

Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

Information Book 2 **Company Directors**

Decision Notice D/2011/1

The Principal Duties and Powers of

Company Directors

under the Companies Acts 1963-2009

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1.0 Introduction

The Companies Acts 1963-2009 contain extensive provisions detailing how the affairs of companies are to be conducted. These provisions describe how the various participants in companies should discharge their duties and obligations. In addition, participants are accorded substantial rights and powers in order to enable them to assert their rights and, if necessary, defend their personal and/or corporate interests.

The Director of Corporate Enforcement is of the view that the extensive requirements of the Companies Acts make it difficult for many non-professional participants in company affairs to be well informed of their rights and obligations under the law. This has, in part, contributed to an inadequate standard of compliance with company law in the past.

Section 12(1)(b) of the Company Law Enforcement Act 2001 specifies that a function of the Director is “*to encourage compliance with the Companies Acts*”. Consistent with this remit, the Director has issued a series of information books. These Information Books were first issued in November 2001, and this edition updates those books for changes in the law up to the end of 2010. There are information books 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 & Examiners**

In addition to information on the relevant duties and powers, each book contains information on the penalties for failure to comply with the requirements of the Companies Acts and useful addresses and contact points.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law readily accessible and 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 where 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

October 2011

2.0 Principal Duties and Powers of Company Directors

2.1 What is a Company Director

A company is owned by its members (shareholders). Every company is required to have a minimum of two directors¹. Directors are usually appointed by the members of the company but can be appointed by the other directors where the articles of association allow. The directors of the company are collectively known as the ‘board of directors’.

Section 2(1) of the Companies Act, 1963 defines ‘director’ as *“including any person occupying the position of director by whatever name called”*.

The primary function of the directors is to manage the company on behalf of the members. The articles of association usually provide for the delegation of the members’ management powers to the board of directors and many of the functions of the directors are set out in a company’s articles of association. A company director may also act as the company secretary (the company secretary is dealt with in Information Book 3 – Company Secretaries).

The main legislative provisions concerning directors are set out in sections 174 to 199 of the Companies Act, 1963, Parts III, IV (Chapter 1 only) and VII of the Companies Act, 1990, sections 43 to 45 of the Company Law (Amendment) (No. 2) Act, 1999 and Parts 4 and 9 of the Company Law Enforcement Act, 2001, as amended where appropriate.

Every person appointed as a company director should, on or before appointment, become familiar with the legal responsibilities and obligations attaching to the position. This book sets out a summary of directors’ responsibilities, obligations and powers.

2.2 Qualifications Required to Become a Company Director

A person requires no formal qualifications to become a company director. A director is not required to be a member (shareholder) of the company unless the articles of association specifically so provide. Certain parties, such as bodies corporate (i.e. companies), undischarged bankrupts, the auditors of the company and disqualified persons (i.e. a person disqualified by a Court from acting as a company director) are ineligible to act as company directors.

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 director.

Shadow Directors

In addition to those who are formally appointed as directors, any person, other than a professional adviser, with whose instructions the directors of the company normally comply is a ‘shadow director’. In other words, where a person who is not a director exerts such an influence over the company’s directors that those directors are accustomed to acting in accordance with that person’s instructions, that person is a shadow director. The significance of being a shadow director is that a shadow director has many of the legal responsibilities of a director².

¹ Section 174 Companies Act, 1963.

² Section 27 Companies Act, 1990.

Alternate Directors

The Table A standard form articles make provision for 'alternate directors'. Alternate directors are persons who are nominated by a director to act in their absence. An alternate director can only be appointed with the agreement of a majority of the directors.

De Facto Directors

A 'de facto director' is a person who has not been validly appointed or who is disqualified but who in effect occupies the position of, and acts as if he were, a director. Such persons, although they may not have been validly appointed, also come within the ambit of section 2(1) of the 1963 Act.

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 legal classifications but rather 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.

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.

It should be noted that for most companies there is **no** legal obligation to appoint non-executive directors³. However, certain companies i.e. companies listed on the Stock Exchange are required to comply with codes of corporate governance best practice which do require the presence of non-executive directors on the board. Further information on the subject of corporate governance and related best practice is available on the ODCE website (www.odce.ie).

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.

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

³ Part 9 of S.I. No. 220 of 2010 requires that Public Interest Entities must establish audit committees, the members of which shall include not less than two independent non-executive directors.

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 (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 company⁴.

2.5 Directors' Common Law Duties

Directors' common law duties can be summarised into three principles:

- I. Directors must exercise their powers in good faith and in the interests of the company as a whole. Directors must not abuse their powers. They must exercise their powers in what they honestly believe to be the interests of the company as a whole or the members as a whole rather than in the interests of a particular member or members.
- II. Directors are not allowed to make an undisclosed profit from their position as directors and must account for any profit which they secretly derive from their position as director. It is not automatically a breach of a director's

duties to be involved in a business which competes with the company of which they are a director. However, where a director has a contract of employment or service contract with the company, it may be in breach of their duties of fidelity and loyalty to the company to do so.

- III. Directors are obliged to carry out their functions with due care, skill and diligence. A director is liable for any loss resulting from their negligent behaviour. However, a director need not exhibit in the performance of his or her duties a greater degree of skill than may reasonably be expected from a person of his or her knowledge and experience.

A director is, in general, justified in delegating duties to other officials of the company (e.g. 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.

2.6 Directors' Statutory Duties

Directors' statutory duties arise from the Companies Acts 1963-2009 and related legislation e.g. EU Regulations etc. This section gives a guide to the principal duties imposed by statute.

⁴ Section 52 Companies Act, 1990.

2.6.1 Duties as a Company Officer

A director, as an officer of a company, is under a duty to comply with his or her obligations under the Companies Acts and to ensure that the requirements of the Companies Acts are complied with by the company. A director is in breach of this duty where they authorise or permit a default to take place.

A director is presumed to have permitted a default by the company unless the director can establish that s/he took all reasonable steps to prevent it or, due to circumstances beyond their control, was unable to do so⁵.

Where a director, in purported compliance with any provision of the Companies Acts, answers a question, makes a statement or produces a document which he or she knows to be false or is reckless, they are in breach of the Acts.

2.6.2 Duty to Maintain Proper Books of Account⁶

Under section 202 of the Companies Act, 1990 as amended, every company is required to maintain proper books of account. The directors of the company are required to ensure that this requirement is complied with. It is a criminal offence for any director of the company to fail to take all reasonable steps to ensure compliance with this requirement.

Proper books of account should:

- correctly record and explain the transactions of the company;
- at any time, enable the financial position of the company to be determined with reasonable accuracy;

- enable the company's directors to ensure that the balance sheet and profit and loss account comply with the Companies Acts, and;
- enable the accounts to be readily and properly audited.

Books of account 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 year to the next. Section 202 of the 1990 Act stipulates that the books of account 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 take 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 of services, a record of the services provided and all the invoices relating to those services must be maintained.

The books of account should be kept at the company's registered office or at such other place as the directors think fit.

5 Section 383 of the Companies Act, 1963, as amended.

6 See also Appendix E to Information Book 1 – Companies.

If a company, which is unable to pay its debts as they fall due, is being wound up (legally dissolved) and that company has failed to maintain proper books of account, the Court can, if satisfied that the failure to maintain proper books of account contributed to the company's inability to pay its debts, hold every director in default and guilty of an offence. Furthermore, the Court may make the directors personally liable for the debts of the company⁷.

2.6.3 Duty to Prepare Annual Accounts (Financial Statements)

Generally, companies (and by extension directors) are required to prepare accounts on an annual basis.

The annual accounts are prepared from the information contained in the company's books of account and other relevant information. The accounts (also known as financial statements), which are required to give 'a true and fair view'⁸ of the company's affairs, 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 records the income and expenditure of the company over a particular period and shows the profit or loss arising from the company's activities;
- Balance sheet: this is a statement of the company's assets and liabilities at a given point in time;
- Cash flow statement: this is a statement of the company's cash inflows and outflows over a period of time. 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);

- Notes to the financial statements: these contain detailed information relating to the profit and loss account, balance sheet or cash flow statement e.g. analysis of fixed assets and depreciation;
- Directors' Report: The directors are required to annex a report to the accounts, known as a directors' report⁹. This is a report by the directors to the members of the company. It is required to address certain matters, namely:
 - the state of the company's affairs. To the extent necessary for an appreciation of the state of the company's affairs, the report should address any changes in the nature of the company's business during the year;
 - a fair review of the development of the business during the financial year;
 - particulars of any important events affecting the company which have occurred since the year end;
 - an indication of likely future developments in the business of the company;
 - an indication of the company's activities, if any, in the area of research and development;
 - the amount, if any, that the directors recommend should be paid as a dividend;
 - the steps that the directors have taken to ensure compliance with the requirement for the company to maintain proper books of account, and;
 - the exact location of the books of account.

⁷ Sections 203 and 204 Companies Act, 1990.

⁸ The term 'true and fair view' is not defined in law. However, it is generally accepted that a set of financial statements will give a true and fair view when they have been prepared in accordance with (i) the provisions of the Companies Acts, and (ii) accounting standards.

⁹ The Directors' Report is required by section 158 of the 1963 Act as amended. Its contents are prescribed by section 158 of the 1963 Act and by sections 13 and 14 of the Companies (Amendment) Act, 1986.

2.6.4 Duty to Have an Annual Audit Performed

Having prepared the financial statements, the directors are generally obliged by law to have the financial statements audited at least once a year. An audit is an independent examination of the financial statements by an independent expert (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 e.g. whether the financial statements give a true and fair view of the company's affairs and whether the financial statements are in agreement with the underlying books of account. The matters upon which auditors are required to report on 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 conditions¹⁰. The criteria that must be satisfied are set out in Information Book 1 – Companies (section 2.10.3).

2.6.5 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;
- register of directors and secretaries;
- register of directors' and secretary's interests;
- register of debenture holders;
- minute books;
- directors' service contracts;
- contracts to purchase own shares;
- register of interests of persons in its shares (public limited companies only).

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

2.6.6 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 are required to be filed by every company e.g. the annual return while others are required to be filed only in certain circumstances e.g. on the death of a director.

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 return¹¹;
- Change of registered office;
- Notice of increase in nominal (authorised) capital;

¹⁰ The criteria and procedures for audit exemption are set out in Part III of the Companies (Amendment) (No. 2) Act, 1999, as amended.

¹¹ The annual return and its contents are dealt with in Appendix A to Information Book 1 – Companies.

- Change of director and/or secretary or of their particulars;
- Declaration that a person has ceased to be a director or secretary;
- Notice that a person holding the office of director or secretary has died;
- Nomination of a new annual return date;
- Notification of the creation of a mortgage or charge;
- Memorandum of satisfaction of charge;
- Ordinary resolution (see Information Book 4 – Members and Shareholders);
- Special resolution (see Information Book 4 – Members and Shareholders).

2.6.7 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 directorships¹²;
- interests in shares of the company or related companies in the register of directors' interests¹³;
- payments to be made to them in connection with share transfers¹⁴;
- directors' service contracts with the company must be made available for inspection by any member of the company¹⁵;
- where a director has in any way an interest 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 company¹⁶. For the purposes of this requirement, a general notice given

to the other directors is deemed to be a sufficient declaration of that interest.

2.6.8 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

In general, every company is required to hold an annual general meeting (AGM) annually¹⁷. No more than 15 months should elapse between each meeting. The only exception to the requirement to hold an AGM is in the case of a single member private limited company, where the sole member may decide to dispense with the holding of an AGM¹⁸. The AGM must be held in the State unless otherwise provided for in the articles or where all the members of the company agree.

The directors are required to present audited financial statements to the members at each AGM (or unaudited financial statements where the company is eligible to, and has decided to, avail of the small company audit exemption – see Information Book 1 – Companies section 2.10.3). A report by the directors 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).

¹² Section 195 Companies Act, 1963.

¹³ Section 53 Companies Act, 1990.

¹⁴ Section 188 Companies Act, 1963.

¹⁵ Section 50 Companies Act, 1990.

¹⁶ Section 194 Companies Act, 1963 as amended.

¹⁷ Section 131 Companies Act, 1963 as amended.

¹⁸ Regulation 8(1) of European Communities (Single Member Private Limited Companies) Regulations, 1994 (S.I. No. 275 of 1994). For further information on the provisions of S.I. 275 of 1994, see Appendix F to Information Book 1 – Companies.

Extraordinary General Meetings

As the term suggests, an extraordinary general meeting (EGM) of the company deals with matters outside the normal business conducted at an AGM. Under certain circumstances, company directors are required to convene an EGM of the company e.g. directors are under a duty to convene an EGM where the company's net assets (i.e. total assets less total liabilities) have fallen to 50% or less of its called-up share capital¹⁹. Where such circumstances exist, the auditors (where an audit has been performed) are required to state in their audit report that, in their opinion, an EGM is required.

2.6.9 Directors' Duties Regarding Transactions Between the Directors and the Company

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 (i.e. a company owning in excess of 50% of the shares of the company in question) or a person connected²⁰ with a director acquires an asset from, or sells an asset to, the company and the value of that asset exceeds:

- €63,487 or;
- 10% of the company's 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 resolution of the company in a general meeting²¹. Note: this requirement does not apply where the amount in question does not exceed €1,270.

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 (i.e. can be nullified), subject to certain exceptions.

A company is generally prohibited from making a loan or quasi-loan (i.e. a transaction which is a loan in all but name) to a director of the company or its holding company or a connected person. It is also generally prohibited from entering into a credit transaction or guarantee on behalf of such a person and from providing security in relation to such a transaction²². However, this general rule is subject to a number of exceptions and savers, details of which are set out below:

- the general prohibition does not apply to loans, quasi-loans and credit transactions if the aggregate value of the arrangement and the amount(s) outstanding from any other such arrangements is less than 10% of the company's 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 10% of the called up share capital where no accounts have been prepared and laid)²³. However, where the amount(s) outstanding under any other such arrangement(s) come to exceed

¹⁹ Section 40 Companies (Amendment) Act, 1983.

²⁰ A person is connected with a director of a company if he or she is a near relative of the director, in business partnership with the director or if he or she acts as trustee for a trust the principal beneficiaries of which are the director, his near relatives or a company which he controls. A company is connected with a director if it is controlled by that director. Furthermore, it is presumed that the sole member of a single member company is connected with a director of that company.

²¹ Section 29 Companies Act, 1990.

²² Section 31 Companies Act, 1990.

²³ Section 32 Companies Act, 1990.

10% of the company's net assets for any reason including because the value of those assets has fallen, the directors are required within two months of becoming aware of the situation to amend the terms of the arrangements concerned in order to bring the value of loans back within the limit²⁴.

- the general prohibition does not preclude a company from entering into a guarantee or providing any security in connection with a loan, quasi-loan or credit transaction made by any other person for a director of a company or of its holding company if²⁵:
 - the entering into the guarantee is, or the provision of security is, given under the authority of a special resolution of the company, and;
 - the company has provided, with each notification of the general meeting at which the matter is to be considered, a statutory declaration setting out the following information;
 - the circumstances in which the guarantee is to be entered into or the security provided;
 - the nature of the guarantee or security;
 - the person(s) to or from whom the loan, quasi-loan or credit transaction is to be made;
 - the purpose for which the company is entering into the guarantee or is providing security;
 - the benefit which will accrue to the company directly or indirectly from entering into the guarantee or providing the security;

- the persons making the declaration have made a full inquiry into the affairs of the company and that, having done so, are of the opinion that the company will, having entered into the guarantee or provided the security, be able to pay its debts as they fall due.

The statutory declaration must also be submitted to the Registrar of Companies and is required to be accompanied by a report from the company's auditors stating whether, in their opinion, the declaration is reasonable.

Where a company director makes such a statutory declaration without having reasonable grounds for the opinion that, having entered into the guarantee or security, the company will be able to pay its debts as they fall due, the transaction is voidable (cancellable) at the instance of the company. Moreover, that director can be held personally liable (without any limitation of liability) for all or any of the debts of the company. Similarly, if the company is wound up within 12 months after the making of the statutory declaration and its debts are not paid, it is presumed (unless shown to the contrary) that the director did not have reasonable grounds for the opinion.

- the general prohibition does not prevent a company from making a loan or quasi-loan to any company which is its holding company, subsidiary or subsidiary of its holding company or from entering into a guarantee or providing any security in connection with a loan or quasiloan made by any person to any company which is its holding company, subsidiary or subsidiary of its holding company. A similar exception applies to entering into a credit transaction as creditor²⁶.

²⁴ Section 33 Companies Act, 1990 as amended.

²⁵ Section 34 Companies Act, 1990 as amended.

²⁶ Section 35 Companies Act, 1990 as amended.

2.6.10 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

Where a director of an insolvent company (i.e. a company which cannot pay its debts as they fall due) 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.

A director can also be held personally liable (without limitation of liability) for a company's debts if found liable for reckless trading²⁷. An officer of a company will be deemed to have been guilty of reckless 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, or any one of them, of the company, or;
- they were party to the contracting of a debt by the company and did not honestly believe that the company would be able to pay the debt as it fell due.

Similarly, if a director is found guilty of fraudulent trading the director can be held personally liable (without limitation of liability) for the debts of the company²⁸. However, as fraudulent trading is also a criminal offence, a person convicted of that offence may also be fined or imprisoned²⁹. 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.

Duties of Directors of Companies in Liquidation

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 & Examiners).

Where it is proposed to put the company into members' voluntary liquidation, a director is under a duty to make an accurate declaration of solvency³⁰. An essential feature of a members' voluntary liquidation is that the company must be solvent i.e. be able to pay its debts as they fall due. Accordingly, the directors, or a majority of them, are required to make a sworn statement to the effect that the company is solvent. The declaration of solvency must be accompanied by a report from an independent person who is qualified to act as the company's auditor. That independent person is required to form an opinion as to whether the statement of solvency is reasonable.

²⁷ Section 297A Companies Act, 1963 as inserted.

²⁸ Section 297A Companies Act, 1963 as inserted.

²⁹ Section 297 Companies Act, 1963.

³⁰ Section 256 Companies Act, 1963 as amended.

Where, contrary to the statutory declaration of solvency, a company is actually insolvent (i.e. unable to pay its debts), a company director can be made personally liable for some or all of the company's debts³¹. Furthermore, where a company's debts have not been paid or provided for 12 months after the commencement of the members' voluntary winding up, it is presumed that the directors did not have reasonable grounds for their opinion that the company was solvent³².

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, usually via the company's articles of association.

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 such meetings³³. Where decisions are made informally, a company's articles of association usually accept their validity, provided that a resolution is signed by all of the directors. Typically, the articles of association of a company provide that the directors may exercise all of the powers of the company which are not required by the Companies Acts or by the articles of association 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.

As is the case with a company, a director is precluded from doing anything which is illegal or *ultra vires* (i.e. outside the powers of the company). 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 articles. Similarly, the company cannot in a general meeting take any step which is delegated to the directors by virtue of its articles of association.

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.

³¹ Section 256(8) Companies Act, 1963.

³² Section 256(9) Companies Act, 1963.

³³ Section 145 Companies Act, 1963.

3.0 Penalties Under the Companies Acts

3.1 Penalties for Criminal Offences

Court Imposed Penalties

Under the Companies Acts, 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.

In general the maximum penalty on conviction:

- of a summary offence under the Companies Acts is €1,904 and/or 12 months imprisonment, and;
- of an indictable offence under the Companies Acts is €12,697 and/or 5 years imprisonment.

However, the Companies Acts also provide for considerably higher sanctions in respect of certain offences e.g. fraudulent trading (€63,487 and/or 7 years imprisonment on conviction on indictment) and market abuse (€10 million and/or 10 years imprisonment on conviction on indictment).

3.2 Civil Penalties

Disqualification

In addition to fines and penalties, there are also provisions for other sanctions under the Acts. Persons convicted on indictment of an indictable offence relating to a company or involving fraud or dishonesty are automatically disqualified from acting as company directors/officers (see also Appendix B). The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person:

- guilty of two or more offences of failing to maintain proper books of account, or;
- guilty of three or more defaults under the Companies Acts.

Restriction

The provisions relating to the restriction of company directors apply to insolvent companies i.e. companies that are unable to pay their debts as they fall due. Where a company which goes into liquidation or receivership³⁴ is insolvent, a director of the company who fails to satisfy the High Court that he or she has acted honestly and responsibly will be restricted for a period of up to five years.

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. In the case of a private company, the capital requirement is €63,487 in allotted paid up share capital, and in the case of a public company, €317,435. Such a company is also subject to stricter rules

³⁴ A liquidator's function is to collect and realise the assets of the company, to discharge the company's debts, to distribute any remaining surplus, investigate the company's affairs and to legally dissolve the company. The function of a receiver is to dispose of certain assets of the company in order to allow the repayment of a debt to a creditor e.g. a bank. See Information Book 7 for further information on liquidators and receivers.

in relation to capital maintenance. The topic of restriction is dealt with in detail in Appendix B.

Strike Off

Where a company defaults in performing certain of its legal obligations e.g. fails to file an annual return with the Registrar of Companies, the Registrar can strike the company off the register of companies.

If 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 as though the company had not been dissolved³⁵.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies.

³⁵ Section 12B(1) Companies (Amendment) Act, 1982.

4.0 Useful Addresses

Office of the Director of Corporate Enforcement

16 Parnell Square
Dublin 1
Tel: 01 858 5800
Web: www.odce.ie

Companies Registration Office

14 Parnell Square
Dublin 1
&
O'Brien Road
Carlow
Tel: 01 804 5200
Web: www.cro.ie

Department of Jobs, Enterprise & Innovation

Kildare Street
Dublin 2
Tel: 01 631 2121
Web: www.djei.ie

Company Law Review Group

Earlsfort Centre
Hatch Street Lower
Dublin 2
Tel: 01 631 2763
Web: www.clrg.org

Basis

*Business Access to State
Information & Services*
Web: www.basis.ie

Irish Auditing & Accounting Supervisory Authority

Willow House
Millennium Park
Naas
Co. Kildare
Tel: 045 983600
Web: www.iaasa.ie

Appendix A

Appointment and Removal of Directors and Related Matters

Appointment of Directors

The first directors of a company must be named in a statement delivered to the Registrar of Companies and will usually also be named in the articles of association. The rules and procedures governing subsequent appointments are governed by the articles of association. A director is usually appointed by the company in a general meeting. The standard articles as contained in the Companies Act, 1963 provide that one third of directors, apart from the managing director, retire each year at the AGM and may, if they wish, offer themselves for re-election.

Where a director dies or resigns, the articles generally empower 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. The articles may also be drafted in a manner permitting the appointment of certain persons as directors for life (however, life directors are only permitted in private companies).

Removal of Directors³⁶

The members of the company are empowered to dismiss or remove a director by passing an ordinary resolution (i.e. by simple majority). Where a director is appointed for life by the memorandum or articles of association, such a director can only be removed if the correct procedure for the alteration of the memorandum or articles is followed.

Where a resolution to remove a director is proposed, 28 days notice must be given to the company and to the director concerned, unless the articles of association provide otherwise. Members must be notified of all written (non-defamatory) representations in relation to the proposed resolution, and the director may require that the representations be read at the meeting and that he or she be afforded an opportunity to speak on the resolution at the meeting. A director who is removed cannot be deprived of compensation or damages to which he or she is entitled, for example, under a contract of employment.

Remuneration of Directors

The articles usually provide that the company in general meeting shall determine the remuneration and expenses of the directors. Contracts of employment entered into between a company and a director for a term in excess of five years, and which cannot be terminated by notice or which can only be terminated in specific circumstances, must be approved by the members in general meeting³⁷. Readers should note that it is unlawful for a company to pay a director's remuneration free of income tax.

³⁶ Section 182 Companies Act, 1963.

³⁷ Section 28 Companies Act, 1990.

Requirement to Have One Director Resident in the European Economic Area (EEA)³⁸

Except in limited circumstances, at least one of the directors of a company must be resident in the EEA. This rule does not, however, apply to a company which holds a bond worth €25,395. The purpose of the bond is to provide for the payment of any fines that might be imposed on the company under the Companies Acts or certain fines and penalties imposed under the Taxes Consolidation Act, 1997. An exemption is allowed where the Registrar of Companies grants a certificate 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 Directorships³⁹

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.

38 Section 43 Companies (Amendment) (No. 2) Act, 1999 as amended. The EEA consists of the European Union and Iceland, Norway and Liechtenstein.

39 Section 45 Companies (Amendment) (No. 2) Act, 1999.

Appendix B

Restriction and Disqualification of Company Directors

Introduction

Part VII of the Companies Act, 1990 introduced 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 apply to insolvent companies i.e. companies that are unable to pay their debts as they fall due. Where a company which goes into liquidation⁴⁰ or receivership is insolvent, a director of the company who fails to satisfy the High Court that he or she has acted honestly and responsibly will be restricted for a period of up to five years.

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. In the case of a private company, the capital requirement is €63,487 in allotted paid up share capital, and in the case of a public company, €317,435. Such a company is also subject to stricter rules in relation to capital maintenance (see below). Restrictions will also apply to shadow directors

and persons who are directors of the company within twelve months prior to the winding up.

A person will not be restricted as a director provided that the High Court is satisfied that they:

- have acted honestly and responsibly in relation to the conduct of the affairs of the company and there is no other just and equitable reason for imposing the restrictions;
- are a nominee of an institution providing credit facilities to the company provided that personal guarantees from the directors have not been obtained for such facilities, or;
- are solely a nominee of a venture capital company which has purchased or subscribed for shares in the company.

In the context of the foregoing, it should be noted that in relation to nominees of credit institutions and venture capital companies, in order to avoid restriction the individuals in question will also have to demonstrate that they have acted honestly and responsibly.

On application by a liquidator or a receiver, the High Court may extend the period of restriction as it sees fit. It may also lift the restriction on the application of a restricted person within one year of the imposition of the restriction order.

In considering whether to restrict a director, the Court takes into account matters such as:

- whether the company continued to trade when the director knew it was insolvent;
- the preservation of basic records and compliance with the Companies Acts;
- the accuracy or reliability of the statement of affairs⁴¹ sworn by the director;

⁴⁰ A liquidator's function is to collect and realise the assets of the company, to discharge the company's debts, to distribute any remaining surplus, investigate the company's affairs and to legally dissolve the company. The function of a receiver is to dispose of certain assets of the company in order to allow the repayment of a debt to a creditor e.g. a bank. See Information Book 7 for further information on liquidators and receivers.

⁴¹ A statement of affairs is a statutory statement of the company's assets and liabilities, together with full details of all of the company's creditors i.e. names, addresses, occupations and amounts owed.

- the lifestyle maintained by the director if it was funded by the company.

Rules Regarding Capital Maintenance of Companies who have a Restricted Director (or Secretary)⁴²

Such companies are not permitted to give financial assistance for the purchase of their own shares. Moreover, the restrictions normally only applying to public limited companies (plcs) under sections 32-36 of the Companies (Amendment) Act, 1983 regarding the acquisition of non-cash assets from, *inter alia*, directors apply to the company (regardless of whether it is a plc or not).

Disqualification of Directors

A court may disqualify a person from acting as, *inter alia*, a director. The effect of being disqualified is that when such a disqualification order is imposed, the person concerned is disqualified from acting as a director, auditor, officer, receiver, liquidator or examiner or being involved in the promotion, formation or management of a company for a period of five years or such other period as the Court may direct.

Automatic Disqualification

Disqualification is automatic in the following circumstances:

- where a person is convicted on indictment of any indictable offence⁴³

⁴² Section 155 Companies Act, 1990.

⁴³ The Companies Acts provide for two types of offence, namely summary offences and indictable offences. Summary offences are tried before a judge only in the District Court. Such offences are said to be tried summarily. Indictable offences, which are generally more serious in nature, can be also be tried summarily i.e. in the District Court. However, the distinction is that an indictable offence can also be tried on indictment i.e. before a jury in the Circuit Court. Where an indictable offence is tried on indictment the penalties (i.e. fines and prison sentences) available to the Court on conviction are generally substantially higher than were it to be tried summarily.

in relation to a company or involving fraud or dishonesty⁴⁴;

- where a person fails to notify the Registrar of Companies on appointment as a director that they have been disqualified in another State or makes a false or misleading statement in this regard⁴⁵;
- where a person is convicted of acting as a director while restricted except in the circumstances permitted by statute⁴⁶. Any person guilty of acting as a director while restricted, in addition to being automatically disqualified, is also guilty of a criminal offence (for which the maximum penalty is €1,904 and/or 12 months imprisonment on summary conviction or €12,697 and/or 5 years imprisonment on conviction on indictment);
- where a person is convicted of acting while disqualified. Any person guilty of acting while disqualified will automatically have their period of disqualification extended for a further 10 years. Moreover, they are also guilty of a criminal offence (for which the maximum penalty is €1,904 and/or 12 months imprisonment on summary conviction or €12,697 and/or 5 years imprisonment on conviction on indictment);
- where a person is convicted of acting as auditor, liquidator or examiner of, or in the formation, promotion or management of, any company while an undischarged bankrupt⁴⁷.

Discretionary Disqualification

The Court has the discretion to disqualify a person for such period as it deems fit where that person, while acting as director, promoter,

⁴⁴ Section 160(1)(b) Companies Act, 1990.

⁴⁵ Section 160(1A) Companies Act, 1990.

⁴⁶ Section 161 Companies Act, 1990.

⁴⁷ Section 169 Companies Act, 1990.

auditor, officer, receiver, liquidator, or examiner of a company has been guilty of any of the following:

- (a) a fraud in relation to the company, its members or creditors⁴⁸;
- (b) a breach of duty in relation to the company⁴⁹;
- (c) conduct which makes them unfit to be concerned with the management of a company or fraudulent or reckless trading which resulted in a declaration of personal liability for some or all of the debts of the company⁵⁰;
- (d) persistent default in relation to obligations under the Companies Acts⁵¹. Persistent default is defined as being conclusively proven where in any five year period a person has been guilty of three or more defaults;
- (e) two or more offences of failure to maintain proper books of account⁵²;
- (f) in the case of a director of an insolvent company, failure to file all outstanding annual returns on request and the company is struck off the register of companies as a result⁵³.

The Court may also disqualify a person where they have been 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 appropriate⁵⁴.

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 person⁵⁵.

Civil Consequences of Acting While Restricted or Disqualified

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 disqualified⁵⁶.

Registers of Restricted and Disqualified Persons

The Registrar of Companies is required to maintain a register of restricted persons⁵⁷ and a register of disqualified persons⁵⁸. 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.

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

⁴⁸ Section 160(2)(a) Companies Act, 1990.

⁴⁹ Section 160(2)(b) Companies Act, 1990.

⁵⁰ Section 160(2)(c), (d) and (e) Companies Act, 1990.

⁵¹ Section 160(f) Companies Act, 1990.

⁵² Section 160(2)(g) Companies Act, 1990.

⁵³ Section 160(2)(h) Companies Act, 1990.

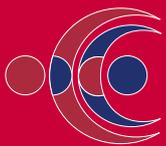
⁵⁴ Section 160(2)(i) Companies Act, 1990.

⁵⁵ Section 161(5) Companies Act, 1990.

⁵⁶ Section 163(3) Companies Act, 1990.

⁵⁷ Section 153 Companies Act, 1990.

⁵⁸ Section 168 Companies Act, 1990.



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