LK SHIELDS
YOUR LEGAL COUNSEL

COMPANY SECRETARIAL AND CORPORATE GOVERNANCE

Compliance Agenda - September 2019

by

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We are delighted to publish the latest edition of our newsletter, Compliance Agenda. It contains a round-up of all the latest legal updates of interest to Company Secretaries, Company Directors and Compliance Officers.

Buy Back v Redemption - The Importance of Getting it Right

The Companies Act 2014 provides the mechanism for a private limited company ("LTD") in Ireland to acquire its own shares. However, it is extremely important for Directors to understand the correct mechanism to use to acquire its own shares as otherwise the transaction will be deemed void and the Directors will be guilty of a Category 2 offence.

There are various reasons as to why an LTD would consider acquiring its own shares including:

1. To return share to a shareholder(s)
2. To exit a shareholder(s)
3. To raise funds
4. To alter current shareholdings

Redemption V Buy Back

Whilst both methods essentially have the same outcome, a redemption of shares can only be completed where there are redeemable shares which were issued solely with the purpose that they be redeemed at some point in the future, if desired. Whereas a buyback of shares can be applied to shares in their current form and the required contract is used for the buyback of the shares.

Key Company Secretarial Considerations

Also, any acquisition by way of a buyback or redemption must be funded from distributable profits (limited exemptions exist) which means that either method is only available where an LTD has sufficient reserves.

In terms of authorisation, Section 105 of the Companies Act 2014 provides various conditions which must be satisfied in the course of the transaction. The redemption or purchase of shares by a company may only be authorised through:

- Authorisation contained in the Constitution of the Company;
- A Special Resolution of the Shareholders: and
- The specific rights which are attached to the shares in question.

Finally, when the shares have been redeemed or bought back, the shares can either be cancelled or held as treasury shares and consideration needs to be given to this decision as once the shares are cancelled, they can no longer be used by the Company for other transactions.

Obtaining Correct Advice

It is always important for a company considering the acquisition of its own shares seek consultation from an experienced company secretarial provider. The LK Shields Company Secretarial and Compliance team would be pleased to answer any questions that may arise as well as assist with the planning and implementation stages.

No Deal Brexit! Will My Company Be In Breach of Company Law?

As another Brexit deadline looms, companies will need to consider if a no deal Brexit will leave them in breach of Irish company law.

Section 137 of the Companies Act 2014 (the "2014 Act") provides that every Irish registered company is required to have at least one director who is resident in the EEA. Failing that, a company is liable to fines under the 2014 Act and the Taxes Consolidation Act 1997, or worse still, section 726 of the 2014 Act provides power to the Registrar of Companies to strike a company from the register if she has reasonable cause to believe that section 137 is not being complied with.

Until now, many companies have relied on a UK resident director to satisfy this requirement, however, if the UK does "crash out" of the EU come October 31st, this will no longer be an available avenue.

What do I do?

If your company has indeed been fulfilling this requirement by relying on a UK resident director, you must act now to ensure you do not default on your statutory obligations. You have 3 solutions;

1. Appoint another director who is resident in the EEA;
2. Put in place a non-EEA resident director bond; or
3. Obtain a certificate of a real and continuous link with one or more economic activities in the state; or

Appointing an EEA director

In theory, the simplest solution, although this may not be an economically viable option for some companies.

Non-EEA resident director bond

This effectively provides an exemption from having an EEA resident director. A bond to the value of €25,000 can be put in place which provides that in the event of a failure by a company to pay the whole or part of a fine imposed in respect of an offence under company or tax legislation, there shall become payable, under the bond, a sum of money to discharge such a fine. Once in place, the bond is effective for 2 years and can be renewed thereafter if required.

Certificate of a real and continuous link

To obtain such a certificate, an application can be made to the Registrar of Companies accompanied by a statement from the Irish Revenue Commissioners that the company has a real and continuous link with an economic activity within the state. For so long as the certificate is in force, the company will be exempt from having an EEA resident director. The granting of such certificate will only be on the basis of retrospective activity and as such will unlikely be available to a newly incorporated company intending to have such a real and continuous link.

We can help

Whichever option is most suitable for you, our experienced Company Secretarial Team can provide advice

and assistance in getting your company Brexit ready.

Irish Companies Take Note of the CRO Strict 14 Day Rule

On 1 June 2019, the Registrar decided to utilise powers under section 898 of the 2014 Act, to introduce a 14 day limit on returning certain post incorporation forms to the Companies Registration Office ("CRO") that have been sent back to the presenter for amendment (i.e.) the "14 day return rule".

The 14 day return rule applies generally to post-incorporation forms including those related to ordinary and special resolutions, amendments to constitutions, allotment of shares, changes to share capital and summary approval procedures.

The requirements also apply to electronic filings as per section 897 of the 2014 Act.

In effect, any document submitted to the CRO which is inaccurate, incomplete or does not comply with the provisions of the 2014 Act may be rejected by the CRO.

The CRO has advised that companies should be particularly diligent about recording their correct email address to ensure that they are alerted when their electronically filed documents are being rejected as the CRO will not issue a letter or return electronically filed documents by post.

The key points to note:

- any documents which are submitted to the Registrar which do not comply with the specified requirements may be rejected by the Registrar with a notice indicating why the document does not comply and unless the amended documents are not returned within the 14 day limit they will be deemed to have never been received;
- it is a criminal offence for a person to knowingly or recklessly deliver a document to the CRO which is false; and
- there are very specific rules and potential penalties where annual returns are concerned and the Form B1 along with many other forms are only accepted electronically by the Registrar.

Our Company Secretarial team can assist your company in navigating all its filing requirements. Contact details for members of the team are available here.

No Deal Brexit: Do UK registered companies with an Irish registered branch have to re-register?

Many UK companies operating in Ireland chose to establish a Branch as opposed to an Irish incorporated subsidiary from which they operate their Irish business. A branch is simply an extension of the UK company which has been registered outside of Ireland and is not considered a separate legal entity.

If the UK leaves the European Union without any deal in place on 31 October 2019, pre-existing External Companies ("**Branches**") will not have to re-register with the Companies Registration Office, nor will they be required to incorporate an Irish subsidiary. Branches will, however, be subject to filing annual returns with the CRO under non-EEA country legislation, which carries additional filing requirements. The major result of this will be the Branch's responsibility to state it's called up share capital figure on the annual Form F7.

Those looking to keep their business within the EEA and European Union post Brexit should consider the incorporation of an Irish subsidiary as a contingency to a no-deal Brexit. A subsidiary is an independent legal entity and its liability is limited to its issued share capital. The UK parent company can still own and control the subsidiary, but it is a separate entity incorporated within the EEA and EU, and therefore may be suitable to those with major lines of business within the EU.

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About the Author