

## ACCA

### COMPANIES ACT 2014

### CARPE DIEM

**Paul Keane**  
**pkeane@reddycharlton.ie**  
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## ➤ TOPICS

1. Company law as you have known it, but made easier
2. Structure of the Act
3. LTD and DAC compared
4. Painless transition (we hope!)
5. Corporate capacity and authority
6. Members' resolutions
7. Summary approval procedure
8. Arrangements: Mergers, divisions and share for undertaking swaps
9. Corporate governance
10. Financial statements, filing and audit

- Company law as you have known it, but made easier
  - ✓ Mass of Legislation since 1963
  - ✓ CLRG working since 2000
  - ✓ Companies Act – Restatement and Reform

- ✓ Reflects Irish business as it really is
  - ◆ 1963 Act derived from needs of public company
  - ◆ Emphasis on private companies limited by shares

## ➤ Structure of the Act

### Private company limited by shares

PART 1 – Preliminary and General

PART 2 – Incorporation and Registration

PART 3 – Share Capital, Shares and Certain Other Instruments

PART 4 – Corporate Governance

PART 5 – Duties of Directors and Other Officers

PART 6 – Financial Statements, Annual Return and Audit

PART 7 – Charges and Debentures

PART 8 – Receivers

## ➤ Structure of the Act (Contd)

### Private company limited by shares

PART 9 – Reorganisations, Acquisitions, Mergers and Divisions

PART 10 – Examinerships

PART 11 – Winding Up

PART 12 – Strike Off and Restoration

PART 13 – Investigations

PART 14 – Compliance and Enforcement

## ➤ Structure of the Act (Contd)

### Other company types and regulation

- PART 15 – Functions of Registrar and of Regulatory and Advisory Bodies
- PART 16 – Designated Activity Companies
- PART 17 – Public Limited Companies
- PART 18 – Guarantee Companies
- PART 19 – Unlimited Companies
- PART 20 – Re-registration

## ➤ Structure of the Act (Contd)

### Other company types and regulations

- PART 21 – External Companies
- PART 22 – Unregistered Companies and Joint Stock Companies
- PART 23 – Public Offers of Securities, Financial Reporting by Traded Companies, Prevention of Market Abuse, etc
- PART 24 – Investment Companies
- PART 25 – Miscellaneous

- ✓ Five main types of companies
  - ◆ Private company limited by shares “Ltd”)
  - ◆ Designated Activity Company (“DAC”)
  - ◆ Company limited by guarantee (“clg”)
  - ◆ Public Limited Company (plc”)
  - ◆ Unlimited Company (“uc”)

➤ LTD AND DAC COMPARED

	LTD (LCS)	DAC
Min no of shareholders	1	1
Min no of directors	1	2
Objects clause	No	Yes
Ultra vires applies	No	No
Constitution	One doc	Memo and Arts
May list debt securities	No	Yes
Must hold AGM	No	Yes
Act sets out default rules	Yes	Yes

- Painless Transition (we hope!)
  - ✓ Muddle through
  - ✓ May Object – to preserve status quo
  - ✓ Convert early
    - ◆ To DAC
    - ◆ To Ltd
  - ✓ Re-Register Later

- Corporate capacity and authority
  - ✓ Ultra vires doctrine
    - ◆ Invalid if acting beyond powers
    - ◆ Constructive notice
      - ❖ Jon Beauforte – Constructive notice of permitted objects and deemed actual notice of business being conducted

## ➤ Corporate capacity and authority (Contd.)

### ✓ Efforts to limit the doctrine

- ◆ Drafting
- ◆ Section 8, 1963 Act
- ◆ Regulation 6 European Communities (Companies) Regulations 1973

## ➤ Corporate capacity and authority (Contd.)

### ✓ Invalidity of acts beyond authority of directors

- Rolled Steel Products (Holdings Limited -v- British Steel Corporation and Others 1986: whether a guarantee given for a purpose outside of objects valid – express power to give guarantees held: company had contractual capacity to give a guarantee and not ultra vires the company but were acting beyond their authority, to the knowledge of the beneficiary of the guarantee – guarantee not effective.

## ➤ Corporate capacity and authority (Contd.)

### ✓ LTD

- ◆ Full Capacity
  - ❖ Any business, activity, act or transaction
  - ❖ Full rights, powers and privileges

### ✓ DAC, CLG, PLC and UC

- ◆ Capacity to do any act or thing stated in the objects
- ◆ But validity of an act done by DAC not affected by its objects (S 973 (1))
- ◆ No constructive notice of objects (S 973 (5))
- ◆ Directors' duty to observe limitations on their powers (S 973 (3))
- ◆ Members may seek injunction (S 973 (2))



## ✓ Authority of Directors / Registered Persons

- ◆ Registered persons
- ◆ Full authority for board/registered person
- ◆ But only whether transaction fails due to lack of authority
- ◆ Powers of company
- ◆ Liability for breach of authority

## ✓ Authority of persons other than a board / registered person

- ◆ Indoor management rule (Turquand's case not affected) (S 40 (11))
- ◆ Actual authority: general rule does not affect exercise of actual authority (S 40 (3))
- ◆ Ostensible authority – no reference to be made to company's constitution (S 40 (9))

### ✓ Members Resolutions

- ◆ Unanimous resolutions in writing
- ◆ Majority resolutions in writing
- ◆ Removal of directors or auditors
- ◆ Abridged notice of meeting

### ✓ Unanimous Resolutions

- ◆ Unanimous resolutions in writing deemed passed when signed (S 193)
- ◆ Signatories to deliver written resolution to the company within 14 days
- ◆ Company to notify members of passing of resolution (if not signed contemporaneously by all)

## ✓ Majority resolution in writing (S 194)

- ◆ LTD or DAC
  - ❖ Proposed text and explanation of its purpose to be circulated to members
  - ❖ Requisite majorities (ordinary resolution: simple majority, special resolution: 75%)
  - ❖ Resolution to be delivered to the company

## ✓ Majority resolution in writing (S 194) (Contd.)

- ◆ LTD or DAC (contd.)
  - ❖ Moratorium on effectiveness (ordinary resolution: 7 days; special resolution: 21 days)
  - ❖ Moratorium may be waived by all voting members
  - ❖ Not for removal of director or auditor

## ✓ Majority resolution in writing (S 194) (Contd)

- ◆ LTD or DAC (contd.)
  - ❖ Abridged notice of meeting
  - ❖ Ordinary resolution: consent of all members entitled to vote plus auditors
  - ❖ Special resolution: consent of 90% of voting shares (being majority in number)

## ➤ Summary Approval Procedure

### ✓ Consistent validation procedure

### ✓ Restricted activities

- ◆ Financial assistance for acquisition of own shares
- ◆ Reduction in company capital
- ◆ Variation of company capital on reorganisation
- ◆ Treatment of pre-acquisition profits as distributable
- ◆ Prohibition of loans etc to directors and connected persons
- ◆ Mergers
- ◆ Members voluntary winding up

## ✓ Topics

- ◆ Form of declaration
- ◆ Expert report
- ◆ Moratorium to allow challenge
- ◆ “In connection with” financial assistance for acquisition of own shares

## ✓ Form of declaration

- ◆ Depends on the restricted activity
- ◆ Made by the directors or by a majority of directors

### ✓ Form of declaration (Contd.)

- ◆ having made full enquiry
- ◆ opinion that the company
- ◆ having entered into the relevant restricted activity
- ◆ able to pay / discharge its debts and other liabilities in full as they fall due
- ◆ within 12 months

### ✓ Form of declaration (Contd.)

- ◆ If no reasonable grounds, personal liability for debts / liabilities of the company
- ◆ If insolvent within 12 months, presumption
- ◆ Merger: directors to confirm that terms of merger deal with consequential effects

## ✓ Experts Report

- ◆ Restricted transactions
  - ❖ Reduction in Capital
  - ❖ Variation of company capital on reorganisation
  - ❖ Pre-acquisition profits
  - ❖ Members Voluntary winding-up
- ◆ Opinion that declaration of directors is not unreasonable

## ✓ Moratorium to allow challenge

- ◆ 30 days after declaration before restricted activity may be implemented
- ◆ May be waived, if approved by members holding more than 90% of voting shares

## ✓ Financial assistance for acquisition of own shares

- ◆ Existing s 60 covers:
  - ❖ Financial assistance in connection with an acquisition
- ◆ Prohibition limited to assistance for the purpose of acquisition (s 82)
- ◆ Must be principal purpose not apply if assistance incidental to larger purpose

## ➤ Arrangements: Mergers, Divisions and Share for Undertaking Swaps

### ✓ Mergers

- ◆ Existing Techniques
- ◆ Mergers – Overview
- ◆ Types of Merger
  - ❖ Merger by acquisition
  - ❖ Merger by formation of new company
  - ❖ Merger by absorption



## ✓ Mergers

- ◆ Modelled on EC (Cross Border Mergers) Regulation 2008 but no necessity for cross border element
- ◆ Transfer of assets and liabilities by operation of law
- ◆ Dissolution of transferor without liquidation
- ◆ No court order, if approved by unanimous SAP in all merging companies

## ✓ Types of Mergers

- ◆ Merger by acquisition
  - ❖ In exchange for issue of shares in Successor Co
- ◆ Merger by formation of a new company
  - ❖ In exchange for issue of shares in New Co
- ◆ Merger by absorption
  - ❖ Transferor wholly owned by Successor Co
  - ❖ No issue of shares

### ✓ Key features

- ◆ No PLCs, but one CLS
- ◆ SAP or court approval
- ◆ Common draft terms of merger
- ◆ Directors' explanatory report
- ◆ Experts report
- ◆ Merger financial statements
- ◆ Publication of terms of merger

### ✓ Consequences of Mergers

- ◆ Assets and liabilities of transferor transferred to successor company
- ◆ All contracts, agreements, instruments, novated to successor company
- ◆ Members of transferor becomes members of the successor company
- ◆ Directors / Experts liable for misconduct / untrue statements

## ✓ Advantages of Mergers

- ◆ Automatic transfer
- ◆ Third party consent not required (except those required under Irish or EU enactments)
- ◆ No liquidation – automatic dissolution
- ◆ No need for court order if SAP used

## ✓ Divisions

- ◆ Two or more successor companies acquire between them all the assets and liabilities of the transferor company
- ◆ Key features similar to mergers
- ◆ Approval by special resolution
- ◆ Confirmation by court (no SAP)

## ✓ Share for undertaking swap

- ◆ Return of capital to shareholders
  - ❖ Distributable reserves equivalent to value of assets
  - ❖ Market value or book value?
  - ❖ Now: approval by SAP (or special resolution plus court order)
  - ❖ Book value applied

## ✓ Competition and Consumer Protection Act 2014

- ◆ Notification Thresholds:-  
In the most recent financial year:-
  - ❖ The aggregate turnover in the state of all the undertakings involved is at least €50m  
AND
  - ❖ The turnover in the state of each of two or more of the undertakings involved is at least €3m.
- ◆ Notification Timing:-
  - ❖ As soon as can demonstrate good faith intention to conclude an agreement

## ✓ Competition and Consumer Protection Act 2014 (Contd.)

- ◆ Period of Review:-
  - ❖ Phase 1 : Increased from 1 month to 30 working days
  - ❖ Phase 2 : Increased from 3 months to 120 working days

## ✓ Competition and Consumer Protection Act 2014 (Contd.)

- ◆ Media Mergers – Definition of Media Business now includes:-
  - ❖ Publication of newspapers and current affairs periodicals over the internet
  - ❖ Making available of certain audio-visual media consisting substantially of news and comment on current affairs on electronic communications networks

## ✓ Competition and Consumer Protection Act 2014 (Contd.)

- ◆ Media Notification
  - ❖ Competition and Consumer Affairs Commission and Minister for Communications, Energy and Natural Resources

Failure to notify – VOID transaction!

## ➤ Corporate Governance

### ✓ Directors' duties codified

- ◆ Good faith
- ◆ Act honestly and responsibly
- ◆ Act for proper purpose
- ◆ Not divert company's property information or opportunities
- ◆ Not restrict independent judgment
- ◆ Avoid conflict of duties and interests
- ◆ Exercise care skill and diligence
- ◆ Regard interests of members and employees

- ✓ Restriction of director: extent of cooperation with liquidator
- ✓ Director's Loans
  - ◆ Restriction on loans, quasi loans, credit transactions in favour of directors / connected persons and associated guarantees and security (S 239) = S31
  - ◆ Whitewash by way of SAP

- ✓ Director's Loans (Contd.)
  - ◆ Extends to all transactions (only associated guarantees and security covered by existing whitewash)
  - ◆ No expert report
- ✓ Undocumented loans to/from directors

## ➤ Financial Statements, Filing and Audit (Part 6)

- ✓ Accounting Records to be kept
- ✓ Financial statements to be prepared
- ✓ Periodic returns to CRO
- ✓ Auditing of financial statements
- ✓ Appointment and removal of statutory auditors

## ✓ Financial Year (Chap 3)

- ◆ 1st year end: within 18 months of incorporation
- ◆ Subsequent : 12 months +/- 7 days
- ◆ Y/e of Subs and HoldCo to coincide ( comply or explain )
- ◆ May change y/e ,but
  - ❖ ≤ once in five years
  - ❖ No greater than 18 months
  - ❖ Not if financial statements late to CRO



## ✓ Statutory Financial Statements

To give true and fair view

- ◆ Directors to prepare for each financial year
- ◆ Financial Reporting Framework:
  - ❖ Companies Act financial statements or IFRS

## ✓ Disclosures in Statutory Financial Statements (Chap 6)

- ◆ Directors Remuneration
- ◆ Directors' benefits: loans etc
- ◆ Other arrangements/transactions in which directors/connected persons have material interest
- ◆ Related undertakings ( 20% or more of any class of equity shares)
- ◆ Particulars of staff ( average numbers and costs)

## ✓ Disclosures in Statutory Financial Statements (Contd.)

- ◆ Share capital (authorised/allotted) and movements
- ◆ Financial assistance for purchase of own shares
- ◆ Holding of own shares or parent company shares
- ◆ Accounting Policies
- ◆ Remuneration for audit, audit-related and non-audit work
- ◆ Off –balance sheet arrangements

## ✓ Directors Reports

- ◆ No relevant audit information of which the auditors are not aware; and
- ◆ Taken all the steps he ought to have taken to make himself and the auditors aware of any relevant audit information



- ✓ Compliance statement for larger companies ( S 225 )
  - ◆ Statement : responsible for securing company compliance with relevant obligations and confirming they have:
    - ❖ Drawn up company compliance policy statement
    - ❖ Put in place arrangements and structures designed to secure compliance
    - ❖ Reviewed arrangements and structures

- ✓ Compliance statement for larger companies (S 225) (Contd.)
  - ◆ Balance sheet < €12.5m; T/o < €25 m
  - ◆ Confined to company law (Cat 1 & 2, serious Market Abuse/Prospectus offence) and tax law

✓ Medium company

Two or more of the following:-

- Turnover < €20 million
- Balance sheet < €10 million
- Average employees <250

✓ Reporting to registrar and director

- Cat 1 & 2 offences only
- Cat 1: Fine €500k/10 yrs
- Cat 2: Fine €50k/5 yrs

## ✓ Audit Exemptions

- ◆ Now includes :-
  - ❖ CLG
    - But any member may insist
  - ❖ Small Groups
    - Lost if Annual return for current and previous year not filed on time
- ◆ Dormant company audit exemption
  - ❖ No significant accounting transaction
  - ❖ Only assets and liabilities: group shareholding and inter group debt

## ✓ Terminology

- ◆ “Financial statements” not “accounts”
- ◆ Adequate accounting records” not “proper books of account”.
- ◆ “Subsidiary”:
  - ❖ Now one definition
  - ❖ Based on definition of subsidiary undertaking
  - ❖ “Golden share” group structures still possible.
  - ❖ Old definition preserved for pre-Act documents

## ✓ Terminology (Contd.)

- ◆ Turnover
  - ❖ Revenue derived from provision of goods /services
  - ❖ Within ordinary activities
  - ❖ After deduction of trade discounts, VAT and other taxes based on turnover
  - ❖ **NEW**  
Where ordinary activities include making/holding investments, includes gross revenue derived from those activities.

## ✓ Voluntary revision of defective statutory financial statements (Chap 17)

- ◆ Original F/S or Director's report non-compliant
- ◆ Full revision or supplementary note
- ◆ Statement identifying the revisions
- ◆ Auditor's report, unless exempt
- ◆ Publication and filing of revision



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