE YOU A LIMITED OR DESIGNATED ACTIVITY COMPANY?

One starting point for review involves the key provisions of the Act related to the registration of companies and governance issues as they may apply to Irish subsidiaries of overseas companies.

The Act provides that during a transition period that started on June 1, 2015, all private limited companies must choose to convert to a limited (Ltd.) company or a designated activity company (DAC) before August 31, 2016. Legal advice should be sought as to which classification of company is most suitable depending on the individual circumstances, but the following could be relevant, particularly as the definition of a credit institution is currently very broad under the Act. If no action is taken by December 1, 2016, a current Ltd. company will convert to the new Ltd. company automatically. This may not be the best outcome for every company.

LTD COMPANY

- May have only one director.
- Is not required to hold an annual general meeting (AGM).
- Is able to have a one-document constitution replacing the memorandum and articles of association, but cannot carry out the activity of a credit institution or insurance undertaking.
- Cannot offer shares or securities to the public and cannot list securities.

DAC

- Must have two directors or more.
- Must have an AGM if more than one shareholder.
- Must have a constitution including a memorandum and articles of association. Must include a stated objects clause that sets out the activities for which the company was incorporated.
- Can carry out the activity of a credit institution and insurance undertaking.
- Can list securities.

To re-register as a Ltd. company, there must be a special resolution of shareholders and a revised constitution (no memorandum) completed before November 30, 2016.

DACs must re-register before August 31, 2016.

DIRECTORS AND OFFICERS DUTIES AND LIABILITIES

Today's world-class directors and officers know that their personal assets may be at risk due to increased regulatory scrutiny, internal or official investigations, and stakeholder empowerment. Freeing them to make decisions, inspire others, and act in the best interest of the firm, is critical.

The Act modernizes the duties of corporate directors and corporate governance. For the first time, the Act sets out a non-exhaustive list of eight principal fiduciary duties of the directors of an Irish company.² It also imposes on all directors an express duty to ensure that the company secretary has the necessary skills to competently discharge his or her duties, or has the necessary resources to do so.³

Part 14 of the Act codifies the law relating to compliance and enforcement of company law. It is largely a restatement of the old duties *with a few important extras*. Apart from codifying the duties, company law offences are now classified into four categories according to their gravity. The penalties that can be imposed are set out in the act and range from the most serious – category one – where 10 years imprisonment and/or a fine of €500,000 can be imposed. The lowest level – category four – can impose a class A fine. Part 14 adds the duty of a director to cooperate as fully as possible with the liquidator in a wind-up situation as far as could reasonably be expected in relation to the conduct of the wind-up. It is no longer a sufficient defense that the director acted reasonably and responsibly in his dealings with the company alone in these circumstances.

Chapter 5 of the Act introduces a new feature in that restrictions or disqualification are permitted to be made by way of an undertakings procedure. The Office of the Director of Corporate Enforcement (ODCE) can send a notice to the company officer in question requesting that they take the restriction/disqualification as an undertaking without recourse to the court. The impact of this procedure has yet to be assessed.

Also new is the requirement that directors of public limited companies and of certain large private limited companies (those with assets of €12.5 million or more and turnover or sales of at least €25 million), now need to file an annual compliance statement.

The directors' compliance statement requires directors to acknowledge each year that they are responsible for securing material compliance with "relevant obligations" under company law and tax law. "Relevant obligations" refers to something that may give more than just a summary conviction or give rise to a small fine — this potentially includes a broad range of activities, such as a serious market abuse or prospectus offense (for publicly listed companies) and any obligation that concerns "tax law."⁴

CORPORATE INDEMNIFICATION: STILL ELUSIVE

The limited ability of a company to indemnify its directors and officers remains unchanged. Section 235 of the new act replaces section 200 of the old acts and still voids any provision exempting officers of the company from liability. It is not a complete bar to indemnity, however, as reimbursement may be allowed once a judgement in the officers' favor is given. The courts may be allowed to grant relief from the claim under sections 233 and 234 of the 2014 Act.

In these sections, the court has the power to grant relief where it believes that — while the officer concerned is or may be liable of negligence, default, breach of duty, or breach of trust (the "wrong concerned") — the officer acted honestly and reasonably and that, having regard to all the circumstances of the case, he or she ought fairly to be excused for the wrong concerned. The court then has the power to relieve the officer concerned, either wholly or partly, from his or her liability in respect of the wrong concerned on such terms as the court may think fit.⁵

Otherwise, any provisions purporting to hold an officer harmless or indemnify an officer from liability negligence, default, breach of duty, or breach of trust of which he or

she may be guilty as respects the company, is void.⁶ Other than situations where a court orders indemnification, companies may only indemnify officers where there is a judgment in their favor or they are acquitted of liability.⁷ It follows from this that the officer concerned must have either the personal assets to conduct their own defense until proven not guilty or the funds to bring in court for an application for relief under sections 233 or 234.

D&O INSURANCE

The good news is that the act specifically states that a company may expressly purchase and maintain for any of its officers insurance in respect of alleged negligence, default, breach of duty, or breach of trust.⁸ Any claims will initially be brought as side-A claims and only become side-B claims once an acquittal has been secured.

While the terms and conditions of D&O insurance includes limitations and exclusions, it is also subject to considerable negotiation and can be a "bespoke" executive protection.

As Ireland's insurance regulations prohibit non-admitted insurance (insurance from companies not registered in Ireland), most global companies with Irish subsidiaries purchase D&O cover in Ireland or the European Union (on a *passporting* or freedom of services basis).

CONCLUSION

The areas noted above are the main ones in which a transition must take place under the Act. However, companies should be aware that the Act requires amendments in many other areas to reflect their revised status. For example, public limited companies (PLCs) will be unchanged, but unlimited companies (UCs) and companies limited by guarantee (CLGs) will also need to change their company paper, seals, and so on.

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ENDNOTES

- 1 Passed into law on December 23, 2014 and commencing in June 2015, the 1170 page Act reforms the previous Irish Company Law: <http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0038.pdf>
- 2 Part 5. Duties of Directors and Other Officers, Chapter 2. General duties of directors and secretaries and liability of them and other officers, §228(1)
- 3 §226(2)
- 4 §225
- 5 §233
- 6 §235(1)
- 7 §235(3)
- 8 §235(4) and under subsection 7, any directors and officers liability insurance purchased or maintained before 6 April 2004 is as valid and effective as it would have been if this section had been in operation when that insurance was purchased or maintained.

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