The Companies Act 2014

Agenda

- new company types
- overview of changes in the Act
- impact on the role of directors'
- accounting matters

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What has happened?

- Companies Act 2014 (the "Act") consolidates all old legislation into 25 parts, over 1400 sections – enacted 23 December 2014, commenced 1 June 2015
- Act is structured in 2 volumes:
  - parts 1 to 15 - model private company limited by shares
  - parts 17 to 25 - all other companies

Company types going forward

- Private Company Limited by Shares (LTD)
- Designated Activity Company (DAC)
- Unlimited companies (UC)
  – private unlimited company with shares
  – public unlimited company with shares
  – public unlimited company no shares
- Public Limited Company (PLC)
- Guarantee Company (CLG).

What is a new model Private Limited Company (Ltd)

- Likely to be the most common form of Private Limited Company (Ltd)
- Single director companies (different secretary)
- Unlimited capacity to carry on any business
- One document constitution – no objects clause
- Can dispense with holding an AGM
- Cannot list debt securities
- Does not need an authorised share capital
- No name change needed

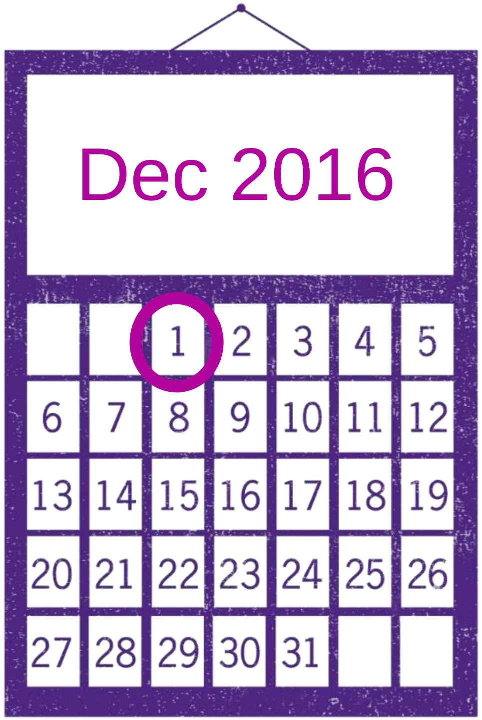
What is the new Designated Activity Company (DAC)?

- similar to our current Private Limited Company
- name must end in DAC – *The Happy Hotel Dac"*
- must have at least two directors
- two document constitution – continues to have an objects clause
- can list debt securities
- cannot waive requirement to hold AGM
- can convert to a DAC during the transition period.

A company limited by guarantee "CLG"

- Entity used by charities, sports and social clubs and management companies
- Name changes to include words “Company Limited by Guarantee” or “CLG”
- Must have at least two directors
- Continues to have a Memorandum and Articles of Association with a main objects clause
- It will be able to avail of the audit exemption (not currently available)
- Cannot waive requirement to hold AGM
- May opt to have just 1 member (currently must have at least 7)

Transition period ends



during transition private companies limited by shares should decide whether they will:

- register as a LTD
- register as a DAC or
- Register as another form of company
- do nothing and be deemed to register as an LTD

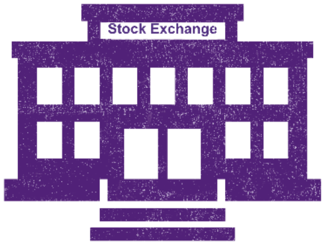
Existing private limited companies will be treated as DACs during the transition phase until they make their election.

How to decide whether to re-register

While there are no strict rules the following should be considered:

Requires a specific purpose

Credit institution or insurance undertaking



Has debt securities listed

So far…..

2569

Limited companies have converted

49

opted for a DAC

(2% approx.)

2061

opted for LTD

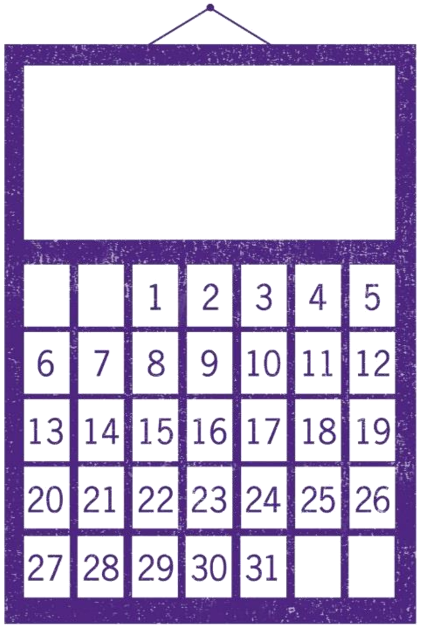
numbers provided by Search4Less

Incorporations under the new Act

June
91 DAC
1260 Ltd

July
70 DAC
1611 Ltd

August
53 DAC
1307 Ltd



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Some of the changes brought about by the Act

the Act is primarily a consolidation of the old law

- ultra vires rule abolished
- single director companies (still need a separate secretary)
- members written resolution no longer needs to be unanimous
- location of directors meeting now set-out in law
- directors of insolvent company must show they co-operated with the liquidator to avoid restrictions
- court liquidation: increase in outstanding amount due (€10k) for creditor to petition wind-up
- prescribes minimum qualifications for liquidators

Some of the changes brought about by the Act

- private limited companies allowed reduce their capital without court order
- validation procedure – Summary Approval Procedure
  - financial assistance for acquisition of own shares
  - reduction of company capital
  - variation of capital in reorganisations
  - loans, etc, to directors and connected parties
  - mergers
  - voluntary windings up.
- offences categorised

Categorisation of offences

Category 1 offence
conviction on indictment can result in a term of imprisonment of up to ten years or a fine of up to €500,000 or both (reportable by auditor).

Category 2 offence
conviction on indictment can result in a term of imprisonment of up to five years or a fine of up to €50,000 or both (reportable by auditor).

Category 3 offence

a summary offence only, attracting a term of imprisonment of up to six months and a “Class A fine” (or both).

Category 4 offence

also a summary offence only, punishable by the imposition of a Class A fine (i.e. a fine not exceeding €5,000).

Officers duties

Amanda-Jayne Comyn

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Company Secretary

- officer of the company who acts in accordance with the directors' instructions
- **overseer** of day to day running of company, maintenance of records, filing of returns and accounts
- written declaration acknowledging role and responsibilities associated with the role
- previously responsible for company complying with Companies Act – now moved to directors
- directors must satisfy themselves that company secretary has necessary skills ***or resources*** available to perform duties
- general market view – professional company secretarial function employed to ensure directors' obligation fulfilled
- duties include:
  - co-signing annual return
  - certifying true copies of financial statements with annual return.

Types of Director

1. **Executive Director** – works on a full-time basis for the company (*not defined in the Act*)
2. **Non-Executive Director** – works in a part-time capacity for the company (*not defined in the Act*)
3. **Alternate Director** – person appointed to act for another director with agreement by the other directors
4. **Shadow Director** – person in accordance with whose instruction the board of directors is accustomed to act
5. **De-facto Director** – person who occupies the position of director but who has not been formally appointed.

Change to the definition of Director under CA 2014

Director was defined in the 1963 Act as:

> *"including any person occupying the position of director by whatever name called" (i.e. executive and non-executive)*

Shadow directors were included under the 1990 Act in respect of certain duties only – liability for fraudulent/reckless trading, restriction and disqualification, conflicts of interest.

CA 2014 expands the definition to expressly include: Shadow directors, De-facto directors in addition to formally appointed directors.

Expanded definition now imposes positive obligation on both shadow and de-facto directors to comply with all director's duties

Role of Director

- no formal qualification requirement
- officer of the company not employee
- requirement to have at least 2 directors except in a LTD
- director is appointed by the members of the company
- primary function of a director is to manage the company on behalf of the members
- director owes primary duty to the company alone and not the members who appointed them
- account for their control over company's assets by keeping proper books and accounts
- exercise their power honestly and in the best interests of the company
- not make a "secret profit" when acting for the company
- not have personal interest in a contract with the company unless permitted by the articles or ratified by company.

Provisions in CA 2014

- internal rules on corporate governance are contained in Part 4 and 5 CA 2014
- any current or prospective director should familiarise themselves with expectations and legal responsibilities
  - Part 4 Sections 128 – 167 (corporate governance); and
  - Part 5 Sections 219 – 255 (duties and breaches)
- on appointment a director must sign a declaration acknowledging the legal duties and obligations associated with the role
- certain restrictions on transactions between a company and its directors

Directors duties

In the past determining the duties and responsibilities of the directors has not been clear, the codification of directors duties in the Act gives clarity for directors. These are set out in eight fiduciary duties which will apply to directors, shadow directors and de facto directors

- Part 5 CA 2014 deals with Directors duties and consequences for breaches of duties
- duties are broken into 2 categories: general duties and fiduciary duties
- there is a definitive move towards the accountability and responsibility of directors
- company must ensure that person eligible to be a director
  - not a undischarged bankrupt
  - <18 years of age
  - not a statutory auditor of the company
  - not a disqualified director
  - not a body corporate or unincorporated body of persons.

Breach of duties

General duties

- dealt with under Part 14 of the Act
- each section specifies the penalty attaching for a breach

  e.g. Section 225 - Directors' Compliance Statement – failure to provide is a Category 3 offence
- general breach of company law will not affect the
  - validity of a contract or other transaction; or
  - enforceability of any contract or other transaction.

Fiduciary duties

- 8 fiduciary duties specified in Section 228
- breach of 6 of the 8 fiduciary duties falls within Section 232
- duty to account to the company directly for the gain; and
- indemnify the company in respect of any loss or damage resulting from breach.

General duties

- ensure compliance by company with CA 2014 – historically was a duty of the company secretary
- directors must have regard for the interests of employees and members in the performance of their functions (this duty is still owed to the company rather than the employees or members)
- duty to keep adequate accounting records
- duty to prepare financial statements
- duty to maintain certain registers
- duty to ensure certain documents are filed with the CRO
- duty to disclose
  - personal information for register of directors
  - interests in shares of company or related company (1% exemption)
  - interest in a contract with the company
  - disclose payments in relation to share transfers
- duty to convene meetings.

Codified Directors’ duties
Law is clarified

- act in good faith
- act honestly and responsibly
- act in accordance with the company’s constitution
- not use the company’s property, information or opportunities for the director’s own or anyone else’s benefit
- agree not to restrict the director’s power to exercise an independent judgement
- avoid any conflict between the director’s duties to the company and the director’s other interests
- exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person in the same position with the same knowledge
- have regard to the interests of its employees and of its members as a whole.

Transactions between a Company and its Directors

Loans from company to Directors

- prohibited under Section 239 CA 2014 (previously s31 CA 1990)
- repetition of previous prohibition together with relevant exceptions
- SAP used for all transactions prohibited under Section 239 – (i.e. loans, quasi-loans, credit transactions and security and guarantees in respect of such loans, quasi-loans, credit transactions)
- **tax rules on loans to directors unchanged!!**

Substantial non cash transaction with directors

- Applies to real property
- Values exceeding >10% of net assets of €65,000
- requires approval by members

Accounting and audit related matters

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Audit exemptions

New qualifiers for the audit exemption

- small groups
- companies limited by guarantee
- dormant companies (allowed to adjust for intra-group transactions)

  Where:

  - no significant accounting transactions
  - assets and liabilities comprise only **permitted assets** and liabilities.

Audit exemptions

Exemption from the requirement to have a statutory audit

- where a company meets **2 of 3** of the requirements (for 2 consecutive financial years):

  1. **total assets** not exceeding **€4.4m**
  2. **turnover** not exceeding **€8.8m**
  3. **average** number of **employees** not exceeding **50**

- cannot avail of exemption if:
  - notice is served
  - annual return is not filed on time.

Audit committees

Establish or explain

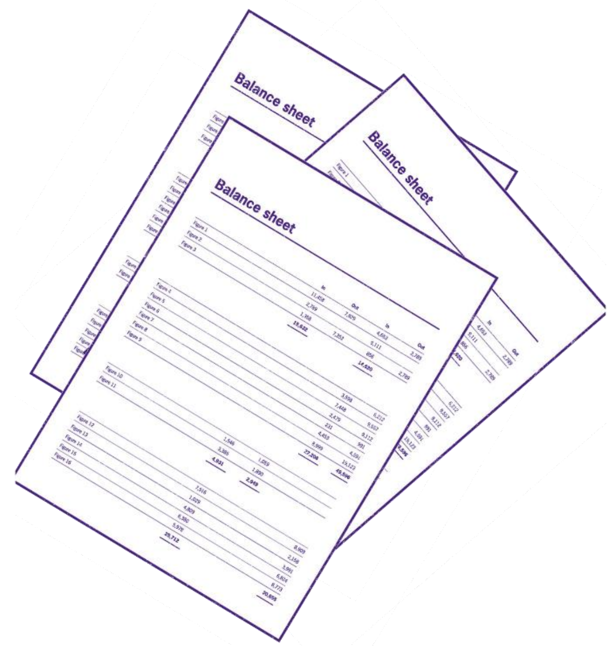
- a large company shall either:
  - establish an audit committee and confirm in the Directors' Report; or
  - if not established, explain why not in the Directors' Report

A company whose	Large
Turnover*	>€50m
Total assets*	>€25m
or	
A group together meeting the above criteria	

*for the current and preceding financial year

Directors remuneration

Directors remuneration is now publically available



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Directors remuneration

Now publically available …..

- categories and scope of directors' remuneration disclosures extended to include:
  - emoluments for qualifying services
  - gains made on the exercise of share options
  - amount of money or value of other assets for qualifying services
  - contributions paid to a retirement benefit scheme
  - compensation for loss of office or other termination benefits

*All disclosures include those of shadow and *de facto* directors

Directors' compliance statement

Key points

- applies to all Public Limited Companies (except investment companies) and to all other large limited companies with a balance sheet total of €12,500,000 and a turnover of €25,000,000 (unlimited and investment companies are excluded from this requirement).
- directors must make an annual statement in their Directors' Report, acknowledging that:
  - they are responsible for securing the company's compliance with its relevant obligations*
  - confirming that certain things have been done or, if they have not been done; and
  - explaining why they have not been done.

*Relevant obligations" means an obligation under tax law, or where failure to comply would constitute a Category 1 or Category 2 offences under the Act, or a serious Market Abuse or prospectus offence (or in certain cases a serious Transparency offence).

Directors' loans

- **loans to** a director: if not in writing presumed to be repayable on demand and bear interest [s236]
- **advances by** a director: if not in writing, presumed not to be a loan. To the extent it was a loan – does not bear interest and is subordinate
- beware of accounting issues arising under FRS 102 as a result of potential 'financing transactions'.

Loans from Directors to company

- undocumented loans by a Director presumed to be a gift to the company
- documented loans without statement of interest presumed to bear no interest

Mergers

- statutory mechanism for merging set out in the Act.
- merger can now be done:
  - by acquisition
  - by absorption
  - by formation of a new company
- basis for applying merger accounting set out in the Act – previous contradiction no longer exists!
- also introduced the concept of 'merger relief' and 'group reconstruction relief'

Note: FRS 102 only permits merger accounting in group reconstructions and for charities!

Things to note…

- small company registered with Central Bank **MUST FILE FULL ACCOUNTS with CRO** will impact many insurance brokers where no requirement to file full accounts previously.

- provision for revision of defective financial statements

- can only change year end once every five years

- directors report to confirm there is no relevant audit information of which auditors are unaware – increased accountability

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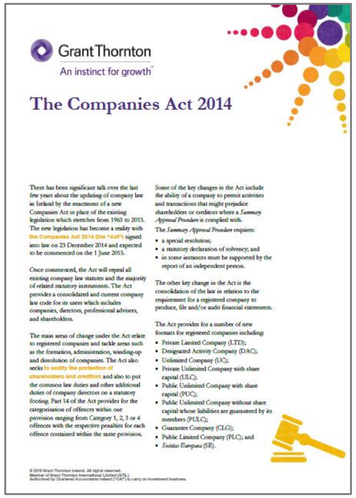
KnowledgeBase announces partnership with Grant Thornton

View coverage on the announcement on TechCentral.ie, Business World, Digital Daily, Silicon Ireland, BizPlus.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Topic 1: Audit committees
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Topic 2: Directors' loans and advances
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Topic 3: Filing thresholds and audit exemption
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Topic: Accounting miscellaneous
April 2015

More to come…

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Questions & feedback