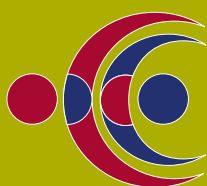
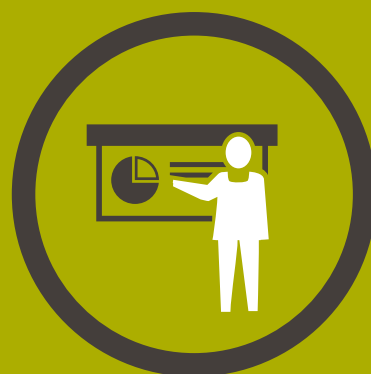


The Principal Duties and Powers of

Company Secretaries

under the Companies Act



Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement



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1.0 Introduction

The Companies Act 2014 brought about some of the most significant changes in company law in fifty years. It created new forms of company, and introduced a number of changes to the roles of various parties in company law.

The Office of the Director of Corporate Enforcement (ODCE) in furtherance of its remit to encourage compliance with company law, has historically issued a range of Information Books outlining the main roles and responsibilities of some of the key parties in company law, to assist non-professionals who aspire to be better informed about their rights and obligations under the law.

These Information Books were first issued in November 2001, and the current edition represents the third major rewrite of these publications since their first publication. The current edition reflects the law as at the passing of the Companies Act 2014. The books are on the following topics:

Information Book 1 – Companies

Information Book 2 – Company Directors

Information Book 3 – Company Secretaries

Information Book 4 – Members and Shareholders

Information Book 5 – Auditors

Information Book 6 – Creditors

Information Book 7 – Liquidators, Receivers and Examiners

In addition to information on the relevant duties and powers, each book also contains information on the penalties for failure to comply with the Companies Act.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law more easily understandable.

The Director of Corporate Enforcement considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. These Information Books are designed to increase the awareness of individuals in relation to those duties and responsibilities.

The Director wishes to make clear that this guidance cannot be construed as a definitive legal interpretation of the relevant provisions. Moreover, it must be acknowledged that the law is open to different interpretations. Accordingly, readers should be aware that there are uncertainties in how the Courts will interpret the law, particularly when the law is applied to the specific circumstances of specific companies and individuals.

It is important to note that when readers have a doubt as to their legal obligations or rights, they should seek independent professional legal or accountancy advice as appropriate.

As changes are made to company law in the future, the Director intends to keep this guidance up to date. He also welcomes comment on its content, so that future editions can remain as informative as possible.

**Office of the Director of Corporate Enforcement
May 2015**



2.0 Principal Duties and Powers of Company Secretaries

2.1 What is a Company Secretary

A company secretary is the person or body corporate appointed by the directors to carry out the duties and function of the secretary. The duties of the company secretary are defined in company law. To this may be added further duties by the board of directors which are normally administrative. Therefore, the company secretary acts in accordance with the directors' instructions and their main functions are normally to oversee the company's day to day administration and to ensure specifically that the company complies with the law and observes its own regulations.

2.2 The Requirement to have a Company Secretary¹

Every company is required by law to have a company secretary, who may be one of the directors². Where a company has only one director, that person cannot hold the office of secretary of the company³.

Every person should, on or before appointment as a company secretary, familiarise themselves with the duties and obligations attaching to the position.

2.3 Qualifications of a Company Secretary

Generally, no formal qualifications are required to become the secretary of a private company. However, the directors of all companies have a duty to ensure that the person appointed as secretary has the skill necessary to discharge his or her statutory and other legal duties and such other duties as may be delegated to the secretary by the directors⁴.

In order to be eligible to become the secretary of a Public Limited Company the person must satisfy at least one of the following three qualification conditions⁵:

- the person, for at least 3 of the 5 years immediately preceding his or her appointment as secretary, held the office of secretary of a company; or
- the person is a member of a body recognised for such purposes by the Minister for Jobs, Enterprise and Innovation⁶; or
- the person is a person who, by virtue of his or her holding or having held any other position; or his or her being a member of any other body, appears to the directors of the PLC to be capable of discharging the duties as a company secretary.

Eligibility

Before a person is appointed as company secretary, the directors must ensure that the person is eligible to hold the position. Certain persons are ineligible to hold office as a company secretary, such as:

- a person who is under the age of 18 years⁷;

¹ Section 129 Companies Act.

² Section 129(1) Companies Act.

³ Section 129 (6) Companies Act.

⁴ Section 129 (4) Companies Act.

⁵ Section 1112 Companies Act.

⁶ The Institute of Chartered Secretaries and Administrators (ICSA) has been recognised by the Minister for this purpose.

⁷ Section 131 Companies Act.



- an undischarged bankrupt⁸;
- a person disqualified from acting as a director⁹.

2.4 Appointment of the Company Secretary

The first secretary of the company must be named in the statement delivered with the constitution to the Registrar for registration¹⁰. Subsequent appointments to the office of company secretary are in accordance with the constitution of the company. Generally, the secretary is appointed by the directors of the company for such term, at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them¹¹. The secretary of a company consents to their appointment and signs a statement in the prescribed form to the effect that:

“I acknowledge that, as a secretary, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law¹²”.

It is possible for a company to have an assistant or deputy secretary who may act as secretary if no secretary is capable of acting or if the office of company secretary is vacant¹³. It is also possible for a company to have more than one secretary, for example joint secretaries¹⁴.

2.5 Duties of the Company Secretary

A company secretary may be assigned such functions and duties as may be delegated by the company’s directors. For ease of reference, secretaries’ duties are classified in the sections below as:

- statutory duties;
- duty of disclosure;
- duty to exercise due care, skill and diligence, and
- administrative duties.

2.5.1 Statutory Duties

A number of duties are imposed on the company secretary by the Companies Act. However, few of these are the secretary’s exclusive responsibility. Rather, they tend to be tasks which may (or are required to) be performed by the secretary and a director of the company. They include:

- signing the annual return (which is also required to be signed by a director of the company)¹⁵. The annual return is dealt with in detail in Information Book 1 – Companies;
- certifying that the financial statements attached to the annual return are true copies of the originals¹⁶;
- making out the statement of affairs in a winding up or receivership¹⁷ (see Information Book 7 which deals with liquidations and receiverships);

⁸ Section 132 Companies Act.

⁹ Section 838 Companies Act.

¹⁰ Section 22(2) Companies Act.

¹¹ Section 129 (3) Companies Act.

¹² Section 226 (5) Companies Act.

¹³ Section 22(3)(c) Companies Act.

¹⁴ Section 22(2)(b) Companies Act.

¹⁵ Section 343 Companies Act.

¹⁶ Section 347 Companies Act.

¹⁷ Section 593 Companies Act.

- signing the relevant application form including a “statement of compliance”, to re-register a company as a different type of company, for example converting a Private Limited Company into a public limited company¹⁸;
- making the statutory declaration required for a public limited company before it may carry on business¹⁹.

A company secretary, as an officer of the company, is under an indirect duty to comply with the company’s obligations under the Companies Act²⁰. A company secretary is in default where he or she authorises or permits a default to take place in breach of his or her duty as a secretary. Where a secretary, in purported compliance with any provision of the Companies Act, answers a question, makes a statement, produces a document, knowing the answer, statement or document to be false, or is reckless in the conduct of his or her duties; he or she is in breach of the Companies Act.

2.5.2 Duty of Disclosure

The secretary is obliged to disclose certain information for inclusion in the Register of Directors and Secretary and the Register of Directors’ and Secretary’s Interests. The information that must be disclosed is:

Where the secretary is an individual

- name;
- residential address;
- date of birth.

Where the secretary is a corporate body

- corporate name;
- its registered office;
- the registration number and the country where it is registered;

The secretary of a company has a duty to notify the company in writing of any interest they have in shares or debentures of the company or any other body corporate of the same group²¹, as well as any purchases or sales of such shares or debentures.

2.5.3 Duty to Exercise Due Care, Skill and Diligence

A company secretary is under a duty to exercise due care, skill and diligence in the performance of their duties. The secretary can be held liable for any loss arising as a result of their negligence. However, the secretary need not exhibit in the performance of their duties a greater degree of skill than might reasonably be expected from a person with their level of knowledge and experience.

2.5.4 Administrative Duties

In addition to the duties imposed specifically by statute, a company secretary may be allocated important administrative duties, which will vary depending on the nature and size of a company. These may include, for example:

- keeping the company’s minutes of board, board sub-committee (if applicable) and general meetings on behalf of the directors;

¹⁸ Section 1285 Companies Act.

¹⁹ Section 1010(3) Companies Act.

²⁰ Sections 270 and 271.

²¹ Section 261 – 263 Companies Act.



- keeping, and making available for inspection, the company's registers²² on behalf of the directors, including, *inter alia*, the:
 - register of members²³;
 - register of directors and secretaries²⁴;
 - register of directors' and secretary's interests²⁵;
 - register of debenture holders²⁶;
- ensuring that documents are filed with the Registrar of Companies within the prescribed time limits, such as the company's annual and other returns (see section 2.6);
- communicating with the company's members, for example notifying the members of meetings of the company, details of proposed resolutions to be considered at meetings, circulating them with copies of the annual financial statements etc.;
- delivering copies of special and certain other resolutions passed by the company;
- publishing statutory notices e.g. in national newspapers as required;
- administering share transfers;
- providing the directors with legal and administrative support;
- ensuring that the board's decisions are properly communicated;
- custody of the company seal. Important legal documents executed by a company must generally carry the company's seal, which bears the company's name;
- ensuring that the company's obligations with regard to its name are complied with. Every company is required to paint or affix its name in a conspicuous place, in legible lettering, outside each place at which it conducts business²⁷;
- ensuring that the company's letterhead bears the appropriate details. Every company's letterhead is required to bear the names of the directors and, where they are not Irish, their nationalities²⁸.

Depending on the nature and size of the company, a company secretary may also be empowered and/or authorised by the directors to, for example:

- swear affidavits (legal documents);
- sign cheques;
- supervise incoming and outgoing mail;
- prepare accounts;
- maintain the company's books and records;
- interview job applicants and approve their appointments.

²² Section 216 Companies Act.

²³ Section 169 Companies Act.

²⁴ Section 149 Companies Act.

²⁵ Section 267 Companies Act.

²⁶ Section 267 Companies Act.

²⁷ Section 49 Companies Act.

²⁸ Section 151 Companies Act.





2.6 Further Information

The Registrar of Companies has published an information leaflet (Leaflet No. 16) entitled ‘The Company Secretary’. This leaflet is available from the Registrar’s website and can be accessed at <http://www.cro.ie> and provides further detail on the duties of the company secretary, including:

- a comprehensive list of returns and documents that may be required to be filed with the Registrar of Companies and the circumstances under which they are required to be filed;
- details of the time limits for filing of each of the above returns and documents;
- a list of the most frequent errors contained in returns submitted to the Registrar, and;
- a list of resolutions in addition to special resolutions that must be filed with the Registrar.

2.7 Company Secretaries’ Powers

A company secretary has authority to make contracts within his or her own sphere of competence, for example the day to day administration of the company. Additionally, a company secretary may, under the doctrine of ‘ostensible authority’, bind a company, where the action is one within the secretary’s usual authority even if the secretary in fact had no authority to act. Outside the usual areas of authority for a company secretary, a company secretary has no authority to make contracts unless specifically authorised to do so by the directors.



3.0 Penalties Under the Companies Act

3.1 Penalties for Criminal Offences

Court Imposed Penalties

Under the Companies Act, provision is made for two types of criminal offence, namely summary and indictable offences. A summary offence is generally of a less serious nature and is tried before a judge only in the District Court. Indictable offences are generally of a more serious nature. Indictable offences can, in the same way as summary offences, be tried in the District Court before a judge only. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences can also be tried in the Circuit Court i.e. before a judge and jury. Where this course is taken, the indictable offence is said to be prosecuted on indictment. Where an offence is prosecuted on indictment, the penalties provided for by the law on conviction are generally considerably higher than had the offence been prosecuted summarily.

Under Section 871 of the Companies Act, a person guilty of an offence under the Companies Act that is stated to be a category 1 offence shall be liable:

- on summary conviction, to a class A²⁹ fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

In general, a person guilty of an offence under the Companies Act that is stated to be a category 2 offence shall be liable:

- on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both; or
- on conviction on indictment to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

A person guilty of an offence under the Companies Act that is stated to be a category 3 offence will be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

A person guilty of an offence under the Companies Act that is stated to be a category 4 offence will be liable on summary conviction to a class A fine.

The Court in which a conviction for an offence under the Companies Act is affirmed or recorded may order the person convicted to remedy the breach³⁰.

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

- Transparency Directive³¹ – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under transparency (regulated markets) law³²;

²⁹ “Class A fine” at the date of publication means a fine not exceeding €5,000 (Source: Fines Act 2010).

³⁰ Section 872 Companies Act.

³¹ Transparency (Directive 2004/109/EC) Regulations 2007 – S.I. No. 277 of 2007.

³² Section 1382 Companies Act.

- Prospectus Directive³³ – a fine of up to €1 million and/or 5 years imprisonment on conviction on indictment under Irish Prospectus Law³⁴;
- Market Abuse Directive³⁵ – a fine of up to €10 million and/or 10 years imprisonment on conviction on indictment under Irish market abuse law³⁶.

3.2 Civil Penalties

Disqualification

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

Disqualification means a person being disqualified from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company³⁷.

A person can be disqualified by way of:

- (a) Disqualification Order by the court; or
- (b) Accepting a Disqualification Undertaking – whereby the person submits to being subject to disqualification, by accepting and signing a prescribed disqualification undertaking.

Automatic Disqualification³⁸

A person is automatically disqualified by the court, if that person is convicted on indictment of:

- any offence under the Companies Act or any other enactment in relation to a company as prescribed; or
- any offence involving fraud or dishonesty.

A person disqualified by the court is subject to a disqualification order for a period of 5 years or other period as specified by the court. The court is obliged to send details of the disqualification order to the Registrar of Companies so that the details supplied are included in the public register of disqualified persons³⁹.

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person on a number of grounds⁴⁰ including:

- guilty of two or more offences in relation to accounting records offences (section 286);
- guilty of persistent defaults under the Companies Act;
- guilty of fraudulent or reckless trading while an officer of a company.

³³ Prospectus (Directive 2003/71/EC) Regulations 2005 – S.I. No. 324 of 2005.

³⁴ Section 1356 Companies Act.

³⁵ Market Abuse (Directive 2003/6/EC) Regulations 2005 – S.I. No. 342 of 2005.

³⁶ Section 1368 Companies Act.

³⁷ Section 838 Companies Act.

³⁸ Section 839 Companies Act.

³⁹ Sections 863 & 864 Companies Act.

⁴⁰ Section 842 Companies Act.





Disqualification Undertaking⁴¹

This is a new administrative procedure that provides a person (where the Director is of the opinion that certain circumstances in relation to a person apply) with an option to submit to a disqualification without the need for a court hearing. This procedure can be availed of where the Director has reasonable grounds for believing that one or more of the circumstances specified in section 842(a) to (i) of the Companies Act applies to the person⁴². The Director of Corporate Enforcement may, at his discretion, offer the person an opportunity to submit to a disqualification. Where the person submits to a “disqualification undertaking” and returns the disqualification acceptance document duly signed to the Director, they are deemed to be a disqualified person. The Director is obliged to send details of the disqualification to the Registrar of Companies, for inclusion in the public register of disqualified persons⁴³.

Restriction

The provisions relating to the restriction of company directors⁴⁴ apply to insolvent companies, i.e. companies that are unable to pay their debts⁴⁵ as they fall due. Where a company which goes into liquidation or receivership and is insolvent, a director of the company who fails to satisfy the Director of Corporate Enforcement or the Court that he or she has acted honestly and responsibly may be restricted for a period of up to five years.

Restriction Undertaking⁴⁶

This is a new administrative procedure that provides the person with an opportunity to submit to a restriction without the need for a court hearing. The Director may, at his discretion, offer the director of an insolvent company an opportunity to submit to be restricted. The offer will include the circumstances, facts and allegations leading to the Director forming the belief that restriction is appropriate.

Where the person accepts the restriction, and returns the restriction acceptance document, duly signed, the Director will send details of the “restriction undertaking” to the Registrar of Companies, for inclusion in the register of restricted persons⁴⁷.

Such a restriction prevents a person from being appointed or acting in any way, directly or indirectly as a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised⁴⁸. In the case of a public limited company (other than an investment company), the capital requirement is €500,000 in allotted paid up share capital, and in the case of any other company, the capital requirement is €100,000. Such a company is also subject to stricter rules in relation to capital maintenance.

A person who continues in office as a director of a company on the restriction taking place without the company being adequately capitalised, will be deemed, without proof of anything more to have contravened the Companies Act and will be automatically disqualified as a director. The topic of restriction is dealt with in detail in Appendix B to Information Book 2.

⁴¹ Section 849 Companies Act.

⁴² These are the circumstances which if the court were satisfied that they applied would result in a disqualification order, and are set out in section 862 Companies Act.

⁴³ Section 864 Companies Act.

⁴⁴ Section 819 & 820 Companies Act.

⁴⁵ Section 570 Companies Act.

⁴⁶ Section 852 Companies Act.

⁴⁷ Section 823 Companies Act.

⁴⁸ Section 819(3) Companies Act.



A person who acts in relation to any company in a manner or a capacity which they are prohibited by virtue of being (a) subject to a disqualification order, or (b) subject to a declaration of restriction, shall be guilty of a category 2 offence⁴⁹.

Strike Off⁵⁰

The Registrar of Companies may give notice of the intention to strike a company off the register on any of the following grounds:

- the company has failed to make an annual return as required; or
- there are no persons recorded as being current directors of the company; or
- the Revenue Commissioners have given notice of the company's failure to deliver a statement of particulars by new companies; or
- the Registrar has reasonable cause to believe that the company is not complying with the requirement to have a director resident in an EEA state or does not hold the requisite bond in the absence of such a director⁵¹; or
- the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting; or
- the company is being wound up and no returns have been made by the liquidator for a period of 6 consecutive months.

If a company is struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced⁵² as though the company had not been dissolved.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies. Specific and detailed information on restoring a company to the Register is available on the CRO website – www.cro.ie

⁴⁹ Section 855 Companies Act.

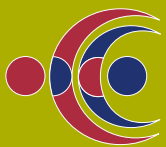
⁵⁰ Section 725 Companies Act.

⁵¹ Section 137 Companies Act.

⁵² Section 734 Companies Act.







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