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COMPANIES BILL 2012 - THE CHANGING FACE OF COMPANY LAW

INTRODUCTION

With the enactment of the Companies Bill 2012 (the **Bill**) drawing ever closer, it is important that legal advisers, directors, company secretaries and other advisers are aware of the changes which the Bill will introduce and its implications for corporate life. Over 85% of Irish companies currently registered with the Companies Registration Office (the **CRO**) are private companies limited by shares (**Existing Private Companies**) – the Bill introduces the most significant changes for these companies including the introduction of new company forms to replace all Existing Private Companies. This note provides an overview of some of the provisions of the Bill in relation to the new company forms, the transition to those new company forms and the key changes in the areas of corporate governance and directors' duties.

Effect & Aims

When enacted, the new legislation will repeal substantially all of the existing Irish company law acts and statutory instruments[1] (subject to a small number of exceptions[2]) replacing the existing statutory regime with one self-contained, consolidated piece of legislation. The new legislation will be the most significant development in Irish company law since the introduction of the Companies Act 1963.

The Bill is designed to consolidate, modernise and reform existing Irish company law and introduces some radical changes to the current legislation. The aims of the new legislation include simplifying and clarifying company law, making it more accessible, and reducing the administrative burden particularly for small private companies.

Timeframe for Enactment

The Bill has now passed through the Report Stage in the Dáil as of April and is likely to be before the Seanad in the coming weeks. It is anticipated that the Bill will be enacted by the end of this year – some reports suggest that this could happen as early as the autumn with a commencement order issuing anywhere between 3 to 6 months after enactment.

Don't Panic!

While the Bill will be the largest single piece of legislation in the history of the State to be enacted, it is not all new. The Bill does include a number of new features including some key innovations in the area of corporate governance and in respect of transactional arrangements however many of the provisions in our current Companies Acts 1963 to 2013 are directly (or almost directly) transposed into the Bill.

Transition Period

There will be a transition period of 18 months from the date of commencement of the Bill (the **Transition Period**) during which Existing Private Companies can transition to the new company forms. This 18 month period can be extended to up to 30 months by the Minister.

NEW COMPANY FORMS

In addition to consolidating existing Irish company law, all Existing Private Companies will be required to restructure their form and constitution under the new regime. The new legislation introduces two new company forms which will replace all Existing Private Companies, being:-

(i) a private company limited by shares (**CLS**); and

(ii) a designated activity company (**DAC**).

The Bill requires Existing Private Companies to re-register as either a CLS or a DAC. Certain Existing Private Companies will be required to re-register as a DAC while others will have the option to convert into either a CLS or a DAC[3].

[1] There are currently 25 applicable company law Acts and Statutory Instruments.

[2] Exceptions include the following: the Prospectus (Directive 2003/71/EC) Regulations 2005, the Market Abuse (Directive 2003/6/EC) Regulations 2005 and the Transparency (Directive 2004/109/EC) Regulations 2007

[3] This decision will have implications in relation to the nature and scope of the company's constitution and the statutory regulations that will apply to the company under the new legislation.

The CLS will provide the most flexible form of corporate entity going forward and most Existing Private Companies will want to avail of the new CLS entity and the advantages associated with being a CLS.

Introduction of CLS Model as Default Company Type

While the most common form of company currently registered in Ireland is the private company limited by shares, Irish company law has to date operated on the basis that the public company model is the default company type with private companies being a variation on the public company model. By way of a significant change to the existing company law regime and, in recognition of the fact that the private company limited by shares represents the most common form of legal entity in practice, under the new legislation it is proposed that the CLS model will become the new default company type.

STRUCTURE

The Bill is divided into 25 parts as follows:-

- Parts 1 to 15 cover the new CLS model; and
- Parts 16 to 25 cover all other types of companies, these include:-
  - Part 16: DACs;
  - Part 17: Public limited companies (**PLC**);
  - Part 18: Guarantee companies (**CLG**);
  - Part 19: Unlimited companies which will include: a private unlimited company (**ULC**); public unlimited company (**PUC**); and public unlimited company with no share capital (**PULC**).

KEY FEATURES OF THE CLS

The new CLS model will have the following key features:-

- its name will end with "Limited" or other permitted variations;
- it will have a short-form, one document constitution in place of the current memorandum and articles of association;
- it will have the same contractual capacity as a natural person (that is, full and unlimited contractual capacity) and therefore will not be subject to the doctrine of ultra vires;
- it can have a single director and it must also have a company secretary – where there is only one director appointed that director cannot also act as company secretary;
- it will not be required to have an authorised share capital;
- it will be possible for both a single and a multi-member CLS to dispense with the requirement to hold a physical annual general meeting;
- directors of a CLS exceeding certain financial thresholds will be required to make annual compliance statements;
- directors of a CLS will be required to include in their annual directors' report a relevant audit information statement; and
- there will be a new summary approval procedure whereby certain restricted activities can be carried out when validated.

KEY FEATURES OF THE DAC

The DAC model will be similar to Existing Private Companies having the following key features:-

- its name will include the words "designated activity company" or "DAC" subject to certain exemptions[4];
- it will be required to have a two document constitution – that is, equivalent to an existing memorandum and articles of association but which will be referred to as a constitution;
- the primary defining feature of a DAC will be the continued existence of an objects clause – a mitigated doctrine of ultra vires will continue to apply to a DAC;
- it will be required to have a minimum of two directors;
- it can be a company limited by shares or a company limited by guarantee having a share capital;
- a director of a DAC will not be entitled to vote in respect of any contract in which he is interested;

[4] A DAC can be exempted from using the words "designated activity company" as part of its name provided it complies with provisions of Section 973 of the Bill, for example, its objects are the promotion of a charity. Similar provisions existed under the Companies Acts. Where a DAC was exempt from using the word "limited" in its name prior to the enactment of the Bill it can continue to have that exemption with the modification that it will operate to exempt the company from the use of the words "designated activity company" in its name (Section 973(8)).

- it may publish a prospectus but solely for the purpose of listing debentures on a regulated market;

- it cannot dispense with the requirement to hold annual general meetings unless it is a single member company;

- a director of a DAC will not be able to hold any other office or place of profit in the DAC; and

- the new summary approval procedure referred to above in relation to a CLS will also apply to a DAC allowing a DAC to carry out certain restricted activities when validated.

An existing private company limited by guarantee having a share capital shall from the commencement of the Bill continue in existence and be deemed to be known as a "DAC limited by guarantee"[5].

NEW FORM OF CONSTITUTION

One of the biggest initial changes introduced by the legislation will be the new form of constitution that will apply to the CLS model. Our existing company law requires Existing Private Companies to have a two document constitution consisting of a memorandum and articles of association. The articles of association usually adopt by incorporation Table A of the Companies Act 1963 which sets out long-form model regulations governing the internal management of companies. The Bill provides that Table A will be eliminated entirely and instead the substance of virtually all of these provisions has been incorporated into the new legislation (either as voluntary provisions or as compulsory provisions). Some of the provisions in Table A which are currently voluntary will under the new legislation become compulsory provisions[6]. There will also be a number of new provisions governing the internal management of companies which will be introduced under the new legislation.

The existing memorandum and articles of association of a company converting to a CLS will under the Bill be replaced with a prescribed standard form single document constitution. Where a company's constitution is silent, its internal regulations will default to the provisions (including the voluntary provisions) contained in the Bill.

[5] Section 982(3)

[6] For example, the provisions setting out the formal requirements for the appointment of proxies.

Information to be Included in the New Constitution

Section 19 of the Bill details the information to be included in the constitution of a CLS which includes the following:-

- the company's name;

- the fact that it is a CLS;

- if the CLS adopts regulations excluding, varying, amending or supplementing the statutory regulations imposed by the Bill, those supplemental regulations. Supplemental regulations are entirely optional – there will be no requirement for a CLS to have any supplemental regulations[7];

- in relation to its share capital, either:-

    - its authorised share capital, where a company has an authorised share capital, together with details of the division of the authorised share capital; or

    - where a company does not have an authorised share capital, details of the division of its share capital into shares of a fixed amount; and

- the number of shares to be taken by each subscriber on incorporation.

As part of the conversion process it will be necessary by way of a preliminary step to review the existing memorandum and articles of association of each private company which will convert to a CLS to identify those specific regulations currently contained in a company's memorandum and articles of association which should (where permitted by the Bill) be continued and those regulations in Table A which have previously been dis-applied by the company to ensure that this disapplication (where required and permitted by the Bill) is continued by the inclusion of appropriate provisions in the supplemental regulations in the constitution adopted by the company on conversion. By adopting supplemental regulations a company will, in so far as permitted by the new legislation, be able to replicate the regulations set out in its existing articles of association.

DAC V CLS – HOW TO CHOOSE?

In view of the significant advantages attaching to the CLS model, the vast majority of Existing Private Companies will elect to re-register as a CLS. It is expected that only a small number of such companies will re-register as DACs.

[7] Section 59(2)

Certain Existing Private Companies will be obliged to re-register as a DAC but for others there are no strict rules as to what the choice is. Some factors to be considered include the following:-

- Whether the company has been incorporated for a specific purpose and requires its objects clause for that purpose, for example a joint venture company with specific objects?
- Does the company have negotiated articles of association with various classes of shares carrying different rights?
- If the Company has specific charitable objects then it needs to convert to a DAC. Most companies that have charitable objects are however companies limited by guarantee;
- Has the company listed debt securities? If so, it must convert to a DAC; and
- If the company is an insurance undertaking or a credit institution and it is a private company limited by shares it must convert to a DAC.

On the other hand if the company is a "family" type company with little by way of complexity in the provisions of its articles of association or in its share structure, the CLS model will be more appropriate.

CONVERSION / TRANSITION PROCESS

The provisions dealing with the conversion of Existing Private Companies to the new CLS and DAC models are set out in Part 2, Chapter 6 of the Bill. This part details the following:-

- the conversion options available to Existing Private Companies;
- the timeframe within which the conversion must occur;
- the various ways in which the conversion can be effected; and
- the provisions which will apply during the Transition Period.

Options During the Transition Period

During the Transition Period, there are **three options** open to an Existing Private Company:-

- Conversion to a CLS;
- Conversion to a DAC or another company type; or
- Taking no action.

Option 1: Conversion to a CLS

The Bill sets out two ways in which an Existing Private Company can pro-actively seek to re-register as a CLS:-

(i) **Section 59 – Members Action Re-Registration:** Under Section 59(1) of the Bill the members can by way of a special resolution adopt a new constitution in the form provided under Section 19 of the Bill and deliver copies of the resolution and the new constitution to the CRO together with a Form N1 for registration[8]. Once the new constitution has been registered with the CRO, the Registrar will issue a certificate of incorporation stating that the company is a CLS[9]. There is no change of name as the suffix for this company remains "limited" or its various equivalents.

The benefit of being pro-active is that the members control the content of the constitution having considered the provisions of the Bill; or

(ii) **Section 60 – Directors Action Re-Registration:** Where the members do not adopt a new constitution in accordance with Section 59(1) of the Bill and the existing company is not required to re-register as a DAC, or the members do not elect to re-register the company as a DAC, the directors will be obliged under Section 60 of the Bill to take the following steps:-

(a) to prepare and adopt a constitution for the company in the form provided under Section 19 of the Bill;

(b) to deliver a copy of the proposed constitution to each of the company's members; and

(c) to deliver the constitution and the board resolution adopting same together with a Form N1 to the CRO for registration[10].

The constitution which the directors prepare for the converting company will consist of:-

(x) the provisions of its existing articles of association; and

[8] Section 59
[9] Section 59(3)
[10] Section 60(1)

(y) the provisions of its memorandum of association stating its name and share capital and the provisions (if any) that could be contained in its articles of association but are contained in its memorandum of association instead but excluding the objects clause.

In preparing the new constitution, the directors can only make those changes which are strictly necessary for the purpose of becoming a CLS[11].

If a company does not have registered articles of association, or to the extent that its existing articles of association do not exclude or modify the provisions of Table A, then Table A will be deemed to, or shall continue to, apply notwithstanding that Table A is repealed by the Bill (save to the extent that those regulations are inconsistent with any mandatory provisions of the Bill).

While the members are entitled to receive a copy of the new constitution prepared by the directors, Section 60 does not provide any mechanism for the members to object to the form of constitution proposed by the directors before it is filed.

Option 2: Conversion to a DAC

The Bill sets out two ways in which an Existing Private Company can be re-registered as a DAC:-

(i) **Conversion by Members:-**

(a) **Section 56(1) - Voluntary:** An Existing Private Company can elect to re-register as a DAC by passing an ordinary members' resolution to that effect[12]. This resolution must be passed not later than 3 months before the expiry of the Transition Period (i.e. no later than 15 months after the commencement date (unless this period is extended)). The resolution will alter the memorandum and articles of association to reflect the fact that the company is now a DAC. The following is delivered to the CRO:-

- a copy of the ordinary resolution;
- a copy of the new two document Constitution as altered;
- a CRO Form N2; and
- a statement of compliance by a director and secretary stating that the requirements of the legislation have been complied with.

The Registrar will then issue a certificate of incorporation stating that the company has been re-registered as a "designated activity company".

Part 16 of the Bill will apply to the company on and from the date of issue of the certificate.

(b) **Section 56(2) - Obligatory:** An Existing Private Company shall be obliged to re-register as a DAC if (not later than 3 months before the expiry of the Transition Period) a notice requiring it to re-register as a DAC is served on it by any member or members holding more than 25% of the voting rights in the company. The documentation to be filed is the same as outlined above in relation to Section 56(1) save that the ordinary resolution referred to in Section 56(1) is replaced with a directors' resolution.

(ii) **Section 57 – Court Ordered Conversion:-**

If prior to the expiry of the Transition Period neither of the Section 56 re-registration options have been availed of, an application can be made to court for an order directing the re-registration of the company as a DAC by either:-

(a) one or more members of the company who hold not less than 15 per cent in aggregate of the nominal value of the company's issued share capital or any class thereof; or

(b) one or more creditors of the company who hold not less than 15 per cent in aggregate of the company's debentures entitling the holders to object to the alteration of the company's objects[13].

In the case of a court ordered re-registration, the ordinary resolution

[11] Section 60(3)
[12] Section 56(1)
[13] Section 57

referred to in Section 56(1) is replaced with a directors' resolution.

Option 3: Do Nothing

Where no action has been taken within the Transition Period, an Existing Private Company will be automatically deemed by default, from the expiry of the Transition Period, to have become a CLS[14].

It will also be deemed to have a constitution as provided for under Section 19 of the Bill comprising of its existing memorandum of association (excluding the objects clause) and its existing articles of association to the extent that those provisions do not conflict with the mandatory provisions of the Bill. The Registrar will automatically issue a certificate of incorporation stating that the company is a CLS.

Doing nothing is not recommended as the conversion process offers a company the opportunity to discuss with its advisers, directors and members the steps to be taken so as to ensure that the company has the required regulations incorporated into its new constitution. The issue with taking no action is that the company will not have had an opportunity to review its current articles of association to see if any of those provisions are contrary to mandatory provisions which will apply under the new legislation.

APPLICABLE LAWS DURING TRANSITION PERIOD

From the date of commencement of the legislation until the expiration of the Transition Period (that is, for an initial period of 18 months (subject to any extension of this period)), the part of the legislation applicable to DAC's will apply to all Existing Private Companies until such time as they deliver to the CRO a new constitution in the requisite form and re-register as a CLS.

RELIEF FOR MEMBERS AND CREDITORS

The Bill includes certain protections for members and creditors who believe that their interests have been prejudiced in the conversion process.

Members

If any member considers that his interests have been prejudiced by the exercise or non-exercise by either the company or its directors of any powers in connection with the re-registration procedures outlined in the Bill, that member can apply to court for an order under Section 212 of the Bill[15] (which is equivalent to Section 205 of the Companies Act 1963 – minority oppression (**Section 205**)). Section 212 sets out the various remedies available in the case of alleged minority oppression. There is no minimum shareholding requirement which members must meet in order to avail of this relief – that is, it is available to each member.

Where such an application is made by a member in circumstances where the directors have failed to comply with their obligation to re-register under Section 60 of the Bill then, unless the members have adopted a new constitution in accordance with the provisions of Section 59(1) of the Bill, there will be a presumption that the directors have exercised their powers in a manner oppressive to the applicant or in disregard of his interests as a member. It will be incumbent on the directors to rebut this presumption. Therefore, where a company or its directors neglects to take the necessary steps to re-register but opts instead to wait for the automatic re-registration process to kick in under Section 61, this may lead to such a Section 212 action being taken by any member who considers that his/her rights are prejudiced as a result of the automatic imposition by the CRO of a new Section 19 standard form constitution. This places a very high burden on directors to ensure that the new constitution is filed in good time during the Transition Period.

Section 212 entitles the court may make any order or orders which it thinks fit including an order directing or prohibiting any act or cancelling or varying any transaction or an order for the payment of compensation to the aggrieved member[16]. The possibility of payment of compensation is not a remedy currently available under Section 205.

Creditors

In addition, any creditor or creditors of a company holding in aggregate 15 per cent or more of the company's debentures entitling the holders to object to the alteration of the company's objects may also apply to court under Section 62(3) for relief where the new constitution prejudices any interest of such creditors. Where a creditor can establish that their rights have been prejudiced in the re-registration process, the court can grant such relief as it thinks just.

FAILURE TO COMPLY WITH THE CONVERSION PROVISIONS

A failure by the directors to comply with their obligation to re-register under Section 60 of the Bill will not expose the company, the directors or

[14] Section 61(1)
[15] Section 62(1)
[16] Section 212(3)

any other officer to any specific sanctions[17]. The possible exposure for the company and its directors arises from the risk of a minority oppression action being taken by a member under Section 212 of the Bill or an action being taken by a creditor under Section 62(3) of the Bill.

IMPLICATIONS FOR CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

Part 4 of the Bill sets out in 91 sections the law relating to the governance and administration of companies in 10 chapters. Part 5 of the Bill sets out in 52 sections the law relating to the duties of directors and other officers in 6 chapters. The Bill sets out some significant reforms in the area of corporate governance and directors' duties, many of which will simplify existing obligations and make corporate governance requirements easier to understand and the law in relation to directors' duties more accessible.

Key Innovations for Corporate Governance and Directors' Duties

The key innovations in the Bill in terms of corporate governance and directors' duties are as follows:-

- the introduction of single director companies;
- the codification of the rules of internal management currently found in a company's articles of association – the substance of virtually all of the regulations in Table A have been incorporated into the Bill and will be the statutory default, so that there is no need to have extensive articles set out in the constitution of a new CLS[18]; and
- the fact that certain key directors' common law duties have been codified and together with all diverse statutory duties assembled as a comprehensive code (Part 5).

Directors and Secretaries

A CLS is only required to have one director[19] and must also have a company secretary[20] – where there is only one director appointed that director cannot also act as company secretary[21]. The new legislation does not therefore permit single officer companies.

The introduction of single director companies will be of benefit to small private companies which are in reality run by one individual and groups which have a number of subsidiaries.
The Bill prohibits a body corporate or an unincorporated body of persons[22], a minor or any person who is an undischarged bankrupt from acting as a director[23]. Minors and undischarged bankrupts are also prohibited from acting as a company secretary[24]. Under the existing Companies Acts 1963 to 2013 it is possible for a minor to be a director and/or company secretary.

Single Director Companies – Execution Requirements

One knock on effect of the introduction of single director companies is in the area of the execution of documents. A number of existing statutory provisions currently require Existing Private Companies to execute certain documents with two signatures; either the signature of a director and the company secretary or two directors – e.g. the signature of the directors' report annexed to a company's annual financial statements. Some of these provisions have been amended to allow for signature by a single director in the case of a single director company[25] however others remain unchanged. An example of this is the execution of an instrument under seal. The provisions in the Bill are more flexible than those currently contained in Table A as to the persons who can attest the affixing of a company's seal. Section 43(2) of the Bill provides that any two officers or other authorised persons must attest the affixing of the seal – it will no longer be necessary to have at least one director attest the affixing of the seal unless the company's constitution specifically requires this.

WRITTEN MEMBERS' RESOLUTIONS

The Bill introduces a number of key changes in the area of written members' resolutions.

Unanimous Written Members' Resolutions[26]

The Bill provides that the members of a CLS will under the terms of the new legislation be entitled to act by way of unanimous written resolution[27] and that nearly all members' resolutions (notable exceptions include a resolution to remove a

[17] A failure would amount to a breach of the directors' general duty to secure compliance with the provisions of the new legislation under Section 223(1)
[18] One point worth noting from the codification of Table A is that the delegation of the management of the business of a company to its board of directors is put on a statutory footing - what is now Regulation 80, Part I of Table A will become Section 158 of the Bill which provides that the business of the company shall be managed by its directors – this can only be restricted by specific provisions in a company's constitution or by directions made by the passing of special resolutions.
[19] Section 128(1)
[20] Section 129(1)
[21] Section 129(6)
[22] Section 130: This is to ensure that directors can be held personally responsible for their actions.
[23] Sections 130 to 132
[24] Sections 131 and 132
[25] Section 332(2) provides that in the case of a single director company the annual director's report need only be signed by the sole director
[26] Section 193 can be dis-applied by DACs, unlimited companies and CLGs
[27] Section 193

director or statutory auditor[28]) can now be passed by way of unanimous written resolution in place of general meetings[29]. Contrary to the current position[30], there will be no requirement for a company's constitution to permit the use of unanimous written resolutions.

Majority Written Members' Resolutions[31]

The Bill introduces new provisions authorising a CLS to pass certain members' resolutions by way of majority written resolutions[32]. The new majority written members' resolution procedure will apply in respect of both ordinary and special resolutions subject to the resolutions being signed by the requisite majority. In the case of ordinary resolutions, the requisite majority will be any member or members holding more than 50% of the voting rights in the company[33]. In the case of special resolutions, the requisite majority will be any member or members holding more than 75% of the voting rights in the company[34].

In order for a majority written members' resolution to be validly passed, all members of the company who are entitled to attend and vote at general meetings must have been circulated with the proposed text of the resolution and an explanation of its effects[35].

Once a majority written resolution has been signed by the requisite majority and delivered to the company, the company must within 3 days notify every member of the fact that the resolution has been signed by the requisite majority and of the date on which the resolution will be deemed to have been passed[36]. A failure to comply with this requirement constitutes an offence[37].

Effective Date of Majority Written Members' Resolutions

Unlike the unanimous written resolution procedure under which a resolution becomes effective immediately once it has been signed by the last member to sign, majority written resolutions will not become effective immediately once signed. The date on which a majority written members' resolution will be deemed to have been passed will be[38]:-

(i) in the case of an ordinary resolution, 7 days after the date on which it was signed by the last member to sign; or

(ii) in the case of a special resolution, 21 days after the date on which it was signed by the last member to sign.

The purpose behind the delay in majority written resolutions becoming effective is to provide a safeguard for dissenting members. However, Section 194(10) of the Bill does provide a mechanism for reducing these 7 and 21 day time periods where:-

- the resolution specifies the date on which it is to be deemed to be passed which is an earlier date than that provided for under Section 194(9) but not being a date earlier than the date on which the last member to sign the resolution signs; and
- all the members of the company entitled to attend and vote on the resolution provide a written waiver confirming that the statutory time period set out in Section 194(9) has been waived.

In light of the procedural requirements, it remains to be seen how useful majority written members' resolutions will be in practice given the significant delay (particularly in the case of special resolutions) that will apply before the resolution will be deemed to be passed and the fact that a reduction of the relevant time periods can only be availed of with the consent in writing of all members.

Counterparts

The provisions of Table A are often modified to allow for written resolutions to be executed in counterparts. Section 193(3) of the Bill provides for the execution of written resolutions in counterparts.

WRITTEN BOARD RESOLUTIONS

Unanimous Written Board Resolutions

As in the case of the unanimous written members' resolution procedure, the ability of a CLS to pass board resolutions by way of unanimous written resolution is put on a statutory basis in the Bill[39].

Majority Written Board Resolutions

The Bill also introduces new provisions authorising a CLS to pass board resolutions by way of majority written resolutions in certain

[28] Section 193(11)
[29] Section 193(1)
[30] Section 141(8)(a), Companies Act 1963
[31] Multi-member DAC's can by its constitution dis-apply the majority members' resolution procedure. Section 194 shall be dis-applied for PLCs and CLGs
[32] Section 194
[33] Section 194(3)
[34] Section 194(6)
[35] Section 194(7)
[36] Section 195(2)
[37] Section 195(7) – Category 4 offence applicable to the company and each officer in default
[38] Section 194(9)
[39] Section 161(1)

limited circumstances[40]. Unlike the members' majority written resolution procedure outlined above which can be widely used, the directors' majority written resolution procedure can only be used in very specific circumstances to exempt one or more of the directors from signing a written resolution who would not by reason of:-

- any provision in the Bill or any other enactment;
- the company's constitution; or
- any rule of law,

be permitted to vote on a resolution if such a resolution was passed at a meeting of the board of directors.

Where any director does not sign a majority written resolution, the resolution must state the name of each of the directors who did not sign it and the grounds on which he or she did not sign it.

MEMBERS' MEETINGS - ANNUAL GENERAL MEETINGS

A multi-member CLS will also be entitled to dispense with the requirement to hold an annual general meeting (**AGM**)[41]. Under the current legislation only single-member companies are entitled to dispense with the requirement to hold AGMs.

The Bill provides that in order to dispense with the requirement to hold an AGM in any year, **all** the members of a CLS who are entitled to attend and vote at general meetings must sign a written resolution:-

- acknowledging receipt of the financial statements;
- resolving all such matters as would have been resolved at the meeting; and
- confirming no change is proposed to the company's auditors[42].

The majority written members' resolution procedure cannot be availed of to dispense with the requirement to hold a physical AGM – all members must consent.

BOARD MEETINGS

Chairperson Casting Vote

Regulation 101 of Part I of Table A is put on a statutory footing by the Bill which provides that, in the event of an equality of votes, the chairperson is to have a second or casting vote[43]. This can be dis-applied by a company's constitution.

Telephonic/Electronic Attendance etc

Section 161(6) of the Bill provides for the attendance of directors at board meetings by telephone, video or other electronic means provided certain requirements are met. This provision can be dis-applied[44].

Section 161(6) of the Bill goes on to provide that where any directors elect to attend a board meeting by telephone, video or other electronic means then the meeting will be deemed to take place either:-

(i) where the largest group of those participating is assembled;

(ii) if there is no such group, where the chairperson of the meeting then is; or

(iii) if neither of the above applies, in such location as the meeting itself decides.

DUTIES OF DIRECTORS & OTHER OFFICERS

General Duty to Secure Compliance with Company Law

Under the current legislation[45] both directors and company secretaries are responsible for ensuring that the company complies with its obligations under the Companies Acts 1963 to 2013. While this requirement has been retained for directors[46], under the Bill the requirement has been removed in respect of company secretaries in recognition of the much more limited role that company secretaries play in the area of compliance.

However, on the re-registration of a company as a CLS or on the subsequent appointment of both directors and secretaries to a CLS they must provide a positive confirmation acknowledging their legal duties and obligations[47].

[40] Section 161(2)
[41] Section 175(3)
[42] Section 175(3)

[43] Section 160(2)
[44] For certain companies there may be specific Irish tax residency drivers which make this dis-applicable preferable.
[45] Section 383(3) of the Companies Act 1963
[46] Section 223
[47] Section 223(3) and Section 226(5)

Codification of Principal Fiduciary Duties of Directors

Section 228 of the Bill codifies directors' common law fiduciary duties into eight key duties[48]. Rather than applying an overly prescriptive approach, the approach adopted in the Bill has been to set out broad general principles based on existing common law and equitable principles which have developed over time – leaving discretion to the court in relation to the interpretation of these duties. The codification of the existing common law duties is hugely significant and follows the UK approach as introduced in 2006.

Directors will owe their duties to the company and to the company alone. The interpretation and application of these duties will be based on common law rules and equitable principles.

The following are the key duties set out in the Bill:-

- to act in good faith in what the director considers to be the interests of the company[49];
- to act honestly and responsibly in relation to the conduct of the affairs of the company[50];
- to act in accordance with the company's constitution and to exercise his or her powers only for the purposes allowed by law[51];
- not to use the company's property, information or opportunities for his or her own or anyone else's benefit unless expressly permitted by the constitution or approved by the members[52];
- not to restrict his or her power to exercise an independent judgment unless it is expressly permitted by the constitution or is in the interests of the company[53];
- to avoid conflicts of interest unless permitted by the members[54];
- to exercise care, skill and diligence[55]; and
- to have regard to the interests of the company's members[56].

Separately, Section 224 of the Bill also imposes a duty on directors to have regard to the interests of employees.

Although not expressly stated in the Bill, the statement of general duties set out in Section 228 of the Bill is not exhaustive and directors should be aware that other duties may exist which fall outside the scope of the general duties listed[57]. Where a director has been nominated or appointed by a particular shareholder, he/she may have regard to the interests of that particular shareholder subject to the director's overriding obligation to act in good faith in what he/she considers to be in the interests of the company[58].

Directors will continue to be required to disclose interests they may have in contracts with the company of which they are a director[59] however the Bill introduces a materiality concept which provides that this requirement does not apply in relation to an interest that cannot reasonably be regarded as likely to give rise to a conflict of interest[60].

Company Secretaries - Duties and Qualifications

The Bill does not codify the duties of company secretaries. Section 226(1) provides that the duties of company secretaries shall be those that are delegated to him or her from time to time in addition to statutory or other legal duties.

The Bill also introduces a new obligation on the directors to ensure that the person appointed as company secretary has the necessary skills to discharge his/her statutory and other legal duties including the duty to maintain (or procure the maintenance of) the records (other than accounting records) required to be kept by law[61]. It is unclear from the Bill what steps must be taken by directors to demonstrate compliance with this obligation or how they should assess the skill of a prospective company secretary as there are no minimum qualifications for company secretaries imposed by the new legislation.

DISCLOSURE OF INTERESTS IN SHARES/ DEBENTURES

The Bill completely re-writes the existing Section 53[62] obligations on directors and other officers to

[48] Section 228
[49] Section 228(1)(a)
[50] Section 228(1)(b) – This is a positive statement of Section 150 of the Companies Act 1990 which provides that directors who have not acted honestly and responsibly in relation to the conduct of the affairs of the company may be restricted.
[51] Section 228(1)(c)
[52] Section 228(1)(d)
[53] Section 228(1)(e)
[54] Section 228(1)(f)
[55] Section 228(1)(g)
[56] Section 228(1)(h)

[57] For example, the common law duty imposed on directors of an insolvent company to have regard to the interests of creditors is not expressly included but will continue to apply. See Re: Frederick Inns Ltd [1991] ILRM 582 (HCt) [1994] 1 ILRM 387 (SCt)
[58] Sections 228 (3) and (4)
[59] This reflects the current position under Section 194 of the Companies Act 1963 (as amended by Section 47 of the Companies (Amendment) (No. 2) Act 1990
[60] Section 231(2)
[61] Section 226(2) – this is similar to the duty imposed on the directors of a Plc under Section 236 of the Companies Act 1990.
[62] Section 53, Companies Act 1990

disclose their interests in any shares or debentures held by them in a company of which they are a director or officer in an attempt to make these obligations more user-friendly. The Bill doesn't quite achieve its goal here as the legislation on this point is still quite complicated. Two key changes worth noting:-

- the introduction of a de minimis interests exception – there is no obligation to disclose an interest in shares or debentures representing less than 1% or less, in nominal value, of a body corporate's issued share capital carrying voting rights[63]; and

- where directors and officers are given options by a company they will not be required to disclose the fact that they hold such options[64].

ANNUAL DIRECTORS' REPORT

The Bill makes two key changes to the annual directors' report:-

- the re-introduction of compliance statements for larger companies; and

- the introduction of a new requirement to prepare a relevant audit information statement.

Directors' Compliance Statements for Larger Companies

The Bill re-introduces the obligation on directors to prepare compliance statements. Directors' compliance statements were originally legislated for in the Companies (Auditing and Accounting) Act 2003[65]. However as a result of significant concerns raised at the time, particularly in relation to the impact of these obligations on smaller companies, no commencement order was ever issued in respect of the relevant provisions. Instead, the Company Law Review Group was tasked with reviewing the proposal and preparing a report which was published in 2005.

The new legislation has taken into account some of the concerns and objections raised by interested parties in relation to the original statutory provisions regarding compliance statements set out in the Companies (Auditing and Accounting) Act 2003[66]. The provisions relating to compliance statements set out in the Bill incorporate some of the more proportionate recommendations of the Company Law Review Group.

Under Sections 225(2) and (3) of the Bill the directors of a CLS will be required to prepare and to include in their annual directors' report, compliance policy statements and related statements in respect of any financial year in which the company's:-

- balance sheet total for the year exceeds €12,500,000; and

- the amount of its turnover exceeds €25,000,000.

A compliance policy statement is defined in the Bill as a statement setting out the policies adopted by the company (which in the directors' opinion, are appropriate to the company) in relation to compliance by the company with its relevant obligations. "Relevant obligations" are defined under the Bill as including the following:-

- a company's obligations under the new legislation where a failure to comply would constitute a category 1 or a category 2 offence, that is, the more serious offences – the range of these offences is fairly broad;

- a serious market abuse or prospectus offence; and

- a breach of tax law[67].

The directors of such companies are also required to put in place appropriate arrangements or structures to secure material compliance with the company's relevant obligations and to conduct an annual review of those arrangements and structures.

The directors' report including the compliance statement must be annexed to the annual return publicly filed with the Companies Registration Office.

Relevant Audit Information Statement

The directors of a CLS will be required to include in their annual directors' report a statement confirming that in so far as each director is aware there is no relevant audit information of which the company's statutory auditors are unaware and that the directors have taken all steps that they ought to have taken as a director in order to make themselves aware of any relevant audit information and to establish that the company's statutory auditors are aware of that information[68].

[63] Section 260(f)
[64] Section 264(3)
[65] Section 45 of the Companies (Auditing and Accounting) Act 2003 was due to become effective in relation to private companies in 2005, however, to date no commencement order in respect of this provision has been issued.
[66] Section 45 of the Companies (Auditing and Accounting) Act 2003 was due to become effective in relation to private companies in 2005, however, to date no commencement order in respect of this provision has been issued.
[67] Section 225(1)
[68] Section 330

In complying with this obligation the directors are required to make such enquiries of other directors and the auditors and to have taken such other steps as required so as to exercise reasonable care, skill and diligence.

This requirement to include a statement on relevant audit information in the directors' report will apply to all companies and the statement is required to be annexed to the annual return publicly filed with the Companies Registration Office in the case of all companies other than those companies availing of the filing exemptions applicable to small companies[69].

DIRECTORS' LOANS

Section 31 Restrictions

The provisions of Section 31 of the Companies Act 1990 in relation to loans, quasi loans and credit transactions in favour of directors have been largely retained by the Bill[70]. The validation procedure currently set out in Section 34 of the Companies Act 1990 is however replaced by the new summary approval procedure.

Undocumented Loans to and from Directors

Under the Bill, loans to directors, if not in writing shall be presumed to be repayable on demand and to bear interest at the appropriate rate – this presumption will be rebuttable[71].

Section 237 of the Bill is designed to address concerns raised by the ODCE in relation to winding up scenarios where directors will often claim to be creditors of a company by having made undocumented loans to the company. Section 237 of the Bill addresses this by providing that advances by a director to a company, if not in writing, shall be presumed not to be a loan and to the extent that such advances are proved to be a loan, if the terms are ambiguous, there will be a rebuttable presumption that the loan shall not bear interest or security and shall be subordinated to all other creditors[72].

APPOINTMENT OF A REGISTERED PERSON

In addition to the existing common law protections which are available to third parties contracting in good faith with a company[73], the Bill introduces an additional safeguard for third parties contracting with a CLS.

The Bill provides that where the board of directors of a CLS appoints a person who is entitled to bind the company, the company is required to notify the Companies Registration Office of this appointment[74]. Any director (other than a sole director) or officer of the company who is authorised to bind the company must be registered with the Companies Registration Office as such a registered person.

The Companies Registration Office will maintain a register of all such registered persons who will be deemed to have authority to exercise any powers of the company and to bind the company to contracts without the need for counterparties to make any further enquiries. Registered persons will also have the authority to use and affix the company seal provided it is correctly countersigned[75].

CONCLUSION

The Bill when enacted will provide a simplified framework for corporate incorporation and activity and will increase the accessibility and transparency of the Irish company law regime.

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[69] Section 350 – a "small company" is defined under the Bill as a company with a turnover of less than €8.8 million, a balance sheet total of less than €4.4 million and having less than 50 employees
[70] Section 239
[71] Section 236
[72] Section 237
[73] The indoor management rule set out in Royal British Bank v Turquand [1843 – 1860] All ER Rep 435
[74] Section 39(1)
[75] Section 43(3)