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Companies Limited by Guarantee, Directors' Duties and the Companies Bill

Presentation to the Carmichael Centre for Voluntary Groups

4th December 2014

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Background to the Companies Bill

- The cornerstone of modern Irish company law is the Companies Act 1963 and the Companies Bill proposes to consolidate it and c 32 other enactments (17 Acts & 15 SIs)

- The publication by the Department of Jobs, Enterprise and Innovation of the Companies Bill 2012 on 21 December 2012 was a landmark development in a process conceived by the McDowell Group on Compliance & Enforcement in 1998 and begun by the Company Law Review Group (CLRG) in 2000.

  "...a programme should be undertaken to incorporate the provisions of the existing Companies Acts and the substantive company law now set out in regulations...into one single comprehensible companies code." (McDowell Report at para 5.4.1)

Background to the Companies Bill

- The CLRG was established as a statutory advisory group to the Minister for Jobs, Enterprise and Innovation by the Company Law Enforcement Act 2001, having been established on an administrative basis in January 2000.

- CLRG's purpose is to monitor, review and advise the Minister on matters concerning the Companies Acts and in so doing to "*...seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity*."

Background to the Companies Bill

- The CLRG's First Report (to 31 December 2001) made 195 recommendations, all unanimously endorsed by its widely-based membership which included the **social partners** (e.g. ICTU and IBEC etc); **users of company law** (e.g. CCABI, Law Society, Bar Council, Courts Service, Revenue Commissioners, ISE, Institute of Directors, ICSA etc); and **regulators and administrators** (e.g. CRO, AGO, the Department etc). Membership has since been enlarged to include ODCE, ISME, SFA, IAASA, Central Bank etc.

- CLRG's First Report was the blueprint for the Companies Bill.

The design of the Companies Bill

- The private company was established as a separate company type by the Companies Act 1907 and was recognised by the CLRG as the most common type:
  - "The private company limited by shares should be the primary focus of simplification" (**para 3.2.3**)
  - "the law should be clear and accessible…the legislation should be structured in such a way that the provisions apply to small companies are easily identifiable" (**para 3.2.8**)
  - "The private company limited by shares should be established as the model company" (**para 3.6.5**)
  - The consolidated Companies Act should be sub-divided into two groups of law: the first group will define the private company and contain all company laws that apply to it and the second group will define the remaining types of company and the provisions that apply to each (**para 3.7.2**)
- In furtherance of this recommendation, the CLG is addressed in its own Part, Part 18 of the Bill

The design of the Companies Bill

- The Bill modernises the law relating to registered companies:
  - The different types of company – LTDs, DACs, PLC, UCs and CLGs
  - How they are formed
  - How they are administered
  - How they are to be wound up and dissolved
  - How members and creditors are protected
  - The criminalisation of certain acts and omissions by companies and others
- The Bill is confined to company law and does not address matters relating to:
  - the rights and protections of employees of companies;
  - the taxation and residence of companies or their directors;
  - the administration and regulation of charities;
  - the regulation of commercial contracts;
  - consumer protection;
  - the management of apartment buildings, etc
- The key reason is because such matters are not are not exclusive to companies but are relevant to other forms of business organisation and do not properly form part of "company law".

The design of the Companies Bill

- A draft of the first 15 Parts was published on 30 May 2011.
- The Bill, containing 25 Parts (now, 1,448 sections), was published on 21 December 2012; second reading on 23rd and 25th April 2013.
- Dail Committee Stage was 6th November 2013 and Report Stage 2nd April 2014; Seanad Committee Stage completed 17th June 2014 and Report and Final Stage Seanad on 30th September 2014
- Bill has to go back to Dail to approve Seanad amendments
- Enactment anticipated in December 2014
- Indicative commencement date is 1 June 2015

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- The key architectural feature is that the Bill, published in two volumes, segregates the law relating to the LTD from other types (Volume 1 – Parts 1 to 15) and the law relating to all other types is set out in Volume 2 – Parts 16 to 25.

Key innovations in the Bill

- Activities that might prejudice shareholders or creditors are permitted where the company complies with the *Summary Approval Procedure* which requires a special resolution, a statutory declaration of solvency which, in some cases, must be supported by the report of an independent person (*Part 4 – Chapter 7*)
- Directors' common law fiduciary duties have been codified and together with all diverse statutory duties assembled as a comprehensive code (*Part 5*)
- All offences are categorised as being either Category 1, 2, 3 or 4 offences and the penalties applicable to each type are set out in one provision (*Part 14 – s 871*)

New obligations and new regulations?

The Companies Bill is primarily a consolidation of existing law and there are fewer new obligations and regulations than one might expect. The main new obligations include:

- Transitional obligations – to change name to include "CLG" unless exempt from being required to have CLG in name.
- New obligations – to make compliance statements (only some companies), to state in directors' report auditors not unaware of any relevant audit information; to establish audit committees (only some)
- New regulations – minors cannot be directors; loans to and from directors should be in writing.

Features of the company limited by guarantee (CLG)

- Governed by Part 18 and Parts 1 to 15 (save to the extent that they are disapplied, modified or supplemented);
- Can have just one member and no upper limit;
- Must have 2 directors;
- Must have a company secretary;
- Cannot have a share capital or shareholders – only members;
- Has a "constitution" made up of a memorandum and articles of association
- Name must end in "company limited by guarantee" or "CLG" unless the Registrar of Companies accepts that it meets the criteria of a non-for profit
- Will continue to have an objects clause
- There will be no Table C but instead some 87 statutory-default provisions will apply to its internal administration, save to the extent that its constitution provides otherwise.

Guarantee Companies (Part 18)

- Defines a CLG as a company which does not have a share capital whose members' liability is limited to the amount they guarantee to contribute, as is specified in the constitution, in the event of the company being wound up.
- The law that applies to a CLG is the law in Parts 1 to 15 save to the extent that it is disapplied, modified or supplemented by Part 18.

Guarantee companies (Part 18)

Law set out in 9 chapters:

1. Preliminary and definitions
2. **Incorporation and consequential matters**
3. **Share capital**
4. **Corporate governance**
5. **Financial statements, annual return and audit**
6. Liability of contributories in winding up
7. Examinerships
8. Investigations
9. Public offers of securities

Preliminary and General (Part 1)

- When enacted, it will be commenced by order (section 1)
- Definitions are provided in section 2, and these definitions will apply generally throughout the 25 Parts.
- The definitions apply in hundreds of provisions in the Bill and great care has been taken in ensuring that they are fit for purpose in all instances;
- E.g. “company”, “director”, “constitution” etc
- A central definition (in section 7) is that of “subsidiary” and the definition afforded includes what is currently the s 155 CA 1963 definition of “subsidiary” and also the group accounts definition of “subsidiary undertaking”.
- References in instruments to subsidiary and holding company as defined in the 1963 Act are unaffected by the new definitions of those terms (sections 7(1) and 8(4)).

Incorporation & Registration (Part 2 & 18)

- Part 2 is the source of many of the provisions that are key to the identity of the new model private company limited by shares (referred to here as the LTD).
- Part 2 contains provisions relating to the formation and registration of LTDs and is divided into 6 chapters:
  1. Preliminary (definitions)
  2. **Incorporation and consequential matters**
  3. **Corporate capacity and authority**
  4. Contracts and other transactions
  5. Company name, registered office and service
  6. ~~Conversion of existing private companies to the new model private company~~

Incorporation and Registration (Part 2 & 18)

- CLGs will be governed by their "constitution" which will take the form of a memorandum of association and articles of association
- CLGs can be formed with just one member but will continue to need at least 2 directors
- The main change will be the name – CLGs cannot end in "Limited" or "LTD" and there is a transition period within which CLGs should change their name;
- Transition period is 18 months from commencement (i.e. indicative commencement date is 1 June 2015)
- At end of transition period, if they do not change name, it will be deemed to have been changed

Incorporation and Registration (Part 2 & 18)

- A major innovation is the codification of the rules of internal management found today in articles of association.
- The substance of virtually all of the regulations in Table C 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 company limited by guarantee (CLG) .
- These provisions are optional so that they are expressed to apply "*save to the extent that the company's constitution provides otherwise*".
- Companies may (and it is thought will) still set out the rules governing meetings, the appointment and removal of members and directors and related matters in their own constitution for reasons of convenience.
- Companies are advised to review their articles of association with a view to updating references and ensuring that no unintended statutory defaults apply.

Incorporation & Registration (Part 2 & 18)

Chapter 3 – capacity and authority

- CLG will have the capacity to do any act or thing stated in its objects clause in its memorandum of association.
- This contrasts with an LTD which will have full and unlimited capacity to carry on and undertake any business or activity, to do any act or enter into any transaction and for those purposes, full rights, powers and privileges (*s 38*)
- The effect is to make redundant the doctrine of *ultra vires*
- **NB: <u>CLGs will continue to have objects clauses and section 38 does not apply to CLGs</u>**
- The board of directors is deemed to have the authority to bind the company (*s 40*)

Share Capital (Part 3)

- Most of the provisions in Part 3 are disapplied to CLGs because it is concerned, in the main, with shares and share capital which a CLG does not by definition have.
- Part 3 deals with share capital, shares and other instruments and is set out in sections 64 to 126
- Part 3 is sub-divided into 7 Chapters:
  1. Pre~~liminary and interpretation~~
  2. Offers of securities to the public
  3. ~~Allotment of shares~~
  4. ~~Variation in capital~~
  5. ~~Transfer of shares~~
  6. ~~Acquisition of own sh~~ares
  7. Distributions

Corporate Governance (Part 4 & 18)

- Virtually all of Part 4 applies to CLGs
- Part 4 sets out in 92 sections the law relating to the governance and administration of companies in 10 chapters:
  1. Preliminary
  2. **Directors and secretaries**
  3. Service contracts and remuneration
  4. **Proceedings of directors**
  5. **Members**
  6. **General meetings and resolutions**
  7. Summary approval procedure
  8. Protection for minorities
  9. Forms of registers, indices and minute books
  10. Inspection of registers and provision of copies etc

Corporate Governance (Part 4 & 18)

Chapter 2 – Directors and secretaries

- A CLG must have at least 2 directors (s1194) and a company secretary
- No person under the age of 18 can become a company director.
- Directors retire by rotation *unless the constitution provides otherwise*.
- Directors remuneration (if allowed) will be determined by the members in general meeting *unless the constitution provides otherwise*.

Corporate Governance (Part 4 & 18)

Chapter 4 – Proceedings of Directors

- Unless a company's constitution provides otherwise, the business of the company shall be managed by its directors (section 158)
- Directors can delegate their powers to such persons as they think fit (section 158)
- Alternates can be appointed (unless the constitution provides otherwise) (section 165)
- Audit committee requirement for CLGs on a comply or explain basis (section 167)

Corporate Governance (Part 4 & 18)

Chapter 5 – Members

- The initial subscribers are deemed to have agreed to become members.
- Persons who the directors admit to membership or who are admitted pursuant to a provision in the constitution can become members (section 1199)
- Members may resign by serving notice on the company and the directors may terminate a members' membership (unless the constitution provides otherwise)
- Death or bankruptcy terminate membership (s 1199)

Corporate Governance (Part 4 & 18)

Chapter 6 – General meetings and resolutions

- AGMs become optional for CLGS which have only one member but not multi-member CLGs*(s 175* and *1202);*
- All law relating to meetings, voting and resolutions has been made statutory subject to an elective opt-out;
- CLGs are not required to allow members appoint proxies;
- Unanimous written resolutions are permitted unless the constitution provides otherwise (no longer any need to say that they are permitted)
- Majority written resolutions are not allowed in the case of CLGs

Duties of directors (Part 5)

- Codification of common law duties hugely significant. All statutory and common law duties now provided for in 53 sections, divided into 6 chapters:
    1. Preliminary and definitions
    2. General duties of directors etc
    3. Evidential provisions concerning loans etc
    4. Prohibitions and restrictions on loans etc
    5. Disclosure of interests in shares or debentures
    6. Responsibilities of officers etc

Duties of directors (Part 5)

Chapter 1 – Preliminary and definition

- Applies duties not only to formally appointed directors but also to "de facto" directors and "shadow directors"

Chapter 6 – Officer in default

- Many offences under the Act apply to the company and to any "officer in default" i.e. any officer who authorises or who in breach of his duty permits the default
- Where it is proved that an officer was aware of the basic facts concerning a default, it will be presumed that he permitted the default unless he shows he took all reasonable steps to prevent it or that by reason of circumstances beyond his control, was unable to do so

Duties of directors (Part 5)

Chapter 2 – General duties of directors

- Introduction of *Directors' Compliance Statement* (*s 225*);
- Obligation to prepare applies to CLGs where both the balance sheet >€12.5m and turnover >€25m;
- In the Directors' Report the directors must confirm that they are responsible for the company securing compliance with its relevant obligations and also confirm that the following three things have been done or if not done, specifying the reasons why not (i.e. on a comply or explain basis):
  - That a compliance policy statement has been drawn up, setting out its policies concerning compliance with relevant obligations;
  - That appropriate arrangements or structures designed to secure material compliance with relevant obligations have been put in place; and
  - That a review in the financial year to which the Directors' Report relates of arrangements and structures that are in place has been conducted.

Duties of directors (Part 5)

Chapter 2 – General duties of directors

Statement of 8 principal fiduciary duties of directors (*s 228*)

1. Act in good faith in what the director considers to be the company's interests;
2. Act honestly and responsibly in the company's affairs
3. Act in accordance with the constitution and exercise powers only for lawful purposes
4. Not use company property for own or others' use unless approved by members or in the constitution
5. Not to fetter discretion unless permitted by constitution or entered into in the company's interests
6. Avoid conflicts of interest unless released by members;
7. Exercise care, skill and diligence (subjective test);
8. Have regard to interests of members and employees.

Financial statements, filing & audit (Part 6)

- The consolidation of the law in this area is a radical improvement in accessibility and transparency, and is set out in 23 chapters:
    1. Preliminary
    2. Accounting records
    3. Financial Year
    4. Statutory financial statements
    5. Group financial statements: exemptions & exclusions
    6. Disclosure of directors' remuneration and transactions
    7. Disclosures required in notes to financial statements
    8. Approval of statutory financial statements
    9. Directors' Report
    10. Obligation to have statutory financial statements audited
    11. Statutory auditors' report

Financial statements, filing & audit (Part 6)

12. Publication of financial statements
13. Annual return and documents annexed to it
14. Exclusions, exemptions and special arrangements regarding disclosure
15. Audit exemption
16. Special audit exemption for dormant companies
17. Revision of defective statutory financial statements
18. Appointment of statutory auditors
19. Rights, obligations and duties of statutory auditors
20. Removal and resignation of statutory auditors
21. Notification to supervisory authority of certain matters etc
22. False statements – offence
23. Transitional

Financial statements, filing, audit - Part 6 & 18

Notable proposed changes to the law here include:

- **Revision of defective financial statements** – new procedure will allow for the preparation, approval, audit and filing of revised financial statements or directors' reports in respect of a prior year (*ss 366 to 379*)
- **Directors' report to confirm (so far as directors are aware) there is no relevant audit information of which the auditors are unaware** – increases directors' accountability for audit (*s 330*)
- **Auditors' reporting of offences** – no longer the nebulous "indictable"; will now be category 1 and 2 offences only (*s 393*)
- **Audit exemption** – available to CLGs but any one member can object and insist that statutory auditors are appointed (s 334 & 1218)
- **Exemption from filing** – is facilitated for charities where agreed by the Charities regulatory authority and the conditions of section 1220 are satisfied.

Charges and Debentures (Part 7)

- 4 chapters: 1. Interpretation; 2. Registration of charges and priority; 3. Provisions as to debentures; 4. Prohibition on registration of certain matters
- Significant changes in the law include:
  - All "**charges**" must be registered (409(1));
  - "Charge" means (section 408(1)) a mortgage or a charge in an agreement (written or oral), that is created over an interest in **any property** of the company, excluding:
    - Cash,
    - Money credited to an account of a financial institution or any other deposits, shares, bonds or debt instruments
    - Units in collective investment undertakings or money market instruments, or
    - Claims and rights (such as dividends or interest) in respect of any of the foregoing (except cash)

Charges and Debentures (Part 7)

- There is a new (optional) **two-stage registration** procedure so that notification can be given to the CRO of the *intention* to create a charge so as to secure priority even before the charge is actually created and then registering the charge within 21 days of its creation;
- The Registrar will register the notice of intention to create the charge and it will appear on the register;
- Intention is to allow lenders put the public on notice of the intention to create a charge and perhaps encourage in some cases the provision of credit before the completion of a full legal due diligence and perfection of security.

Receivers (Part 8)

- Law relating to receivers appointed to companies set out in four chapters:
  1. Interpretation
  2. Appointment of Receivers
  3. Powers and duties of receivers
  4. Regulation of receivers and enforcement of duties
- The law is mostly consolidated and modernised but there are a few innovations. For example, section 437 now lists the powers a receiver will have, subject to any court order or debenture appointing a particular receiver.

Reorganisations, Acquisitions, Mergers and Divisions (Part 9)

- Part 9 of the Bill radically reforms the way in which Irish companies can be reorganised in four Chapters:
  1. Schemes of arrangement
  2. Acquisitions
  3. Mergers
  4. Divisions
- The most innovative procedures in this Part are in Chapter 3 relating to Mergers (and corresponding provisions apply in Chapter 4 relating to Divisions).

Reorganisations, Acquisitions, Mergers and Divisions (Part 9)

- Mergers are provided for in **Chapter 3**.
- The law is modelled on the Cross-Border Merger Regulations of 2008 which have been so successfully used by Irish companies merging with non-Irish EC companies.
- Merger by acquisition, absorption or formation of a new company.
- Where a merger takes place all of the assets and liabilities of the transferor company will be transferred to the successor company and the transferor will be dissolved.
- Merger can take effect by Court order or, most innovatively, by utilising the *Summary Approval Procedure,* a mechanism which will make the cost of merger significant lower than if an application to Court was required in all cases.

Examinerships (Part 10)

- The law relating to examinerships or court protection is set out in Part 10 in five chapters:
    1. Interpretation
    2. Appointment of Examiner
    3. Powers of Examiner
    4. Liability of third parties for debts of company
    5. Conclusion of examinership
- The law set out in this Part is broadly in line with the current law with one significant change, namely, all proceedings in relation to "small companies" can be brought in the Circuit Court in accordance with CLRG's September 2012 recommendations (*s 509(7)(b)*) – this provision has been brought forward in the *Companies (Miscellaneous Provisions) Act 2013*, signed by the President on 24 December 2013, and so the Companies Bill consolidates this new law.

Winding Up (Part 11)

The law on winding up is set out in 16 Chapters:

1. Preliminary and interpretation
2. Winding up by Court
3. Members' voluntary winding up
4. Creditors' voluntary winding up
5. Conduct of winding up
6. Realisation of assets and related matters
7. Distribution
8. Liquidators

Winding Up (Part 11)

9. Contributories
10. Committee of Inspection
11. Court's powers
12. Provisions supplemental to conduct of winding up
13. General rules as to meetings (members, creditors etc)
14. Completion of winding up
15. Provisions related to Insolvency Regulation
16. Offences by officers etc

Winding Up (Part 11)

Some significant changes here include:

- **Liquidators must be qualified** – members of prescribed accountancy body or other professional body recognised by IAASA, solicitor, person qualified in another EEA State or a person "grandfathered" (*s 633*)
- **Winding up in public interest** – by ODCE (*s 569*)
- **Minimum indebtedness increased** – to €10k (*s 559*)
- **Provisional liquidators' powers narrowed** – to those expressly provided for in the order (*s 626*)

Generally, the Bill seeks to introduce greater consistency between the three modes of winding up and to reduce Court involvement in official liquidations

Strike Off and Restoration (Part 12)

Strike off and restoration are each deal with in a separate chapter.

Strike off (*ss 725 – 735*)

- Voluntary strike off given statutory recognition
- Involuntary strike off broadly repeat existing grounds

Restoration (*ss 736 – 745*)

- Administrative and judicial restoration restated.

Investigations (Part 13)

Existing law broadly remains intact – effectively a restatement of the existing law in four Chapters:

1. Preliminary
2. Investigations by court appointed inspectors
3. Investigations initiated by Director
4. Miscellaneous provisions

Compliance & Enforcement (Part 14)

Radical reorganisation involving restatement and reform:

1. Compliance and protective orders
2. Disclosure Orders
3. **Restrictions on directors of insolvent companies**
4. Disqualification generally
5. **Disqualification and restriction undertakings**
6. Enforcement - disqualification and restriction
7. **Provisions relating to offences generally**
8. Additional general offences
9. Evidential matters

Compliance & Enforcement (Part 14)

Chapter 3 - Restrictions on directors of insolvent companies

- The defence of acting honestly and responsibly is no longer sufficient for a director to avoid being restricted;
- Directors of insolvent company must now also show that they have when requested to do by the liquidator, cooperated as far as could reasonably be expected in relation to the conduct of the winding up (*s 819(2)(b)*)
- In addition to obligations on companies with share capital, the law will be clarified to provide that if, when restricted, one becomes a director of a guarantee company without a share capital, one of its members must have given a guarantee of not less that €100,000.

Compliance & Enforcement (Part 14)

Chapter 5 - Disqualification and restriction undertakings

- The present position whereby all persons who are restricted or disqualified must be the subject of a court application will change.
- It will be possible to avoid a court appearance (and of course the costs associated with this for all parties) where the director concerned agrees to give an undertaking not to act in a way as would be prohibited if they were the subject of a disqualification order (*s 851(5)*) or a restriction order (*s 853(5)*)

Compliance & Enforcement (Part 14)

Chapter 7 - Provisions relating to offences generally

- The Bill proposes a four-fold classification of offences created by the Bill into categories (*s 871*)
- **Category 1** – conviction on indictment can result in imprisonment for a term of up to 10 years and/ or a €500k fine;
- **Category 2** – conviction on indictment can result in imprisonment of up to 5 years and/or a €50k fine
- **Category 3** – a summary offence only attracting a term of up to 6 months' imprisonment and/ or a Class A fine
- **Category 4** – a summary offence only, punishable by a Class A Fine

for "Class A Fine" see Fines Act 2010 – currently up to €5k

Functions of Registrar and of regulatory & advisory bodies (Part 15)

Four chapters containing the law on:

1. The Registrar of Companies
2. Irish Auditing and Accounting Supervisory Authority
3. Director of Corporate Enforcement
4. Company Law Review Group

The Other Parts

Part 16 – Designated Activity companies

Part 17 – PLCs

Part 18 – Guarantee companies

Part 20 – Re-registration

Part 21 – External companies

Part 22 – Unregistered companies

Part 23 – Public offers of securities

Part 24 – Investment companies

Part 25 –Miscellaneous

Further Information

Q&A

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