
Briefing

Companies Act 2014: Duties of a Director



INSTITUTE OF DIRECTORS
IN IRELAND

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The Companies Act 2014 (the “Act”) came into effect on 1 June 2015. The Act introduced significant reforms in company law in Ireland.

The Act re-enacts much of the previous law concerning directors' duties but with some important changes. This briefing provides an overview of the principal Act-related changes that are likely to be relevant to a director of a company in Ireland when assessing his or her duties.

Key Features

- Directors' fiduciary duties are codified.
- Directors remain subject to a large number and wide range of statutory obligations, not merely under the Act.
- New obligations are imposed on directors to prepare an annual compliance statement and to review compliance procedures at least annually.
- Disclosure and transparency requirements on directors are expanded, especially regarding conflicts of interest and transactions with the company.
- Every person “occupying the position of director” is regarded as a director, even if not formally appointed as such; “shadow directors” are subject to many of the duties of a general director.
- No formal recognition of the distinction between executive and non-executive directors is made.

Role of the Directors

The directors of a company, who continue to be appointed by the members, remain responsible for the management of the company's business. This must be in accordance with resolutions of the members in general meeting, the company's constitution, the Act and general law. The position of a managing director continues to be recognised, if the board chooses to appoint one.

Like previous law, the Act does not recognise formally any distinction between executive directors (ie those who are engaged in the management of the company, typically as employees) and non- executive directors.

Duties of a Director

General Duties

A director continues to have many statutory duties and responsibilities, not merely under the Act. Legislation relating to topics such as health and safety, data protection, waste management, employment law and many others (especially if the company is operating in a regulated sector such as financial services) remain relevant and are unaffected by the Act.

The Act continues to recognise that it is the duty of each director to ensure that the relevant company complies with the Act; indeed, every director is required to make a statement to this effect, and in respect of compliance with all other legal obligations, when taking office.

The key duties of a director in the Act, described below, apply to every person who is occupying the position of a director, whether or not appointed formally as such, and to "shadow directors", ie those who are unduly influential with a company's board (but excluding professional advisers acting as such).

Apart from general law, the Act itself also imposes a large number and wide range of obligations on a director, such as to ensure that the company keeps adequate financial records and (in duties that are enforceable by the company only) to have regard to the interests of the company's employees in general and to the interests of its members.

Fiduciary Duties

The Act, for the first time in Irish law, sets out in statute the fiduciary duties of a director of a company that is registered in Ireland. The fiduciary duties of a director are those that stem from the essence of the office: that the director is in a special relationship to the company in which trust and confidence are essential.

The statutory fiduciary duties of a director are:

- to act in good faith in what the director considers to be the interests of the company;
- to act honestly and responsibly in relation to the conduct of the affairs of the company;
- to act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;

- not to use the company's property, information or opportunities for his or her own benefit, or that of anyone else, unless (a) this is permitted expressly by the company's constitution or (b) the relevant use has been approved by a resolution of the company in general meeting;
- not to agree to restrict the director's power to exercise an independent judgement unless (a) this is expressly permitted by the company's constitution or (b)
- to avoid any conflict between the director's duties to the company and the director's other (including personal) interests, unless the director is released from his or her duty to the company in relation to the matter concerned, whether by the company's constitution or by a resolution of the members in general meeting;
- to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both (a) the knowledge and experience that may reasonably be expected of a person in the same position as the director and (b) the knowledge and experience which the director has; and
- (as mentioned above) to have regard to the interests of the company's employees in general and its members.

The breach of any of these fiduciary duties may entail personal liability by the director to the company (including a duty to account to the company for any profit arising from a conflict of interest that has not been permitted or excused) but does not of itself affect the enforceability of any contract. As previously, the High Court is empowered to relieve a director from personal liability if he or she has acted honestly and reasonably and where the court believes that, in the circumstances, the director ought fairly to be excused. The restrictions on a company indemnifying its directors or exempting its directors from liability continue, as does the entitlement of a company to pay for directors and officers insurance for its board.

The Act permits a director who has been appointed by the company's parent entity (what sometimes is described as a nominee director) to have regard to the interests of the appointing parent, so long as to do so is not inconsistent with the interests of the company on the board of which the director is serving. This effectively restates the current common law on the point.

Directors' Report

Unless a company avails of the audit exemption, its directors have to state formally that as far as each director is aware:

- the director has taken all steps that the director ought to have taken, as a director, to make himself or herself aware of any relevant audit information and to establish that the auditors are aware of that information; and
- there is no relevant audit information of which the company's statutory auditors are unaware.

Directors' Compliance Statements

General Requirement

The requirement for the directors of certain companies to include a directors' compliance statement in their Directors' Report was included in the Companies (Auditing & Accounting) Act 2003.

However, that requirement was more onerous than the Act provides and the provisions of the 2003 Act were opposed on that basis and never brought into force. The Act provides for a more measured requirement for directors' compliance statements.

Companies Affected

The requirement to produce a compliance statement applies to directors of every public limited company ("PLC"), regardless of the company's turnover or balance sheet total for the relevant year.

The requirement applies to every:

- company limited by shares ("LTD");
- designated activity company ("DAC"); and
- guarantee company ("CLG");

which, in respect of the financial year of the company to which the directors' report relates, has:

- a) a balance sheet total for the year that exceeds €12.5m; and
- b) turnover for the year exceeds €25m.

The obligation to prepare a compliance statement does not apply to investment companies or to certain other companies that are subject to an exemption given by ministerial regulations.

Relevant Obligations

The "relevant obligations" covered by the compliance statement mean the obligations of the company:

- which, if an obligation were to be breached, would either be a category 1 or a category 2 offence under the Act (for example, failure to keep adequate accounting records, carrying on the business of the company with an intent to defraud creditors or non-compliance with financial assistance provisions) or be a serious market abuse offence or a serious prospectus offence; and
- under tax law (for example, Taxes Consolidation Act, Capital Gains Tax Acts and the Value-Added Tax Acts).

Statement in the Directors' Report

The directors must include in their Directors' Report an acknowledgement that they are responsible for securing the company's compliance with the relevant obligations together with confirmation that the directors have (or have not, in which case, the reason for that failure must be given):

- drawn up a compliance policy statement setting out the company's policies (that are, in the opinion of the directors, appropriate to the company) in respect of the company's compliance with its relevant obligations; and
- put in place appropriate arrangements or structures that are, in the opinion of the directors, designed to secure material compliance with the company's relevant obligations. This is clarified to mean that the arrangements or structures provide a reasonable assurance of compliance in all material respects with the company's relevant obligations. The arrangements can include reliance on the advice of an employee or service provider (in either case appearing to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations); and
- conducted a review, during the financial year to which the Directors' Report relates, of any arrangements or structures put in place to ensure material compliance with the company's relevant obligations.

Failure to comply with these compliance statement requirements is a category 3 offence attracting a term of imprisonment of up to six months or a fine of up to €5,000 (or both).

Directors' Interests in Shares / Debentures of the Company

As regards disclosure of a director's interest in the shares and debentures of the company, a director is not obliged to disclose certain interests of that director or of a connected person, including those that:

- are held through a UCITS or an authorised unit trust fund;
- are held in the capacity of an attorney or a proxy;
- in aggregate, do not represent more than one per cent (1%) in nominal value of the company's issued share capital.

The Act also expands the disclosures that must be made in respect of transactions with a director, requiring transparency in respect of the total amounts of such transactions.

Audit Committees

The directors of a “large company”¹ (of any type) have to either form an audit committee, with as a member at least one independent non-executive director who has competence in accounting or auditing, or state in their annual statutory directors’ report that they have not done so and why not. This is separate from the current, similar obligation in respect of companies in certain sectors (such as credit institutions) to do so in any event.

Liability of a Director

The Act makes frequent provision for the liability of a director (or other officer such as a company secretary) who is “in default”. This describes “any officer who authorises or who, in breach of his or her duty as such officer, permits the default mentioned in the provision.”

Action Required

A director should familiarise himself or herself with the provisions of the Act on directors’ duties. In particular, a director should recall his or her legal obligation to ensure that the company complies with the Act (in all respects). Directors also need to be aware of the new and varied obligations that it imposes on directors. New law (such as the requirement that the directors of certain companies prepare an annual compliance statement) is especially relevant.

¹ The threshold criteria are that a company, or a group of companies when aggregated, in both its / their most recent financial year and the immediately preceding one, meets the following criteria: (A) its / their balance sheet total for the year exceeds €25 million and (B) the amount of its / their turnover for the year exceeds €50 million.

Further information is available from



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