The Companies Act 2014

Overview of the 2014 Act

The Company Law Review Group (CLRG) was set up to review and advise on the various Companies Acts enacted since 1963. CLRG recognised the importance of the private company and that it should be the model company under any new legislation (as opposed to the plc under the Companies Act 1963). The structure to the Companies Act 2014 (the 2014 Act) is two fold -Parts 1 to 15 relate to the private limited company (LTD) and Parts 16 to 25 relate to all other types of companies. The 2014 Act commenced on 1 June 2015 and is confined to matters of company law. For example it does not address such matters as taxation and residency of companies.

General Structure of the 2014 Act

Part	Subject Matter
1	Preliminary and General
2	Incorporation and Registration
3	Share Capital, Shares, Etc
4	Corporate Governance
5	Duties of Directors and Other Officers
6	Financial Statements, Annual Returns and Audit
7	Charges and Debentures
8	Receivers
9	Re-organisations, Acquisitions, Mergers, Divisions
10	Examinerships
11	Winding Up
12	Strike-Off and Restoration
13	Investigations
14	Compliance and Enforcements
15	Functions of Registrar and of Regulatory & Advisory Bodies
16	Designated Activity Companies
17	Public Limited Companies
18	Guarantee Companies
19	Unlimited Companies
20	Re-registration
21	External Companies
22	Unregistered Companies and Joint Stock Companies
23	Public Offers of Securities, Financial Reporting by Traded Companies, Prevention of Market Abuse
24	Investment Companies
25	Miscellaneous

Key Amendments to Existing Company Law

The 2014 Act modernises the law relating to companies. There are a number of key features to the 2014 Act.

- The number of shareholders in a LTD is now capped at 149

- Certain activities by a company that might prejudice its shareholders and creditors are now permitted where the company complies with the Summary Approval Procedure (SAP)
- Directors' fiduciary duties have now been codified
- All company law offences are now categorised in 4 different categories and the penalties applicable to each category are set out in one place
- There is no Table A Model Memorandum & Articles of Association. Instead, the 2014 Act sets out a number of statutory defaults and these apply unless specifically disapplied in a company's constitution.
- There are transitional obligations for private limited companies to elect to be LTDs or DACs
- There are no obligations for some types of companies to make compliance statements
- Minors cannot be directors
- Loans to and from directors should be in writing
- No offer of any securities to the public may be made by an LTD in respect of which a prospectus is required or where the offer is to more than 149 people
- No authorised share capital is required but remains optional for an LTD
- LTDs can now reduce the share capital without court confirmation, by using SAP

Corporate Conversion Process and Transition Arrangements

The 2014 Act provides for a transition period to 30th November 2016 for pre existing companies to regularise themselves. The first thing that existing private limited liability companies must do is decide whether to convert to an LTD or a DAC.

These companies do not have to wait until the end of the transition period. They can convert to an LTD by passing a special resolution adopting a new constitution (section 59). In these circumstances, the members pass a special resolution in accordance with its existing memorandum and articles of Association and adopt a new constitution in the prescribed form and deliver that constitution to CRO for registration.

Pursuant to section 60 where a new constitution is not adopted by special resolution, the directors have an obligation to prepare a new constitution in the prescribed form based on the existing Memorandum and Articles of Association and file it in the CRO and deliver a copy of this to each member.

There is now a safety default net where a company sends nothing to the CRO, after the expiration of the transition period it will be deemed to have a constitution comprising its existing Memorandum & Articles of Association less the objects clause and any other provisions which prevent their alteration (see section 61).

An existing private limited liability company can opt out of becoming an LTD by passing an ordinary resolution any time before 31st August 2016 to become a DAC.

It is interesting to note that pursuant to section 57 of the 2014 Act, members and creditors meeting certain thresholds (15% in nominal value of its issued share capital (or of any class thereof), or one or more creditors holding not less than 15% of its debentures) will have the right to apply to court for an order directing that their company reregister as a DAC. A member or members holding more

than 25% of the voting rights in the company can serve a notice in writing on the company requiring it to reregister as a DAC.

Main Types of Companies

There are 5 types of company worth looking at in any great detail.

Model Private Company (LTD)

This is the form of company that the vast majority of Irish companies will be and the one that the majority of old limited liability companies will convert to.

The main features of the LTDs are :

1. There can now be between 1 and 149 shareholders in a company
2. A company can have one director
3. A company must have a company secretary which cannot be the singular director (company secretary can be a corporate body, a director can not)
4. Liability of shareholders is now limited to the amount unpaid on shares registered in their name
5. Must have a one document constitution
6. Company name must end in “Limited” or “Ltd”
7. Companies can no longer have an objects clause
8. Companies cannot list any securities (banks and insurance companies and any companies with an existing debt listing cannot be LTDs)
9. The Board and any registered person is deemed to have authority to bind the company

Designated Activity Company (DAC)

While, this is a new type of private company but you will find that it closely resembles the old private limited liability company. The law applicable to DACs is set out in Part 16 of the 2014 Act and also that applicable to LTDs (Parts 1 to 14 of the 2014 Act) unless it is disapplied or modified by its constitution. DACs will be suitable for companies to be used to list debt securities on a stock exchange or where a specific objects clause may be required such as in a specific commercial activity for a joint venture.

The main features of the DAC are

1. It will have a 2 document constitution
2. It will have an objects clause
3. Its name must end with “designated activity company”, “DAC”, “D.A.C”, “dac” or the Irish equivalent
4. It will not be prevented from having its debentures being listed
5. It must have at least 2 directors
6. While a single member DAC may not need to hold an AGM; multimember DACs must
7. It will have an authorised share capital

Public Limited Company (PLC)

The law now applicable to PLCs is contained in Part 17 of the 2014 Act and the law applicable to LTDs as set out in Parts 1 to 14. The law applicable to LTDs can be disapplied or modified by its constitution. PLCs will continue to be the type of company used for companies wishing to list their shares on a stock exchange.

The key features for PLCs are :

1. They can be incorporated with a single member
2. They must have an objects clause
3. The name must normally end with "public limited company", the abbreviations "plc", "PLC", "P. L. C", "p.i.c" or the Irish equivalents
4. They must have a minimum issued share capital of €25,000 and obtain a trading certificate confirming this
5. They can list their shares and debentures and offer them for sale to the public
6. There are significant restrictions on the use of SAPs (discussed later)
7. Provisions relating to allotment of shares and pre-emption reflect the old regime
8. They must have at least 2 directors

Guarantee Company (CLG)

The equivalent companies accounted for approximately 8.5% of all companies prior to June 2015. The applicable law is set out in Part 18 of the 2014 Act and also the law applicable to LTDs (Parts 1 to 14) unless disapplied or modified by its constitution. These companies do not have a share capital and have members as opposed to shareholders. They are most likely to continue to be the type of company of choice for management companies, charities, etc.

Key features for CLGs are as follows :

1. Cannot have a share capital
2. Can have just one member; there is no maximum number of members
3. Will have an objects clause
4. Name must end with "company limited by guarantee" or abbreviations ("CLG", "C.L.G", "clg" or "c.l.g" or the Irish equivalents. Applications can be made to dispense with this requirement
5. Will not be prevented from having its debentures traded or listed
6. Must have at least 2 directors
7. May dispense with holding an AGM if it is a single member but cannot if it is multi member
8. Can avail of audit exemption however any one member may object. (This audit exemption is new)
9. There will be no need for pre 2014 Act companies limited by guarantee without share capital to reregister as a CLG.

Unlimited Company (UC)

The 2014 Act recognises 3 types of UCs

- private unlimited company with a share capital (ULC)
- public limited company with a share capital (PUC)

- public limited company without a share capital whose liabilities are guaranteed by its members (PULC)

All 3 types must end in “unlimited company”, “UC” or the Irish equivalent.

The applicable law to UCs is set out in the 2014 Act at Part 19 and Parts 1 to 14 (these latter parts can be disapplied or modified).

Key features for UCs include:

1. All UCs can have just one member
2. ULCs cannot offer for sale or list any securities (similar to an LTD) but a PUC or a PULC may list
3. They can reduce share capital and UCs may also make distributions other than from distributable profits
4. Requirement to make a directors’ compliance statement does not apply to any type of UC.
5. A ULC is not required to file accounts with CRO (same as old regime for private unlimited companies).

Unregistered Company

This is provided for in Part 22 of the 2014 Act and only warrants mention in passing. Bank of Ireland is an unregistered company.

Re-registrations

Part 20 of the 2014 Act applies to reregistration and it is set out in 3 chapters within the 2014 Act. Essentially any type of company may reregister as another type of company. The 3 applicable chapters of the 2014 Act are:

1 Interpretation
2 General provisions as to reregistration
3 Special requirements for reregistration

In simple terms, a company may reregister as another type of company once it passes the requisite special resolution and the application is lodged with CRO in the prescribed form, with the necessary documents (which would include a compliance statement). Reregistration takes effect once the Registrar has issued a Certificate of Incorporation on reregistration. There will be additional requirements where a company will have share capital on its reregistration.

External Company

There are significant changes from the previous registration requirements for branches and places of business. The law is set out in Part 21 of the 2014 Act. The only external companies required to register are those

1 whose members have limited liability; and
2 establish a branch in Ireland

New Form of Company Constitutions

As already referred to, there is no Table A Model Memorandum & Articles of Association. Instead, the 2014 Act sets out a number of statutory defaults and these apply to all companies unless specifically disapplied in the company's constitution. There are over 150 such defaults for an LTD set out in the 2014 Act. Essentially, the 2014 Act now sets out on a default basis what used to be set out in detail in the Memorandum & Articles of Association.

The model constitution is set out in Schedule 1 to the 2014 Act (a copy is appended as is the template for DACs).

Corporate Capacity and Authority

LTDs have full and unlimited capacity to carry on any business or activity and to do any act or enter into any transaction for those purposes (section 38). Thankfully, the doctrine of ultra vires is now redundant. Where the Board now appoints persons entitled to bind the company and they are not restricted to a particular transaction or type of transaction then those persons may be registered with the CRO. The Board and such registered persons are deemed to have the authority to bind the company and parties dealing with them do not have to look behind this.

Notwithstanding anything in its constitution, a company may empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in anyplace whether inside or outside the State.

Restricted Transactions and How To Validate Them

The Summary Approval Procedure (SAP) is provided for in sections 200 to 211 of the 2014 Act. The restricted transactions that it can approve are:

- Financial assistance (old section 60)
- Reduction in issued capital
- Variation of capital on reorganisation
- Treatment of pre-acquisition profits or losses as distributable
- Loans etc with Directors and connected persons (old section 31). This can now be used for the provision of direct loans, quasi-loans and credit transactions to directors and connected persons where previously only the provision of guarantees and security in connection with such transactions could be whitewashed under section 34 of the 1990 Companies Act.*
- Merger of private limited companies (Court approval needed for divisions)*
- Commencement of members voluntary winding up*

*a PLC can only avail of SAP to approve these 3 particular transactions.

While SAP is similar to the old section 60 whitewashe procedure there are some variations. There are now 3 steps to be undertaken.

1. Directors' Declaration of Solvency
   While the precise wording of the declaration will vary depending on the particular activity, the declaration must state that the company will be able to pay its debts and

liabilities as they fall due within 12 months. A Statutory Declaration is no longer required so it does not have to be sworn before a practising solicitor, commissioner for oaths or notary public.

2. Special Resolution of the Members (unanimous resolution required for Mergers)
   A copy of the Declaration of Solvency must be attached to the notice for the general meeting or written resolution (as applicable).
3. CRO Filing
   The Declaration of Solvency must be filed with the CRO within 21 days after the date on which the relevant activity to be carried out is commenced.

Four of the above restricted transactions must also be accompanied by an Independent Person's Report (being a person qualified to act as auditor of the company). These 4 restricted activities are

- Reduction in issued capital
- Variation of capital on reorganisation
- Treatment of pre-acquisition profits as distributable
- Commencement of members voluntary winding up

Section 211 of the 2014 Act sets out that in the case of a transaction where the SAP is being used but it does not have unanimous approval. Unless one or more members holding more than 90% in nominal value of each class of issued voting shares have voted in favour of the special resolution then the company must wait for 30 days after the date of approval of the special resolution before it can carry out the restricted activity. Also, if a legitimate application has been made to court by one or more members who hold not less than 10% in nominal value of the company's issued share capital or any class thereof on the date of the passing of the special resolution or the date of making of the application to set the SAP aside; the SAP approval cannot be used until that application has been determined.

New M&A Techniques

Part 9 of the 2014 Act has radically changed the way in that companies can be reorganised. There are now 4 methods of reorganisation, namely

- Schemes of Arrangement
- Acquisitions
- Mergers
- Divisions

<u>Schemes of Arrangement</u>

The process for a scheme of arrangement is now more streamlined. The High Court now has the power where it is exercising its discretion to convene a scheme meeting and where it considers it "just and convenient to do so" to give directions on the appropriate meetings to be held.

The requisite majority for a scheme is a majority in number and at least 75% of value.

Advertising of the passing of the scheme resolutions and the court applications for approval is now a condition of the scheme becoming effective. It must be made in "at least 2 daily newspapers

circulating in the district where the registered office or principal place of business of the company is situated"

The scheme order must be delivered to CRO within 21 days and will take effect immediately upon delivery. Once this is done a copy of that order must be attached to every copy of the constitution of the company thereafter.

Acquisitions

The old provisions of section 204 of the Companies Act 1963 have been broadly replicated. It does now provide for a procedure for "hoovering up" minority shareholders following an 80% acquisition. The provisions of the European Communities (Takeover Bids (Directive 2004/25/EC) will still apply to transactions involving companies subject to that directive (companies listed on a regulated market). For these companies, the old threshold remains at 90%.

Under the new 80% regime, if beneficial owners of at least 80% value of shares accept the offer then the acquiring party has 6 months to acquire the other 20% on the same terms. A notice in the prescribed form must be sent to the 20% shareholders notifying them that they wish to acquire the beneficial ownership of those shares. There is then a waiting period of 30 days to elapse without any of the 20% shareholders making application to court on the matter.

Where 20% in value of the shares in the target company are already beneficially owned by the acquiring party or a group company then the requisite approval is 50% in number of the other shareholders and 80% in value

Mergers

Mergers are provided for in chapter 3 of the 2014 Act. They are modelled on the Cross-Border Merger Regulations of 2008 which have up to now been used by Irish companies merging with non-Irish EC companies. Merger can take place by way of acquisition, absorption or formation of a new company. Where a merger takes place, all the assets and liabilities of the transferring company are transferred to the successor company and the transferring company is dissolved. Mergers can take effected by Court Order or by using the SAP. This latter mechanism should make the cost of mergers significantly cheaper than an application to Court. A merger by SAP where there is unanimous shareholder approval should prove to be handy for tidying up groups.

Division

This is a new concept. Unlike mergers they must have court approval. The documentation required comprise :

a) Common Draft Terms
b) Directors' Explanatory Report - this is not needed where an absorption is taking place.
c) Expert's Report - this is for the benefit of the members. The expert must be someone qualified to be an auditor but not an auditor of that company or group.
d) Financial Statement - this is an updated set of accounts and is not necessary where SAP is involved.

Joint application is then made to the High Court. On the basis it is successful the court grants a registration order and there is publication in the CRO Gazette. This is then followed by dissolution of the transferring company/companies

If there is a "change of control" clause or provision in any contract (such as a property lease) then that clause is ignored. For example if a tenant under a lease was being so reorganised then landlord approval would not be required regardless of any clause to the contrary in the lease.

There could be a slight hiccup in relation to transfers of property. Prior to the 2014 Act there would have been a court confirmation and the PRA would amend the record of ownership of property on production of a court order to that effect. However, it is unclear for example in a merger or division which is done by SAP and there is no court order what would be necessary to furnish to the PRA for it to amend the records of ownership.

Corporate Governance (Directors Duties, Directors Loans)

Part 4 of the 2014 Act sets out the law relating to the governance and administration of companies. It does so under 10 headings or chapters.

1. Preliminary
2. Directors and Secretaries
3. Service Contracts and Remuneration
4. Proceedings of Directors
5. Members
6. General Meetings and Resolutions
7. Summary Approval Procedure
8. Protection for Minorities
9. Forms of Registers and Minute Books
10. Inspection of Registers and Provision of Information

The 2014 Act has codified the rules of internal management of the company which had previously been set out in the Articles of Association. Nearly all of the 138 regulations previously contained in Table A have been incorporated into the 2014 Act and are now the statutory default. (For example section 158 (3) provides that the directors may exercise all the powers to borrow money and mortgage or charge its undertaking, property and uncalled capital).

General meetings (including AGMs) are now optional for LTDs. Instead, all members entitled to attend and vote at such general meeting must sign before the last date for the holding of that meeting unanimous written resolution pursuant to section 193 of the 2014 Act which:

a) Acknowledges receipt of the financial statements that would otherwise have been laid before the AGM
b) Resolves all such matters as would have been resolved at the AGM
c) Confirms no changes proposed in the appointment of the person (if any), at the date of the resolution is the statutory auditor of the company.

AGMs and EGMs can now be held in more than one venue inside or outside the State. This allows for AGMs and EGMs to be held by conference call or videoconference.

The business which must be carried out at the AGM is now set out in the 2014 Act and must include

a) Consideration of the statutory financial statements and the directors and auditors reports (if subject to audit)
b) The review by members of the company's affairs
c) Unless where the constitution provides otherwise –
    i) the declaration of a dividend not exceeding an amount recommended by the Directors
    ii) the authorisation of the Directors to approve the remuneration of auditors
d) Unless the constitution provides otherwise the election and re-election of directors
e) The appointment or reappointment of statutory auditors (unless auditor exempt)
f) Where the company's constitution so provides, the remuneration of directors.

Directors now have an absolute right to convene EGMs even where there is insufficient quorum for directors. For example, if the quorum of Directors was 2 and 1 resigned then the remaining director can act to convene an EGM to appoint a replacement director.

The members are also given a right to convene an EGM. Members holding 50% or more of the paid up share capital of the company carrying the right to vote can exercise this right. The percentage threshold can be amended in the constitution.

There is also provision for majority written resolutions. These resolutions can be executed in counterpart. Signatories of written resolutions must deliver it to the company within 14 days of its passing. If it is not contemporaneously signed, the company must notify the members of its passing within 21 days of the company itself having received all signed documents constituting the resolution from the members. Under section 194(1) and (3) of the 2014 Act a resolution in writing can be passed as an ordinary resolution if it described as being an ordinary resolution, is signed by members who represent more than 50% of the total voting rights and the proposed text of which, and an explanation of its main purpose, has been circulated by the directors or the proposer of the resolution to all members who would otherwise be entitled to attend and vote on the resolution. A similar procedure applies for special resolutions however the percentage is 75% of the relevant voting rights. There is a cooling off period for the coming into effect of written resolutions which are not unanimous. Ordinary resolutions will take effect 7 days after the last member has signed and 21 days for special resolutions.

Section 195 sets out other additional requirements for majority written resolutions :

a) it can not be used to remove a director or statutory auditor
b) all members must be notified within 3 days of delivery of the resolution to the company that it has been signed and the days that it will be deemed to be passed
c) the members who signed resolution must deliver the documents constituting it to the company
d) the documents constituting the resolution must be retained as if they were minutes
e) the resolution can't be effective unless it is delivered to the company but if the company does not notify the resolution to other members or retain it that will not affect its validity.

As mentioned earlier in the paper, directors' duties have now been codified. Eight principal or general fiduciary duties of directors are set out in section 228. It should be noted that these duties not only apply to formally appointed directors but also to people that could be "de facto" or "shadow" directors.

Fiduciary Duties of Directors

- Act in good faith in the company's interests
- Act honestly and responsibly
- Act in accordance with the company's constitution
- Use company property, information or opportunities only for the interests of the company unless approved by the company's constitution or by the members
- Not restrict or agree to restrict power to exercise independent judgement unless it is permitted by the constitution or entered into in the company's interests
- Avoid conflicts of interest unless approved by members
- Exercise care, skill and diligence (this will be judged under a subjective test)
- Have regard to interests of members and employees

Other duties which are new under the 2014 Act are:

- Appoint a company secretary with necessary skills to discharge applicable statutory duties
- Prepare and deliver a company constitution (Section 19)
- Prepare a directors' compliance statement.

There is also the duty to procure compliance with the 2014 Act.

If a loan to a director is not evidenced in writing, it is now presumed that such loans are repayable on demand and bear interest. Equally, if advances made by a director to a company are not evidenced in writing it is presumed not to be a loan and to the extent that it was a loan, it does not bear interest or security and is subordinate to all creditors.

Section 260(f) now sets out that disclosures of interests in shares of less than 1% can be disregarded.

Chapter 5 of Part 5 of the 2014 Act deals with disclosure of Directors' and Secretaries' interests in shares. Any person who is a director or secretary and is aware of having an interest themselves or their spouse, civil partner or child having disclosed interest in shares in a company or another company which is a member of the same group must notify the company of that disclosed interest.

This duty to notify the company arises if a director or secretary of the company (or that person's spouse, civil partner or child):

- holds shares or debentures in such company or any other company within its group at the date of commencement of the 2014 Act and that interest was not previously notified under prior company law requirements (must be notified within 8 days)
- has acquired or ceased to hold shares or debentures in the relevant company or member of the group (must be notified within 30 days if by way of transfer otherwise within 8 days)
- is an existing holder of shares or debentures and subsequently becomes an officer (must be notified within 8 days)
- is granted by another group company right to subscribe for shares or debentures in that group company (must be notified within 8 days)

- is granted by another body corporate of same group a right to subscribe for shares or debentures in that other body corporate or exercises such a right (must be notified within 5 days)
- assigns or enters into a contract to sell shares or debentures or another group company (must be notified within 5 days)

If there is a failure to make these notifications within the relevant timeframes, no right or interest in the shares or debentures would be enforceable by the director or secretary concerned. There are some exceptions:

1. there is a right to apply to court for relief if the failure was inadvertent or on just and equitable grounds
2. if the details are entered on the statutory register within 30 days
3. a resolution can be passed in general meeting that (I) the notification provisions have been complied with in relation to the relevant shares or debentures and (II) the registered holder is entitled to deal with the shares or debentures registered in his or her name. A 3rd party may rely on such a resolution
4. if there was a failure to notify under the old provisions of the 1990 Companies Act, the Board can within 18 months of the commencement of the 2014 Act resolve that any default in complying with section 53 of the 1990 Act shall cease to operate if the officer concerned presents evidence to the Board and the Board is satisfied that the default concerned was inadvertent.

Where it is proved that an officer of the company was aware of facts concerning a default by the company, it is now presumed that that officer permitted the default unless he/she shows they took all reasonable steps to prevent it or because of circumstances beyond their control they were unable to do so.

Part 6 of the 2014 Act consolidates the law in the area of financial statements, filings and audit. In this regard, notable changes are

- a new procedure allows for the preparation, approval, audit and filing of revised financial statements of directors reports in respect of the prior year (sections 366 to 279)
- updated thresholds for medium-sized companies where turnover is not greater than €20,000,000, balance sheet is not greater than €10,000,000 and less than 250 employees (section 350)

Very usefully, the 2014 Act now provides that written Directors' resolutions can be executed in counterpart. There used to be some doubt on this where such power was not specifically provided for in the Articles of Association.

Auditors Duty To Report

It used to be the case that pursuant to section 74 of the Company Law Enforcement Act 2001 auditors were required to report to the Office of the Director of Corporate Enforcement (ODCE) where they had reasonable grounds for believing that the company, or an officer or an agent of the company, had committed an indictable offence under the then Companies Acts.

Thankfully, the phrase “indictable” is no longer relevant in this area. Pursuant to sections 392 and 393, auditors must only report offences which would be categorised as category 1 and 2 offences.

Where in the course of, and by virtue of, their carrying out an audit of the financial statements of a company, information comes into the hands of the auditors that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of the company has committed a category 1 or 2 offence, the auditors must notify that opinion to the ODCE. They must also provide the ODCE with particulars of the grounds on which they have formed that opinion. If requested by the ODCE, the auditor will furnish the ODCE with such further information in their possession or control relating to the matter and give such access to books and documents in their possession or control relating to the matter (section 393 of the 2014 Act).

If, at any time, the auditors form the opinion that the company being audited is contravening, or has contravened, any of sections 281 to 285 of the 2014 Act, they are obliged to serve a notice on the company informing it of that opinion. If the necessary steps are not taken by the directors to remedy that infringement within seven days, the auditors are required to notify this to the Registrar of Companies, who will in turn notify the ODCE (section 392 of the 2014 Act).

The 2014 Act has introduced a number of newly reportable offences.

1. Signature of Balance Sheet -Section 324 of the 2014 Act requires a director/directors to sign the original balance sheet and that the signatory names are to be shown on each copy of that balance sheet to be laid before the members of the company or otherwise circulated or published or delivered to the Registrar of Companies. If these are not complied with then the company and any officer of it is in default is guilty of a category 2 offence.
2. True and Fair View - Section 324 (6) of the 2014 Act provides that every director of a company who is knowingly party to the approval of statutory financial statements that do not give a true and fair view or otherwise complies or is reckless as to whether this is so is guilty of a category 2 offence. The auditor must consider the reporting obligation to the ODCE where the opinion in the audit report is qualified with regard to the truth and fairness of the company or group financial statements of a company and the compliance of the financial statements with the requirements of the 2014 Act. Various types of qualification of the auditors report are possible in accordance with the 2014 Act and so qualification does not automatically give rise to a reporting obligation.
3. Relevant Audit Information - Section 330 of the 2014 Act requires directors to state in the Directors Report that there is no relevant audit information of which the auditor is unaware (discussed below). Any director who knew that such a statement was false or was reckless as to whether it was false and failed to take reasonable steps to prevent the approval of the Directors Report is guilty of a category 2 offence. Auditors need to be aware of this requirement when considering the Directors Report in the course of its audit.
4. Abridged Financial Statements - Section 355(7) provides that every director who is party to the approval of abridged financial statements which have not been prepared in accordance with the 2014 Act and who knows that they have not been so prepared or is reckless as to whether they have been so prepared is guilty of a category 2 offence. Similarly sections 355(9) and 356(5) provide that the company and any of its officers who are in default due to non-compliance with the requirements of the 2014 Act in relation to the documents (which

includes the auditors special report on the abridged financial statements being annexed to the annual return) is guilty of a category 2 offence.

There are also a number of changed offences.

A. Adequate Accounting Records - Sections 281 to 285 of the 2014 Act set out the obligation on a company to keep adequate accounting records and the particular requirements to be met. A company that fails to keep adequate accounting records and any director who fails to take all reasonable steps to secure the company's compliance with those requirements is guilty of a category 1 or a category 2 offence. Section 282 of the 2014 Act introduces 2 new requirements in relation to adequate accounting records. The first is the taking of adequate precautions to guard against falsification and facilitating discovery of such falsification if it occurs where the accounting records are kept otherwise than in a bound book. The second is the location of the computer server in the State or that computer provides services to another computer which are necessary for the maintenance of the accounting records of the company in the State. Where the auditor forms the opinion that adequate accounting records are not held then section 392 requires it to notify the company by recorded delivery of that opinion and if the directors do not take steps to ensure the adequacy of the records within 7 days of that notification then the auditor notifies the Registrar of Companies in the prescribed form. This notification is not required where the contravention concerned is minor or immaterial in nature. Section 393(1) obliges the auditor to report to the ODCE where the auditor formed the opinion that the company has not kept adequate accounting records.
B. Right to Information and Explanations - Section 387 sets out the auditors right to information and explanations within 2 days of making the request from the officers of the company being audited. Section 388 goes further and requires a subsidiary entity and its auditor to provide the parent company's auditor with information and explanations requested reasonably by the parent company auditor for the purposes of that parent company's audit within 5 days. Any officer of a company or subsidiary undertaking or auditor not complying with these provisions is guilty of a category 2 offence. Section 389 provides that an officer of a company who knowingly makes a false or misleading statement to the auditor or makes a statement reckless as to whether it is false or misleading in a material particular is guilty of a category 2 offence.
C. False Statements - Section 406 provides that any person who intentionally makes a statement that is false, knowing that statement to be false, in a material particular in any return, statement, financial statement or document required by Part 6 of the 2014 Act is guilty of a category 2 offence. Should an auditor in the course of and by virtue of the audit, become aware of a misstatement in a document specified by Part 6 should consider that this may be a reporting requirement in relation to section 406.

Directors' Reports and Compliance Statement

In Directors' Reports, directors must confirm that the actions set out below have been done or if not they must explain why not.

1. That a compliance policy statement has been drawn up which sets out the company's policies concerning compliance with relevant obligations

2. That appropriate arrangements or structures have been designed to secure material compliance with relevant obligations
3. That a review has been conducted of arrangements and structures in place in relation to the financial year to which the Directors Report relates.

Section 225 introduces Directors' Compliance Statements. All companies (except unlimited and investment companies) are obliged to produce such statements where the Balance Sheet is greater than €12,500,000 and turnover is greater than €25,000,000.

The directors must make an annual statement in the directors report which

- acknowledges that they are responsible for ensuring the company's compliance with its "relevant obligations"
- confirms that certain things have been done or if they have not been done, explaining why this is the case.

"Relevant obligations" means an obligation under tax law; a category 1 or 2 offence under the 2014 Act; or a serious market abuse or Prospectus offence.

Director's accountability for audits is increased under section 330. The Directors' Report must confirm (so far as directors are aware) there is no relevant audit information of which the auditors are unaware. In this regard "relevant audit information" is defined as information needed by statutory auditors in connection with preparing their report. This information will clearly only be definitively known to the company's statutory auditors so it would be necessary for the directors to communicate with the statutory auditors on an ongoing basis to ensure that this obligation is met. A Director would be regarded as having "taken all steps that he or she ought to have taken as a director" if he or she has made such enquiries of his or her fellow directors (if any) and of the company's statutory auditors for that purpose and taken such other steps (if any) for that purpose as are required by his or her duty as a director of the company to exercise reasonable skill, care and diligence.

It is a category 3 offence if the directors do not undertake these compliance requirements or explain why they have not done so. The resulting penalty is a fine of €5000 or a maximum sentence of imprisonment of up to 6 months or both. When determining the responsibility of a director for particular actions of a company you must look at section 270 (1), which provides :-

"*For the purposes of any provision of this Act which provides that an officer of the company was in default shall be guilty of an offence, an officer who was in default is any officer who authorises or who, in breach of his or her duty as such officer, permits the default mentioned in the provision."*

Section 271(2) goes on to provide that if it is proved in relevant proceedings that the officer in question was aware of the "basic facts concerning the default concerned", it will be presumed that that officer permitted the default unless he can show that either

1. he took all reasonable steps to prevent it or
2. by reason of circumstances beyond his control, he was unable to do so.

It would seem then that if there are proceedings and it cannot be proved that a director was aware of the basic facts concerning the default then it cannot be presumed that the director permitted the default.

Categorisation of Offences

Part 14 of the 2014 Act now streamlines all offences under company law and introduces a new four tier categorisation of offences with category 1 being the most serious offence. The categories of offence and associated penalties are as follows:

- **Category 1** – conviction on indictment can result in imprisonment of up to 10 years and/or a €500,000 fine while a summary prosecution for a category 1 offence will result in a Class A fine (currently €5000) and/or a term of imprisonment of up to 12 months
- **Category 2** – conviction on indictment can result in imprisonment of up to 5 years and/or a €50,000 fine while a summary prosecution for a category 2 offence will result in a Class A fine and/or a term of imprisonment of up to 12 months
- **Category 3** – summary offence only and attracts a term on up to 6 months imprisonment and/or a Class A fine
- **Category 4** – summary offence only punishable by a Class A fine.

(A summary offence is one which can only be dealt with by a judge sitting alone without a jury while an indictable offence is one which may be or must be tried before a judge and jury.)

This new approach of categorisation of offences will allow practitioners to advise their clients of the gravity of the offences and the potential penalties for non-compliance in a much easier fashion.

Category 1 and 2 offences are also those offences in respect of which a reporting obligation rests on auditors should they have reasonable grounds for believing that an offence has been committed.

John Lane
Managing Partner
john@holohanlaw.ie

HOLOHAN LAW

www.holohanlaw.ie
Waterview House
16 Sundays Well Road
Cork
&
Suite 319
Capel Building
St Mary's Abbey
Dublin 7

Schedule 1 to the Companies Act 2014

Form of Constitution of Private Company Limited by Shares

CONSTITUTION
OF
[name of company as below]

1. The name of the company is: THE SOUTH EASTERN COUNTIES FLOORING AND TILING COMPANY LIMITED.
2. The company is a private company limited by shares, registered under Part 2 of the Companies Act 2014.
3. The liability of the members is limited.
4. The share capital of the company is €50,000 divided into 50,000 shares of €1 each. / The share capital of the company is divided into shares of €1 each.
5. Supplemental Regulations (if any).

We, the several persons whose names and addresses are subscribed, wish to be formed into a company in pursuance of this constitution, and we agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers	Number of Shares taken by each Subscriber
1. Mary Kelly Address: Description:	2,700
2. Alan Redmond Address: Description:	300

Total shares taken: 3,000

As appropriate:

signatures in writing of the above subscribers, attested by witness as provided for below; or authentication in the manner referred to in section 888.

Dated the ---------- day of ---------- 20--

Witness to the above Signatures:

Name:----------
Address: ----------

Template Constitution for the new DAC model

SCHEDULE 7 to the Companies Act

Form of Constitution of Designated Activity Company Limited by Shares

CONSTITUTION
OF
[name of company as below]

MEMORANDUM OF ASSOCIATION
1. The name of the company is: THE SAFE SKIES SOFTWARE DESIGNATED ACTIVITY COMPANY.
2. The company is a designated activity company limited by shares, that is to say a private company limited by shares registered under Part 16 of the Companies Act 2014.
3. The objects for which the company is established are the development, production and sale of computer software designed to enhance the safety of aviation and the doing of all such other things as are incidental or conducive to the attainment of the above object.
4. The liability of the members is limited.
5. The share capital of the company is €200,000, divided into 200,000 shares of €1 each.

ARTICLES OF ASSOCIATION
The following Regulations shall apply to the company:
[or, instead of the immediately foregoing words, the following sentence:-*]

The provisions of the Companies Act 2014 are adopted.

*See section 968(5)

We, the several persons whose names and addresses are subscribed, wish to be formed into a company in pursuance of this constitution, and we agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers	Number of Shares taken by each Subscriber
1. Patrick McKenna	300
Address:	
Description:	
2. Bridget McCloy	2,700
Address:	
Description:	
Total shares taken:	3,000
As appropriate:	

signatures in writing of the above subscribers, attested by witness as provided for below; or authentication in the manner referred to in section 888.

Dated the _____day of _____ 20___

Witness to the above Signatures:

Name: _____
Address: _____