

# COMPANIES ACT, 2014

MAY 2015

## PRIVATE COMPANY LIMITED BY SHARES (LTD)

An LTD is a simplified new-form private company limited by shares. It will be by far the most common company type on the Register and a range of new reforms in the Companies Act, 2014 will apply to it.

These will include having a one-document constitution, the ability to have a single director, the power to dispense with an AGM and to have the contractual capacity of a natural person.

## DESIGNATED ACTIVITY COMPANY (DAC)

A DAC (Designated Activity Company) will be similar in format to the existing Private Limited by Shares Company. Its activities will be limited by its objects clause, it will have a constitution that comprises of both a Memorandum and Articles of Association and it must have two Directors.

Its name must end in "Designated Activity Company" or "Cuideachta Ghníomhaíochta Ainmnithe" unless it qualifies for an exemption.

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## EXEMPTION FROM USE OF COMPANY TYPE IN COMPANY NAME

Under the new Act, the phrase "Designated Activity Company" or "Company Limited by Guarantee" may be dropped from the company's name where the company is a Designated Activity Company or a Company Limited by Guarantee and the constitution of the company states that the objects will be the promotion of commerce, art, science, education, religion or charity. In addition, the company's constitution must state that:

(a) the profits of the company (if any) or other income are required to be applied to the promotion of the objects;

(b) payment of dividends/distributions to its members is prohibited;

(c) all assets which would otherwise be available to its members are required to be transferred on its winding up to another company whose objects are the promotion of commerce, art, science, religion or charity.

Such companies file a form G5 together with the application to incorporate. Companies which are converting to DAC status must submit the form G5 together with their application to convert to the new company type. It should be noted, however, that a company which is exempted from the obligation to use the words as part of its name, is still obliged to show on its letters and order forms the fact that it is such a company.



## PRIVATE COMPANY LIMITED BY SHARES (LTD) OR DESIGNATED ACTIVITY COMPANY (DAC)?

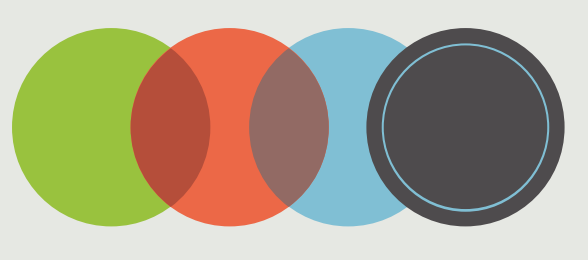
Following a lengthy review and consultation process, the Companies Act 2014 was signed into law on 23 December 2014. The Act consolidates the existing 33 company law enactments, Companies Acts 1963 to 2013, into a single statute, and it will be commenced on 1 June 2015.

The Act does not change the fundamental nature of any Irish company, which remains a body corporate with separate legal personality, and with a board of directors to which primary responsibility for management of the company is delegated. The principal changes under the Act relate to the private company limited by shares which is the most common type of company in Ireland.

Going forward, there will be two types of private company, which will replace the existing single form. These will be: (i) a private company limited by shares ("LTD"); and (ii) a designated activity company ("DAC").

Upon commencement on June 1st 2015, there will be an 18 Month 'Transition Period' during which existing private companies limited by shares will have to decide on which form they wish to take i.e. either LTD or DAC.

The decision on whether to register as a LTD or a DAC will depend on whether the company law provisions and procedures that apply to only the new LTD company type will be suitable in any particular case.



3 Church Street, Dungarvan, Co. Waterford  
 Phone: +353(0)58 45878  
 Fax: +353(0)58 48435  
 E-mail: info@jbw.ie  
 Web: www.jbw.ie  
 Skype: john-b-white





## DIRECTOR RESPONSIBILITIES

In the past determining the duties and responsibilities of the directors has not been clear, now the codification of directors duties in the Act gives clarity for directors. These are set out in eight fiduciary duties which will apply to directors, shadow directors and de facto directors as follows:



- act in good faith
- act honestly and responsibly
- act in accordance with the company's constitution and to exercise those powers only for lawful purposes
- not to use company property unless approved by the members or the company constitution
- not to fetter discretion unless permitted by the constitution or unless it's in the company's interest
- to avoid conflicts of interest
- to exercise care, skill and diligence and
- to have regard for the interests of members as well as employees

*A breach of Statutory Directors duties can result in the director having to personally indemnify the company for loss or damage resulting from the breach and to compensate for direct or indirect gains made by the director.*

## OFFENCES

There will be four categories of offences under the Companies Act 2014 depending on the type of offence and some offences will carry significantly higher sanction than is the case at the moment. The highest category carries a penalty of imprisonment of up to 10 years in jail and/or a €500,000 fine.

Category 1 and 2 offences have to be reported by auditors to the Director of Corporate Enforcement (previously all indictable offences). Intentional misstatements in financial accounts will be a category 2 offence.

There are a number of methods for conversion to an LTD company. This applies to private limited companies which were incorporated prior to the new Companies Act, which are limited by shares. There are three different sections of the Act whereby a company can be converted to a LTD company, Private Company Limited by Shares.

**Section 59 new Companies Act**  
Shareholders Special Resolution - Under Section 59 of the new Companies Act, during the transition period,

a company can submit a special resolution (75% of Ordinary Shareholders) together with its new [model constitution](#) together with **Form N1**. The registrar of companies will upon registration of the documents issue a new certificate of incorporation.

**Section 60 new Companies Act**  
Directors' Resolution - Under Section 60 of the new Companies Act, during the transition period, a company's directors can submit **Form N1** together with its new [model constitution](#) as drafted by the

directors. The directors should have prior to this sent a copy of the constitution to each member of the company. The registrar of companies will upon registration of the documents issue a new certificate of incorporation.

In fulfilling these duties, the directors must ensure that the constitution does not alter the rights and obligations of the company and must ensure that the constitution does not alter the rights and obligations of members of the company as set out in its memorandum and articles of association. This option will severely limit what can be altered in the new constitution and may result in overlap and/or conflict with the provisions in the Act.

**Section 61 new Companies Act**  
If the private company has failed to convert by **30th November 2016**, the Registrar of Companies will apply the deeming provisions and the company becomes an LTD company. The Registrar will then issue a new certificate of incorporation to the company.

**LTD CONVERSION PROCESS**  
*The default option is not recommended as the existing Memorandum & Articles of Association will become practicably unintelligible as a stand-alone document and may result in conflict with shareholders, banks and Enterprise Ireland.*

## COMPANIES LIMITED BY GUARANTEE (CLG)

CLG IS LIKELY TO REMAIN A POPULAR TYPE FOR CHARITIES, SPORTS AND MANAGEMENT COMPANIES

Companies Limited by Guarantee will automatically convert over and they have the choice of amending their name to have the appropriate suffix or wait until the transition period has elapsed, and a new certificate of incorporation will then be issued with the new suffix. These companies will have to update their headed paper and company seal.



A CLG must have at least two directors and must hold an AGM unless it is a single member company in which case this requirement may be dispensed with. The name of a CLG must end with the words "company limited by guarantee" or "CLG" (or the Irish equivalent) although, as is currently the case, an exemption from using such a suffix may be available.

The CLG is likely to remain a popular type of company for charities, sports and social clubs and property management companies. The members' liability is limited to such amount as they undertake in the constitution of the company to contribute to the assets of the CLG in the event of its winding up. A CLG has a two document constitution, consisting of a memorandum and articles of association.

The Directors' Report in the financial statements must include a statement that each director is aware of no relevant audit information of which the company's statutory auditor is unaware and has taken the necessary steps to establish that the auditor is aware of all relevant audit information.

### RESIDENTIAL ADDRESS

There will be a procedure to exempt Directors from filing their residential address in the CRO if there are security concerns.

## DAC CONVERSION

A Designated Activity Company (DAC) is determined in Part 16 of the Companies Act 2014 and defined as a private company limited by shares with the capacity, including the power, to do only those acts or things set out in its constitution (memorandum of association). So, a DAC company will have certain regulations in its constitution, detailing certain objects or articles of association which are not specified in the template LTD company constitution.

Certain companies are obliged to convert to a DAC - an existing private limited company that has published an offering document or obtained an admission to trading on a regulated market for its debentures.

Conversion to this company type will require a change in name of the company as all Designated Activity Companies must include their company type at the end of their name. The process of conversion involves the Shareholders passing an Ordinary Resolution (simple majority) within 15 months of the commencement date and this is filed with the new form constitution and a Form N2.

However, the new constitution must remain unchanged (save for the alterations prescribed by law) unless changes to it have also been passed by the shareholders by way of a Special Resolution. Upon registration of the documents the CRO will issue a new Certificate of Incorporation.

## AUDIT EXEMPTION

The audit exemption, currently available LTD / DAC companies, is being extended to the CLG under the Act (although any one member can object and can force the company to carry out an audit).

The audit exemption will also be available in certain group situations and to dormant companies. An LTD and a DAC may avail of the audit exemption where two of the three prescribed conditions are met (whereas, under old law, all three conditions needed to be satisfied).

