

Structure and Governance: Company Directors

INFORMATION LEAFLET NO. 36 / JUNE 2017

Caution

These notes are in general form. In specific cases it may be necessary for you to consult with your professional adviser (e.g. chartered secretary, solicitor, accountant, etc.). While the staff of the CRO will answer questions you may have relating to the documents that a company is required to file with the Office, you should consult your professional adviser if further assistance is required as to the duties of a director or company law generally.

1. Qualification for appointment as a director

There is an age requirement for the appointment either as director or secretary of a company.

Under the Companies Act 2014, a director of a company:

- cannot be under the age of **eighteen**. (Section 131). Any appointment of a minor as a director is void and the minor ceases to have the power to act as a director.
- cannot be a body corporate. (section 130)
- cannot be an undischarged bankrupt. (section 132).
- cannot be a director of more than 25 companies unless those other companies are exempted*. (section 142).
- cannot be disqualified (s.160 1990 Companies Act, Chapter 4 Part 14 Companies Act 2014).

Limit 25 companies

*Exempted companies, for the purpose of the 25 company rule, include:

- PLCs (public limited companies),
- Companies with **Form B67** registered (statement that company has a real and continuous link with one or more economic activities that are being carried on in the State).
- Where **form B68** is filed, that company is also exempted. Form B68 is a statement that the company be exempted as it holds a licence under section 9 of the Central Bank Act 1971 or because it is a company falling within the provisions of Schedule 5 to the Companies Act 2014.

A holding company and its subsidiaries are counted as one company for the purposes of section 142.

Disqualification abroad

Form B74 is required to be completed by any person being appointed as director of an Irish registered company, where that person is currently disqualified in a foreign jurisdiction from acting as a director or secretary of a body corporate or an undertaking. The B74 sets out the jurisdiction in which the individual is so disqualified, the date on which he/she became so disqualified and the period for which he/she is so disqualified.

If a person whose appointment as director is notified to the CRO on Form B10 is currently disqualified abroad, that person is required to ensure that the B10 is accompanied by a properly completed B74 signed by him/her on its delivery to the CRO.

Form B74a is required to be completed where a person already appointed as a director of an Irish registered company becomes disqualified in a foreign jurisdiction after the notice of appointment.

2. Minimum number of directors/requirement to have an EEA resident director

Every company is required to have 2 directors. There is one exception to this and this the LTD company type registered under Part 2 of the Companies Act 2014. This company type can have a single director if so desired.

All other company types must have two directors - public companies, DACs (Designated Activity Companies), unlimited and guarantee companies.

Every company should have an EEA (European Economic Area) resident director. (Section 137). An alternate director is insufficient to meet the requirements of the section. There are exceptions.

- The requirement does not apply to a company which has a **bond (€25,000)** in place.

- The residency requirement does not apply to a company which has a certificate under section 140 of the Companies Act 2014. This certificate, made after application on a **form B67**, is in respect of a company having a real and continuous link with one or more economic activities that are being carried on in the State.

For further information in relation to the requirement that at least one of the directors of a company be EEA-resident, see Information Leaflet No. 17, "Requirement To Have An EEA-Resident Director".

3. Obligations under the Companies Act

3.1. Every company, whether trading or not, must file an annual return at the CRO not later than 28 days from its statutory annual return date (ARD). The ARD of every company can be checked free of charge on the CRO website at www.cro.ie/search

A company director must ensure that an annual return on behalf of the company is delivered to the CRO. The annual return (**Form B1**) is a document setting out certain prescribed information in respect of the company. This document has to be filed with the CRO annually, regardless of whether or not the company is trading. A company's annual return is required to be made up to a date every year which is no later than the company's ARD and to be filed with the CRO within 28 days of the date to which it has been made up.

For further information on annual return filing, see Information Leaflet No. 23, "Annual Return and Financial Statements Requirements".

3.2. In almost every case, financial statements must be attached to that return; the financial year end of those financial statements must be no earlier than nine months before the date of the return. To comply with that requirement, it might be necessary to change your company's ARD. Changing an ARD is possible only if the statutory provisions are followed in full, see www.cro.ie > Annual Return

Generally speaking, the financial statements documents are:

- a copy of the balance sheet*;
- a copy of the profit and loss account*;
- a copy of the directors' report; and
- a copy of the auditor's report.

The financial statements marked * are required by law to be audited (unless exempted) and to cover the period:

- in the case of the first annual return to which accounts are annexed, since the incorporation of the company, and
- in any other case, since the end of the period covered by the financial statements annexed to the preceding annual return filed with the CRO,

and must be made up to a date not earlier by more than nine months than the date to which the annual return is made up.

3.3. Where returns are not filed on time, a substantial late filing penalty must be paid and further enforcement actions may be pursued by the CRO.

Returns which are filed late (i.e. more than 28 days after the effective date of the return) with the CRO incur a substantial late filing penalty, in addition to the standard filing fee of €20 per return. The late filing penalty is €100 with effect from the expiry of the company's filing deadline, with a daily penalty of €3 accruing thereafter, up to a maximum of €1,200 per return. (All returns must be submitted electronically.)

The following enforcement options are open to the CRO in respect of non-filing of annual returns:

(a) Prosecution (b) Court injunction (c) Strike off

Enforcement measures employed by CRO have regard to a company's annual return filing compliance history in recent years. Filing an annual return late affects a company's compliance history and could result in it being selected by this Office for enforcement measures in future years.

A late return also disqualifies the company from claiming the audit exemption in respect of the financial statements attached to the current year's return as well as the following year's annual return, even if the company meets all other qualifying criteria for the audit exemption in respect of the financial years covered by the financial statements attached to both returns.

3.4. Reminders and other important notices are sent to companies at their registered office as notified to the CRO. If the address is wrong you may not become aware of important information regarding your company. The registered office of every company can be checked at www.cro.ie/search

Every company is obliged to have a registered office within the State, which cannot be a P.O. Box number. **Form B2** is used to notify the CRO of a change in a company's registered office, and must be delivered to the CRO within 14 days of any such change.

3.5. Certain forms – in particular a change of address and change of director or secretary – may be filed free of charge at www.core.ie

Online notification of changes to registered particulars is free, secure and quick. It is more reliable and more efficient than using paper and can cut down on administration. The facility provides for the completion of forms online, the results to be printed, signed and submitted to us. The status of electronically filed forms can also be checked at any time.

3.6. It is the responsibility of each director to ensure that his or her company is not in breach of the Companies Act.

The Companies Act 2014 expressly states (section 223) that it is the duty of each director of a company to ensure that the company complies with the requirements of the Companies Act.

(a) Other CRO filing requirements

A company director must also ensure that the following changes of information in relation to the company are notified to the CRO (please note that many of these forms can be filed free of charge at www.core.ie):

Change in	Required to file
locations of company's statutory registers (register of members, directors and secretaries, debenture holders, directors service contracts, disclosable interests, minute books etc).	Form B3
constitution, including authorised capital	Form G1/G1Q plus new constitution
particulars in relation to its directors and/or secretary	Form B10
particulars of register person authorised by board of directors	Form B46
issued share capital	Form B5/B7/H5
authorised capital (increase)	Form B4

(b) Notification of termination of a directorship to CRO

A company is obliged to notify the CRO within 14 days of any change among its directors or of any particulars concerning its directors (i.e. change of address). The relevant form is the **Form B10**. Where there has been breach of this obligation, the company and every officer of the company shall be guilty of an offence.

Form B10 has to be signed by a **current** officer of the company; it cannot be signed by an officer who has resigned. Form B10 will be rejected by CRO and returned to the presenter in circumstances where the termination of the directorship notified on the form would result in the company being registered with less than the statutory minimum number of directors (two) unless the company is a Private Company Limited by Shares (LTD company). An LTD company can have just one director.

Where the termination of a directorship, which is notified to the CRO on Form B10, leaves the company without an European Economic Area (EEA) resident director, the company should lodge either a section 138 bond with the B10, or obtain a section 141 certificate. For further information on the requirement that a company have at least one director resident in a member State, see Information Leaflet No. 17, "Requirement to have an EEA - Resident Director".

If a company fails to lodge Form B10 in respect of a person who has ceased to be a director of that company, there is a procedure whereby the former director can notify the CRO, using **Form B69**, that the company has failed to file the proper documents. See Information Leaflet No. 18, "Notification by Director/Secretary of Resignation".

4. Principal Fiduciary Duties of a Director

The principal fiduciary responsibilities of a director are set out in Part 5 of the Companies Act 2014.

There is a requirement on a director to act in good faith, to act honestly and responsibly and to act according to the company's constitution. There is a requirement for the directors to have regard to the interests of the company's employees as well as to the interest of the members. Under section 231 of the Act, there is a duty on directors to disclose any interest they have in contracts made by the company. The duties set out in the Act are not exhaustive and will still require directors to consider obtaining legal advice concerning compliance with their duties.

Section 228 states: 1) A director of a company shall—

- (a) act in good faith in what the director considers to be the interests of the company;
- (b) act honestly and responsibly in relation to the conduct of the affairs of the company;
- (c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- (d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless—
 - (i) this is expressly permitted by the company's constitution; or
 - (ii) the use has been approved by a resolution of the company in general meeting;
- (e) not agree to restrict the director's power to exercise an independent judgment unless—
 - (i) this is expressly permitted by the company's constitution;
 - or
 - (ii) the case concerned falls within subsection (2);
- (f) 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 in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;
- (g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both—
 - (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and
 - (ii) the knowledge and experience which the director has;
- and
- (h) in addition to the general duty under section 224 (duty to have regard to the interests of its employees in general), have regard to the interests of its members.

(2) If a director of a company considers in good faith that it is in the interests of the company for a transaction or engagement to be entered into and carried into effect, a director may restrict the director's power to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this.

(3) Without prejudice to the director's duty under subsection (1)(a) to act in good faith in what the director considers to be the interests of the company, a director of a company may have regard to the interests of a particular member of the company in the following circumstances.

(4) Those circumstances are where the director has been appointed or nominated for appointment by that member, being a member who has an entitlement to so appoint or nominate under the company's constitution or a shareholders' agreement.

5. Annual Return and Compliance Statement

Section 225 of the Companies Act 2014 applies an obligation to directors of certain companies to complete a compliance statement in addition to the statement required under section 325.

- Companies can be exempted under section 943(1)(g) class if they are qualifying companies within the meaning of section 110 of the Taxes Consolidation Act 1997 (as inserted by section 48 of the Finance Act 2003). However they would still require **Ministerial approval** for the exemption.
- Unlimited companies
- Companies are **exempted where they are not relevant companies**. (not available to Public Limited Companies).

Relevant companies for the purposes of this section are those whose balance sheet total exceeds **€12,500,000** and companies whose turnover for the year exceeds **€25,000,000**.

(The statement under section 325 is the directors report, which must include a report on general matters in relation to the company, a business review, information on the acquisition or the disposal of own shares, information on the interests in shares or debentures and also a statement on relevant audit information).

The compliance statement must acknowledge that the directors are responsible for securing the company's compliance with its relevant obligations.

With respect to each of the things specified below confirming that the thing has been done, or it has not been done, specifying the reasons why it has not been done.

- 1. The drawing up of a statement (to be known, and in the Companies Act 2014, referred to as a "compliance policy statement", setting out the company's policies (that in the directors' opinion, are appropriate to the company) respecting compliance by the company with its relevant obligations;
- 2. The putting in place of appropriate arrangements or structures that are, in the directors' opinion, designed to secure material compliance with the company's relevant obligations;
- 3. The conducting of a review, during the financial year to which the report relates, of any arrangements or structures referred to in part 2 that have been put in place.

The arrangements or structures referred to in point 2 may, if the directors of the company in their discretion so decide, include reliance on the advice of one or more than one person employed by the company or retained by it under a contract for services, being a person who appears to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations.

The arrangement or structures referred to in point 2 may, shall be regarded as being designed to secure material compliance by the company concerned with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

Failure to comply with section 225 is a category 3 offence in relation to each director in default.

6. Directors Report

There is an obligation to prepare a directors' report for every financial year. Exemptions can apply to micro and small companies. See Companies (Accounting) Act 2017.

Under section 325(1), the directors of a company shall for each financial year prepare a report (a "directors' report") dealing with the following matters—

- general matters in relation to the company and the directors. See 6.1 below;
- a business review. See 6.2 below;
- information on the acquisition or disposal of own shares. See 6.3 below;
- information on interests in shares or debentures. See 6.4 below;

- statement on relevant audit information. See 6.5 below.

This is in addition to the other requirements of this Act that apply in certain cases with regard to the inclusion of matters in a directors' report, namely the requirements of –

- section 167(3) (Section 167(3) requires a board of directors of a relevant company* shall state in the report whether the company has established an audit committee and the reason behind their decision if they did not establish one) and
- section 225(2) (directors' compliance statement in case of a company to which that section applies**)

*Companies are exempted regarding section 167(3) where they are not relevant companies. Relevant companies or group of companies for the purpose of this section are those whose balance sheet total exceeds **€25,000,000** and companies whose turnover for the year exceeds **€50,000,000**.

** Companies are exempted where they are not relevant companies. Relevant companies for the purposes of this section are those whose balance sheet total exceeds **€12,500,000** and companies whose turnover for the year exceeds **€25,000,000**.

Offence

If a director fails to fulfil his or her obligation under section 325, he or she shall be guilty of a category 3 offence. A director includes a person who is a shadow or de facto director.

Group Directors Report

For a financial year in which—

- the company is a holding company; and
- the directors of the company prepare group financial statements,

the directors shall also prepare a directors' report that is a consolidated report (a "**group directors' report**") dealing, to the extent provided in the following provisions of this Part, with the company and its subsidiary undertakings included in the consolidation taken as a whole.

Where group financial statements are published with entity financial statements, it is sufficient to prepare the group directors' report (as distinct from that report and a directors' report in respect of the holding company as well) provided that any information relating to the holding company only, being information which would otherwise be required to be provided by section 325(1) or section 167(3) or 225(2) (directors compliance statement) is provided in the group directors' report.

A group directors' report may, where appropriate, give greater emphasis to the matters that are significant to the company and its subsidiary undertakings included in the consolidation taken as a whole.

6.1 General matters to be reported in Directors Report

Sections 326 to 332 deal with what the directors' report for a financial year must state—

- the names of the persons who, at any time during the financial year, were directors of the company;
- the principal activities of the company during the course of the year;
- a statement of the measures taken by the directors to secure compliance with regard to the keeping of accounting records and the exact location of those records; (See sections 281 to 285),
- the amount of any interim dividends paid by the directors during the year and the amount, if any, that the directors recommend should be paid by way of final dividend.

Where relevant in a particular financial year, the directors' report shall state—

- particulars of any important events affecting the company which have occurred since the end of that year;
- an indication of the activities, if any, of the company in the field of research and development;
- an indication of the existence of branches (within the meaning of Council Directive 89/666/EEC) of the company outside the State and the country in which each such branch is located;

- political donations made during the year that are required to be disclosed by the Electoral Act 1997.

Where material for an assessment of the company's financial position and profit or loss, the directors' report shall describe the use of financial instruments by the company and discuss, in particular –

- the financial risk management objectives and policies of the company, including the policy for hedging each major type of forecasted transaction for which hedge accounting is used; and
- the exposure of the company to price risk, credit risk, liquidity risk and cash flow risk.

Group directors' report: In relation to a group directors' report, reference to the company is a reference to the company and its subsidiary undertakings included in the consolidation.

6.2 Directors' report: business review. (section 327)

Also to be included in the directors' report for a financial year, is a review of the business of the company and a description of the principal risks and uncertainties facing the company. The review shall be a balanced and comprehensive analysis of –

- the development and performance of the business of the company during the financial year; and
- the assets and liabilities and financial position of the company at the end of the financial year, consistent with the size and complexity of the business.

The review shall, to the extent necessary for an understanding of such development, performance or financial position or assets and liabilities, include —

- an analysis of financial key performance indicators*; and
- where appropriate, an analysis using non-financial key performance indicators, including information relating to environmental and employee matters.

The directors' report shall, where appropriate, include additional explanations of amounts included in the statutory financial statements of the company and shall include an indication of likely future developments in the business of the company.

Group directors' report: References to the company are references to the company and its subsidiary undertakings included in the consolidation.

*Key performance indicators means factors by reference to which the development, performance and financial position of the business of the company can be measured effectively.

6.3 Directors' report: acquisition or disposal of own shares. (section 328)

Where, at any time during a financial year of a company, shares in the company—

- are held or acquired by the company, including by forfeiture or surrender in lieu of forfeiture; or
- are held or acquired by any subsidiary undertaking of the company, the directors' report with respect to that financial year of the company shall state—
 - (i) the number and nominal value of any shares of the company held by the company or any subsidiary undertaking at the beginning and end of the financial year together with the consideration paid for such shares;
 - (ii) a reconciliation of the number and nominal value of such shares from the beginning of the financial year to the end of the financial year showing all changes during the year including further acquisitions, disposals and cancellations, in each case showing the value of the consideration paid or received, if any.
 - (iii) the reasons for any acquisitions made during the financial year, and
 - (iv) the proportion of called-up share capital held at the beginning and end of the financial year.

6.4 Directors' report: interests in shares and debentures.(Section 329)

The directors' report in respect of a financial year shall, as respects each person who, at the end of that year, was a director of the company —

- state whether or not he or she was, at the end of that financial year, interested in shares in, or debentures of, the company or any group undertaking of that company;
- state, if he or she was so interested at the end of that year, the number and amount of shares in, and debentures of, the company and each other undertaking (specifying it) in which he or she was then interested;
- state whether or not he or she was, at the beginning of the financial year (or, if he or she was not then a director, when he or she became a director), interested in shares in, or debentures of, the company or any other group undertaking; and
- state, if he or she was so interested at either of the immediately preceding dates, the number and amount of shares in, and debentures of, the company and each other undertaking (specifying it) in which he or she was so interested at the beginning of the financial year or, as the case may be, when he or she became a director.

This information shall also be given in respect of the secretary.

References to interests of a director and secretary in shares or debentures are references to all interests required to be recorded in the register of interests (Section 267 Companies Act 2014) and includes interests of shadow directors and de facto directors required to be so registered.

*The time when a person became a director shall, in case of a person who became a director on more than one occasion, be read as a reference to the time when he or she first became a director. (section 329(2)).

6.5 Directors' report: statement on relevant audit information. (section 330)

The directors' report in relation to a company shall contain a statement to the effect that, in the case of each of the persons who are directors at the time the report is approved —

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

It should be noted that a director is regarded as having taken all the steps that he or she ought to have taken as a director in order to do the things mentioned above, if he or she has—

- made such enquiries of his or her fellow directors (if any) and of the company's statutory auditors for that purpose; and
- taken such other steps (if any) for that purpose, as are required by his or her duty as a director of the company to exercise reasonable care, skill and diligence.

Where a directors' report containing the statement required by this section is approved but the statement is false, every director of the company who—

- (a) knew that the statement was false, or was reckless as to whether it was false; and
 - (b) failed to take reasonable steps to prevent the report from being so approved,
- shall be guilty of a category 2 offence.

6.6 Approval and signing of directors' report. (section 332)

The directors' report and, where applicable, the group directors' report shall be approved by the board of directors making the report and signed on their behalf by 2 directors, where there are 2 or more directors. (Where the company is a LTD company under Part 2 of the Companies Act 2014 and has a sole director, that director must approve and sign the report or reports concerned).

Every copy of every directors' report which is laid before the members in general meeting or which is otherwise circulated, published or issued shall state the names of the persons who signed it on behalf of the board of directors.

Section 325 (1)(c) - information on interests in shares and debentures as specified in section 329 Companies Act 2014 and section 329 itself - does not apply to a Company Limited by Guarantee (CLG) or Public Unlimited Company with no share capital (PULC).

7. Restrictions and Disqualifications

Offences

The Act provides for a four-fold categorisation of offences into Categories 1 to 4. Throughout the Act, offences are, as created, categorised as attracting a particular category of penalty. In Chapter 7 of Part 14, those penalties are set out:

- Category 1 offence – conviction on indictment can result in a term of imprisonment of up to 10 years or a fine of up to €500,000 or both;
- Category 1 offence - summary conviction can result in a class A fine or imprisonment for a term not exceeding 12 months or both;
- Category 2 offence – conviction on indictment can result in a term of imprisonment of up to five years or a fine of up to €50,000 or both;
- Category 2 offence - summary conviction can result in a class A fine or imprisonment for a term not exceeding 12 months or both;
- Category 3 offence – a summary offence only, attracting a term of imprisonment of up to six months and a “Class A fine” (or both); and
- Category 4 offence – also a summary offence only, punishable by the imposition of a Class A fine

A “Class A fine” is a fine within the meaning of the Fines Act 2010 (i.e. a fine not exceeding €5,000).

Restriction and Disqualification

Directors of a company can be restricted or disqualified from acting as an officer to a company by the High Court or a director may undertake to accept disqualification or restriction by the Office of the Director of Corporate Enforcement (ODCE) without the necessity to go to the High Court.

The restriction requirement has been amended under the Companies Act 2014. In order for a restricted director to act in relation to a company, the allotted share capital of nominal value must be not less than €500,000 in the case of a public limited company (other than an investment company) or a public unlimited company or €100,000 in the case of any other company type. Each share shall be paid up (in cash) to an aggregate amount not less than the figures stated above including the whole of any premium on that share.

In relation to companies limited by guarantee, contribution to the company by a member(s) is not less than €100,000. The member must be an individual rather than a body corporate.

In relation to an investment company, the value of the issued share capital must be at least €100,000. At least €100,000 in cash must be paid in consideration for the allotment of shares in the company.

Restriction lasts for 5 years. There can be different periods set for disqualification but the normal period of disqualification would be 5 years also.

Restriction can be made in relation to an insolvent company unless the Court is satisfied that the person acted responsibly and honestly in relation to the conduct of the affairs of the company or has co-operated with the liquidator in relation to the conduct of the winding up of the company or if it is just and equitable in the eyes of the court that the restriction is not made.

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