

Corporate M&A

TRANSITIONING TO THE NEW FORM OF PRIVATE COMPANY LIMITED BY SHARES AS PROVIDED UNDER THE NEW COMPANIES BILL, WHAT WILL BE REQUIRED?

TRANSITIONING TO THE NEW FORM OF PRIVATE COMPANY LIMITED BY SHARES AS PROVIDED UNDER THE NEW COMPANIES BILL, WHAT WILL BE REQUIRED?

Published: Tue 31 Jan 2012

The proposals for consolidation and reform of company law in the new Companies Bill published in May 2011 will have significant implications for existing private companies limited by shares which will be required to restructure their form and constitution to ensure compliance with the new regime.

Forms of Companies

Under the Bill two new forms of private companies are to replace all existing private companies limited by shares. These will be:

- private company limited by shares ("CLS"); and
- designated activity company ("DAC")

The vast majority of existing private companies limited by shares will be registered as a CLS which is a more flexible model. Under the Bill it is provided that a CLS will, for example, have unlimited capacity to undertake any business (similar to an individual) and be permitted to have only one director.

The DAC model must be adapted by the following existing private companies limited by shares:

- those that have published an offering document or obtained an admission to trading on a regulated market for its debentures; and
- those that are required or wish to retain an objects clause;

Once a decision is made as to which model is required then the conversion to the required model should be implemented in accordance with the provisions of the Bill once enacted.

Conversion Options

Existing private companies limited by shares can convert to a CLS or a DAC.

Conversion to a DAC

- an existing private company limited by shares can convert to a DAC by passing an ordinary resolution before the status date (i.e. within 6 months after the commencement of the Act).

- an existing private company limited by shares that has published an offering document or obtained admission to trading on a regulated market for its debentures must be re-registered as a DAC before the end of the transition period (i.e. the period of 12 months after the status date).
- an existing private company limited by shares can be compelled to register as a DAC if:-
 - one or more creditors of the company who hold, or together hold, not less than 15% of the Company's debentures then entitling them to object to alterations of its objects, or
 - one or more of the members of the company who hold, or together who hold, not less than 15% of the nominal value of the Company's issued share capital or any class thereof make an application to court for an order directing the company to re-register as a DAC.

Conversion to a CLS - 3 options

- Section 59 - the members of a company can by special resolution on or after the status date adopt a new constitution in the form required and deliver it to the CRO for registration. Once the constitution is registered the company becomes a CLS.
- Section 60 - unless the Company has registered a new constitution as above or is required to or is proceeding to register as a DAC then the directors are obliged before the end of the transition period to:-
 - prepare a constitution;
 - deliver a copy of the constitution to each member; and
 - deliver the constitution to the CRO for registration.

The new constitution must not alter the rights and obligations of the members of the existing company.

- Section 62 - where there has neither been a delivery of a constitution in respect of an existing private company for registration within the transition period or an existing company has not re-registered or been required to re-register as a DAC then all existing private companies limited by shares shall be deemed from the end of the transition period to be converted to a CLS and have a constitution imposed on them as issued by the CRO. This is a default mechanism. This is not a preferable option as the constitution that is issued by the CRO will most likely not be the same as the existing articles of association or tailored to the existing company and therefore the internal regulations of the company will not mirror what was in place prior to the Act. This may cause issues in dealings with shareholders.

Simplified Compliance Procedure

The Bill allows the Directors to circumvent the preparation of a new constitution by instead delivering to the CRO (before the end of the transition period) a statement in the prescribed form to the effect that the company is adopting as its constitution:-

- the provisions of its current articles of association; and
- the provisions of its memorandum relating to name and capital and any provision that could be contained in the articles of association but is contained in its memorandum.

The Registrar will then issue a constitution in respect of the Company.

The difficulty that may arise with this approach is that if the articles of association contain provisions that have been omitted from the Bill or amended in the Bill then there will be a conflict and an ambiguity as to how the provisions of the articles of association will be construed.

The better approach is for the company to adopt a new constitution based on the provisions of the Bill so as to ensure the new constitution is consistent with the current articles of association of the company and consistent with the Act and once in force, is clear in its application and has been approved by the shareholders. All existing companies should be prepared to adopt a new constitution under the Bill once enacted.

Laws applicable during the Transition Period.

During the period commencing on the commencement of the Bill as an act and ending on the expiry of the transition period (that is a maximum of 18 months) the laws applicable to a DAC shall apply to an existing private company unless and until the constitution is delivered to the CRO.

Once a new constitution is delivered then the provisions of the new Act will apply.

An existing private company that has adapted the regulations in Part II of Table A of the Companies Act, 1963 will despite the repeal of the 1963 Act be governed by those regulations until a new constitution is delivered to the CRO or it registers as a another type of company; however, under Section 62 of the Bill, if a company fails to adapt a new constitution then on expiry of the transition period it is deemed to have a new constitution imposed on it.

Relief

Members:

if any member considers that his or her rights have been prejudiced by the exercise or non-exercise of any power under the provisions relating to conversion they may apply to court for an order under Section 209 (minority oppression)

Creditors:

if one or more creditors who hold or together hold not less than 15% of the company's debentures entitling them to object to alterations of the company's objects believes the new constitution prejudices their interest they may apply to court for relief.

Failure to comply with the conversion provisions exposes the company / directors to possible members or creditors actions above.

Once the Bill is enacted companies should review their Articles of Association and seek to adopt a new constitution.

January 2012 - This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or in relation to the Irish legal position on the new Companies Bill, please contact Leonora Malone or your regular Eugene F. Collins contact.

© Eugene F. Collins 2012

Author: Leonora Malone