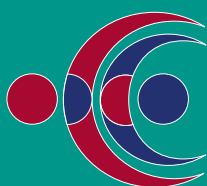


The Principal Duties and Powers of

# Members and Shareholders

under the Companies Act



Oifig an Stiúirthóra 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 Members and Shareholders

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### 2.1 What is a Member

A member of a company is a person who participates in the capital of a company, is registered as such and is entitled to certain rights. The initial subscribers to a company's constitution are deemed to have agreed to become 'members' of the company, and, on its registration, their names are entered as members in its register of members. Every other person who agrees to become a member of a company and whose name is entered in its register of members will become a member of the company<sup>1</sup>.

### 2.2 What is a Shareholder

A shareholder is a person who holds a share or shares in a company. When their name is entered into the register of members they become a member of the company. Membership rights and responsibilities vary depending on the nature of the company. However, it should be noted that a person who purchases shares in a company, while being a shareholder from the date of purchase, will not become a member of the company until their name is entered into the register of members.

A company may be permitted by its constitution to issue different classes of shares which may differentiate between the rights of the shareholders in the company.

*Further details on the classes of shares which may be issued are set out in Appendix A.*

### 2.3 Register of Members

Every company is obliged to keep a register of its members<sup>2</sup>. The register must be kept at a place within the State which can be one of the following; the registered office of the company, its principal place of business or another place. If the register is not kept at the company's registered office, the company is required to notify the Registrar of Companies where the register is kept and of any change in that place<sup>3</sup>.

The register is open to inspection to every member free of charge and to any member of the public on payment of the relevant fee<sup>4</sup>.

The register of members must contain the following particulars:

- members' names and addresses;
- shares held by each member (in the case of companies having a share capital);
- the date on which each person was entered in the register as a member;
- the date on which each person ceased to be a member of the company.

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<sup>1</sup> Section 168 Companies Act.

<sup>2</sup> Section 169 Companies Act.

<sup>3</sup> Section 216(6) Companies Act.

<sup>4</sup> Section 216 (8) & (9) Companies Act.





## 2.4 Duties of Members and Shareholders

The principal duty of a member who is a shareholder is to pay the company the amount, if any, which remains outstanding in respect of the price agreed for the share in the original allotment. This sum becomes payable by the shareholder when a call is made upon him by the company, or where the terms of issue provide for the payment in instalments, on the payment date. Shareholders in a company with unlimited liability are liable without limit for the debts of the company where it is insolvent i.e. unable to pay its debts.

## 2.5 Rights and Powers of Members and Shareholders

The Companies Act and the constitution of a company normally set out the powers of members and those powers which are delegated by the members to the directors of the company. The Companies Act provides that the business of the company is managed by its directors, who may exercise all such powers of the company that are not required by the Companies Act or by the constitution to be exercised by the company members in a general meeting<sup>5</sup>.

A number of important matters must be approved by the members, such as an alteration of the company's constitution. By amending the constitution, members can alter their relationship with the directors.

### 2.5.1 Transfer of Shares<sup>6</sup>

A member of a private company<sup>7</sup> may transfer shares in the company by way of instrument in writing to the directors seeking their approval for the transfer. The directors may in their absolute discretion and without assigning any reason for doing so, decline to register the transfer of shares. Where the directors decline the transfer of shares they must within two months of the delivery of the instrument of transfer notify the transferee of the refusal<sup>8</sup>.

### 2.5.2 Dividend and Distribution

A dividend is a distribution of certain of a company's assets to its shareholders. It can only be paid out of the company's profits which are available for distribution<sup>9</sup>. The profits available for distribution are a company's net accumulated realised profits. Other profits and reserves such as unrealised profits or share premium cannot be used for the purposes of declaring a dividend. A company can, by ordinary resolution, declare a dividend of an amount not greater than the amount recommended by the directors, and the directors<sup>10</sup> must give effect to such resolution.

There is no legal obligation on a company to declare a dividend even where there are sufficient distributable profits available, unless the company's constitution states otherwise. A company in general meeting may, on the recommendation of the directors, decide that the sum available for distribution by way of dividend be used to capitalise the company on a proportional basis.

A PLC can only make a distribution of assets if at the time the amount of its net assets is not less than the aggregate of the PLC's called-up share capital and its undistributable reserves, and if the distribution does not reduce the amount of those assets to less than that aggregate<sup>11</sup>.

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<sup>5</sup> Section 158 Companies Act.

<sup>6</sup> Section 94 Companies Act.

<sup>7</sup> See section 2.4 of Information Book 1 for more information on private companies.

<sup>8</sup> Section 95 Companies Act.

<sup>9</sup> Section 117 (1) Companies Act.

<sup>10</sup> Section 124 Companies Act.

<sup>11</sup> Section 1082 Companies Act.



### 2.5.3 Shareholders Pre-emption Rights

The Companies Act gives the existing members of an LTD a statutory 'pre-emption' right. This means that, where new shares in the company are issued, the existing shareholders have an automatic right of first refusal to purchase these shares in proportion to their existing shareholdings. Parties other than the existing shareholders will, therefore, only be entitled to purchase newly issued shares in the company if the existing shareholders decline to exercise their pre-emption rights<sup>12</sup>.

Under the statutory pre-emption scheme, the offer of shares to the existing shareholders must be served to the members in the same manner as notices of general meetings and must provide a period of not less than fourteen days during which the offer can be accepted and during which the offer cannot be withdrawn<sup>13</sup>.

The statutory pre-emption rights set out above can generally be removed by the constitution or by a special resolution of the company (a special resolution is a resolution passed by 75% of those members voting). However, where a resolution to this effect is to be put before a meeting of the company, in addition to the notice of the meeting, the directors must also furnish the members with a written statement explaining their reasons for the proposed departure from the statutory pre-emption scheme.

Statutory pre-emption rights are not given<sup>14</sup>:

- where the allotment of shares is for a consideration wholly or partly paid for, otherwise than in cash;
- in respect of allotments of shares to the subscribers of a company before its incorporation;
- where the allotment of shares is in respect of an employees' share scheme established by the company;
- where the allotment is an allotment of bonus shares;
- where the constitution or a special resolution of a general meeting of the company so provides.

### 2.5.4 Right to Participate in a Winding-Up

A shareholder has the right to participate in the winding-up of a company (a winding-up is the orderly termination resulting in the legal dissolution of the company). Once the creditors and expenses of the liquidator (the liquidator is the person appointed to conduct the dissolution of the company) have been paid, any remaining funds are returned to the shareholders in proportion to their shareholdings, unless the constitution provides otherwise.

### 2.5.5 Rights Regarding Members' Meetings

The members of a company exercise control over the company at its meetings. The main statutory provisions concerning meetings of a company are set out at sections 175 to 199 of the Companies Act. In general, all companies are required to hold annual general meetings (AGM's) every calendar year and not more than 15 months should elapse between each meeting. Certain companies (such as a "single member company"<sup>15</sup> and an LTD) may dispose with the holding of an AGM. In the case of an LTD<sup>16</sup> this is allowed where 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.

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<sup>12</sup> Section 69 Companies Act.

<sup>13</sup> Section 69(6)(b) Companies Act.

<sup>14</sup> Section 69(12) Companies Act.

<sup>15</sup> Section 196 Companies Act.

<sup>16</sup> Section 175(3) Companies Act.



### **Annual General Meetings (AGM)<sup>17</sup>**

The business of the annual general meeting will include:

- the consideration of the company's statutory financial statements and the directors report and the auditors' report (if any);
- the review by the members of the company's affairs;
- unless the company's constitution states otherwise, the declaration of a dividend (if any) of an amount not greater than the amount recommended by the directors;
- the approval of the remuneration of the statutory auditor (if any);
- the election and re-election of directors in accordance with the company's constitution;
- the appointment or re-appointment of the statutory auditors unless the company is entitled to and has availed of audit exemption;
- the remuneration of the directors where the company's constitution so provides;
- other business, such as the amendment of the company's constitution, which is known as special business.

A member of the company can apply to the Director of Corporate Enforcement to call or direct the convening of an AGM where one is overdue<sup>18</sup>. The High Court may, on application being made to it, make an order requiring a general meeting of a company to be called. The Court will not make an order unless it is satisfied that it is realistic and desirable to do so<sup>19</sup>.

### **Extraordinary General Meetings (EGM)<sup>20</sup>**

All general meetings of a company other than the AGM are called extraordinary general meetings (EGM's). EGM's are normally convened 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 to do so. If there are not enough directors available to form a quorum, any director or any member of the company may convene an EGM in the same manner as it would have been convened by the directors. A member or members holding 50% or more of the paid up share capital of the company may also convene an EGM<sup>21</sup>.

The following may request the directors to convene an AGM:

- Members holding 10% or more of the paid up share capital of the company or 10% of the voting rights for a company without a share capital<sup>22</sup>;
- A member or members of a PLC holding not less than 5% of the paid up share capital (with voting rights)<sup>23</sup>.

The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company.

If the directors do not within 21 days after the date of the deposit of the requisition proceed to duly convene a meeting to be held within two months after the "requisition date", the requisitionists, or 50% of them with voting rights, may themselves convene a meeting, but any meeting so convened must be held within 3 months of the requisition date<sup>24</sup>.

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<sup>17</sup> Section 175 Companies Act.

<sup>18</sup> Section 175(5) Companies Act.

<sup>19</sup> Section 179 Companies Act.

<sup>20</sup> Section 177 Companies Act.

<sup>21</sup> Section 178 Companies Act.

<sup>22</sup> Sections 178 & 1203 Companies Act.

<sup>23</sup> Section 1103 Companies Act.

<sup>24</sup> Section 178 Companies Act.



In addition, the directors of a PLC are obliged to convene an EGM where the net assets of a PLC are half or less of the amount of the company's called-up share capital<sup>25</sup>.

### **Resolutions<sup>26</sup>**

Resolutions are the decisions taken by vote by the members of a company usually at a meeting. All resolutions must be passed in accordance with the requirements of the Companies Act and the company's constitution.

Ordinary resolutions are resolutions passed by a simple majority of votes cast by members of a company, who are entitled to vote, in person or by way of a proxy at a meeting<sup>27</sup>. Most of the standard business conducted at AGMs (e.g. consideration of the company's financial statements, election of directors and auditors, etc.) is carried out by way of ordinary resolution.

A special resolution is a resolution passed by a qualified majority of not less than 75% of the votes cast by members of a company who are entitled to vote, in person or by way of a proxy at a meeting<sup>28</sup>. Special resolutions are used to conduct certain business at EGMs and AGMs, such as the alteration of the constitution of a company.

A unanimous written resolution is a resolution in writing signed by all the members of a company entitled to attend and vote on such a resolution at a general meeting. It will be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held, and if described as a special resolution shall be deemed to be a special resolution within the meaning of the Companies Act<sup>29</sup>.

A majority written resolution is an ordinary resolution signed by the requisite majority of members of the company, where all the members of the company entitled to attend and vote on the resolution have been circulated with the proposed text of the resolution and an explanation of its main purpose<sup>30</sup>. Only LTDs and DACs can utilise a majority written resolution.

In the case of a single member company, the requirement to pass a resolution is deemed to be satisfied by a decision of the sole member which is drawn up in writing and notified to the company in accordance with the Companies Act<sup>31</sup>.

### **Right to Notice of Meetings**

All the members of a company and any other person entitled to attend and vote at a meeting are entitled to notice of the meeting as follows:

- In the case of an AGM not less than 21 days' notice<sup>32</sup>;
- In the case of an EGM for an LTD or CLG not less than 7 days' notice<sup>33</sup>;
- In the case of an EGM for a PLC not less than 14 days' notice<sup>34</sup>.

However, where a special resolution is required to be passed by all company types, not less than 21 days' notice<sup>35</sup>.

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<sup>25</sup> Section 1111 Companies Act.

<sup>26</sup> Section 191 Companies Act.

<sup>27</sup> Section 191(1) Companies Act.

<sup>28</sup> Section 191(2) Companies Act.

<sup>29</sup> Section 193 Companies Act.

<sup>30</sup> Section 194 Companies Act.

<sup>31</sup> Section 196 Companies Act.

<sup>32</sup> Section 181(1)(a) Companies Act.

<sup>33</sup> Section 181(1)(b) Companies Act.

<sup>34</sup> Section 1098 Companies Act.

<sup>35</sup> Section 181(1) Companies Act.



Extended notice of not less than 28 days' must be given under the following circumstances:

- Where a resolution to remove a director is proposed, unless the constitution of the company states otherwise (i.e. a director holding office for life)<sup>36</sup>;
- Where a resolution to remove the statutory auditor from office is proposed at a meeting<sup>37</sup>;
- Where a resolution is proposed at a meeting to appoint any person other than the incumbent as statutory auditor.

To be valid, a meeting must be properly convened by notice, a quorum must be present (see below) and the meeting must be presided over by a Chairperson.

### Notice of Meeting

The notice of a meeting must state:

- (a) The place, the date and the time of the meeting;
- (b) The general nature of the business to be transacted at the meeting;
- (c) Where a special resolution is proposed, the text or substance of the proposed resolution; and
- (d) A statement informing the member of their entitlement to appoint a proxy in their place to attend, speak and vote at the meeting, including a proxy form. (See Appendix B – instrument appointing a proxy and format permitted.)

### Proxy

A proxy is a person appointed by any member of a company entitled to attend and vote at a meeting, to exercise the members' entitlements at the meeting. A proxy has the same rights as the member to attend, speak and vote at a meeting<sup>38</sup>. Unless the company's constitution otherwise provides, a member can only appoint one proxy to attend on the same occasion and the instrument appointing a Proxy must be:

- in writing and on the authority of the appointer or his or her legal representative authorised in writing; or
- if the appointer is a company, either stamped with the seal of the company or on the authority of an officer or legal representative duly authorised in writing;
- deposited at the registered office of the company concerned or another location as specified at least 48 hours before the meeting or time appointed for taking a poll.

### Quorum

A quorum is a fixed number of members which must be present in person or by proxy at a general meeting of a company before the meeting can proceed and any business can be transacted<sup>39</sup>.

Unless the constitution of a company states otherwise, the number of members required to form a quorum is:

- for a single member company, one member of a company present in person or by proxy at a general meeting;
- for all other company types, two members present in person or by proxy at a general meeting.

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<sup>36</sup> Section 146 Companies Act.

<sup>37</sup> Section 396 Companies Act.

<sup>38</sup> Section 183 Companies Act.

<sup>39</sup> Section 182 Companies Act.



### Chairperson

A chairperson is normally a director selected by the board of directors to chair general meetings of a company. If the directors have not appointed a chairperson or the chairperson is unwilling to act, the directors present may select one of the directors to act as chairperson of the meeting. If no director is present or willing to act as chairperson, the members present may select one of the members to act as chairperson of the meeting<sup>40</sup>.

### Vote of Members

Unless a poll is demanded (in accordance with Section 189 of the Companies Act, see below), all resolutions put to a vote at any general meeting of a company will be decided on a show of hands. The chairperson will declare that a resolution has, on a show of hands, been carried, or carried unanimously, or by a specified majority, or lost. If the vote results in a tie, the chairperson of the meeting is entitled to a second or casting vote. The result of the vote should be recorded in the minutes of the meeting and will be conclusive evidence of the proceedings<sup>41</sup>.

At a meeting, a poll may be demanded<sup>42</sup> in relation to a matter by:

- (a) the chairperson of the meeting;
- (b) at least three members present in person or by proxy;
- (c) any member or members present in person or by proxy representing not less than 10% of the voting rights of all the members having the right to vote at the meeting, or
- (d) a member or members holding shares with voting rights being the aggregate sum of not less than 10% of the total sum paid up on all the shares conferring that right.

Except where the company's constitution provides otherwise and subject to any restrictions attached to any class or classes of shares, where a matter is being decided:

- (a) on a show of hands, every member present in person and every proxy will have one vote (no individual member has more than one vote);
- (b) on a poll, every member must, whether present in person or by proxy, have one vote for each share he or she holds or for each €15<sup>43</sup> of stock held.

Where there are joint holders of a share, seniority will be determined by the order in which the names of the joint holders stand in the register of members.

### 2.5.6 Members' Right to Information

A member of a company has an entitlement to certain information concerning the company. The members' entitlement to information includes:

- a right to receive a copy of the constitution of a company;
- a right to inspect and receive copies of the books containing the minutes of general meetings and resolutions<sup>44</sup> (see appendix C for information on contents of minutes);
- a right to inspect and obtain copies of the various registers kept by the company including the register of members, the register of directors and secretaries and the register of directors' and secretary's interests<sup>45</sup>;

<sup>40</sup> Section 187(3) Companies Act.

<sup>41</sup> Section 187(7) Companies Act.

<sup>42</sup> Section 189 Companies Act.

<sup>43</sup> Section 188(2)(b) Companies Act.

<sup>44</sup> Section 216 Companies Act.

<sup>45</sup> Section 216 Companies Act.

- a right to a copy of the company's financial statements for the most recent financial year laid before the AGM and the directors' report for that year and the statutory auditors' report (if any)<sup>46</sup>;
- a right to receive copies of subsidiary financial statements laid before the AGM if the group financial statements do not deal with the subsidiary for the most recent financial year;
- a right to receive copies of financial statements of any subsidiary laid before an AGM of the subsidiary for the preceding 10 years at a charge not exceeding €3 for each set of financial statements<sup>47</sup>.

### 2.5.7 Members' Powers where the Company is in Default

Where a company or any of its officers is in default in complying with any provision of the Companies Act, a member can serve a notice on the company or officers requiring the company or officers to remedy the default within 14 days. If the company or officer fails to remedy the default, a member can apply to the High Court for an order directing the company or officer to make good the default<sup>48</sup>. The Director of Corporate Enforcement also has the power to apply to the Court for this remedy.

### 2.5.8 Right of Members to Apply for the Restoration of a Company<sup>49</sup>

The Registrar of Companies can involuntarily strike a company off the register<sup>50</sup> 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 grounds to believe that the company is not complying with the statutory requirement to have a director resident in an EEA state or to hold a bond<sup>51</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 any member or officer of the company is aggrieved at the company's involuntary strike off, they can apply to the Registrar of Companies for the restoration<sup>52</sup> of the company within 12 months of the strike off. Provided that the Registrar is satisfied that all outstanding documents have been filed and all outstanding fees paid, s/he can restore the company to the register. Where the Registrar restores the company to the register, the company is deemed to have continued in existence as though it had not been struck off<sup>53</sup>. Specific and detailed information on restoring a company to the register of companies is available from the Companies Registration Office at: [www.cro.ie](http://www.cro.ie).

<sup>46</sup> Section 339 Companies Act.

<sup>47</sup> Section 339(3) & (4) Companies Act.

<sup>48</sup> Section 797 Companies Act.

<sup>49</sup> Section 737 & 738 Companies Act.

<sup>50</sup> Section 733 Companies Act.

<sup>51</sup> Section 137 Companies Act.

<sup>52</sup> Section 737 Companies Act.

<sup>53</sup> Section 737(5) Companies Act.





After the 12 month period referred to above has expired, any member, officer or creditor of the company can apply to the Court<sup>54</sup> to have the company restored<sup>55</sup> to the register (provided that the application is made within 20 years of strike off). Where the Court is satisfied that it would be just and equitable to restore the company to the register<sup>56</sup>, the company is deemed to have continued in existence as though it had not been struck off. However, the Court can also order if it considers it appropriate that the officers, or any one of them, be held personally liable for any debts incurred by the company during the period of strike off<sup>57</sup>.

The timeframe to apply for the restoration of a Property Management Company to the Registrar of Companies has been extended to 6 years by the Multi-Unit Developments Act 2011<sup>58</sup>. Other administrative requirements may also apply in such cases. Further information is available from the Companies Registration Office, at [www.cro.ie](http://www.cro.ie).

While a company is struck off the register, ownership of the company's assets will automatically transfer 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>59</sup> as though the company had not been dissolved.

### 2.5.9 Members' Right to Seek an Investigation of a Company<sup>60</sup>

On the application of certain persons, the court may appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into the matters specified. The application to the court can be by any of the following persons:

- the company;
- not less than 10 members of the company;
- a member or members holding one-tenth or more of the paid up share capital of the company;
- a director of the company; or
- a creditor of the company.

Any person intending to make an application to the Court should give the Director of Corporate Enforcement not less than 14 days' notice in writing of his or her intention. The Director has an entitlement to appear and be heard on the hearing of the application. Where the Court appoints an Inspector, it will specify the precise matters into which inquiries should be made. The Court may require the applicant or the applicants to give security for payment of the costs of the investigation. Inspectors appointed under this section take their directions from, and report to, the Court.

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<sup>54</sup> Section 743 Companies Act – Court means either the High Court or the Circuit Court.

<sup>55</sup> Section 738 Companies Act.

<sup>56</sup> Section 741 Companies Act.

<sup>57</sup> Section 742(c) Companies Act.

<sup>58</sup> The Multi-Unit Developments Act 2011 is not part of the Companies Act and accordingly the ODCE has no role in enforcing any element of that Act.

<sup>59</sup> Section 734 Companies Act.

<sup>60</sup> Section 747 Companies Act.





### 2.5.10 Right to Petition for the Winding-up of a Company<sup>61</sup>

A member of a company has the right to petition the Court for the winding-up of a company on a number of grounds<sup>62</sup> (subject to certain exceptions). A member will usually exercise this right where, for example:

- there is a deadlock in the management of the company;
- where the objectives of the company can no longer be achieved;
- where the company has illegal objects;
- where the company is being used as an instrument of fraud;
- where the company has a small number of members who no longer wish to conduct business with each other.

### 2.5.11 Right to Petition for Relief in Cases of Oppression<sup>63</sup>

Any member of a company who considers the affairs of the company are being conducted or the powers of the directors are being exercised:

- (a) in a manner oppressive to him or her or any of the members, or
- (b) in disregard of his or her or their interests as members,

may apply to the court for an order under this section.

Oppressive conduct is the exercise of the company's authority in a manner which is burdensome, harsh and wrong. The types of conduct which might give rise to such an application include fraudulent and unlawful transactions, oppressive management and exclusion of the member from the management of the company.

The order which a court can so make may include an order<sup>64</sup>:

- directing or prohibiting any act or cancelling or varying any transaction;
- for regulating the conduct of the company's affairs in future;
- for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; and
- for the payment of compensation.

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<sup>61</sup> Section 571 Companies Act.

<sup>62</sup> Section 569 Companies Act.

<sup>63</sup> Section 212 Companies Act.

<sup>64</sup> Section 212(3) 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>65</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>66</sup>.

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

- Transparency Directive<sup>67</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law<sup>68</sup>;

<sup>65</sup> “Class A fine” at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).

<sup>66</sup> Section 872 Companies Act.

<sup>67</sup> Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.

<sup>68</sup> Section 1382 Companies Act.

- Prospectus Directive<sup>69</sup> – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law<sup>70</sup>;
- Market Abuse Directive<sup>71</sup> – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law<sup>72</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>73</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>74</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>75</sup>.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds<sup>76</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>69</sup> Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.

<sup>70</sup> Section 1356 Companies Act.

<sup>71</sup> Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005.

<sup>72</sup> Section 1368 Companies Act.

<sup>73</sup> Section 838 Companies Act.

<sup>74</sup> Section 839 Companies Act.

<sup>75</sup> Sections 863 & 864 Companies Act.

<sup>76</sup> Section 842 Companies Act.





### **Disqualification Undertaking<sup>77</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>78</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>79</sup>.

### **Restriction**

The provisions relating to the restriction of company directors<sup>80</sup> apply to insolvent companies, i.e. companies that are unable to pay their debts<sup>81</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>82</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>83</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>84</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>77</sup> Section 849 Companies Act.

<sup>78</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>79</sup> Section 864 Companies Act.

<sup>80</sup> Section 819 & 820 Companies Act.

<sup>81</sup> Section 570 Companies Act.

<sup>82</sup> Section 852 Companies Act.

<sup>83</sup> Section 823 Companies Act.

<sup>84</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>85</sup>.

#### **Strike Off<sup>86</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>87</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>88</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>85</sup> Section 855 Companies Act.

<sup>86</sup> Section 725 Companies Act.

<sup>87</sup> Section 137 Companies Act.

<sup>88</sup> Section 734 Companies Act.





## Appendix A

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### Classes of Shares

#### Introduction

The rights and duties of a member will depend on the company's constitution. Certain rights accrue only to members who are shareholders in a company. A member of a company limited by shares must be a shareholder in the company. Where a company has a share capital, it is presumed that all shares have equal rights but the company may in its constitution create a power to issue different or special classes of shares, including ordinary, preference and redeemable shares.

#### Ordinary Shares

Ordinary shares generally carry the right to a vote. Where a company is wound up they generally have a right to participate in any surplus funds (i.e. when all creditors have been discharged) beyond the fixed amount which they originally invested in their shares.

Where ordinary shares carry weighted or differing levels of voting power, but carry equal entitlements in respect of dividends and capital, they are normally divided into classes e.g. Ordinary Shares Class A, Ordinary Shares Class B etc.

#### Preference Shares

Preference shares carry preferential rights, most commonly as to dividend or capital. A share which is preferred as to dividend usually entitles the member to be paid his or her dividend in priority to the ordinary shareholders. Preference shareholders' entitlements to dividends are generally expressed as a right to a percentage per annum of the nominal amount of the share.

A share which is preferred as to capital entitles the member to have his or her capital investment in the company repaid in full before the ordinary shareholders are returned their capital in a winding-up.

#### Redeemable Shares

Redeemable shares are shares which the company is entitled to redeem (i.e. buy back) from its members. Where shares are redeemed, the company generally cancels them. However, a treasury share is a share which is retained on redemption by the company and can subsequently be re-issued.

#### Bonus Shares

Bonus shares are shares issued to the shareholders in proportion to their existing shareholdings. They are issued as having been fully paid up i.e. the shareholders are not required to pay for them. They are usually paid from accumulated profits that have been transferred to capital i.e. capitalised.



## Appendix B

### Form of Proxy<sup>89</sup>

An instrument appointing a proxy shall be in the following form or a form as near to it as circumstances permit –

- [name of company] (“the Company”)
- [name of member] (“the Member”) of [address of member] being a member of the Company hereby appoint/s [name and address of proxy] or failing him or her
- [name and address of alternative proxy] as the proxy of the Member to attend, speak and vote for the Member on behalf of the Member at the (annual or extraordinary, as the case may be) general meeting of the Company to be held on the [date of meeting] and at any adjournment of the meeting.

The proxy is to vote as follows:

| Voting Instructions to Proxy<br>(choice to be marked with an ‘X’)        |           |         |         |
|--|-----------|---------|---------|
| Number or description of resolution:                                     | In Favour | Abstain | Against |
| 1  |           |         |         |
| 2  |           |         |         |
| 3  |           |         |         |
| Unless otherwise instructed the proxy will vote as he or she thinks fit. |           |         |         |
| Signature of member<br>.....   |           |         |         |
| Dates: [date]<br>.....   |           |         |         |

<sup>89</sup> Section 184 Companies Act.



## Appendix C

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### Illustrative Form and Content of Minutes of General Meetings

The Companies Act requires companies to keep minutes of all proceedings of general meetings and the terms of all resolutions must be entered in books kept for that purpose<sup>90</sup>. The books are required to be kept at the same place. If a company fails to keep minutes of meetings or resolutions the company and any officer of it who is in default will be guilty of a category 4 offence<sup>91</sup>.

Section 199 does not specify the information that should be recorded in the minutes. However, minutes should represent an accurate reflection of what transpired at a meeting. Accordingly, it is recommended that, as a minimum, the following information should be recorded in minutes.

#### General Meetings of Companies

- Date, time and location of the meeting;
- Names of the directors and secretary present;
- Persons from whom apologies for inability to attend have been received;
- Name of the person chairing the meeting (Chairperson);
- Names of other persons present (at the 'top table') and the capacity in which they are in attendance;
- Approval of minutes of previous meeting and any corrections requested;
- Details of any documents or papers tabled for consideration by the members, including the title and author of any such documents. Documents that will form the basis of decisions (resolutions) at the meeting, such as the financial statements and auditor's report (where applicable), must be circulated to the members before the meeting to afford them an opportunity to study them;
- Details of proposals put before the members for vote, the names of the persons proposing and seconding the proposals;
- Details of any conflicts of interest declared by directors and whether, for example, they refrained from participating in any discussions, abstained from any vote taken or absented themselves from the meeting for any discussions on the matter;
- An account of the views expressed by each person making a contribution to the discussion should be recorded, including, for example, questions put to the board from the floor by members and the responses given. While the minutes may summarise the contributions made, the summary should accurately reflect the substance of the contributions made. Where a board member specifically requests that their contribution be minuted e.g. where disagreement arises, particular care should be taken to ensure that the minutes accurately reflect the contribution made;
- The results of any vote taken (as declared by the Chairperson) and whether it was taken by a show of hands or by poll;
- Details of the resolutions passed by the company i.e. formal decisions made following a vote;
- Signature of the Chairperson of the board certifying that the recorded minutes are an accurate reflection of the proceedings;
- The agenda, as circulated to those attending the meeting should be appended to the minutes (each item on the agenda should be sequentially numbered for ease of reference).

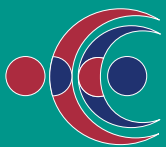
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<sup>90</sup> Section 199 Companies Act.

<sup>91</sup> Section 871 Companies Act.







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