THE Companies Act 2014

One of its striking features is the general structure which the Act has adopted. For the first time in Irish company law, the most common company type, the private company limited by shares, is placed at the core of the legislation as the default company. By adopting this structure the Act acknowledges the practical reality that almost 90% of the companies currently registered at the Companies Registration Office are private companies limited by shares. In addition the Act rectifies the anomaly in the current legislation which pre-supposes that the public limited company is at the centre of corporate life in Ireland whereas in reality less than 1% of companies registered are public limited companies.

The result is that that architecture of the company law code is now recalibrated to reflect the true landscape of enterprise in the State. There is world of difference between the one-person private company formed by a trade person and the large publicly listed limited company.

DJEI

To ensure greater accessibility of the new company law code, the Companies Act is made up of 2 Volumes. Volume 1 (containing Parts 1 to 15 of the Act) sets out the law applicable to the most common company type in the State – the private company limited by shares (the “new LTD company”). In keeping with the objective of ensuring that the law is clearly accessible the Act is arranged to reflect the life cycle of the company – starting with the incorporation of a company, followed by matters pertaining to its operation, and finally providing for the company’s wind down.

In Volume 2 (which contains Parts 16 to 25 of the Act and its Schedules) sets out the other types of company that can exist and how the law contained in Volume 1 is applied, disapplied or varied for each other company type. These other company types are the Designated Activity Company (DAC), the Public Limited Company (PLC), the Guarantee

Company (CLG), the Unlimited Company, the Unregistered Company and the Investment Company. There are legitimate users of all the different company types set out in the Act and it is imperative that Irish company law should facilitate all types of enterprise and the wider commercial community by making appropriate provision for these different company types.

Summary of MAIN INNOVATIONS

Returning to the new model private limited company, the Act contains a number of significant innovations and reforms for this company type:-

- Firstly this company type will have the same legal capacity as a natural person. The current *ultra vires* rule does not apply to this new company type – the *ultra vires* rule is the legal doctrine whereby a company must have an “objects clause” in its Memorandum of Association. Removing the need for an objects clause will both ease the administrative burden on companies and provide certainty to third parties (such as lenders) who will no longer have to examine extensive objects clauses to determine whether a company is acting within its powers.
- This company type will be allowed to have only one director. Under the current law, a company must have at least two directors – even if one person wishes to establish a business as a company on his or her own, he or she needs to find an additional person to act as the second director. Removing this requirement will make it easier to start a new business.
- The “new LTD company” can have a minimum of 1 member and up to a maximum of 149 members. The 149 upper-limit is linked to the requirements of EU Prospectus Law, which govern the offer of shares to the public.
- The “new LTD company” will have a single-document constitution, in contrast to the current law whereby every company must have two documents – a Memorandum of Association, and separate Articles of Association.

DJEI

- The “new LTD company” will no longer be obliged to go through the formality of holding a “physical” AGM whereby all of the members have to convene in one location at the same time on an annual basis. Instead the members will be able to hold a “written” AGM, whereby all of the matters which must be dealt with at the AGM can be approved by written procedure.

- The Act contains a codified version of the fiduciary duties to which directors are currently subject by a combination of the common law and statutory provisions. This brings all of these duties together in a single identifiable place, making it easier for directors to understand their responsibilities and more difficult to deny their existence. This also addresses one of the recommendations of the Moriarty Report in relation to company law.

- The Act contains a “summary approval procedure”, which is applicable to a number of activities (for example, reduction of capital) which under the current law might require the company to undertake the burdensome and expensive process of securing Court approval. The new Summary Approval Procedure incorporates safeguards in relation to directors’ liability in circumstances where the procedure is used without proper justification.

DJEI

Additionally there are a number of innovations which will apply to other company types, for example;

- Part 20 enables any company to convert from its existing company type to any other company type which can be formed under the Act, in contrast to the current law, which contains restrictions on conversions. This provides flexibility and greater options to companies which face a change in their circumstances.

- For the first time, guarantee companies will be able to avail of the audit exemption. This innovation will be of significant benefit to the sectors which tend to use the guarantee company structure (for example companies in the voluntary sector, charities and residential management companies), whilst at the same time

recognising the particular circumstances applying to guarantee companies in allowing a single member to object.

<u>**Part level Summary - VOLUME 1**</u>

PART 1 and 2– PRELIMINARY AND GENERAL and INCORPORATION AND REGISTRATION

Part 1 consists of 14 sections and is largely devoted to house-keeping. It sets out the structure and defines terms which are used throughout the Act.

Part 2 makes provision for the incorporation and registration of the new model private company limited by shares (the "new LTD company") and provides that any one or more persons may form such a company.

The most significant aspect of this Part is the provision for the conversion of an existing private company limited by shares to a new model private company limited by shares. If the company chooses to opt for the new regime, Schedule 1 sets out a template to assist them. Companies that do not elect to opt into the new regime will not be able to avail of the many advantages associated with the new model private company limited by shares, such as the ability to have only 1 director, the one-document constitution and the possibility to avoid having a "physical" AGM. However the new Ltd company will not suit all business activities and therefore a company is entitled to opt out of the new regime and can do so by converting to a Designated Activity Company (DAC) or other company type.

PART 3 – SHARE CAPITAL, SHARES AND CERTAIN OTHER INSTRUMENTS

Part 3 consolidates all existing law relating to share capital, shares, and certain other instruments. At present, this law is set out across the three main Companies Acts. Many provisions from Table A of the First Schedule to the Companies Act 1963, which are commonly inserted into the articles of association of a company, are now incorporated into

DJEI

the text of the Act and apply unless the company's constitution provides otherwise, thus reducing the amount of detail required in the constitution of the company and making it more business friendly.

PART 4 – CORPORATE GOVERNANCE

Part 4 provides a framework for directors and other officers as regards their appointment, their interaction with the company and its members, and the ways in which the activities of the company are conducted on a day-to-day basis.

This Part permits the "new LTD company" to have a single director. It also allows such a company to dispense with holding an AGM, where agreed unanimously by the members. Provision is made for unanimous written resolutions, thus allowing a company to pass resolutions, including special resolutions, in writing.

DJEI

Part 4 also sets out the new Summary Approval Procedure which deals with restricted activities such as the giving of financial assistance for the acquisition of shares, making reductions in company capital, varying company capital and giving loans to directors and connected persons. This reduces the burden and expense on companies who previously may have had to secure Court approval for certain transactions. Additionally it simplifies and streamlines the current methods of effecting such transactions. To ensure balance, it incorporates safeguards in relation to directors' liability if the procedure is used inappropriately.

PART 5 – DIRECTORS DUTIES AND OTHER OFFICERS

Part 5 codifies, for the first time in Irish law, all the duties of directors and other officers of the company. Up until now, these duties were to be found in the common law and in various statutory provisions. They are set out now in their entirety for the sake of clarity and

it is expected that this innovation in company law will promote compliance with such duties by directors and company officers.

Also dealt with in this Part is the Directors' Compliance Statement, which is now being introduced into law as recommended by the CLRG and approved by Government in November 2005. These provisions apply to all public limited companies (except investment companies) and large limited companies. It places on obligation on directors to make an annual statement in their Directors' Report, acknowledging that they are responsible for securing the company's compliance with its "relevant obligations". This provides that Directors confirm that certain actions have been done, or where they have not been done, explaining the reasons why. Failure to prepare a Director's Compliance Statement will constitute an offence under the Act.

PART 6 – FINANCIAL STATEMENTS, ANNUAL RETURN AND AUDIT

Part 6 contains provisions regarding the accounting records to be kept by companies, the financial statements to be prepared by them, the periodic returns to be made to the Registrar of Companies and the auditing of financial statements. It also covers other matters related to auditors, particularly rules governing the appointment of statutory auditors and their removal from office. To a large extent, the requirements are unchanged from existing law however; the relevant provisions have been redrafted in order to make them easier to understand in order to improve compliance.

PART 7 – CHARGES AND DEBENTURES

Part 7 contains provisions regarding debentures and charges and introduces a number of changes to the current law, the purpose of which is to simplify the registration and de-registration of charges while clarifying the rules for the priority of charges.

DJEI

A new two-stage procedure for the registration of charges is proposed. It provides that an initial notice can be sent to the Registrar stating the intention of the company to create a charge followed up by a further more detailed notification within 21 days of the creation of the charge, stating that fact. In this way, it is envisaged that lenders may be more willing to advance funds if they can achieve an enhanced security priority over a company's assets.

The rules governing the priority of charges have also been significantly changed in that where the priority of charges is not governed by other regulation; such priority will be determined by reference to the date of receipt by the Registrar of Companies of the prescribed particulars.

PART 8 - RECEIVERS

Part 8 deals with receivers. It substantially re-enacts the current law on receivership as contained in the Companies Act 1963, as amended. There are however some new provisions that set out the powers and duties of receivers. Receivers are now given certain specific powers in this Part in addition to those conferred on them by court order or the instrument under which they were appointed. Conferring statutory powers on receivers is intended to alleviate many of the problems which arise from poorly drafted debentures.

PART 9 – REORGANISATIONS, ACQUISITIONS, MERGERS AND DIVISIONS

Part 9 contains provisions relating to the reorganisation, acquisition, merger and division of companies. The main innovation in this Part is the provision, for the first time in Irish law, of a statutory mechanism whereby two private Irish companies can merge, so the assets, liabilities and corporate identity of one, are transferred by operation of law to the other, before the former is dissolved. A further innovation is that a merger can be effected without the necessity for a High Court order. Where a merger meets the requirements of the legislation, it is proposed that the Summary Approval Procedure can be utilised to effect the merger, which can be expected to result in a significant saving of time and money. The

DJEI

provisions dealing with divisions are also entirely new and have been drafted to mirror the corresponding provisions in this Part on mergers.

PART 10 – EXAMINERSHIP

Part 10 contains the provisions in relation to examinership. It largely reproduces the existing law on examinerships as contained in the 1990 Act and the recent 2013 Act which allowed small private companies to go to the Circuit Court for examinership.

PART 11 – WINDING UP

Part 11 reorders in a more logically coherent way the law relating to winding up. As a result greater consistency has been introduced between the three different methods of winding up (members' voluntary, creditors' voluntary and court ordered). This is most evident in the changes to the court-initiated mode of winding up, which will reduce the court's supervisory role in favour of greater involvement for creditors.

Further changes are the introduction of new professional indemnity insurance requirements for liquidators and the requirement for a person to be qualified before acting as liquidator of a company.

DJEI

PART 12 and 13 – STRIKE OFF AND RESTORATION and INVESTIGATIONS

Part 12 combines into one Part the many diverse provisions of the current law regarding the strike off and restoration of companies. The new provisions set the reasons why a company may be struck from the Register and in another, the procedures for restoration to the Register. The Director of Corporate Enforcement will be empowered to require the directors of a company which is being struck off, to produce a statement of affairs. These directors can be required to appear before a Court and answer on oath any question relating to the statement.

Part 13 substantially re-enacts, without any significant amendments, the law regarding the appointment of inspectors to companies and seeks to codify all law relating to the investigation of companies.

PART 14 – COMPLIANCE AND ENFORCEMENT

In keeping with the stricter approach to the enforcement of company law, Part 14 brings together the various compliance and enforcement provisions, a change which will provide greater transparency.

If a director applies for relief from a restriction order, the Director of Corporate Enforcement must now also be included as a notice party in any application for relief. A new provision is inserted whereby a company is prohibited from utilising the Summary Approval Procedure where that company has a restricted Director. Additionally higher capitalisation is now required for companies with a restricted Director.

A new four-tier categorisation of offences is introduced. It is proposed that, subject to a small number of exceptions in the case of the most serious offences (for example prospectus and market abuse offences), that all offences under the Companies Acts should be categorised according to this four-tier scheme. The Senators will find details of the scheme in their information packs.

A further new provision has been introduced which provides that, following a conviction for an offence under this Act, the Court may order that the convicted person should remedy any breach of the Act in respect of which they were convicted.

DJEI

PART 15 – FUNCTIONS OF THE REGISTRAR AND ADVISORY BODIES

Part 15 contains provisions relating to the Registrar of Companies, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Director of Corporate Enforcement and the Company Law Review Group. For the first time, the powers and duties of both the Minister and these bodies are brought together in one coherent group of legislative provisions.

DJEI

Part level summary - VOLUME 2

Volume 2 of the Companies Act, sets out the other types of company that can exist and how the law contained in Volume 1 is **applied, disapplied or varied** for each other company type set out in Parts 16 to 24.

PART 16 – DESIGNATED ACTIVITY COMPANIES (DAC)

Part 16 of the Act makes provision for a type of private company to be known as a designated activity company or "DAC". There will be two types of DAC under the Act - a private company limited by shares and a private company limited by guarantee, having a share capital. The primary defining feature of a DAC will be the continued existence of an objects clause in the constitution of the company. It is envisaged that entities which would welcome the DAC include special purpose companies – for example those incorporated for joint ventures or for use in a financing transaction. However, the Act does not restrict the availability of DACs to persons engaged in such activities.

PART 17 – PUBLIC LIMITED COMPANIES (PLC)

Part 17 is concerned with Public Limited Companies (PLCs). The key difference between public limited companies and private companies is that only PLCs will be permitted to list their shares on a stock exchange and offer them to the public. A PLC is now permitted to have as few as 1 member and there is no maximum number on the membership of such a company. A PLC must have at least 2 directors. A PLC is obliged to establish an audit committee and corporate governance provisions for certain PLCs are set out.

PART 18 – GUARANTEE COMPANIES (CLG)

Part 18 makes provision for companies limited by guarantee, the CLG, not having a share capital. Since Guarantee Companies do not have a share capital, they are a popular type of

company for charities, sports and social clubs and management companies. A CLG may be exempt from the requirement to use such a suffix to its name, for example if it has a charitable object.

The audit exemption is now being extended to guarantee companies under the Act, if it fulfils the criteria for a small company. It is expected that this will benefit the many guarantee companies that are charities or sports clubs etc. Any one member of the company is entitled to object to the exemption, and thus force a company to carry out an audit.

PART 19 – UNLIMITED COMPANIES (UC)

Part 19 makes provision for unlimited companies. This Part is structured in such a way that it covers both private unlimited companies and public unlimited companies. In this regard, three different types of unlimited companies are being catered for – the private unlimited company with a share capital (ULC), the public unlimited company with a share capital (PUC) and the public unlimited company that has no share capital (PULC). All three types of unlimited company exist already.

PART 20 – RE-REGISTRATION

Part 20 makes provision for re-registration of companies. A company will generally be permitted to re-register as another type of company subject to complying with the requirements applicable to the latter company type. Re-registration will involve the passing of a special resolution and the delivery of certain documents, including a compliance statement, to the CRO; additional requirements may apply depending on the type of company following re-registration.

PART 21 – EXTERNAL COMPANIES

Part 21 makes provision for the registration and disclosure requirements of external companies (also known as foreign companies or overseas companies) which have been formed and registered outside the State but which have a connection with Ireland. Existing law provides for both the concept of "place of business" and the concept of "branch"; however under the Act the place of business is abolished and the law will provide only for the "branch" concept. By not retaining the concept of "place of business", it is intended to remove the uncertainty in the current law and oblige external companies to register as a branch if appropriate and thus be required to file accounts.

PART 22 – UNREGISTERED COMPANIES AND JOINT STOCK COMPANIES

Part 22 deals with unregistered companies and joint stock companies and the application of the Act to companies formed or registered under previous Acts. It also provides a mechanism for an unregistered company to register as a PLC. The most important unregistered company in Ireland is the Governor and Company of the Bank of Ireland.

DJEI

PART 23 – PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC.

Part 23 contains the provisions relating to prospectus law, market abuse law, and transparency law. In particular, provisions are set out regarding the consequences of a breach of a measure forming a part of any of these, and requiring a company with traded securities to prepare a corporate governance statement. For the sake of clarity, these provisions are housed in a stand-alone Part rather than in Part 17 of the Act on PLCs.

PART 24 – INVESTMENT COMPANIES

Part 24 of the Act makes provision for the establishment of companies as investment companies, currently provided for under the 1990 Act. In order to be permitted to operate,

these companies must be authorised by the Central Bank. Such companies are a key constituent of the set of legal structures under which the international collective investment funds industry operates in Ireland. An investment company is a type of PLC.

PART 25 – MISCELLANEOUS

The final Part of the Act, Part 25, contains miscellaneous provisions that do not naturally "fit" in any of the preceding Parts of the Act, such as foreign insolvency proceedings, the prohibition on partnerships with more than 20 members and certain public auditor requirements.

DJEI Company Law 2015

DJEI