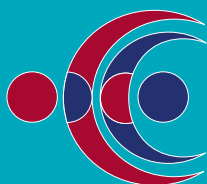


The Principal Duties and Powers of

# Company Directors

under the Companies Act



Oifig an Stiúrthóra um  
Fhorfheidhmiú Corparáideach

Office of the Director  
of Corporate Enforcement





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## 1.0 Introduction

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The Companies Act 2014 brought about some of the most significant changes in company law in fifty years. It created new forms of company, and introduced a number of changes to the roles of various parties in company law.

The Office of the Director of Corporate Enforcement (ODCE) in furtherance of its remit to encourage compliance with company law, has historically issued a range of Information Books outlining the main roles and responsibilities of some of the key parties in company law, to assist non-professionals who aspire to be better informed about their rights and obligations under the law.

These Information Books were first issued in November 2001, and the current edition represents the third major rewrite of these publications since their first publication. The current edition reflects the law as at the passing of the Companies Act 2014. The books are on the following topics:

**Information Book 1 – Companies**

**Information Book 2 – Company Directors**

**Information Book 3 – Company Secretaries**

**Information Book 4 – Members and Shareholders**

**Information Book 5 – Auditors**

**Information Book 6 – Creditors**

**Information Book 7 – Liquidators, Receivers and Examiners**

In addition to information on the relevant duties and powers, each book also contains information on the penalties for failure to comply with the Companies Act.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law more easily understandable.

The Director of Corporate Enforcement considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. These Information Books are designed to increase the awareness of individuals in relation to those duties and responsibilities.

The Director wishes to make clear that this guidance cannot be construed as a definitive legal interpretation of the relevant provisions. Moreover, it must be acknowledged that the law is open to different interpretations. Accordingly, readers should be aware that there are uncertainties in how the Courts will interpret the law, particularly when the law is applied to the specific circumstances of specific companies and individuals.

It is important to note that when readers have a doubt as to their legal obligations or rights, they should seek independent professional legal or accountancy advice as appropriate.

As changes are made to company law in the future, the Director intends to keep this guidance up to date. He also welcomes comment on its content, so that future editions can remain as informative as possible.

**Office of the Director of Corporate Enforcement  
May 2015**



## 2.0 Principal Duties and Powers of Company Directors

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### 2.1 What is a Company Director

A company director is a person appointed, usually by the members of a company, to manage the company on their behalf. The term “director” has no specific meaning but is defined under Section 2(1) of the Companies Act, as follows: ‘director’ “includes any person occupying the position of director by whatever name called”. Accordingly, a director is recognised not merely by his or her title but principally by his or her function, which depends on the nature of the company.

The primary function of the directors is to manage<sup>1</sup> the business of the company on behalf of the members.

The internal rules on corporate governance and the duties of officers of the company are now codified in the Companies Act under Part 4 and Part 5. This means that a company need not have extensive Articles in the constitution. However, if the company adopts the standard articles without any exclusions or modifications to the optional provisions as set out in those parts, all the provisions in the standard articles, including the optional provisions apply to the company and to its directors where relevant.

The main legislative provisions concerning company directors under the Companies Act are set out under Part 4 in sections 128 to 167 and under Part 5 in sections 219 to 255.

**Every person who plans to become a company director should, on or before appointment, become familiar with the legal responsibilities and obligations attaching to the position.**

### 2.2 Qualifications Required to Become a Company Director

A person requires no formal qualifications to become a company director. The Companies Act requires a company to have at least one<sup>2</sup> director. However, most companies other than an LTD<sup>3</sup>, are legally required to have at least two directors. In most instances, a director is not required to be a member (shareholder) of the company unless the constitution requires it.

#### Eligibility

Before a person can be appointed a director of a company, the company must ensure that such person is eligible to hold the position of director. Certain parties and persons are ineligible to hold office as a company director, such as:

- a body corporate<sup>4</sup> or an unincorporated body of persons;
- a person who is under the age of 18 years<sup>5</sup>;
- an undischarged bankrupt<sup>6</sup>;
- the statutory auditor of the company;
- a person disqualified from acting as a director by the Courts.

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<sup>1</sup> Section 158 Companies Act.

<sup>2</sup> Section 128 Companies Act.

<sup>3</sup> A private company limited by shares. For more information on the different types of companies, see Information Book 1 – Companies.

<sup>4</sup> Section 130 Companies Act.

<sup>5</sup> Section 131 Companies Act.

<sup>6</sup> Section 132 Companies Act.





In addition, where a person is restricted in acting as a director, the company must comply with certain capital requirements before he or she can so act. The topics of disqualification and restriction are dealt with in detail in Appendix B to this book.

## 2.3 Types of Company Director

The following are legal categories of company directors.

### **Shadow Directors<sup>7</sup>**

Any person, other than a professional adviser, in accordance with whose directions or instructions the directors of a company are accustomed to act is a 'shadow director'. A 'shadow director' will be treated as a director of the company for the purposes of Part 5 of the Act<sup>8</sup>. In addition under section 231 they have additional duties to disclose any interest in a contract s/he or a connected person has with the company whether directly or indirectly, by writing to the directors to inform them. Many of the legal responsibilities of a director apply to "shadow directors".

### **De Facto Directors<sup>9</sup>**

A 'de facto director' is a person who occupies the position of director of a company but who has not been formally appointed or who is disqualified but who in effect occupies the position of, and acts as if he were, a director. Such persons, although not formally appointed, for the purposes of section 2(1) of the Companies Act, will be treated as a director of the company.

### **Alternate Directors<sup>10</sup>**

A director of a company may appoint any other director of the company as an alternate director or, with the approval of a majority of its directors, any other person as an alternate director. Any appointment as an "alternate director" will be effected by notice in writing given by the appointer to the company. The appointment may be revoked at any time by the appointer or by a majority of the other directors or by the company in general meeting.

### **Managing Directors<sup>11</sup>**

The directors of a company may from time to time appoint one or more of themselves to the office of managing director for such period and on such terms as to remuneration and otherwise as they see fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. The directors may confer upon the managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit.

In addition to the legal categories of director as set out above, other terms are used in business to describe company directors. In practice company directors are generally categorised as either being 'executive directors' or 'non-executive directors'. However, it is important to note that these are not defined classifications set by the Companies Act, rather they are distinctions drawn under corporate governance best practice. Regardless of whether an individual is an executive or non-executive director, they have exactly the same legal responsibilities under the Companies Act.

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<sup>7</sup> Section 221 Companies Act.

<sup>8</sup> Companies Act Part 5 – Duties of Directors and other Officers.

<sup>9</sup> Section 222 Companies Act.

<sup>10</sup> Section 165 Companies Act.

<sup>11</sup> Section 159 Companies Act.



### Executive Directors

Executive directors are directors of the company who are involved in the day to day management of the company. As these individuals are involved in the management of the company they may, in practice, have specific titles within the company, for example, managing director, finance director, marketing director etc.

### Non-Executive Directors

Non-executive directors are not involved in the day to day management of the company and are appointed from outside the company. The rationale behind appointing non-executive directors is that, as they are not involved in the day to day management of the company, they can bring an independent voice and perspective to the board.

## 2.4 What are Company Directors' Duties and Obligations

Company directors' responsibilities are wide and diverse. Their duties arise primarily from two sources: statute (i.e. Acts of the Oireachtas and other legislation e.g. EU Regulations) and common law. A director on appointment consents to the role and signs a statement to the effect that:

*"I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law"*<sup>12</sup>

As the vast majority of Irish companies are private companies, there are a substantial number of companies of which the directors and members are one and the same. Under such circumstances, the distinction between the company's property and the director/member's own property can be a matter of some confusion with the result that the directors treat company property as though it was their own.

A company director stands in a special relationship to the company of which they are an officer. This special position is known as a 'fiduciary position' and the director is known as a 'fiduciary'. A fiduciary is required to act in a manner which is legally becoming of their office and which places the interests of the company ahead of their own. Perhaps somewhat surprisingly to many, a director's duties are usually owed in the first instance to the company and not to the members, creditors or employees of the company. Where, however, a director expressly undertakes certain obligations to shareholders, he or she may stand in a fiduciary relationship to them and owe them fiduciary duties. This may particularly be the case in a small private company where shareholders often look to the directors for advice.

When a company is insolvent<sup>13</sup> (i.e. is unable to pay its debts as they fall due), a director will owe a duty to the company's creditors (i.e. people to whom the company owes money).

A director is also obliged to have regard to the interests of the company's employees. However, this duty may not be enforced by the employees themselves and is instead owed to the company.

## 2.5 Directors' Fiduciary Duties<sup>14</sup>

Directors' fiduciary duties are based on certain common law rules and equitable principles owed to a company by its directors. The principal fiduciary duties of a company director are owed to the company, and the company alone<sup>15</sup>.

<sup>12</sup> Section 223 Companies Act.

<sup>13</sup> Section 570 Companies Act.

<sup>14</sup> Section 227 Companies Act.

<sup>15</sup> Section 227(1) Companies Act.



The principal fiduciary duties of a company director<sup>16</sup> are to:

- act in good faith in what the director considers to be the interest of the company;
- act honestly and responsibly in relation to the conduct of the affairs of the company;
- act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- not benefit from or use the company's property, information or opportunities for his or her own or anyone else's benefit unless the company's constitution permits it or a resolution is passed in a general meeting;
- not agree to restrict the director's power to exercise an independent judgment unless this is expressly permitted by the company's constitution;
- avoid any conflict between the director's duties to the company and the director's other interests unless the director is released from his or her duty to the company in relation to the matter concerned;
- exercise the care, skill and diligence which would be reasonably expected of a person in the same position with similar knowledge and experience as a director. A director may be held liable for any loss resulting from their negligent behaviour.

A director of a company appointed or nominated by a member who has an entitlement to do so under the company's constitution or a shareholders agreement may have regard to the interest of that particular member of the company.<sup>17</sup>

A director of a company who acts in breach of his or her fiduciary duties and benefits or profits from the company's property, information or opportunities for his or her own or anyone else's benefit will be liable to account to the company for any gain and/or indemnify the company for any loss or damage resulting from that breach<sup>18</sup>.

A director of a company owes his or her fiduciary duty to the company and the company alone<sup>19</sup>. Any breach by a director of their fiduciary duties will not of itself affect the validity of any contract or other transaction, or the enforceability of any such contract. The fiduciary duties of a director are based on certain common law rules and equitable principles as they apply in relation to a director and can be enforced through the courts. A court hearing such proceedings, having regard to all the circumstances and the wrong concerned, has the power of granting relief either wholly or partly to the officer concerned<sup>20</sup>.

A director is, in general, justified in delegating duties to other officials of the company (for example to the company's management) where such duties may properly be left to such officials, having regard to the articles of association of the company and the nature of its business. A director, while not bound to give continuous attention to the affairs of the company, should attend meetings in circumstances where he or she is reasonably able to do so.

Where a director abuses their powers, any action taken is invalid but may be subsequently ratified by a general meeting of the members of the company.

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<sup>16</sup> Section 228 Companies Act.

<sup>17</sup> Section 228 (3) & (4) Companies Act.

<sup>18</sup> Section 232 Companies Act.

<sup>19</sup> Section 227 Companies Act.

<sup>20</sup> Section 233 Companies Act.



## 2.6 Directors' Statutory Duties

Directors' statutory duties arise from the Companies Act and related legislation, for example EU Regulations etc. This section gives a general guide to the principal duties imposed by the Companies Act only.

### 2.6.1 Duties as a Company Officer

It is the duty of each director of a company to ensure that the Companies Act is complied with by the company<sup>21</sup>. An officer is in default if he or she is in breach of their duty as an officer of a company or authorises or permits a default to take place<sup>22</sup>. A default includes a refusal to do a thing or contravention of a provision in the Companies Act.

Where a director, in purported compliance with any provision of the Companies Act, answers a question, provides an explanation, makes a statement or completes, signs, produces, lodges or delivers any return, report, certificate, balance sheet or other document that is false in a material particular, and he or she knows that it is false or is reckless, they are in breach of the Act and are guilty of a category 2 offence.<sup>23 24</sup>

Where an officer of a company destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification, of any book or document affecting or relating to the property or affairs of the company or makes a false entry in any such document, they are in breach of the Companies Act and are guilty of a category 2 offence<sup>25</sup>.

Where an officer of a company fraudulently parts with, alters, or makes an omission in any book or document affecting or relating to the property or affairs of the company or are party to the fraudulent parting with, fraudulent altering or fraudulent making of an omission in any such book or document they are in breach of the Companies Act and are guilty of a category 2 offence<sup>26</sup>.

### 2.6.2 Duty to Keep Adequate Accounting Records<sup>27</sup>

Every company is obliged to keep or cause to be kept adequate accounting records. It is a criminal offence for any director of the company to fail to take all reasonable steps to ensure compliance with this requirement.

Adequate accounting records are those that are sufficient to:

- correctly record and explain the transactions of the company;
- enable, at any time, the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy;
- enable the company's directors to ensure that any financial statements of the company required to be prepared comply with the Companies Act, and where applicable, Article 4 of the IAS Regulation<sup>28</sup>; and
- enable those financial statements of the company so prepared to be properly audited.

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<sup>21</sup> Section 223 Companies Act.

<sup>22</sup> Section 270 Companies Act.

<sup>23</sup> Section 876 Companies Act.

<sup>24</sup> See Section 3.0 Penalties under the Companies Act.

<sup>25</sup> Section 877 Companies Act.

<sup>26</sup> Section 878 Companies Act.

<sup>27</sup> Section 281 Companies Act.

<sup>28</sup> "IAS Regulation" means Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 and Article 4 relates to a private company limited by shares.



The accounting records must be kept on a continuous and consistent basis, that is to say the entries made in them must be made in a timely manner and be consistent from one period to the next. If those records are not kept by making entries in a bound book but by other means, adequate precautions must be taken for guarding against falsification and facilitating discovery of such falsification, should it occur<sup>29</sup>. The accounting records kept must contain:

- entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure takes place;
- a record of the company's assets and liabilities;
- if the company's business involves dealing in goods (i.e. stocks):
  - a record of all goods purchased and sold (except those goods sold for cash by way of ordinary retail trade) showing the goods, sellers and buyers in sufficient detail to enable the goods, sellers and buyers to be identified and a record of all the invoices relating to such purchases and sales; and
  - a statement of stock held by the company at the end of each financial year and all records of stocktakes on which such statements are based;
- where the company's business involves the provision or purchase of services, a record of the services provided or purchased, to whom they were provided or from whom were purchased (unless provided or purchased by way of ordinary retail trade) and all the invoices relating thereto.

The accounting records should be kept at the company's registered office or at such other place as the directors think fit<sup>30</sup>.

If a company, that is being wound up, is unable to pay all of its debts and, has contravened any of sections 281 to 285 of the Companies Act (obligation to keep adequate accounting records), if the court considers that such contravention has contributed to the company's inability to pay all of its debts, or resulted in substantial uncertainty as to the assets and liabilities of the company or substantially impeded the winding up, the court if it thinks it proper to do so may hold the officers and former officers of the company personally liable, without any limitation of liability<sup>31</sup>, for all or such part as is specified of the debts and other liabilities of the company.

### 2.6.3 Duty to Prepare Financial Statements<sup>32</sup> (Annual Accounts)

The directors of a company are required to prepare financial statements in respect of each financial year. The annual financial statements are prepared from the information contained in the company's accounting records and other relevant information. The directors must not approve the financial statements of a company unless they are satisfied they give a true and fair view (see below) of the assets, liabilities and financial position as at the financial year end. The financial statements (sometimes known as the company's accounts), normally include the following, some of which are required by law and others of which are required by accounting standards:

- Profit and loss account: this is a statement of performance of the company showing revenue, expenses, gains and losses earned and incurred by the company during a period in a manner required by the financial reporting framework adopted by the company;
- Balance sheet: this is a statement of assets, liabilities and financial position drawn up at a particular date showing the assets, liabilities and equity of the company at that point in time;

<sup>29</sup> Section 282(2) Companies Act.

<sup>30</sup> Section 283 Companies Act.

<sup>31</sup> Section 609 Companies Act.

<sup>32</sup> Sections 290-295 Companies Act.



- Cash flow statement: this is a statement of the company's cash inflows and outflows over a period of time. The cash flow statement is not a legal requirement. However, it is a requirement under accounting standards but is not required in the case of 'small' companies. The criteria to qualify as a 'small' company are set out in Appendix A to Information Book 1 – Companies;
- Accounting policies: A company is required to disclose<sup>33</sup> in the notes to the financial statements the accounting policies adopted by the company in determining the items and amounts to be included in its profit and loss account and its balance sheet;
- Notes to the financial statements: these contain more detailed information relating to figures appearing in the profit and loss account, balance sheet or cash flow statement e.g. analysis of fixed assets and depreciation, analysis of the creditors figure etc.;
- Directors' Report: The directors of a company are obliged to prepare a report<sup>34</sup> each financial year for the members. The directors report must be approved by the board of directors and signed on behalf of the board by two directors or if there is only a single director, by that director. The report should deal with general matters of the company, a business review, information on the acquisition or disposal of shares and relevant audit information. The report is required to address certain matters, namely:
  - Directors' report general matters<sup>35</sup> which include;
    - the names of the directors during the financial year, the principal activities of the company, a statement in relation to compliance with keeping of accounting records and the exact location of those records and amounts paid, if any, as interim or final dividend;
    - particulars of any important event affecting the company since the financial year end, activities if any in the field of research and development, an indication of the existence of branches outside the state and disclosure of any political donations;
    - description of the use of financial instruments by the company and in particular financial risk management objectives and policies including the policy of hedging forecasted transactions and exposure of the company to price risk, credit risk, liquidity risk and cash flow risk.
  - Directors' report business review<sup>36</sup>:
    - the directors' report will contain a fair review of the business of the company, and a description of the principal risks and uncertainties facing the company;
    - the review should be a balanced and comprehensive analysis of the performance of the business and the assets and liabilities and financial position of the company at the end of the financial year, consistent with the size and complexity of the business;
    - The report should list shares and debentures held by the directors and any acquisition or disposal by directors of their shares or debentures during the year.
  - Directors' statement on relevant audit information<sup>37</sup>:
    - the directors' report will contain a statement to the effect that as far as the directors are aware, there is no relevant audit information of which the company's statutory auditors are unaware; and
    - the directors have taken all the necessary steps to ensure that the company's statutory auditor is aware of any relevant audit information of the company.

<sup>33</sup> Section 321 of the Companies Act.

<sup>34</sup> Section 325 of the Companies Act.

<sup>35</sup> Section 326 Companies Act.

<sup>36</sup> Section 327 Companies Act.

<sup>37</sup> Section 330 Companies Act.



## 2.6.4 What does “True and Fair View” Mean

Reference in the Companies Act to financial statements giving a “true and fair view” means<sup>38</sup>:

- In the case of Companies Act entity and group financial statements, that the financial statements give a true and fair view of the assets, liabilities, financial position and profit or loss of the company alone in the case of an entity<sup>39</sup> and in the case of group financial statements the company and its subsidiary undertakings<sup>40</sup>;
- In the case of IFRS<sup>41</sup> entity and group financial statements, that the financial statements present fairly the assets, liabilities, financial position, financial performance and cash flows of the company or group concerned.

In order for a set of financial statements to give a true and fair view, they would be expected to:

- be prepared using accounting policies that are appropriate in the circumstances of the company;
- incorporate judgment as to valuation, disclosure, and materiality that aim to give a true and fair view;
- be prudent in the consideration of matters of judgment in the financial statements, especially where there is uncertainty; and
- ensure that the financial statements reflect the commercial substance of transactions, and not just their legal form.

## 2.6.5 Obligation to have Statutory Financial Statements Audited<sup>42</sup>

Directors’ of a company are obliged to arrange for the company’s statutory financial statements to be audited by a statutory auditor, unless the company is entitled to, and chooses to avail itself of, audit exemption<sup>43</sup>. An audit is an independent examination of the financial statements by an independent professional (an auditor). Having conducted an examination of the financial statements, the auditor is required to report to the members of the company. In that report, the auditor is required to form an opinion on a number of matters including, for example whether the financial statements give a true and fair view<sup>44</sup> and whether the financial statements are in agreement with the underlying accounting records. The contents of auditors’ reports are dealt with in detail in Information Book 5 – Auditors. Certain companies can be exempted from the requirement to have an annual audit provided that they comply with certain conditions<sup>45</sup>. The criteria that must be satisfied are set out in Information Book 1 (section 2.10.3).

## 2.6.6 Duty to Maintain Certain Registers and Other Documents

Every company has a legal obligation to maintain certain registers and other documents. Company directors are responsible for ensuring that companies comply with their obligations in this regard and, consequently, directors are responsible for ensuring that these records are maintained, updated as appropriate and made available to the appropriate parties.

Directors are responsible for ensuring that the following registers and other documentation are maintained by the company:

- register of members<sup>46</sup>;
- register of directors and secretaries<sup>47</sup>;

<sup>38</sup> Section 274(2) Companies Act.

<sup>39</sup> Section 291 Companies Act.

<sup>40</sup> Section 294 Companies Act.

<sup>41</sup> IFRS means International Financial Reporting Standards.

<sup>42</sup> Section 333 Companies Act.

<sup>43</sup> Section 360 Companies Act.

<sup>44</sup> Section 336(3) Companies Act.

<sup>45</sup> Section 360 Companies Act.

<sup>46</sup> Section 169 Companies Act.

<sup>47</sup> Section 149 Companies Act.



- register of directors' and secretary's interests<sup>48</sup>;
- register of debenture holders<sup>49</sup>;
- minute books<sup>50</sup>;
- directors' service contracts<sup>51</sup>;
- contracts to purchase own shares<sup>52</sup>;
- individual and group acquisitions share register<sup>53</sup> (PLC's only).

Directors should refer to section 2.10.4 of Information Book 1 where the information required to be included in these registers is set out in detail.

### 2.6.7 Duty to File Certain Documents with the Registrar of Companies

Company directors are legally obliged to ensure that certain documents are filed with the Registrar of Companies. Some documents are required to be filed annually by every company, for example an annual return while others are required to be filed to notify of an event or a change of circumstances.

Once filed with the Registrar, these become public documents and are open to inspection by any member of the public at the Companies Registration Office. Set out below is a list of those documents more commonly required to be filed with the Registrar.

- Annual return<sup>54</sup>;
- Change of registered office<sup>55</sup>;
- Notice of alteration or increase of share capital<sup>56</sup>;
- Notice of increase in nominal (authorised) capital<sup>57</sup>;
- Change of director and/or secretary or of their particulars<sup>58</sup>;
- Notification where a person has been authorised to bind the company<sup>59</sup>;
- Notification where company fails to send prescribed form to the Registrar that a person has ceased to be a director or secretary<sup>60</sup>;
- Nomination of a new annual return date<sup>61</sup>;
- Notification of the creation of a mortgage or charge<sup>62</sup>;
- Memorandum of satisfaction of charge<sup>63</sup>;
- Ordinary and special resolutions and agreements<sup>64</sup> (see Information Book 4 – Members and Shareholders);

<sup>48</sup> Section 267 Companies Act.

<sup>49</sup> Section 1121 Companies Act.

<sup>50</sup> Section 199 Companies Act.

<sup>51</sup> Section 154 Companies Act.

<sup>52</sup> Section 112 Companies Act.

<sup>53</sup> Section 1061 Companies Act.

<sup>54</sup> Section 343 (2) Companies Act.

<sup>55</sup> Section 50 Companies Act.

<sup>56</sup> Section 92 & 93 Companies Act.

<sup>57</sup> Section 116 Companies Act.

<sup>58</sup> Section 149(8) Companies Act.

<sup>59</sup> Section 39(1) Companies Act.

<sup>60</sup> Section 152 Companies Act.

<sup>61</sup> Section 346 Companies Act.

<sup>62</sup> Section 409 and 413 Companies Act.

<sup>63</sup> Section 416 Companies Act.

<sup>64</sup> Section 198 Companies Act.







A director becoming disqualified under the law of another state<sup>65</sup> is deemed to be a change among the directors. The company must notify the Registrar of the jurisdiction in which the director has become disqualified, the date on which they became disqualified and the timeframe of the disqualification.

### 2.6.8 Duty of Disclosure

Directors are required to disclose the following:

- certain personal information in the register of directors and secretaries. The information required is name, date of birth, address, nationality, occupation and details of any other directorships<sup>66</sup>;
- interests in shares of the company or related companies in the register of directors' interests<sup>67</sup>;
- duty of director to disclose payments in connection with share transfers<sup>68</sup>;
- copies of directors' service contracts and copies of all memorandum of contract of service and any variation thereof must be available for inspection<sup>69</sup>;
- where a director, whether directly or indirectly, has an interest in any way in a contract or proposed contract with the company, they are required to declare the nature of that interest at a meeting of the directors of the company<sup>70</sup>.

### 2.6.9 Duty to Convene General Meetings of the Company

Company law provides for two types of meeting of a company, namely an Annual General Meeting and an Extraordinary General Meeting. General meetings of the company are meetings of the members and the directors at which certain company business is conducted.

#### Annual General Meeting (AGM)<sup>71</sup>

In general, a company is required to hold an annual general meeting (AGM) every calendar year and not more than 15 months should elapse between each meeting. Certain companies (such as a "single member company"<sup>72</sup> and an LTD) may dispense with the holding of an AGM. In the case of an LTD<sup>73</sup> this is effected when all the members entitled to attend and vote at the meeting sign a written resolution to that effect before the latest date for holding the meeting.

An AGM will normally be held in the State, unless all of the members entitled to attend and vote consent in writing to its being held outside the State<sup>74</sup>. Not less than 21 days' notice is required for the calling of an AGM<sup>75</sup>.

The directors are required to place the company's audited financial statements before the members at each AGM (or unaudited financial statements where the company is eligible to, and has decided to, avail of audit exemption). The directors' report must also be annexed to the financial statements presented to the members at the AGM (the matters that must be addressed in the directors' report are set out in section 2.6.3 above).

<sup>65</sup> Section 150 Companies Act.

<sup>66</sup> Section 149(3) Companies Act.

<sup>67</sup> Section 261- 264 Companies Act.

<sup>68</sup> Section 253 Companies Act.

<sup>69</sup> Section 154 Companies Act.

<sup>70</sup> Section 231 Companies Act.

<sup>71</sup> Section 175 Companies Act.

<sup>72</sup> Section 196 Companies Act.

<sup>73</sup> Section 175(3) Companies Act.

<sup>74</sup> Section 176 Companies Act.

<sup>75</sup> Section 181 Companies Act.



### Extraordinary General Meetings (EGM)<sup>76</sup>

All general meetings of a company, other than the AGM, are called extraordinary general meetings (EGM's). EGM's are normally organised to deal with special business or matters outside the normal business conducted at an AGM. The directors of a company may convene an EGM whenever they consider it appropriate. A member or members holding 50% or more of the paid up share capital of the company may also convene an EGM<sup>77</sup>. Members holding 10% or more of the paid up share capital of the company may request the directors to convene an EGM. Not less than 7 days' notice<sup>78</sup> is required for the calling of an EGM.

### 2.6.10 Substantial Non-Cash Transactions Involving Directors<sup>79</sup>

Directors have certain responsibilities and obligations where they enter into transactions with the company of which they are a director. Where a director of a company or its holding company or a person connected with a director acquires, or is to acquire, one or more non-cash assets from, or sells an asset to, the company and the value of the asset is €5,000 or over and exceeds:

- €65,000 or;
- 10% of the company's "relevant assets", which means the net assets as determined by reference to the accounts prepared and laid before the AGM in respect of the last preceding financial year in respect of which accounts were so laid (or the called up share capital where no accounts have been prepared and laid).

The arrangement must first be approved by a resolution of the company in a general meeting. If the director or connected person is a director of the holding company or a person connected with such a director, the arrangement must be approved by a resolution in a general meeting of the holding company.

Where a company enters into a transaction in contravention of this provision, the arrangement is voidable at the instance of the company unless the company has been indemnified<sup>80</sup> for any loss resulting and the director accounts to the company for any gain made directly or indirectly.

The prohibition in relation to any arrangement for the acquisition of non-cash assets does not apply<sup>81</sup> if it is acquired:

- by a holding company from any of its wholly owned subsidiaries; or
- from a holding company by any of its wholly owned subsidiaries; or
- by one wholly owned subsidiary of a holding company from another wholly owned subsidiary of that holding company; or
- by a person who is a member of the company and the arrangement is made in the character of such a member; or
- If the arrangement is entered into by a company which is being wound up (excludes members voluntary winding-up); or
- If the arrangement involves the disposal of a company's assets by a receiver.

<sup>76</sup> Section 177 Companies Act.

<sup>77</sup> Section 178 Companies Act.

<sup>78</sup> Section 181 Companies Act.

<sup>79</sup> Section 238 Companies Act.

<sup>80</sup> Section 232 Companies Act.

<sup>81</sup> Section 238 Companies Act.



### 2.6.11 Loans to Directors and Connected Persons

A company is generally prohibited from:

- making a loan or quasi-loan to a director of the company or its holding company or a connected person with such a director;
- entering into a credit transaction as creditor for such a director or a person so connected;
- entering into a guarantee or providing any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected;
- arranging for the assignment to it of any rights, obligations or liabilities under a transaction which if entered into by the company would be a breach of any of the above<sup>82</sup>.

This general rule is subject to a number of exceptions as follows:

- the value of the arrangement does not exceed €65,000 or 10% of the company's relevant assets<sup>83</sup> ("relevant assets" is explained in section 2.6.10 above); or
- the arrangement was entered into by the company in accordance with the "Summary Approval Procedure"<sup>84</sup> for the transaction; or
- the arrangement is an inter-group transaction<sup>85</sup> (that is, a transaction with a holding company, a subsidiary, or a subsidiary of its holding company); or
- directors' vouched expenses properly incurred
  - for the purposes of the company or
  - for the purpose of enabling the director to perform his or her duties<sup>86</sup>.

Where a company enters into an arrangement in contravention of this provision, the arrangement is voidable at the instance of the company unless the company is compensated or the arrangement is affirmed by a resolution of the company in general meeting or the rights acquired become *bona fide*<sup>87</sup>.

#### Personal Liability

If a company is being wound-up and is unable to pay its debts and the Court considers the arrangement (loan or guarantee) has contributed materially to the company's inability to pay its debts, the Court may declare that any person who benefited from the arrangement is personally liable without any limitation of liability, for all or such part as may be specified by the Court of the debts and other liabilities of the company<sup>88</sup>.

#### Offence

If a company enters into a transaction or arrangement that contravenes Section 239 of the Companies Act, any officer of the company who is in default will be guilty of a category 2 offence<sup>89</sup>.

<sup>82</sup> Section 239 Companies Act.

<sup>83</sup> Section 238(2) Companies Act.

<sup>84</sup> Section 202 Companies Act (Summary Approval Procedure means the procedure whereby the authority for the carrying on of the restricted activity has been conferred by a special resolution of the company accompanied by a statutory declaration by the directors).

<sup>85</sup> Section 243 Companies Act.

<sup>86</sup> Section 244 Companies Act.

<sup>87</sup> Section 246 Companies Act.

<sup>88</sup> Section 247 Companies Act.

<sup>89</sup> Section 248 Companies Act.



### 2.6.12 Duties of Directors of Companies in Liquidation and Directors of Insolvent Companies

Directors have a number of duties and responsibilities where the company of which they are a director is:

- insolvent i.e. unable to pay its debts as they fall due; or
- in liquidation (i.e. in the process of being legally dissolved).

#### Duties of Directors of Insolvent Companies

A director of an insolvent company can be held personally liable (without limitation of liability) for a company's debts if found liable for reckless and/or fraudulent trading<sup>90</sup>. An officer of a company will be deemed to have been guilty of reckless or fraudulent trading if:

- they were party to the carrying on of business which they ought to have known, having regard for their general knowledge, skill and experience, would cause loss to the creditors of the company, or any one of them; or
- they were party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt as it fell due.

Fraudulent trading is also a criminal offence and a person convicted of that offence may also be fined or imprisoned. A person is guilty of fraudulent trading if they are knowingly party to the carrying on of the business of a company with the intention of defrauding the creditors of the company or the creditors of any other person<sup>91</sup>.

#### Duties of Directors of Companies in Voluntary Winding-Up

Where a company is being wound up (i.e. in liquidation), the directors of the company are under a duty to co-operate with the liquidator (person appointed to liquidate the company – liquidators and winding up are dealt with in detail in Information Book 7 – Liquidators, Receivers and Examiners).

Where a director of a company which is being wound-up is found to have misapplied or wrongfully retained or become liable or accountable for any money or property of the company or has wrongfully exercised his or her lawful authority or has breached his or her duty of trust in relation to the company, proceedings can be instituted for the recovery of, or for payment of compensation to the value of, such money or property so lost<sup>92</sup>.

#### Members' Voluntary Winding-Up<sup>93</sup>

Where it is proposed to put the company into members' voluntary winding up, the directors are under a duty to make an accurate declaration of solvency<sup>94</sup> and commence the winding up in accordance with the Summary Approval Procedure<sup>95</sup>. The declaration must state the total amount of the company's assets and liabilities (within the last 3 month period) and that a full inquiry into the affairs of the company has been carried out by the declarants (directors) who have formed the opinion that the company will be able to pay its debts and other liabilities within the next 12 month period.

For "limited duration companies" or "specific purpose companies" an alternative method of members' voluntary winding up to the "summary approval procedure" may be undertaken which allows companies commence the process in accordance with Section 580 of the Companies Act.

<sup>90</sup> Section 610-611 Companies Act.

<sup>91</sup> Section 722 Companies Act.

<sup>92</sup> Sections 612 & 613 Companies Act.

<sup>93</sup> Sections 578-580 Companies Act.

<sup>94</sup> Section 207 Companies Act.

<sup>95</sup> Section 202 Companies Act.



Where a director of a company makes a declaration without having reasonable grounds for the opinion in relation to solvency, the court, may declare that the director will be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company<sup>96</sup>.

### **Creditors' Voluntary Winding-Up<sup>97</sup>**

A company may initiate a creditors' voluntary winding up by resolving that by reason of its liabilities it cannot continue its business. This winding up process must be carried out in accordance with sections 585 to 588 of the Companies Act. If default is made by the directors of the company in having a full statement of the company's affairs together with a list of creditors laid before the creditors' meeting, the directors will be guilty of a category 3 offence<sup>98</sup> and liable on summary conviction to a fine not exceeding €5,000<sup>99</sup> or 6 months imprisonment, or both. In addition, the directors must hold a creditors meeting and ensure that appropriate information is made available to the creditors. Any officer who is in default of these requirements will be guilty of a category 3 offence<sup>100</sup>.

## **2.7 Company Directors' Powers**

A company's directors act on behalf of the company. They only have powers to do what the company itself is legally entitled to do. The powers that directors have are those which have been conferred upon them by the company, under Part 4, Chapter 4 of the Companies Act, as well as any other specific powers set out in the company's constitution.

Normally, directors' powers are conferred collectively. These powers are formally exercised by a resolution at a board meeting, usually decided by a majority of votes. A company is obliged to keep minutes of proceedings of directors meetings<sup>101</sup>. Typically, a combination of the constitution of a company together with Chapter 4, Part 4, of the Companies Act provide that the directors may exercise all of the powers of the company which are not required by the Companies Act or by the constitution to be exercised by the company in a general meeting (i.e. in a meeting of the members). In such circumstances, the delegation to the directors is unrestricted, and they are entitled to do whatever the company is empowered to do.

The company cannot in a general meeting validly set aside an action taken by the directors which is within the powers conferred on them by the constitution. Similarly, the company cannot in a general meeting take any step which is delegated to the directors by virtue of its constitution.

In addition to the actual powers delegated to a director by the board, a director may also have 'ostensible authority'. That is to say, where a company holds a director out as having authority to do something or another party is led to believe that a director has the authority to commit the company in a certain way and no attempt is made to correct the impression given, the company may be precluded from subsequently denying this authority.

Where a managing director has been appointed their powers are those that have been conferred on them by the directors of the company. In conferring such powers the directors should clearly set out what power they are conferring on the managing director exclusively and what powers may be exercised concurrently by both the directors and the managing director<sup>102</sup>.

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<sup>96</sup> Section 210 Companies Act.

<sup>97</sup> Sections 585-588 Companies Act.

<sup>98</sup> Section 587(11) Companies Act.

<sup>99</sup> Class A fine means a fine not exceeding €5,000 (S. 3 Fines Act 2010).

<sup>100</sup> Section 587(10) Companies Act.

<sup>101</sup> Section 166 Companies Act.

<sup>102</sup> Section 159 Companies Act.



## 3.0 Penalties Under the Companies Act

### 3.1 Penalties for Criminal Offences

#### Court Imposed Penalties

Under the Companies Act, provision is made for two types of criminal offence, namely summary and indictable offences. A summary offence is generally of a less serious nature and is tried before a judge only in the District Court. Indictable offences are generally of a more serious nature. Indictable offences can, in the same way as summary offences, be tried in the District Court before a judge only. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences can also be tried in the Circuit Court i.e. before a judge and jury. Where this course is taken, the indictable offence is said to be prosecuted on indictment. Where an offence is prosecuted on indictment, the penalties provided for by the law on conviction are generally considerably higher than had the offence been prosecuted summarily.

Under Section 871 of the Companies Act, a person guilty of an offence under the Companies Act that is stated to be a category 1 offence shall be liable:

- on summary conviction, to a class A<sup>103</sup> fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

In general, a person guilty of an offence under the Companies Act that is stated to be a category 2 offence shall be liable:

- on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

A person guilty of an offence under the Companies Act that is stated to be a category 3 offence will be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

A person guilty of an offence under the Companies Act that is stated to be a category 4 offence will be liable on summary conviction to a class A fine.

The Court in which a conviction for an offence under the Companies Act is affirmed or recorded may order the person convicted to remedy the breach<sup>104</sup>.

However, the Companies Act also provides for considerably higher sanctions in relation to certain offences, such as:

- Transparency Directive<sup>105</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law<sup>106</sup>;

<sup>103</sup> "Class A fine" at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).

<sup>104</sup> Section 872 Companies Act.

<sup>105</sup> Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.

<sup>106</sup> Section 1382 Companies Act.

- Prospectus Directive<sup>107</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law<sup>108</sup>;
- Market Abuse Directive<sup>109</sup> – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law<sup>110</sup>.

## 3.2 Civil Penalties

### Disqualification

In addition to fines and penalties for criminal offences, there are also provisions for other sanctions under the Companies Act, such as disqualification and restriction.

Disqualification means a person being disqualified from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company<sup>111</sup>.

A person can be disqualified by way of:

- (a) Disqualification Order by the court; or
- (b) Accepting a Disqualification Undertaking – whereby the person submits to being subject to disqualification, by accepting and signing a prescribed disqualification undertaking.

### Automatic Disqualification<sup>112</sup>

A person is automatically disqualified by the court, if that person is convicted on indictment of:

- any offence under the Companies Act or any other enactment in relation to a company as prescribed; or
- any offence involving fraud or dishonesty.

A person disqualified by the court is subject to a disqualification order for a period of 5 years or other period as specified by the court. The court is obliged to send details of the disqualification order to the Registrar of Companies so that the details supplied are included in the public register of disqualified persons<sup>113</sup>.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds<sup>114</sup> including:

- guilty of two or more offences in relation to accounting records offences (section 286);
- guilty of persistent defaults under the Companies Act;
- guilty of fraudulent or reckless trading while an officer of a company.

<sup>107</sup> Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.

<sup>108</sup> Section 1356 Companies Act.

<sup>109</sup> Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005.

<sup>110</sup> Section 1368 Companies Act.

<sup>111</sup> Section 838 Companies Act.

<sup>112</sup> Section 839 Companies Act.

<sup>113</sup> Sections 863 & 864 Companies Act.

<sup>114</sup> Section 842 Companies Act.







### **Disqualification Undertaking<sup>115</sup>**

This is a new administrative procedure that provides a person (where the Director is of the opinion that certain circumstances in relation to a person apply) with an option to submit to a disqualification without the need for a court hearing. This procedure can be availed of where the Director has reasonable grounds for believing that one or more of the circumstances specified in section 842(a) to(i) of the Companies Act applies to the person<sup>116</sup>. The Director of Corporate Enforcement may, at his discretion, offer the person an opportunity to submit to a disqualification. Where the person submits to a “disqualification undertaking” and returns the disqualification acceptance document duly signed to the Director, they are deemed to be a disqualified person. The Director is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons<sup>117</sup>.

### **Restriction**

The provisions relating to the restriction of company directors<sup>118</sup> apply to insolvent companies, i.e. companies that are unable to pay their debts<sup>119</sup> as they fall due. Where a company which goes into liquidation or receivership and is insolvent, a director of the company who fails to satisfy the Director of Corporate Enforcement or the Court that he or she has acted honestly and responsibly may be restricted for a period of up to five years.

### **Restriction Undertaking<sup>120</sup>**

This is a new administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Director may, at his discretion, offer the director of an insolvent company an opportunity to submit to be restricted. The offer will include the circumstances, facts and allegations leading to the Director forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Director will send details of the “restriction undertaking” to the Registrar of Companies, for inclusion in the register of restricted persons<sup>121</sup>.

Such a restriction prevents a person from being appointed or acting in any way, directly or indirectly as a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised<sup>122</sup>. In the case of a public limited company (other than an investment company), the capital requirement is €500,000 in allotted paid up share capital, and in the case of any other company, the capital requirement is €100,000. Such a company is also subject to stricter rules in relation to capital maintenance.

A person who continues in office as a director of a company on the restriction taking place without the company being adequately capitalised, will be deemed, without proof of anything more to have contravened the Companies Act and will be automatically disqualified as a director. The topic of restriction is dealt with in detail in Appendix B to Information Book 2.

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<sup>115</sup> Section 849 Companies Act.

<sup>116</sup> These are the circumstances which if the court were satisfied that they applied would result in a disqualification order, and are set out in section 862 Companies Act.

<sup>117</sup> Section 864 Companies Act.

<sup>118</sup> Section 819 & 820 Companies Act.

<sup>119</sup> Section 570 Companies Act.

<sup>120</sup> Section 852 Companies Act.

<sup>121</sup> Section 823 Companies Act.

<sup>122</sup> Section 819(3) Companies Act.





A person who acts in relation to any company in a manner or a capacity which they are prohibited by virtue of being (a) subject to a disqualification order, or (b) subject to a declaration of restriction, shall be guilty of a category 2 offence<sup>123</sup>.

#### **Strike Off<sup>124</sup>**

The Registrar of Companies may give notice of the intention to strike a company off the register on any of the following grounds:

- the company has failed to make an annual return as required; or
- there are no persons recorded as being current directors of the company; or
- the Revenue Commissioners have given notice of the company's failure to deliver a statement of particulars by new companies; or
- the Registrar has reasonable cause to believe that the company is not complying with the requirement to have a director resident in an EEA state or does not hold the requisite bond in the absence of such a director<sup>125</sup>; or
- the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting; or
- the company is being wound up and no returns have been made by the liquidator for a period of 6 consecutive months.

If a company is struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced<sup>126</sup> as though the company had not been dissolved.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies. Specific and detailed information on restoring a company to the Register is available on the CRO website – [www.cro.ie](http://www.cro.ie)

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<sup>123</sup> Section 855 Companies Act.

<sup>124</sup> Section 725 Companies Act.

<sup>125</sup> Section 137 Companies Act.

<sup>126</sup> Section 734 Companies Act.

## Appendix A

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### Appointment and Removal of Company Directors and Related Matters

#### Appointment of Directors<sup>127</sup>

The first director or directors of a company are those persons named by the subscribers in the statement<sup>128</sup> which accompanies the constitution when delivered for registration to the Registrar of Companies. Subsequent directors are appointed individually in accordance with the rules and procedures set out in sections 144 and 145 of the Companies Act as may be varied in the company's constitution. Where a company has not adopted separate rules, the directors will retire by rotation at the AGM. Each director must consent<sup>129</sup> to their appointment and sign a statement in the prescribed form to the effect that:

*"I acknowledge that, as a director, I have legal duties and obligation imposed by the Companies Act, other statutes and at common law."*

Where a director dies or resigns, the constitution generally empowers the board of directors to fill such a vacancy until the next general meeting of the company when the appointed person is eligible for re-election.

#### Removal of Directors<sup>130</sup>

The members of the company can by ordinary resolution remove a director. However, a director holding office for life as set out in the company's constitution can only be removed if the correct procedure for the alteration of the constitution is followed.

Where a resolution to remove a director is proposed, 28 days' notice must be given to the company, the director concerned and to the members, unless the constitution provides otherwise. The director concerned may make written representations on the resolution to the company and request that the representation be given to the members. The director is also entitled to be heard on the resolution at the meeting. A director who is removed cannot be deprived of compensation or damages to which they are entitled, for example, under a contract of employment.

#### Remuneration of Directors<sup>131</sup>

The Companies Act provides that company directors have the right to receive remuneration and compensation for expenses incurred and, unless a company's constitution states otherwise, the following rules apply. The remuneration of directors will be determined by the board of directors and accrue from day to day and, directors may also be paid all travelling and other expenses properly incurred by them in attending and returning from meetings or otherwise in connection with the business of the company. It is unlawful for a company to pay a director's remuneration free of income tax<sup>132</sup>.

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<sup>127</sup> Section 144 Companies Act.

<sup>128</sup> Sections 22 & 144(2) Companies Act.

<sup>129</sup> Sections 144(1) & 223 Companies Act.

<sup>130</sup> Section 146 Companies Act.

<sup>131</sup> Section 155 Companies Act.

<sup>132</sup> Section 156 Companies Act.



**Requirement to have One Director Resident in the European Economic Area (EEA)<sup>133</sup>**

Except in limited circumstances, at least one of the directors of a company must be resident<sup>134</sup> in the EEA. This rule does not, however, apply to a company which holds a bond worth €25,000. The purpose of the bond is to provide for the payment of any fines that might be imposed on the company under the Companies Act or certain fines and penalties imposed under the Taxes Consolidation Act, 1997. An exemption is allowed where the Registrar of Companies grants a certificate<sup>135</sup> stating that the company has a real and continuous link with one or more economic activities being carried on in the State. Further information on bonds is available from the Registrar of Companies.

**Limitation on the Number of Directorships<sup>136</sup>**

A person is not permitted to be a director or shadow director of more than 25 companies at any one time. However, in calculating the number of companies of which the person concerned is a director, companies in respect of which the Registrar of Companies has certified that they have a real and continuous link with an economic activity being carried out in the State are excluded, as are public limited companies and other public companies. A number of other companies such as companies quoted on the Stock Exchange, investment companies and certain banking companies are also excluded.

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<sup>133</sup> Section 137 Companies Act.

<sup>134</sup> Section 141 Companies Act.

<sup>135</sup> Section 140 Companies Act.

<sup>136</sup> Section 142 Companies Act.

## Appendix B

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### Restriction and Disqualification of Company Directors

#### Introduction

Part 14 (Chapters 3 and 5) of the Companies Act makes provision for the restriction and disqualification of company directors (and others) under certain circumstances. Restriction and disqualification are serious sanctions having important consequences for directors and are dealt with in detail below.

#### Restriction of Directors

The provisions relating to the restriction of company directors or shadow directors apply to insolvent companies<sup>137</sup> i.e. companies that are unable to pay their debts<sup>138</sup> as they fall due. Where a company which goes into liquidation or receivership is insolvent, a director of the company who fails to satisfy the Director or Corporate Enforcement or the Court that he or she has acted honestly and responsibly may be restricted<sup>139</sup> for a period of up to five years.

#### Restriction Undertaking<sup>140</sup>

This is a new administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Director may, at his discretion, offer the director of an insolvent company an opportunity to submit to be restricted. The offer will include the circumstances, facts and allegations leading to the Director forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Director will send details of the “restriction undertaking” to the Registrar of Companies, for inclusion in the register of restricted persons<sup>141</sup>.

Such a restriction prevents a person from being a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised. A company must have an allotted share capital of nominal value not less than:

- €500,000 in the case of a public limited company (other than an investment company) or a public unlimited company; or
- €100,000 in the case of any other company (including an investment company). Where a company limited by guarantee without a share capital has a restricted director, it must state in its constitution that if the company is being wound up at least one member of the company will contribute to the assets not less than €100,000.

A person who continues in office as a director of a company on the restriction taking place without the company being adequately capitalised, will be deemed, without proof of anything more to have contravened the Companies Act and will be automatically disqualified as a director.

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<sup>137</sup> Section 819(6) Companies Act.

<sup>138</sup> Section 570 Companies Act

<sup>139</sup> Section 819 Companies Act

<sup>140</sup> Section 852 Companies Act

<sup>141</sup> Section 823 Companies Act





A restricted person is required to give notice in writing of their restriction to any company they are a director of and before they accept any new appointments<sup>142</sup>.

A Court may order the restricted person to pay the cost of the application for restriction and the whole of the costs and expenses incurred by the applicant.

### **Personal Liability<sup>143</sup>**

Where a company which was notified of a restricted director carries on business without the required capitalisation or contribution, and is subsequently wound up and unable to pay its debts, the Court may declare that any person who is an officer of the company may be personally liable without limitation for the debts of the company.

### **Disapplication of Certain Provisions to a Company with a Restricted Person**

A company that has a restricted person cannot avail of the “Summary Approval Procedure” other than for a members’ voluntary winding up<sup>144</sup>. In addition, a company that has a restricted person can only enter into an agreement for the transfer of non-cash assets<sup>145</sup> when specific conditions<sup>146</sup> have been satisfied.

### **Relief from Restriction<sup>147</sup>**

On the application of a restricted person, the Court may if it deems it just and equitable grant that person relief either in whole or in part from the restriction order.

### **Person will not be Restricted<sup>148</sup>**

A person will not be restricted as a director provided that the Court is satisfied that they have acted honestly and responsibly in relation to the conduct of the affairs of the company and when requested by the liquidator cooperated in the winding up and, there is no other just and equitable reason for imposing the restrictions.

### **Offence of Contravening a Restriction Order<sup>149</sup>**

A person who is the subject of a restriction order and acts in a manner or a capacity which he or she is prohibited from doing will be guilty of a category 2 offence and be disqualified for a period of 10 years or such other period as the courts decide.

### **Disqualification of Directors**

A court may disqualify a person from acting as a director. The effect of being disqualified is that the person concerned is disqualified from acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way whether directly or indirectly, concerned or taking part in the promotion, formation or management of a company for a period of five years or such other period as the Court may direct.

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<sup>142</sup> Section 825 Companies Act.

<sup>143</sup> Section 836 Companies Act.

<sup>144</sup> Section 827 Companies Act.

<sup>145</sup> Non-cash asset means any property or interest in property other than cash (including foreign currency).

<sup>146</sup> Section 828(3) Companies Act.

<sup>147</sup> Section 822 Companies Act.

<sup>148</sup> Section 819(2) Companies Act.

<sup>149</sup> Section 855 Companies Act.



### **Offence of Contravening Disqualification Order**

A person who is the subject of disqualification order and acts in a manner or a capacity which he or she is prohibited from doing will be guilty of a category 2 offence and his or her disqualification will be extended for a further period of 10 years or such other period as the court decide.

### **Automatic Disqualification<sup>150</sup>**

A person is automatically disqualified if that person is convicted on indictment of:

- any offence under the Companies Act, or any other enactment as may be prescribed, in relation to a company; or
- any offence involving fraud or dishonesty.

Also, any person disqualified under the law of another State from being appointed or acting as a director or secretary of a body corporate or an undertaking who fails to notify the Registrar in a statement of their disqualification as required or notify the change among directors as required, will be deemed disqualified<sup>151</sup>.

### **Discretionary Disqualification Orders<sup>152</sup>**

The Court can make a disqualification order for such period as it sees fit where that person, while acting as director, promoter, statutory auditor, officer, receiver, liquidator, or examiner of a company has been guilty of any of the following:

- a fraud in relation to the company, its members or creditors;
- any breach of duty in relation to the company;
- two or more offences under Section 286 (accounting records offences, etc.);

The court also has discretion to make such an order where it is satisfied that such an order is appropriate in any of the following circumstances:

- a declaration has been granted under Section 610 of the Companies Act (civil liability for fraudulent or reckless trading) in respect of the person;
- their conduct makes them unfit to be concerned with the management of a company;
- a Court appointed inspectors' report discloses that the person is unfit to be concerned with the management of a company;
- the person has been persistently in default under the Companies Act. Persistent default is defined as being conclusively proven where there have been three or more defaults in the previous five year period<sup>153</sup>;
- the person was a director when notice was issued by the Registrar of the intention to strike off the company and the company was allowed to be involuntary struck of the register and has liabilities;
- a person disqualified under the law of another State and the Court is satisfied that, if the conduct causing that disqualification had occurred in this State, disqualification would have been appropriate.

<sup>150</sup> Section 839 Companies Act.

<sup>151</sup> Section 841 Companies Act.

<sup>152</sup> Section 842 Companies Act.

<sup>153</sup> Section 843 Companies Act.



### **Disqualification Undertaking<sup>154</sup>**

This is a new administrative procedure that provides a person (where certain misdemeanors in relation to a company have occurred) with an option to submit to a disqualification without the need of a costly court hearing. This procedure can be availed of where the Director has reasonable grounds for believing that one or more of the circumstances specified in section 842(a) to (i) of the Companies Act 2014 applies to the person. The Director of Corporate Enforcement may, at his discretion, offer the person an opportunity to submit to be subject of a disqualification. Where the person submits to a “disqualification undertaking” and returns the disqualification acceptance document duly signed to the Director, they are deemed a disqualified person. The Director is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons<sup>155</sup>.

Where a restricted person is, or becomes, a director of a company which commences to be wound up within a period of five years following the commencement of the winding up that caused the restriction and it appears to the liquidator that the company is unable to pay its debts, the Court may if it deems appropriate, disqualify that person<sup>156</sup>.

### **Relief from Disqualification<sup>157</sup>**

On the application of a disqualified person, the Court may if it deems it just and equitable grant that person relief either in whole or in part from the disqualification order.

### **Civil Consequences of Acting while Restricted or Disqualified<sup>158</sup>**

Any person guilty of acting as a director while restricted (except in those circumstances permitted by statute) or disqualified can, at the discretion of the Court, be made personally liable (without limitation of liability) for the debts of the company if the company becomes insolvent during or within a period of twelve months from the date they acted as director while restricted or disqualified.

### **Registers of Restricted and Disqualified Persons**

The Registrar of Companies is required to maintain a register of restricted persons<sup>159</sup> and a register of disqualified persons<sup>160</sup>. The Court Registrar is required to notify the Registrar of Companies when the Court grants a restriction or disqualification order against an individual. These registers are available for inspection by any member of the public and are maintained at the Registrar’s premises and on the CRO website, [www.cro.ie](http://www.cro.ie).

The Director of Corporate Enforcement also publishes details of all restriction and disqualification orders obtained by his Office (address: [www.odce.ie](http://www.odce.ie)).

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<sup>154</sup> Section 850 Companies Act.

<sup>155</sup> Section 864 Companies Act.

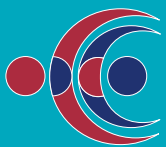
<sup>156</sup> Section 848 Companies Act.

<sup>157</sup> Section 847 Companies Act.

<sup>158</sup> Section 859 Companies Act.

<sup>159</sup> Section 823 Companies Act.

<sup>160</sup> Section 864 Companies Act.



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*Tá leagan Gaeilge den leabhrán seo ar fáil  
An Irish version of this booklet is available*