

Guide to directors' responsibility and risk



Ireland. Private Companies.

The following are the types of private companies which can be incorporated under the Companies Act 2014 (the "Act"):

- Private Company Limited by Shares ("LTD")
- Designated Activity Company Limited by Shares ("DAC")
- Designated Activity Company Limited by Guarantee ("DAC Limited by Guarantee")
- Private Unlimited Company ("ULC")

A director is responsible for the day-to-day management of a company and is expected to make strategic and operational decisions for the company and to continuously manage its activities. A thorough understanding of expectations and duties can assist with ensuring the best corporate governance practices. Where a director fails to comply with their duties they

may be liable to, amongst others, customers, clients, suppliers, governmental authorities, the company and its members. If a director neglects to oversee the proper management of the company, they expose themselves to both civil and criminal actions. In this guide, we provide practical information on how to manage some of the key duties directors face in accordance with company law, as well as some of the risks faced for a failure to effectively undertake the role.

The term "director" includes "any person occupying the position of director by whatever name called". Accordingly, the legal responsibilities and obligations of a director apply to shadow directors and de facto directors, although such persons are not formally appointed.

Director requirements

A company must ensure that the composition of its board meets the minimum requirements of the Act. Some of the most common requirements can be found below.

Corporate director?

No

Minimum number of directors

1*

Declared bankrupt?

No

Residency Requirements

Yes**

* LTD can have a sole director, all other company types must have at least two directors.

**Subject to exceptions, at least one director should be resident in the EEA.

Are there any personal restrictions that may prevent an individual's appointment as director?

An individual cannot act as company director if:

- They are under the age of 18.
- They are a director of more than 25 companies (unless exempted).
- They are an undischarged bankrupt.
- They are the Statutory Auditor of the company.
- They are disqualified from acting as a director by the courts.
- They are restricted from acting as a director (unless the company is adequately capitalised).



Directors' duties

Prior to taking on the role as a director, a person should familiarise themselves with the legal responsibilities and obligations of the role. On appointment, a director signs a consent that they acknowledge their legal duties and obligations imposed by the Act, other statute and common law.

The Act sets out statutory duties (e.g. to prepare financial statements to ensure that the Company complies with the Act) and a non-exhaustive list of fiduciary duties as follows:-

The duty to act in good faith in what the director considers to be the interests of the company.

A director of a company must act in the best interests of the company and in a way they consider would be most likely to benefit the company.

The duty to act honestly and responsibly in relation to the conduct of the affairs of the company.

A director must always act responsibly and honestly and not make reckless or unconsidered decisions.

The duty not to agree to any restriction on the director's power to exercise an independent judgement.

A director must consider the members as a whole when exercising judgement, rather than an individual or a particular group of members. This is subject to circumstances where a director has been nominated to the board by a particular member entitled to nominate a director under the constitution or a shareholders agreement.

The duty not to use the company's property, information or opportunities for his or her own or anyone else's benefit.

A director must not find themselves in an unauthorised position where they are making a decision on behalf of the company in regard to a matter from which they stand to make a personal gain or profit.

The duty to avoid any conflict between the director's duties to the company and the director's other interests.

This includes actual and potential conflicts as well as direct and indirect interests.

The duty to act in the interest of both the employees and the members as a whole.

The Act provides that a director has a duty to have regard not only to the members of the company but also to its employees.

The duty to act in accordance with the company's constitution and to only use their powers for the purpose for which they were conferred.

A director of a company must act in accordance with the company's constitution, and only exercise powers for the purposes for which they are granted.

Example: where the company constitution only permits a director to enter into a contract worth a maximum of €1,000, and they then enter into a contract worth €2,000, they will have breached their duty to the company.

The duty to exercise the care, skill and diligence of a reasonable person who possesses similar knowledge and experience.

This looks at the skill and diligence expected of a reasonable person carrying out the same duties of the director. A director should be aware that the more skills and experience they are deemed to possess, the higher the standard of care that is expected.

Example: where the director is a qualified accountant, they would be held to a higher standard of care for the company's breach of accounting standards than a director who is not.

What are a director's general powers of representation?



Directors generally have power to act on behalf of the company but only have the powers to do what the company is legally entitled to do. A combination of the constitution of the company together with the Act provide that the directors may exercise all powers of the company which are not specifically required to be exercised by the members in general meeting.

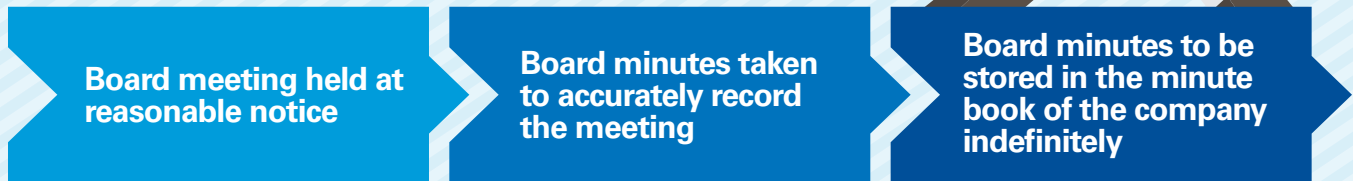
As a matter of good corporate governance, a director should ensure that all decisions made at board meetings are accurately recorded. They should also ensure the board of directors authorise its directors to specifically act on behalf of the company where their actions would go beyond general day to day management. For example, to execute a high value contract. This helps to negate any future concerns relating to a director's authority.

In addition to specific authority given to a director, the company may be bound by a director's actions when he or she acts with 'ostensible authority' (i.e. where the director is held out by the company as having the authority to do something or another party is led to believe that a director has the authority to commit the company in a certain way and no attempt is made to correct that impression.

Finally, under the Act, a Company may authorise a director or any person to bind the company, and that person can be registered in the Companies Registration Office as a "registered person" who will be deemed to have authority to bind the company.



Board meeting process



Conflicts of interest

A director has a duty to ensure that their personal interests do not conflict with their role as a director. They are not permitted to use the company's assets for their own personal gain, including obtaining loans directly from the company. Where a conflict situation does arise, the director must disclose it to the other directors as soon as they become aware. A company has the ability to release a director from this restriction to allow them to enter into and participate in conflicted matters.

You are a director of A Limited which would like to enter into a supply contract with B Limited. You are also a director of B Limited. Prior to deciding whether to execute the supply contract, you must inform the other directors of your conflict of interest and ensure that, unless authorised, you do not partake in the vote.



You are acting as a director of Company C, a consultancy company, who is approached by Company D in search of advisory and consultancy services. As opposed to referring Company D onto Company C's sales team, you decided to act for Company D in a personal capacity, and all proceeds you earn will go to you directly. There is a conflict of interest in this situation, and where you do not disclose this, and obtain permission from Company C to proceed with the provision of the services, you could be liable to account to Company C for all profits made as a result.



Bribery & Corruption

Where a public official or agent, such as a company director, corruptly gives or receives any gift or benefit in order to induce or reward an action or inaction they will be guilty of bribery. Where a director is found guilty of bribery, they will be liable for an unlimited fine and/or up to 10 years imprisonment.

A company and its directors, depending on its size, are expected to put certain procedures in place in order to prevent bribery, a failure to do so could lead to liability.

These could include:

- A compliance programme which adopts a risk-based approach customised to the company's individual needs (i.e. company size, sector it operates in, third countries it operates in and the use of third parties);
- Delivery of training to all employees, implementation of internal controls;
- Introduction of a code of conduct and relevant bribery and corruption policies;
- Appropriate procedures in order to detect, prevent and record any bribery and corruption offences suspected or committed; and/or
- Appropriate whistleblowing procedures.

Scenario

An Irish engineering company is operating a factory out of Brazil in order to manufacture a product, the factory is guarded by the local police at all times. In order to provide this service, the local authorities request a 'service fee'. Where the company fails to pay the service fee, the police refuse to allow the products to be moved from the site of manufacture to the nearby ferry port, stating safety and contamination concerns. In an attempt to prevent any delay, the company pays the service fee on a monthly basis in the form of travel reimbursements and meal vouchers. This is likely to be considered a bribe, and the directors should seek advice prior to proceeding with payment.



Can a director delegate their duties? If so, are they still liable for them?

A director can delegate their powers to such person or persons as they think fit, including committees.

Generally, directors will have the ability to delegate some or all of their duties and will commonly do so to one or more committees or alternative directors. However, the director will still be expected to oversee the functions of their delegate and ensure they are undertaking the duties effectively.



Can a company extend the deadline for approving and filing the company's annual accounts?

The financial statements of a company are filed together with the company's annual return.

A company's annual return is made up to a fixed date in each year, such date to be no more than 9 months after the financial year end. Therefore, the filing deadline for the annual return is the filing deadline for the financial statements.

Once a company has achieved the maximum annual return date, other than changing its financial year end or applying to the District Court for an extension of the timetable, it cannot extend the deadline for filing.

Cyber security and data protection

Companies are likely to collect and process various types of data, such as generic employee or customer details and sensitive personal information including medical conditions or political opinions. On 25 May 2018, the General Data Protection Regulation (“GDPR”) became immediately enforceable in all member states of the EU. Where a company collects personal data, the GDPR will tightly regulate the processing of that data. These controls are extremely comprehensive, for example:

- All personal data that the company collects and processes must be done so fairly and lawfully;
- The company must tell the data subject what data processing will be done in clear and plain language;
- The personal data collected must be adequate, relevant and limited to what is necessary for the purposes for which they are being processed;
- All personal data collected must be stored safely and securely;
- All personal data held should be maintained to ensure that it is accurate and up to date; and
- Any personal data that is stored must not be kept for longer than it is required, and should be securely deleted as soon as it is unnecessary.

In addition, a company may also hold transactional details, financial information and complex product related confidential material, and it will be essential for a business to shield this information. Cyber security and the protection of information is considered a major threat to companies and directors should ensure that there are appropriate technical and organisational measures in place to protect against risk. These could include:

- Ensuring that your information databases are appropriately protected and regularly testing the security processes you have in place;
- Ensuring there are measures in place to prevent, detect and record any breaches of data security;
- Implementing a privacy policy so third parties are informed on how you handle, protect and process data; and
- Taking out insurance which covers any losses incurred as a result of breaches of data security.

Directors may be made personally liable for failing to ensure that the company implements appropriate defences to safeguard personal data processed.

If there are concerns about threats within a company, advice should be sought immediately

Administrative duties

A director must make sure that they understand their administrative responsibilities whilst always giving due consideration to their aforementioned general duties. This could include their responsibility to call shareholders meetings, appoint managers and senior employees, and prepare internal management reports.



Statutory Reporting and Filing Requirements

A director is required to ensure that the company meets all its regulatory and statutory filing requirements. These include:

- Ensuring that the company keeps adequate accounting records;
- Ensuring the financial statements are prepared in accordance with financial accounting standards and give a true and fair view of the company’s financial affairs;
- Ensuring that, where required, an annual audit is performed;

- Ensuring the annual general meeting (AGM) is convened (or written AGM completed) in each calendar year at which the financial statements will be laid before the members;
- Ensuring that the company files its annual return, and financial statements (unless exempt) within 28 days of its Annual Return Date;
- Ensuring the maintenance of all company records and registers and ensuring that all information relating to the company held in the Companies Registration Office (“CRO”) is accurate and up-to-date.

Insolvency

Where a company has financial difficulties and approaches insolvency, directors' duties may alter and become owed to the company's creditors. A director should consider this when making decisions that will affect the creditor's interests. A director of an insolvent company can be personally liable (without limitation of liability) for a company's debts if found guilty of reckless or fraudulent trading or misapplying company assets. Where a company is placed into involuntary liquidation, the liquidator is obliged unless relieved by the Director of Corporate Enforcement, to apply to have each of the directors restricted.

Liabilities and penalties

The duties of a director are owed to the company and where a director breaches their duties they may be liable towards the company and any affected third parties. This could include personal liability or collective liability with any other culpable directors, for any damages which are upheld.

Where a director's actions are sufficiently severe they can be criminally liable for their actions and be liable for an offence under the Act. Offences are categorised as follows:

Category 1 - conviction on indictment can result in a term of imprisonment of up to ten years and/or a €500,000 fine while a summary prosecution for a category 1 offence will result in a Class A fine and/or a term of imprisonment of up to twelve months;

Category 2 - conviction on indictment can result in a term of imprisonment of up to five years and/or a €50,000 fine while a summary prosecution for a category 2 offence will result in a Class A fine and/or a term of imprisonment of



up to twelve months;

Category 3 - summary offence only attracting a term of up to six months imprisonment and/or a Class A fine; and

Category 4 - summary offence only punishable by a Class A fine.

A **Class A fine** is a fine not exceeding €5,000.

Additionally, a court may disqualify a director for a period of 5 years or other period specified by it. The disqualified person cannot be appointed or act as a director, other officer, statutory auditor, receiver, liquidator or examiner or be in any way concerned in the promotion, formation or management of any company.

In respect to insolvent companies, where a director cannot satisfy the court that they acted honestly and responsibly, the court can restrict the person from being a director for a period of up to 5 years. The person cannot be appointed unless the company is adequately capitalised.

What are the penalties for failing to file the company's annual accounts?

Where an annual return, which should generally have the financial statements annexed, is filed late, there will be a late filing fee of €100 plus €3 accruing on a daily basis for every day it continues to be late, up to a maximum of €1,200.

The Companies Registration Office may commence involuntary strike off proceedings against the company.

In addition, the company director can face prosecution and disqualification from acting as a director.



Practical hints and tips

Oversight

Know what is going on in your company, and, if you aren't able to oversee it yourself, ensure that there are appropriate practices, qualified individuals or committees in place to do so in your stead. Even if this does not absolve you of your responsibility, it will help prevent a breach of your overall duties to the company.

Knowledge

Make sure you hold sufficient board meetings to ensure that you can appropriately communicate with the other directors and understand any problems or difficulties that departments or committees may be experiencing.

Training

Ensure that your staff members are appropriately trained in their roles and positions. They must be in the right position to undertake their job effectively and appropriately. Failure to do so could not only disadvantage the company, but could also leave you liable for a breach of your directors' duties.

Review

Do not be afraid to scrutinise current business practices and relationships with government authorities and officials, third parties and customers; no matter how long standing the relationships are. Where you have failed to act in the best interests of the company, it will not be a valid defence to rely on established practices of the company. Monitor your company and its subsidiaries, business trends and recent enforcement activity. Is your company at risk? Are you at risk? Has a government authority recently started enforcing penalties on companies for a certain type of behaviour? This could indicate areas of weaknesses for your business, it could be appropriate to review your policies in this area to ensure that you have the appropriate processes in place to combat any susceptibility.

Integrity

Above all else, act with integrity in everything you do. Always consider your duties as a director and where you are unsure, ask.

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