

Technical Factsheet 51

Companies (Amendment) (No.2) Act 1999

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This Memorandum, which summarises significant provisions of the Act, does not deal in detail with individual Sections and cannot be regarded as a comprehensive guide to the Act's detailed requirements. It should be read in conjunction with, and not as a substitute for, the Act.

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Introduction

The Act, to be construed as one with the Companies Act, 1963 to 1990,

- i makes significant changes to the existing statutory framework governing examinations contained in the Companies (Amendment) Act, 1990;
- ii grants, on compliance with specified conditions, exemption from statutory audit to small private companies;
- iii requires the Registrar of Companies to be satisfied that a company formed under the Companies Act, 1963 to 1999, when registered, will carry on an activity in the State;
- iv obliges each company to have at least one director resident in the State or, alternatively, to hold a bond to the value of IR£20,000;
- v restricts a person, with some exceptions, to 25 directorships; and
- vi empowers the Registrar of Companies to initiate strike off proceedings against any company which has not filed an annual return in respect of any one year.

Examinations

Among the significant changes made by Part II of this Act to the statutory framework governing examinations contained within the Companies (Amendment) Act, 1990, is the application of a stricter test by the Court (Section 5) whereby it will not appoint an examiner unless it is satisfied 'that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern'.

The petition for the appointment of an examiner must now be accompanied by a report from an independent accountant – either the auditor of the company or a person who is qualified to be appointed as its examiner – which must encompass (Section 7), amongst other matters:

- A statement of affairs of the company incorporating ‘as at the latest practicable date’ details of the company’s assets and liabilities, together with names and addresses of its creditors and securities held by them.
- The independent accountant’s opinion as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern.
- The independent accountant’s opinion as to whether formulation, acceptance, and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of survival.
- The independent accountant’s opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors of the whole than a winding up of the company.

As a consequence, the initial report by the examiner provided for in Section 16, Companies (Amendment) Act, 1990, is no longer required and that Section is repealed.

The company and any interested party is entitled to a copy of the independent accountant’s report (Section 11). The Court may determine that certain information should be omitted from the copy supplied if disclosure is considered detrimental to the survival of the company.

The period of protection is reduced from three months to seventy days (Section 14).

The examiner cannot repudiate a contract entered into by the company prior to the protection period (Section 18).

The examiner is required to formulate proposals, to hold the necessary meetings with creditors and members and to report to the Court within 35 days of being appointed. (Section 22). A copy of the examiner’s report is to be provided to the Court, to the company, and “to any interested party on written application being made to him”. The Court may, on application, direct that particular information likely to prejudice the survival of the company can be omitted from the copy report supplied to an interested party.

Where a creditor decides to require payment from a third party under the terms of a guarantee any rights to vote attaching to the creditor by virtue of the debt pass to the guarantor (Section 25). In such circumstances, should the guarantor make full or partial repayment to the creditor his right of recovery under the examiner’s scheme of arrangement takes the place of the creditor for the relevant amount.

The remuneration costs and expenses of the examiner rank in priority to all of the debts (Section 28), including in priority to a subsequent liquidator’s claim. Liabilities certified under Section 10 of the Companies (Amendment) Act, 1990 by the examiner, as expenses properly incurred, rank after fixed securities.

Audit Exemption

Any member, or group of members, of the company holding more than 10% of the voting rights can require that the company, notwithstanding its eligibility for exemption, have an audit (Section 33). Formal notice of that wish must be served on the company no later than 1 month before the end of the financial year

preceding the financial year in which exemption would otherwise be available.

The criteria all of which the company must meet if it is to qualify for exemption from statutory audit (Section 33) include:

- i It is a company to which the Companies (Amendment) Act, 1986 applies.
- ii Turnover does not exceed IR£250,000.
- iii The balance sheet total (fixed and current assets) of the company does not exceed IR£1,500,000.
- iv Average number of employees during the year does not exceed 50.
- v The company is not a parent undertaking, nor a subsidiary undertaking, as defined by the European Communities (Companies : Group Accounts) Regulations, 1992.
- vi The company is neither a bank, an insurer, nor a company of the types listed in the Second Schedule to the Act
- vii The company has submitted its annual return on time.

Unless it is the first financial year of the company, the company must satisfy these conditions both for the current year and the preceding financial year. The directors continue to have the statutory obligation of preparing and laying before the Annual General Meeting financial statements which give a true and fair view.

Where the appointment of the auditors ceases because the company has decided to avail of the statutory audit exemption (Section 34), the auditors must formally serve notice on the company, sending a copy thereof to the Registrar of Companies, that there are no circumstances relating to the directors' decision which they consider should be brought to the notice of the members or creditors of the company, or, if there are such circumstances, specifying what they are

(Section 34). Where the exemption is no longer available the directors must appoint an auditor "as soon as maybe" who will hold office until the conclusion of the next annual general meeting (Section 35).

The exemption from statutory audit is also available to partnerships (Section 38) to which Part III of the European Communities (Accounts) Regulations, 1993, applies.

Miscellaneous

The potential exposure of auditors to unlimited liability under Section 16, Investment Limited Partnerships Act, 1994, has been removed (Section 40).

A company cannot be registered under the Companies Act, 1963 to 1999, unless it appears to the Registrar of Companies that it proposes to carry on an activity, specified in its Memorandum, within the State (Section 42). A statutory declaration that the purpose, or one of the purposes, for which the company has been formed is carrying on activity with the State is required from one of the persons named as director in the Memorandum and Articles of Association delivered to the Registrar, or one of the persons named as Secretary/Joint Secretary of the company in that document, or the solicitor engaged in the formation of the company.

Every company formed after the commencement date for Section 43 must have a director who is resident in the State, which requirement will apply to existing companies within twelve months of that commencement date.

Alternatively, the company can avail of the mechanism specified in Section 44 or provide a bond to the value of IR£20,000 which will be called upon should the company fail to pay certain fines or penalties arising under the Companies Acts or the Taxes Consolidation Act,

1997. Failure to comply with these provisions will lead to the company being struck off.

On receipt of proof that the company has a real and continuous link with one or more economic activities being carried on in the State, which would be presumed in the case of a statement from the Revenue Commissioners that they have reasonable grounds to so believe, the Registrar of Companies may grant a company a certificate to that effect (Section 44). The company is not then obliged to have a director resident in the State.

There is a general limitation of the number of companies to which a person can be director at 25 (Section 45). In calculating the number of directorships held the following types of companies may be excluded

- A public limited company
- A public company within the meaning of the Companies (Amendment) Act, 1983
- A company which holds a certificate issued under Section 44
- A company that is a holder of a license under Section 9 of the Central Bank Act, 1971, or is exempt from the requirement to hold such a license.
- A company of the types listed in the Second Schedule to the Act.

A company which has not filed an annual return in respect of any one year can now be struck off the Register (Section 46). Previously action was only taken when two or more annual returns were outstanding. Therefore, any company which has not filed its annual return for Calendar 1999 by the end of February 2000 is liable to be struck off, which process commences one month after the issue of the single statutory strike off notice to the company advising it is in default. Where the Court consents to an application for restoration to the Register of

Companies, the Court may, if it considers it appropriate to do so, provide that one or more of the officers of the company is responsible, in whole or in part, for a debt or liability incurred by, or on behalf of, the company during the period when it was struck off.

Where a company has failed to notify the Companies Registration Office a person has ceased to be a director or secretary of that company, the person concerned can send the CRO directly a copy of the appropriate notice of resignation (Section 47).

The grounds on which information or documents obtained as a result of an investigation under Section 20 of the Companies Act, 1990, can be revealed has been extended to include, amongst others:

- With a view to the investigation or prosecution of an offence being an offence under
 - The Companies Act
 - The Central Bank Acts
 - The Insurance Acts
 - The Taxes Consolidation Act
 - Regulations relating to insurance under the European Communities Act
- Entailing misconduct in connection with the management of the body's affairs or misappropriation or wrongful retainer of its property.
- For the purpose of assisting or facilitating the performance by a Minister of the Government of any of his functions.
- For the purpose of assisting or facilitating any accountancy or professional organisation in the performance of its disciplinary functions with respect to any of its members.

First Schedule

The provisions of the Companies Acts, 1963 to 1999, which will not apply to a company availing of the statutory audit exemption under Part III of this Act.

Second Schedule

Listing of companies for the purposes of Section 32 and 45 respectively of this Act.

Provision	Commencement Order	Date of Commencement
PART I		
Section 1 to 3	SI 406 of 1999	21/12/1999
PART II		
Sections 4 to 30	SI 406 of 1999	1/2/2000
PART III		
Sections 31 to 32	SI 406 of 1999	21/2/2000
Sections 33(1), (4), (5) and (6)	SI 406 of 1999	21/2/2000
Sections 33 (2), (3) and (7)	SI 406 of 1999	21/12/1999
Section 34 to 39	SI 406 of 1999	21/2/2000
PART IV		
Sections 40 to 41	SI 406 of 1999	21/12/1999
Sections 42 to 45	SI 61 of 2000	18/4/2000
Section 46	SI 61 of 2000	23/3/2000
Section 47 and 48	SI 61 of 2000	18/4/2000
Sections 49 to 51	SI 61 of 2000	23/3/2000
Sections 52 to 54	SI 406 of 1999	21/12/1999
FIRST SCHEDULE	SI 406 of 1999	21/2/2000
SECOND SCHEDULE		
In so far as it relates to Part II of the Act	SI 406 of 1999	1/2/2000
In so far as it relates to Part III of the Act	SI 406 of 1999	21/2/2000

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