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Preface

The law relating to companies is vast and students are often confused by the complex web of rules and legal principles that govern the area. If the reasoning behind those principles is understood, the technical rules can be easier to understand. This book is designed to help students to recognise and understand the basic rules and principles that have shaped company law.

Since the previous edition of this book, the landscape of company law has changed considerably, with the introduction of the Companies Act 2014 (the Act) which will commence on 1 June 2015. This Act repeals over thirty pieces of company legislation, both primary and secondary. There are many new and innovative aspects to this Act, which will be considered throughout this book. However, for present purposes it is enough to say that there is at last a structure and order to the legal framework of companies in Ireland.

As an introductory text, this book focuses on private limited companies of which there are now two types: the new-form private company limited by shares and the new designated activity company. The private company limited by shares is likely to be the model-form of company in the Irish corporate world and it will operate in a more simplified administrative environment with a single member, a single director and unlimited corporate capacity. The designated activity company is similar in almost all respects (despite the obvious difference in name) to the old-form private limited company. The designated activity company will exist to facilitate private companies which intend to or are required to have objects and which propose to list debt securities. This focus requires students to deal only with Parts 1–16 of the Act. While occasional reference is made to public companies, it is for the purpose of comparison only. The law relating to such companies, particularly those trading on a regulated market, is now more appropriately dealt with in specialist works on financial regulation, corporate governance and corporate finance.

Given the focus of this book, changes have been made since the previous edition. These changes primarily reflect the structure of the Act but also respond to the many comments and contributions I have received over the past few years from lecturers involved in teaching company law on undergraduate programmes in the areas of law, accountancy and business. Accordingly, there is now a single chapter on the company's constitution, rather than separate chapters on the memorandum and articles of association. There are no longer chapters on corporate capacity, market abuse and reorganisation of companies. There is an increased emphasis on directors, with a new chapter on directors' duties in insolvency. Finally, investigation of companies is now included as part of the general chapter on corporate enforcement.

This text is aimed at students who are studying company law for the first time as part of their undergraduate studies, whether in the fields of business, banking, accountancy or otherwise. These students are generally required to have a thorough, though not overly academic, knowledge of the subject. Law undergraduates who wish to obtain a sound knowledge of the first principles of company law (before engaging in more advanced or specialist works) would also benefit from this book.

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Waterford Institute of Technology
8 May 2015

Dedication

To the memory of my beloved uncle, James Callanan (1933–2014)

For the long, long road to Tipperary
Is the road that leads me home
O'er hills and plains, by lakes and lanes
My woodlands, my cornfields
My country, my home.

(John A. Carpenter, *c*.1917)

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CHAPTER ONE

Introduction

1. Development of Companies

Prior to 1844, persons who associated for the purpose of carrying on business generally did so by way of a partnership arrangement. Although some companies existed, they were enjoyed only by the privileged. This was because incorporation was possible only by obtaining a charter from the Crown or by the authority of a special Act of Parliament. In the seventeenth century, joint stock companies emerged. These companies possessed some of the characteristics of the modern company: shares were transferable; the assets and liabilities of the company were separate from those of the members; and the company could sue in its own name. The joint stock company was the principal mechanism for monopolistic trade developed during Britain's mercantile era as it expanded trade to the Near East, the Far East and Northern America. A more notable example was the English East India Company, which received a royal charter in 1600. It was granted exclusive rights to trade with all countries to the east of the Cape of Good Hope. The company was initially used to develop the tea trade between Britain and India but it eventually became one of the largest companies in the world, possessing a fleet of ships larger than that of most European countries. For companies such as the English East India Company, obtaining a charter was more about the privileges gained from monopoly status rather than any privileges related to its corporate status.

The main advantage of the modern company – the limited liability of the members – was not enjoyed by these companies, even where incorporated by charter, because some charters expressly conferred a power on the company to make calls or 'leviations' on the members to meet the company's liabilities. If the company failed to make such calls, creditors could step in and recover the amounts due from the members.[1]

In the early eighteenth century, persons with common business objectives began associating together to form companies based on contract. The contract would determine the rules regarding membership and share transfers. Rather than applying for a charter, which involved an expensive and tedious procedure, some of these companies purchased charters from defunct companies. Representing themselves as having charter status, many of these 'companies' succeeded in raising funds from the public. Following some high profile company collapses there was growing public disquiet about the fraudulent and speculative activities of some company promoters. Parliament intervened with the passing of the

1 *Salmon v The Hamborough Co.* (1671) 1 CH Cas 204.

Bubble Act 1720.[2] This Act sought to check the rise in company promotions by prohibiting the formation of joint stock companies, except those incorporated by statute or charter. The idea behind this Act was to restore security to commercial expansion and economic innovation.

The Bubble Act did, however, exempt most partnerships from its effect, resulting in the emergence of a new form of company, which was based on a combination of the partnership and trust concepts. Using this device, the subscribers to these 'deed of settlement' companies would agree by deed to associate in an enterprise with a predetermined joint stock divided into shares. The deed usually provided for the vesting of the company's property in a board of trustees and the delegation of the management functions to a committee of directors. Like the joint stock company, the deed of settlement company was treated as a partnership and the liability of the members remained unlimited.

1.1. The Modern Company

The Bubble Act remained on the books until the early nineteenth century when the Industrial Revolution led to increased demand for changes in order to facilitate business development. A number of statutes followed but it was not until William Gladstone took a leadership role in the Parliamentary Committee on Joint Stock Companies that the beginnings of the modern form of company emerged. The resulting Joint Stock Companies Act 1844 provided for the following:

(a) the incorporation of companies by registration, which obviated the need for incorporation by royal charter, letters of patent or an authorising Act of Parliament;
(b) the registration, as companies, of all associations with more than twenty-five members or with freely transferable shares;
(c) the introduction of publicity requirements; and
(d) the establishment of the office of the Registrar of Companies in England and Ireland.

Despite these developments, it was not until the passing of the Limited Liability Act 1855 that members of companies could enjoy limited liability, upon compliance with certain conditions, including the use of the word 'limited' at the end of the company's name. The Joint Stock Companies Act 1856 replaced former statutes, revised the system for the registration of companies and introduced for the first time the requirement that companies register a memorandum and articles of association.

By the early twentieth century, several further pieces of legislation had been introduced which sought to amend, repeal or consolidate the legal framework

2 The Bubble Act 1720 (6 Geo I, c 18); officially titled the Royal Exchange and London Assurance Corporation Act 1719.

governing companies. The Companies Acts of 1900 and 1907 were significant in that they not only recognised the small private company, but also exempted it from many of the statutory requirements regarding publicity. A further consolidation of company legislation occurred in 1908 with the enactment of the Companies (Consolidation) Act 1908, which repealed eighteen statutes and introduced several new provisions and refinements in the manner in which companies were formed and administered.

1.2. Ireland's Independence

Following Ireland's Independence in 1921, little was done to amend the Companies (Consolidation) Act 1908, which remained the principal legislation governing companies in Ireland until 1963. In 1951 a committee was established with the remit of investigating the entire area of company law.[3] Its findings were reported in 1958 and although some of its recommendations were given legal effect in the Companies Act 1959, it was the Companies Act of 1963 that embodied many of the Committee's recommendations.[4] The Companies Act 1963 repealed all previous legislation, introduced several new rules for companies and became the cornerstone of Irish company legislation for the next 50 years. During this time, almost thirty further legislative enactments were introduced relating to companies and it became clear that consolidation was once again necessary.

The Company Law Review Group (CLRG) was initially established on an informal advisory basis, until 2001 when it was placed on statutory footing.[5] Its primary function is to monitor, review and advise the Minister on matters concerning company law. The CLRG was given the arduous task of simplifying company law and making recommendations for consolidating company legislation. In this regard, under the stewardship of Dr Thomas Courtney, the CLRG published a General Scheme of the Companies Consolidation and Reform Bill in 2007. This General Scheme formed the basis for the Companies Act 2014 ('the Act').

2. Companies Act 2014

The Act was signed into law on 23 December 2014, following a relatively straightforward passage through the legislative process. It repeals all prior Companies Acts, which include:

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3 Report of the Company Law Reform Committee ('The Cox Committee Report'), PL 4523 (1958).

4 The draftsmen of the Companies Act 1963 also embodied some of the recommendations of the 1962 Report of the Jenkins Committee in the UK: Report of the Company Law Committee (Cmnd. 1749).

5 Company Law Enforcement Act 2001 (CLEA); the CLRG is now regulated by Chapter 4, Part 15 of the Companies Act 2014.

(a) the Companies Acts 1963–2005;
(b) Parts 2 and 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006;
(c) the Companies (Amendment) Act 2009;
(d) the Companies (Miscellaneous Provisions) Act 2009;
(e) the Companies (Amendment) Act 2012;
(f) the Companies (Miscellaneous Provisions) Act 2013; and
(g) every other enactment passed or made before the commencement of the Act, which provides that the enactment be read as one with the Companies Acts.[6]

The Act is over 1,100 pages long and is divided into twenty-five Parts. Much of the Act recasts the provisions of the prior Companies Acts but key refinements and amendments are evident throughout, many of which are both innovative and substantial. The most obvious change is a structural one, with the new-form private company limited by shares being placed at centre stage. This new-type company is likely to become the default type of private limited company following the expiry of the transition period, which will be discussed later in this chapter. The entire legislative framework for such a company is contained in Parts 1–15 of the Act. Accordingly, there will be no need to cross-reference any of the remaining ten Parts of the Act when dealing exclusively with matters relating to such companies. The key features of this private company limited by shares are considered later in this chapter. The remaining Parts of the Act will regulate all other types of companies, which will also be considered later in this chapter.

The Act also introduces several other changes, many of which will be considered in subsequent chapters. The principal changes relate to the following:

(a) optional default provisions are contained in the body of the Act, which will replace the former model articles of association found in Table A;[7]
(b) the reduction of the minimum share capital for public companies limited by shares from €38,000 to €25,000;[8]
(c) the reduction in the minimum number of members for public companies from seven to one;
(d) the codification of directors' fiduciary duties;[9]
(e) the imposition of additional statutory duties for directors during the transition period and thereafter;
(f) the requirement that company secretaries have necessary skills;[10]

6 Section 2(1) of the Act.
7 Table A: Schedule 1, Companies Act 1963 contained the model regulations for companies limited by shares. See Chapter 3.
8 See Chapter 7.
9 See Chapter 10.
10 See Chapter 8.

(g) the modernisation of the means of holding general meetings and members' decision-making;[11]
(h) the introduction of a new summary approval procedure for certain *restricted activities*;[12]
(i) the easing of the rules regarding variation of capital and the provision of financial assistance for the purchase of a company's shares;[13]
(j) the ability of companies to revise defective financial statements;[14]
(k) the extension of the audit exemption for some small group companies and for dormant companies;
(l) the streamlining of provisions regarding the three different types of winding up; and
(m) the simplification of company law offences, with the creation of four different categories of offences.[15]

3. Other Sources of Law

While legislation is clearly the principal source of company law, it is not the only one. Indeed, the legal framework governing companies in Ireland is derived from several different sources, including common law and equity and the law of the European Union.

3.1. Common Law and Equity

Since the nineteenth century the courts have played an important role in the development of company law. The courts of equity and the common law courts developed principles that are as much a feature of company law today as they were when they were first developed. Many of these principles have become embedded in modern legislation.

The speeches of Lord Macnaghten and his fellow Lords in the case of *Salomon v Salomon*[16] are regularly cited in modern cases concerning the issue of a company's separate personality. The rule in *Foss v Harbottle,*[17] which requires that wrongs done to a company must be pursued by the company, not individual members, is a fundamental rule of company law. The prohibition of a company issuing shares at a discount was a common law development before being enshrined in legislation. Many of the modern capital maintenance rules also originated from the courts.[18]

11 See Chapter 12.
12 See Chapters 5, 7 and 11.
13 See Chapter 7.
14 See Chapter 14.
15 See Chapter 22. There will be additional serious offences under Prospectus Rules and Market Abuse Rules for companies that are trading on a regulated market. These rules are outside the scope of this book.
16 [1897] AC 22.
17 (1843) 2 Hare 261.
18 *Ooregum Gold Mining Co. of India v Roper* [1892] AC 125.

The recognition that all the members of a company could unanimously make informal decisions that had the same effect as formal resolutions first found favour with the courts before legislation yielded to the principle.[19] The fiduciary duties of directors towards the company – originating in the courts of equity – are now codified in the Act.[20]

3.2. Law of the European Union

Accession to the European Economic Community in 1973 created new legal obligations for the Irish State. As part of the objective of creating a single market and to remove potential impediments to freedom of establishment, a harmonisation process began which included *inter alia* the area of company law. A number of directives have been adopted by the European Council, covering a diverse range of company law matters including *inter alia* formation of companies, financial statements, auditing, insider dealing, takeovers and mergers, shareholders' rights and companies' registers. Most of the directives apply only to listed companies but some apply to all companies within the European Union (EU). The objectives of these directives are primarily concerned with 'equivalent' minimum standards rather than uniform standards. Despite the continuing development of EU company law, there does not appear to be any indication of a change in this approach.

Several Council Regulations have also influenced the area of company law. Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings[21] was introduced to establish common rules in relation to insolvency proceedings where companies have business activities or economic interests in different member states. This Regulation is largely focused on the liquidation process and is currently under review. Council Regulation on the Statute for a European Company[22] provides for the establishment of a European Company (also known as a *Societas Europaea* or SE). The SE is a type of public limited company which can register in any member state and transfer to any other member state without having to dissolve in the original state and re-register in the new member state. Very few companies across the EU have opted for this process, primarily because of the differing attitudes to employee participation in the management of the company, which is a requirement for these types of companies.

4. Types of Companies

There are various means of categorising companies. They may be distinguished in terms of the manner in which they are formed, the liability of their members, their public or private status, or their position within a group of companies.

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19 See Chapter 12.
20 See Chapter 10.
21 Council Regulation No. 1346/2000.
22 Council Regulation No. 2157/2001.

4.1. Chartered Corporations

As mentioned earlier, chartered corporations were created by the assent of the British Crown, which by the grant of a charter or letters patent conferred the privilege of incorporation on a business entity. Many of these chartered companies became defunct and following the Limited Liability Act of 1855, charter companies fell out of use. A number of chartered bodies remain in existence in Ireland but few have a commercial object. Bank of Ireland is one such commercial company and it was established by charter in 1783 following an Act of the old Irish Parliament in 1781. The charter has now been revoked by the Act.[23] Since Ireland's Independence, the Executive has assumed the power to grant charters, although it has never done so. All unregistered companies, including those created by charter, are governed by the provisions of Part 22 of the Act.

4.2. Statutory Companies

Statutory companies were granted their status by the authority of an Act of Parliament, and were usually conferred with special powers and monopolistic rights. Since Independence, most of these companies have been dissolved and their business undertakings transferred to new State bodies. However, several statutory companies have been established since 1921 whose objectives were considered to be of national importance, e.g. Aer Lingus, Aer Rianta, the Industrial Credit Company and the Agricultural Credit Company. Given the general prohibition by European Union law on giving state aid to companies, many statutory companies have now been privatised. However, occasionally companies are still formed by the State for special purposes. The National Asset Management Agency (NAMA) is a statutory corporate body formed in 2009, as one of the measures introduced to stabilise the Irish banking system following the collapse of the Irish economy.

4.3. Registered Companies

The normal means of forming a company is by registration through the Companies Registration Office (CRO). The Act sets out the prescribed procedure that must be followed before registration can be effected by the Registrar of Companies (Registrar). This procedure is considered further in Chapter 2. The types of Irish registered companies which now exist under the new statutory regime are as follows:

(a) private company limited by shares;
(b) designated activity companies (DACs);
(c) public limited companies (PLCs);

23 Schedule 15 of the Act.

(d) guarantee companies without a share capital (CLGs);
(e) unlimited companies;
(f) external companies; and
(g) investment companies.

4.3.1. Private Companies Limited By Shares

As mentioned earlier, the private company limited by shares is a new type of company that will be regulated exclusively by Parts 1–15 of the Act. The liability of members of this company is limited to the amount unpaid on their shares. This new-form private company will operate in a more simplified administrative environment with:

(a) a single constitutional document that will not contain a memorandum and articles of association;
(b) unlimited contractual capacity with no objects;
(c) the option of having a sole director who will have the authority to bind the company;
(d) the option of having a statement in its constitution regarding the nominal value of its shares instead of a traditional authorised share capital clause;
(e) a minimum of 1 and a maximum of 149 members; and
(f) the option of dispensing with the requirement to hold an Annual General Meeting (AGM).

The transition requirements for conversion of existing private limited companies to the new-form private company limited by shares are considered later in this chapter.

4.3.2. Designated Activity Companies

The DAC is a new type of private limited company (in terms of its name) and it is defined by s.963 as a company that has either:

(a) the status of a private company limited by shares registered under Part 16 of the Act; or
(b) the status of a private company limited by guarantee, and having a share capital.

In reality the DAC is substantially the same as the old-form private company limited by shares in that:

(a) it may be incorporated with a minimum of 1 member and a maximum of 149;
(b) it will have at least two directors;

(c) it will have a constitution consisting of a memorandum and articles of association;
(d) it must have objects;
(e) it may be limited by shares or limited by guarantee and having a share capital;
(f) where it has only one member, it may dispense with the requirement to have an AGM; and
(g) it may list debt securities but not shares.

Part 16 of the Act will apply exclusively to DACs. Parts 1–15 will also apply except in so far as they are disapplied or modified and only twelve such provisions are specifically disapplied in the case of a DAC.[24] Where a DAC lists debts securities, it is also subject to chapters 1, 2, and 4 of Part 23, in so far as they are applicable to companies other than public limited companies.[25]

This type of private company was considered necessary for two reasons: choice and necessity. Private limited companies that are part of an international group may be required by their holding companies to have objects similar to other companies in the group. Companies formed for joint-venture purposes may be required to have objects pursuant to contractual arrangements. Private limited companies wishing to list debt securities must be a DAC, as the private company limited by shares is prohibited from doing so. Finally, it may be the case that members of a company choose to retain an objects clause as a means of limiting directors' powers. Indeed certain companies may be obliged under the terms of other regulatory requirements to have objects, including *inter alia* credit institutions licensed by the Central Bank, where they are not formed as public companies. Furthermore, a court could require a company to convert to a DAC in certain circumstances.[26] The transition requirements for conversion to this new-form company will be considered later in this chapter.

4.3.3. Public Limited Companies

A PLC is a company limited by shares, the constitution of which states that the company is to be a public limited company and that it has been properly registered under the Act.[27] The essential characteristics of a PLC are as follows:

(a) it must have at least two directors;
(b) it may be formed with a minimum of one member and it has no maximum limit;

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24 Section 964. For the purpose of the disapplication, any provision which is incidental, consequential or supplemental to a disapplied provision is also disapplied: s.964(5).
25 Section 999.
26 Section 212: Minority Protection. See Chapter 13.
27 Section 1000(1).

(c) where it has only one member it may dispense with the requirement to hold an AGM;
(d) it may issue shares and other securities to the public;
(e) it is required to have a minimum share capital of €25,000 or such greater amount as specified by Ministerial Regulations;[28]
(f) its allotted share capital must be paid up to the extent of one-quarter of the nominal value and any premium on the share;[29]
(g) it may not commence business until it has received an additional certificate from the Registrar in relation to its share capital;[30]
(h) additional rules apply in relation to the acquisition of its own shares; and
(i) if the company is trading on a regulated market, it is subject to additional requirements and its directors are subject to additional obligations.

The provisions of Part 17 of the Act apply exclusively to public limited companies that are not investment companies.[31] Parts 1–15 of the Act also apply except in so far as they have been disapplied or modified.[32] A *Societas Europaea* that is registered with the Registrar is a PLC for the purposes of Part 17.[33] Public limited companies formed under the prior Companies Acts will continue in existence and are deemed to be a PLC for the purposes of the Act.[34] Where a PLC is trading on a regulated market it is subject to Part 23 of the Act. These types of PLCs are outside the scope of this book.

4.3.4. Guarantee Companies

A CLG is a company limited by guarantee; it does not have a share capital and its members are liable for the amount specified in its memorandum in the event that the company is wound up. The most common CLGs in Ireland are charities, sporting organisations, social clubs and management companies. The essential characteristics of a CLG are as follows:

(a) it is a public company;[35]
(b) it cannot have a share capital;[36]

28 Section 1000(1).
29 Section 1026.
30 Section 1010.
31 Section 1001.
32 Section 1002(1).
33 Section 1003.
34 Section 1018.
35 Section 1173.
36 Section 1172.

(c) it cannot have securities listed on a regulated market with the exception of debt securities;[37]
(d) the minimum number of members is one and there is no maximum;
(e) it must have at least two directors;[38]
(f) where it has only one member, it may dispense with the requirement to hold an AGM;[39]
(g) it may in limited circumstances avail of an audit exemption;[40] and
(h) certain exemptions are permitted in relation to the filing of documents to be annexed to the annual return.[41]

CLGs are governed by Part 18 of the Act. Parts 1–15 also apply in so far as they have not been disapplied or modified.[42]

4.3.5. Unlimited Companies

Unlimited companies may be private or public. Public unlimited companies may or may not have a share capital. Accordingly, the Act recognised three types of unlimited companies:

(a) a private unlimited company (ULC);
(b) a public unlimited company (PUC); and
(c) a public unlimited company that has no share capital (PULC).

Very few unlimited companies are registered in Ireland. This is because, as the name suggests, if the company is wound up, the members are fully liable for the debts and liabilities of the company. The primary reason for using unlimited companies is to avoid disclosure obligations in relation to financial information. These companies are governed by Part 19 of the Act and are outside the scope of this book.

4.3.6. External Companies

An external company is one that is registered in another state but has a branch established in Ireland. These branches must be registered in the State and the rules governing them are set out in Part 21 of the Act. These companies are outside the scope of this book.

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37 Section 1191.
38 Section 1194(1).
39 Section 1202.
40 Section 1173.
41 Section 1220.
42 Section 1173.

4.3.7. Investment Companies

An investment company is a special type of PLC, the object of which is stated in its memorandum to be the collective investment of its funds in property with the aim of spreading investment risk and giving members the benefit of the results of the management of its funds.[43] This type of company structure is very attractive to international fund managers who can take advantage of Ireland's tax regime. These companies are governed by Part 24 of the Act, which relaxes many of the Act's requirements that would usually apply to PLCs. All investment companies are regulated by the Central Bank. These companies are outside the scope of this book.

4.4. Group and Related Companies

Corporate structuring may require the use of subsidiary undertakings. It may be strategically beneficial to set up subsidiary undertakings where:

(a) a company wishes to expand or diversify by acquiring an existing company or establishing a new one;
(b) it is necessary for transactional reasons such as joint ventures or other contractual arrangements;
(c) there is a need to protect one group company by migrating potential risk from one jurisdiction to another; and
(d) there are tax efficiencies to be obtained.

Prior to the introduction of the Act, holding and subsidiary undertakings had different meanings depending on a particular legal scenario. The Act now provides a single definition for group and subsidiary undertakings. By virtue of s.7, a company is a subsidiary of another if, but only if, the superior company owns the majority of the inferior company's equity share capital or controls it in some other way. The concept of control goes beyond share ownership and includes where the superior company:

(a) controls the voting rights in the inferior company;
(b) controls the composition of the board;
(c) has the right or the power to exercise a dominant influence or control over the inferior company by provisions in its constitution or through private contractual arrangements;
(d) actually exercises a dominant influence over the inferior company; or
(e) together with the inferior company are managed on a unified basis.

43 Section 1386.

A holding company is one that has a subsidiary by reference to the above.[44] A wholly owned subsidiary is one where it has no other members other than:

(a) the holding company; or
(b) any of the holding company's other subsidiaries; or
(c) nominees of the holding company; or
(d) a mixture of any two of the aforementioned.[45]

A group of companies means a holding company and one or more of its subsidiaries.[46] The meanings of *subsidiary*, *holding company* and *group of companies* are relevant for several provisions of the Act, including *inter alia* the obligations relating to statutory financial statements and the potential for audit exemptions.

The concept of related companies is different from the idea of group companies. While it includes group relationships, it also extends to other relationships including where:

(a) the companies have no corporate connection but are controlled by mutual members;
(b) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part thereof, is not readily identifiable; or
(c) there is another body corporate to which both companies are related.[47]

The concept of the related company becomes relevant in the context of appointing examiners,[48] pooling and contribution orders in a winding up,[49] or the appointment of inspectors to investigate the affairs of a company.[50]

5. Transition for Private Limited Companies

The Act provides for a transition period of eighteen months, or such longer period as the Minister may allow, for existing private companies limited by shares ('existing companies') to decide whether to convert to the new-form private company limited by shares or to a DAC or to re-register as another type of company.[51]

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44 Section 8(1).
45 Section 8(2).
46 Section 8(3).
47 Section 2(10).
48 See Chapter 17.
49 See Chapter 19.
50 See Chapter 22.
51 Section 15 and s.16(1).

5.1. Conversion

5.1.1. Conversion to New-form Private Company Limited By Shares

If the existing company wants to convert to the new-form private company limited by shares, the members must, by special resolution and subject to any provisions regarding variation of class rights in the existing constitution, adopt and register a new constitution in the form provided by s.19.[52]

In the event that the company does not adopt a new constitution or follows the re-registration procedure for another form of company, directors are under a mandatory obligation to prepare a new constitution in the form provided for by s.19.[53] This duty effectively enables the directors to bypass the members and proceed to convert the company to the new private company limited by shares. In preparing the new constitution, the directors can only include the provisions of the company's existing memorandum and articles other than provisions relating to the company's objects or provisions which provide for, or prohibit, the alteration of the company's memorandum and articles.[54] Furthermore, if the company's articles had adopted Table A, those regulations shall continue to apply unless they are inconsistent with the mandatory provisions of the Act.[55]

Failure by the directors to comply with their duty in this regard may result in a member applying to the court for an order under s.212 of the Act in relation to the oppression of members.[56] If the company has not adopted a new constitution, it will be presumed, unless the contrary is shown, that the directors have exercised their powers in a manner that is oppressive to the applicant member or in disregard of the applicant member's interest.[57]

The changing nature of the company's constitution, particularly in the context of the removal of objects, may be a source of concern for members and creditors. Accordingly, members may, notwithstanding any other rights during the transition period, apply to the court under s.212 if their rights have been prejudiced following the coming into effect of the new constitution under s.19.[58] Holders of at least 15 per cent of the company's debentures, which confer a right to object to the alteration of the objects of the company, may also seek similar relief where the 'new' constitution prejudices their rights.[59] This right is necessary because the company is no longer constrained in business by an objects clause, and this could potentially increase the risk to the debenture holder in relation to existing loans to the company.

52 Section 59(1). Form N1: SI 147 of 2015.
53 Section 60.
54 Section 60(3).
55 Section 60(6).
56 Section 62(1).
57 Section 62(2).
58 Section 62(1).
59 Section 62(3).

5.1.2. Conversion to DAC

If the existing company wants to convert to a DAC, it must, at least three months prior to the expiry of the transition period, pass an ordinary resolution that the company is so registered.[60] An existing company is obliged to re-register as a DAC before the expiry of the transition period if − not later than three months before the expiry of that period − a notice in writing requiring it to re-register is served on it by members holding 25 per cent of the voting rights in the company.[61] If the existing company issues any debt securities during the transition period, which is prohibited for a private company limited by shares, it must re-register as a DAC.[62]

Where a company has not re-registered as a DAC during the transition period, members holding 15 per cent of the voting rights may apply to the court for an order directing the company to re-register. The court may, unless cause is shown to the contrary, make the order sought or such other order as it thinks just.[63] A similar application may also be made by holders of at least 15 per cent of the company's debentures which confer an entitlement to object to alterations of a company's articles of association.

5.2. Status During the Transition Period

Until the company adopts the new constitution or re-registers as another type of company, its existing constitution will continue to apply. In particular, where the existing company had adopted Table A (in whole or in part) as its articles, those regulations will continue to apply to the company except in so far as those regulations are inconsistent with any mandatory provisions of the Act.[64] During the transition period all existing private limited companies will be governed by the provisions of the Act applying to DACs until they formally convert to the new private company limited by shares, which means that they cannot avail of the benefits associated with the new form of company.[65]

5.3. Status at Expiry of Transition Period

In the event that the company has not converted during the transition period, it will at the expiry of that period be deemed to be a new-form private company limited by shares. From the expiry of that period an existing private company shall be deemed to have, in place of its existing memorandum and articles, a constitution that comprises:

60 Section 56(1). Form N2: SI 147 of 2015.
61 Section 56(2).
62 Section 56(3).
63 Section 57.
64 Section 58(5).
65 Section 58.

(a) the provisions of the existing memorandum other than provisions that contain its objects, or provide for, or prohibit, the alteration of all or any of the provisions of the memorandum and articles; and
(b) the provisions of its existing articles.[66]

Where the company had adopted Table A (in whole or in part) as its articles, those regulations will continue to apply unless they are inconsistent with the mandatory provisions of the Act.[67] This constitution will be deemed to have satisfied the provisions of s.19.

66 Section 61.
67 Section 61(5).