

ARTHUR COX

**Preliminary and General:
Part 1 of the Companies Bill**

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Contents of Presentation

- 1. Background to the Companies Bill**
- 2. The design of the Companies Bill**
- 3. Key features of the model private company**
- 4. Key innovations in the Bill**
- 5. Part 1 – preliminary and general**

Background to the Companies Bill

- The publication by the Department of Enterprise Trade and Innovation of the draft Companies Bill is a landmark development in a process conceived by the McDowell Group on Compliance & Enforcement in 1998 and begun by the Company Law Review Group (CLRG) in 2000.
- *"...a programme should be undertaken to incorporate the provisions of the existing Companies Acts and the substantive company law now set out in regulations...into one single comprehensible companies code."* (McDowell Report at para 5.4.1)

Background to the Companies Bill

- The CLRG was established as a statutory advisory group to the Minister for Jobs, Enterprise and Innovation by the Company Law Enforcement Act 2001, having been established on an administrative basis in January 2000.
- CLRG's purpose is to monitor, review and advise the Minister on matters concerning the Companies Acts and in so doing to *"...seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity."*

Background to the Companies Bill

- The CLRG's First Report (to 31 December 2001) made 195 recommendations, all unanimously endorsed by its widely-based membership which included the **social partners** (e.g. ICTU and IBEC etc); **users of company law** (e.g. CCABI, Law Society, Bar Council, Courts Service, Revenue Commissioners, ISE, Institute of Directors, ICSA etc); and **regulators and administrators** (e.g. CRO, AGO, the Department etc). Membership has since been enlarged to include ODCE, ISME, SFA, IAASA, Central Bank etc.
- CLRG's First Report was the blueprint for the draft Companies Bill.

The design of the Companies Bill

- “The private company limited by shares should be the primary focus of simplification” (**para 3.2.3**)
- “the law should be clear and accessible...the legislation should be structured in such a way that the provisions apply to small companies are easily identifiable” (**para 3.2.8**)
- “The private company limited by shares should be established as the model company” (**para 3.6.5**)
- The consolidated Companies Act should be sub-divided into two groups of law: the first group will define the private company and contain all company laws that apply to it and the second group will define the remaining types of company and the provisions that apply to each (**para 3.7.2**)

The design of the Companies Bill

- The Bill contains 25 Parts (1429 sections), and was formally published on 21 December 2012.
- The first 15 Parts, which were originally published on 30 May 2011, set out comprehensively the law applying to the private company limited by shares.
- The remaining 10 Parts deal with the DAC (designated activity company – also private), PLC/SE, Guarantee company, Unlimited Company, Unregistered Company, Investment Company and converting from one type of company to another.
- Enactment likely in 2013, but possibly going into 2014.

Key features of the model private company

- Can have between 1 and 99 shareholders (*Part 2 - s 17*);
- Can have 1 or more directors (*Part 4 - s 129*);
- Must have a company secretary (*Part 4 - s 130*);
- Liability of shareholder(s) is limited to the amount, if any, unpaid on the shares registered in their name (*Part 2 - s 17*);
- Must have a one-document constitution (*Part 2 - s 19*);
- Name must end in "Limited" or "Ltd" (*Part 2 - s 26*);
- Cannot have an objects clause because it has full unlimited capacity (*Part 2 - s 38*);
- Must register persons (other than officers or persons with limited authority) authorised to bind the company (*Part 2 - s 39*);
- Must have a common seal (*Part 2 - s 43*);

Key innovations in the Draft Bill

- Activities that might otherwise prejudice shareholders or creditors are permitted where the company complies with the *Summary Approval Procedure* which requires a special resolution, a statutory declaration of solvency which, in some cases, must be supported by the report of an independent person (*Part 4 – Chapter 7*)
- All offences are categorised as being either Category 1, 2, 3 or 4 offences and the penalties applicable to each type set out in one provision (*Part 14 – s 872*)
- Directors' common law fiduciary duties have been codified and together with all diverse statutory duties assembled as a comprehensive code (*Part 5*)

Part 1 – Preliminary & general

- Part 1 contains 14 sections:
 1. Short title and commencement
 2. Interpretation generally
 3. Periods of time
 4. Repeals and revocations
 5. Savings and transitional provisions
 6. Construction of references in other acts to 1908 & 63 Acts
 7. Definition of subsidiary
 8. Definition of holding company, wholly owned sub and group
 9. Structure of Act

Part 1 – Preliminary & general

10. References in Parts 2 to 14 to mean private companies
11. References to directors, board of directors etc
12. Regulations and orders
13. Authentication of certain official documents
14. Expenses

The highlights of the foregoing are now considered

Sections 1, 2 and 3

- Section 1 says the Act will be known as the Companies Act [20**] and provides that different provisions can be commenced and come into operation on different day as ordered by the Minister.
- Section 2 contains key definitions which apply throughout the Act and differs from Chapter 1 of most parts which contains definitions relevant to that Part only. Note s 2(10) defines related company
- Section 3 provides that when the time for doing something ends on a Saturday, Sunday or public holiday it is extended to the next day that is not such; also where something has to be done within a number of days not exceeding 6, Saturday, Sunday or a public holiday shall not be reckoned in computing that number.

Section 4, 5 and 6

- Section 4 repeals and revokes the enactments specified in Parts 1 and 2 of Schedule 2.
- Section 5 provides that the repeal does not affect companies incorporated under repealed Acts; provides that documents referring to repealed Acts are to be read as to the corresponding provisions of this Act; preserves appointment of officers, registers, accounts etc
- Section 6 provides that references in other enactments to companies formed and registered under the 1908 or 1963 Acts are to be taken to be references to those Acts or this Act as is appropriate

Section 7 – definition of subsidiary

- Section 7 replaces provides for one definition for holding company/subsidiary and parent undertaking/ subsidiary undertaking for legal and accounting purposes.
- The term used is subsidiary company and holding company.
- To be a subsidiary, the holding company must either
 - Be a shareholder or member of it and control the composition of the board of directors, or
 - Hold more than half in nominal value of equity share capital, or
 - Hold more than half in nominal value of shares carrying voting rights except which only arise in specified circumstances; or
 - Is a shareholder or member and controls a majority of the shareholders' or members' voting rights, or

Section 7 – definition of subsidiary

- Has the right to exercise a dominant influence over it by virtue of provisions in the subsidiary's constitution or a control contract; or
 - Has the power to exercise, or actually exercises a dominant influence or control over it; or
 - Are both managed on a unified basis; or
 - The subsidiary is a subsidiary of a subsidiary.
- A subsidiary's board of directors shall be regarded as being controlled if the holding company has the unilateral power to appoint or remove the holders of all or a majority of the directors.

Section 7 – definition of subsidiary

- A holding company is deemed to have power to appoint a director if either a person can't be appointed without the exercise in his favour by the holding company of its power or the person's appointment follows necessarily from being a director of the holding company.
- Guidance is also given to when shareholdings are reckonable or are to be disregarded.
- Control contract is defined as is equity share capital;
- As under current law, "company" is defined to include any body corporate.

Section 8 – holding company, wholly-owned subsidiary and group

- A company is defined as another's holding company if that other is its subsidiary
- A wholly-owned subsidiary is a subsidiary that has no members except the holding company, or companies that are wholly owned subsidiaries of the holding company, or nominees of either or a mixture of the foregoing.
- Group means a holding company and its subsidiaries;
- Company includes a body corporate.

Sections 9 & 10

- Section 9:
 - Provides that all law applicable to private companies limited by shares is contained in Parts 1 to 14 and Schedules 1 – 6.
 - Parts 16 to 25 will apply to other types of companies as will Parts 1 – 14 where applied or adapted to them;
 - Part 15 applies to all types of company.
- Section 10:
 - Provides unless otherwise provided, a reference in Parts 2 to 14 to a company means to a private company limited by shares

Section 11 – references to directors

- References to “the directors” of a company shall be to the sole director where there is only one director.
- References to “board of directors” shall be to the sole director where there is only one director.
- References to members or subscribers shall where the company as a sole member be read as to the sole member or subscriber as may be the case
- Above does not derogate from any special provision as to the construction of the expression director or member and without prejudice to the generality of the Interpretation Act 2005 on plural meaning singular and vice versa

Sections 12, 13 and 14

- Section 12 contains a regulation making power for the Minister for JE&I
- Section 13 provides that the Minister may authorise someone else to give any approval, sanction, direction, licence or revocation of licence.
- Section 14 provides that the Minister's expenses incurred in administering the Act shall be paid out of money provided by the Oireachtas and sanctioned by the Minister for Finance.

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Thank You.

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