



BANKING AND FINANCE

Lenders Will Be Affected by the Companies (Accounting) Act 2017

by **Richard Curran**

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Amendments have been made to the Companies Act 2014 (2014 Act) by the Companies (Accounting) Act 2017 (2017 Act) impacting lenders and other creditors of a company.

The main purpose of the 2017 Act is to transpose EU Directive 2013/34/EU on the financial accounting requirements for certain types of undertakings, but it also addresses a number of anomalies in the 2014 Act and implements other recommended changes to the 2014 Act.

This article focuses on the following changes which will be of particular interest to lenders and other creditors of a company:

1. A private company involved in intra-group lending and group treasury functions no longer falls within the definition of a "credit institution" and can now register as a private company limited by shares;
2. Clarification that charges created by an Irish company over shares held in a foreign incorporated company do not have to be registered with the Companies Registration Office; and
3. The crystallisation of floating charges into fixed charges no longer gives lenders priority over claims of preferential creditors.

These changes came into force on 9 June 2017.

Amended definition of "credit institution"

The definition of "credit institution" in the 2014 Act was very broad and included any company which accepts deposits or other repayable funds or grants credit on its own account. This definition was interpreted to capture companies that were involved in intra-group lending and group treasury functions as well as those carrying out traditional banking activities.

As the 2014 Act prohibits a private company limited by shares (LTD) from carrying on the activity of a "credit institution", any company involved in intra-group lending and group treasury functions had to be registered as a designated activity company (DAC) rather than a LTD.

Section 12 of the 2017 Act amends the definition of a "credit institution" to provide that only companies that accept repayable funds from the public need to be registered as a DAC. Therefore a company engaged in intra-group lending and group treasury functions will no longer fall within the definition of a "credit institution" and will have the option of registering as a LTD.

New exemption to the registration of charges over shares in foreign incorporated companies with the Companies Registration Office

Under the 2014 Act, an Irish company is required to register particulars of charges over certain assets with the Companies Registration Office (CRO). Pursuant to section 408(1) of the 2014 Act, a charge created by an Irish company over shares in a "company" does not need to be registered with the CRO. A "company"

under the 2014 Act only refers to a company formed and registered under the 2014 Act (i.e. an Irish company). This created uncertainty as to whether the exemption in section 408(1) applied where the shares charged are held by an Irish company in a foreign incorporated company. As failure to register a charge with the CRO within 21 days of execution renders it void (as against any liquidator and creditor of the company), a practice developed of registering charges created by Irish companies over shares held in a foreign incorporated company.

Section 98(c) of the 2017 Act amends section 408(1) of the 2014 Act to specifically include shares in a body corporate (i.e. a foreign incorporated company). Therefore there is no longer any requirement to register charges created by an Irish company over shares held in a foreign incorporated company.

Changes in priority of claims in insolvency

The 2014 Act provides a priority system for claims of different classes of creditors of a company in the event of its insolvency. The claims of fixed charge holders rank first, followed by those of preferential creditors, floating charge holders and lastly unsecured creditors.

This priority of claims was considered by the Supreme Court in *J.D. Brian Limited (in liquidation) t/a East Coast Print and Publicity and others v. Companies Acts [2015] IESC 62 (Belgard Motors)*. In *Belgard Motors*, the lender served a notice of crystallisation on each chargor company in accordance with the terms of the underlying debenture with the intention of crystallising the floating charge into a fixed charge. The question arose as to whether service of such a notice of crystallisation was effective to give the lender (as a crystallised fixed charge holder) priority over the claims of preferential creditors. The Supreme Court held that where a floating charge has crystallised and became fixed prior to the date of winding up of the chargor company, the lender (as now a fixed charge holder) gained priority ahead of the claims of preferential creditors.

Whilst the Supreme Court decision in *Belgard Motors* was welcome for lenders who held floating charges, it created uncertainty for preferential creditors.

Following recommendations by the Company Law Review Group, the 2017 Act now reverses the Supreme Court decision in *Belgard Motors*. Section 92 of the 2017 Act amends section 621(7)(b) of the 2014 Act to provide that claims of preferential creditors will rank in priority to those of holders of charges created originally as floating charges. This priority will therefore apply irrespective of the crystallisation of floating charges into fixed charges.

Additionally, pursuant to section 98(d) of the 2017 Act, amending section 440(1)(a) of the 2014 Act, any receiver appointed under a floating charge which has crystallised into a fixed charge must now ensure that claims of preferential creditors are paid in priority of those of the charge holder.

Conclusion

The amendments to the definition of "credit institution", and the registration requirements for charges created by Irish companies over shares in foreign incorporated companies, provide welcome clarity in relation to the unintended anomalies in the 2014 Act.

Whilst preferential creditors should welcome the amendments made by the 2017 Act to the priority system for floating charge holders, lenders should now look at reviewing their lending and security policies. Lenders could consider requesting fixed asset registers from companies when entering into negotiations and taking 'all asset debentures' from those companies on completion. Such 'all asset debentures' would incorporate fixed charges over the assets stated on the fixed asset register and a floating charge over those assets which cannot be secured by way of fixed charge. This should allow lenders to maximise their position as a fixed charge holder should a chargor company become insolvent and provide lenders with some comfort when extending credit.

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