McCann FitzGerald

Issues for Directors

COMPANIES ACT 2014

The Companies Act 2014 (the "**Act**") came into effect on 1 June 2015 and has introduced significant reforms in company law in Ireland. The Act has since then been amended and updated.

Under the terms of the Act, directors of every Irish company are subject to a large number and wide range of obligations, some of which are a continuation of previous law but others of which are significant new developments.

Key Features

- Directors remain responsible for the management of a company and have to ensure that it complies with the Act and have to acknowledge that, as directors, they owe obligations under statute and common law.
- 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.
- Only a human person, aged at least 18 years and not otherwise prohibited, is permitted to be a director.
- No formal recognition of the distinction between executive and non-executive directors is made.
- A company limited by shares is allowed as few as one director although every other company type has to have at least two.
- Residency requirements and ceilings on the number of directorships remain.
- Directors remain subject to a large number and wide range of statutory obligations, not merely under the Act.
- Directors' fiduciary duties are codified.
- 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.

Introduction

Although the Act re-enacts much of the previous law concerning directors it does so with some important changes. This briefing provides an overview of the principal Act-related matters that are likely to be relevant to a director of a company in Ireland. Other relevant McCann FitzGerald briefings include those on "Directors' Compliance Statement", the "Summary Approval Procedure", "Directors' Meetings" and "Members' Meetings".

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.

Appointment of a Director

The following points regarding the qualification of a person to serve as a director, and the appointment of a person as such, are notable:

- A person is a director of a company whether appointed as such formally or if the person merely "occupies the position of director", even though not appointed formally. However, it continues to be the case that a person must consent to being appointed as a director.
- The appointment of directors continues to be the role of the members of the company. Unless they choose to vote in a single resolution, a vote on the appointment of two or more persons as directors has to be taken on a candidate-by-candidate basis. Apart from a person who has been appointed as a director for life, as a matter of company law the members are entitled to remove a person as a director at any stage (however, employment law and other implications may arise in individual cases).
- Every company has to have at least two directors although a company limited by shares is permitted to have only one. No ceiling is applied to the number of directors for any company type.
- A director has to be a human (a "natural") person, aged at least 18 years and not precluded by law from being a director: a body corporate (such as a company) is not permitted to be a director. An undischarged bankrupt is precluded from serving as a director.
- The Act continues to permit a director to appoint an alternate director to act as a "substitute" in the place of the relevant director, and to be capable of exercising the powers of that director.
- A director is permitted to also serve as the company secretary. However, if something must be done by both the company secretary and by a director, then the same person may not fulfil both roles in respect of that particular procedure.
- Every company has to have (a) a real and continuous link with economic activity in Ireland, or (b) at least one director who is resident in the European Economic Area, or (c) a bond to the value of €25,000 that is available to the Registrar of Companies and the Revenue Commissioners to discharge any penalties for certain breaches of the Act.
- Subject to detailed rules and certain exceptions (principally relating to corporate group arrangements), a person is not be permitted to be a director of more than 25 companies that are registered in Ireland. Breach of this restriction continues to be significant: any directorship in excess of this number, if not subject to an exception, continues to be void.

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 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) the case concerned falls within limited exceptions;
- 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' Compliance Statement

A separate McCann FitzGerald briefing is available on the obligation that the Act introduces, requiring the directors of certain companies[2] (excluding unlimited companies) to prepare an annual compliance statement regarding the company's compliance with the Act and its tax obligations.

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.

Registers and Transparency

A company continues to be obliged (and a director is obliged to provide the necessary information to the company to permit the company) to:

- maintain an up-to-date register (in electronic form, if the company so chooses) of its secretary and directors which has to be available for inspection by the members and others (including enforcement agencies);
- keep written copies or a note of the service contract (of at least three years unexpired duration) of every director, available for inspection by the members and others (including enforcement agencies);
- unless the company's constitution provides otherwise, pay to a director his or her properly incurred expenses in performing the role;
- subject payments to a director to the appropriate taxation;
- maintain in a book any disclosures that its directors have made of interests that any of them may have in the contracts and proposed contracts of the company, if that interest may reasonably be regarded as likely to give rise to a conflict of interest. The company in general meeting is entitled to excuse a director's failure to declare a relevant interest, without any need for an application to court;
- maintain an up-to-date register of the detailed interests of directors (and persons connected to them), whether held solely or with other persons and whether held legally or beneficially, directly or indirectly, in the shares and debentures of the company (see further below);

2 *ie* every public limited company and every private company limited by shares, designated activity company and guarantee company that has a balance sheet total exceeding €12.5 million and a turnover exceeding €25 million.

- disclose in the financial statements of the company additional information on (a) directors' share options and long-term incentive schemes, (b) pension arrangements, and (c) amounts paid by or receivable from a holding company; (d) disclose any consideration paid to third parties for the services of a director; and
- include prescribed information regarding the directors and the company in every "business letter" 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.

A Director Transacting with the Company

Special rules continue to apply to a director[3] who enters into certain transactions with the company. These are additional to the director's fiduciary duties (above) but may, in limited circumstances and subject to strict controls, permit a director to engage in certain transactions that otherwise might be prohibited.

The Act restates much of the law relating to directors in these instances but also provides for some clarifications and changes:

- **Loans and "Quasi-Loans" to a Director**: Subject to limited exceptions, the Act continues the previous prohibition on a company making a loan or a quasi-loan to a director of the company or of its holding company, or to a connected person[4], or enter into a credit transaction or a guarantee or enter into a guarantee to provide security in connection with loan, quasi-loan or credit transaction. The principal exceptions are (a) where the transaction is on 'arms' length terms, in the ordinary course of business, (b) where the loan, guarantee *etc*, aggregated with any other relevant loan(s) or guarantee(s) (including to a connected person), unless that other loan *etc* has been approved under the summary approval procedure, is less than 10% of the company's relevant assets, and (c) where the transaction has been approved under the summary approval procedure (see separate McCann FitzGerald briefing).

Where a company makes a loan or a quasi-loan to a director or a director of its holding company or a connected person and its terms are either not in writing, or are only partly in writing, or are in writing but are ambiguous, it is presumed (until the director proves the contrary) that the loan or quasi-loan is repayable on demand and bears interest at the appropriate rate.

Where it is claimed that a director or a connected person has made a loan or a quasi-loan to the company, and the terms are not in writing, it is presumed (until the director proves the contrary) that the loan or quasi-loan is not repayable by the company. If it is proved that a director or connected person did make a loan or quasi-loan (whether its terms are in writing, are partially in writing or are wholly verbal), then if the terms

3 As mentioned above, "director" for these purposes include any person occupying the position of director, whether or not appointed to the role, and a shadow director.

4 *ie* "connected" in terms of family or business relationship. For these purposes a "person" includes a body corporate such as a company.

are ambiguous it is presumed (until the director proves the contrary) that the loan does not bear any interest, is not secured and is subordinated to the debt of every other creditor.

- **Transactions in Non-Cash Assets**: There is little change in the position under previous company law concerning transactions in non-cash assets between a director and the company, if approved by shareholders. The Act provides that a non-cash asset is of the requisite value if it is not less than €5,000 (previously €1,269.74) but, subject to that, exceeds €65,000 (formerly €63,486.90) or 10% of the amount of the company's relevant assets.

An arrangement in contravention of the Act is voidable at the instance of the company unless the arrangement is affirmed by a resolution of the company in general meeting passed within a reasonable period of time after the date on which the arrangement is entered into.

Board Meetings

A separate McCann FitzGerald briefing is available on the topic of "Directors' Meetings".

Audit Committees

The directors of a "large company"[5] (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 and in particular the new and varied obligations that it imposes on directors. New law (such as the summary approval procedure and the requirement that the directors of certain companies prepare an annual compliance statement) is especially relevant, but directors' duties generally, and the amendments to the previous law on a director transacting with his or her company, are also extremely important. In particular, a director should recall his or her legal obligation to ensure that the company complies with the Act (in all respects).

5 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.

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