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INTERNATIONAL LAWYERS NETWORK



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ESTABLISHING A BUSINESS ENTITY IN IRELAND**

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I. Introduction

Irish Law recognises various forms of business organisation, the majority of which are companies, partnerships and sole traders. Each form of business organisation carries with it its own distinct advantages and disadvantages.

Companies

A company is a body formed and registered under the **Companies Act 2014** which has legal personality separate and distinct from its members. We have focused on this form of entity in this paper.

Sole Traders

A sole trader may be defined simply as an individual who sets him or herself up in business. Sole traders do not enjoy separate legal personality and are therefore liable for any losses accruing to their business. Persons engaged in business as sole traders may protect themselves to some extent from certain categories of loss which the business might incur through the purchase of insurance.

Partnerships

The **Partnership Act 1890** defines a partnership as a “relation which subsists between persons carrying on a business in common with a view to profit.” A “business” is defined in the **Partnership Act** of the Act to include “every trade, occupation or profession.” A partnership is the coming together of two or more persons and in return for the benefits received, such as extra capital and expertise from the others engaged jointly in the venture. Partnerships in contrast are not legal entities: there may be a name attached to the firm but the partnership consists solely of the individual partners and the firm has no independent legal existence.

The partners share the profits of their venture, the assets and liabilities are those of the partners. It is possible to register a limited

partnership in which some partners have limited liability under the **Limited Partnerships Act 1907** but limited partners may not take place in the management of the business. Whereas the affairs of a company are managed by its directors and not by the members by contrast, each partner is entitled to participate in all the partnership activities.

II. Types of Companies

There are a number of different types of company structures provided for under the Companies Act. Companies can be broadly classified as either private or public companies with limited or unlimited liability. All Irish Companies are governed by the recently enacted Companies Act, 2014.

Companies Act 2014

The newly commenced Companies Act 2014, the “**Act**,” condenses the previous 17 companies acts and related company law provisions into a single comprehensive code of company legislation. The design of the new Act focuses on simplification and modernisation of company law. It has created new forms of company and has introduced a number of changes to the roles of various persons in the corporate structure.

A significant portion of the legislation is dedicated entirely to the company limited by shares, “**LTD**” or “**CLS**.” It is intended that the **LTD** will become the company model of choice for the vast majority of private companies in Ireland. The remainder of the legislation sets out the law applying to other company types, namely public limited companies, guarantee companies, unlimited companies, investment companies and designated activity companies (or DACs).

1. Private Company Limited by Shares (LTD)

The LTD is a private company limited by shares formed for a lawful purpose where the liability of the shareholder/member is

limited to the amount, if any, unpaid on the shares registered in their name at that time.

Key features

- No requirement for the LTD to have an authorised share capital.
- A LTD will be able to dispense with holding a physical AGM, irrespective of the number of shareholders.
- Can have between 1 and 149 shareholders;
- Can have 1 or more directors;
- Must have a company secretary;
- Must have a one-document constitution;
- Name must end in “Limited” or “Ltd”;
- Cannot have an objects clause because it has full unlimited capacity
- The board (including a sole director), and any person registered with the CRO as having authority, will be deemed to have authority to bind the company.

2. The Designated Activity Company (DAC)

A DAC has the status of a private company and can be formed for any lawful purpose by any person or persons subscribing to a constitution and complying with relevant sections of the Companies Act.

The format of a DAC can be either:

- a) a private company limited by shares, or
- b) a private company limited by guarantee and having a share capital.

Key features

- Constitution is in the form of a memorandum and articles of association and contains an objects clause detailing its permitted activities;
- Can list any debt securities for offer to the public, unlike the LTD;

- Company name must end with "designated activity company" or DAC;
- Can have between 1 and 149 shareholders;
- Must have at least two directors and where there is more than one member it cannot dispense with AGM's.

3. The Public Limited Company (PLC)

Key features

A public limited company (PLC) is a company limited by shares and having a share capital which is not less than the authorised minimum of €25,000. A PLC's constitution is in the form of a memorandum and articles of association and contains an objects clause. It has the capacity to offer, allot and issue securities to the public.

- The format of a Public Limited Company (PLC) can be either:
 - a) an investment company with its sole objects of collective investment of funds, or
 - b) a public company other than an investment company;
- The main feature of a PLC is that it can establish with a minimum of one member and no maximum limit. It must have a minimum of two directors and the directors have a duty to ensure that the person appointed as company secretary has the skill necessary to carry out his/her statutory duty. A PLC is required to hold an AGM and have its financial statements audited and a traded company is required to include a “corporate governance statement” in its director's report;
- A Societas Europea (SE) is the European equivalent of a PLC and similar rules also apply;

- PLCs are the chosen form of corporate structure where companies wish to list their shares on a stock exchange and offer them to the public, this being their key distinguishing feature;
- Can be incorporated with just one member;
- Must have an objects clause (although the Act seeks to oust the operation of the doctrine of ultra vires by providing that the validity of an act done by a PLC shall not be questioned on the ground of lack of capacity);
- Must have a minimum issued share capital of €25,000 and obtain a trading certificate which confirms this;
- Must have at least two directors;
- Unless constitution provides otherwise:
 - the directors shall retire by rotation;
 - directors' remuneration (if any) must be determined by the members in general meeting;
- Supplementary rules for meetings (notice, proxies, equality etc.);

4. Private Unlimited Company (ULC)

A ULC is a private unlimited company with a share capital formed for any lawful purpose by the subscribers to the constitution and complying with relevant sections of the Companies Act. Unlimited companies are not generally used as trading companies as the liability of the members is not limited and in a winding up situation the members are obliged to pay all the debts of the company.

Some of the features of a ULC are that it may be formed with just one member, it must have a minimum of two directors, it must hold AGMs, and it is not required to attach financial statements to its annual return.

5. Guarantee Companies

A Company Limited by Guarantee or "CLG" is a company which does not have a share capital and where the member's liability is limited by its constitution to such amount the members undertake to contribute to the assets of the company in the event of it being wound up. A CLG is required to have a minimum of 2 directors, it is required to hold AGM's and a CLG that is not a credit institution or an insurance undertaking may avail of audit exemption if they satisfy the conditions specified.

Key features

- Cannot have a share capital;
- Can have just one member, and no maximum number of members;
- Can have an objects clause (although the Act seeks to oust the operation of the doctrine of ultra vires by providing that the validity of an act done by a DAC shall not be questioned on the ground of lack of capacity);
- Its name must end with "company limited by guarantee" (or "CLG", "C.L.G", "clg" or "c.l.g.") or the Irish equivalent, save where application made to dispense with this requirement;
- Is not prevented from having its debentures admitted to trading or listed;
- Must have at least two directors;
- Unless constitution provides otherwise:
 - directors shall retire by rotation;
 - directors' remuneration (if any) must be determined by the members in general meeting;
- CLG may not dispense with holding an AGM where it has more than one member;

- Key feature is that it does not have a share capital i.e. it has members, not shareholders;
- Likely to be the legal form of choice for the many charities, sports and social clubs and management companies which are currently incorporated as public companies limited by guarantee without a share capital.

6. External Companies

An external company means an EEA company or a non-EEA company that establishes a branch in Ireland. An external company wishing to establish a branch in Ireland is obliged to deliver to the Registrar of Companies within 30 days of establishment a certified copy of its constitutive documents

- The only external companies required to register and file in the CRO are those whose members have limited liability, and which establish a branch in Ireland;
- Accordingly, unlimited companies and companies whose presence is less than that of a “branch” do not register;
- A presence that constitutes a “place of business” but not a branch does not give rise to a requirement to register.

III. Steps and Timing to Establish

The process of incorporation and registration of a company commences with the delivery of a constitution together with a statement of consent and declaration in accordance with the Companies Act to the Registrar of Companies. On the registration of the constitution, the Registrar will certify in writing that the company is incorporated and issue a certificate of incorporation. The certificate of incorporation is conclusive evidence that the Company is registered under the Companies Act.

The Registrar will not register a constitution unless he or she is satisfied that all the

requirements in relation to the form of the constitution under the Companies Act have been complied with.

The constitution of the company must state:

1. the company’s name;
2. the type of company to be registered (i.e. LTD, DAC, PLC, etc.);
3. the objects (if required) depending on company type;
4. the liability of members;
5. the share capital of the company divided into numbers and value of each share;
6. details of where the company proposes to conduct its business and the company’s Registered Office i.e. the place where the central administration of the company will normally be carried on;
7. confirmation that the company will have at least one director who is resident in the European Economic Area (EEA)
8. where the company has no director resident in the EEA it is required to deliver for registration a bond to the value of €25,000(at an annual cost of approx. €1,000). The purpose of the bond is to provide for certain fines or penalties that might be imposed as a result of the company’s non-compliance with company and/or tax law;
9. a completed Form A1, which is available from the Registrar of Companies (this provides details of the company name, its registered office, details of secretary and directors, their consent to acting as such, the subscribers and details of their shares. It incorporates a declaration that the requirements of the Companies Act have been complied with, and as to the activity which the company is being formed to engage in)

IV. Governance, Reputation and Ongoing Maintenance

Registered Office

A registered office address in Ireland is required. The Registered Office is the official address for the limited company, where legal documents and letters from Revenue, The Companies Registration Office etc. may be served. All "official" correspondence is sent to the registered office.

Company Officers

1. Directors

Companies must have one secretary and a minimum of two directors. The LTD can have one director if it chooses. It must have a separate secretary though.

One of the directors is required to be resident in a member state of the European Economic Area (EEA). There is an exemption from the requirement to have an EEA-resident director. The requirement to have at least one resident director from a member State does not apply to any company which for the time being holds a bond, in the prescribed form, in force to the value of €25,000.

A person must have reached the age of 18 years to be eligible for appointment as a director. Any change among directors is required to be notified to the Registrar within 14 days.

2. Company Secretary

The company secretary is the person or company appointed in accordance with the company's constitution. Every company is required by law to have a company secretary. The function and duties are a mix of legislative provisions and those duties delegated to the company secretary by the board of directors. They are essentially administrative and are limited to ensuring that the company's filing obligations under company law are complied with. It is the responsibility of the company directors to ensure that the person appointed as secretary has the skills necessary to

carry out the statutory and legal duties of the company secretary.

General Meetings

Duty to Hold General Meetings of the Company

A company is required to hold an annual general meeting (AGM) every calendar year. Certain companies (such as a "single member company" and a LTD) may dispose with the holding of an AGM in the case of a LTD where all the members entitled to attend and vote at the meeting sign a written resolution to that effect before the latest date for holding the meeting. The AGM will normally be held in the State, unless all of the members entitled to attend and vote consent in writing to its being held outside the State. Not less than 21 days' notice is required for the calling of an AGM.

The directors of a company may convene an EGM or "extraordinary general meeting" whenever they consider it appropriate. A member or members holding 50% or more of the paid up share capital of the company may also convene an EGM (this number may be varied in the company's constitution). Members holding 10% or more of the paid up share capital of the company may request the directors to convene an EGM. Normally, EGM's are convened to deal with special business of the company. Not less than 7 days' notice is required for the calling of an EGM.

Members and Shareholders

Rights and Powers of Members and Shareholders

The Companies Act and the constitution of a company normally set out the powers of members and those powers which are delegated by the members to the directors of the company. The Companies Act provides that the business of the company is managed by its directors, who may exercise all such powers of the company that are not required by the Companies Act or by the

constitution to be exercised by the company members in a general meeting.

Members' Powers where the Company is in Default

Where a company or any of its officers is in default in complying with any provision of the Companies Act, a member can serve a notice on the company or officers requiring the company or officers to remedy the default within 14 days. If the company or officer fails to remedy the default, a member can apply to the High Court, for an order directing the company or officer to make good the default.

Members' Right to Seek an Investigation of a Company

On the application of certain persons, the court may appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into the matters specified. The application to the court can be by any of the following persons:

1. the company;
2. not less than 10 members of the company;
3. a member or members holding one-tenth or more of the paid up share capital of the company;
4. a director of the company; or
5. a creditor of the company.

Any person intending to make an application to the Court should give the Director of Corporate Enforcement not less than 14 days' notice in writing of his or her intention. The Director has an entitlement to appear and be heard on the hearing of the application. Where the Court appoints an Inspector, it will specify the precise matters into which inquiries should be made. The Court may require the applicant or the applicants to give security for payment of the costs of the investigation. Inspectors appointed under this

section take their directions from, and report to, the Court.

Right to Petition for the Winding-up of a Company

A member of a company has the right to petition the Court for the winding-up of a company on a number of grounds (subject to certain exceptions). A member will usually exercise this right where, for example:

- there is a deadlock in the management of the company;
- where the objectives of the company can no longer be achieved;
- where the company has illegal objects;
- where the company is being used as an instrument of fraud;
- where the company has a small number of members who no longer wish to conduct business with each other.

Right to Petition for Relief in Cases of Oppression

An application can be made to Court by any member of a company who considers the affairs of the company are being conducted or the powers of the directors are being exercised:

- a) in a manner oppressive to him or her or any of the members, or
- b) in disregard of his or her or their interests as members,

Oppressive conduct has been defined as the exercise of the company's authority in a manner which is burdensome, harsh and wrong. The types of conduct which might give rise to such an application include fraudulent and unlawful transactions, oppressive management and exclusion of the member from the management of the company.

The order which a court can so make may include an order:

- directing or prohibiting any act or cancelling or varying any transaction;
- for regulating the conduct of the company's affairs in future;
- for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; and
- for the payment of compensation.

V. Advantages of Establishing in Ireland

There are many advantages to locating a business in Ireland, not least the evolving tax system which is a key aspect of the Irish Government's support for industry.

A key feature of incorporation is that the company becomes a separate legal entity, distinct from its members, recognised in law as having a separate identity and enjoying certain rights. Registered companies may also benefit from limited liability such that the assets, debts and obligations of company and not to its members.

The following are the consequences of incorporation and main advantages of registered companies as business organisations:

- i. Separate legal personality
- ii. Limited liability
- iii. Transferability of interests
- iv. Perpetual succession
- v. Common seal
- vi. Floating charges
- vii. Formation of large associations
- viii. Taxation - The standard corporate rate of tax is currently 12.5% whereas the top personal rate of tax is 41%.

Ireland has a corporation tax rate of 12.5% on profits earned in the course of an active business. This together with its capital gains participation exemption, generous foreign tax credit system, membership of the EU, ever expanding double tax treaty network, lack of CFC & thin capitalisation rules makes Ireland an attractive destination for the registration of a Company.