

## **Directors duties and responsibilities**

What leaders need to know



## An overview

The Companies Act 2014 (the “Act”) imposes various obligations, duties and responsibilities on directors of Irish companies. Regardless of whether a director is aware of these obligations, duties and responsibilities he or she can be faced with various penalties for failing to comply with them.

The purpose of this guidance note is to summarise some of the main duties that you should be aware of when acting as a director of an Irish company.

Under the Act, directors’ duties and requirements will apply whether or not a director is formally appointed or is a “De Facto” or a “Shadow” director. Similarly, it should be noted that the Act does not recognise any distinction between executive directors and non-executive directors, except in very limited circumstances.

Section 223 of the Act provides for an overall duty on each director to comply with the provisions of the Act, therefore it is essential that any person acting as a director of a company in Ireland is aware of the duties and responsibilities imposed by the Act.

## Becoming a director

There are no specific qualifications required in order to become a director. The Act does, however, set out some eligibility requirements which a person who intends to become a director must satisfy.

The Act prohibits the following persons from becoming a director:

- a person who is under the age of 18 years
- a body corporate or an unincorporated body of persons
- an auditor of the company
- a person who is a director of more than 25 companies (a company need not be counted if it falls into the exempted category which includes, for example, PLCs and group companies)
- a person who is an undischarged bankrupt
- a person who has been disqualified by the High Court from acting as a director.

## Fiduciary duties

The Act specifically sets out the following fiduciary duties, which a director owes to a company:

- **To act in good faith** – a director must act in a manner which he or she considers to be in the best interests of the company and not to their personal benefit.
- **To act honestly and responsibly** – a director must act honestly and responsibly when conducting the affairs of the company.
- **To exercise care, skill and diligence** – a director will be expected to exercise the level of care, skill and diligence as would reasonably be expected from a person (i) acting as a director of a company, and (ii) acting with the knowledge and expertise of the director in question.
- **To have regard to the interests of the company’s members** – a director must remain cognisant of the interests of the company’s shareholders when carrying out his or her duties, however, their first loyalty must always be to the company itself rather than individual shareholders.
- **To avoid a conflict of interest** – a director must try to avoid a conflict arising between their duties to the company and their personal interests, unless the director is released from their duties by the company’s constitution or by a resolution of the members of the company.
- **Not to use the company’s property, information or opportunities for his or her own or anyone else’s benefit** – the use of company property or information by a director in such a manner is prohibited unless (i) it is expressly permitted by the company’s constitution, or (ii) it has been approved by a resolution of the members of the company.
- **Not to agree to restrict the director’s power to exercise an independent judgment** – a director is prohibited from entering into any contract which would restrict his or her ability to exercise independent judgement and control when carrying out their role, unless authorised by either (i) the company’s constitution or (ii) a resolution of the members of the company.



## Duty of due skill, care and diligence

This duty is the duty which tends to cause the greatest concern for directors, in terms of understanding the precise standard being imposed.

The general principle that a director must exercise due skill, care and diligence in the discharge of his or her functions has been interpreted to mean that:

- a director need not exhibit, in the performance of his or her duties, a greater degree of skill than may reasonably be expected from a person with his or her knowledge and experience
- a director will not be held liable for mere errors in judgement (if a director makes a decision which he or she genuinely believes to be in the best interests of the company, the fact that he or she is subsequently proven to have been mistaken will not in itself give rise to any liability)
- a director is not under a duty to attend every board meeting, however, failure to attend board meetings with reasonable regularity may be a breach of his or her duty (what constitutes “reasonable regularity” will depend upon the circumstances of the company in question).

## Other duties owed by directors

In addition to the fiduciary duties imposed on directors by the Act, the Act also provides for additional responsibilities and obligations which directors owe to a company, such as:

- to ensure that the Company Secretary has the necessary skills to undertake the role as required by the Act
- to disclose any interests he or she has in any contracts made by the company
- to acknowledge the existence of their duties by signing a declaration to that effect
- to disclose to the company any payments to be made to him or her in connection with the transfer of shares in the company
- to ensure that the company keeps adequate accounting records that explain all payments to or from the company or its customers and suppliers, and that accurately identify its assets and liabilities. Directors must ensure that the company prepares financial statements that give a true and fair view of the company’s affairs
- to ensure that the company files its annual returns. Failure to do so can result in the company being struck-off the register of companies and an application being brought by the Director of Corporate Enforcement to the High Court for an order disqualifying the director from acting as a director or having any involvement in the management of any company.

## Duties to creditors

In addition to the duties which a director will owe to the company, the Irish courts have developed a line of authority to the effect that if a company is insolvent or trading recklessly, the directors of the company will owe a duty to the company’s creditors. In such circumstances, the directors can be made personally liable for the company’s losses. As such it is essential that if a company finds itself in a position of insolvency, the directors seriously consider whether the company has a realistic prospect of continuing as a going concern or whether it should be wound up.



## Breach of director’s duties

A breach of a director’s duty may require the director in question to account to the company any gains made by him or her as a result of such breach. The director may also be required to compensate the company for any loss that occurred as a result of such breach of their duties.

In determining whether a director will be liable a court will have regard to the duty of due skill, care and diligence. When judging a director’s actions a court will have regard to what would reasonably be expected of any director in the particular role. However, a court will allow a higher standard to be imposed on those directors with greater knowledge and experience. In other words, the more expertise a director has the higher the standard that will be expected of them.

A court may grant relief from liability arising as a result of a breach of a director’s duties to the company, if the court is satisfied that the director acted honestly and reasonably in the circumstances.

## Directors’ liabilities

In addition to liability arising from a breach of a director’s duties a director may be liable to the company and to third parties in the following circumstances:

- **Agency** – when a director fails to make a third party aware of the fact that he is acting as the agent of the company, he or she may be liable for the cost of such a contract as if he or she had entered into it in their own personal capacity. This means that it is important to make clear in all dealings with third parties that one is acting on behalf of the Company and not in a personal capacity.
- **Failure to correctly state company’s name** – where a director fails to use the name or the full name of the company when signing a contract or an order on the company’s behalf or has used a seal, which does not show the name of the company in legible characters, liability may be incurred. In such a situation, if the company refused to honour the contract or the order, the director could be liable to a fine and may also be personally liable for the contract or the order.
- **Civil wrongs** – a director will be liable to third parties for any fraudulent acts committed by the director or for the commission by the director of any tort. For example, if, by order of the directors, a trespass is committed, a patent infringed or such other wrongful act is committed, the directors who are party to such acts may be made personally liable for such acts.

## Loans and transactions involving directors

### Loans by a company to a director

Where a loan from a company to a director is not in writing, it is presumed that the loan is repayable on demand and that the unpaid amount of the loan shall bear interest at the "appropriate rate". If the loan is in writing or partially in writing but its repayment terms are ambiguous, it shall be presumed to be repayable on demand. If it is ambiguous as to whether interest is payable, then interest at the appropriate rate is due.

The appropriate rate is currently set at 5%, however, this can be amended by Ministerial Order.

Section 239 of the Act goes on to provide that that a company shall not:

- make a loan or a quasi-loan to a director of a company or to a director of its holding company or to a person 'connected' with such a director
- enter into a credit transaction as a creditor for such a director or a person so connected
- enter into a guarantee or provide any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected.

There are a number of exemptions to these prohibitions, such as:

- where the value of the loan, credit transaction or guarantee is of a value which is less than 10% of the company's relevant assets
- where the company uses the Summary Approval Procedure to validate any such transaction, which would otherwise be prohibited.

### Substantial transactions with a director

Section 238 of the Act prohibits the transfer of a non-cash asset between a company and a director of the company, of its holding company, or of a person connected with such a director where at the time of the transfer, the non-cash asset in question is worth at least €5,000 and its value neither exceeds €65,000 or 10% of the company's net assets.

Such a transaction can however, be approved by a resolution of the members in a general meeting.

## Director protections

Due to the fact that directors have significant duties and responsibilities to their company, it is important that they are aware of ways in which they can protect themselves, as best as possible, from any liability arising from a breach of these duties and responsibilities.

### Indemnity from the company

- The Act allows a company to purchase and maintain professional indemnity insurance for its directors. Such insurance provides cover for directors and officers when carrying out their duties and as such should be seriously considered by all companies
- While Section 235 of the Act prohibits a company, either through a contract or through its constitution, from indemnifying a director from any liability which arises as a result of the director's negligence, default or breach of duty/trust, a company may indemnify a director against any liability incurred by such director in defending proceedings, whether civil or criminal, in which judgment is given in his/her favour or in which he/she is acquitted, or in connection with section 233 or 234 proceedings.



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