Matheson

Companies Act 2014
Ireland

Financial Times 2012-2015
Matheson is ranked in the FT's top 10 European law firms 2015. Matheson has also been commended by the FT for corporate law, finance law, dispute resolution and corporate strategy.

1 Introduction

The Companies Act 2014 became operative on 1 June 2015. Now that this new law is in force, we are advising clients to consider the Act's impact on their future business and transactions.

The Act consolidates and modernises Irish company law and is expected to make it easier for companies to do business in and through Ireland. Matheson has been actively involved in the 14 year progression of this legislation which has been led primarily by the work of the Company Law Review Group (of which a Matheson partner is a member).

The principal changes under the Act relate to the private company limited by shares (the "private company"), which is the most common type of company in Ireland. Going forward, there are two types of private company, which replace the previous single form. These are: (i) a private company limited by shares ("LTD"); and (ii) a designated activity company ("DAC"). These are explained in more detail below. Under the Act, all existing private companies are required to convert to either an LTD or a DAC.

2 Structure

The Act brings together 33 previous company law enactments into a single piece of legislation. It runs to over 1400 sections and is the largest substantive statute in the history of the State. The Act is divided into 25 parts: Parts 1 to 14 and 16 define the new types of private company and contain all the company law provisions that apply to them. Parts 17 to 25, among other things, define the remaining company types and contain the company law provisions that apply to each type.

3 Conversion

There is an 18 month transition period running to 30 November 2016 during which existing private companies must convert to either an LTD or a DAC. Private companies which have taken no action by the end of this transition period automatically convert to an LTD. Existing private companies can opt out of the default company scheme and re-register as a DAC by simply passing a shareholder resolution. Other company types, such as PLCs, unlimited companies and guarantee companies, will not need to convert although there will be some changes to the rules applicable to them.

Matheson can advise companies on transitioning to the new regime in a practical and cost-effective way.

4 Company Types

As mentioned above, the Act provides for two new types of private company and recognises the continued existence of the other company types. Under the new system, a company of any type may be incorporated with a single member.

4.1 Company Limited by Shares (LTD)

The LTD is the new model form of private company limited by shares. It has the same unlimited legal capacity as an individual. It may have just one director but, in that case, must have a separate company secretary. It can adopt written procedures instead of holding an annual general meeting of shareholders (AGM). It has a one-document constitution (replacing its current memorandum and articles of association) and its internal regulations are set out in simplified form in that constitution. Its name will not change after conversion and it can continue to use the suffix "Limited" or "Ltd" (or the Irish equivalent). An LTD is prohibited from offering securities (equity or debt) to the public.

4.2 Designated Activity Company (DAC)

While technically a new type of company, the DAC is similar in many ways to the private company formed under the old Companies Acts. A key distinction between a DAC and an LTD is the continued existence of an objects clause in the DAC constitution. A DAC may be a suitable vehicle where an objects clause is needed (eg to restrict the corporate capacity of a joint-venture vehicle) or for companies listing debt securities on a stock exchange. A DAC requires two directors. It must convene an AGM unless it is a single member company, in which case this requirement can be dispensed with. Its name must end with "designated activity company" or "DAC" (or the Irish equivalent) which will mean changes to company stationery, websites, seals and registrations.

4.3 Unlimited Company

The Act recognises that there are three distinct types of unlimited company:

- The private unlimited company with a share capital (ULC)
- The public unlimited company with a share capital (PUC)
- The public unlimited company without a share capital (whose liabilities are guaranteed by its members) (PULC)

Unlike the LTD, an unlimited company must have at least two directors and must continue to hold an AGM unless it is a single member company in which case this requirement can be dispensed with. Significantly, the statutory rules on distributions (and any other rule of law on the topic) do not apply in the case of unlimited companies. ULCs may not offer for sale or list any new securities, as is the case for an LTD, but a PUC and PULC may list debt securities. The name of all three company types must end in "unlimited company" or "UC" (or the Irish equivalent) which will mean changes to company stationery, websites, seals and registrations. The Act, however, grants the Minister for Enterprise, Jobs and Innovation the statutory power to exempt an unlimited company from the obligation to use the name "unlimited company" in special circumstances. It remains to be seen how this power will operate in practice.

4.4 Public Limited Company (PLC)

The PLC continues to be recognised as a company type under the new regime. The key distinction between PLCs and private companies is that only PLCs may list their shares on a stock exchange and offer them to the public. The Act contains few substantive changes in relation to the law governing PLCs but it draws together that body of law from various sources and sets it out with greater precision in one place.

A PLC must have an objects clause although the Act seeks to oust the doctrine of *ultra vires* (see part 6 below) by providing that a third party dealing in good faith with the company will not be prejudiced if the company exceeds its corporate capacity. A PLC must have at least two directors and cannot dispense with the holding of an AGM. A Societas Europaea (SE), the European model company, will continue to be regarded as a PLC under the Act. The name of a PLC must end with the words "public limited company" or "PLC" (or the Irish equivalent). It must have a minimum issued share capital of €25,000. The general prohibition on the giving of financial assistance by a PLC in connection with the acquisition of shares in itself or its holding company will continue, in modified form.

4.5 Guarantee company (CLG)

The Act provides for companies limited by guarantee, not having a share capital. Guarantee companies that have a share capital are considered to be DACs under the Act. The CLG is likely to remain a popular type of company for charities, sports and social clubs and property management companies. The members' liability is limited to such amount as they undertake in the constitution of the company to contribute to the assets of the CLG in the event of its winding up. A CLG has a two document constitution, consisting of a memorandum and articles of association. A CLG must have at least two directors and must hold an AGM unless it is a single member company in which case this requirement may be dispensed with. The name of a CLG must end with the words "company limited by guarantee" or "CLG" (or the Irish equivalent) although, as was previously the case, an exemption from using such a suffix may be available.

The audit exemption previously available to other types of company was extended to the CLG under the Act (although any one member can object and can force the company to carry out an audit).

4.6 Investment companies

The Irish Collective Asset-management Vehicles Act 2015 introduced a new corporate vehicle designed for Irish investment funds. The Act does not contain any significant amendment to the existing rules relating to investment companies.

5 Corporate Governance

5.1 Governance provisions to apply by default

A key innovation for Irish company law is that where a company's constitution is silent on an issue, the provisions in the Act apply by default. Many of the existing "Table A" provisions now apply as requirements of law. This should reduce the need to have detailed provisions set out in company constitutions of the type previously required to be set out in the articles of association. Companies, however, may prefer to include some of the provisions contained in the Act, for consistency with their existing rules of operation contained in their articles of association and so that the company's governance rules are all contained in a single document, without having to cross-refer to the Act.

5.2 Directors' duties

Directors' common law fiduciary duties have been codified in the Act. These exist alongside the many existing statutory duties of directors (contained in the Act and in other legislation) which continue to apply.

5.3 Compliance statements

The Act requires the directors of (i) all PLCs; and (ii) certain large private companies which reach prescribed thresholds to prepare a statement of compliance with company and tax law to be included in the directors' report in the annual accounts, and to ensure that the company adopts appropriate compliance measures.

5.4 Disclosure of interests in shares and share options

The Act contains a new exemption from what is a disclosable interest in a case where the shares or share options held by a director (aggregated with those of connected persons) amount to an interest in less than 1% in nominal value of the company's issued share capital of a class of shares carrying voting rights. This should substantially reduce and, in many cases, eliminate the disclosure obligations for directors and secretaries.

5.5 Directors' residential addresses

The Minister for Jobs, Enterprise and Innovation has introduced regulations which allow for the non-publication of a director's usual residential address in the Companies Registration Office or on company registers in cases where that director's personal safety or security are at stake.

5.6 Company secretary

Under the Act, the company's directors are required to ensure that the company secretary has either the skills or the resources necessary to discharge his or her statutory and other legal duties. The obligation on company secretaries to ensure compliance with companies legislation has been removed.

5.7 Annual general meeting

AGMs have become optional for LTDs and single member DACs, PLCs, CLGs and unlimited companies under the new regime as they are entitled to adopt written procedures instead. This involves shareholders signing a written resolution acknowledging receipt of financial statements, resolving all matters as would be required to be resolved at the AGM and confirming that there is to be no change to the auditor.

5.8 Majority written resolutions

The Act introduces new decision-making mechanisms for shareholders. Majority written resolutions can be passed as ordinary resolutions (50% or more of total voting rights) or special resolutions (75% or more of total voting rights) and take effect 7 and 21 days, respectively, after the last member has signed. This is in addition to the old system where written shareholder resolutions must be unanimous and take immediate effect which option is still available to companies.

5.9 Serious loss of capital

Under the new system, there is no requirement for private companies to convene an extraordinary general meeting on a serious loss of capital. The requirement remains in the case of PLCs.

6 Capacity

6.1 Corporate capacity

The doctrine of *ultra vires* ("beyond the legal powers") ceases to apply to the LTD which no longer has an objects clause. This means that an LTD has unlimited corporate capacity once acting within the law. Other company types retain an objects clause but a third party dealing in good faith with the company will not be prejudiced if the company exceeds its corporate capacity.

6.2 Corporate authority

Where the board of a company generally authorises a person (including one of the directors) to bind the company in contract, that person may be registered in the Companies Registration Office as a "registered person". The board of directors and registered persons are deemed to have the authority to bind the company. These provisions should make it easier for third parties to enter into contracts with companies as there should be no necessity to obtain a copy of a board resolution authorising the relevant transaction in certain instances.

7 Structures

7.1 Reorganisations

The Act contains new procedures to merge and divide companies as well as retaining established mechanisms for reorganising companies, namely court-sanctioned schemes of arrangement and the compulsory acquisition of minority shareholdings. For the first time under Irish law, there is a statutory procedure allowing two Irish private companies (of which at least one must be an LTD) to merge so that the assets and liabilities of one transfer by operation of law to the other, after which the former company is dissolved. These new measures are modelled on the cross-border mergers regime used successfully by many Irish companies. Under the new system, a statutory merger can occur using the Summary Approval Procedure (SAP) (see below) without court approval. Use of the SAP should significantly reduce the time and cost of these type of transactions.

7.2 Capital reductions

The Act makes it easier for a company to reduce its capital by providing that it may be carried out using the SAP (see part 8 below) rather than necessarily requiring court confirmation. The reserve arising from a capital reduction is treated as a realised profit.

7.3 Place of business

The Act abandons the concept of a "place of business" and the new law provides only for the "branch" concept. The only external companies which are required or permitted to register and file accounts in Ireland are those whose members have limited liability and which establish a branch in Ireland. External unlimited companies and companies whose presence is less than that of a branch may not register their presence in Ireland under the new system.

7.4 Group companies

The Act combines the definition of "subsidiary company" which was contained in the Companies Act 1963 with the definition of "subsidiary undertaking" which was contained in the European Communities (Companies: Group Accounts) Regulations 1992 for the purposes of group accounts, so that there is now a common definition. A "wholly-owned subsidiary" is defined for the first time under Irish company law.

8 Other key changes

8.1 Summary Approval Procedure (SAP)

The introduction of an omnibus statutory validation procedure is a key innovation of the Act. A simplified written approval process may be undertaken for activities that might prejudice shareholders or creditors (financial assistance for acquisition of own shares, reduction of company capital, variation of capital on reorganisations, treatment of pre-acquisition profits as distributable, transactions with directors and connected persons, mergers and members' voluntary windings up). This new validation procedure involves the passing of a special resolution and the making by directors of a declaration of solvency (which, in some cases, must be supported by the report of an independent person). In certain cases, the SAP eliminates the need for court approval of a transaction.

8.2 Financial assistance

The Act attempts to ease the restrictions on a company giving financial assistance for the acquisition of its own shares by reformulating the wording of the prohibition and introducing a "principal purpose" exemption.

8.3 Charges and debentures

The Act introduces several important changes to the law regarding charges and debentures. The aim of these changes is to simplify the registration of charges while clarifying the rules for the priority of charges. The Act introduces an optional two-stage procedure so that notification can be given to the CRO of the intention to create a charge in order to secure priority before the charge is actually created. It is thought that lenders may be more willing to advance funds if they can achieve an enhanced security priority over a company's assets. Under the new system, charges over cash or a bank account will not need to be registered.

8.4 Revision of defective financial statements

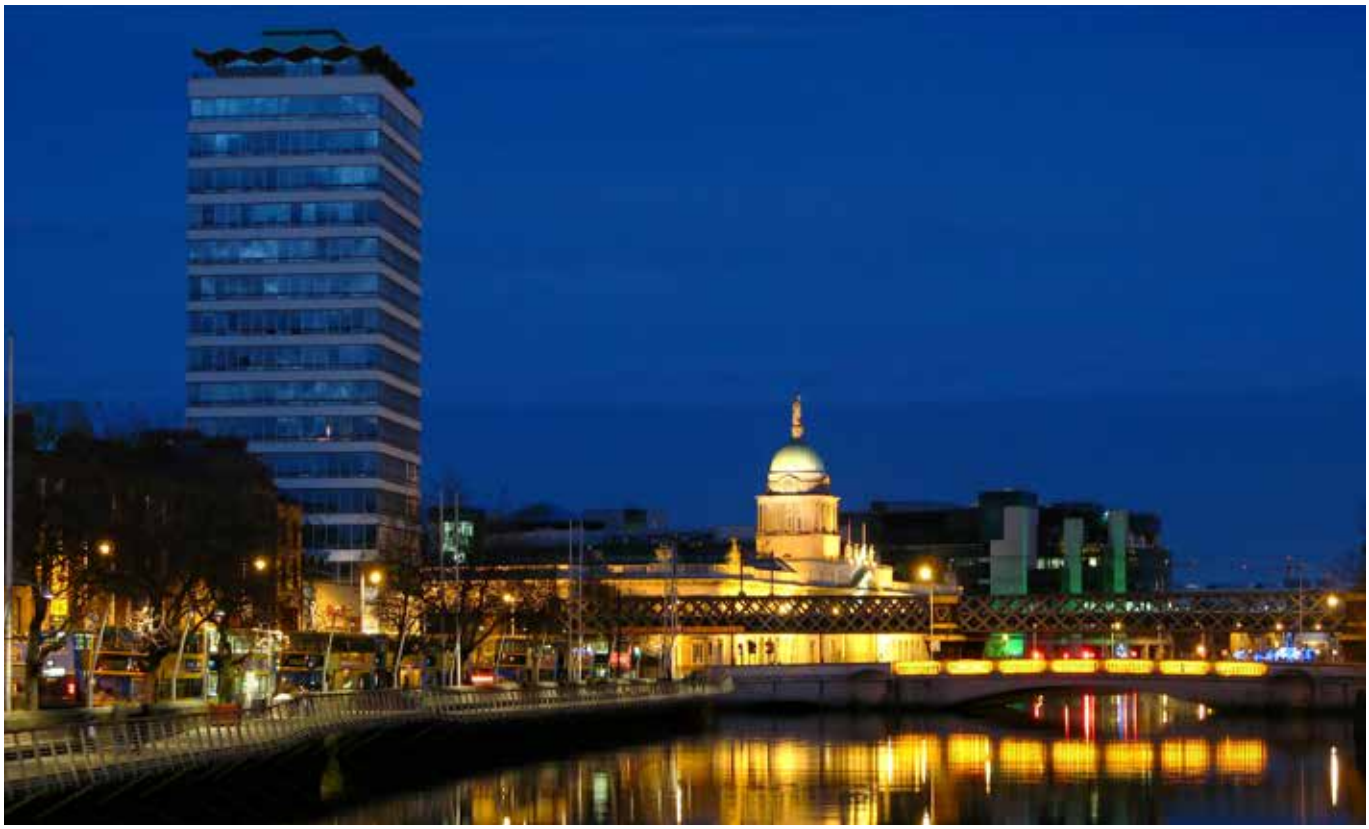
The Act introduces a new procedure which will allow for the preparation, approval, audit and filing of revised financial statements in relation to a prior year.

8.5 Audit exemption

The audit exemption is now available in certain group situations (but not for a PLC, PUC, PULC or a company with securities listed on a regulated market). The audit exemption is also extended to dormant companies (ie, companies with no significant accounting transactions during the year and which have only intra-group assets and liabilities). An LTD and a DAC may avail of the audit exemption where two of the three prescribed conditions are met (whereas, under old law, all three conditions needed to be satisfied).

8.6 Offences

Under the Act, all offences are categorised as either Category 1, 2, 3 or 4 offences and the penalties which apply for each type of offence are set out in Part 14.



Contacts

Deirdre-Ann Barr
PARTNER
DUBLIN
E deirdre-ann.barr@matheson.com

Darren Maher
PARTNER
DUBLIN
E darren.maher@matheson.com

Fergus Bolster
PARTNER
DUBLIN
E fergus.bolster@matheson.com

Éanna Mellett
PARTNER
DUBLIN
E eanna.mellett@matheson.com

George Brady
PARTNER
DUBLIN
E george.brady@matheson.com

Robert O'Shea
PARTNER
DUBLIN
E robert.oshea@matheson.com

Alan Chiswick
PARTNER
DUBLIN
E alan.chiswick@matheson.com

Tim Scanlon
PARTNER
DUBLIN
E tim.scanlon@matheson.com

Pat English
PARTNER
DUBLIN
E pat.english@matheson.com

Patrick Spicer
PARTNER
DUBLIN
E patrick.spicer@matheson.com

19.05.16

This material is provided for general information purposes only and does not purport to cover every aspect of the themes and subject matter discussed, nor is it intended to provide, and does not constitute or comprise, legal or any other advice on any particular matter. © Matheson. The information in this document is subject to the Legal Terms of Use and Liability Disclaimer contained on the Matheson website.