Companies (Miscellaneous Provisions) Bill 2009

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COMPANIES (MISCELLANEOUS PROVISIONS) BILL 2009

Introduction

The Companies (Miscellaneous Provisions) Bill, 2009 (the "Bill") when passed into law will introduce a number of important changes to Irish company law. The Bill can be broken down into the following parts, each of which will be dealt with in more detail below;

- Use of US GAAP in Ireland;
- Costs of Company Investigations;
- Recognized Stock Exchange;
- Overseas Market Purchase;
- Continuation of foreign investment companies in Ireland;
- De-registration of companies when continued under the law of jurisdiction outside the State;
- Statutory Declaration of Solvency
- Amendment of UCITS Regulations; and
- Amendment of Companies (Auditing and Accounting) Act, 2003

Key Provisions

The Use of US GAAP in Ireland: Section 1 of the Bill provides for the use on a transitional basis of US Generally Accepted Accounting Principles (GAAP) by certain parent undertakings, to the extent that the use of those principles in the preparation of the undertaking's accounts does not contravene any of the provisions of the Companies Acts or any regulations made there under.

This arrangement will be limited to a specified category of companies. These companies are parent companies incorporating in Ireland for the first time whose securities are not traded on a regulated market in the EEA, whose securities are registered with or who are subject to reporting to the US Securities and Exchange Commission (SEC) and who, on the date that this Bill passes into law, are not already subject to an obligation to make an annual return to the Registrar of Companies ("Registrar") with accounts annexed thereto.

Section 3 of the Bill amends a number of existing provisions of the Companies Act, 1990 as follows:

Costs of Company Investigations Sections 3(b) and (c) of the Bill amend Sections 7(3) and 13(1) of the Companies Act, 1990, as amended by the Company Law Enforcement Act, 2001, by removing the upper limit (i.e. the ceiling of €317,435) that applicants can be asked to contribute towards the costs of court investigations initiated on foot of their applications under Section 7 of the 1990 Act.

The upper limit currently applies both to the security applicants can be asked to advance before the investigation commences (Section 7(3)) and to the amount of the eventual costs of the investigation that the applicants would have to bear (Section 13(1)). The removal of the upper limit would leave total discretion to the court in relation to the issue of costs, and would place Section 7 applicants on the same general footing as other parties initiating court proceedings in that they can be held liable for the full costs of the proceedings if the court so decides.

Recognized Stock Exchange – Section 3(a) of the Bill amends the definition of "recognized stock exchange" for the purposes of Section 215 of the Companies Act, 1990 dealing with the provisions of market purchases by a company on a recognized stock exchange, by adding exchanges outside the State to the definition.

Overseas market purchase: Section 3 of the Bill introduces a new type of purchase called an "overseas market purchase". Pursuant to the Bill, a purchase by a company that issues shares, or by a subsidiary of that company, of the first-mentioned company's shares, is an "overseas market purchase" if the shares are purchased on a recognized stock exchange outside the State. The company which has issued the shares shall publish on its website for a continuous period of not less than 28 days beginning on the day after the overseas market purchase concerned and is a day on which the recognized stock exchange is open for business, the following information;

- The date and time of the overseas market purchase;
- The price at which the shares were purchased;
- The number of shares purchased; and
- The recognised stock exchange on which the shares were purchased.

The Bill provides that the company and all officers of the company will be guilty of an offence if the above is not complied with.

Continuation of foreign investment companies in Ireland: In addition, Section 3 also makes provision for a new Section 256F which will be inserted in the Companies Act, 1990. The Section provides that a body corporate which is a collective investment undertaking, established and registered under the laws of a relevant jurisdiction outside the State; and which the Minister may prescribe where he or she is satisfied that the law of the place concerned makes provision for companies to continue under the laws of the state in a substantially similar manner, may apply to the Registrar to be registered as a migrating company in the State by way of continuation.

The body corporate will not be registered unless the Registrar is satisfied that all of the requirements of the Companies Acts in respect of the registration are complied with, including an application signed by a director of the migrating company together with the registration documents. The Bill lists the registration documents as follows;

- a certified and authenticated copy of the certificate of registration (or equivalent certificate);
- a certified and authenticated copy of the Memorandum and Articles of Association (or equivalent constitutive documentation);
- a list setting out particulars in relation to the directors and secretary of the migrating company in accordance with Section 195 of the Companies Act, 1963;
- a statutory declaration of a director of the company made not more than 28 days prior to the date on which the application is made to the Registrar. The declaration shall provide that (i) there has been no petition or similar proceeding to wind up or liquidate the migrating company notified to the migrating company, (ii) the appointment of a receiver, liquidator, examiner or other similar person has not been notified to the migrating company, (iii) the migrating company is not operating or carrying on business under any scheme made by the migrating company with creditors in any place, (iv) notice of the proposed registration has been served on creditors of the migrating company, (v) any consent required by any contract has been obtained or waived, (vi) the registration is in accordance with the Memorandum and Articles of Association (or equivalent constitutive documentation). Finally, if the director who made the statutory declaration becomes aware of any material change prior to the registration, he or she shall deliver a new statutory declaration;
- a declaration of solvency;
- a schedule of charges or security interests created or granted by the migrating company;
- notification of the proposed name of the migrating company if different from its existing name; and
- a copy of the Memorandum and Articles of Association of Association of the migrating

company which it has resolved to adopt (in English or Irish) and which shall take effect on registration.

Where the above registration documents are not written in English or Irish, the documents must be translated and certified as a correct translation.

The other requirements in order to be registered are:

- the name or proposed name shall not contravene Section 21 of the Companies Act, 1963;
- the registration fee (if any) has been paid;
- the address of the registered office of the company has been notified to the Registrar;
- the migrating company must also have applied to the Financial Regulator to be authorized to carry on business as a company under Section 256 (1) and the Financial Regulator has notified the company and the Registrar that it proposes to authorize the migrating company to carry on such business; and
- a statutory declaration made by a solicitor engaged by the migrating company or a director of the company stating that the above requirements have been complied with must accompany the application. The Registrar may accept such a declaration as sufficient evidence of compliance.

If a certificate of registration by way of continuation is issued, the Registrar shall enter in the register maintained for the purposes of Section 103 of the Companies Act, 1963, the particulars prescribed by Section 103, of the charges and security interests notified to it by the company (if any). From the date of registration the migrating company shall be deemed to be a company formed and registered under the proposed new legislation provided that a new legal entity is not created, or that the registration does not operate to prejudice or affect the identity or continuity of the company as previously established, or to affect any contract or resolution affecting the rights, powers, authorities functions and liabilities or obligations of the company.

It should be noted that the failure of the migrating company to send to the Registrar particulars of a charge or security interest created prior to the registration shall not prejudice the rights of any person in whose favour the charge or security was made.

Any legal proceedings that could have been continued or commenced by or against the company before the migration may be continued or commenced following registration of that company.

Once registered the migrating company shall as soon as possible apply to be de-registered in the relevant jurisdiction. Under the Bill, the migrating company has three days to notify the Registrar and the Financial Regulator of its deregistration in the relevant jurisdiction.

De-registration of companies when continued under the law of place outside the State:

The Bill also proposes inserting Section 256G into the Companies Act, 1990. Accordingly, a company which proposes to be registered in a relevant jurisdiction (which the Minister may prescribe where he or she is satisfied that the law of the place concerned makes provision for bodies corporate that are substantially similar to companies to continue under the laws of the State in a substantially similar manner to continuations under Section 256F above) by way of continuation may apply to the Registrar to be de-registered in the State. In order to de-register, the applicant must complete the prescribed application form accompanied by the transfer documents as follows;

- statutory declaration of a director of the applicant made not more than 28 days prior to the date on which the application is made to the effect that (i) the company will continue as a body corporate, (ii) there is no petition or similar proceeding to wind up or liquidate the company, (iii) no receiver, liquidator or examiner has been appointed, (iv) the company is not operating under any scheme created with creditors, (v) the application for de-registration is not intended to defraud creditors, (vi) any necessary consent has been obtained or waived as the case may be and (vii) de-registration is permitted by the Memorandum and Articles of Association;
- declaration of solvency; and
- a copy of the special resolution of the company that approves the proposed de-registration in the State.

The company must pay the fee (if any) as specified from time to time, inform the Financial Regulator of its intention to be de-registered (and the Financial Regulator must not object), the company must also notify the Registrar of any proposed change of name and of its proposed change of registered office. The application shall be accompanied by a statutory declaration by a solicitor engaged by the company or by a director of the company, that the above requirements have been complied with. The Registrar may accept such a declaration as sufficient evidence of compliance.

It is important to note that holders of not less than 5 per cent of the issued share capital of the company and who have not voted in favour of the resolution or any creditor of the applicant may apply for an order (no later than 60 days after the publication of the notice in

the CRO Gazette) preventing the proposal or passage of the de-registration resolution from taking effect. The High Court can grant an order if it finds that it is just and equitable to do so.

Once the company is registered in the relevant jurisdiction, it has three days to notify the Registrar and the Registrar shall issue a certificate of de-registration.

From the date of registration in the relevant jurisdiction, the company shall cease to be a company for all purposes of the Companies Acts and shall continue as a body corporate under the laws of the relevant jurisdiction.

The proposed new legislation shall not operate to create a new legal entity; to prejudice or affect the identity or continuity of the company as previously established; or to affect any contract or resolution to affect the rights, powers, authorities, functions and liabilities or obligations of the company.

Statutory Declaration of Solvency: the Bill sets out the exact form that the statutory declaration of solvency must take for the above purposes of 256F and 256G. Accordingly, a director of the migrating company or applicant, as the case may be, shall make a statutory declaration stating that he or she has made full inquiry into the affairs of the relevant company and has formed the opinion that it is able to pay its debts as they fall due.

- the declaration of solvency must be made not more than 28 days prior to the date on which the application is made to the Registrar;
- it must contain a statement of the migrating company's or applicant's assets and liabilities as at the latest practicable date before the making of the declaration and in any event at a date not more than 3 months before the making of the declaration;
- it must be accompanied by a report by an independent person which includes a statement that in their opinion, based on information and explanations given to him, that the statements are reasonable and that he has given and not withdrawn his consent to the making of the declaration with the report attached to it. The independent person shall be at the time the report is made, a person who is qualified to be the auditor of the migrating company or applicant.

A director who makes a declaration under this Section without having reasonable grounds for the opinion that the migrating company or applicant is able to pay its debts as they fall due commits an offence and is liable to fines of up to €5,000 and 12 months imprisonment on summary conviction and fines of up to €50,000 and imprisonment for a term of up to 5 years on conviction on indictment.

UCITS Regulations: Section 5 of the Bill provides that the provisions of Sections 256F to 256H of the Companies Act, 1990 (as introduced by this Bill), shall apply to any investment company authorized pursuant to the UCITS Regulations.

Amendment of Companies (Auditing and Accounting) Act, 2003: Section 4 of the Bill, provides that Section 27 of the Companies (Auditing and Accounting Act), 2003 is amended by providing that persons who are directors of the Supervisory Authority at the time a committee is established for the purposes of the 2003 Act will be entitled to continue on the committee until the inquiry is completed.

The Section further provides that a committee may be established for the purposes of investigating any matter and that any committee established prior to the enactment of the Bill shall be deemed to have been properly constituted and to have had all the necessary powers to perform its functions accordingly.

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