



COMPANY LAW UPDATE

The Companies Act 2014, as commenced on 1 June 2015

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INTRODUCTION

Years in development, the Companies Act 2014 commenced with limited exceptions on 1 June 2015. Consolidating and replacing the many Companies Acts since 1963, the new Act also modernises and simplifies company law, especially with regard to companies limited by shares. While red tape for SME companies is reduced, there are new obligations on directors to ensure they have the appropriate authority to carry out transactions and to document any changes in writing, particularly loans to or from directors and connected persons.

COMPANY TYPES

In the Companies Act 2014, the different company types include:

- company limited by shares (LTD);

- designated activity company (DAC);
- public limited company (PLC);
- company limited by guarantee (CLG); and
- unlimited companies (UC), of which there are three kinds/options: private unlimited company having a share capital (ULC); public unlimited company having a share capital (PUC); and public unlimited company not having a share capital (PULC).

While Parts 1 to 14 of the Act focus on the most common company type, company limited by shares (LTD), the designated activity company (DAC) is an alternative private company limited by shares. Unlike an LTD company, a DAC is required to have an objects clause.

COMPARISON OF LTDs AND DACs

COMPANY LIMITED BY SHARES ('LTD')	DESIGNATED ACTIVITY COMPANY ('DAC')
Must end in the suffix 'Limited' or 'LTD', or Irish equivalent	Generally, ends in the suffix 'Designated Activity Company' or 'DAC', or Irish equivalent
Minimum of 1 director	Minimum of 2 directors
Sole director cannot be the secretary	Secretary may be one of the directors
1 – 149 shareholders	1 – 149 shareholders
No objects clause – full and unlimited capacity	Capacity limited to the objects clause in the Memorandum
Single-document constitution	Two-document constitution made up of a Memorandum & Articles of Association
May dispense with physical AGM	Cannot dispense with holding physical AGM unless it is a single-member company
No requirement for an authorised share capital	Must have an authorised share capital
Cannot list securities (debt or equity)	Can list securities (debt and equity)
Cannot be a credit institution or an insurance undertaking	Can be a credit institution or an insurance undertaking

QUESTIONS TO ASK BEFORE CHOOSING A COMPANY TYPE

Before deciding on whether to convert your company type or not, or what company type is appropriate, you should consider the following questions:

- Do you want a sole director company?
- Do you want the company to have an objects clause?
- Is the company established as a joint venture?
- Does the company have different share classes with different rights?
- Does the company have specific regulations in its Articles of Association?
- Is the company governed by a shareholders' agreement?
- Does the company have shareholders that are not directors?
- Does the company have Enterprise Ireland/Local Enterprise Office as shareholders?
- Does the company have BES or EIIS investors?
- Is the company regulated by the Central Bank or subject to other regulation?
- Does the company have bank funding covenants?

If you answered **Yes** to any of the above, during the 'transition period' you should make contact with shareholders and interested parties and consider adopting a new constitution and converting the company into either an LTD or DAC.

CONVERSION OPTIONS

- The transition period commenced on 1 June 2015 and lasts 18 months to 30 November 2016.
- For the duration of the transition period all existing private companies (EPCs) will operate under the rules applying to DACs unless they have converted into an LTD or DAC.
- EPCs do not automatically become LTDs on 1 June 2015 – this will happen on 30 November 2016.
- EPCs cannot avail of the features of the LTD without having been first converted into an LTD.

So, in the transition period, an EPC may choose one of the following conversion options:

1. Convert into an LTD

The members may pass a special resolution converting the company into an LTD and adopt a new constitution and file an N1 Form with the CRO.

2. Convert into a DAC

The members may pass an ordinary resolution converting the company into a DAC and adopt a new constitution and file a N2 Form with the CRO.

3. Do nothing and automatically become an LTD on expiry of the transition period

If the directors and members decide not to convert the company in the transition period, and the company does not have to be a DAC, then it will

automatically become an LTD on 1 December 2016. The existing Articles of Association will continue to exist,

though they may be in conflict with some mandatory provisions in the Companies Act 2014.

OTHER COMPANY TYPES

Existing Company	New Company Type	Optional Actions
Public Limited Company	Automatically becomes a PLC	May amend its constitution to reflect the new provisions in the Act
Company Limited by Guarantee without a Share Capital	Automatically becomes a company limited by guarantee (CLG)	In the transition period may change its name to include the suffix 'Company Limited by Guarantee' or 'CLG'. May amend its constitution to reflect the new provisions in the Act.
Unlimited Company	Automatically becomes an unlimited company (UC)	In the transition period may change its name to include the suffix 'Unlimited Company' or 'UC'. May amend its constitution to reflect the new provisions in the Act.

AUDIT EXEMPTION AND FINANCIAL STATEMENTS

Under the new Act, audit exemption is now available to small companies, parents and subsidiaries in small groups, companies limited by guarantee, certain unlimited companies and dormant subsidiaries. The qualifying criteria

for a small company are satisfied by a company in relation to a financial year in which it fulfils 2 or more of the following requirements. A company loses 'small' status if it does not satisfy these criteria for 2 consecutive years.

	Small Company Thresholds
Turnover	€8.8 million
Balance Sheet	€4.4 million
Average No. Employees	50

Some key changes in financial statements, the Directors' Report and Auditors' Report include:

- The first financial year may only last for 18 months. Subsequent financial years must be no longer than 12 months and a company may only change the financial year end once every five years.
- Directors must provide a statement in the Directors' Report that there is no relevant audit information of which the company's auditors are unaware and disclose this every year.
- The requirement to hold an extraordinary general meeting to deal with a Section 40 serious loss of capital is no longer required for LTDs and DACs.
- There are new rules regarding revision of defective financial statements and how these are filed with the CRO.
- All offences under the Companies Act have been categorized and category 1 and 2 offences must be reported by the auditors to the ODCE.
- A new procedure is available whereby directors can seek an extension from the District Court for filing the annual return and financial statements while retaining audit exemption and avoiding late filing penalties.
- For all PLCs and companies with a turnover exceeding €25 million and a balance sheet total exceeding €12.5 million, the directors must include in the Directors' Report a Directors' Compliance Statement acknowledging

their responsibility for securing compliance of the company with its obligations (including certain company law requirements and tax law).

- Audit committees are required for large companies and groups with turnovers exceeding €50 million and balance sheet totals exceeding €25 million.

CORPORATE GOVERNANCE

An LTD may dispense with holding a physical AGM by passing a unanimous written resolution every year. Majority written resolutions have been introduced and may be passed as ordinary or special resolutions and will take effect seven and 21 days (respectively) after the last member has signed the resolution, unlike unanimous written resolutions which take immediate effect.

DIRECTORS' DUTIES AND LOAN RULES

The Act codifies the duties of directors for the first time, setting out their fiduciary duties and what is expected of directors. Directors also have various other statutory duties under the Act. It is the duty of each director of a company to ensure that the Act is complied with by the company.

New evidential provisions are required for loans given to or received from directors or connected persons. If the terms of the loans are not approved in writing then they may be repayable on demand and be subject to interest at the appropriate rate. If the terms of a loan given to a company are not approved in writing then the loan is effectively a gift or capital contribution.

THE COMPANY SECRETARY

Every type of company is required to have a company secretary. The secretary may be one of the directors; however, if the company has only one director then that company must have a separate secretary.

It is now the directors' duty to ensure that the company secretary has the skills or resources necessary to discharge his or her statutory and other duties. These statutory duties include maintenance of the statutory register and minute book, and countersigning the annual return.

SUMMARY APPROVALS PROCEDURE

A new Summary Approvals Procedure (SAP) establishes a procedure for authorising companies to engage in seven different restricted activities:

- financial assistance for acquisition of own shares;
- deduction of company capital;
- variation of capital in reorganisations;
- treatment of pre-acquisition profits or losses;
- loans, etc., to directors and others;
- mergers; and
- members' voluntary winding up.

The SAP streamlines the procedure to approve the above activities. The procedure includes the directors making a declaration of solvency setting out the terms of the transaction and that the company can pay its debts within 12 months, as well as a special resolution. An independent person's report is required for four of the seven transactions. If the opinion of the directors in the declaration is proven to

be false, the court may declare the directors personally responsible without limitation for all liabilities and debts of the company.

STRIKE OFF AND WINDING UP

Liquidators must be qualified and the Act sets out the qualification provisions. In order to petition the High Court to have a company wound up, you must have an undisputed debt of at least €10,000.

Voluntary strike off is given statutory recognition and members must now pass a special resolution to apply to have the company voluntarily struck off the Register of Companies. The Act also establishes the grounds to strike off a company, which includes a provision that where a company is wound up and the Registrar has reasonable cause to believe that a liquidator is not acting, the company will be struck off the Register. The ODCE has the power to require directors of the company being struck off the Register to produce a statement of affairs.

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