

Introduction

The act which came into law on 12th July 2009 effects changes to the Companies Acts 1963, 1990 and 1999, the Company Law Enforcement Act 2001 and the Companies (Auditing and Accounting) Act 2003.

Section 1

This contains the definitions used in the Act, none of which are of significance.

Section 2

Section 194 of the 1963 Act requires directors to declare their interests in contracts and for all declarations to be kept in a statutory Book for such purpose. At present, the Book is only open for inspection by directors, members and others from within the company. Section 2 introduces a right for the Director of Corporate Enforcement to require inspection of the Book and to be given facilities for inspecting and taking copies thereof.

Note the minor reference to the amendment of Section 194 by the 2003 Act which was simply to state that Section 194 does not apply to any director of the Supervisory Authority (of auditors) established by the 2003 Act.

Section 3

This Section is consequential on the amendment to be made under Section 4 and is essentially only a cross reference change.

Section 4

Section 19 of the 1990 Act introduced a wide range of powers which were conferred on the Minister for Enterprise, Trade and Employment to require companies under investigation to produce books and documents. Upon the establishment of the Director of Corporate Enforcement under the 2001 Act, a new Section 19 was enacted under which the Minister's powers were transferred to the Director of Corporate Enforcement, who may require the production of books and documents. There seems to have been some uncertainty concerning the Director's powers to require the production of documents held by third parties which relate to a company under investigation. The new Section 19(3)(c) provides for an explicit right to require production. The remaining provisions in the new Section 19(3) are simply restatements of the existing law.

Section 4 also introduces a new Section 19(3A) which prescribes the method whereby the Director may issue a direction.

Section 4(2) makes it clear that directions made under the existing Section 19(3) are not prejudiced by the above clarification.

Section 5

Section 20 of the Companies Act 1990 introduced a power for the District Court to issue a warrant to the Garda Siochana and others named to enter and search for a company's books and records. Section 20 was repealed by Section 30 of the 2001 Act and a new Section 20 was substituted therefor. Section 5 of the Act makes further changes to Section 20 including the following:-

- The duration of the search powers is no longer restricted to a one month period and is to be determined in accordance with the period referred to in the District Court warrant and any extensions to the warrant.
- The new Section 20(2A) enables an officer to remove, to a place off-site, paper and electronic information from searched premises for subsequent examination in order to determine whether or not the material contains relevant material. In other words the investigating officer does not need to make the assessment on site.
- The new Section 20(2B) addresses the situation where the officer knows that relevant information is incorporated in a document which is attached to something which he is not entitled to seize. Where separation is not possible the officer's powers of seizure now extend to the non seizable information. Specific criteria are set out in order to determine whether separation is reasonably practicable. Safeguards are set out in Section 20(2D) for storage, access, preservation of confidentiality etc in relation to all seized information.
- The new Section 20(2E) deals with changes in the status of seized information following seizure.
- The new Section 20(2F) imposes obligations to carry out a determination, separation etc as soon as possible and to return non seized information to the person entitled to it.
- Provision is made for the District Court to extend the duration of a search warrant on the application of an officer.

Many of the above changes have been made in response to issues raised in the context of the investigation of Anglo Irish Bank.

Section 6

When powers were introduced in Part II of the 1990 Act to enable the Court to appoint an inspector to carry out an investigation of a company, Section 23 of the 1990 Act introduced safeguards to make it clear that the provisions of Part II could not compel the disclosure of legally privileged information and information relating to

customers and others of a bank. Section 23 was amended by Section 32 of the 2001 Act. The amendments were insignificant.

Section 6 substitutes a new Section 23(1) which contains a much wider range of powers to seize information (whether legally privileged or not) pending determination by the Court on the issue of legal privilege. However, within 7 days after taking possession of the privileged documentation an application must be made to Court by the officer for a determination as to whether or not the information is legally privileged or not. The Court is empowered to appoint an independent person to determine whether information is legally privileged or not. Court applications may be heard in camera.

Section 7

Section 7 substitutes a new Section 40 of the 1990 Act. Section 40 criminalises a breach of Section 31 (prohibition on the making of loans by companies to their directors). Under the existing Section 40 the prosecution must effectively prove wilful default on the part of the director, officer etc. The new Section provides that if a company enters into a transaction in contravention of Section 31 "every officer of the company who is in default" shall be guilty of an offence. This removes the previous requirement for the prosecution to establish that a director knew or had reasonable cause to believe that the company was contravening Section 31. The Explanatory Memorandum states that this is intended to bring the offence into line with other similar statutory offences committed by officers of a company.

Section 8

In broad terms Section 8 places banks on a similar footing to other companies in terms of the requirements to include directors' loans etc in the accounts of the bank. It is reasonable to assume that Section 8 is in response to concerns relating to Anglo Irish Bank's loans to its former Chairman.

Section 8 amends Section 41 of the 1990 Act. Section 41 requires a company's accounts to disclose substantial contracts and other transactions with directors, connected persons etc. It is not confined to loans under S.31 CA1990. Section 41(6) of the 1990 Act exempted banks from much of the disclosure obligations. Section 8 introduces a more limited exemption for banks under Section 41(6). It appears that all loans by a bank to its directors must be disclosed together with the maximum amount outstanding.

The new Section 41(10) makes it clear that nothing in Sections 42 to 45 of the 1990 Act prejudice the ability of banking supervisory authorities to require additional disclosure of such matters to be included in the accounts of banks.

The new Sections 41(11) and (12) create a statutory offence for directors in default and a defence where the director took all reasonable steps for securing compliance with the Section.

Under Section 43(5) of the 1990 Act it is only necessary for the accounts of licensed banks to disclose the aggregate amounts of the value of transactions with directors and connected persons. Section 8(2) of the Bill introduces a new Section 43(5) which requires that all loans to each individual director are to be disclosed separately in the annual accounts.

Section 9

This Section makes changes to Section 44 of the 1990 Act. Section 44 of the 1990 requires a bank to maintain a Register of transactions with directors and connected persons. Under Section 44(3) prior to the holding of the AGM a bank is required to prepare a statement based on the information contained in its Register and for this to be made available prior to and at the AGM. This statement is no longer required if the relevant information is disclosed in the accounts either by law, on a voluntary basis or as a result of separate requirements of the Financial Regulator.

Section 10

Sections 43 and 44 of the Companies (Amendment) (No. 2) Act 1999 were enacted due to the Government's concerns with the wide spread use during the late 1990s of non resident Irish companies in unregulated and possibly legally suspect activities overseas. In an effort to preserve Ireland's good standing Section 43 introduced the requirement that an Irish company must have at least one Irish resident director or a performance bond. In an effort to attract genuine non resident companies an exemption was also introduced to exclude a company from these requirements where the company has a "real and continuous link with one or more economic activities that are being carried on in the State".

Section 10 of the Act introduces amendments to Sections 43 and 44 of the 1999 Act as follows:-

- The requirement that at least one director of an Irish company must be resident in the State is has been relaxed so as to include residence in a Member State of the EEA (the European Economic Area). This change was introduced to meet the concerns of the European Commission as it regarded the requirement for an Irish resident director as being incompatible with the EC Treaty. Given the recent enlargement of the EU and the fact that this requirement extends to countries within the EEA it is likely that increased interest in the use of Irish companies for overseas activities will arise.

- Section 43(12) of the 1999 Act has been repealed. This Section provides that any provision of the company's Articles of Association shall be void in so far as it has the effect of prohibiting a person who is resident in the State from being a director of the company.
- Under Section 44 of the 1999 Act the Registrar of Companies may grant to a company a Certificate stating that it has "*a real and continuous link with one or more economic activities that are being carried on in the State*". Proof of such a link is deemed to exist where the Revenue Commissioners issue a statement in writing that they have reasonable ground to believe that the company has such a link. The Revenue Guidance on this subject states that the ordinary meaning of the words "*economic activity being carried on in the State*" comprehends some active participation in income generation and that test would not be satisfied by, for example, opening a deposit account. Neither would the Revenue Commissioners regard a dormant Irish registered company holding but not exploiting assets as carrying on an economic activity in the State. In relation to holding companies, provided the company's subsidiaries are carrying on an economic activity in the State and there is evidence of a real and continuous link the holding company should be able to receive a Revenue statement. The Revenue state that holding companies without such a link to an economic activity would not be in a position to qualify for a statement even if the company were liable to Irish tax on foreign source income. Equally the Revenue look at each subsidiary of a holding company on its own merits and the fact that one of the subsidiaries of a holding company is carrying on an economic activity would not suffice as a link to an economic activity on the part of its economically inactive fellow subsidiary. This latter construction has been affected by the Act.
- Section 10(2)(b) of the Act introduced a statutory definition of the term "*a real and continuous link with an economic activity that is being carried on in the State*". The requirement will be satisfied where:
 - a) The affairs of the company are managed by one or more persons from a place of business established in the State and that person or those persons is or are authorised by the company to act on its behalf.
 - b) The company carries on a trade in the State.
 - c) The company is a subsidiary or a holding company of a company or another body corporate that satisfies either or both of the conditions in paragraphs (a) and (b).
 - d) The company is a subsidiary of a company, another subsidiary of which satisfies either or both of the conditions in paragraphs (a) and (b).

It would appear that the statutory definition goes beyond the existing Revenue interpretation.

Section 11

The Act is to be read as one with the Companies Acts. Accordingly all references in agreements, company formation papers such as Memorandum and Articles of Association should be amended to read the Companies Acts 1963 – 2009.

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