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# Briefing

## Companies Act 2014:

### Company Administration



INSTITUTE OF DIRECTORS  
IN IRELAND

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The Companies Act (the “Act”) came into effect on 1 June 2015. The Act has introduced significant reforms in company law in Ireland.

While restating much of the previous law relating to company administration, the Act also provides for a number of significant changes. This briefing provides an overview of these principal changes in the Act that are relevant to Irish companies and, in particular, the private company limited by shares with a share capital (an “LTD”) and the designated activity company (a “DAC”).

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### Key Features

- The doctrine of ultra vires no longer applies to a private company limited by shares.
- The company secretary is no longer responsible for ensuring the company's compliance with the Act. It is the duty of the directors to ensure that a suitably qualified secretary is appointed.
- Fiduciary duties of directors are codified.
- An LTD may have a single director (other company types require two).
- Directors of certain companies are required to prepare directors' compliance statements.
- Directors of “large” companies must establish audit committees (or explain why they have not done so in their directors' report).
- Disclosure requirements are eased for directors' and secretaries' interests in shares and debentures.

## Capacity

### Objects

An LTD is not permitted to have an objects clause, so that an LTD has the same unqualified legal capacity to do anything that a natural (*ie* a human) person may lawfully do. Therefore, the doctrine of *ultra vires* (“beyond the legal powers”) no longer applies to an LTD, and an LTD is – by default – empowered to do anything lawful that its directors determine. The DAC will continue to be restricted by an objects clause.

Where a company (necessarily other than an LTD) retains an objects clause, a third party dealing with the company in good faith will not be prejudiced if the company exceeds its capacity.

### Corporate authority

The Act introduced the optional requirement to register with the Companies Registration Office (“CRO”) the name of every person who has unqualified legal authority to bind an LTD and to authorise others to do so. Once authorised by the board of directors and registered with the CRO, a “registered person” is taken to be duly authorised.

### Legislating for governance

The Act recasts many of the optional provisions that are suggested for the constitution of a company (often called “Table A”) as requirements of law.

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## Company Secretary

### Role and duties

Whilst some of the law relating to the role of secretary of a company is unchanged by the Act, there are some reforms worth mentioning not least because of the impact they have on the position of both the company secretary and the company’s directors.

The Act reaffirms the significance of the role and duties of the company secretary. Under the Act, company secretaries are no longer obliged to ensure compliance with the Act. This change acknowledges that company secretaries lack the power and authority to ensure such compliance.

Instead, the Act provides that the directors have a duty to ensure that the person appointed to the role of company secretary has the skills or resources necessary to discharge his or her statutory duties and other duties. This includes the case of an appointment of one of the directors of the company as secretary. The duty is based on the existing duty of directors of Public Limited Companies (PLCs) although (as may be seen below) is not as substantive.

### ***Delegated Duties***

The Act does not codify the duties of the secretary in the same manner as they do directors' fiduciary duties. The duties and powers of the company secretary will largely comprise of those which may be delegated by the directors.

### ***A Public Limited Company***

The directors of a public limited company (a "PLC") have a more onerous duty because they must appoint a secretary who meets specific requirements set out in legislation. These include the requirement that the person has, for at least three years of the five years immediately preceding his or her appointment as secretary, held the office of secretary of a company; or the person is a member of a recognised body; or is, by virtue of his or her holding or having held any other position or his or her being a member of any other body appears to the PLC directors capable of discharging their duties. The expectation of a company secretary of a PLC is that he or she would advise the board of directors, through its chairman, on corporate governance matters. A body corporate appointed as secretary is also required to satisfy at least one of these requirements.

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## **Directors**

By default, the directors have a power to borrow money and to charge the property of the company as security. An LTD may have a single director (other company types require two), but a sole director will not be permitted to be the company secretary, therefore requiring a second person to perform that role. The previous limit on a person holding more than 25 relevant directorships continues. A director must be 18 years or older.

### ***Fiduciary duties of a director***

The Act places the fiduciary duties of a director on a statutory basis, but not all directors' duties. This is a significant qualification: while the Act brings the common law fiduciary duties into legislation, the many statutory duties (under the Companies Acts and otherwise) that existed are not affected by the Act.

### ***Disclosure of Interests***

The Act states that the duty to disclose an interest in a contract or proposed contract does not apply in relation to an interest that is reasonably considered as not giving rise to a conflict of interest. The Act exempts de minimis (ie trivial) interests from the requirement on directors and secretaries to disclose certain interests in shares or debentures in the company, and in associated companies.

### Compliance statements

The Act provides that directors of a public limited company (other than an investment company), and the directors of an LTD, a DAC and a company limited by guarantee, the balance sheet of which exceeds €12.5m and the turnover of which exceeds €25m, must prepare a compliance policy statement (the “**Statement**”).

Unlimited companies are not subject to this requirement. The directors’ report must acknowledge that the directors are responsible for securing the company’s compliance with its obligations under the Act the contravention of which is a category 1 or 2 offence, or a serious Market Abuse or Prospectus offence, and tax law (“**relevant obligations**”) and in respect of the following matters confirm that it has been done or (if it is not done) specify the reasons why not:

- drawing up the Statement setting out the company’s policies (that, in the opinion of the directors, are appropriate to the company) regarding compliance with its relevant obligations;
- putting in place arrangements and structures that are, in the directors’ opinion, designed to secure material compliance with those obligations; and
- conducting an annual review of such arrangements and structures.

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## Company Seal and Execution of Documents

Under Table A of the previous Companies Acts, at least one director had to attest affixing of the seal, the second person could have been a director, secretary or authorised person. The Act introduces greater flexibility. There is now nothing in the Act to prevent the constitution of a company authorising one person only to affix the seal (for example, any director or secretary).

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## Accounts and Auditing

### Accounts (*financial statements*)

Accounts are referred to as “financial statements”; reference to proper books of account is to “adequate accounting records”; and “financial year” is defined (it is not permitted to exceed 18 months). The Act permits the voluntary revision of defective accounts, and the audit exemption is extended to dormant companies and may be available in group situations.

### Accounting

In certain circumstances in which a company acquires another company through a share issue, it will not be necessary to create a share premium. In effect, this will be a form of merger relief and facilitates companies using merger accounting rules. It is possible to disapply the prohibition on a company using as its realised profits the profits of a subsidiary relating to the period before the subsidiary became a subsidiary of the relevant company.

### **Audit Committees**

The directors of a “large company”<sup>1</sup> (of any type) have to either establish an audit committee, with as a member at least one independent non-executive director who has competence in accounting or auditing, or state in their directors’ report that they have not done so and why not. This is separate from the current, similar obligation in respect of companies in certain sectors (such as credit institutions) to have an audit committee under their relevant corporate governance codes. Such companies should review the terms of reference for their audit committees to ensure that they cover items required by the Act.

### **Audit exemption (conditions)**

An LTD and a DAC may avail of the audit exemption where at least two (and not all three) of the prescribed conditions in respect of the particular year are satisfied (ie any two of (a) the balance sheet total of the company does not exceed €4.4m; (b) the amount of the turnover does not exceed €8.8m; and (c) the average number of persons employed by the company does not exceed 50).

The Act also contains new provisions which provide for the extension of the audit exemption to holding and subsidiary companies in circumstances where the company and all of the subsidiary undertakings satisfy certain size conditions.

The Act obliges a company that has availed itself of the audit exemption in respect of a financial year to provide to the Director of Corporate Enforcement (“Director”), if requested, such access to and facilities for inspecting and taking copies of the books and documents of the company and to furnish to the Director any such information as the Director may reasonably require to satisfy himself that the company was entitled to avail of the audit exemption.

### **Annual general meeting (“AGM”)**

Subject to conditions, an LTD (whether having a single member or multiple members) may adopt written procedures in place of an AGM. Any DAC, PLC, CLG and UC having more than one member may not dispense with the requirement to hold an AGM.

### **Unlimited companies**

The statutory rules on distributions are disappplied in the case of an unlimited company, and the previous exemption for certain types of unlimited company from having to file accounts with the CRO continues.

### **Action Required**

With the doctrine of ultra vires being abolished in respect of the LTD, companies need to carefully consider whether they wish to be free from the constraints of an objects clause and thus convert to the LTD during the transition period.

Directors need to be mindful of the fact that it is now they, and not the company secretary, who is responsible for ensuring the company’s compliance with the Act. Directors must also be aware of their obligation to ensure that a suitably qualified secretary is appointed.

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<sup>1</sup> The threshold criteria are that a company, or a group of companies when aggregated, in both its / their most recent financial year and the immediately preceding one, meets the following criteria: (A) its / their balance sheet total for the year exceeds €25 million and (B) the amount of its / their turnover for the year exceeds €50 million.

*Further information is available from*



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