



Public & Regulatory Law Update

April 2009

Companies (Amendment) Bill 2009

On 9 April 2009 the Companies (Amendment) Bill 2009 was published to improve transparency and enhance the enforcement of company law and is expected to be implemented quickly. Two of the main issues it deals with are as follows:

Strengthening the powers of the DCE

The Bill increases the powers of the Director of Corporate Enforcement (DCE) through a number of measures including:

- Making it an offence for companies (including banks) and their directors not to comply with the Companies Acts' disclosure provisions regarding loans etc. to directors and connected persons;
- Giving the DCE a specific right of access to the statutory register of directors' interests in contracts made by the company;
- Clarifying the DCE's right of access third party records relating to a company under investigation.
- Modifying the evidential requirement on the DCE when pursuing alleged breaches of company law rules in relation to company loans to directors by imposes liability on every officer of the company who is in default of the general prohibition on making of loans by a company to its directors.
- Expanding the DCE's power to enter and search premises on foot of a search warrant issued by the District Court;
- Permitting the DCE to seize information (whether privileged or not) on a sealed basis pending a High Court determination as to whether the information is legally privileged.

Transactions with directors and disclosure obligations

The Bill increases the disclosure obligations on companies and, in particular, companies that are "licensed banks". Companies must disclose in their accounts all loans (transactions, arrangements or agreements) to directors and connected persons and it will be a criminal offence if the company (banking or non-banking) and every director does not comply with the disclosure obligations (although it is a defence if the director can prove he took all reasonable steps to secure compliance.)

The Bill also makes some amendments that relate solely to companies that are licensed banks and provides, in future, all loans above a de minimis threshold of €3,174.35 to each individual director will be disclosed separately in the annual accounts and will include the maximum amount outstanding during the period covered by the accounts. The effect of these amendments is to require the disclosure in the annual accounts of loans made to persons connected with directors, where these loans are above the de minimis threshold and are made on favourable terms. In this instance aggregate disclosure will continue to suffice but maximum amounts outstanding during the reporting period will also have to be disclosed. The amendments also recognise that licensed banks may be required to make similar or more detailed disclosure under rules imposed by the Financial Regulator.

National Asset Management Agency established

The establishment of the National Asset Management Agency ("NAMA") was announced on 7 April 2009 to provide the banks with a clean bill of health, to strengthen their balance sheets, to considerably reduce uncertainty over bad debts and, as a consequence, ensure the flow of credit on a commercial basis to individuals and businesses. NAMA will be a commercial semi-state entity which will operate under the management of the National Treasury Management Agency. Full details of the initiative have not been published yet.



It is proposed that certain assets will be transferred into NAMA and NAMA will pay for those either in government bonds or in government guaranteed bonds issued by NAMA. The loans which will be covered are loans secured on development land and property under development. In addition, the largest property backed exposures of all the banks in the scheme will be transferred. The price at which these loans will be acquired is yet to be determined. The loan books of each of the banks which are covered by the proposal will need to be reviewed. It is notable that land development loans outside of Ireland will be eligible to transfer to NAMA.

The Government has indicated that the value of the assets on the books of the various banks to which the initiative will be applicable could be in the region of €80-€90 billion. However, it has also stated that a valuation process will be gone through and an appropriate discount will be applied to these loans to reflect the value of the loans and the risks being transferred to the State. The banks will have to take an appropriate write-down in the value of the loans. However, the impact on individual banks cannot be established in advance of the valuation of the relevant loans. The existing terms and conditions of the loans transferred to NAMA will remain in place and the legislation to give effect to the initiative will provide for a power to require the transfer of the loans to NAMA.

Co-operative legislation consultation

A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise. On 15 April 2009 the Government published a consultation paper (the paper) on the legislation which applies to co-operative societies ("*Co-operative Societies: Consultation paper on the Industrial and Provident Societies Acts 1893 – 2005*"). The review forms part of the Government's Better Regulation Programme which aims to improve the quality of regulation generally and reduce administrative burdens on business.

Co-operatives in Ireland usually register under the Industrial and Provident Societies Acts 1893 -2005 (IPS Acts). The objective of the review is to determine whether any changes to the present (mostly Victorian) legislative and administrative arrangements are necessary.

The following are the main issues under review:

1. Restrictions on the raising of funds, including share capital. The current statutory limit on individual shareholdings is €150,000 or 1% of the total assets of the society, whichever is the greater. The rationale for having such a limit is not clear. The paper asks whether there should continue to be a statutory limit on individual shareholdings in societies or whether this should be left to individual societies to decide.
2. Financial reporting requirements of societies. Detailed financial reporting requirements, dating mainly from the pre-1922 Acts, apply to co-operative societies. These involve annual returns, balance sheets, auditing and so on and are enforced by the Registrar of Friendly Societies. The paper seeks to ascertain whether these requirements are causing difficulties for societies and whether any changes are necessary or desirable.
3. Governance of societies. Unlike the Companies Acts, the IPS Acts make only limited provision for corporate governance matters such as duties of directors, making of rules and voting rights. The paper asks how the provisions of the IPS Acts in relation to governance operating in practice and whether any changes should be introduced.

Fund-raising restrictions for certain societies, borrowing powers, cancellation of societies, amalgamations, winding up, examinership, distribution of property, registration fees and public enforcement arrangements are also examined in the paper. Comments on the review are requested by 30 June 2009.

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