

The Companies Act 2009

The Companies (Amendment) Act 2009 (the Act) was signed into law on 12 July 2009. The principal changes which the Act has brought about:

- residency requirement for directors of Irish companies has been extended;
- directors' disclosure obligations in respect of certain transactions have been expanded; and
- the powers of the Director of Corporate Enforcement (DCE) have been increased.

Directors residency requirements

Prior to the signing of the Act all Irish companies needed to have at least one resident Irish director. This requirement has now been extended to include residents of the European Economic Area (EAA), being the European Union (EU) plus Iceland, Norway and Liechtenstein. For companies that do not have a director resident in the EAA the exceptions that were previously in place continue as before, that is the application for real and continuous link with the State or putting a bond in place to the value of €25,395 for a period of two years.

Transactions with directors

Disclosure obligations in respect of certain transactions between a company and any of its directors have been increased by the Act and special rules for disclosure by "licensed banks" have been applied.

In broad terms Section 31 of the Companies Act 1990 prohibits loans by a company to a director or "person" connected with a director to include connected companies. Previously a director needed to be proved to have been "knowingly" in contravention. This onus has now been reduced and every officer who is in "default", (that is to say who authorises or who, in breach of their duty, permits a transaction) is guilty of an offence, regardless of whether they are aware of the breach of legislation.

The annual accounts of a company must disclose loans made to its directors and to persons connected with them. The Act prescribes criminal penalties for failure to disclose such loans.

Prior to the enactment of the Act a licensed bank was not subject to the same disclosure requirements for transactions with its directors. Transactions with directors and connected parties were being disclosed in aggregate and shareholders did not have full, if any, transparency of these transactions. The Act made changes so that licensed banks are now subject to the same disclosure requirements for transactions with directors as all other companies. This means that they must disclose in their annual accounts each individual loan to each director as well as the maximum outstanding during the period of the accounts.

They must also disclose the aggregate of loans, which are on more favourable terms than are generally available to customers, made to a connected person of a director above €3,174.35. It should be noted that this is in addition to any rule or direction of the Financial Regulator where often more onerous disclosure is required than that which is set out in the Act. A company that is a licensed bank must continue to maintain a register of loans to directors. Such a register must be accessible to the DCE. A statement must be made available prior to and at the AGM of the licensed bank based on the information in the register. If this information is disclosed in the annual accounts a separate statement is not necessary.

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Increased powers of the Director of Corporate Enforcement (DCE)

The Act has expanded the power of the DCE. An outline of the changes is set out below.

The DCE now has a specific right of access and power to take copies of the register of directors' interests in contracts or proposed contracts which all companies must maintain and the register of transactions with directors and connected persons which must be maintained by licensed banks.

The Act provides clarification of the DCE's power to require the production of records from third parties where those records relate to the business of a company under investigation.

The DCE is permitted to seize and store information in both hard copy and electronic format, but not carrying out an examination on such documentation pending determination by the High Court, where legal privilege is claimed.

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