

A Single Guide for Companies



Oifig an Stiúirthóra um
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of Corporate Enforcement

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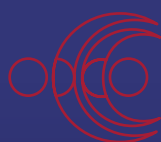
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Director of Corporate Enforcement

15th December 2020



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Introduction

The Office of the Director of Corporate Enforcement (ODCE) has prepared a Single Guide for Companies in response to frequent public requests for a single document to explain some of the rules and rights of the various participants of companies.

The Director in furtherance of his remit to encourage compliance with company law, has historically issued a series of guidance. To complement our suite of popular Information Books and Quick Guides we have prepared a Single Guide for Companies. This guide brings together the main roles and responsibilities of the key parties in companies into a single guide. It includes the role and duties of; companies, company directors and secretaries, general meetings, accounting records, financial statement, registers and filing requirements.

The Director considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. The guide is designed to increase the awareness of individuals in relation to those duties and responsibilities.

The guide has been prepared from the Companies Act for use by a non-professional audience in order to make the main requirements of company law more easily understandable.

The Director wishes to make clear that this booklet is guidance only and cannot be construed in any way as an interpretation of the Companies Act. 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.

ALL REFERENCES IN THIS GUIDE TO THE [COMPANIES ACT](#) ARE TO THE COMPANIES ACT 2014 (AS AMENDED) UNLESS OTHERWISE STATED.

ODCE's main suite of Information Books are available on our website at: <https://www.odce.ie/en-gb/publications/companylawguidance/informationbooks.aspx>

- **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, **ODCE Frequently Asked Questions [FAQ](#)** section of website is an excellent source of current information on various parties associated with companies.

**Office of the Director of Corporate Enforcement
15th December 2020**

1.0 Companies



A company is a legal structure created by one or more people to manage and run a business or social enterprise. The company is separate from the people who own and manage it. This means the company can, in its own name, sign agreements, own property, have debts and take legal action. In other words, the company has a separate legal personality.

In Ireland, companies are obliged to comply with the Companies Act together with other related legislation, for example EU Regulations. The Companies Act sets out the law in a clear, accessible and structured way and identifies the various company types that can be established and defines the law that applies to each company structure.

1.1 Types of Companies

The Companies Act allows people to set up different types of companies, which can be broadly classified as either:

private or public companies which refers to ownership and how capital is raised, and

limited or unlimited liability which refers to owner's responsibility for repaying the debt.

One of the main differences between private and public companies is how the companies raise capital. Private companies raise capital from its owners while public companies may raise capital by way of offering its shares and debentures to the public.

The following is a list of the company type available under the Companies Act:

- Private company limited by shares (LTD)
- Designated activity company (DAC), which can be either:
 - A. a private company limited by shares, or
 - B. a private company limited by guarantee and having a share capital
- Private unlimited company (ULC)
- Public limited company (PLC), which can be either:
 - A. an investment company whose sole objects is collective investment of funds, or
 - B. a public limited company (other than an investment company) that carries on an activity in the State being an activity that is mentioned in its memorandum¹ (including Societas Europae²)
- Public unlimited company, which can be either:
 - A. a public unlimited company having a share capital (PUC), or
 - B. a public unlimited company not having a share capital (PULC)
- Company limited by guarantee (CLG)
- External Company is an EEA or non-EEA company whose members liability is limited – More information from [CRO Leaflet No. 5](#)

1. Section 1006 Companies Act

2. A SE is a European Public Limited Company registered in Ireland

1.2 Incorporation and Registration of a Company

The process of incorporation and registration of a company in Ireland commences with:

(a) the delivery to the **Registrar of Companies**³ a completed Form A1 containing a *statement of Consent*⁴, *Declaration*⁵, and annexed to it the company's Constitution, and (b) the required fee.

Constitution

The constitution of a company consists of the Memorandum of Association and Articles of Association which is printed and signed by each subscriber or authenticated in the prescribed manner⁶. It sets out the legal parameters under which the company operates, such as activity, capacity, finance and internal rules.

Upon registration with the CRO, the constitution binds the company and its members to observe its internal rules as well as the statutory requirements set out in the Companies Act. The constitution may be changed by special resolution placed before members to vote on at a properly conducted meeting held in accordance with the Companies Act.

Memorandum of Association

The memorandum of association is the principal constitution document by which a company's registration is achieved. The statutory format prescribes certain mandatory requirements, that is: – Name; Company Type; Object; Liability; Capital.

Articles of Association

The Articles of Association are the publicly registered internal rules of a company. They bind the company with its members. They must deal with internal matters such as; number of directors, meetings, membership, shares.

Registered Office of a Company

The registered office of a company is the address filed with the Registrar to where all communications and notices may be delivered. Every company is required to have a registered office⁷ in the State and to notify the Registrar of any change in the address within 14 days⁸.

Certificate of Incorporation

The certificate of incorporation is the written document issued by the Registrar of Companies confirming that the company is registered. The certificate is conclusive evidence that the Company is registered under the Companies Act⁹.

1.3 Duties of a Company

A company, being a legal structure created by its subscribers, operates through both its shareholders (members) and persons appointed as officers to manage it. The officers are responsible for managing the company business and are also responsible for ensuring the company comply with its statutory obligations.

1.4 Officers of a Company

The officers of a company are the persons holding "official positions" in a company. Section (2)1 of the Companies Act, interpretation generally, states - an "officer" in relation to a body corporate, includes a director and secretary.

3. CRO is the repository for public statutory information on registered companies in Ireland
4. Section 22 Companies Act
5. Section 24 Companies Act
6. Section 888 Companies Act
7. Section 50(1) Companies Act
8. Section 50(6) sets out the default as a category 4 offence
9. Section 25 Companies Act



2.0

Company Directors



The directors of a company are the persons appointed to manage and run a company on behalf of the members. The first directors of a company are those persons listed in the registration documents filed with the CRO on incorporation of the company. Subsequent appointments are made in accordance with the company's constitution, usually by the members (owners) in general meeting of a company.

The title director is defined by section 2(1) of the Companies Act as “any person occupying the position of director by whatever title or name called”. **Therefore, a director is recognised not merely by the title but principally by their function, which depends on the company type.**

Every company is required to appoint company directors¹⁰. A private limited company (LTD) may operate with one director, while other company types have a statutory requirement to appoint at least two directors. Some companies set a higher minimum number of directors in their internal rules than the statutory requirement.

2.1 Change among Directors

A company has a duty to notify the CRO in the prescribed form of any change (appointment or resignation) among its directors within 14 days of the event happening¹¹. A director becoming disqualified under the law of another state¹² is deemed to be a change among the directors. Accordingly, the company must notify the Registrar of the jurisdiction in which the director has become disqualified, the date they became disqualified and the timeframe of the disqualification.

2.2 Eligibility for Appointment as a Company Director

A person requires no formal qualifications to become a company director. Normally, the members of the company appoint the directors in accordance with the internal rules. Before a person is nominated for appointment, the company must ensure the person is eligible to hold the position of company director as certain parties and persons are ineligible to hold office, such as:

- a body corporate or an unincorporated body of persons;
- a person who is under the age of 18 years;
- an undischarged bankrupt, that is, someone who is going through the process;
- a person disqualified from acting as a director;
- the statutory auditor of the company.

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. A company must have an allotted share capital of nominal value not less than:

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

A person that continues in office as a director of a company while restricted 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.

10. Section 128 Companies Act

11. Section 149(8) Companies Act

12. Section 150 Companies Act

A restricted person is required to give notice in writing of their restriction to any company of which they are a director and before they accept any new appointments¹³.

2.3 Types of Company Director

The title 'director' is defined by section 2(1) of the Companies Act as *"any person occupying the position of director by whatever title or name called"*. Accordingly, **all company directors have the same legal duties under the Companies Act.**

- **Executive Directors** are directors involved in the day to day running and managing of the company.
- **Non-executive Directors** are directors not involved in the daily management or operations of the company. They are usually appointed for their specialist knowledge and experience to give independence to the board.
- **Alternate Director** is a person usually appointed by a board member to replace that member in their absence at a meeting.
- **De Facto Directors** perform the duties and role as company director themselves without being formally appointed.
- **Shadow Directors** are persons that are not formally appointed directors who give instructions which the company's directors are accustomed to act upon or follow.

2.4 Duties of a Company Directors

Company directors' responsibilities are wide and varied. On appointment, a director consents to their role and signs a statement to that effect¹⁴.

Their duties fall into two broad categories;

- common law duties, originally established by the courts in decided cases; and
- statutory duties laid down in the Companies Act and related legislation.

2.4.1 Common Law or Fiduciary Duties

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 relationship is a relationship of trust. A fiduciary is required to act in a manner which is consistent with the obligations of their office and which places the interests of the company ahead of their own. 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.

When a company is insolvent (i.e. is unable to pay its debts as they fall due)¹⁵, 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. Directors must;

- act in good faith and in the company's interest;
- act honestly and responsibly in relation to the company;
- act within the rules of what is permitted by the company's constitution and the law;
- not use their powers for personal gain or for others to benefit at the company's expense;
- act with due care, skill and diligence (e.g. meet regularly to review the company's finances);
- avoid conflict between their duties to the company and the director's other interests.

2.4.2 Statutory Duties

Statutory duties require each company director to ensure that the company is compliant with the Companies Act and related legislation. These obligations include duties to;

- disclose personal information and interest in the company;
- convene general meetings including the AGM of the company;
- ensure the company keeps adequate accounting records;
- ensure the company's annual financial statements are prepared;
- arrange to have the financial statements audited;
- ensure the company maintain certain registers and other documents;
- ensure the company file certain documents with the Register of Companies.

13. Section 825 Companies Act

14. Section 223 Companies Act

15. Section 570 Companies Act



2.5 Transactions between Companies and Directors

In general, directors cannot use company assets for their own benefit. However, there are some exceptions.

- A company may give loans to directors and people or organisations connected by family or business to the directors if the total loan does not exceed 10% of the company's 'relevant assets'. Relevant assets mean the net assets of the company listed in the accounts presented to members at the last AGM.
- A company may give loans (10% or over) to directors and people or organisations connected by family or business to the directors if the directors sign a document saying that they believe the company will be able to pay its debts after the loan is given. However, they may be personally liable for the company's debts if a court decides there was no good reason for them to believe this.
- In certain circumstances a company may engage in a property sale or purchase with a director or people or organisations connected by family or business to the directors. However, the directors must justify the proposed transaction to the members and the majority must approve it at a general meeting before the transaction can take place.
- The transaction can also be undertaken by way of the Summary Approval Procedure¹⁶.

16. Section 202 of the Companies Act

3.0 Meetings



Company directors have a duty to convene General Meetings of the Company, namely Annual General Meetings and Extraordinary General Meetings. General meetings of the company are meetings of the members and the directors at which certain company business is conducted. The notification periods for meetings are included below after the description of the types of meetings.

3.1 Annual General Meetings (AGM)¹⁷

In general, a company is required to hold an annual general meeting (AGM) every calendar year. Its first AGM must be held within 18 months of incorporation and thereafter, every calendar year with not more than 15 months between each meeting. Certain companies (such as a “single member company”¹⁸ and an LTD) may dispense with the holding of an AGM.

For both type of companies¹⁹ this is achieved when all the members entitled to attend and vote at the meeting sign a written resolution to that effect before the latest date for holding the meeting. A CLG²⁰ cannot dispense with the holding of an AGM.

The business of the annual general meeting will normally include:

- consideration of the company’s financial statements and the reports of directors and auditors;
- 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;
- election and re-election of directors in accordance with the company’s constitution;
- appointment or re-appointment of the statutory auditors unless the company is entitled to and has availed of audit exemption;
- approval of the remuneration of the statutory auditor (if any);
- remuneration of the directors where the company’s constitution so provides;
- Any other business.

An AGM will normally be held in the State, unless all the members entitled to attend and vote consent in writing to its being held outside the State.²¹

17. Section 175 Companies Act

18. Section 196 Companies Act

19. Section 175(3) Companies Act

20. Section 1202 Companies Act

21. Section 176 Companies Act

3.2 Extraordinary General Meetings (EGMs)²²

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. A member or members holding 50% or more of the paid-up share capital of the company may also convene an EGM.²³

3.3 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' notice²⁴;
- In the case of an EGM for an LTD or CLG not less than 7 days' notice²⁵;
- In the case of an EGM for a PLC not less than 14 days' notice²⁶. However, where a special resolution is required to be passed by all company types, not less than 21 days' notice²⁷ is required.

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)²⁸;
- Where a resolution to remove the statutory auditor from office is proposed at a meeting²⁹;
- Where a resolution is proposed at a meeting to appoint any person other than the incumbent as statutory auditor.

To be validly constituted, a meeting must be properly convened by notice, a quorum must be present (see next page) 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.

3.4 Resolutions³⁰

A resolution is a decision 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 meeting³¹. 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.

Special Resolutions are resolutions 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 meeting³². Special resolutions are used to conduct certain business at EGMs and AGMs, such as the alteration of the constitution of a company.

22. Section 177 Companies Act

23. Section 178 Companies Act

24. Section 181(1)(a) Companies Act

25. Section 181(1)(b) Companies Act

26. Section 1098 Companies Act

27. Section 181(1) Companies Act

28. Section 146 Companies Act

29. Section 396 Companies Act

30. Section 191 Companies Act

31. Section 191(1) Companies Act

32. Section 191(2) Companies Act

3.5 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 meeting³³. 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; and
- 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.

3.6 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 transacted³⁴.

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 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.

3.7 Vote of Members

All resolutions put to a vote at any general meeting of a company will be decided on a show of hands, unless a poll is demanded³⁵. 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 proceedings³⁶.

3.8 Failure to convene an AGM

Where the directors of a company fail to convene an AGM, any member of the company can apply to the Director of Corporate Enforcement (ODCE) to call or direct the convening of an AGM where one is overdue³⁷. The application is by way of completing and submitting a [complaint form](#) to ODCE.

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 so³⁸.

33. Section 183 Companies Act

34. Section 182 Companies Act

35. Section 189 of the Companies Act

36. Section 187(7) Companies Act

37. Section 175(5) Companies Act

38. Section 179 Companies Act

4.0

Accounting Records and Audits



Every company is obliged to keep or cause to be kept adequate accounting records³⁹. The accounting records should be kept at the company's registered office or at such other place as the directors think fit⁴⁰. Failure to keep adequate accounting records or failure to take all reasonable steps to ensure compliance with this requirement is a criminal offence⁴¹.

4.1 Adequate Accounting Records

Adequate accounting records are those that:

- correctly record and explain the transactions of the company;
- enable, at any time, the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy;
- enable the company's directors have the financial statements prepared which comply with the Companies Act or if applicable, Article 4 of the IAS Regulation⁴²; and
- enable the financial statements of the company so prepared to be properly audited.

The accounting records must be kept on a continuous and consistent basis, which means the entries made in them must be made in a timely manner and be consistent from one period to the next.

If those records are not kept in a bound book but by other means, adequate precautions must be taken for guarding against falsification and facilitating discovery of such falsification, should it occur⁴³. The accounting records kept must contain:

- day to day entries of all sums of money received and expended by the company;
- a record of the company's assets and liabilities;
- Where the company's business involves dealing in goods (i.e. stocks):
 - a record of all goods purchased and sold showing the sellers and buyers on the Invoice; and
 - a statement of stock held by the company at the end of each financial year.

4.2 Annual Financial Statements⁴⁴ (Annual Accounts)

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

Profit and Loss Account: is a statement of the company performance showing revenue, expenses, gains and losses;

Balance Sheet: is a statement of assets, liabilities and financial position of the company at that point in time;

Directors' Report: is the report the directors are obliged to prepare each financial year for the members. The report should deal with general matters of the company, a business review, information on the acquisition or disposal of shares and relevant audit information.

Cash Flow Statement: is a statement of the company's cash inflows and outflows;

Accounting Policies: Are the policies adopted by the company in determining its profit and loss;

Notes to the Financial Statements: contain more detailed information relating to figures appearing in the profit and loss account, balance sheet or cash flow statement;

39. Section 281 Companies Act

40. Section 283 Companies Act

41. Section 286 Companies Act

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

43. Section 282(2) Companies Act

44. Sections 290-295 Companies Act

4.3 Obligation to have Statutory Financial Statements Audited⁴⁵

Companies must have their financial statements audited annually, unless the company is entitled to, and chooses to avail of, audit exemption. An audit is an independent examination of the financial statements by a professional (an auditor). Having conducted an examination of the financial statements, the auditor is required to report to the members of the company.

In that report, the auditor is required to form an opinion on a number of matters including, for example whether the financial statements give a true and fair view⁴⁶ and whether the financial statements are in agreement with the underlying accounting records.

4.4 What is an Audit

An audit is an examination of a company's financial statements by a professional called an auditor. In carrying out an audit, an auditor will examine the financial statements of the company and ensure they comply with the requirements of the Companies Act and Auditing Standards.

The auditor aims to give the company's owners (also known as members or shareholders) an independent opinion on whether the financial statements:

- are true and fair or fairly stated; and
- comply with certain requirements in the Companies Act.

4.5 What is an Auditor

An auditor is an independent individual or firm who is qualified to carry out audits. A company auditor can be an individual or firm who holds the relevant qualification to do an audit. A full list of auditors qualified to carry out company audits is available on the Companies Registration Office [website](#).

4.6 What does an Audit Involve

The audit process usually involves the three tasks set out below.

1. Learn about the Company

The auditor would gain an understanding of the company's business and identify the areas:

- where there is most risk to the business; and
- of the financial statements that are most likely to be wrong.

2. Check and Decide

They would also:

- check the accuracy of a sample of transactions, account balances and disclosures;
- decide if the company's accounting policies are reasonable (this involves checking the method used to calculate items and totals);
- identify and assess the company's internal controls and report to the company directors on any weaknesses in those controls which could lead to loss or fraud.

3. Assess, Evaluate and Report

The auditor would:

- assess whether the estimates and judgments that the directors relied on when they prepared the financial statements are acceptable;
- evaluate any significant events that have happened since the financial statements were prepared;
- write to the directors setting out any problems or errors discovered during the audit and advise on how to deal with them; and
- issue their auditor's report to the members of the company.

45. Section 333 Companies Act

46. Section 336(3) Companies Act

4.6.1 Auditors duty to Report Category 1 and 2 Offences

If the auditors discover information during an audit that makes them believe that the company or anyone associated with it may have committed a category 1 or 2 offence under the Companies Acts, they must:

- tell the Office of the Director of Corporate Enforcement (ODCE); and
- help the ODCE with its investigation of the company.

A category 1 or 2 offence is an offence that is serious enough to be tried before a judge and jury in the Circuit Court, and the potential penalties, from category 1 to category 4 are described in greater detail at paragraph 10.1.1 of this guide.

During their audit work, an auditor may also discover category 3 or 4 offences under the Companies Acts. These are lesser offences that the auditor will inform the company directors about but will not normally report to the ODCE. Categories 3 and 4 offences apply to less serious offences under the Act:

- Category 3 offences include non-filing of annual returns, failure to hold an AGM; and
- Category 4 offences include routine filings such as failure to notify the CRO of the registered office of a company.

4.7 Audit Exemption

Audit exemption is an exemption available to certain small companies from the requirement to have their statutory financial statements audited. To qualify for audit exemption a company must first be an 'eligible entity' and then satisfy the size requirement. An eligible entity is a company that is **not** a credit institution, an insurance undertaking or a public traded company.

The qualifying conditions based on size of a company are satisfied if the company fulfils two of the following conditions within their category:

Small Company (individual & Group)

- a turnover of €12 million (individual) or €14.4 gross (group) or less;
- a balance sheet total of €6 million(individual) or €7.2m gross (group) or less;
- 50 or fewer employees.

In addition, the company must have filed its annual return on time for both the current year and the previous year with the Registrar of Companies. **A company that fails to file their annual return on time cannot claim audit exemption for the next two years.**

It should be noted that companies availing of audit exemption are required to keep adequate accounting records, prepare annual financial statements, give the financial statements to the members and send a copy to the Companies Registration Office (CRO) along with the company's annual return.

4.8 Audit Committee

An audit committee is a group of people within the company itself whose main responsibilities are to:

- monitor the company's financial reporting process;
- monitor the effectiveness of the company's systems of internal control, internal audit and risk management;
- monitor the company's statutory financial statements; and
- monitor and review the independence of the statutory auditor for other services provided to the company.

Most members of the audit committee should be independent directors of the company. All members must be independent enough to be able to report any problems they might see, without being influenced by difficulties which might arise for the company from their reporting of those problems.

Where an audit committee is required under company law, the committee must include at least one independent non-executive director of the company. Where there are more than one independent directors, one of the directors should be competent in accounting or auditing.

What Companies must have an Audit Committee⁴⁷

Certain companies such as Public Limited Companies (PLCs) as well as 'public interest entities', **must** set up audit committees.

Public interest entities are:

- companies with shares quoted on a stock exchange;
- banks and certain other credit institutions; and
- insurance companies.

The directors of other large companies can decide whether to establish an audit committee. However, they must report their decision and their reasons for it in the company's financial statements.

4.9 Duty on Large Companies to Disclose Non-Financial Information⁴⁸

Large companies,⁴⁹ groups and undertakings are required to disclose and publish non-financial information, each financial year, in a specific section in their directors' report or in a separate statement. The information required is the policies the company implements in relation to: environmental protection, social responsibilities and treatment of employees, respect for human rights, bribery and anti-corruption.

In addition, large traded companies are required to disclose in their **Corporate Governance Statement**⁵⁰ information on diversity on their board (in terms of age, gender, education and professional background).

47. Section 167 Companies Act and Statutory Instrument No. 312 of 2016 (Reg 115)

48. Directive 2014/95/EU implemented in Ireland by S.I. No 360 of 2017 as amended by S.I No 410 of 2018

49. Section 280H of the Companies Act (as inserted by Section 15 Companies (Accounting) Act 2017 which inserts a new Chapter 1A

50. Section 1373 Companies Act (as amended by Section 82 Companies (Accounting) Act 2017)



5.0 Registers



A register is a document or list kept in paper format or by electronic means which is required to be maintained by a company.

5.1 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;
- minutes of meetings;
- directors' service contracts;
- contracts for the purchase of own shares;
- individual and group acquisitions share register (PLC's only).

Register of Members

Every company is obliged to keep a register of its members⁵¹. 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 ⁵².

The register is open to inspection to every member free of charge and to any member of the public on the payment of the relevant fee ⁵³.

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.

Register of Directors' & Secretaries⁵⁴

A company is required to keep a register of its directors and secretaries. The register of directors should contain the following particulars;

- Name (forename and surname);
- Date of birth;
- Usual residential address;
- Nationality;
- Occupation

The Register of Secretaries should contain the following particulars;

(Individual)	(Corporate body)
A. Name (forename and surname);	A. its registered office;
B. Date of birth;	B. where the company is registered;
C. Usual residential address	C. company's registration number

51. Section 169 Companies Act

52. Section 216(6) Companies Act

53. Section 216 (8) & (9) Companies Act

54. Section 149 Companies Act

Register of Interests of Directors and Secretaries⁵⁵

A company is required to keep a register of interest in shares and debentures by directors and secretaries. The register should contain the following:

- A. The date on which the right was granted;
- B. The period during which it is exercisable;
- C. The consideration for the grant (or that there is no consideration);
- D. The description of shares or debentures, the numbers or amount and price to be paid.

Register of Debenture Holders⁵⁶

In general terms, a debenture is a loan given to a company in a written form. Every company issuing debentures is required to maintain a register of debenture holders. The register is required to contain details of the name, address and amount held in respect of each debenture holder. The company is required to notify the Registrar of the location of the register and to make the register available for inspection by any member of the public.

Minutes of Meetings⁵⁷

A company is required, as soon as may be, after holding a meeting or passing a resolution, cause;

- A. minutes of all proceedings of general meetings of it, and
- B. the terms of all resolutions of it,

to be entered in a book kept for that purpose by the company (see Appendix A)

Directors' Service Contract⁵⁸

A company is required to keep a copy of:

- A. a written service of contract it has with each director;
- B. a written memorandum setting out the terms of a contract that is not a written contract;
- C. a written contract or memorandum with each director employed by its subsidiaries;
- D. a written memorandum of any variation in any service contract referred to at (a),(b) or (c).

Contracts for the Purchase of Own Shares⁵⁹

Every company that enters into a contract to purchase its own shares is required to keep at its registered office a copy of the contract, or where the contract is not in writing, a memorandum of the terms of the transaction. The contract must be kept until the expiration of 10 years⁶⁰ after the date on which the contract has been fully performed.

A company is required to make the contract documents available for inspection⁶¹ during business hours to every member of the company and, if the company is a public limited company, to any member of the public.

Individual and Group Acquisitions Register (applies to public limited companies (PLC's only)⁶²

Any person acquiring an interest in shares of 3% or greater in a public limited company is required to notify the company of their interest⁶³. A PLC is obliged to keep a register of individual and group acquisitions of the company's shares, by entering the name of the person, the relevant information and the date of the entry.

55. Section 267 Companies Act

56. Section 1121 Companies Act

57. Section 199 Companies Act

58. Section 154 Companies Act

59. Section 105 Companies Act

60. Section 112 Companies Act

61. Section 112(2) Companies Act

62. Section 1061 Companies Act

63. Sections 1049 Companies Act

5.2 Where the Registers are Kept

The registers are required to be kept within the State at a single location, which is-

- A. The registered office of the company; or
- B. Its principal place of business; or
- C. Another place within the State which has been notified to the Registrar of Companies.

5.3 Inspection of Registers

Specific register or document is open to the inspection of any member of the company without charge and to any other person on the payment of the relevant fee. The registers are those as set out in accordance with Section 216 of the Companies Act.

5.4 Duty to File Certain Documents with the Registrar of Companies

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

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

- Annual return⁶⁴;
- Change of registered office⁶⁵;
- Notice of alteration or increase of share capital⁶⁶;
- Notice of increase in nominal (authorised) capital⁶⁷;
- Change of director and/or secretary or of their particulars⁶⁸;
- Notification where a person has been authorised to bind the company⁶⁹;
- Notification where company fails to send prescribed form to the Registrar that a person has ceased to be a director or secretary⁷⁰;
- Nomination of a new annual return date⁷¹;
- Notification of the creation of a mortgage or charge⁷²;
- Memorandum of satisfaction of charge⁷³;
- Ordinary and special resolutions and agreements⁷⁴

64. Section 343(2) Companies Act

65. Section 50(3) Companies Act

66. Section 92 & 93 Companies Act

67. Section 83 Companies Act

68. Section 149(8) Companies Act

69. Section 39(1) Companies Act

70. Section 152 Companies Act

71. Section 346 Companies Act

72. Section 409 and 413 Companies Act

73. Section 416 Companies Act

74. Section 198 Companies Act

6.0

Company Secretary



A company secretary is the person or body corporate appointed, usually by the directors, to carry out the administrative duties of the company. Every company is required by law to have a company secretary, who may be one of the directors⁷⁵.

The role of the company secretary is to:

- carry out the instructions of the company directors;
- ensure the company obeys both the law and the rules in its constitution; and
- assist with the preparation and maintain the company's legal documents.

6.1 Who can be a Company Secretary

There are no formal qualifications required to become the company secretary of a private company. However, the company secretary of a public limited company (PLC) must have either:

- a relevant qualification from the Chartered Governance Institute (formerly the Institute of Chartered Secretaries and Administrators (ICSA)); or
- at least 3 years' experience as a company secretary.

Directors must make sure that the person they appoint as company secretary is over 18 years of age and has the skill to carry out the legal and other duties required of them.

Disclosure of Certain Information

When they are appointed, a company secretary must give the company:

- their name, address, nationality and occupation; and
- details of any shares or loans they have in the company or a related company in which they have an interest.

6.2 Duties and Powers of a Company Secretary

6.2.1 Administrative Duties

These may include:

- maintaining the company's registers;
- sending notice to members of the company's meeting – AGM & EGMs;
- preparing or assisting with the minutes of company general meetings;

- making the company's registers, minute book, etc., available for inspection;
- sending information and documents to the Companies Registration Office (CRO);
- assisting with or publishing legal notices in the media;
- providing the directors with administrative support (as required).

The company secretary, together with one or more directors, must:

- complete, sign and file the company's annual return with the Registrar of Companies;
- certify the financial statements are true copies of the originals; and
- prepare an accurate statement of the company's assets and liabilities (what it owns and what it owes) if the company goes into liquidation or receivership.

6.2.2 Power of a Company Secretary

The power of the company secretary is limited to a few legal powers and any other power the directors assign to them. Generally, they may:

- enter into contracts relating to the day-to-day running of the company;
- enter into other contracts that are approved by the directors; and
- use whatever other powers the directors delegate to them.

6.2.3 Fiduciary Duties

A company secretary must:

- act in good faith and in the company's interest; and
- act with due care, skill and diligence in the interests of the company and its members.

Company secretaries can be penalised if a court finds that they or the company breached the Companies Act. However, the secretary need not exhibit in the performance of their duties a greater degree of skill than might reasonably be expected from a person with their level of knowledge and experience.

75. Section 129(1) Companies Act

7.0

Members and Shareholders



A member of a company is usually a person who participates in the capital of a company, is registered as such and whose name is entered in the register of members. A shareholder is a person who holds shares in a company. They become a member when their name is entered in the register of members. Membership rights and responsibilities vary depending on the nature of the company.

7.1 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 meeting⁷⁶.

A few 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.

7.1.1 Members' Right to Information

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

- receive a copy of the constitution of a company;
- inspect and receive copies of the minutes of general meetings and resolutions;
- 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 their interests⁷⁷;
- receive a copy of the company's financial statements for the most recent financial year laid before the AGM, the directors' report and the statutory auditors' report (if any)⁷⁸.

7.1.2 Right to Attend Annual General Meetings (AGMS)

Companies must hold an AGM every calendar year⁷⁹. The only exceptions are private limited companies (LTDs) and companies with just one member. Special rules apply where a company decides not to hold an AGM.

At the AGM, the members and directors will:

- discuss the company's financial statements, the directors' report and the auditor's report;
- discuss whether to pay a dividend (a payment to members from the company's profits) of an amount recommended by the directors;
- review the company's affairs;
- elect new directors to replace those stepping down; and
- appoint or re-appoint an auditor and decide how much they will be paid.

76. Section 158 Companies Act

77. Section 216 Companies Act

78. Section 339 Companies Act

79. Section 175 Companies Act

7.1.3 Right to Receive Notice of Meetings

Members have the right to attend and vote at AGMs and EGMs and to get notice in writing of these meetings. The notice should:

- state the date, time and place of the meeting;
- outline what will be discussed at the meeting (the agenda); and
- include other relevant documents such as financial statements, the directors' report and the auditor's report (if any).

7.1.4 Right to Wind up a Company

A company may be wound-up voluntary as a members' voluntary winding-up provided the company is solvent (i.e. can pay its debts). The process is commenced by way of the Summary Approval Procedure - details set out in Section 9 (Members' Voluntary Winding-Up).

A member can also ask the Court to wind up a company if:

- the company can no longer achieve its aims;
- certain members no longer want to stay in business with other members;
- the company has illegal objectives; or
- someone is using the company to commit fraud.

7.1.5 Right to Restore the Company to the Register

When a company is struck off the Register of Companies, it no longer exists legally. A member can apply to the Companies Registration Office (CRO) within 12 months to restore the company to the Register. The CRO will do this if the company sends in its outstanding documents and pays all outstanding fees. After 12 months, a member must apply to the court to restore the company.

A Property Management Company has up to six years to apply to the CRO to have the company restored to the Register.

7.1.6 Rights in Cases of Oppression

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.



8.0

Creditors



A creditor is a person or a company that is owed money (a debt) by the company. In general, there are two types of creditor: secured and unsecured.

Secured Creditor – this type of creditor has a claim over the company’s assets, such as property. For example, if a company borrows money from a bank to buy a building, the bank will ask for the title deeds to the building as security in case the company cannot repay the loan.

Unsecured Creditor – this is a creditor who is owed money by a company but does not have any claim over the company’s assets. For example, if a company cannot pay all of its debts, unsecured creditors will only be paid if there is money remaining after the secured creditors have been paid.

How Creditors can undertake searches

One way for a creditor to check out the status of a company is to undertake a [search](#) of the public registrar of companies maintained by the Companies Registration Office. Creditors can then decide if they want to do business with that company.

A regular credit check could prevent financial loss and avoid the need for creditors to take legal action to protect their interests.

8.1 What Powers do Creditors have

8.1.1 Power to Appoint a Liquidator

The most important power that a creditor has is to have a company liquidated (legally terminated). A liquidator is the person appointed to wind up a company.

- A creditor can ask a court to appoint a liquidator if the company is unable to pay its debts – A creditors voluntary winding up. A company is deemed unable to pay its debts⁸⁰ when for three weeks of a written request for payment of the debt remains unpaid.
- If the members of a company decide to voluntarily wind up a company because it is unable to pay its debts, the creditors can appoint a liquidator to wind up the company.

8.1.2 Power to Seek Civil Remedies

Creditors can ask the court to make the directors personally responsible (liable) for all or part of the company’s debts⁸¹.

8.1.3 Power to Seek a Court Judgment

When a company does not pay a debt, a creditor can look for a court judgment (decision) against the company. If it gets the judgment, the creditor can employ a public official (known as a sheriff) to try to recover the debt.

The creditor can also ask the court to register the judgment. This means the debtor’s name will be published, which may affect their credit rating. The poor publicity associated with a registration can make it difficult for the company to get credit from banks or other businesses while the debt remains unpaid.

80. Section 570 Companies Act

81. Section 610 Companies Act

8.1.4 Powers regarding Insolvent Companies

When a company cannot pay its debts but is not in liquidation, creditors can sometimes apply to the Court to:

- order a related company (such as a parent or subsidiary company) to contribute to the assets of the insolvent company;
- order that assets which were wrongly taken from the company be returned to it;
- make directors personally responsible for the company's debt if they are guilty of fraud or reckless trading;
- make directors personally responsible for the company's debt if the company has not kept adequate accounting records;
- assess what damages directors should pay if they have done wrong;
- question the directors or company secretary under oath about the company's business;
- inspect the company's accounts; or
- have a director or company secretary arrested and their records and personal property seized.

8.1.5 Power to Restore a Company to the Register

When a company is 'struck off' the Register of Companies, it ceases to legally exist. Creditors who want to take legal action against the former company must first get it restored to the Register. They can ask the court to direct that this be done.

8.1.6 Power to Seek an Investigation

Creditors can ask the court to appoint one or more inspectors to investigate and report on the company's affairs.

8.1.7 Power if a Company fails to comply with the Companies Act

If a company or any of its directors does not comply with the requirements of the Companies Act, a creditor can demand that they do so within 14 days. If this does not happen, the creditor can ask the court to order the company to correct the situation.



9.0

Winding-up and Examinership



Where a company wishes to cease its existence, it is required to wind up in an orderly manner resulting in the legal end of the company. The orderly and legal way to wind up a company is through the process of Liquidation.

9.1 What is Liquidation

Liquidation is the process by which a company is brought to a legal end and the assets of the company are redistributed. The liquidation of a company involves the cessation of the company's activities, the conduct of an investigation into the company's affairs, the realisation of the company's assets, the payment of the company's creditors to the extent possible (i.e. if there are sufficient funds) and, if having discharged the company's debts there are any surplus funds, distribution of same to the members. The company is then dissolved, terminating its legal existence.

9.2. What is a Liquidator

A liquidator is a person appointed to conduct a winding-up of a company. The qualifying conditions for appointment as a liquidator⁸² are set out in the Companies Act. The general role of both voluntary and Court appointed (official) liquidators are the same, in that both are involved in presiding over the winding-up of a company. The main legislative provisions concerning liquidators are set out in Section 11 Chapter 8 of the Companies Act 2014.

Duty to Administer and Distribute the Company's Property

A liquidator has a duty to administer and distribute the property of the company to which he or she is appointed. The main duties of a liquidator are to:

- take possession of the seal, books and records of the company, and all the property to which the company is or appears to be entitled;
- make a list of the company's creditors and those persons obliged to contribute to the assets of the company on its winding-up
- have any disputed cases adjudicated by the Court;
- pay all costs, charges and expenses properly incurred in the winding up of the company including the remuneration of the liquidator;
- following the discharge of all liabilities, distribute any surplus assets in a legal manner.

82. Section 633 Companies Act

9.3 Types of Winding-up

A company can be wound up either by way of voluntary liquidation or by official liquidation. The main distinction between the two is that an official liquidation is undertaken under the supervision of the High Court (the Court appoints a liquidator to act on its behalf), while a voluntary liquidation is usually carried out with little or no recourse to the Courts, with members and/or creditors playing a more active role. A voluntary liquidator is an agent of the company, while a Court appointed liquidator is, in addition, an officer of the Court and takes his or her instructions from the Court.

Voluntary liquidations can be classified into two categories, namely;

- Members' Voluntary Liquidations and
- Creditors' Voluntary Liquidations

Members' Voluntary Winding-Up (Liquidation)⁸³

An essential feature of a members' voluntary liquidation is that the company must be solvent, (i.e. can pay its debts as they fall due) when the members decide to end its existence. The process is commenced in accordance with the Summary Approval Procedure⁸⁴ by way of a special resolution⁸⁵. Where the company is of a "fixed duration" or a "specific purpose" an alternative method is by way of ordinary resolution⁸⁶. The meeting must also appoint a liquidator.

A vital element of a members' voluntary winding-up is the "Declaration of Solvency"⁸⁷. The directors are under a duty to make an accurate Declaration of Solvency. The declaration must state the total amount of the company's assets and liabilities (within the last three month period) and that a full inquiry into the affairs of the company has been carried out by the declarants (directors) who have formed the opinion that the company will be able to pay its debts and other liabilities within the next twelve month period. The declaration must be drawn up in the correct format and accompanied by a report by a person who is qualified to act as a statutory auditor of the company, who states whether, in his or her opinion, the declaration is not unreasonable⁸⁸.

Where a director of a company makes a declaration without having reasonable grounds for the opinion in relation to solvency, the Court, may declare that the director will be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company⁸⁹.

Furthermore, where a company has passed a resolution to wind up voluntarily, and the creditors of a company (representing one-fifth in number or value of creditors) are of the opinion that the company is unlikely to be able to pay or discharge its debts and other liabilities, the creditors may apply to the Court for an order that all the provisions of a creditors' voluntary winding apply to the winding-up of the company. The application to the Court must be made within 30 days of the date on which the resolution for voluntary winding-up has been advertised⁹⁰.

83. Section 562 Companies Act

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

85. Section 579 Companies Act

86. Section 580 Companies Act

87. Section 207 & 579 Companies Act

88. Section 208 Companies Act

89. Section 210 & 582(7) Companies Act

90. Section 582(2) Companies Act

Creditors' Voluntary Winding-Up (Liquidation)⁹¹

A company may be wound up voluntarily as a creditors' voluntary winding-up where the following circumstances occur:

- the members of the company in general meeting resolve that the company cannot by reason of its liabilities continue its business and that it be wound up as a creditors' voluntary liquidation and a creditors meeting is held;
- a members' voluntary liquidation is converted to a creditors' voluntary liquidation; or
- where a declaration in relation to a members' voluntary winding-up is not made in accordance with the relevant provisions of the Companies Act.

In the first set of circumstances as outlined above, a liquidator is usually appointed at the members' meeting⁹² and the company calls a meeting of its creditors for the day on, or the day after, the winding-up resolution is proposed. The company must advertise the creditors meeting, once at least in two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated and give at least ten days' notice.

The notice for the meeting of creditors must include:

- the date, time and location of creditors meeting;
- the name and address of the person proposed as liquidator; and
- a list of creditors of the company or notify the recipient of his or her entitlements to inspect the list of creditors.

The directors must also prepare a full statement of the position of the company's affairs ('Statement of Affairs') containing:

- details of the company's financial position;
- a list of its creditors; and
- the estimated amount of the creditors' claims.

This statement of affairs is then presented to the creditors' meeting⁹³

A nominated director will preside at the creditors' meeting and will generally give short reasons for the failure of the company and answer questions. The meeting will consider:

1. the statement of affairs
2. the liquidator nominated at the members' meeting and whether the creditors wish to replace the members' nominee. The creditors can replace the members' liquidator nominee with their own liquidator where the majority of creditors in value wish to do so;
3. whether to appoint a Committee of Inspection⁹⁴

Winding up by Court – Compulsory (official) Liquidation⁹⁵

The High Court can order the winding-up of a company on various grounds⁹⁶, including;

- where the company has by special resolution resolved that the company be wound up by the Court;
- where the company has not commenced business within one year of incorporation or suspends its business for a whole year;
- where the members of the company are all deceased and no longer exist;
- where the company is unable to pay its debts;
- where the Court is of the opinion that it is just and equitable that the company should be wound up;
- where the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard to their interests as a member;
- where the Court is satisfied, on a petition of the Director, that it is in the public interest that the company should be wound up.

91. Section 585 Companies Act

92. Section 588 Companies Act

93. Section 587(7) Companies Act

94. Section 666(6) Companies Act

95. Section 568 Companies Act

96. Section 569 Companies Act

A company is deemed to be unable to pay its debts⁹⁷, where:

- A. a creditor to whom the company is indebted in a sum exceeding €10,000⁹⁸ has served a written demand on the company at its registered office to pay the sum due and the company has for 21 days failed to pay the sum due or to secure or compound for it to the reasonable satisfaction of the creditors; or
- B. if two or more creditors whom the company is indebted in a sum exceeding €20,000⁹⁹ have served a written demand on the company at its registered office to pay the sum due and the company has for 21 days failed to pay the sum due or to secure or compound for it to the reasonable satisfaction of the creditors; or
- C. if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- D. if it is proven to the satisfaction of the Court the company is unable to pay its debts.

A High Court petition for the appointment of a liquidator can be brought by a range of parties, including the company itself, any creditor and, in certain circumstances, members or persons required to contribute to the company's assets in a winding-up. The petition must be advertised. On hearing the petition, the Court may dismiss the petition, or adjourn the hearing or make any interim order, or any other order that it thinks fit but the Court cannot refuse a winding-up order on the ground that the company has no assets.

The Court may appoint a liquidator provisionally at any time after the presentation of the winding-up petition and before the first appointment of a liquidator¹⁰⁰. Where a Court order is made to wind up a company, a liquidator will be appointed, usually on the nomination of the petitioner or, the Court may appoint a liquidator. The winding-up of a company by the Court is deemed to commence at the time of the presentation of the winding-up petition¹⁰¹.

9.3.1 Solvent Liquidation

If a company is wound up but can pay all its debts, this is known as a solvent liquidation. The directors must send a copy of the declaration of solvency to the Registrar of Companies. The declaration should state that the directors have made a full inquiry into the affairs of the company and they believe that the company will be able to pay its debts in full for the next 12 months.

9.3.2 Insolvent Liquidation

If a company does not have enough money to pay its debts and is wound up, this is known as an insolvent liquidation. The directors must prepare a statement of the company's assets and liabilities and co-operate with the liquidator.

9.3.3 Trading Difficulties

If a company finds itself in financial difficulty, it should get independent advice as early as possible. This advice will clarify the options, for example, if it is possible to save the company (by re-financing or restructuring) or, if it should be wound up and liquidated.

9.3.4 Reckless Trading

If directors help to create a company debt knowing that the company will not be able to pay the creditor, a court may order them to pay some or all of the company's debts themselves.

9.3.5 Struck-off Insolvent Companies

Where directors of a company that owes a large debt fail to have it liquidated and allow it to be struck off the Register of Companies for failing to file its annual returns, a court may disqualify the directors from acting as directors of any company.

97. Section 570 Companies Act

98. Amount temporary changed to €50,000 during Covid-19 - Companies (Miscellaneous Provisions) (Covid19) Act 2020

99. Amount temporary changed to €50,000 during Covid-19 - Companies (Miscellaneous Provisions) (Covid19) Act 2020

100. Section 573 Companies Act

101. Section 589 Companies Act

9.4 What is Examinership

Examinership is a process whereby the protection of the Court has been obtained to assist the survival of an insolvent company. Essentially it allows a company with a reasonable prospect of survival “protection from its creditors” for a limited period¹⁰² to restructure the business with the approval of the Court. A Court will appoint an examiner to a company where it is satisfied there is a reasonable prospect of the survival of the company or any part of the undertaking as a going concern.

9.5 Appointment of an Examiner¹⁰³

An application by way of petition to the Court for the appointment of an examiner may be made by the company itself, its directors, a creditor (including an employee) or by a member holding not less than one-tenth of the voting shares. An application in relation to a credit institution or a holding company of an insurer may only be made by the Central Bank.

The application must be accompanied by the report of an independent expert, who is either the statutory auditor or a person qualified to be appointed as an examiner to the company¹⁰⁴. The report will contain relevant information on the company including the expert’s opinion on whether the company or any part of its undertaking would have a reasonable prospect of survival as a going concern and any conditions they considerate are essential to its survival.

Effect of Petition to Appoint Examiner on Creditors and Others¹⁰⁵

Where an examiner is appointed, the period of Court protection lasts for seventy days from the date of presentation of the petition, unless the protection is withdrawn or extended.

The main restrictions which apply when a company is under the protection of the Court are that:

- no proceedings for the winding-up of the company may be commenced or no resolution for the winding-up the company may be passed;
- no receiver can be appointed to any part of the property the company;
- no attachment, sequestration, distress or execution can be put into force against the property or effects of the company, except with the consent of the examiner;
- no action may be taken to realise the whole or any part of a secured claim against the company, except with the consent of the examiner;
- no steps may be taken to repossess goods in the company’s possession under any hire-purchase agreement, except with the consent of the examiner;
- no order for relief can be made against the company in respect of complaints as to the conduct of the affairs of the company or the exercise of the powers of the directors prior to the presentation of the petition;
- no proceeding in relation to the company may be commenced except by leave of the Court.

9.6 Duty, in Certain Circumstances, to Report to the Court on Irregularities

Where, arising out of the presentation to it of the report of the independent expert or otherwise, it appears to the Court that there is evidence of a substantial disappearance of property of the company concerned that is not adequately accounted for, or of other serious irregularities in relation to the company’s affairs having occurred, the Court shall, as soon as it is practicable, hold a hearing to consider that evidence.¹⁰⁶

102. Section 520 Companies Act

103. Section 510 Companies Act

104. Section 511 Companies Act

105. Section 520 Companies Act

106. Section 533(1) Companies Act

9.7 Examiners' Powers

On appointment of an examiner, the directors of the company retain their functions in relation to its management. However, an examiner is entitled to apply to the Court to seek to have all or any of the directors' or liquidator's powers vested in him or her. In determining whether to accede to such a request, the Court will consider whether it is just and equitable to do so¹⁰⁷.

9.7.1 Power to Dispose of Company Assets

The Court may also grant an examiner the power to dispose of the company's assets if the examiner considers that this would facilitate the achievement of his or her objectives. In such circumstances assets which are subject to a security can be disposed of as if they were not subject to the security. However, where assets which are subject to security are disposed of, the holder of the security retains the same priority for payment purposes in respect of any property of the company directly or indirectly representing the property disposed of¹⁰⁸.

9.7.2 Right of Access to Books and Records¹⁰⁹

An examiner has the right of access at all reasonable times to the books and documents of the company. All officers and agents of the company, including the company's bankers, solicitors and auditors, must make available to the examiner all documents relating to the company in their custody or power and attend before the examiner if requested and give sworn evidence and otherwise give all reasonable assistance.

9.7.3 Powers Relating to Meetings¹¹⁰

An examiner has the power to convene, set the agenda for and preside at board meetings of the directors and general meetings of the company and propose resolutions and present reports at such meetings. He or she has the right to be given reasonable notice of, to attend and be heard at, board meetings and general meetings.

9.7.4 Power to Repudiate Contracts¹¹¹

An examiner cannot repudiate a contract entered into by the company prior to his or her appointment. However, an examiner may where he or she is of the opinion that the provisions of an agreement entered into by the company, were it to be enforced, would be likely to prejudice the survival of the company, serve notice on the party or parties to the agreement to repudiate the agreement.

9.7.5 Right to Seek Direction from the Court¹¹²

An examiner has the power to apply to the Court for the determination of any question arising in the course of the Examinership.

9.7.6 Power of Court to Order Return of Assets Improperly Transferred¹¹³

An examiner can apply to the Court for the return of property disposed of by the company if he or she considers that the effect of the disposal was to perpetrate a fraud on the company, its creditors or members. Where the Court is satisfied of this, it may order the return of the property or the proceeds of sale of such items as it sees fit.

9.8 Examiners' Liability

Examiners are personally liable for any contracts entered into in their own name or in the name of the company. However, they are entitled to be indemnified (reimbursed) out of the assets of the company at the discretion of the Court.¹¹⁴

9.9 Costs and Remuneration of Examiners¹¹⁵

An examiner is entitled to be paid remuneration, costs and reasonable expenses properly incurred as sanctioned by the Court. Liabilities incurred by the company during the protection period which have been certified by the examiner can be treated as expenses properly incurred, but while all other remuneration and expenses are payable in priority to any other claim, such liabilities do not have priority over secured creditors.

107. Section 528 Companies Act

108. Section 530 Companies Act

109. Section 526 Companies Act

110. Section 524(2)&(3) Companies Act

111. Section 525 Companies Act

112. Section 524(7) Companies Act

113. Section 557 Companies Act

114. Section 532(6) & (7) Companies Act

115. Section 554 Companies Act



9.10 Civil Liability for Fraudulent and Reckless Trading¹¹⁶

An examiner may institute proceedings where an officer of the company was knowingly a party to the carrying on of any business of the company in a reckless manner or where any person was knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purpose. The Court can declare that such persons are personally responsible, without any limitation of liability, for all or any part of the company's debts or other liabilities of the company. Criminal liability can also be imposed on a person found guilty of fraudulent trading.

An officer is deemed to be knowingly a party to reckless trading if the officer was:

- A. a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company, or
- B. a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts¹¹⁷.

The Court has the power to relieve any person of liability in whole or in part where it appears that the person concerned acted honestly and responsibly in relation to the conduct of the affairs of the company.

116. Section 610 Companies Act

117. Section 610(3) Companies Act



10.0

Offences and Penalties



There are in excess of 300 offences that can be enforced for breaches of various sections of the Companies Act. The cases most frequently investigated each year by ODCE relate to AGM's, company director's conduct, reckless/fraudulent or insolvent trading, accounting records, register of members and director's loans.

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

Under the Companies Act, and generally, 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. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences are usually 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. Indictable offences can however, and subject to certain conditions, be tried in the District Court before a judge only if the case is sufficiently minor that the penalties available to the District Court are sufficient to address the conduct complained of.

A list of criminal offences is available on the [ODCE website](#).

10.1 Penalties for Criminal Offences

10.1.1 Court Imposed Penalties

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 A¹¹⁸ 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.¹¹⁹

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

119. Section 872 Companies Act

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

- Transparency Directive¹²⁰ – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law¹²¹;
- Prospectus Directive¹²² – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law¹²³;
- Market Abuse Directive¹²⁴ – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law¹²⁵.

10.1.2 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 company¹²⁶.

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 Disqualification¹²⁷

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 persons¹²⁸.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds¹²⁹ 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.

120. Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007

121. Section 1382 Companies Act

122. Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005

123. Section 1356 Companies Act

124. Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005

125. Section 1368 Companies Act

126. Section 838 Companies Act

127. Section 839 Companies Act

128. Sections 863 & 864 Companies Act

129. Section 842 Companies Act

Disqualification Undertaking¹³⁰

This administrative procedure 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 person¹³¹.

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 persons¹³².

Restriction

The provisions relating to the restriction of company directors¹³³ apply to insolvent companies, i.e. companies that are unable to pay their debts¹³⁴ 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 Undertaking¹³⁵

This administrative procedure 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 persons¹³⁶.

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 capitalised¹³⁷.

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.

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 offence¹³⁸.

130. Section 849 Companies Act

131. 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

132. Section 864 Companies Act

133. Section 819 & 820 Companies Act

134. Section 570 Companies Act

135. Section 852 Companies Act

136. Section 823 Companies Act

137. Section 819(3) Companies Act

138. Section 855 Companies Act

Strike Off¹³⁹

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 director¹⁴⁰; 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.

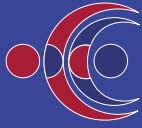
If a company is struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced¹⁴¹ 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](#).

139. Section 725 Companies Act

140. Section 137 Companies Act

141. Section 734 Companies Act



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Tá leagan Gaeilge den leabhrán se oar fail

An Irish version of this booklet is available