

IRISH DEBT SECURITIES ASSOCIATION

Companies Act 2014: Key Considerations for Irish SPVs

Background

The Companies Act 2014 (the **2014 Act**) was enacted on 23 December 2014 and is expected to come into effect on 1 June 2015 (the **Commencement Date**). The 2014 Act is the largest piece of legislation ever enacted in Ireland and replaces, reforms and consolidates over 50 years of Irish company legislation into a single, user-friendly, modern statute.

This note has been prepared by the Legal Committee¹ of the Irish Debt Securities Association (**IDSA**) for the purposes of summarising some key aspects of the re-registration process under the 2014 Act which will apply to Irish special purpose vehicles (**Irish SPVs**) who have entered into both public and private structured products & debt capital markets transactions.

KEY POINTS TO NOTE:

- > **Form of SPV:** Irish SPVs (other than PLCs) which issue listed debt must convert to, or be established as, a DAC. For existing Irish SPVs this needs to be completed by 1 September 2016.
- > **No Consent:** it is expected that trustee / lender consent should not be required to convert an existing Irish SPV with listed debt into a new form of DAC under the 2014 Act as this is a mandatory change required by law.

Business as usual for Irish SPVs

The first point to note is that the changes to be brought about by the 2014 Act will have minimal practical impact on the type of transactions typically entered into by Irish SPVs. Arrangers, managers, trustees, counterparties and rating agencies should expect substantially the same legal and taxation opinions in respect of Irish SPVs following the Commencement Date as they would have received prior to the Commencement Date.

Conversion of existing Irish SPVs under the 2014 Act

The 2014 Act recognises that most Irish companies are established as private companies limited by shares. As such, it creates a new form of private limited company (**LTD**) and it looks to simplify the law relating to such companies. One of the more significant changes introduced by the 2014 Act is the creation of a second form of Irish private limited liability company, namely the designated activity company (**DAC**).

While both LTDs and DACs have new features, DACs more closely resemble existing private companies (**EPCs**) while LTDs are a more streamlined, simplified form of company.

The primary difference between a DAC and an LTD is that a DAC will retain the concept of a designated activity or limited objects clause; whereas an LTD will have a single-document constitution and essentially full and unlimited capacity. In addition, an LTD will not be able to list debt securities on a stock exchange.

Irish SPVs incorporated prior to the Commencement Date will have to elect within 18 months of the Commencement Date (the **Transition Period**) to either opt-in to the new regime and re-register as an LTD or opt-out and register as a DAC. Irish SPVs (other than public limited companies (**PLCs**)) which have issued (or intend to issue) listed debt securities will have no choice but to re-register as a DAC. This needs to be done no later than 3 months before the expiry of the Transition Period (i.e. by 1 September 2016).

¹ The IDSA Legal Committee is comprised of representatives from A&L Goodbody, Arthur Cox, Dillon Eustace, LK Shields, Maples & Calder, Mason Hayes & Curran, Matheson, McCann FitzGerald, Walkers Ireland and William Fry.

The conversion to a DAC can be achieved in a number of ways. It is also possible to convert to a DAC without shareholder involvement. However, a shareholder resolution will still be required to amend the constitutional documents in order to adopt necessary consequential amendments to an Irish SPV's existing memorandum and articles of association. On that basis, it is expected that the simplest route for most Irish SPVs will be for the shareholders to pass an ordinary resolution to approve the re-registration of the company as a DAC (if appropriate). A copy of the relevant ordinary resolution, the new constitution and a Form N2 will need to be filed with the Companies Registration Office. There will be no filing fees required in connection with this submission. The conversion process will be completed once the Registrar issues a new certificate of incorporation.

In many cases, the conversion of an Irish SPV to a DAC will also involve consequential changes to the company's existing constitutional documents which will require approval by way of a special resolution of its shareholders. This can be done at the same time that the Form N2 is submitted to the Companies Registration Office to alter the company type.

As many Irish SPVs are orphaned entities whose sole member is a professional share trustee, this should be a straightforward, efficient and inexpensive process.

Irish SPVs which have not converted will be regarded as DACs during the Transition Period and will then automatically convert to LTDs following the Transition Period. At that point, if they have listed debt securities, they will then be deemed to be in breach of their obligations under the 2014 Act.

EXPECTED MARKET PRACTICE: Accordingly, Irish SPVs which have issued listed debt securities will re-register as a DAC as soon as practicable after the Commencement Date in order to avoid a scenario whereby the Irish SPV is deemed to be in default of its statutory obligation to re-register as a DAC and, consequently, trigger a breach of its contractual covenants to comply with applicable laws.

It is expected that most Irish SPVs which are not required to re-register as a DAC or where there is no expectation that it will need to be a DAC (e.g. the Irish SPV has not issued nor does it expect to issue listed debt securities), will seek to be re-registered or incorporated as an LTD. However, the appropriateness of this route will need to be assessed on a transaction-by-transaction basis.

If an Irish SPV re-registers as an LTD and subsequently needs to issue listed debt securities it will be able to re-register as a DAC at a later point in time.

Existing Irish SPVs that are PLCs will not be required to convert their status under the 2014 Act. As such, no action will need to be taken in terms of their conversion; however it is expected that the constitutional documents of PLCs will need to be amended to take account of other general provisions of the 2014 Act.

Trustee / Lender Considerations

Trust deeds, security agreements and other transaction documents entered into by Irish SPVs commonly include restrictions or conditions around the ability of an Irish SPV to, among other things, change its constitutional documents, name or status including, for example, third party consent requirements or rating agency confirmations.

The 2014 Act imposes a statutory duty on the directors of Irish SPVs to re-register the company as an LTD or a DAC within the Transition Period, which in the case of a conversion to a DAC, will result in an Irish SPV's name changing to include the words "designated activity company", or "DAC" rather than "Limited" and consequential amendments of the constitutional documents of all Irish SPVs to take account of the 2014 Act.

EXPECTED MARKET PRACTICE: It is expected that the requirements to obtain trustee consent or to comply with other relevant contractual restrictions contained in transaction documents should not apply to a re-registration of an Irish SPV as a DAC because such conversion will be a mandatory requirement under Irish law.

Failure to comply with this obligation (and to make consequential amendments to the constitutional documents of the entity) will result in a statutory breach and, potentially, a breach of contractual covenants and other commitments which could ultimately trigger a default under the transaction documents.

Naturally, there may be situations where, due to nuances in the documentation, it may be necessary to obtain trustee or other consents in advance of the re-registration of an Irish SPV. Invariably, views of the relevant counterparties and their counsel where the applicable transaction documents are not governed by Irish law will need to be obtained in this regard.

However, it is expected that, in these cases, a trustee or lender will not require further noteholder or secured party consent on the basis that (i) the re-registrations are mandatorily required by Irish law and (ii) the consequential changes to constitutional documents are only of a technical and minor nature which, objectively speaking, could not be reasonably seen to materially prejudice the interests of the noteholders or secured parties.

On that basis, it is expected that a conversion of a typical Irish SPV to a DAC should be able to be effected with minimal disruption and without any need to seek pre-approval from trustees, noteholders or secured parties.

For live transactions that are being entered into prior to the Commencement Date, appropriate provisions are already being included in transaction documents to allow the Irish SPV to make the necessary conversion at the appropriate time without trustee or lender involvement.

Practical implications following re-registration

Upon re-registration (whether as an LTD or a DAC), an Irish SPV is required to submit an amended constitution to the Irish Companies Registration Office, as detailed above).

Subject to certain exemptions with respect to charitable and other companies, the 2014 Act requires that each company specify the type of company it is as part of its name. This means that, as noted above, EPCs will have to change their name to specify their relevant company type at the end of their name (e.g. "XYZ Investments DAC" or "XYZ Investments LTD"). Changes to the company name will also need to be reflected in company seal, letterheads, stationery, signage and other relevant documentation and registrations.

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About IDSA:

The Irish Debt Securities Association ("IDSA") an industry organisation established with the aim to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. Membership of IDSA includes more than 30 multi-disciplinary members including audit firms, legal advisors, corporate administrators, trustees, listing agents and other parties involved in the structured products and debt capital markets industry in Ireland.

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