



Directors' Duties – Private Companies

Introduction

This is a brief summary of the duties and responsibilities of directors of private companies incorporated in Ireland. There are additional requirements and considerations for directors of public companies (i.e. companies that have no restrictions on the transfer of shares and whose shares can be offered for sale to the public) which are not within the scope of this legal briefing. In addition to obligations of directors arising under the Companies Acts 1963 to 2003, statutory obligations also arise in other areas such as employment law.

Appointment

A company must have at least two directors – it is a requirement of Irish law that at least one director be Irish resident, however, where this is not possible, the company must hold a bond in the prescribed form.

The day-to-day affairs of a company are managed by its directors and its Articles of Association (equivalent to by-laws) normally provide for the appointment of directors by a simple majority of shareholders. The board of directors may also appoint additional directors to fill a casual vacancy.

A person may not be a director of more than 25 companies at any one time (directorships of public companies or companies within the same group are not aggregated for the purposes of this limitation).

A company may not be a director, nor can an undischarged bankrupt or the company's auditor.

Resignation, Retirement and Removal

A director may resign at any time by giving reasonable notice, subject to any contractual commitments.

The Articles of Association may provide for a proportion (often one third) of the directors to retire by rotation at each Annual General Meeting and to be eligible for re-election.

A simple majority of the shareholders may dismiss a director, although certain formalities must be complied with. The Articles of Association will normally provide for Directors to be removed in certain instances.

Who is a Director?

- Executive Director
A director who is an employee of the company.

- Non-Executive Director
A director who is not an employee of the company. Usually a non-executive director will not have the same level of knowledge of the company's day to day affairs. However, Irish company law is placing increasing expectations on all directors, whether or not non-executive, so that, at the very least, they have a reasonable knowledge of the company's business. The law makes no distinction between the duties of executive and non-executive directors as such.

- Nominee Directors

Directors may be appointed by investors in a company to represent such investors on the company's board. Nominee directors must also act in the best interests of the company and cannot place the interests of the investors they represent above the interests of the company.

- Alternate Directors

Companies usually permit a director to appoint an alternate director to act in his place – usually with the same powers and subject to the same responsibilities and duties as the director appointing him.

- Shadow Directors

Where the directors of a company are accustomed to acting in accordance with the direction or instructions of another person, that person is deemed to be a shadow director and assumes liabilities accordingly. A shadow director is subject to many of the statutory obligations imposed on directors generally.

General Responsibilities and Duties

A director's primary duty is to act in good faith in the best interests of the company as a whole. Based on this primary duty a number of specific rules have developed:

A director may not enter into an arrangement with the company where he has a conflicting interest unless he has shareholder authority to do so.

A director may be liable to account to the company for any profits he makes as a result of his office (whether or not there has been a breach of duty or an abuse of power).

A director cannot limit his discretion in any way which would inhibit him from exercising his functions in the best interests of the company as a whole.

A director must exercise skill, due diligence and care in the discharge of his functions. However:

- (a) a director need not exhibit in the performance of his duties a greater degree of skill than could be reasonably expected from a person of his knowledge and experience;
- (b) a director should not be held responsible for errors of judgement provided he genuinely believed that a decision was taken in the best interests of the company; and
- (c) a director is not bound to give continuous attention to the affairs of his company provided he attends to his duties with reasonable regularity.

To whom are the Duties owed?

The director's duties are owed to:

- (a) the company itself as a separate legal entity;
- (b) the employees of the company; and
- (c) the shareholders generally. In addition, the shareholders are also owed special duties under certain circumstances, for example when a takeover bid for shares in the company is received.

Director of Corporate Enforcement

The office of Director of Corporate Enforcement was introduced by the Company Law Enforcement Act 2001. The Director can hold office for up to five years and the function of the Director is to enforce and encourage compliance with the Companies Acts 1963 to 2003, using his statutory powers.

LIABILITIES

Reckless Trading

A person can be held personally liable (without limitation) for the debts of a company if, while a director of the company, that person was knowingly a party to the carrying on of the business in a reckless manner or with intent to defraud its creditors.

A liquidator, receiver, examiner, creditor or contributory may make an application to Court to have a director held personally liable for debts.

A director may be deemed to be knowingly a party to reckless trading where:

- (a) having regard to the general knowledge, skill and experience that might reasonably be expected of a person in that position, he ought to have known that his actions or those of the company would cause loss to the creditors; or
- (a) if the director was party to the company contracting a debt and did not honestly believe on reasonable grounds that the company would be able to repay the debt.

Fraudulent Trading

Fraudulent trading arises when a person is knowingly a party to the carrying on of any business of the company with intent to defraud its creditors or for any other fraudulent purpose. A Court is empowered, on application by a receiver, examiner, liquidator, creditor or contributory of the company, to make a director personally liable for the company's liabilities. A director may also be guilty of a crime of fraudulent trading and liable to either imprisonment for up to seven years and/or fines of up to euro€63,480.

Proper Accounts

A director can also be liable for some or all of the debts of a company which is in liquidation, if it is unable to pay its debts and has not kept proper books of account. A director can avoid liability on this ground if it can be shown that he took all reasonable steps to ensure proper books of account were kept or delegated this responsibility to someone who was trained and competent to keep such proper books of account.

Restrictions

On the application to Court of the Director of Corporate Enforcement, a liquidator or receiver, a restriction order may be made against any director of an insolvent company, which will restrict him from acting as a director for a period of 5 years, unless specified minimum paid up capital requirements are met by companies of which he wishes to become a director. Other restrictions on the use of such companies' capital are also imposed.

If there is contravention of a restriction order, a person will be guilty of an offence and liable to either imprisonment for up to five years and/or fines of up to euro€12,696.

A restricted person will also be automatically disqualified from acting as a director, unless the company has a share value of at least euro€63,480, and may become personally liable for all or part of the debts or other liabilities of the company if the

company is wound up within twelve months of the breach. Liquidators are now obliged to apply for restriction orders in respect of the directors of the insolvent companies to which they have been appointed unless directed otherwise by the Director of Corporate Enforcement.

Disqualification

The Companies Act 1990 provides a range of circumstances in which a person may be disqualified by Court order from acting as a director. Disqualification may arise if:

- (a) the director is convicted of an indictable offence in relation to the company or of an offence involving fraud or dishonesty;
- (b) the director is guilty of fraud in relation to the company's members or creditors;
- (c) the director has been declared personally liable for a company's debts on grounds of fraudulent or reckless trading;
- (d) the conduct of the director makes him or her unfit to be concerned in the management of a company; or
- (e) the director has been persistently in default in relation to filing requirements at the Companies Registration Office (conclusively shown by three convictions within five years on filing matters).

Applications for disqualification orders can be made by the Director of Corporate Enforcement, the Director of Public Prosecutions, a receiver, liquidator, examiner, shareholder, employee, creditor, contributory or officer of a company.

A person convicted for a breach of an existing disqualification order is exposed to the same penalties as apply for a breach of a restriction order. Disqualification goes further than restriction as it debars involvement in the management of any company. Any company officer who obeys the directions of a disqualified director and who knows that the director is disqualified, will also have committed an offence and may be disqualified and could become personally liable for the debts and liabilities of the company.

Disclosure Requirements

All directors must declare all interests held by them, their spouses and their minor children and by companies controlled by any of them (i.e. a company which is either accustomed to act in accordance with a person's direction or where the person controls one third or more of its voting power). The declaration must be made to all holding, subsidiary and associated companies of which they are directors.

Every interest in shares or debentures in companies must be notified. Directors must also disclose certain events relating to those shares or debentures - for example, ceasing to be interested in the shares or debentures, entering into a contract in respect of them, etc.

Significant criminal penalties are imposed for any breach of the disclosure requirements including fines and imprisonment.

Further Information:

Owen O'Connell - owen.oconnell@williamfry.ie
 Brendan Cahill - brendan.cahill@williamfry.ie
 Ken Casey - ken.casey@williamfry.ie

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