

Companies Act 2014

Key impacts for investment companies and fund managers

The Companies Act 2014 ("the Act") came into effect on 1 June 2015. It consolidates the existing Companies Acts, simplifies Company Law and introduces some welcome reforms. The Act affects all Irish companies, including fund service providers such as administrators and depositaries, managers of both UCITS and AIFs, as well as investment companies.

All existing private companies will have to decide whether to become a company limited by shares (LTD), a designated activity company (DAC) or another type of company. Companies regulated by the Central Bank of Ireland ('CBI') however, will likely be required to re-register as a DAC. We anticipate that the CBI will publish guidance on this matter.

Key impacts for Investment companies

Provisionally Ireland's investment fund companies were PLCs with variable capital, governed by Part XIII of the Companies Act 1990. This regime has been replaced and repealed by Part 24 of the Act, which is largely a restatement of the existing law. In addition to Part 24, the following sections of the Companies Act apply to investment companies:

- » Parts 1-14 which apply to limited companies, unless displaced by either Part 24 dealing with investment companies or Part 17 which governs PLCs.
- » Part 17 governs PLCs and therefore encapsulates investment companies also, save for certain exceptions such as the definition of 'authorised minimum' and 'authorised share capital'.
- » Certain provision of the UCITS Regulations.
- » Schedule 16 provides a very brief template memorandum and articles of association which must be supplemented with operational provisions.

Impact on ICAVs

The Irish Collective Asset Management Vehicle (ICAV) is a new form of corporate fund structure. However it is not an "investment company" under Part 24 of the Companies Act, although certain provisions of the Act will apply to such ICAV vehicles as explicitly provided for in the ICAV Act 2014.

Directors Duties

These will now be codified.

Restoration to the Register of Companies:

There is now a 2 year rather than 20 year period during which investment companies which were struck off can apply for restoration.

Model form constitution:

Schedule 16 now provides a model form constitution for investment companies. The constitution of existing Investment Companies can continue in force, save any provisions which are inconsistent with the Act's "mandatory provisions".

Risk Spreading:

The Act re-confirms that investment companies will still be required to operate a policy of risk-spreading.

Authorisation:

The investment company must be authorised by the CBI before carrying on any business in the State.

Operate within Ireland:

The Act requires an investment company to carry on some activity in the state.

Continuation:

Existing investment companies established under the current regime will continue in existence after the commencement of the Act, and will be governed by Part 24.

Share Capital:

The investment company may purchase its own shares if fully paid up, which must then be canceled. The issued share capital must also be reduced by the amount paid for the shares.

Corporate Governance Statement:

Where the investment company has listed or is trading its securities, it must provide a corporate governance statement.

Financial Statements:

In addition to IFRS, investment companies may prepare financial statements according to accounting standards applicable in other prescribed countries, such as Japan, Canada, USA.

Umbrella Funds:

The Act provides that segregated liability will apply between sub-funds.

Migration:

Overseas funds are permitted to migrate into Ireland and be authorised here by way of continuation, so that the existing track record, contracts, etc, are maintained and so that they do not have to liquidate in their original country. Similarly, Irish investment companies are permitted to migrate overseas.

AGM:

An Investment company cannot dispense with the holding of an Annual General Meeting (AGM).

Investors:

An Investment company can have a minimum of one member.

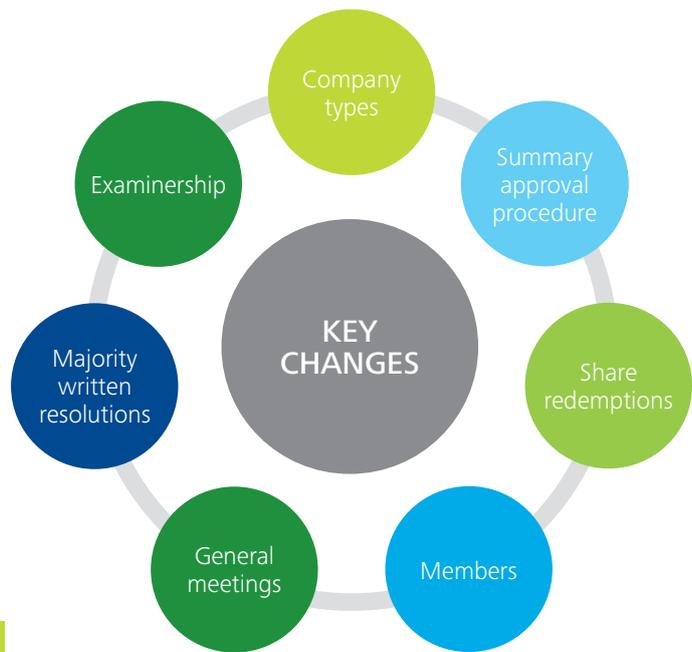
Constitution:

The constitution of the investment company will continue to comprise 2 documents – the memorandum and articles of association.

Key impacts for fund managers

Fund managers:

Any corporate fund managers currently registered as Private Limited Companies will be required to elect to become either a Company Limited by shares ("LTD" or a Designated Activity Company ("DAC" during the 18 month transition period. If no action is taken, the fund manager will at the end of the transition period automatically convert by default to LTD. The LTD is a new model company which will replace the previous private company limited by shares. Although it is largely similar to the existing vehicle, it can have one director and unlimited legal capacity. However the CBI may require regulated entities to become DACs. In this case, care will need to be taken to comply with the deadline.



Company types

The Act introduces new types of company,

Public limited company

- » Public limited company (PLC)
- » Company limited by guarantee not having a share capital (CLG)
- » Company limited by guarantee having a share capital (DAC)

Unlimited company

- » *Private* unlimited company (ULC)
- » *Public* unlimited company (PUC)
- » Public unlimited company not having a share capital (PULC)

Private limited company

- » Company limited by shares (LTD)
- » Designated activity company (DAC)

Summary approval procedure

One streamlined validation procedure introduced with minor variations tailored for certain transactions e.g. financial assistance, mergers and transactions with directors.

The procedure involves **Special Resolution of Members** OR in the case of a Merger a **Unanimous Resolution** from each of the merging companies' members, A Declaration of Company Solvency by Directors – tailored to each type of transaction. An **Auditor's Report** is required in certain cases but not all (e.g. for loans to directors or financial assistance for purchase of own shares).

In the case of a merger – special directors' confirmation is required. A LTD can avail of Summary Approval Procedure for reduction of share capital or variation of capital on reorganisation instead of the court procedure.

Share redemptions

The requirement to have 10% of the share capital as non-redeemable is eliminated.

Members

The maximum number of members for an LTD or DAC is extended to 149. All Company types can have a single member.

General meetings

A single member/multi member LTD will have power to dispense with the requirement to hold an AGM. A single member DAC, PLC, UC and CLG will have the power to dispense with the holding of their AGM. AGMs and EGMs can be held outside the State and there is provision for participation by electronic means.

Majority written resolutions

100% written approval no longer required in the following circumstances:

- » *Ordinary resolution is deemed passed 7 days after the members representing 51% have signed.*
- » *Special resolution is deemed passed 21 days after the members representing 75% have signed. Not available for removal of a Director or Auditor.*

Examinership

Small companies, as defined in the Act, can apply to the Circuit Court rather than the High Court for Examinership as per Companies (Miscellaneous Provisions) Act 2013

Financial reporting

Electronic filing pdf's

Permission to 'type sign' only accounts for filing purposes as per Companies (Miscellaneous Provisions) Act 2013

Revision of defective financial statements

Allows voluntary revision of company financial statements and reports filed with the Registrar where directors have already approved them and subsequently an error/ deficiency comes to light. An auditor's report on the revised financial statements is also required to be filed, except where there is an audit exemption.

Mergers and divisions

It is possible to divide companies and merge them, once directors complete the appropriate summary approval procedures.

Audit exemptions

Expanded to include Companies limited by Guarantee, dormant companies and there is an increase in thresholds for medium companies.

Dividends from preacquisition profits

Once directors complete the appropriate summary approval procedure the receipt of a dividend from pre-acquisition profits can be accounted for as if the dividend was out of post acquisition profits.

Audit Committees

- » Irish investment companies remain exempt from the requirement to have an audit committee.
- » DACs must have an audit committee if their balance sheet total exceeds €25million and their turnover exceeds €50 million, or when together with its subsidiaries meets the size criteria in both the current and the previous financial years. This will likely apply to regulated entities, including fund managers.



Audit exemptions for group companies

All companies in the group must have filed returns on time and the group taken as a whole meets 2 or more of the following criteria (in current and previous year):- Turnover < €8.8m; Balance Sheet Total <€4.4m; Average number of employees <50; provided members holding 10% or more of the voting rights do not object; extended to parent company and subsidiaries; special exemption for dormant companies.

Merger relief

The full share premium at market value for certain transactions is required if conditions are met including the completion of the appropriate summary approval procedure.

Key impacts for company directors & company secretaries of fund managers



Number of directors
 A LTD may have a single director who can sign the financial statements. A DAC must still have a minimum of two directors who must both sign the financial statements.

Retirement by rotation
 The requirement for 1/3 of the Directors to retire by rotation at the AGM has been removed for LTD's except for those appointed by the Board during the year who must all offer themselves for re-election.

Compliance statements
 Directors of a PLC (excluding Investment Companies) or a large LTD with a balance sheet total greater than €12.5m and turnover greater than €25m for the year will be required to make a statement that they acknowledge that they are responsible for securing and have reviewed the company's compliance with its relevant obligations.

Compliance with relevant obligations includes all taxation legislation as well as compliance with Category 1 and Category 2 offences as outlined in the Act. One of the challenges for Directors is the basis upon which they can make the required statements. The Deloitte Assessment Cube can help.

Company secretary
 It is the Directors' duty to ensure that the company secretary has the necessary skill to maintain records as required by the Act. A company secretary may be a corporate entity. A LTD with only one director must have a different person/entity as its company secretary.

Registered person
 A person may be appointed by a company as a registered person with authority to bind a company in a contract. The registered person may be notified to the Registrar of Companies and is entitled to use the company seal, and retains authority until the Registrar is notified of revocation. This person does not have to be a director. This is optional and not mandatory.

Directors' interests
 No longer need to disclose Directors Interests in shares which are <1% of the issued capital or are non-voting.

Directors' duties
 Directors Duties now codified in the Act as follows:

- » To act in good faith in the interests of the company;
- » To act honestly and responsibly in relation to the affairs of the company;
- » To act in accordance with the company's constitution and exercise powers lawfully;
- » To avoid any conflicts of interest, exercise reasonable care, skill and diligence, have regard for the interests of the Company's employees and members;
- » 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 a shareholders resolution; and
- » Not agree to restrict power to exercise an independent judgement unless permitted by the constitution or approved by shareholders resolution.

Introducing the Deloitte Assessment Cube
 Our risk assessment tool, the Deloitte Assessment Cube can help you develop an initial understanding of the current state of your governance activities in the relevant areas to support your compliance. The Cube is a set of specifically designed self-assessment questions and categorises and scores your responses into four interrelated components which govern your compliance activities- governance, people, processes, data & systems.

Understanding priorities
 The output from the Deloitte Assessment Cube gives you an indicative assessment of risk, using the system of red, amber and green (see below), based on your responses to the questions. This allows Directors (both Executive and Non-Executive) to understand and identify priorities for change. Results from the Deloitte Assessment Cube may also be used to benchmark your compliance risk management framework against other organisations. Below we outline a sample output from such an exercise.

Output from such an exercise.



Summary of main changes

Main Differences

Irish Companies

- To re-register as Designated Activity Company (“DAC”) under 1 of 2 conversion mechanisms.
- Codification of directors’ fiduciary duties.
- Requirement for a corporate governance statement where the company is a traded company.
- Directors’ compliance statement for large companies (balance sheet of Euro12.5 million; turnover exceeding Euro 25 million).
- Audit committee requirement for large companies.

Irish Investment Companies

- No re-registration requirement automatically converted an “investment company” under Part 24 of the Companies Act.
- Codification of directors’ fiduciary duties.
- Requirement for a corporate governance statement where the company is a traded company.
- Exempt from compliance statement requirements.
- Exempt from audit committee requirements.

It is anticipated that the two most popular forms of company will be the DAC and the LTD. The new model private company, the LTD, is the new form of the existing private company limited by shares. It is also anticipated that all private companies regulated by the CBI will be established as DACs. Existing companies which fail to re-register as one of the new forms of company under the Act will default to being a LTD. The main differences between the LTD and the DAC are:

Key Differences

DAC

- Must have two directors.
- Liability is limited by shares or guarantee.
- Will operate with a two-document constitution which will have an objects clause.
- Able to pass majority written resolutions.
- Must hold AGMs

LTD

- Can have 1 director (once a separate secretary).
- Will operate with a single constitutional document, with no objects clause.
- Able to pass majority written resolutions.
- Need not hold AGMs.

Who will it impact?

This is the most significant change in Company Law ever introduced and it will impact:

All Companies

All Directors

Company Secretaries

How to be prepared

Private Companies

Companies including managers of AIFs and UCITS must within 15 months of the enactment of the Act:

1. Examine existing Articles:
 - Are they consistent with the Act?
 - Are there specific Articles that need to be retained in the constitution?
 - Do you wish to retain the ‘Objects’ clause (and become a DAC)?
 - Do you wish to retain a share capital clause?
2. Re-register as a LTD or DAC
3. For large private limited companies make preparations for the approval of the Directors Compliance Statement

Public Companies

No need to make any immediate filings or changes but examine Part 17 and Parts 1 to 14 of the Act for Public Limited Companies and refer to Part 24 for Investment Companies. Make preparations for the approval of the Directors Compliance Statement (excluding investment companies).

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