
Briefing

Companies Act 2014:

Directors - Transactions with the Company



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 directors' transactions with the company, the Act also provides for a number of changes and clarifications. This briefing provides an overview of these principal changes in the Act that are likely to be relevant to a director of a company in Ireland.

Key Features

- Widens exceptions to prohibition on directors' transactions.
- The new summary approval procedure can be used to validate certain transactions.
- Introduces new evidential requirements in respect of directors' transactions.
- Provides for a number of clarifications on the issue of “connected persons”.
- Amends the requisite value of non-cash assets in respect of non-cash transactions between directors and the company.

Under the Act, specific rules continue to apply to a director, or a person connected with that director, who enters into certain transactions with the company. These are additional to the director's fiduciary duties but may, in limited circumstances and subject to strict controls, permit a director to engage in transactions that otherwise might be prohibited.

The Act retains the previous requirement for directors who are interested in a contract or proposed contract with a company to disclose that interest. However, the Act provides that this requirement does not apply if the interest would not reasonably be considered as giving rise to a conflict of interest.

Loans and “Quasi-Loans” to a Director

Subject to limited exceptions, the Act continues the previous prohibition on a company making a loan or a quasi-loan to a director of the company or of its holding company, or to a connected person, or entering into a credit transaction or giving a guarantee or security in connection with such a loan, quasi-loan or credit transaction.

The principal exceptions are:

- where the transaction is on ‘arms’ length terms, in the ordinary course of business;
- where the loan, guarantee etc aggregated with any other relevant loan(s) or guarantee(s) (including to a connected person), excluding transactions approved under the
- summary approval procedure, is less than 10% of the company's relevant assets; and
- where the transaction has been approved under the summary approval procedure.

Under the Act, the 10% threshold can now be used in respect of guarantees and security (previously it only permitted loans and quasi-loans and credit transactions). As before, in certain instances the director can be made liable for debts of a company on a winding up if the making of certain loans contributed to the insolvency of the company.

The summary approval procedure is the new whitewash procedure under the Act and is broader in scope than the previous whitewash procedure. The previous regime only provided for the whitewash procedure in the case of a company entering into a guarantee or providing security in connection with a loan, quasi-loan or credit transaction. Under the summary approval procedure the making of loans, quasi-loans and entering into credit transactions can now also be whitewashed.

It is also worth noting that, while a special resolution of the company and a declaration of the directors are still required, an independent report is no longer required for whitewash transactions.

Evidential Provisions

Loans to directors by a company

Where a company makes a loan or a quasi-loan to a director or a director of its holding company or a connected person and its terms are either not in writing, or are only partly in writing, or are in writing but are ambiguous, it is presumed (until the director proves the contrary) that the loan or quasi-loan is repayable on demand and bears interest at the appropriate rate.

Loans from directors to a company

Where it is claimed that a director or a connected person has made a loan or a quasi-loan to the company, and the terms are not in writing, it is presumed (until the director proves the contrary) that no loan was made. If it is proved that a director or connected person did make a loan or quasi-loan (whether its terms are in writing, are partially in writing or are wholly verbal), then if the terms are ambiguous it is presumed (until the director proves the contrary) that the loan does not bear any interest, is not secured and is subordinated to the debt of every other creditor.

Accordingly, the parties to such transactions need to consider and to record fully the terms of the arrangement in writing in order to prevent the assumptions applying.

Connected Persons

The Act provides a number of clarifications on the issue of connected persons. In addition to spouses, civil partners, parents, siblings and children of directors being defined as connected persons, the Act clarifies that children of the director's civil partner who are ordinarily resident with the director and the civil partner will also be considered to be connected persons.

In addition to a body corporate being connected with a director if it is controlled by that director, it is now provided expressly that a body corporate will be connected with a director if it is controlled by another body corporate that is, in turn, controlled by that director. The Act further clarifies that a "person" includes a "body corporate" which acts as trustee of a trust where the principal beneficiary of that trust is the director, the spouse (or civil partner) or any children of that director or any body corporate which that director controls.

Transactions in Non-Cash Assets

There is little change in the position under previous company law concerning transactions in non-cash assets between a director and the company. Such transactions are permitted if approved by shareholders. The Act provides that a non-cash asset is of the requisite value if it is not less than €5,000 (previously €1,269.74) but, subject to that, exceeds €65,000 (formerly €63,486.90) or 10% of the amount of the company's relevant assets.

An arrangement in contravention of the Act is voidable at the instance of the company unless the arrangement is affirmed by a resolution of the company in general meeting passed within a reasonable period of time after the date on which the arrangement is entered into.

Disclosure of Directors' Transactions

The requirement to disclose directors' transactions in a company's financial statements continues under the Act. The Act does however amend the monetary values of certain transactions below which certain disclosures will be exempted:

- the obligation to disclose benefits received by a director in relation to loans, quasi-loans, credit transactions and guarantees does not apply in relation to a director or connected person where the aggregate value of the agreements / arrangements did not exceed €7,500 during the financial year (this amount was previously €3,175); and
- arrangements and transactions in which the directors have a material interest do not need to be disclosed where, during the relevant financial year, the value of such transaction or arrangement did not exceed in aggregate €5,000 or (if more) did not exceed €15,000 or one per cent of the value of the net assets of the company preparing the financial statements (whichever is less).

A specific disclosure regime applies to the holding company of a credit institution.

Penalties

Failure to comply with the provisions relating to the prohibition of loans etc to directors and connected persons will be a category 2 offence for any officer in default, attracting a Class A fine and/or a term of imprisonment up to 12 months on summary conviction. A conviction on indictment will result in imprisonment of up to five years and/or a €50,000 fine. Auditors will continue to have a reporting obligation to the Director of Corporate Enforcement in respect of suspected breaches of the Act. The Office of Director of Corporate Enforcement ("ODCE") views breaches of these rules by directors as a serious breach of company law and in practice the ODCE investigates such reports and takes action, including prosecution, accordingly to ensure that the breach is remedied.

Action Required

Directors should familiarise themselves with the new disclosure requirements in the Act but in instances where the Act reduces those requirements directors need to be mindful of their continuing obligations under relevant corporate governance codes. It is important for directors to ensure that the additional disclosures are included, as required, in the notes to their company's financial statements.

Directors also need, in particular, to be mindful of the requirements in relation to documenting any loans etc which they make to their company.

Further information is available from



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