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Responsibilities of directors in Ireland.

Your questions answered

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Responsibilities of directors in Ireland.

Your questions answered

Prepared by Mary Fulton, Partner

Introduction

Responsibilities of directors in Ireland is intended to answer some of the questions asked by directors of Irish private companies in an understandable manner but without using a great deal of legal terminology.

This book should be useful for directors who require an outline of their responsibilities or want to update their knowledge in this time of change. It will be especially useful to those already holding the position of director who may require guidance on a point of current interest, especially directors of "family" companies and non-executive directors. It is not intended to be a fully comprehensive guide covering all the requirements for listed companies. It is based on the legislation on the statute book at the end of April 2004.

The intention behind this book is to cover matters which commonly arise, but it can only be of general guidance and cannot be a substitute for professional advice on complex matters which can arise in individual cases.

Pat Cullen,
Managing Partner.

Directors and officers

Directors and officers

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Appointment

Who can become a director?

Almost every individual is eligible to become a director of a company as there are no specific professional qualifications required of a director. There are certain exemptions to the general rule, as certain individuals are prohibited from holding office. Some examples are:

- Undischarged bankrupts are prohibited from holding the office of director

- In certain circumstances of fraud or mismanagement a director may be disqualified or restricted from holding office. Disqualification and Restriction are discussed in Chapter 6

- A corporate body is not permitted to be a director. Accordingly, a limited company cannot itself be a director of another company

- The auditor of a company is prohibited from acting as a director of that company

In addition to these limited restrictions on eligibility set out in the Companies Acts, 1963 to 2003, a company can prescribe its own internal rules regarding its directors. Table A of the Companies Act, 1963, which sets out model Articles of Association, suggests being of an unsound mind, being convicted of an indictable offence and being absent from board meetings for more than six months as sufficient reasons for ineligibility which a company may choose to adopt. Another common restriction relates to age, both minimum and maximum. A director is not required to be a shareholder of a company. However, some companies have a requirement for their directors to hold a specified number of shares in their company.

Must a director of an Irish registered company be resident in Ireland?

At least one director of the company must be resident in the State. In the event that this is not the case, the company must provide a bond to the Companies Registration Office (CRO). At the date of publication the value of the bond is 25,395 and this provides for the payment of any fine or penalties that may arise under the Companies Acts or the Taxes Consolidation Act 1987. In some cases the company can avoid the requirement to hold a bond, providing that it obtains a certification from the Revenue that the company has a real and continuous link with economic activities that are being carried on in the State. The Companies (Auditing & Accounting) Act, 2003 ("2003 Act") restricts alternate directors resident in the State from fulfilling the requirement of a company to have a director that is resident in the State.

How do I know what my powers and duties are?

The powers and duties of directors are set out in the various Companies Acts and clarified by case law. Matters specific to the company are set out in its Memorandum and Articles of Association. In addition, the Director of Corporate Enforcement has published a booklet setting out the principal powers and duties of Company Directors under the Companies Acts.

What are the Memorandum and Articles of Association?

The Memorandum of Association is a document which sets out the purposes of a company. The Articles of Association is a document setting out the rules of the company's internal administration.

The Memorandum of Association must be filed with the CRO (together with other statements dealing with the capital of the company, the first directors and secretary and the registered office) before the CRO will issue a certificate of incorporation. The Memorandum must state the company's name, the objects of the company, whether liability of the members is limited or unlimited and if it is limited whether by guarantee or share capital. If there is a share capital the names of the first shareholders (known as subscribers) and shares subscribed by them must be stated.

As a director you will probably be most interested in the objects clause of the Memorandum of Association which sets out the purposes of the company. Nowadays it is usual to form a company with a wide objects clause to avoid the need to change the objects at some later date when the company wishes to take on some activity not previously contemplated. The objects can be altered by a special resolution of the shareholders (see Chapter 4).

The Articles of Association set out the internal rules of the company. Matters covered will include:

- Share capital.
- General meetings.
- The number of directors.
- The powers and duties of directors.
- The appointment, retirement, disqualification and removal of directors.
- Directors' remuneration.
- Managing director.

- Company secretary.
- The company seal.
- Dividends, reserves and capitalisation of profits.
- Accounts and audit.

If a company wishes to adopt its own Articles of Association from incorporation, the Articles must be registered together with the Memorandum of Association before incorporation. If a company limited by share capital does not register Articles then the model Table A Articles set out in the Companies Act, 1963 will automatically apply. (For companies limited by guarantee, Table C will apply.)

Frequently companies will base their Articles of Association on Table A but will include their own modifications to it. Articles of Association can be amended by special resolution of the company at a general meeting.

What should I know about a company before I become a director?

In many cases the director-designate will be familiar with the operation of the company either as a senior executive or as the owner-manager. In these circumstances the appointee is unlikely to require information to decide whether or not to accept the appointment, but will need to become familiar with the Memorandum and Articles of Association and particularly those sections dealing with the powers and responsibilities of directors. Even a senior executive is unlikely to have had access to the minutes of directors' meetings and all of the management information presented to directors and should review these on taking up his directorship.

In the case where as the director-designate you are not wholly familiar with the company and are being appointed from outside either as an executive or non-executive director, then some time spent examining recent accounts, reports of credit reference or rating agencies, any recent press releases or news reports and other market information will assist you in evaluating the organisation you are about to join. You should pay attention to the company's trading performance and in particular whether there are questions as to whether it is a going concern, to the integrity of management and to its competitive position. You should consider asking the current directors to provide you with a package of information which they believe will be of assistance to you in obtaining an understanding of the company. It may include the Memorandum and Articles of Association, the most recent audited accounts, management accounts, cash flows and budgets, recent minutes of board and other management meetings and an organisation chart of personnel and their responsibilities.

How is a director appointed?

If the company is to be newly-formed, the names and other details of the first directors and company secretary must be submitted to the CRO before the company is incorporated. The directors are confirmed in their appointment when the certificate of incorporation is issued by the CRO.

The rules for appointment of directors after incorporation are set out in the Articles of Association. Usually directors are appointed by ordinary resolution at the annual general meeting of the shareholders, although most companies have a rule which allows the board of directors to make appointments in the course of the year to fill vacancies and add additional directors. Normally directors appointed during the year by the board are required to retire and stand for re-election at the annual general meeting and this is a specific requirement for listed companies. The appointment of all new directors must be notified to the CRO within fourteen days.

All companies must have at least two directors.

Can I be appointed a director without my consent?

The notice of first directors and notice of additional appointments sent to the CRO must contain the signature of the appointee signifying consent to the appointment. Appointment cannot be made effective without your consent.

Can I be a director of more than one company?

A person can be a director of up to 25 companies at any time. In calculating the number of directorships held, any companies of which you may be a shadow director (see below) must be included. Certain directorships can be excluded when considering whether the threshold has been exceeded. These include a public limited company and a non resident company for which the CRO has granted a certificate stating that the company has a real and continuous link with economic activities being carried on in the State. In addition, there are exemptions for directors of groups of companies.

I attend board meetings and carry out similar work to the directors but I have not been formally appointed. What is my position?

Your position is unclear. Someone acting as a director can be treated by the law as a director even if not formally appointed i.e. a 'defacto' director (see below) If you merely attend the meeting, play no active role in decision making and do not vote then you may not be acting as a director. If you are "held out" to others as a director of the company there are a number of legal implications relating to your ability to bind the company in contracts and your personal liability as a director.

In any case you should seek professional advice if you are unsure as to your position.

Types of director

What is a shadow director?

A shadow director is "a person in accordance with whose directions or instructions the directors of a company are accustomed to act." This concept comes from the Companies Acts and deals with the role of the beneficial owner or controller for whom nominee directors (see below) may act. If, for example, you own a significant shareholding in a company and the directors follow your instructions as to how the company is to be managed, then you may be treated as a shadow director. A banker or lender who dictates the actions of the directors, even for legitimate commercial reasons, may be a shadow director. A holding company may act as a shadow director in governing the actions of the board of a subsidiary. The only exception to the rule is where the directors act on your advice given in a professional capacity, for example as the company's solicitor or accountant.

The implication of acting as a shadow director is that you can be treated as if you were a director with all the legal obligations and duties of a director. The rules regarding disclosure of interests and dealings in the company's shares (see Chapter 5) will apply to you as if you were a director, as will the sanctions against insider dealing (see Chapter 5). If the company becomes insolvent and a receivership or liquidation takes place then shadow directors may also be covered by any statutory restrictions and any disqualification order issued by the Court (see Chapter 6).

For example, in one case the Court held that a company's accountant and auditor were acting as shadow directors in advising the client as to which cheques to write and which payments to make. In another instance the shareholder of a company appointed managers of the company, the directors having resigned. These managers were not appointed directors. The Court found that the shareholder had become a shadow director as he controlled and directed the activities of the managers concerned.

What is a 'de facto director'?

The term 'de facto director' has a slightly different meaning to that of shadow director. The term shadow director is defined in legislation. That of 'de facto director' has arisen out of case law. A shadow director is someone under whose directions the board is accustomed to act whereas a de facto director is a person or persons of whom there is evidence that they were directing the affairs of the company, with others of the same status or with true directors. The legal implications relating to restriction are the same for a de facto director as for a shadow director. This is a significant development in company law in that it implies an individual may have legal obligations even if they are not a validly appointed director.

What is a nominee director?

A nominee director is one who is appointed to the board of a company on the nomination of an outside interested party such as a major shareholder, the company's bankers, a venture capital investor or the investing parties in a joint venture company.

If you are requested to act as a nominee director you should remember that the powers and responsibilities of a nominee director are the same as for other directors. A director's duties are owed to the company of which he is a director. There is no prohibition on a director holding more than one directorship as long as it does not lead to a conflict of interest. The question of conflict of interest can arise for a nominee director who could be liable as an individual for any damage done to the company due to his actions as a nominee. It makes little difference in this case whether or not the nominee director is a director of the nominating company (rather than say, an executive) if a conflict of interest can be shown to exist.

What is a non-executive director?

A non-executive director is a director who does not have a contract of service with the company and normally serves the company on a part time basis only. As a non-executive you will not have a management function in the running of the business other than assisting in the deliberations of the board. Nonetheless your legal powers and duties are identical to those of executive directors and for this reason you should ensure that you have the same ability to obtain information from within the company as other directors, even though in practice you may use mainly summarised information submitted in reports to the board. A duty of care is required of both non-executive and executive directors. However your duties as a non-executive director will be intermittent and as a result, you are not expected to give the same continuous attention to the company's affairs as that given by executive directors.

Is a company required to have non-executive directors?

Most companies are not required to have non-executive directors on the board although many companies choose to do so because of the benefits in expertise and improved corporate governance. Listed companies in the UK and Ireland are obliged to comply with the principles of the Combined Code on Corporate Governance. The code includes a requirement to have non-executive directors on the board of directors of the company. The Companies (Auditing and Accounting) Act 2003, through its requirement for certain companies to establish an Audit Committee, brought the recognition of the non-executive director into Irish company law for the first time.

Under that Act the directors who are members of the audit committee cannot be an employee or have been an employee of the company for the three years prior to appointment to the committee.

What benefits can a non-executive director bring to the company?

A non-executive director may be able to contribute to the deliberations of the board in three specific ways by:

- Widening the horizons within which the board determines strategy by bringing wider experience, the external view or perhaps special skills or contacts.

- Assisting the Chairman in monitoring management performance, setting levels of executive and senior management remuneration and advising on board and management structure; the non-executive may be a member of the Remuneration or Nomination Committees of the board.

- Ensuring that adequate financial and other information is presented both to the board and externally and providing an independent view to protect the interests of the company when potential conflicts of interest arise with the personal interests of executive directors; the non-executive may be a member of the Audit Committee of the Board.

Employment and service contracts

As a director am I also an employee of the company?

A director is not an employee of the company by virtue of his directorship. Whether or not you are an employee will depend on the terms of your appointment. If you have additional duties above and beyond normal board duties you may be an employee. Chairmanship or membership of a board committee will not, of itself, make you an employee.

It is important to know whether you are an employee for a number of reasons. If you are removed as a director at a company meeting this may not end your employment although your directorship has been ended. An employee is covered by redundancy and employment protection legislation, is entitled to certain benefits, (such as participation in a company pension scheme), and has certain priority over other creditors in respect of outstanding salary payments in a receivership or winding up.

Should I have a service contract?

If your position is that of executive director and it is intended that you are to be an employee of the company then you should have a service contract with the company. All employees have contracts of service; the contract is implied if there is nothing in writing although under the Minimum Notice and Terms of Employment Act, 1973 an employer is obliged to furnish new employees with written notification, within 28 days of their recruitment, setting out the terms of their employment contract.

In practice the Courts have been reluctant to imply a contract of service with a director unless the facts are clear cut and for this reason every director carrying out a function over and above board duties should ensure that they have a written contract. The contract will be a contract of service if you are intended to be a full time employee and a contract for services if you perform other functions, such as consultancy advice on a part-time or occasional basis.

What matters should my service contract cover?

The terms of your service contract will depend on your particular circumstances and those of your company and therefore you may need professional advice on the content of the contract.

Matters which are normally covered include:

- Remuneration, expenses and other benefits.

- The job title and function.

- Compensation for loss of office.
- The period of the service contract and how it may be terminated.
- The confidentiality of information you obtain in the course of your duties.
- That you will devote all your time and attention to the company's business.
- That your duties and powers will be as delegated to you by the board.
- Directors liability insurance arrangements.
- The ability to take independent professional advice if required.
- That you will comply with decisions of the board.

Must the shareholders approve my service contract?

Under the Companies Acts an ordinary resolution of the shareholders is required to authorise a company to enter into an employment contract with a director of the company or with a director of a holding company involving a commitment of more than five years. A wholly-owned subsidiary is exempt from the need to obtain shareholders' permission for a contract of more than five years although any such contracts with a director of an Irish holding company of the subsidiary will require approval by the shareholders of the holding company.

The purpose of this requirement is to prevent directors awarding themselves long service contracts as protection against dismissal by the shareholders. Contracts of service and contracts for services are both covered by the requirement. Where a contract with a director has more than six months to run and a new contract is entered into, if the unexpired period of the old contract and the period of the new contract taken together are more than five years then shareholders approval for the new contract must be sought. This is to prevent a series of contracts being linked together to avoid the need to seek shareholders' approval.

Can I keep the terms of my service contract confidential?

If your service contract has more than three years to run, then the contract must be made available for inspection by shareholders at the registered office of the company or some other nominated location. There are no other statutory disclosure requirements for contracts of less than three years duration. Contracts of more than five years duration, as discussed above, must in any case be made available to the shareholders for approval. If the contract is not in writing a memorandum of the terms of the contract must be available for inspection. If you work wholly or mainly outside Ireland the company does not have to keep a copy of the contract but must keep a memorandum showing your name and the duration of the contract and if you are contracted to a subsidiary, the name of that subsidiary.

For listed companies there are additional requirements. Copies of all directors' service contracts of more than one year's duration must be made available for inspection at the registered office between the date of issue of the notice of the annual general meeting and the date of the meeting itself and also be available for inspection during that meeting.

Cessation

Is there any limit to the length of time that I can remain a director?

There is no legal limit to the length of time you can remain a director as long as you remain qualified to be a director. In fact, a private company is allowed to appoint a director for life although in practice this rarely occurs. In respect of public companies, the Combined Code now sets out a maximum timeframe of nine years for which a non-executive director can hold office and reasonably continue to justify their independent status.

What is retirement by rotation?

Many companies, in line with Table A in the Companies Act, 1963, include a regulation in their Articles which requires up to one third of the directors to retire in turn each year. Usually these directors offer themselves for re-election at the annual general meeting. Table A, the model Articles of Association in the 1963 Act, also provides for the Managing Director, and sometimes Articles of Association also provide for other executive directors to be exempted from the requirement to retire by rotation.

The original intention of retirement by rotation was that boards would be called regularly to account to their shareholders and would not become self-perpetuating. In practice the retirement provision can be inconvenient and may not in itself fulfil the original intention. Many private companies amend their Articles of Association to remove it.

Can I resign at any time?

Yes. It is always open for a director to resign at any time although the Articles of Association may impose certain restrictions. Table A requires that the director gives written notice of resignation to the company. Despite this requirement if you resign orally at a general meeting of the shareholders it will probably be effective if accepted by the meeting and cannot then be withdrawn.

In what circumstances should I resign?

There are obviously a variety of personal circumstances which may require resignation from the board, the most common being the resignation of the executive director who wishes to move on to a position with another company. Or as a non-executive director, you could find that you cannot devote the time necessary to properly fulfil the duties required.

A director may also find himself in the position where a conflict of interest between his role as a director and other business interests arises which cannot be resolved by declaring the interest and taking no part in the relevant board decisions. For example, a director sitting on the boards of two companies may find that one company acquires a business which directly competes with an activity undertaken by the other company. While common directorships in this circumstance may not be illegal, it is often forbidden by the Articles of Association and in any case is unlikely to be good business practice. A conflict of this nature is a particular risk for those who sit on the boards of large holding companies which operate in a number of sectors and acquire businesses on a regular basis.

There are occasions when you may have to consider resignation on a point of principle. If you disagree on a commercial point with the other directors, resignation may be considered but you should remember that it is a sanction which may only be used once and that there may be other alternatives. On the other hand if you believe that the company is undertaking something which is illegal, such as fraudulent or reckless trading, then resignation may be the best option open to you, although on its own it is not a defence against consequent disqualification as a director (see Chapter 6). Your best defence is to show that you also took steps to stop the illegality and minimise any loss to the company's creditors.

Can I be dismissed from the board by the shareholders?

Unless you are a life director of a private company you can be dismissed from your position as a director at any time before the end of your period of office by an ordinary resolution of the shareholders, regardless of any provisions in the Articles of Association or in your contract of service. If requisitioned by shareholders the company must be given extended notice of 28 days of the proposed resolution and the company must send you a copy of the resolution. You are entitled to speak at the general meeting when the resolution is proposed and the company is obliged to send your written representations of reasonable length to all those who received notice of the meeting as long as the representations are not defamatory.

Can I be dismissed from the board by the other directors?

You cannot be dismissed by the board by the other directors unless the Articles of Association make specific provision for it. In practice many companies do have such a provision in order to permit disputes to be resolved, if necessary, by removal of directors with the minimum of publicity. It is also common for subsidiary companies to make provision for removal of directors by written notice to the company from the major shareholder, i.e. the holding company.

Can I protect myself against dismissal?

It is possible for a company to adopt a rule which confers weighted voting rights to the shares owned by a director in the event of a resolution to remove him from office. This type of provision, known as a "Bushell -v- Faith" clause, can only be effective in certain circumstances, in particular when you are not only a director but a major shareholder as well. For obvious reasons this type of provision is not acceptable for companies whose shares are traded on the open market and therefore the presence of such a clause is not permitted in the Articles of Association of a listed company by the Irish Stock Exchange. In the absence of such a clause and having followed the procedures for audience at the general meeting at which the vote to dismiss is taken, the director has no other protection to stop his dismissal as a director.

Dismissal as a director is not the same as dismissal as an employee and if you are an executive director you will have the same protection under the law available to any dismissed employee and any contractual rights conferred by your service contract.

Will I be compensated if I am dismissed?

Your ability to recover compensation in the event of dismissal will depend on the manner of your dismissal and the terms of your service contract.

Where you are not an employee or not covered by any service contract, then the general right of the company to remove directors at any time means that you are not entitled to any compensation.

If you have a service contract and you are dismissed in breach of contract before that contract expires, you are entitled to any compensation which is set out in the service contract. If compensation is not specifically dealt with in your contract you may be entitled to sue for breach of contract. Any compensation paid which is not by way of damages for breach of contract must be disclosed to the shareholders and approved by ordinary resolution at a general meeting. In either case the total of compensation paid to directors for loss of office in the year has to be disclosed in the annual accounts and of course if your service contract is required to be disclosed to shareholders then the details of any compensation will already have been made available to them.

There are circumstances where you would not be entitled to any payment even if specified in your contract. Compensation may not be payable if you resign or retire, although many companies choose to make ex-gratia payments in these circumstances. Where you yourself are in fundamental breach of your contract, for example in committing a fraud, then it is unlikely that you would be able to recover compensation. Finally many service contracts carry notice periods, which if complied with by the company, will result in no compensation being payable.

If you are an employee of the company you will be protected by the statutory rights available to any employee although the statutory compensation may not be important given the amounts involved.

Officers

Who is an officer of the company?

The definition of an officer varies depending on the circumstances. The term covers directors (and shadow directors), the company secretary, in some instances the company's auditors and possibly also senior members of management with substantial executive power. In the context of the insider dealing provisions under the Companies Act, 1990 (see Chapter 5) the term extends to all employees of the company.

The significance of the term is that there are a number of areas such as transactions with the company, loans from the company and liability for fraudulent or reckless trading, where the effect of the legislation is extended beyond the directors to other officers.

What qualifications are required of a company secretary?

In a private company, any individual, not necessarily a director, can be the company secretary. In the typical small company with two directors, one of the directors will also act as the company secretary. Many small companies obtain the assistance of professional advisors to carry out some of the tasks of the company secretary such as maintaining the statutory books and making returns to the CRO.

The Companies Act, 1990, includes a test of knowledge and experience for the company secretary of a public limited company. The directors must be satisfied that the secretary has "the requisite knowledge and experience" to undertake the role. The test will normally be satisfied by a person with a legal, accounting or secretarial qualification or a person who has already undertaken the role for a company for three years.

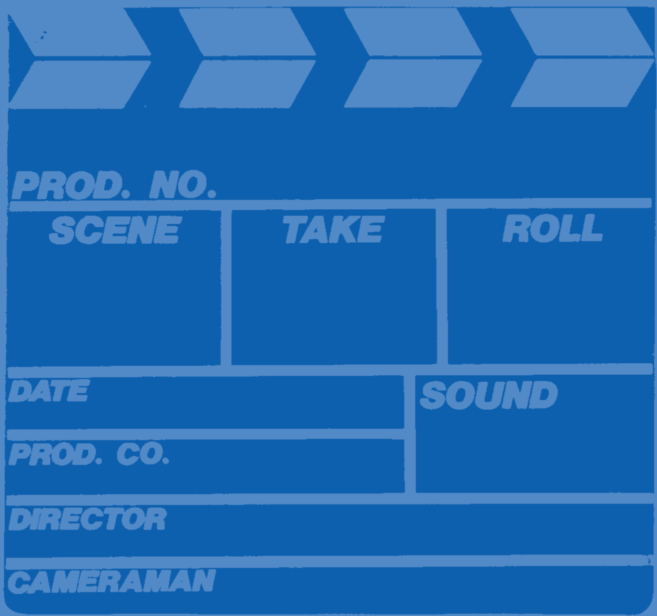
What role does the company secretary perform and should he be a director?

The company secretary is usually responsible for company administration. Traditional duties include notices of meetings, board and other meeting minutes, maintenance of statutory books, shares transfers and filing returns with the CRO. In practice in larger companies many of these administrative tasks are delegated.

The company secretary is frequently also the chief legal officer within the company responsible for contracts, employment law, disputes which involve legal action and other legal aspects of protecting the company's interests. As the company secretary is often a useful source of advice to the board on these issues many large companies prefer to keep the roles of secretary and director separate. There are however no legal prohibitions on the company secretary also being a director.

Company legislation states that it is the duty of each director and the company secretary to ensure that the company complies with the requirements of the Companies Acts; however this is not expanded on in terms of what the company secretary should do in order to fulfil this duty. The skills expected of a company secretary of a public company are more extensive than required for a private company and include the valuable role of informing and advising non executive directors.

Duties and role of directors



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Directors' powers and duties

Do I have any specific powers as a director?

Directors' powers are collective, in that they are exercised by the board of directors. All companies are required to have a minimum of two directors. As an individual director you have no specific powers to make decisions or take actions purely on the basis of your membership of the board. In practice of course, it is not always possible or desirable for the board to act collectively, so the board can and should delegate responsibilities to individual directors, to committees of directors and possibly also directly to senior members of management. The extent of some of the powers delegated will be set out in the Articles of Association (which usually authorise the board to appoint a managing director to manage the company) while some delegation will be determined by the directors as and when required.

Are there restrictions on the powers of directors?

Yes, there are restrictions on the powers and actions of a board of directors which can be classified into three types:

- The Companies Acts place a variety of restrictions on the powers of directors, such as the provisions which protect minority shareholders in the event that directors exercise their powers in a way which is oppressive to that minority.

- The common law places certain duties on directors which prevents them abusing their position to the detriment of others. These duties are discussed below.

- The Memorandum and Articles of Association set out, amongst other things, the objects and internal rules of the company. The legal rule of ultra vires means that where a company, through the directors, acts outside the objects given to it in its Memorandum, then that act is void and has no effect. For various legal reasons this rule is of less importance nowadays, partly because modern objects clauses are so widely drafted, although it may still be relevant to an older company which has not amended the objects clause since its incorporation. The Articles of Association grant various powers to the directors acting collectively, such as the power to manage the company, use the company's Seal, pay interim dividends and so on, but these powers are circumscribed by the rights of the shareholders who can always dismiss the directors or change the powers given to the directors. In practice, shareholders change the powers delegated to the directors very infrequently and are more likely to seek the resignation of a director than push through a motion for dismissal.

In what ways am I responsible as a director?

The responsibilities or duties as a director are of two kinds:

- **Statutory duties**

  Some statutory duties are actually imposed on the company but devolve on the directors, such as the requirement to keep accounting records, and some are imposed on directors themselves, such as the prohibition of insider dealing and other restrictions on directors taking financial advantage of their position. The second category of statutory responsibilities, which generally will only be triggered by acts at which they are specifically aimed, are discussed under the various subjects where they arise in this and other chapters, but particularly in Chapter 5.

  The Company Law Enforcement Act, 2001, specifically imposes a requirement on directors to comply with company law. This is a relatively recent development in the law and it remains to be seen how far the courts will be willing to go in their interpretation of this provision when giving consideration to breaches of the Acts that are brought before them.

  Directors also have responsibilities to ensure that the company is in compliance with other pieces of legislation that do not form part of company law. These include the Safety, Health and Welfare at Work Act, 1989, the Environmental Protection Act, 1992, and other relevant legislation. The Companies (Auditing and Accounting) Act 2003 brings in a requirement for directors to assess this compliance in full on a three yearly basis and to update and report on their level of compliance in their annual report.

- **Common law duties**

  The second kind of responsibilities undertaken by the director are two general duties imposed by the common law on all the activities of every director; the duty of care and a fiduciary duty.

  - **Duty of care**

    The duty of care requires directors to exercise their powers with skill and care but the degree of skill and care may vary according to the individual involved. The traditional view of the standard of care required was set out in a British legal case in 1925 during which three basic principles were formulated:

    - A director is not an expert, and need only display skills reasonably expected from a person of his experience. He is not liable for mere errors of judgement. In essence this principle means that the duty of skill varies with the individual director.

    - A director need not devote his continuous attention to the business.

- A director is entitled, in the absence of suspicious circumstances, to trust company officials to perform their duties honestly, where those duties can be properly left to them.

The second statement is probably still true as it applies to non-executive directors but since the time that these principles were set out it has become normal practice to appoint full-time executive directors. Nowadays an executive director with a service contract would also probably be required to display an objective level of skill as implied in that contract and to devote all their attention to the company.

- **Fiduciary duty**
  The fiduciary duty of the director is to act honestly in the interests of the company, a more onerous duty than the duty of care. The implications of this duty are that directors cannot act in their own interests rather than those of the company, for example in issuing new shares. They cannot take advantage of opportunities arising from their directorships for personal profit which could have accrued to the company. In the past the duty to the company was interpreted so strictly that ex-gratia payments to an employee have been considered as contrary to the interests of the company.

  The fiduciary duties of directors include having regard to the interests of the company's employees and its shareholders, although the duty is owed only to the company and therefore only the company can take action for breach of it. The provision implies that a board of directors may be able to take a decision which is not in the best interests of the corporate entity but is in the best interests of the shareholders or employees, for example in reaction to a take-over bid.

  In addition, if a company is insolvent or trading recklessly a director will owe a duty to the creditors of the company. This is dealt with in Chapter 6.

Are there any plans to change or formalise the duties of directors in the future?

The Company Law Review Group has identified seven specific duties of directors that have arisen out of case law over time and which they recommend be set out in statute. The duties identified are as follows:

- Duty of loyalty.

- Duty of obedience to the company constitution.

- Duty of avoidance of secret profits.

- Duty of independence of judgement.
- Duty to avoid conflicts of interest.
- Duties of care, skill and diligence.
- Duty to consider the interests of third parties.

Does anyone check whether I am fulfilling my duties in accordance with legislation?

Companies are required to file certain documentation with the CRO such as an annual return and accounts and notifications of changes in directors and secretary. The CRO has the power to reject a document sent for registration if an instance of non-compliance with company legislation is identified within a document. This rejection of documents can in certain circumstances result in a deemed failure by the directors to submit the required documentation within the timeframe required and penalties can arise.

The Director of Corporate Enforcement is responsible for monitoring compliance with company law. His responsibility is twofold. In the first instance he encourages compliance with company legislation, which he does by increasing awareness of the requirements through activities such as the issuance of information booklets on legal requirements in certain areas. In the second instance he enforces the law by following up on reported breaches of company legislation. He is responsible for taking prosecutions for various indictable offences.

How does the Director of Corporate Enforcement know if there has been a breach of company law?

In the past, while there were offences under the Companies Acts, there was no obligation on any party to report any offences to a third party. The Company Law Enforcement Act, 2001 changed this position through the establishment of the 'Office of The Director of Corporate Enforcement' (ODCE). Auditors are now required to report indictable offences under the Companies Acts that they become aware of in the course of their audit work to the ODCE and in some instances to the CRO and the Revenue. Liquidators also have a responsibility to report certain information to the ODCE in the case of every insolvent company to which they are appointed. This is dealt with in Chapter 6.

What can happen to me if I am found to be negligent in my duties as a director?

The penalties that can arise from a finding against a director vary depending on the particular offence. Any director is liable to be restricted from being a director of certain companies for five years if he has been a director of a company within twelve months prior to the commencement of winding up of the company and the insolvent company being placed in liquidation. A disqualification order may be made against a director by the court in certain circumstances such as the director having been convicted of an indictable offence involving fraud or dishonesty. Disqualification and Restriction are dealt with in more detail in Chapter 6.

Do I need to sign cheques?

Traditionally in many small companies one of the controls exercised by directors is the requirement for directors to sign cheques or authorise other payment media. The required signatures will be determined by the board and set out in the bank mandate which details the combinations of signatures up to set limits. It is not usual for non-executive directors to have cheque signing authority for day-to-day amounts although the board as a whole may be required to authorise large contracts or expenditure.

Given the volume of cheque payments required in many businesses and the widespread use both of computerised cheque generation equipment and electronic funds transfer many companies delegate the authorisation of payments down the chain of management responsibility. Very large amounts will probably still require the specific approval of a director or directors.

Must my name be printed on the company's stationery?

Yes. The names of all directors, and their nationality if they are not Irish, must appear on all the business letters of the company.

Making Contracts

Can I commit the company to a deal?

If the deal is within the powers delegated to you by the board then you can commit the company. Even if you have not been delegated that specific responsibility by the board but the contract would normally be within the powers of a director of your area of responsibility, then you can also bind the company, unless the person with whom you are dealing specifically knows that you are acting outside your powers. For example, unless one knew otherwise, it would be reasonable to assume that a sales and marketing director is empowered to engage an advertising agency to plan a new advertising campaign.

What happens if a director acts outside his powers in completing a contract?

The implication of a director acting outside his powers in completing a contract is that the company may be able subsequently to avoid the contract as the action is deemed to be invalid. The members of the company may subsequently ratify the action in a general meeting.

Should I sign contracts in my own name?

When signing a contract on the company's behalf you are signing as an agent of the company. The normal practice is to sign "for and on behalf of" the company, making your role quite clear by appending your functional title to ensure you are not making the contract yourself. When undertaking large or unusual contracts it is sensible to obtain professional advice.

When is it necessary to use the company's Common Seal?

A company's seal is a metal stamp which is impressed on legal documents and its effect is similar to that of a signature of an individual. It is required by law to be impressed on all deeds entered into by the company but in practice is often also impressed on other documents such as business contracts. Table A requires that all documents to which the seal is affixed are approved by the directors and signed by a director and countersigned by the company secretary, another director or another person appointed by the directors for that purpose.

The company secretary will usually keep a record of all documents sealed with the company's common seal, known as a sealing book.

Managing Director's Powers

I have been designated "Managing Director." Does this give me any additional powers?

The title "Managing Director" does not in itself confer any additional powers within the company although it can be reasonably taken by people outside the company to mean that you have the power to enter into contracts of any type on the company's behalf. Such an assumption can be made because it is usual for the board to delegate substantial powers to the managing director to run the company, the board being given power by the Articles of Association to appoint a managing director. In practice, the managing director or chief executive officer commonly is the pinnacle of the management structure including any executive directors.

Board Chairman

Is it necessary to have a board chairman?

No, there is no legal requirement to appoint a chairman of the board of a private company (although there must be a chairman of meetings of shareholders - see Chapter 4), but it makes practical sense to have a chairman who can ensure the efficient running of board meetings. Table A provides for the appointment of a chairman and also gives the chairman a casting vote on any decision where the board are evenly divided. The chairman of a listed company has specific responsibilities under corporate governance requirements in the combined code.

Virtually all active companies do appoint a chairman of the board who typically performs a role far beyond that of an umpire at board meetings. The chairman takes a key role in determining what will be on the agenda at meetings and directs discussion towards consensus decisions. He often plays an important part in determining the composition of the board and will normally decide the role of any board committees. The chairman may also be expected to act as the company's leading representative in dealings with the outside world, including institutional investors, financial analysts, the press and key customers or trading partners.

How is a chairman appointed?

The chairman is appointed by the board of directors who will also determine the method of choosing the chairman.

Board meetings

Is it necessary to have formal board meetings?

No, it is not necessary although it is usual and desirable. The Articles of Association commonly permit the directors to conduct their business in whichever way they see fit. In practice, large companies tend to retain a formal structure with regular meetings while small private companies sometimes dispense with formal meetings almost entirely in favour of written resolutions signed by all directors. Nevertheless the discipline of a framework for meetings can be useful even for small informal companies. It is best practice to formally record in minutes the major decisions taken by the board.

Some companies may find it useful to be able to hold board meetings even when a quorum of directors cannot meet in one location. In this case an amendment to the Articles of Association permitting the holding of a meeting by means of a telephone conference call or video conference may be helpful.

What notice of board meetings must be given?

The period of notice required is sometimes set out in the Articles of Association but in most companies the company secretary and precedent will decide what notice is given. Small companies which operate in an informal way may find that virtually no formal written notice is issued. Oral notice, at least, should be given to all directors. Circulation of a list of prearranged dates can be taken as sufficient notice and is a convenient practice for most companies.

What information should be provided before a board meeting?

Apart from the fact that the meeting is going to take place, the extent of other information sent to directors prior to the meeting should be appropriate to the circumstances, in particular the extent to which the directors are already familiar with the matters on the agenda. Normally it will include at least the agenda for the meeting and the minutes of the previous meeting.

If the best use is to be made of the collective abilities of the board, and particularly where there are non-executive directors, it makes sense to distribute background papers on the major decisions to be taken at the meeting. For these papers to be useful they should be accurate, concise and distributed in sufficient time before the meeting. The papers may be expected to include proposals for new projects, overall plans and budgets and regular financial and statistical information to review progress. It is worth emphasising that only key information should be presented; the time available to any board is fairly limited and, often, regularly presented monitoring information is overly detailed. Use of exception or variance reporting is one way of making information more effective.

What should I do if I am not receiving adequate information to discharge my duties?

If you consider that you are not receiving sufficient information to carry out your responsibilities as a director you should make a request that the additional information should be prepared by management and given to the board.

In making such a request you should consider whether the information is important and material to carrying out your responsibilities or merely constitutes useful background information. If the latter is the case circulation of the information to the board without formal presentation and discussion of the information at board meetings may be sufficient.

If you consider that the information presented to you as an individual or to the board in general is inadequate for the purposes of taking decisions and a request to management has not produced the required results then you may have to consider whether firmer action by the board is necessary. It is essential that the members of the board are privy to all information necessary for collective decision making.

In the extreme situation where, as an individual, you feel that key information is being withheld and your requests have been ignored, then you may have to consider your position on the board.

What should I do if I cannot attend a board meeting or series of meetings?

Your actions will depend on the length of your absence, the business which is likely to be conducted in the period and possibly also the attitude of your fellow directors. If your absence is only for one meeting and you feel it is not necessary for you to be formally represented, all that will be required is for you to send your apologies in advance of the meeting. You may find it useful to informally pass on your views on agenda items to the chairman before the meeting. If your absence is to be an extended one or there is a key decision to be taken for which you feel you should be represented then it may be possible under the Articles of Association of the company for you to appoint an alternate director who can attend the meeting in your place and vote on your behalf. Such an alternate should be carefully chosen.

Table A does provide that a director who is absent from meetings of the directors for more than six months without the permission of the directors should automatically vacate his office.

Board committees

What function do board committees fulfil?

As already indicated, the time available to the board at a full meeting is often extremely limited. Many companies, especially large public companies where the board may have a heavy agenda, find it useful to set up board committees of small numbers of directors to deal with significant but routine matters which merit more detailed discussion. The chairman of each committee is then required to report back to the board and minutes of committee meetings may be circulated to all the members of the board. A committee may also be useful in the evaluation of a major decision such as the commencement of a new line of business. The creation of a committee does not absolve the entire board from responsibility but merely enables the relevant area to be dealt with more efficiently. The three most common standing board committees for public companies are a remuneration committee, an audit committee and a nomination committee. The remuneration committee enables the decisions on the remuneration and conditions of service of executive directors to be taken in a fair and confidential way. The audit committee is set up to assist the board in ensuring the company has adequate financial controls in place and that they are operating satisfactorily in determining the validity of published financial information and in providing the board with a contact with the internal and external auditors which is independent of the company's management. The Combined Code requires that the both the audit committee and the remuneration committee be comprised entirely of non-executive directors and the nomination committee comprise a majority of non-executive directors.

What committees are required by company law?

The only committee required by company law is the Audit Committee. Listed companies are required by the Combined Code to have other committees such as the Remuneration Committee and the Nomination Committee.

The Companies (Auditing and Accounting Act) 2003 introduces a requirement for public companies (listed or unlisted) to have an audit committee.

Large private companies are required to consider whether they should establish an audit committee. If they choose to do so the responsibilities of the committee and the regulations surrounding membership of it are the same as those for a public company. The report of the directors to be attached to the financial statements must state whether or not an audit committee has been established. If the company chooses not to establish an audit committee then the reasons for this decision must also be stated in the report. It is an offence by the directors and the company if these requirements are not met.

There is an exemption from the provisions relating to audit committees for a public company that is a wholly owned subsidiary of another public company and also for certain other categories of companies that may be granted exemption by the Minister from time to time as he sees fit. A decision to grant such an exemption would be made on the grounds that the regulation of such companies under another enactment makes it (in the Minister's view) unnecessary or inappropriate to apply this provision to them.

Which directors should be members of the Audit Committee?

There should be at least two non-executive directors as members of the audit committee. These members should not have been an employee of the company or a subsidiary of the company in the last three years. In addition the chairman of the board of directors should not be a member of the audit committee. In certain circumstances this may not be possible, for example if the number of qualified directors on the board of the company is insufficient to enable the company to establish an audit committee. In such cases the qualifying director must be appointed as the sole member of the audit committee or alternatively is appointed the chairman of an audit committee consisting of not more than two members and will hold the casting vote in cases of equal decision of votes.

What are the functions of the Audit Committee?

Until recently the responsibilities of the audit committee have been derived from sources such as the 'Combined Code' which is applicable only to listed companies. The audit committee's responsibilities are now set out in the 2003 Act. These responsibilities include:

- Reviewing the company's annual accounts before they are presented to the board for approval.
- Determining whether the annual accounts give a true and fair view of the state of affairs of the company for the period and of the profit and loss of the company for the period.
- Determining whether the company and its subsidiaries have kept proper books of account for the period.
- Reviewing the directors' compliance statement and determining whether it is fair and reasonable and is based on due and careful enquiry.
- Recommending to the board of directors whether or not to approve the compliance statement and the annual accounts.
- Recommending to the shareholders an auditor for appointment as the company's auditor.

- Monitoring the performance and quality of the auditor's work and the auditor's independence from the company.
- Ensuring that the arrangements made and the resources available for internal audits are suitable, in the committees opinion.
- Including in the directors' report a report on the committees activities for the year.
- Performing any other functions relating to the company's audit and financial management that are delegated to it by the directors.

Board minutes

What record is kept of board meetings?

The Companies Act, 1963, requires that minutes of all meetings of directors or committees of directors shall be kept in "books kept for that purpose." The minutes do not need to record all details of the discussion at the meetings but they should record all proceedings and decisions taken. Responsibility for keeping the minutes normally falls on the company secretary.

It is normal and good practice for the minutes to be confirmed as an accurate record of the meeting at the next meeting of the board and for them to be signed by the chairman of either meeting. There is no legal requirement for this procedure but signed minutes provide evidence, although not conclusive evidence, of proceedings at the meeting and may be useful in the case of any later dispute.

The minutes of directors' meetings are confidential and the shareholders have no right of access to them. The auditors of the company have a statutory right to inspect the minutes as part of the company's books and records.

What can I do if I disagree with the facts given in the minutes?

If you disagree with the minutes on a point of fact you should record your objection with the chairman at the earliest opportunity, probably at the next meeting when the minutes are confirmed. If he fails to take account of your objection you cannot force him to alter them. If you consider the matter sufficiently serious you may find it necessary to formally record your objection, perhaps by a letter to the chairman.

What matters should be minuted?

In practice the amount of detail recorded in minutes varies from company to company, but they should as a minimum record the major decisions taken by the board at the meeting. Often a short narrative by way of explanation of the decision is included but it is not usual or necessary to record the details of the discussion surrounding any decision. A dissenting view will not normally be recorded unless the dissenting director specifically requests it. Papers and formal reports tabled at the board meetings may be included with the minutes in the minute book.

Corporate governance/internal control

I am a director of a private limited company. Does 'corporate governance' have any relevance to me?

Corporate governance is relevant to directors of all companies. It is the term given to the way in which directors perform their duties in running the company. Smaller companies will not normally find it necessary to have as formalised an approach to corporate governance as a large company may require.

In recent times, there is greater expectation with regard to the level of compliance of directors of all companies. Directors are well advised, therefore, to give careful consideration to the steps that they are taking to ensure that they are complying with company legislation. It is advisable that the company holds regular board meetings and that items addressed include the following:

- Strategic and corporate planning
- Review of financial information.
- Actual performance against budgeted.
- Risks facing the business.
- Investment appraisal.
- Cash position.
- Commercial performance and benchmark against competitors.

As stated above, the directors should ensure that minutes are maintained of all meetings with all relevant decisions and considerations documented.

What is the Combined Code and does it affect my company?

The Combined Code is a code issued by the Financial Reporting Council in the United Kingdom. The Code is endorsed by the UK and Irish Stock Exchanges and included in the listing requirements to be adhered to by listed companies traded on the main exchange. It has derived from a number of different reports over the last decade or so, including the Cadbury Report, the Greenbury Report, the Turnbull Committee Report and, more recently, the Higgs and Smith Reports. Each of these reports made proposals as to improvements that could be made in Corporate Governance in areas such as the responsibilities of audit committees, systems of internal control and disclosure of information as to the governance of the company. There is guidance set out in the Combined Code on how directors should conduct the business of the company. Directors of non-listed companies, while not required to comply with the Code, can benefit from reviewing the principles therein and giving consideration to applying them to the governance of companies of which they are directors.

The equivalent guidance for the public sector in Ireland is contained in the Code of Practice for the Governance of State Bodies.

What should I be doing to ensure that there is a good system of internal control in the company?

While directors have overall responsibility for ensuring that the company is in compliance with company legislation it is accepted that they will delegate responsibility for certain functions to board committees and/ or management. Directors are not expected to check up on each and every activity of those to whom responsibility is delegated and indeed it has, in the past, been a defence under company law to have been of the belief that functions delegated to an appropriately qualified person were being carried out appropriately. This is not to say that the directors do not have to take steps to monitor the activities of those to whom tasks have been delegated. A system of internal control should be implemented that is appropriate to the size and complexity of the company. This involves a structure for reporting upwards, adequate segregation of duties and authorisation of transactions, and review of reports by management and by the board.

There is also increasing focus on directors identifying business risks and ensuring that those risks are addressed through the implementation of monitoring systems with regular reporting to board level.

Accounting and reporting responsibilities

Accounting and reporting responsibilities

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Accounting records

What accounting books and records should be kept?

The company is required to keep books of account, kept up to date in a timely and consistent manner, which show:

- Entries of receipts and payments with details of what they are for.
- The assets and liabilities of the company.
- The sales and purchases of goods by the company.
- The sales and purchases of services by the company.
- Stock records.

It is worth noting that the records need not be physically kept in "books"; nowadays even the smallest companies maintain their records on computer and this is quite acceptable for Companies Act purposes. The books should be sufficient to explain the transactions of the company and to show a true and fair view of the state of the company's affairs. This does not mean that the records need to be updated instantaneously nor that the raw data in the records should show a true and fair view at all times. The records should hold the information in an orderly way to enable the financial position to be established with reasonable accuracy at any selected date, having regard to the size and complexity of the company and the nature of its business.

Most companies have other record keeping and accounting responsibilities in addition to the basic Companies Act requirements, typically those in respect of VAT and PAYE. There may also be requirements associated with regulation of the particular industry in which the company operates; for example banks and insurance companies have specialised solvency requirements which are monitored by their regulatory authorities.

Where should the books of account be kept?

The books of account should be kept either at the registered office of the company or at another place the directors consider appropriate, such as the company's place of business. The directors are required to state in the directors report the location of the books of account of the company. If the books of account are kept outside of Ireland then at least every six months a set of management accounts of the company must be returned to Ireland.

What can happen if proper accounting records are not kept?

The importance of the requirement to maintain proper accounting records is emphasised by the fact that failure to keep proper accounting records constitutes a criminal offence on the part of every director of the company, although it is a defence to prove that a competent and reliable person was entrusted with the work and was in a position to carry it out. The Director of Corporate Enforcement has the power to initiate a prosecution for any failure.

The state of the accounting records could well be taken into account in any decision on disqualification of directors if the company was to fail. The Companies Acts provide for the disqualification of a director by the court if he has failed to ensure that proper books of account are kept on two or more occasions. In addition, if on an insolvent winding up the Court considers that the failure to keep proper accounting records has contributed to the inability of the company to pay its debts; the Court may declare one or more of the directors and officers, or former directors and officers, to be personally liable for the debts of the company.

The auditors have a specific duty to form an opinion on the state of the accounting records in the course of the audit and if they consider that the company has been or is in breach of the requirement to keep proper books of account they must serve a notice on the company to that effect. The auditors are required to make a notification to the Director of Corporate Enforcement if the directors have failed to keep proper books as not keeping proper books of account is an indictable offence. Auditors are required to report all indictable offences. If, following a notification to the company of the directors failure to keep proper books of account, the directors take the necessary steps before the end of a seven day period to ensure the books are kept as required, then the auditor is not required to notify the CRO.

How long must accounting records be kept?

The Companies Acts require that records and books of account are kept by the company for at least six years after the latest date to which the record relates. The directors should be aware that there are a variety of other retention periods for particular documents arising from requirements of the Revenue Commissioners, the Department of Social Welfare, employment law or other specific legislation. Contracts under seal must be retained for at least 12 years.

Am I entitled to see the accounting records?

Yes, the books of account must be available for inspection by directors at all reasonable times. They may also be inspected on a director’s behalf by his financial adviser.

Accounting responsibility

Can the board delegate responsibility for accounting and financial matters to the Finance Director?
The board can and should delegate the detailed work and day-to-day responsibility for the finance function to the Finance Director or to an accountant who may not be a member of the board, but delegation does not absolve the board from overall responsibility.

The directors have a responsibility to prepare and present accounts and while every director is not expected to be an expert in accounting he should have at least a broad outline of the accounting responsibilities of the board. It is the duty of the directors to:

- Ensure proper accounting records are kept.
- To prepare and approve annual accounts for the shareholders.
- To ensure accounts are sent to those who are entitled to them.
- To present the shareholders accounts to a general meeting.
- In the case of companies limited by shares, to file accounts with the CRO (for small and medium sized companies the filed accounts can be abridged in certain respects from the accounts presented to the shareholders). In certain circumstances wholly owned subsidiaries of EU member state companies can file their parent companies accounts instead.

The collective responsibility of the directors for the accounts is indicated by the requirement for the accounts to be signed by two directors on behalf of the board.

Financial statements

What accounts or financial statements should be prepared?

Nearly all companies must prepare a profit and loss account (there are some exceptions notably in respect of companies with charitable objectives which may prepare an income and expenditure account) in respect of the accounting period being reported on, a balance sheet at the period end and, where the company has subsidiaries, group accounts. Companies are also required to include a cashflow statement unless they qualify as a small company under company legislation. The financial statements will also include a set of notes to the accounts and the accounting policies used in preparing the accounts. The report of the directors and the report of the auditors must also be attached to the financial statements.

The financial statements must be prepared in formats set out in the Companies (Amendment) Act, 1986 and the European Communities (Companies: Group Accounts) Regulations 1992 and there are certain technical principles and rules which must be followed. The formats are derived from European Community 4 and 7 directives and are common throughout the European Union. Some organisations, such as banks and insurance companies, are exempt from some of the requirements of the Companies (Amendment) Act, 1986. There is specific guidance on the format of financial statements for those particular industries to present the financial information on a basis that is more relevant to their businesses.

There are exemptions for companies falling into the classification of small and medium sized under the Companies (Amendment) Act, 1986 which permit these companies to present some of the information in shareholders' accounts in an abridged format. The accounts filed with the CRO and available for public inspection can be further abridged for small and medium sized companies.

Unlimited companies are required to prepare accounts but are not always required to file those accounts with the CRO.

Do accounts have to be prepared for dormant and non-trading companies?

The Companies Acts make no distinction between dormant and non-trading companies and operating companies. Therefore, accounting records must be maintained and accounts prepared for all such companies in the normal way.

Do the financial statements have to be prepared in accordance with International Financial Reporting Standards (IFRS)?

From 1 January 2005 the consolidated financial statements of all listed companies in the EU will have to be prepared in accordance with IFRS rather than UK and Irish generally accepted accounting practices used presently. The Companies (Auditing and Accounting) Act 2003 has assigned the task of designating an accounting framework to apply to the financial statements of all Irish companies to the Irish Auditing and Accounting Supervisory Authority (IAASA).

I am a director of a company that has a number of subsidiaries, is the company required to present group accounts?

A group of companies must meet certain size criteria which are specified in legislation relating to turnover, balance sheet total and number of employees before being required to prepare group accounts. In addition there are certain other exemptions. If the company has subsidiaries in Ireland but is itself a subsidiary of another EU company which prepares group accounts then the Irish company may not have to prepare group accounts.

As with single company accounts, when group accounts are required to be prepared the directors are required to file the group accounts with the CRO and it is an offence not to do so. If the Company has subsidiaries and is preparing group accounts, these form the financial statements of the Company. Separate financial statements are not normally prepared for the holding company unless they are specifically required for another purpose.

What information should be included in the report of the directors?

The content of the report of the directors is set out in the Companies Acts and the report is required to be attached to the financial statements of the company. Two directors are required to sign the report on behalf of the board of directors. The directors' report should include the following:

- A report by the directors on the state of the company's affairs and, if the company is a holding company, on the state of affairs of the company and its subsidiaries as a group including a fair review of the development of the business in the period and an indication of future developments.

- The amount, if any, that they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to reserves for the period.

- An outline of any material change during the financial year in the nature of the business of the company or of the company's subsidiaries, or in the classes of business in which the company has an interest whether as a member of another company or otherwise.

- Disclosure of the safety at work policy and how it was fulfilled during the period.

- Any important events affecting the company since the period.

- Details of political donations.

- A statement of the measures taken by the directors to ensure the keeping of proper books of account and the exact location of those books.

- The Directors' Compliance Statement (if required)

What is the Directors' Compliance Statement?

The Directors' Compliance Statement should be prepared by the directors of the company and contain the following information in respect of the company:

- An outline of the company's policies regarding compliance with its relevant obligations under the Companies Acts, tax law and any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements.

- The internal financial and other procedures for securing compliance with its relevant obligations.

- The arrangements for implementing and reviewing the effectiveness of those policies and procedures.

The statement must be in writing and submitted to the board of directors for approval. In addition, it should be reviewed by the directors at least every three years and revised if necessary.

What are the 'relevant obligations' of a company?

'Relevant obligations' refer to a company's obligations under each of the Companies Acts, Tax Law and any other enactment that provides a legal framework within which the company operates and that could materially affect the company's financial statements. This could possibly refer to Environmental Legislation in the case of a pharmaceutical company or in the case of a company with a large workforce, Employee Health and Safety Legislation.

Are all companies required to prepare a Compliance Statement?

This requirement was introduced by the Companies (Auditing and Accounting) Act, 2003 and is required of completed public companies, whether listed or unlisted. Private companies limited by shares are also required to comply but there are certain exemptions available for companies if:

- The balance sheet total does not exceed €7,618,428
  and

- The turnover for the year does not exceed €15,236,856.

The Minister may also exempt certain categories of companies

Maintenance of capital

Is there any limit on the amount of dividend which can be paid out?
Yes. The rules on distribution of profits are complex; what appears below is only a brief summary and if you are in any doubt as to the availability of profits for distribution you should take professional advice. It should be noted that dividends can be distributed in the form of practically any asset, not just cash, and the restrictions apply equally to all distributions.

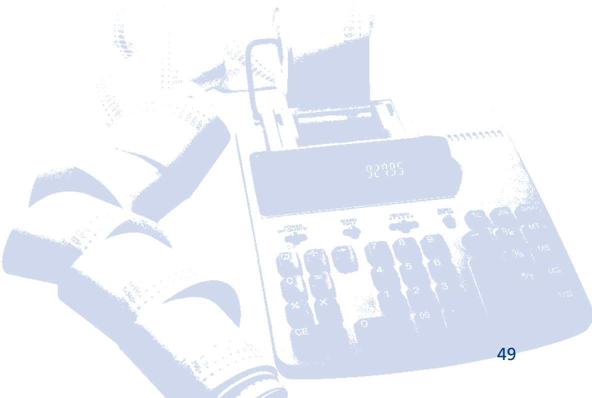
In summary, the rules are intended to maintain the capital of the company as contributed by the shareholders. A private company can distribute only its accumulated realised profits. Realised profits are determined in accordance with generally accepted accounting principles. Simply, a company cannot return a dividend to its shareholders until it has realised a profit. However, if in any one year a company trades at a loss then a dividend can be paid, provided that accumulated undistributed profits from previous years are available in excess of its current loss. Obviously such a policy could not be carried on indefinitely and in any case the directors may wish to maintain the reserves for future use. In addition, a public company cannot distribute its realised profits without making good any excess of unrealised losses over unrealised profits. It can make a distribution only if the distribution does not reduce the net assets below the called-up share capital and undistributable reserves.

Borrowing restrictions

Is there any limit on what the company can borrow?

Your company may have a limit on the amount the directors can borrow on behalf of the company without the approval of the shareholders. Table A permits the directors to borrow up to the nominal value of issued share capital but for many companies with substantial reserves such an amount may well be unnecessarily restrictive. A more common restriction may be up to twice the total of share capital and reserves or, in the case of private companies, no limit is frequently set.

If the company is in financial difficulties the directors will then owe a duty of care to the creditors of the company. In this case personal liability can be imposed on the directors if it is found that they were contracting for a debt of the company which they were aware the company would not be in a position to pay when it fell due. This is dealt with further in Chapter 6.



Auditors

Is it necessary to appoint an auditor?

It is a legal requirement that all companies that are not entitled to an exemption appoint an auditor and the report of the auditor must be attached to the statutory financial statements that are submitted to the shareholders and to the CRO.

Some small private companies are not required to have their accounts audited and will therefore not be required to appoint an auditor. There are a number of specific qualifications that have to be met for the company to avail of this audit exemption:

- The company must not be a parent undertaking or a subsidiary undertaking as defined by statute; and
- The company must be in compliance with the CRO office filing requirements.

  and two out of the following three conditions must apply

- Turnover does not exceed €1,500,000
- The balance sheet total does not exceed €1,904,607
- The average number of employees during the year does not exceed 50

Each of these requirements must be met for both the current and the prior year in order to obtain the exemption unless it is the first financial year of the company. The monetary amounts above are subject to increase over time.

What qualifications are required of an auditor?

The auditor, or more usually the partners of a firm of auditors, is required to hold membership of a recognised body of accountants. Normally in Ireland this will entail membership of the Institute of Chartered Accountants in Ireland or one of the other relevant bodies. Ireland has also implemented a European Community Directive to facilitate the approval of accounting qualifications throughout the Community by permitting the Minister for Industry and Commerce to approve other (including foreign) accounting bodies.

In addition to a professional qualification, the auditor must satisfy certain independence qualifications in respect of each individual appointment held. The auditor cannot, for example, own shares in the company and should not be a close relative, employee or partner of an officer or an existing or recent employee of the company.

Implementation of these rules can be complex and most firms of auditors have internal rules to ensure compliance by their partners and staff. These may include the following:

(i) Arrangements to ensure that staff are adequately trained and empowered to communicate any issue of objectivity that concerns them to a separate partner.

(ii) The involvement of an additional partner (in the case of a sole practitioner, a qualified colleague) to carry out a review or otherwise advise.

(iii) Rotation of engagement partners and staff.

(iv) The evaluation of a potential client when a firm is approached to act, to assess such facts as the integrity of the client's management, company profile, accountancy competence, etc.

(v) Formal consideration and review of the continuance of all engagements before the firm's name is allowed to go forward for reappointment as auditor.

(vi) An overall control environment, starting with a professional approach towards matters of quality and ethics, and taking in staff training, development and performance appraisal, and the assurance provided by a regularly monitored and evidenced control system.

Can the company change its auditor?

Yes, it is possible to change the auditor but to ensure that the company does not change the auditor for other than good reason, the auditor has certain legal protections and responsibilities.

The auditor is appointed from one annual general meeting to the next; if the retiring auditor is not proposed for re-election the company and shareholders must be given extended notice of the resolution. The retiring auditor has the right to require written representations to be sent to the members, and whether or not these are sent, to appear at the general meeting and make the points to the shareholders orally at that meeting. The company need not wait until the annual general meeting to remove the auditor; under the Companies Act, 1990, such a resolution can also be proposed at an extraordinary general meeting. If you do decide to change your auditor you will find that before accepting appointment the proposed new auditor will seek the company's permission to enquire of the retiring auditor whether there are any reasons why he should not accept appointment.

If for any reason the auditor resigns or declines to be re-appointed, and he considers that there are matters which should be brought to the attention of the shareholders, he must state the matters in writing and the board must circulate the notice to the shareholders. The auditor must also send a copy to the CRO. The company or any person who claims to be aggrieved by the notice can apply to the Court for the notice not to be sent if the Court agrees that it contains matter which has been included to secure needless publicity for defamatory matter. If necessary, an extraordinary general meeting should be called to discuss the matter. The provision is to ensure that the auditor cannot avoid a difficult situation by resignation.

What are the duties of the auditor?

The auditor's statutory responsibility is to report to the shareholders on the accounts which have been prepared on behalf of the directors. There are six matters on which the auditors are required to make a statement in their report:

- Whether they have obtained all information and explanations necessary for the purposes of the audit.
- Whether, in their opinion, proper books of account have been kept. (As noted above if the auditors do not think that proper books of account have been kept they must notify the company and may also need to notify the Office of the Director of Corporate Enforcement (OCDE)
- Whether the balance sheet and profit and loss account are in agreement with the books of account.
- Whether in their opinion the accounts give a true and fair view.
- Whether in their view a situation existed at the balance sheet date which under the Companies (Amendment) Act, 1983 requires the convening of an extraordinary general meeting (if the company has not held the AGM in the required timeframe and the auditors become aware of this they will then have to notify the ODCE)
- Whether in their view the compliance statement prepared by the directors is fair and reasonable.

There are amended requirements for the report if the company is a bank or insurance company or if the company has branches which have not been visited by the auditor. The auditor is also obliged to disclose the information about directors' loans or substantial transactions required by the Companies Act, 1990 in his report if it is not disclosed in the accounts.

It is worth noting that 'true and fair' which is the key phrase in the report is not defined in the statute. In many situations there may be more than one approach which is true and fair and the auditor is simply required to form an opinion as to whether the directors' chosen approach is true and fair.

The obligation for the preparation of the accounts remains with the directors; the auditor is asked only to issue an opinion on the accounts. In practice, the auditor may undertake certain other work for the company in addition to the work they undertake to form their opinion for their report. Such work is outside the auditors' legal responsibility and should be agreed with them separately. The auditor has certain other statutory obligations such as the requirement to report suspicious transactions to the authorities under money laundering legislation. Your auditor will explain these requirements to you.

What rights of access does the auditor have to the company?

The auditors have a legal right to access the books, accounts and supporting information of the company at all reasonable times. They also have the right to obtain "information and explanations" from the officers of the company and there are penalties for officers who knowingly or recklessly make "misleading, false or deceptive statements. There is a two day time limit for officers to supply information requested for the purposes of the audit to the auditors of the company. There is a five day limit when the request is made by the auditors of a holding company to the officers of a subsidiary company. Failure to comply is an indictable offence that is reportable to the Director of Corporate Enforcement by the auditors.

In addition to access to the books and to information and explanations to help them form an opinion, the auditors also have the right to attend general meetings of the shareholders and to speak at those meetings.

The auditors have asked me to sign an engagement letter, what does this mean?

Auditors will normally seek to set out the terms of their engagement in writing. The letter will set out the relevant responsibilities between the auditors and the directors such as keeping proper books of account and preparing financial statements. It may also set out the responsibilities of the auditors and the various pieces of legislation that may require them to report to third parties.

The auditors have asked me to sign a letter of representation, what should I expect to be included in this letter?

Auditors often rely on representation from management as part of their audit evidence. They are required by auditing standards to obtain written confirmation of representations on matters that they consider critical to obtaining sufficient audit evidence to allow them to conclude on the financial statements.

Public access to documents

What documents and information about the company are open to inspection by members of the general public?

The general public are entitled to gain access to information about the company from two sources, as set out in the Companies Acts, 1963 to 2003.

- Firstly, the company is required to send certain documents and returns to the CRO. Documents which are filed with the Companies Office become items of public record and are available for inspection by the public.

- Secondly, under the terms of the Companies Acts, the company is required to maintain certain specified registers and documents, often termed the statutory books, and some of these statutory books are required to be made available for inspection by the public.

Documents of which copies will be available for inspection at the Companies Office are listed below, although it should be noted that this is not an exhaustive list.

- Memorandum and Articles of Association.

- Certificate of Incorporation.

- Annual Returns.

- Accounts, which should be filed with the Annual Return. As noted earlier in this chapter, the accounts filed by small and medium sized companies may be in the appropriate abridged format.

- Certain resolutions passed by the company in general meetings, including special resolutions.

- Any changes subsequent to incorporation such as the company's name, registered office, directors and their personal details, company secretary, share capital and Memorandum and Articles of Association.

- Any charges or mortgages over the company's property or undertakings.

Documents to be maintained by the company and made available for public inspection must be kept at the registered office, except for the register of members, the register of debenture holders and the register of directors' interests which may be kept and made available for inspection elsewhere. This is to facilitate those companies who may use a commercial registrar or professional adviser to maintain such registers. The address of the office where the register of members, register of debenture holders and register of directors' interests is kept must be notified to the Companies Office, where it becomes available for public inspection. Documents to be made available by the company for inspection include:

- Register of members, including their name and address, particulars of the shares held, and the date they entered and, if applicable, left the register.

- Register of debenture holders, including their name and address and the amount of debentures currently held by them.

- Register of directors and secretaries. Details to be recorded in respect of each director include their name, date of birth, residential address, nationality, business occupation and any other directorships held by that person.

- Register of directors' and secretaries interests in the shares of the company. This register must include not only shares owned directly by the director or secretary but also those owned by their spouse or minor children. The definition of interests is quite wide in this context and includes options and assignment of rights.

- Register of notifiable interests. Beneficial owners of 5% or more of the share capital of a public limited company are required to notify the company of their interests. Such interests may not be reflected in the register of members because of the use of nominees to hold the shares. The company is required to maintain a register of such notifications and make it available for public inspection. There is also provision for a public limited company to carry out an investigation into the beneficial ownership of its shares (see Chapter 4) and any information received as a result of such an investigation should also be recorded in the register.

Are auditors required to keep the information they receive in the course of the audit confidential?

Auditors are required to keep all information obtained in the course of their work confidential, except in certain specified circumstances required by law or other regulatory requirements. Auditors have responsibilities for example, to report under the Criminal Justice (Theft and Fraud) Act, 2001, certain information relating to fraud or theft to the Gardai and have responsibilities under the Money Laundering Regulations. As mentioned in Chapter 2 and Chapter 6 there is a requirement to report to the ODCE information in relation to indictable offences.

Do I still have to file accounts for the company with the CRO if the company is exempt from audit for the year?

Even if the company takes advantage of the audit exemption it must still file an annual return for the company and annex to it the financial and other information required for a small company in accordance with the Companies (Amendment) Act 1986.

What happens if I don't file the annual return on time?

There are penalties calculated on a daily basis for annual returns that are filed late. In addition, the company can be struck off the register for not doing so. While in the past a significant time period may have elapsed before the company would have been listed for strike off by the CRO, this situation has changed in recent years with late filings being followed up much more promptly.

If the company is struck off, the liabilities of the directors, officers and members of the company continue and can be enforced as if the company had not been struck off. In addition, any interested party can seek the reinstatement of the company in order to pursue their claims.

Shareholders

Shareholders

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Shareholders' Meetings

Is it necessary to hold shareholders' meetings?

Yes. Every company, except a single member company, must hold an annual general meeting of the shareholders each year within at least fifteen months of the previous meeting. A new company must hold its first annual general meeting within 18 months of incorporation. Any meeting which is not the annual general meeting is termed an extraordinary general meeting. Notice of an annual general meeting must be sent to all those entitled to attend at least 21 clear days prior to the meeting unless the Articles of Association provide for a longer period. The notice period for an extraordinary general meeting is 14 days for a public company and 7 days for a private company, although if a special resolution is to be put to the shareholders then the notice period goes back to 21 days. If the auditors and all members entitled to attend and vote at the meeting agree these statutory notice provisions can be waived.

As a director can I attend a shareholders' meeting even though I am not a shareholder?

All directors have an implied right to attend and speak at a general meeting of the shareholders.

As a director must I attend shareholders' meetings?

There is no legal obligation on a director to attend shareholders' meetings but it is advisable that all the directors attend the annual general meeting, particularly in the case of a public company, as shareholders have an opportunity to question members of the board who are accountable to the shareholders. On the other hand an extraordinary general meeting may be held at relatively short notice to deal with a particular matter and therefore the attendance of all directors may not be critical.

Must a shareholders' meeting have a chairman?

Yes, a shareholders' meeting must have a chairman. It is normal practice for the chairman of the board to act as chairman of the meeting and this is the situation envisaged by Table A, which requires another director to stand in if the chairman is unable or unwilling to act. If none of the directors are present or prepared to act as chairman, the shareholders themselves can elect a chairman.

What business is conducted at an annual general meeting?

The business conducted at the annual general meeting will usually include:

- Consideration of the annual report to shareholders, including the accounts, directors' report and auditors' report.

- Re-appointment of the auditors and the fixing of their remuneration.
- Declaration of a dividend.
- Retirements and re-elections of directors if they are required to retire by rotation or otherwise.

Table A terms the matters above "ordinary" business and requires special notice for any other matters such as the authorisation of directors' emoluments, but this restriction can be easily dispensed with by a different provision in the Articles of Association.

Public companies in particular, often look on their annual general meeting as an opportunity to develop their relationship with their shareholders who will expect a review of performance and an assessment of the outlook for the company in the future.

When will an extraordinary general meeting of shareholders be called?

The directors of the company have the power to call an extraordinary general meeting at any time and will do so when they wish shareholders to pass resolutions which will not wait until the next annual general meeting. Such matters may include the approval for a large acquisition or increase in borrowing powers to take advantage of some business opportunity.

There are two situations where directors may be required to call an extraordinary general meeting. Firstly, shareholders holding at least 10% of the voting paid-up share capital can requisition a meeting and if the directors do not comply by calling a meeting within 21 days, the shareholders can convene a meeting themselves. Secondly, under the terms of the Companies (Amendment) Act, 1983, the directors are required to call a meeting if the net assets of the company fall below half the called-up share capital.

What is the quorum required for a shareholders' meeting?

The statutory minimum requirement for a quorum is one for a single member company, two shareholders for a private company and three shareholders for a public company but the minimum can be altered by the company's Articles of Association. If your company has adopted Table A, Part I, you will find that the quorum is three shareholders.

What majority is needed for a shareholders' meeting to pass a resolution?

The majority needed depends on the type of resolution proposed to the shareholders. Ordinary resolutions, which by exception are all those not deemed special, can be carried by a simple majority of the votes although certain ordinary resolutions do require extended notice to the company, such as a vote to remove a director or auditor.

A special resolution requires a majority of 75% of the votes, requires notice of at least 21 clear days and is required for important changes, for example:

- Alteration of objects.
- Change of Articles of Association.
- Change of name.
- Re-registration of a public company as a private company or vice versa.
- Permission for directors to ignore pre-emption rights.
- Authorisation of a proposed contract for an off-market purchase of the company's own shares as permitted by the Companies Act, 1990.
- Reduction in capital.
- Redemption or purchase of shares out of capital.
- Authorisation to issue shares for cash other than pro rata to the existing shareholders for a given period, unless this power is already contained in the Articles of Association.

A separate special meeting of a class of shareholders is necessary when the rights of that class are to be changed and approval of 75% of the class voting at the meeting is required.

What record is kept of shareholders' meetings?

The Companies Act, 1963, requires that the company keep the minutes of proceedings at shareholders' meetings. Like the minutes of meetings of directors, the minutes should record the major decisions taken at the meeting and will not normally record discussions at the meeting. Unlike the minutes of the directors' meetings which are confidential, the minutes of general meetings must be made available for inspection by shareholders.

Beneficial ownership of shares

Can I find out who owns shares in the company?

Yes. In certain circumstances the company, rather than an individual director, can ascertain the beneficial ownership of shares in the company. Companies have been required for many years to maintain a register of members which is open for public inspection, but the widespread use of nominee shareholdings conceal beneficial ownership. Provisions in the Companies Act, 1990 make it possible for a public limited company to establish the beneficial ownership of the company's shares in certain circumstances.

Shareholders in public limited companies are required to notify the company within five days if their interest in the company is 5% or more of any class of voting shares. They must also notify the company each time their interest increases or decreases by more than one percentage point or if their interest falls below 5%. Where the shares are registered through nominees the names of the different nominee shareholdings should be given. If the shareholder fails to notify the interest, they can lose rights associated with the shares. Where a public limited company is listed, the Stock Exchange place further obligations on shareholders to notify the Company and the Company to notify the Exchange if they acquire an interest in excess of 3%, as well as other changes similar to those under Company Law.

If a public limited company has good reason to believe that an investor has an interest which has not been declared it can serve a notice requiring details of the investor's shareholding. The company can be required by shareholders holding 10% of the voting share capital to make such enquiries if there are reasonable grounds.

The company must keep details of all notifications of interests received from shareholders including any notifications received as a result of a notice from the company. The register must be available for inspection by the public and be produced for inspection at the annual general meeting.

The directors must also ensure that copies of any contracts to purchase the company's own shares that the company may have are maintained.

Remuneration, shares and others interests

Remuneration, shares and other interests

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Remuneration

How will my remuneration be set?

The way in which the remuneration of directors is determined and by whom varies from company to company, partly because directors are not entitled by right to a payment; there must be specific provision for their remuneration. Table A requires that the directors' remuneration must be approved by a general meeting of the shareholders although not as normal business of the annual general meeting. Not surprisingly, many companies have inserted a different provision which permits the directors to determine their own remuneration.

The remuneration received by directors purely in respect of their board duties is normally termed a fee while executive directors will, in addition, receive other emoluments including a salary for their executive duties. If you are an executive director this element of your remuneration should be dealt with in your service contract. If you do not have a contract with the company you will in any case be legally entitled to a reasonable payment for any services you render beyond your normal board duties. All directors are entitled to reasonable expenses arising from their attendance at board meetings. It is common for executive directors to waive their fees receivable as directors.

What considerations will normally be taken into account when determining the remuneration of directors?

The considerations of directors in determining remuneration will depend very much on the circumstances of the company. The directors of an owner-managed private company may take into account the financial needs of the business and the taxation implications of any remuneration. For a public company the Remuneration Committee and board has to consider the need to remunerate appropriately for the level of responsibility and to create incentives, but also be sensitive to the interests of other stakeholders including shareholders and employees.

In the past, controversies in respect of profit-sharing and incentive payments emphasised the desirability of the remuneration setting process being handled in as objective a way as possible, in fact the combined code now requires the non executive directors of listed companies to determine appropriate levels of remuneration of executive directors. As indicated in Chapter 2, some large companies deal with executive remuneration by way of a board committee partly because of the complexity of modern executive remuneration packages and partly to demonstrate independence in the process and, again, listed companies are required by the Combined Code to establish a remuneration committee for this purpose

Am I entitled to a pension from my directorship?

A pension is a form of deferred remuneration and in common with other remuneration, a director is not automatically entitled to a company pension. Usually the directors are empowered to make pension payments to ex-directors or their dependants by the Articles of Association of the company but the directors must always act in the best interests of the company. It may be more difficult to support an argument that a pension payment is in the best interests of the company and represents a form of deferred payment if the arrangement is made after a director's resignation, retirement or death.

In practice, many companies cover the provision of pensions by means of contributions to a pension scheme and the majority of executive directors would be provided for in this way. It is not normally desirable for independent non-executive directors of a company to be reliant for their future financial security on pension arrangements from that company.

Will my remuneration be disclosed to anyone?

There is no requirement for most companies to disclose details of individual directors' remuneration. Your company is required to state the total of all directors emoluments including pension contributions and the value of benefits in kind in the shareholders' accounts. The emoluments must be split between fees received as a director and other emoluments such as an executive salary. The information that can be deduced from the accounts about your individual remuneration will therefore depend on the number of directors in total and the breakdown between amounts received as a director and other emoluments. The amount disclosed should include all the remuneration received by the directors as a result of their directorships including amounts from subsidiary companies and any other parties. Listed companies have the additional requirement under the Combined Code to disclose directors' remuneration on an individual basis. This is typically done in the form of a 'Remuneration Report' included in the Annual Report of the company.

If you are a director of a company that falls into the classification of a small company then you should be aware that the abridged accounts to be filed with the CRO and available for public inspection are not required to disclose directors' remuneration.

As noted in Chapter 1, if you are a director with a service contract which has more than three years to run then the contract must be available for inspection by shareholders and any details of remuneration in that contract are, therefore, accessible.

Taxation

Am I subject to tax on directorship income?

As a director, you are liable to tax under Schedule E in respect of your directorship income, irrespective of the situation of any service contract, and the company must operate PAYE. PAYE must be applied when payment is made. If a Company accrues amounts in respect of remuneration, which remain unpaid six months after the end of the company's accounting period, it is deemed to have been paid on the final day of the accounting period. PAYE and interest is deemed to have been due from that date.

Directors should notify the Revenue Commissioners of their taxable income so that the appropriate income tax can be withheld. Directorship income suffers PAYE irrespective of the residence of the director or the location in which the duties are performed.

Neither companies nor partnerships can be directors. If, therefore, an individual director provides services to the company through the medium of a personal service company, or through a partnership, great care must be taken and professional advice obtained to ensure that the Income Tax, (including PAYE), Corporation Tax and Value Added Tax obligations of all parties are fully complied with.

Am I subject to PRSI and levies?

For PRSI, directors can be classed as an employee or as self-employed depending on the circumstances. The classification will have a direct bearing not only on the PRSI to be withheld from the director but also the liability to pay Employers PRSI. The obligation to withhold the Health Levy follows that of the obligation to withhold PAYE.

The liability to PRSI can be split into 3 distinct categories:

- **Proprietary director**
  Where a director has a controlling interest in the company (i.e. holds at least 50% of the shares with voting rights), the individual will likely be classed as a self-employed person for the purpose of PRSI. He will be liable to class S contributions. However there is no employer PRSI charge.

- **Directors with written contracts of service**
  Where a director specifically has a written contract of service he will be classed as an employee for PRSI purposes and liable to class A PRSI contributions.

In addition to the director's personal PRSI obligation, the company also has an employer liability on the directorship income.

- **Neither a proprietary director nor under a written contract of service**
  Where it is not clear whether the director would be classed as self-employed or as an employee, the position should be reviewed to determine the appropriate classification (S or A). The determination will be based on all the facts of the situation including:

- Duties performed
- Remuneration structure (fees and/or salary)
- Share holding
- Relationship to other directors

I am based overseas – am I subject to PRSI?

Where the director is located overseas and/or the duties of the directorship are performed overseas the PRSI situation is not straightforward and requires expert advice. An examination would also be required if an individual based in Ireland holds a directorship in a non-Irish company.

What about benefits in kind?

With effect from 1 January 2004 the PAYE/PRSI and Health Levy withholding provisions above also apply to benefits in kind provided to directors in addition to cash compensation. Particular care must be taken in situations where a director may be provided with benefits in kind with little or no cash compensation.

Do I have to make a return?

All directors have a requirement to file a self-assessment return unless:

- They have no other non-directorship income (e.g. rental income) and are a director of a shelf/dormant/non-trading company
  or

- They have no other non-directorship income (e.g. rental income) and all their income (fees, salary, benefits, distributions etc) has been subject to tax either directly or indirectly under PAYE. This only applies to non-proprietary directors.

If a self-assessment filing obligation exists there are additional considerations regarding the basis which income should be taxed. This is a complex area and directors should seek professional advice on their personal circumstances.

Loans

Can the company lend me money?

Yes, but only up to a limited amount. A company can only lend funds to its directors (including for this purpose shadow directors) up to a combined total of 10% of the net assets of the company based on the most recent audited accounts. If no accounts have been prepared the restriction is to 10% of the called-up share capital. So if, for example, your fellow directors already have loans up to the value of 10% of net assets then no further loan can be granted to you. The definition of director for this purpose is extended to include the connected persons of the director including a close relative or business partner of the director, a company which he or his close relatives control or a trustee on behalf of the director or a connected person.

The intention is to ensure that directors do not use their position to deplete the capital base of the company, but not to prevent a transaction in the ordinary course of business of the company as long as it is on an "arm's length" basis. If the company is normally in the business of making loans and lends to you on the same terms as other customers there is no limitation, although it is unlikely that a customer of a lending institution would be able to borrow the equivalent of 10% of net assets.

If you have a loan from your company you should be aware that a fall in the net assets will reduce the amount you can borrow. In the event that the 10% bench mark falls below the total amounts outstanding, the excess of the loan above 10% must be repaid within two months. There are also provisions for the setting aside in certain circumstances of any prohibited loan and for directors to make good any loss and repay any gain which occurs as a result of a prohibited loan. Finally, even if loans are within the 10% restriction, if the company is subsequently insolvent on a liquidation and the Court considers that the loans contributed to the insolvency it may require recompense from the beneficiary of the loans.

Receipt of a prohibited loan by a company director is an indictable offence and is subject to reporting by the auditor to the ODCE. There were 200 such reports received by the ODCE in 2003 and the Director has commented on the lack of apparent clarity on this issue among company directors. There are both civil and criminal penalties for breach of company law in this area. The civil remedies include the ability of the transaction to be made void and the person who authorised the transaction being made to account to the company for any loss suffered by it and the directors involved could lose their limitation of liability in the event of the company being wound up. There may also be a risk to the directors of either restriction or disqualification from acting as a director (See chapter 6).
In the event of a criminal prosecution through the courts the penalties include fines and custodial sentences for breaches of this section.

Can my company issue a guarantee on my behalf?

Yes, but as in the case of a loan to a director, only to a limited amount. A company may enter into a guarantee or provide security in connection with a loan, quasi-loan or credit transaction made for a director of the company or of its holding company, or for a person connected with such a director to a limit of 10% of net assets of the company as described in relation to loans to directors described above.

There is an exemption available provided that certain requirements are met. These include the requirement that the entering into the guarantee or the provision of the security is authorized by a special resolution of the company passed within the previous 12 months. A statutory declaration relating to the guarantee or security must be made at a directors meeting and circulated to the members with the notice of the general meeting. The statutory declaration must be accompanied by a report by an independent auditor stating whether the statutory declaration is reasonable.

If, after having made the statutory declaration, the company goes into liquidation and the court finds that the declaration was made without the directors having reasonable grounds for forming the opinion that the company would be able to pay its debts in full as they become due, the directors could become personally responsible for the debts of the company.

Can I lease or buy on hire purchase from the company?

Yes, but only to the same extent that you can borrow money. Leasing and hire purchase, along with types of deferred payment arrangements are termed "credit transactions" by the Companies Act, 1990, and the restrictions on loans extend to this type of arrangement.

Can I arrange for the company to pay some of my bills for me if I promise to repay the company?

Yes, but again this type of arrangement is restricted by the Companies Act, 1990, where it is termed a "quasi-loan," and is subject to the same provisions as loans and credit transactions and is counted with them. A common example of a quasi-loan arises when a director purchases goods for personal use using a company credit card on the understanding that he will reimburse his company at a later date.

Does the company have to disclose if it has lent me money or entered a similar arrangement?

Yes. Where a company or one of its subsidiaries at any stage in the course of the financial year has made a loan to or entered into a similar arrangement as discussed above with one or more of its directors (or directors of its holding company) the details of the transaction must be disclosed in the shareholders' accounts. The disclosure also extends to the connected persons of directors. The disclosure required is very full and includes the name of the director(s), the amount of any loan or guarantee at the beginning and end of the period, the maximum amount outstanding during the period, the amount of any unpaid interest, any provision against irrecoverable amounts and the percentage of all such loans compared to the net assets at the end of the year. There is an exemption for small loans which do not exceed €3,174 in the course of the financial year.

Advances to a director to meet company expenses are not affected by the regulations on directors' loans because there is no provision of personal credit to the director who receives the payment to meet expenses incurred on the company's business. Expense advances must be discharged within six months.

Are there any tax consequences if the company lends me money?

There could be tax consequences both for the company and you personally if the company lends you money.

The tax consequence for the company will depend on whether you are a shareholder, and on whether the company is closely owned or controlled. If the company is closely owned, or director owned and you are a shareholder, then payment of tax must be made to the Revenue which will be held by them until the loan is repaid. This is calculated at the standard rate of income tax on the grossed up amount of the loan.

Regardless of shareholding or control, loans to directors constitute taxable benefits in kind on which you will have to pay tax if they are interest free or at a low rate of interest.

Should I give a personal guarantee of the company's overdraft?

For many smaller companies personal guarantees from the directors will be essential if the company is to raise external financing and you may have little option but to give the guarantee if you wish trading to continue. You should nevertheless be aware of the consequences if the business is unsuccessful. You will be held liable for the debt. The guarantee may involve putting a charge on your family home which then becomes at risk. Given these risks you should take every step possible to evaluate the prospects of the company in a conservative manner. In particular, you should consider whether the finance being raised will be adequate to maintain the business until the payback of the investment. You should obtain legal advice on the terms of the guarantee and your accountant's advice on the trading projections.

Substantial transactions

Can I buy an asset from or sell an asset to the company?

Yes, but there are restrictions on the sale or purchase of assets between directors or connected persons and their company. The restricted transactions are termed "substantial property transactions" in the Companies Act, 1990. Transactions involving assets valued at less than €1,270 are exempt, so minor transactions such as the purchase of an old filing cabinet when the company is refurbishing its offices, are not affected. If the value of the assets exceeds the lower of €63,487 or 10% of the value of the company's net assets, then the transaction needs prior approval by a majority of the shareholders in general meeting. If the company is a subsidiary then the holding company may also need to approve it.

Sale and purchase of asset transactions with directors are also caught by a requirement to disclose details in the annual accounts. The benchmark for disclosure is any transaction during the year where the value of the assets bought or sold is the lower of €6,349 or 1 % of the company's net assets. Again, there is a "de minimis" exemption of values less than €1,270.

Interests in contracts

What should I do if the company enters a contract with another company in which I own shares?

You must declare to the board when you, or a person connected with you, have an interest in a contract or proposed contract with the company. You should declare the interest at the first board meeting where the matter is discussed or if the contract has already been made, at the next available board meeting. If you have shares in a company or interest in a firm which conducts business on a regular basis with the company of which you are a director, it is quite sufficient to declare your shareholding in a general notice without having to make a declaration every time a contract is entered into.

The company is required to keep a record of all declarations of interest and make the record available for inspection by the shareholders and other directors. The record must be produced at every general meeting of the company and any meeting of directors where requested by a director.

There is a common law prohibition on a director voting on a contract in which he is interested. Table A, except where it applies to private companies, has a clause incorporating the restrictions although it does permit a general meeting to relax the ban in general or specific circumstances. Even if your company does have a relieving clause in its Articles of Association, as in the case of many private companies, it is probably best practice if you do not vote in circumstances of a conflict of interest.

Finally, if you are aware of a proposed contract and you have an interest in the other party you should always take into account the insider dealing regulations discussed at the end of this chapter.

Interests in shares

Is it in order to own shares in the company of which I am a director?

Yes, it is quite in order for you to own shares in a company of which you are a director. In fact, the Institute of Directors recommends that directors take a long-term personal stake in their company and thereby share in its success or failure. As mentioned in Chapter 1 a shareholding requirement for directors was once quite common. In addition, many companies include participation in ownership as part of the remuneration package of their executive directors and other employees by means of shares as bonuses and share option schemes.

Do I have to disclose my shareholding?

Yes, if you are a director (or shadow director or company secretary) of an Irish company you are obliged to notify the company of your interests in the shares and debt instruments of your company. The interests held by your spouse and children under 18 must be included in your notification. Debt instruments includes debentures and other types of loan stock. Your notification to your company must be in writing and made within five days either of your appointment as director or any change in your interests while you are a director. It should expressly state that it is made in fulfilment of your statutory obligations.

The requirement to notify your company extends beyond the company of which you are a director and includes other companies in the group including those incorporated outside Ireland, even though you may not be a director of those companies. Directors' interests in wholly owned subsidiaries are exempted. For example, if you are required to hold a single share of a subsidiary in trust for the holding company you are not required to disclose this interest.

The requirement for disclosure of directors' interests was introduced by the Companies Act, 1963, partly as a response to the abuse of nominees registrations where the beneficial owner of the shares was not listed on the share register. The Companies Act, 1990 extended the rules on disclosure of directors' interests. It also extends the notification requirement to the directors of all Irish companies except wholly owned subsidiaries, so it affects those private companies where all the members are directors.

The definition of what constitutes an interest is broadly defined and includes being a beneficiary of a trust which has an interest, having a contract to purchase securities of the company, having an option to purchase (a "call" option) or controlling at least one third of another company which has an interest in the company. If you have an interest in a unit trust or UCITS which in turn has an interest in your company, then you do not have to disclose this interest.

Will anyone outside the company know of my interest?

Yes, the company is required to keep a register of directors' interests with the register of members and the register must be available for inspection by members of the public, even when the company is a private company. The register should also be available for inspection at the annual general meeting. The register should record the name of the director making the notification, the details of the notification itself and the date when it was made. There are certain details about directors interests which the company itself must record on the register particularly the grant of share options to a director and the exercise of such options but directors are not absolved of their requirement to notify such transactions. Not making the register of the directors' interests in the company available for inspection within 10 days of being requested to do so is an indictable offence reportable to the ODCE.

If your company is listed on the Stock Exchange the company will be required to pass on the details of any transaction to the Stock Exchange Announcements Office by the end of the following day.

Finally, the company's financial statements must include the details of directors' interests in the Directors' Report or notes to the accounts for all directors who are in office at the end of the financial year. The interests of the company secretary must also be disclosed.

Insider dealing

What is insider dealing?

Insider dealing is the misuse of confidential information about a company to make a profit or avoid a loss by someone who has obtained the information by virtue of their position with the company whether as director, employee, adviser or some other relationship. Generally inside information is used unlawfully to sell shares before the price goes down or to buy before the price goes up when the information to which the insider is privy becomes generally available to the market. The relevant information is termed "unpublished price-sensitive information".

The Companies Act, 1990, introduced provisions to outlaw insider dealing in Ireland. The regulations are complex but in essence they prohibit a person who is in possession of "unpublished price-sensitive information" from dealing in the shares of a quoted company or passing on that information to others so that they might deal. The net is spread wide and those affected include anyone connected with the company, and anyone connected with another company which was proposing a transaction with the first company. It extends to any unconnected person trading on the basis of inside information when he knows or ought to know that the person passing him the information is prohibited from trading. There are also provisions to prevent companies, as opposed to individuals, trading on the basis of price-sensitive information.

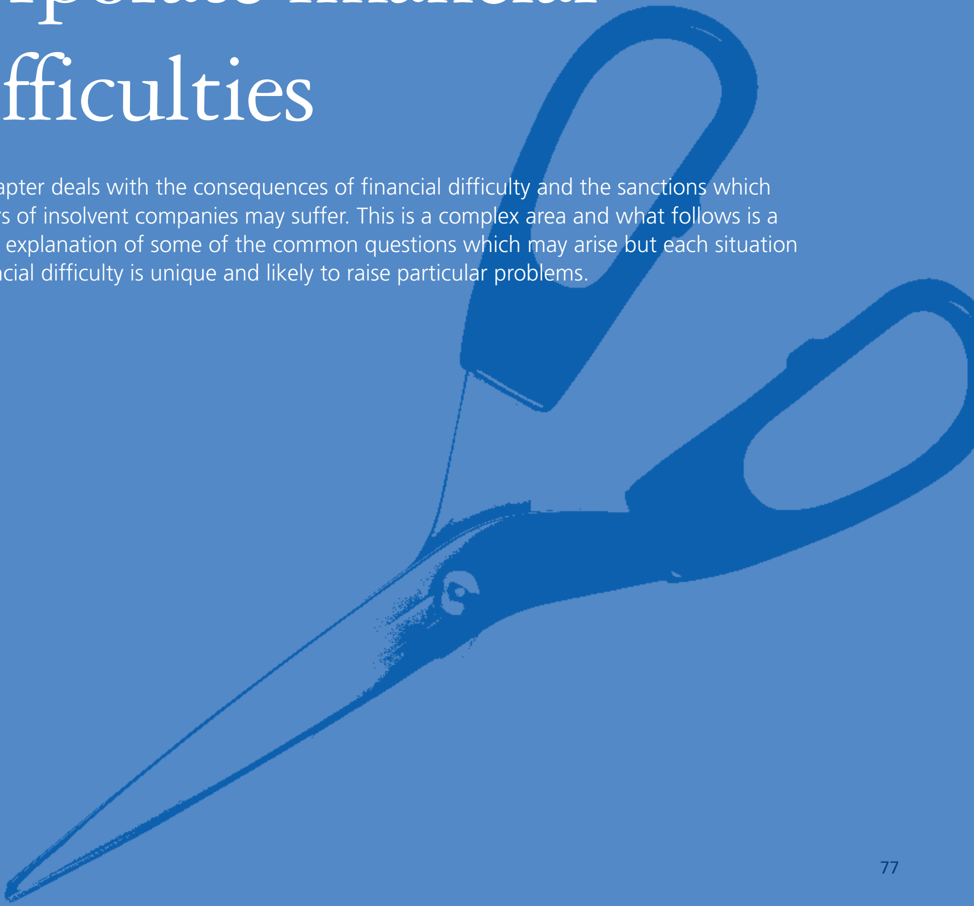
There are potentially severe sanctions on a person who undertakes insider dealing. In addition to criminal prosecution and penalties, and unlike similar legislation in the United Kingdom which has been in operation for several years, anyone engaged in insider dealing in Ireland may also be liable for damages to those who lost as a result of the insider dealing and to account to the company for any profits made.

I am not a director of a quoted company; so can this legislation affect me?

Yes, the legislation can affect you. You do not have to be directly connected with a quoted company for the provisions to apply. For a director of an unquoted company the most likely source of price-sensitive information would be business conducted between your company and a quoted company. This is not to say that all information about dealings with a quoted company is price sensitive. To be covered by the legislation the information must be sufficient to "materially affect the price" of the quoted securities.

Directors and corporate financial difficulties

This chapter deals with the consequences of financial difficulty and the sanctions which directors of insolvent companies may suffer. This is a complex area and what follows is a general explanation of some of the common questions which may arise but each situation of financial difficulty is unique and likely to raise particular problems.



Directors and corporate financial difficulties

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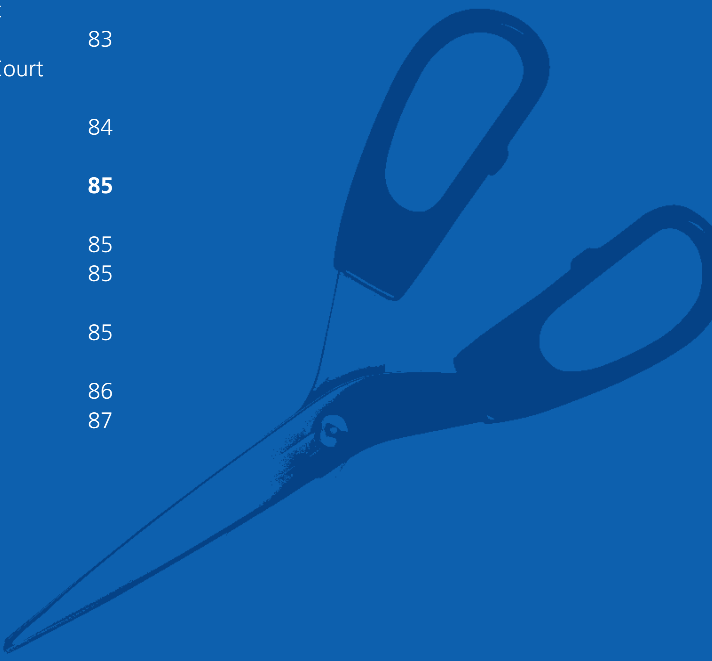


Financial difficulties

What should I do if I think the company of which I am a director is in financial difficulties?

The first step you should take is to discuss matters with your fellow directors and to seek professional advice.

Resignation may be an option but your primary responsibility, if the company is in fact insolvent, is to protect the creditors and leaving the board may not be the best way of achieving this. You may remain personally responsible even if you were to resign.

Assuming that the board is in agreement about the nature of the difficulties experienced by the company, you should look to evaluate the options which are open to you. At this stage you should seek independent advice about the company's financial position and probably your first point of reference will be the financial advisers of the company.

In addition to obtaining the help of financial advisers you should consider discussing the company's difficulties with the company's bankers. They may well adopt a sympathetic response if, before they come to you, you approach them with an analysis of the company's problem and a well thought out plan for dealing with it. For example, if the problem has arisen from a temporary cash flow difficulty your bank may be able to arrange factoring of debts or some other mechanism to improve the cash flow.

In deciding what course of action to take, your ability to make an informed decision will be helped if the necessary financial information is available. Poor accounting records are a common problem in companies that have financial difficulties. Those difficulties may have arisen partly because the management have had insufficient timely information about what is happening. If the company is to survive, accurate cash flow forecasts and other projections will be required and you should ensure that your company can provide them quickly.

If the financial difficulties are very serious it may be necessary to consult an insolvency practitioner, who will advise you on the steps to be taken. It is essential that the advice of the insolvency practitioner is adhered to as substantial responsibility is placed on the directors in these circumstances.

Can we continue and hope to trade our way out of the difficulties?

Perhaps, but not by being unrealistic. Your professional advisers will be aiming to formulate a plan of action which would enable the company to survive in its existing form. In many situations remedial action, taken in sufficient time, is successful. On the other hand you and your advisers will have to be aware of the sanctions which the law provides against directors and other officers who act in an irresponsible way. The provisions on fraudulent and reckless trading discussed below are not intended to penalise business failure but to ensure that the protection of limited liability is not available to directors and officers who defraud their creditors or carry on in business recklessly when there is no reasonable prospect of the creditors being paid.

What are the consequences for directors of trading while insolvent?

As a director you could be liable under both the civil and criminal law if the company trades in a fraudulent or reckless manner with the intention to defraud the creditors. Anyone, whether he is a director of the company or not, can be held personally liable under the civil law for all or part of a company's debts if he is knowingly party to the fraud.

The liability can arise not only when a winding up of the company takes place but also if the Court determines that the company is insolvent either because it is unable to meet its debts, or there is an outstanding judgement for payment of a debt in favour of a creditor. This is because insolvency may not necessarily lead to a winding up. Fraud of this nature is also a criminal offence and could result in both a prison sentence and a fine.

In addition, once the company becomes insolvent the directors owe a fiduciary duty to the creditors of the company as was evident in the case of Re: Fredrick Inns Limited. It also has been established in case law that individual creditors have a right of action against the directors of a company which can result in the loss of limited liability for the directors if there is evidence of fraudulent or reckless trading.

If fraud is not involved what are the consequences of trading while insolvent?

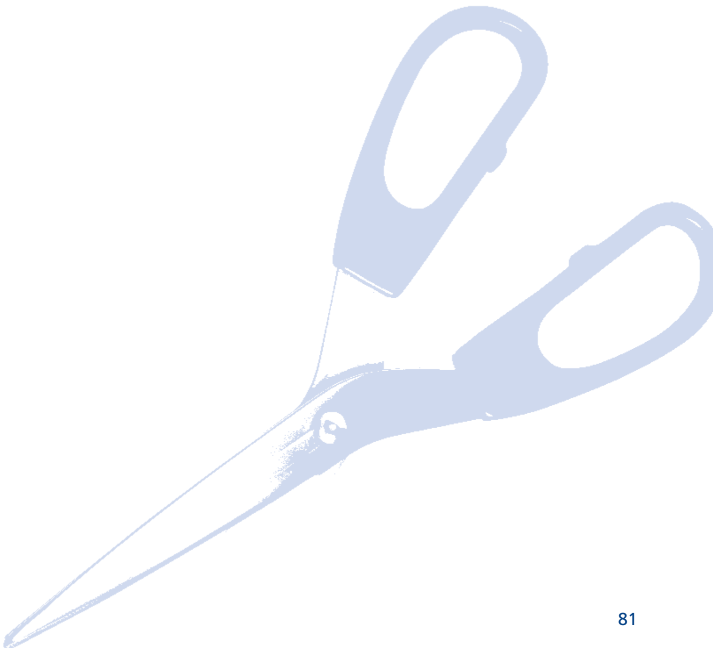
Civil liability and criminal penalties for fraud on creditors have been in existence for some time but, because the deliberate intention to defraud creditors is hard to substantiate and may in fact be relatively rare, there have been few successful actions. The Companies Act, 1990 addressed a more common problem by introducing legislative provisions to deter directors who carry on trading in an irresponsible manner. A concept of reckless trading was defined. There have been very few judgements in this area since its introduction but if your company is in difficulties you should be aware of the risks involved in continuing to trade when the company is in financial difficulties. The case of Hefferon Kearns Limited (January 1993) emphasised that the directors need to show that they were motivated by an honest belief that they were acting in the best interests of the creditors of the company in cases where they continue to trade while the company is insolvent. Failure to prove this can also result in restriction or disqualification.

What is reckless trading?

An officer of the company can be held liable to an unlimited extent for the debts of the company not only if there is a deliberate fraud but also if he is party to the company either:

- Carrying on business when he ought to know that the creditors are likely to lose as a result of carrying on
  or
- Incurring a debt when there are no reasonable grounds for believing that the debt can be paid.

In contrast to the position with fraudulent trading, a person can be liable for reckless trading even if his intentions were not dishonest in any way. The standard for judging whether a person has been involved in reckless trading appears to be an objective one, based on the skill, knowledge and experience to be reasonably expected of a person in that position. This has the effect of placing a higher standard of expected judgement on you if you possess special skills, for example those associated with an accountancy qualification, or you hold a position such as Finance Director. An officer can be held liable for reckless trading not only when a winding up occurs but also when the company can be shown to be insolvent but has insufficient assets to justify a formal winding up. A creditor can initiate an action for reckless trading. As indicated above, the directors must be able to establish that they acted in the best interest of the creditors and, to avoid restriction, that they have acted honestly and responsibly and that it would not be just and equitable that they should be restricted.



Examination, receivership and liquidation

What happens to me and my position as a director if an examiner is appointed?

An examiner may be appointed by the Court when a company "is or is likely to be unable to pay its debts." The appointment of an examiner must be initiated by a petition to the Court which can be submitted by the company, by the directors of the company, by a creditor, by shareholders holding at least 10% of the voting share capital or by a combination of any of these parties. Under the examination procedure, the company is given protection from its creditors (it cannot be put into receivership or liquidation) for a period of three months or more while the examiner explores the options open to the company and reports to the Court on his recommended course of action for the company and other matters.

During the period of the examination the examiner has extensive powers to enable him to complete his examination and to prevent any action taken by interested parties which could be to the detriment of the company or other interested parties. While the rights and powers of the directors are not in themselves altered or limited, the powers of the examiner could circumscribe the ability of the board of directors to take decisions and to direct the affairs of the company.

What powers does the examiner have?

If an examiner is appointed to your company you will find that he has extensive powers to obtain information. He has the same right of access to the books and records of the company as the auditor of the company, but he also has the power to require all officers (which includes each of the directors) and agents of the company and any other person who may have information, to provide any documents they have, to give assistance and to give evidence to him.

In certain circumstances the examiner can even gain access to the personal bank account of the directors.

If the examiner has good reason to believe that a director or past director maintains a bank account which has been used in any misconduct or undisclosed transaction in connection with the company he can require that director to make available bank statements and other documents relating to the account.

The examiner has powers to influence the running of the company. The examiner can convene, set the agenda for and chair meetings of the directors and general meetings of the shareholders and he has the right to attend and speak at all such meetings. He can propose motions and resolutions to these meetings and he can give reports to them. He has a fairly wide power under which he can halt, prevent or rectify any action, such as a disposal of assets which he considers is detrimental to the company.

Ultimately, if necessary to protect the interests of the company, creditors or employees, the examiner can apply to the Court to grant him all the functions and powers of the directors. Such an order would remove the powers from the directors and leave them with very little or no control over the affairs of the company.

What happens to me and my position as a director if the company is insolvent and put into receivership?

A receivership arises when the company is in default of the terms of a loan from a bank or other lender who has been given a mortgage or charge over the assets of the company as security for the loan. The terms of the mortgage or charge may entitle the lender to appoint a receiver whose objective will be to raise sufficient funds from the charged assets to repay the loan. Depending on the circumstances the receiver may sell all or part of the business. The receiver is able to sell the business or assets free of liabilities or dispose of the assets on a piecemeal basis.

The directors remain in office during a receivership and retain their responsibilities but their powers to direct the affairs of the company are limited by the powers of the receiver to deal with the charged assets. In essence, the company remains in existence and the directors continue in office although the business or assets of the company have been removed. A company in receivership may proceed directly to a liquidation (see below), but if the receiver is able to pay off the secured loan in full, the company will continue in existence in which case the directors will have responsibility for the remaining assets and liabilities of the company.

If the company of which you are a director goes into receivership and is insolvent then you will automatically become restricted unless you can persuade the Court otherwise (see below).

What happens to me and my position as a director if the company is insolvent and put into liquidation?

If the company is insolvent and is being wound up by the Court it will cease to exist as a legal entity when the liquidation is completed, although the completion of a liquidation can take some considerable period of time. The liquidator is given extensive powers to wind up the affairs of the company and deal as far as possible with the debts owed to the creditors, for example the power to take control of all the company's property. On the appointment of a liquidator the powers of the directors cease. A court liquidation occurs when a petition is made to the court for the winding up of the company. Parties that could make such a petition include the creditors of the company, the members of the company or the Director of Corporate Enforcement.

You will have a responsibility with the other officers of the company to give the liquidator information and to assist him in other ways such as attending meetings.

The liquidator must make a report to the Director of Corporate Enforcement in a prescribed format for each liquidation. This report sets out the conduct of the directors of the company and whether the liquidator observed any evidence of offences under the Companies Acts in the course of his work. He is also required by law to apply to the court for a restriction order in respect of each director of the company unless the Director of Corporate Enforcement has indicated that the obligation may be waived. There is no indication in the legislation as to the circumstances under which the ODCE may choose to waive the obligation of the liquidator in this respect, but presumably it may occur if the report of the liquidator indicates that the directors of the company were in compliance with their duties in the conduct of the business of the company or met the conditions for Relief under Sec 150 (see above).

Are there other ways, apart from Court liquidation, by which a company can be wound up?

A Court liquidation takes place after the granting of a petition for a winding up by the Court. On the other hand, a voluntary winding up takes place if the shareholders of a company adopt a resolution to wind up the company. A voluntary winding up may take place because of financial difficulty or some other reason such as there being no longer any need for the company.

There are two types of voluntary winding up. In a members' voluntary winding up the directors must swear a statutory declaration to the effect that the company will be able to discharge its debts in full within at most twelve months. The declaration incorporates a statement of assets and liabilities and an accountant's report that both the directors' declaration and the financial statement are reasonable. Where a director makes a declaration that the company will be able to meets its debts without having reasonable grounds for such an opinion he can be held liable for the company's debts.

If the company cannot meet its debts when the resolution for winding up is passed or it becomes clear during a members' voluntary winding up that the company cannot meet its debts then the winding up becomes a creditors' voluntary winding up. There are certain consequences of a creditors' winding up; there must be a meeting of creditors, the creditors can replace a liquidator appointed by the shareholders and the creditors can appoint a committee of inspection to monitor the progress of the liquidation (on which the members may also be represented).

Restriction and disqualification

Are there other consequences of insolvency for me as a director?

Yes, if you are, or within the past twelve months have been, a director of a company which has gone into receivership or liquidation and is insolvent then there are further serious consequences. These consist of either a restriction order or a disqualification order.

What does restriction entail?

Restriction means that the restricted person cannot be a director or a secretary of a company, or involved with promoting a company, unless that company fulfils certain criteria. The criteria are designed to ensure that the company has sufficient capital and funds to protect creditors. The effect is that companies are unlikely to be enthusiastic about appointing, or retaining as a director, anyone with a restriction order against them.

The criteria are:

- Share capital of at least €317,435 for a public company and €63,487 for a private company.
- Each allotted share is fully paid up in respect of both nominal share capital and any premium.
- The amounts fully paid up for each share have been paid in cash.

There are additional requirements placed on a company with a restricted person as a director or officer to ensure that the capital of the company is not eroded. A restricted person must give fourteen days notice of the restriction to a company that intends to appoint him either as an officer of the company or where a restriction is imposed when he is already an officer. In addition there should be no outstanding loans to directors.

A restriction order will apply for up to five years although an individual can apply to the Court for the order to be wholly or partially lifted within one year of the restriction being imposed. A company with a restricted person as director can also apply for the restriction to be lifted but only if the restricted person has not informed them of the restriction as he is required to do.

Can I prevent a restriction order being made?

The Court will impose a restriction order on you unless you can satisfy the Court that you acted honestly and responsibly in your role as director or the Director of Corporate Enforcement waives the requirements. It is a defence to establish that the you acted honestly and reliably in relation to the conduct of the affairs of the company. In La Moselle Clothing Limited (May 1998) the court identified a number of considerations to be taken into account in order to determine whether a director has acted responsibly. These include:

- The extent of compliance with obligations under the Companies Acts.
- The extent of the director's responsibility for the insolvency.
- The extent to which the director's conduct could be regarded as irresponsible.

Therefore, if you are a director in this position, it is important to take professional advice at the earliest opportunity. There is provision for exemption from restriction for directors who are nominees of financial institutions. For this purpose the definition of director includes shadow directors, to whom the restriction could also be applied.

An officer of the Court will pass on to the CRO details of the restriction order given by the Court and the CRO will maintain the details in a register of restricted persons.

In what circumstances could I be disqualified?

Unlike restriction, disqualification does not occur automatically if you have merely been involved as a director with an insolvent company.

The Court can order disqualification of a director in a variety of situations including:

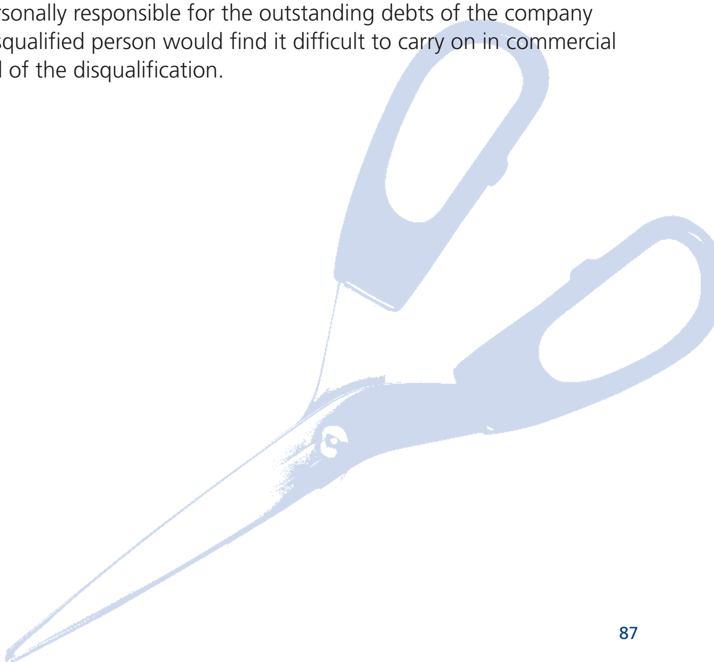
- Fraud.
- Fraudulent or reckless trading has taken place.
- Breach of director's duty.
- Conduct making the director unfit to be involved with the management of a company.
- An inspectors' investigation has shown the director to be unfit to be involved with the management of a company.
- Consistent default in requirements for filing at the CRO (indicated by three convictions for failure to file).
  and

- Being disqualified from being a director in another state in cases where the court is satisfied that if the conduct concerned had arisen in this state it would have resulted in a disqualification order being made.

For the Court to consider making a disqualification order, an application must be made to the Court by an interested party or by the liquidator. There are a number of exceptions such as where the director has been convicted of an indictable offence of fraud or dishonesty or where a person fails to notify the CRO on appointment that they have been disqualified in another state in which case the Court can issue an order directly. If a person who is restricted is found to have been acting as a director (except as permitted by legislation) they will be subject to automatic disqualification and criminal proceedings. For some of the grounds for disqualification, such as breach of duty, an application can be made by a wide range of interested parties including shareholders, creditors and employees. A disqualification order is a heavy penalty and it is unlikely to be imposed by the Court except in the most serious circumstances. Applications for a disqualification order can be made by a number of individuals including the Director of Corporate Enforcement, the Director of Public Prosecutions, a receiver, examiner, shareholder, liquidator, employee or creditor.

What does disqualification entail?

The length of the disqualification order is decided by the Court and during that period the disqualified person cannot hold the position of director or officer of a company or be involved in any way in the promotion, formation or management of a company. In addition to the disqualification order the Court can also make the individual personally responsible for the outstanding debts of the company concerned. A disqualified person would find it difficult to carry on in commercial life for the period of the disqualification.



Company investigations

When could my company be investigated?

Your company can be investigated when an application is made to the Court for inspectors to be appointed to investigate any aspect of a company's affairs. An application can be made by the company itself, a director, a creditor or shareholders representing at least 100 in number or holding 10% of the share capital. An application can also be made by the Director of Corporate Enforcement on the basis of certain circumstances, such as intent to defraud creditors or the shareholders, actions unfairly prejudicial to the shareholders or withholding information from the shareholders.

The Director of Corporate Enforcement has the power to conduct an investigation into the ownership and control of a company without applying to the Court and can use either the resources of his Office or appoint an independent inspector.

What does an investigation involve?

The inspectors, who will normally be experienced lawyers or accountants, are given wide powers to investigate the matter at issue. The powers include access to documents and other information from the company and relevant persons, taking evidence from those involved and if necessary the ability to gain access to a director's private bank accounts. The way in which the investigation proceeds will depend to a large extent on the matter being investigated.

What could be the outcome of an investigation?

The initial result of the investigation will be the report of the inspectors which will be presented to the Court or the Minister. The inspectors may also pass copies of the report to other interested parties, such as the company's auditors and possibly also to the investigated company itself. The distribution may be curtailed by considerations of possible legal action against the parties involved. The inspectors may also give information to the Court relating to offences they consider may have occurred. Ensuing action by the Court or by the Director will depend on the circumstances of the investigation.

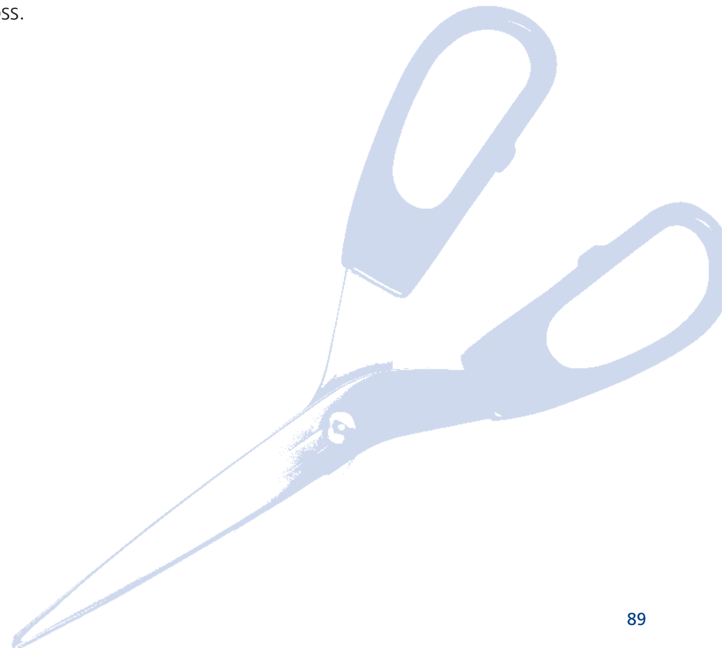
Insuring against liability

Can I insure against any personal liability I may incur as a director?
You can personally insure against most types of actions that may be taken against you as a director for damages, although you cannot insure against criminal prosecution or certain types of civil actions such as slander or libel. Although the cost of "D&O" (Directors and Officers) cover has grown in recent years it still represents a good protection for directors as the cost of an action, if borne personally, could be ruinous.

Can the company insure on my behalf against any personal liability I may incur as a director?
A company is permitted to purchase and maintain insurance for directors and officers in respect of liabilities they incur as a result of their role. This is a change introduced by the Companies (Auditing and Accounting) Act, 2003. Until this legislation a company was not permitted to purchase insurance on behalf of a director or officer.

Any insurance contract purchased or maintained before this provision became effective is now valid as if the legislation had been in place from the date of purchase.

Can the company indemnify me against a loss incurred as a result of my role as a director?
No, a company is expressly prohibited from indemnifying directly a director or officer against loss.



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