DILLON EUSTACE

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Corporate Bulletin

Welcome to the Dillon Eustace corporate bulletin. Below, we have set out some of the recent developments which we feel may be of interest to you and/or your business. If you wish to discuss anything contained in this bulletin, please don't hesitate to contact us.

Companies Act 2014

Commencement of the Companies Act 2014

The Companies Act 2014 commenced by Statutory Instrument on the 1st of June 2015 with a transition period of 18 months for certain elements. The Companies Act impacts heavily on every Irish company including both directors and shareholders.

There are certain limited exceptions to the 1st of June commencement, including:

(i) a deferral of the repeal of current insider dealing rules under the Companies Act 1990;

(ii) a deferral of the revocation of certain regulations on registration and publication of documentation requirements for Irish merging companies;

(iii) a deferral of commencement of certain provisions of the Act relating to registration of an unregistered company under the Act; and

(iv) a deferral of certain consequential repeals and revocations relating to unregistered and joint stock companies.

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As regards the approach in relation to financial statements, the Commencement Order clarifies:

1. If the financial year ends before the 1st of June 2015 and the financial statements are signed by the director(s) before the 1st of June, they must be prepared and filed in accordance with the 1963-2013 Companies Acts; and

2. If the financial year ends after the 1st of June 2015, the financial statements must be prepared and filed under the Companies Act 2014.

Under the Commencement Order the following new obligations in Part 6 of the Act will be commenced in respect of financial years beginning on or after the 1st of June 2015:

- section 167: Audit committees
- section 225: Director's compliance statement and related statement
- section 305(1)b: Share options disclosure
- section 306(1): Payments to connected persons
- section 326(1)a: Director's names
- section 330: Directors' report: statement on relevant audit information

New Company Type

Perhaps the most significant change introduced by the Act is the requirement for existing private limited companies to convert to one of the two new forms of company provided. There is an 18 month transition period from the 1st of June 2015 during which existing private companies must convert to either a private company limited by shares (LTD) or a designated activity company (DAC).

Existing private companies shall be deemed to be a DAC during the transition period or until they convert to an LTD. If by the end of that period a private limited company has not converted to a type of company recognised under the Act, the company automatically becomes an LTD. Other company types, such as public limited companies, unlimited companies and guarantee companies, will not need to convert although there will be some changes to the rules applicable to them.

Dillon Eustace are advising companies to take a proactive approach and to address this process sooner rather than later. By taking a personal approach to each company and offering plain English advice, Dillon Eustace believe that ensuring compliance with the Act should be a straightforward and inexpensive process.

Other Key Provisions and Features

Corporate Capacity

The doctrine of ultra vires no longer applies to an LTD and the LTD will no longer have an

objects clause. The LTD will have unlimited corporate capacity to do anything lawful that its directors are resolved to do.

Corporate Authority

The Act now permits the company to appoint persons with unrestricted entitlement to bind the company and have those persons registered with the Companies Registration Office. Once authorised by the board of directors and registered with the CRO, the registered person or persons are taken to be duly authorised until the CRO is otherwise notified (even in circumstances where the company has already revoked the authorization of such persons).

Share Capital

Variation

The Act allows most companies to reduce its share capital using the summary approval procedure without any court involvement or to use the previous procedure which involves court confirmation.

Corporate Governance

Directors' Duties

Director's common law fiduciary duties have been codified in the Act. Directors will be subject to an objective standard of care, skill and diligence. Where a company and director acts in breach of his or her statutory fiduciary duties then the director is liable to account to the company for any gain which she or he makes directly or indirectly from that breach of duty and/or may be required to indemnify the company for any loss or damage resulting from the breach.

Single Director

An LTD is permitted to have a single director but that sole director is not permitted to be the company's secretary. A DAC retains the requirement have a minimum of two directors.

Compliance Statement

The Act requires that directors of a Public Limited Company (PLC) (other than investment company), LTD, DAC or Company Limited by Guarantee (CLG) the balance sheet of which exceeds €12,500,000 and the turnover which exceeds €25,000,000, should prepare a statement of compliance (this does apply to unlimited companies). The compliance policy statement must set out the company's policies that are appropriate to the company in terms of its compliance with company and tax law and should be included in the director's report in the annual accounts.

Directors' Loans

If loans are made to directors and are not in writing it is presumed they are repayable on demand and bare interest. If advances are made by directors to a company and are not in writing it is presumed not to be a loan and to the extent that it was such a loan it does not bare interest or security and is subordinate to all other creditors.

Disclosure of Interest in Shares and Share Options

Where shares or share options are held by a director and once aggregated with those of connected person's amount to an interest in less than 1% in the nominal value of the company's issued share capital of a class of shares carrying voting rights then such a director shall not be obliged to disclose such interest.

Serious Loss of Capital

Under the Act there will be no requirement for private companies to convene an EGM on a serious loss of capital. However, this requirement will remain for PLCs.

Default Governance Provisions

One of the innovations of the Act is the codification of the rules of internal management, i.e. where company's constitution is silent on any particular issue, the provisions in the Act will apply by default. The substance of virtually all of the regulations in "Table A" will now apply as requirements of law save to the extent that the company's constitution provides otherwise.

Company Secretary

The Act provides that the companies' directors are required to ensure that the company's secretary either has the skills or resources necessary to discharge his or her statutory and other duties. Company secretaries are no longer obliged to ensure compliance with company legislation as was previously the case.

Annual General Meeting

An AGM is now optional for LTDs and single members DACs, PLCs, CLGs and unlimited companies. Under the new regime they are entitled to adopt written procedures in place of holding an AGM.

Majority Written Resolution

Majority written resolutions can be passed as ordinary resolutions (greater than 50% of total voting rights) or special resolutions (greater than 75% of the total voting rights) and will take effect seven in 21 days, respectively, after the last member has signed. The old unanimous written shareholder resolution can still be utilised which take immediate effect if so used.

Charities Act update

The majority of the Charities Act 2009 came into effect from the 16th of October 2014. Part 4 (Protection of Charitable Organisations) and Part 7 (Miscellaneous Provisions), have yet to be commenced however.

On the 16th of October, a Ministerial Order established the Charities Regulatory Authority (the "**CRA**"). This new authority is empowered to maintain the Register of Charities, to require and hold annual reports from registered charities and to investigate complaints about charities (the investigative powers are yet to be commenced).

The Minister for Justice and Equality recently extended the time frame within which Charities established before the 16th of October 2014 must apply to the CRA to be registered on the Register of Charities. Section 40 of the Charities Act 2009 provides that charities established prior to the 16th of October 2014 will not automatically be registered with the CRA and must therefore apply directly in order to register.

The deadline for applications has been extended to the 16th of April 2016 to allow Charities more time to submit their applications.

Consumer Rights Bill

Consumer law in Ireland is due to undergo significant change within the next year. The Minister for Jobs, Enterprise and Innovation, Richard Bruton recently published a Consumer Rights Bill which envisages major reforms in the area of Irish Consumer Law.

The Bill primarily aims to consolidate and modernise the current primary, secondary and European legislation governing consumer law and as result should make consumer rights clearer to both consumers and businesses. Secondly the Bill seeks to address the significant gaps in protections afforded to consumers under the existing legislation by introducing new rights for consumers.

If enacted the Bill will impact every consumer and business in Ireland and the key proposals in the Bill concern the following areas:

- Downloads – establishing rights and remedies for consumers who download/stream music, video games, videos, apps etc;
- Expiry Dates – a ban on using expiry dates for gift cards and vouchers;
- Services – bolster consumer rights in relation to purchasing services e.g. the right to have a substandard service remedied or refunded;
- Goods – introduce a 30 day standard period in which consumers can return defective goods and obtain a full refund;
- Unfair Terms in consumer contracts, whether sales, digital content or service contracts;

- Information Rights for consumers in transactions for healthcare, social services and gambling; and
- Gifts – introduce the same statutory rights for the purchase of gifts as those that apply to the purchase of goods.

The scheme of the Bill is currently in the consultation process and the Department of Jobs, Enterprise and Innovation are considering the responses on the proposed Bill before finalising for submission to Government. It is expected that the Bill will be enacted in the middle of next year.

Workplace Relations Act 2015

The Workplace Relations Act is one of the largest developments in the area of employment law in Ireland in recent history. It was signed into law on the 20th of May 2015, with a commencement date of the 1st of October 2015. The new legislation fundamentally alters the previous system, providing an inherently simplified procedure for resolving employment disputes between the employer and employee. The new streamlined regime will provide for superior access to justice and will result in the expedient resolution of disputes in the workplace.

The Act provides for the effective resolution, mediation and adjudication of workplace disputes and complaints relating to the contravention of, or entitlement under, the Act governing the employment relationship between employers and employees. The aim of the Act was to provide a world-class workplace relations service which provides for maximum compliance with employment law and to ultimately attract businesses to engage in employment in Ireland. The Act will apply to employment legislation and equality legislation.

The Act provides for a single informative source on employment law and a clear process of dispute resolution, thus moving away from the overcomplicated and outdated previous system. From now on all employment disputes will firstly be referred to the Workplace Relations Commission, with the Labour Court being the single appeals body.

The major developments once commenced on the 1st of October 2015 are that the Act will dissolve the Employment Appeals Tribunal and the Equality Tribunal and it will transfer their powers to the Workplace Relations Commission ("WRC") which will have a "Director General" ("DG"). The DG of the WRC has been appointed in addition to other officers in order to deal with disputes more efficiently.

The new structure represent a stark contrast to the current system, whereby the Employment Appeals Tribunals sits as a panel of three with appeals being reverted to both the Circuit Court and the Equality Tribunal who represent single decision makers. The Labour Court provides a conclusive appeals body. It represents a much needed reform to the workplace relations service which is simple to use, independent, effective, impartial, cost effective and provides for workable means of redress and enforcement, within a reasonable period of time.

Supreme Court Confirmation that Dual Bankruptcy can exist under Irish Law

*In the matter of Sean Dunne (a bankrupt),*the Supreme Court confirmed that is possible for a debtor to be adjudicated a bankrupt in Ireland under Irish law notwithstanding the fact that the debtor has already been adjudicated a bankrupt in another jurisdiction which is not subject to the European Insolvency Regulation.

Mr Dunne appealed the decision of the High Court on grounds that the court did not have the requisite jurisdiction to make an adjudication of bankruptcy in Ireland once he had already been declared bankrupt in the United States. He claimed it amounted to 'dual bankruptcy', which was inconsistent with the jurisprudence in international insolvency, thus in turn Irish legislation did not permit such a declaration.

The Supreme Court unanimously rejected Mr Dunne's grounds of appeal stating that there was nothing in the Irish insolvency legislation which prevented such an order being made by the High Court. The Supreme Court did however note that it was not the inherent role of the Supreme Court to make a determination on how the bankruptcy procedure should be conducted, rather it was their duty to adjudicate whether the High Court had the specific jurisdiction to make a declaration of 'dual bankruptcy'.

The decision of the Supreme Court will likely reduce the number of those who seek to declare bankrupt in what are perceived more tolerant countries. Although it must be noted that this decision is limited to jurisdictions who are not subject to European Insolvency Regulations.

Data Protection

On the 15th of June 2015, Ministers in the Justice Council reached a general approach on the European Commission proposal on the Data Protection Regulation. The shared ambition is to reach a final agreement by the end of 2015.

The aim of the data protection reform launched by the European Commission in 2012 is to enable people to better control their personal data. At the same time modernised rules will allow businesses to make the most of the opportunities of the Digital Single Market by cutting red tape and (it is intended) benefitting from reinforced consumer trust. A more rigorous and coherent data protection framework will provide for greater and practical certainty for citizens, businesses and public authority.

The general approach on the Data Protection Regulation includes agreement on:

- *One Continent, one law:* the Data Protection Regulation will establish a single set of rules on data protection, valid across the EU. Companies will deal with one law, not 28.

- *Strengthened and additional rights:* the right to be forgotten will be enforced. When citizens no longer want their data to be processed and there are no legitimate grounds for retaining it, the controllers will be required to delete the data, unless they can show that it is still needed or relevant.

- *European Rules on European Soil*: companies based outside of Europe will have to apply the same rules when offering services in the EU;

- *More powers for independent national data protection authorities*: those authorities will be strengthened in order to effectively enforce the data protection rules, and will be empowered to fine companies that violate EU data protection rules;

- *The 'one-stop shop'*: the rules will establish a 'one stop shop' for businesses and citizen: companies will only have to deal with one single supervisory authority, not 28, making it simpler and cheaper for companies to do business across the EU. Individuals will only have to deal with their home national data protection authority, in their own language- even if their personal data is processed outside their home country.

Foreign Account Tax Compliance Act (FATCA)

In June 2015, the Irish Revenue Commssioners issued a FAQs document which is designed to supplement their 'Guidance Notes on the implementation of FATCA in Ireland' originally published on the 1st of October 2014.

These FAQs provide clarification on a number of matters regarding FATCA registration and reporting.

They also provide for an extension of the Irish FATCA reporting deadline such that the first FATCA reports for Irish Reporting Financial Institutions are now required to be filed with the Irish Revenue Commissioners by the 31st of July 2015 (extended from the original deadline of the 30th of June 2015)

The FAQ document is available via the following link:
http://www.revenue.ie/en/business/aeoi/index.html

Credit Rating Agencies Regulation ("CRAs")

On the 23rd of June 2015, the European Securities and Markets Authority published guidelines on the periodic information to be submitted to ESMA by CRAs (the "Guidelines")

These Guidelines apply to CRAs registered in the EU, and will become effective two months after the publication date.

The aim of the Guidelines set out the information that should be submitted by CRAs to facilitate the consistent supervision of CRAs by ESMA. The Guidelines also seek to clarify ESMA's expectations of the information that should be submitted to ESMA for the circulation of supervisory fees and CRAs market share.

Guidelines are available via the following link:
http://www.esma.europa.eu/system/files/2015-609.pdf

Crystallisation of Floating Charges - Supreme Court Ruling (14 July 2015)

In the matter of J.D. Brian Limited (In Liquidation) t/a East Coast Print and Publicity, In the matter of J.D. Brian Motors Limited (In Liquidation) t/a Belgard Motors, In the Matter of East Coast Car Parts Limited (In Liquidation) and in the matter of the Companies Acts 1963-2009 (the "Companies")

The Supreme Court provided its decision with respect to the ranking of floating charges upon crystallisation. The three above named Companies were part of the Belgard Motors Group and were subject to a court wind up.

The liquidator applied to the High Court for directions in relation to the debentures entered into by all three Companies in 2005 with Bank of Ireland. The Debentures entered into by the Companies included floating charges of the assets of the Companies.

The liquidator sought clarification as to:

- whether the floating charges had crystallised prior to liquidation; and
- if so, whether the crystallisation of the floating charges could defeat the claim of preferential creditors (Revenue Commissioners) over the holder of the debentures.

The Debentures contained specific terms allowing the Bank to serve written notices of crystallisation on the Companies to convert the floating charges over the assets of the Companies into fixed charges. The High court held that such notices would not have the desired effect of converting the assets subject to the floating charges into fixed charges. In addition the High Court clarified the position on Preferential Debtors stating that they would rank in priority of the Banks irrespective of whether the floating charges were converted into fixed charges prior to the winding up of the Companies.

On appeal, the Supreme Court judgment overruled the High Court's decision. The Supreme Court logic was as follows:

- the cyrstallisation notice served on the Companies was a valid notice and it succeeded in converting the floating charges over the Companies assets into fixed charges prior to the commencement of the wind-up; and
- section 621(7) of the Companies Act 2014, provides priority to preferential creditors against assets which are subject to floating charges at the beginning of the liquidation process. Upon crystallization of these floating charges, the claims of the banks are no longer claims under Section 621(7) but rather claims under fixed charges. Ultimately this notice will have effect of giving the banks priority over preferential creditors.

Anti-Money Laundering ("AML")/Counter-Terrorism Financing ("CTF")

On the 5th of June 2015, the Fourth Money Laundering Directive (Directive (EU) 2015/849) ("MLD4") was published in the Official Journal ("OJ"). MLD4 extends and replaces the Third Money Laundering Directive, which is the existing EU AML and counter terrorist financing (regime.

Member states are obliged to transpose MLDR4 into national law by the 26th of June 2017.

The introduction of MLD4 is largely driven by revisions to the Financial Action Task Force ("FATF") recommendations which were adopted in February 2012 in order to address emerging AML and CTF concerns. MLD4 is designed to strengthen the EU's defences against money laundering and terrorist financing.

Some of the important aspects are as follows:

- the risk-based approach;
- beneficial ownership;
- the scope of customer due diligence requirements;
- politically exposed persons ("PEPS");
- reliance on third parties;
- enforcement

Next Steps:

MLD4 provides that the European Supervisory Authority ("ESAs"), through their joint committee must publish guidelines on the risks of money laundering and terrorist financing affecting the EU financial sector. MLD4 also makes provisions for the publication of delegated acts and technical standards by the European Commission. As stated above, Member States must bring into force the

laws, regulations and administrative provisions to comply with MLD4 by the 26th of June 2017. It should be borne in mind that Member States may impose more stringent obligations than those outlined in the directive itself. Firms must now start preparing for compliance with the new rules and will need to consider the effect that MLD4 may have on their business.

Dillon Eustace has published an article on MLD4 which is available via the following link: http://www.dilloneustace.ie/download/1/Publications/Regulatory%20and%20Compliance/Client%20Briefing%20Fourth%20Money%20Laundering%20Directive%20IV.pdf

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