

Investment
Funds,
Companies and
Miscellaneous
Provisions Act,
2006

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INVESTMENT FUNDS, COMPANIES AND MISCELLANEOUS PROVISIONS ACT, 2006

Company Law Update

The Investment Funds, Companies and Miscellaneous Provisions Acts 2006 (the “2006 Act”) became law on 24 December 2006.

The Irish company law statutes are now collectively referred to as the Companies Acts 1963 to 2006.

Increased membership numbers for private companies

Private companies will now be entitled to have up to 99 members. The limit, which was previously set at 50 members, was increased to reflect EU law.

In its first Report the Company Law Review Group recommended the maximum number of members be increased to 150, but this figure had to be decreased in light of the Prospectus Directive which required that a company issue a prospectus where shares were offered to 100 or more persons.

In addition to being reflective of EU-led changes to Irish company law, the increase to 99 members is sensible as now a private company may be able to delay converting to a PLC (which have no limit on the number of their members) to raise share capital from new members.

Permitted offers by private companies

On the adoption of the Prospectus Directive into Irish law (by the Investment Funds Companies and Miscellaneous Provisions Act, 2005 and the Prospectus Regulations) there was a concern that the new legislation had unwittingly broadened the definition of a ‘public offer’ to such an extent that any communication or private placement of securities by a private company could be considered a ‘public offer’.

This was a problem because section 33 of the Companies Act, 1963 provides that a private company is one which "prohibits any invitation to the public to subscribe for any shares or debentures of the company".

This has been satisfactorily addressed by the 2006 Act which clarifies that a private company can make an offer of:-

- ▣ shares to qualified investors, to fewer than 99 persons, or both;
- ▣ debentures solely to 'qualified investors' (such as credit institutions, investment firms, insurance companies and collective investment schemes);
- ▣ debentures to fewer than 100 persons;
- ▣ debentures to investors where the minimum consideration payable is at least €50,000 per investor, or the denomination per unit is at least €50,000; and
- ▣ debentures where the total consideration for the offer is limited to less than €100,000.

The changes take effect retrospectively, from 1st July 2005 (the date of the Act of 2005 and the Prospectus Regulations).

Audit exemption

The 2006 Act has made some improvements in relation to the audit exemption for small companies.

The exemption, which removes the need for a company to engage an independent external auditor has been allowed under EU law since 1978, but wasn't introduced into Ireland until 1999 when it was available for companies with a turnover of less than £250,000 (€317,000). The turnover threshold increased to €1.5m in 2003 but Ireland still lagged behind its competitors, most notably the United Kingdom, which at about that time increased its threshold to the maximum permitted under EU law.

The 2006 Act increases the threshold amounts to the maximum amounts available under EU law, being €7,300,000 of turnover and a balance sheet total of €3,650,000.

The revised criteria apply in respect of:-

- financial years commencing on or after 24 December 2006; and
- financial years which commenced prior to 24 December 2006 and ending not earlier than 24 February 2007.

This change will satisfy auditing and accounting bodies, which for many years called for the maximum threshold to be applied on the basis that the lower thresholds put Ireland at a competitive disadvantage to other jurisdictions.

Dematerialisation

The 2006 Act paves the way for regulations introducing mandatory dematerialisation of the securities of Irish listed and unlisted PLCs. Dematerialisation is an electronic system to replace paper share certificates and stock transfer forms with a shareholder statement and Shareholder Reference Number.

This will bring Ireland into line with many other countries such as Australia, Denmark, France, Sweden, Italy and India and should reduce the costs associated with administering cumbersome paper-based transactions and increase the speed of transactions.

Reduced prospectus liability for guarantors

Before the 2006 Act, when a financial guarantor gave a guarantee in relation to an offer of non-equity securities, such as a bond issue, the guarantor had liability for the contents of the entire prospectus. Now the guarantor will only have liability for statements included in, or information omitted from the prospectus that will relate to the guarantor or the guarantee.

This will address concerns of the securitisation industry as some monoline insurers were refusing to 'wrap' structured finance transactions for PLCs listed in, or securities issued out of Ireland.

Expert reports in prospectuses

The 2006 Act has limited the circumstances under Irish law where it is necessary to get the consent of an expert to include the expert's report in a prospectus.

In most transactions it will no longer be essential to get the consent of an auditor to include historical financial information in a prospectus, where the information was not specifically prepared for the prospectus.

Transparency Directive

Part 3 of the 2006 Act sets out provisions designed to facilitate the transposition of the EU Transparency Directive (2004/109/EC) into Irish law. The Transparency Directive applies to PLCs with securities listed admitted to trading on a regulated market (in Ireland, the Irish Stock Exchange).

The DETE states the aim of the Directive as being to upgrade the information available to investors, thus helping them to allocate their funds on the basis of a more informed assessment. It seeks to ensure that investors receive interim management statements from those share issuers who do not publish quarterly reports, and half yearly financial reports from issuers of new bonds. In addition, all securities issuers will have to provide annual financial reports within four months after the end of the financial year. The Directive is also expected to improve dissemination of information on issuers.

At the time of writing draft Regulations were being settled by the Parliamentary Counsel.

Takeover Directive

Finally there are some provisions in the Act to address matters arising out of the adoption of the Takeovers Directive such as extending the rule making powers of the Irish Takeover Panel, to facilitate its responsibilities under the Directive.

Summary

The 2006 Act introduces some sensible changes into Irish company law and provisions which should increase our competitiveness as a jurisdiction to both incorporate and issue securities.

The much talked about Combined Companies Act is still some way off. The CLRG expects to seek a decision from the Government at Easter to submit the scheme of the Bill to Parliamentary Counsel for drafting. Drafting the Bill itself could take between 12 and 18 months, meaning the Bill could be submitted to the Oireachtas in mid-to-late 2008.

Until then, its expected that any necessary amendments to Irish company law will be made on a yearly basis.

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