

Think Small First - the European Private Company

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Around 99% of businesses in the European Union are small and medium enterprises (SMEs) and the European Union wants to make life easier for them. A report of the European Investment Bank has found that the well-being and growth of SMEs will be the key to Europe's future competitiveness. However, most small businesses remain within national borders. In June this year, the European Commission launched its Small Business Act (SBA) entitled "Think Small First".

The SBA sets out ten principles to make life easier for SMEs. These include creating an environment in which entrepreneurs and family businesses can thrive and where entrepreneurship is rewarded; facilitate access to finance and helping SMEs benefit more from the Single Market while enabling SMEs to deal with environmental challenges. As part of the SBA, the Commission has proposed certain legislative changes including a Regulation providing for a European Private Company to be called "Societas Privata Europaea" ("SPE").

The SPE is a company form designed for SMEs. Small businesses will have the option of setting up an SPE which follows the same rules throughout the EU instead of a private limited company or GmbH or SARL depending on where they are based. The advantage of an SPE is that it is a flexible transparent company form, with the same type of management structure throughout the European Union and it offers a European label that will be easily recognisable in all Member States. It is intended that the SPE will exist in parallel to all national company forms.

Many of the proposals for the SPE are similar to the private limited company that exists in common law jurisdictions of Ireland and the UK but some proposals will not be recognisable.

The main provisions are as follows:-

- it will have limited liability for its shareholders;
- the shares may not be traded publicly on any market;
- it may be set up by an individual or other entity from scratch or by transformation, merger or division;
- it may have its registered office in one

Member State but conduct its business from another Member State;

- it may transfer its registered office to another Member State;
- it may have a share capital of only €1;
- shareholders will have the freedom to decide the manner in which they make decisions, e.g. in person, by video-conferencing etc;
- shareholders will have the freedom to decide the rights attaching to shares such as voting rights; and
- the Regulation will provide rules for the protection of creditors and pre-existing rights of employees.

The Commission hope that the Regulation will enter into force on 1st July 2010.

The proposal does not make the creation of an SPE subject to a cross-border requirement (e.g. shareholders from different Member States or evidence of cross-border activity). The Commission felt that to require cross-border participation from the start would significantly reduce the potential of the SPE as a company form particularly amongst small businesses. It found that just 8% of small businesses engage in cross-border trade.

The minimum capital requirement of just €1 is a departure from the traditional approach of many civil law jurisdictions that have strict minimum capital requirements well above this minimum. However, studies have shown that creditors look at other aspects than capital, such as cash flow, personal guarantees and retention of title clauses to protect their interests.

Shareholders will have the power to decide on the internal management structure and governance of the SPE through articles of association. As in private limited companies in Ireland, these articles will form the constitution of the SPE and may only be varied by a qualified majority vote. The proposed Regulation suggests that a majority vote should be at least 2/3 of shareholders but the shareholders through the articles of association may provide for a larger majority. Irish company law presently requires a 75% majority to change the memorandum and/or articles of association of a private limited company.

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Email marketing- free to do as you please?

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Following the protection introduced by the Government Bank Guarantee Plan, the Financial Regulator fined Irish Nationwide €50,000 after an email was sent to at least one leading global bank seeking new deposits. The email represented the society as one of the safest places to deposit money in Europe at the current time.

The Regulator found that Irish Nationwide had failed to act in a professional manner with regard to the integrity of the financial market and had breached the Regulator's Consumer Protection Code. This code applies to firms regulated by the Financial Regulator and includes banks, building societies, insurance companies and mortgage intermediaries amongst others.

E-mail marketing is attractive because it costs nothing and is easy to do, however regulators are ever vigilant. Recently a Dublin marketing firm analysed a number of e-mail newsletters sent by firms and found that 80% failed to include their registered company number, while 60% failed to include their street address. Under the Companies Acts these mistakes can lead to a fine of up to €2,000.

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Bankruptcy - are you worried about your debts?

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Many people feeling the strain of the recession are worried about their debts. Bankruptcy applies to individuals unable or unwilling to pay their debts. However, it is relatively uncommon in Ireland. Bankruptcy is initiated by creditors in order to force the debtor to repay monies due or compel settlement of the debt.

A sole trader does not have the protection of limited liability and so is personally liable for all the debts of the business. Company directors are not normally pursued in bankruptcy except where they have given personal guarantees on behalf of the company.

The main provisions of bankruptcy law in Ireland are contained in the Bankruptcy Act 1988 ("the Act"). In order for a person to be adjudicated bankrupt, he must commit an act of bankruptcy. The two most common acts of bankruptcy occur when a court makes an order for the seizure of goods which is returned by the sheriff marked "no goods" or a debtor fails to pay a debt within 14 days of a creditor's bankruptcy summons being served on him.

A person who is adjudicated bankrupt loses the capacity to deal with their property and assets. These vest in the Official Assignee who is an officer of the court charged with realising the assets for the benefit of creditors. The consequences of adjudication include the following:-

- All assets vest automatically in the Official Assignee;
- Salary or income is liable to be attached in favour of the Official Assignee;
- A bankrupt cannot act as a director or take an active part in the management of a company.

What to do if debt proceedings arrive

As a debtor, prior to bankruptcy proceedings being issued, you are likely to receive written notification that the creditor intends to issue court proceedings. When you receive a warning, you should examine the amount of the debt and if it is incorrect or some other dispute exists between you and the creditor, you should immediately contact the creditor or his solicitor. If only part of the debt is disputed, you should

pay the amount that is not disputed, as this immediately reduces the total amount of the debt which should automatically reduce both any interest payable and legal costs.

If you cannot pay the full amount immediately, you should offer to pay as much as you can with an offer to pay the balance by a certain date or by instalments. As court proceedings are time consuming and expensive, creditors often favour settlement over proceedings.

Dealing with property

If a person is adjudicated bankrupt there are legal avenues available to the Official Assignee to avoid pre-bankruptcy changes to assets or actions that may affect the total assets available to the creditors.

If a transfer of property or a payment is made to a particular creditor to reduce an obligation by a person who is adjudicated bankrupt within the following 6 months, this payment or transfer may be deemed to be a fraudulent preference of one creditor over another and the payment or transfer may be set aside.

A gift of money, goods or property e.g. a family home to a spouse may be set aside if a person is adjudicated bankrupt within two years of the gift. When making a gift of property it is recommended that the gift is accompanied by a declaration of solvency from the donor.

Where a family home is held jointly, the Official Assignee will hold the part interest of the bankrupt and may apply to the Court for an order for sale to realise the value of the portion owned by the bankrupt. It is at the Court's discretion whether to make such an order.

If a person sells any property or goods at undervalue within 3 months of adjudication or substantially reduces the assets available for the Official Assignee, the sale will be void unless the purchaser acted in good faith without notice of any act of bankruptcy.

If you are concerned about your financial position you should consult a solicitor or financial advisor.

Please tear along perforated line & keep

Pensions Board on the prowl!

Erika O'Leary,
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The Pensions Board is the statutory regulator for PRSAs (Personal Retirement Savings Accounts) and Occupational Pension Schemes. They ensure that employers providing Schemes, or access to Schemes, satisfy the requirements imposed on them by legislation.

PRSAs

Over the course of 2008, the Pensions Board have prosecuted a number of companies for failure to comply with their PRSA disclosure obligations. Section 18(2) of the Pensions Act 1990 ("the Act") requires employers to furnish the Board with information and explanations when requested. During 2008 the Pensions Board increased monitoring of compliance. While it is their policy to achieve compliance by co-operation, the Board will pursue a breach through criminal prosecution.

In April the Board prosecuted a Wexford based company leading to a fine of €300 and €700 in costs for failure to provide information that was requested. In October the Board successfully prosecuted a Dublin company leading to the maximum fine of €5,000 and costs of €1,695 to Boardside Limited trading as Slatтеры. This company had failed to provide the names of the Occupational Pension Schemes established for their employees.

If an employer does not offer an Occupational Pension Scheme, Section 121 of the Act requires that the employer provide access to a standard PRSA. In this case the Company had also failed to provide a copy of their contract with the PRSA provider (insurance company, investment firm or credit institution). They also neglected to provide a copy of the notification that should have been sent to any employee not entitled to an Occupational Pension Scheme, informing them of their right to contribute to a standard PRSA.

Access to at least one standard PRSA must be provided where the employer does not provide an Occupational Pension Scheme or operates an Occupational Pension Scheme where certain employees are excluded.

Access to a PRSA involves:

1. Notifying employees of their right to

contribute to the Scheme;

2. Making the necessary payroll deductions and channelling these contributions into the PRSA within 21 days following the end of the month in which the deductions were made; and
3. Allowing the PRSA Provider and employee reasonable time out of the working day, if required, to make arrangements to establish a PRSA.

In turn the employer enters into contractual arrangements with the PRSA provider to facilitate their employee's participation. The employer is neither under any obligation to make contributions to the PRSA nor can they be held responsible for the investment performance.

Occupational Pension Schemes

For those employers who offer Occupational Pension Schemes to their employees, either Defined Benefit Schemes or Defined Contribution Schemes, they too must be aware of the Pension Board's powers.

This year the Board obtained a High Court judgement against an Irish construction company for €186,000 in pension arrears together with a warrant for the arrest of one of the company directors. Arising out of a complaint that the construction company, Limestone Construction Limited, had failed to remit pension contributions deducted from their employees' wages to the Construction Workers' Pension Scheme (CWPS), the Board launched an investigation. The Board discovered that they had been deducting pension contributions from nearly 200 employees' but failed to pay it to the CWPS. In addition, the company was also found not to have paid the employees' contributions.

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Breaking News

Mandatory Reporting of Data Breaches

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There has been a proliferation of reports of private and public bodies losing laptops, BlackBerrys and other portable devices containing personal information of members of the public.

Perhaps the most worrying aspect is that not all devices reported missing are fully encrypted. Password protection does not provide adequate security. Encryption protects data and devices from loss, theft and unauthorised access.

The Data Protection Acts 1998 to 2003 ("the Acts") grants the Data Protection Commissioner various powers to enforce data protection standards. Although the Acts oblige the taking of security measures to prevent accidental loss or destruction of personal data, the Acts do not provide a system of mandatory reporting of a loss or potential loss of data relating to members of the public.

The Minister for Justice has established a review process to examine whether changes to the Data Protection legislation are required following recent data breaches. The review group will include the Data Protection Commissioner and its first meeting is expected in the coming weeks. Mandatory reporting of data breaches and penalties will be considered and it is expected to draw upon international experience. The Minister has asked the review group to make interim recommendations.

A Private Member's Bill was introduced recently by the Opposition to insert provisions into the Acts for compulsory reporting of suspected breaches of data security to the Data Protection Commissioner. While we do not anticipate this Private Members Bill being implemented, we do foresee the introduction of mandatory data breach reporting sooner rather than later.

Credit Institutions (Financial Support) Scheme

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The Government's guarantee scheme for systemically important banks was announced on 30th September 2008. The Credit Institutions (Financial Support) Act ("the Act") was passed on 2nd October 2008 and the Credit Institutions (Financial Support) Scheme ("the Scheme") was passed by both Houses of the Oireachtas on 17th October 2008.

The main objectives of the Scheme are the maintenance of financial stability and sustainability in the Irish banking system. In achieving these objectives, it is intended to comply with EU and Competition Law.

The Guarantee

The Government has guaranteed all liabilities of the institutions that take part in the Scheme ("covered institutions") including all retail and corporate deposits not covered by the existing deposit protection schemes from 30th September 2008 until 29th September 2010. The existing deposit protection scheme in Ireland was increased to €100,000 per depositor on 20th September 2008. Therefore, any amounts over this sum of €100,000 are guaranteed by the Government until either the end of the Scheme or the withdrawal of the covered institution from the Scheme.

Each covered institution under the Scheme must pay a quarterly charge to the Government. The charge will be calculated to include the cost to the Government of the risk to the Scheme by that institution, steps taken to reduce the risk and the likely risk of default. It is intended that the Scheme will be self-financing. The Scheme also includes provisions for transparency and enforcement, representation on the bank's board of directors by the Government, and regulation of the commercial conduct of the institutions. One of the more controversial aspects of the Scheme

is the establishment of an oversight committee for remuneration of senior executives of the covered institutions. The Scheme requires that bonuses must be "measurably linked" to reductions in excessive risk taking and encouraging the long-term sustainability of the covered institution.

Competition Law

The Act excludes the merger provisions of the Competition Act 2002 from applying to any merger or acquisition of a systemically important credit institution or subsidiary. This would include all six Irish banks and Irish subsidiaries of foreign credit institutions e.g. Halifax. Where such a merger or acquisition is proposed, unlike other such transactions not involving financial institutions, it must be notified to the Minister for Finance and not the Competition Authority as is the norm.

Unlike the provisions relating to the guarantee, Section 7 of the Act is not limited in time to two years from 30th September 2008. In other words, until such time as this section of the Act is repealed, the Minister for Finance will make any decisions relating to the merger or acquisition of banking institutions in this country.

In making these decisions, the Act requires the Minister to consult the Central Bank and the Financial Regulator as he "considers necessary". If the Minister is of the opinion that the merger or acquisition of a bank is necessary to maintain the stability of the financial system in Ireland or that there would be a serious threat to the stability of the banking sector if the transaction did not proceed, he must give a certificate to this effect, to each of the parties involved in the merger or acquisition, together with the Competition Authority and the Governor of the Central Bank.

On receipt of notification of a merger, the Minister may request further information. However, he is required to publish the notification in such a manner as the Minister thinks fit and invite submissions on the notification. In addition, he must consult "urgently" with the Minister for Enterprise, Trade and Employment. The Governor of the Central Bank and the Competition Authority are required to provide advice and assistance to the Minister.

In making his decision, the Minister may proceed on two bases:-

1. The Minister may approve the merger or acquisition if it will not substantially lessen competition in markets for goods or services; or
2. Where the Minister is of the opinion that the merger or acquisition will substantially lessen competition but that the merger or acquisition is necessary for:-

- a) the maintenance of the stability of the financial system; or
- b) to avoid a serious threat to the stability; or
- c) to remedy a serious disturbance in the economy.

"Substantially lessen competition" is a test of the competitive effects of a merger or acquisition. Normally, if the effect of a transaction was to lessen competition and thus adversely affect consumer welfare, such a merger or acquisition would be rejected.

However, the Minister may approve the merger or acquisition with or without conditions or refuse to approve the transaction. The Minister may impose such conditions as he considers appropriate to facilitate competition in the markets for those goods and services.

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