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# Matheson Directors' Guidance Series

## Principal Duties of Directors under Irish Law

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10 October 2018

# Principal Duties of Directors under Irish Law

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## Introduction

In general terms, under Irish law, the authority, power and responsibility to manage the business and affairs of a company is entrusted to its directors. This creates a legal relationship between the directors and the company, known as a fiduciary relationship, whereby the directors serve as fiduciaries with respect to the care of the company's property and interests.

In carrying out their management functions and responsibilities, directors are required to act in accordance with certain duties arising from the fiduciary relationship. These duties are known as fiduciary duties. Directors who act in disregard of such duties may be exposed to personal liability.

## What is a fiduciary relationship?

A fiduciary relationship is a relationship arising under law whereby one party (the fiduciary) is entrusted with the care of the property or money of another (the principal) and carries with it certain legal duties, known as fiduciary duties.

In addition to their fiduciary duties, directors are also subject to a variety of other duties arising under the Companies Act 2014 and may be subject to additional duties under other statutes.

Irish law does not formally recognise any distinction between executive directors and non-executive directors.

## Fiduciary Duties

The Companies Act 2014 sets out a statement of the principal fiduciary duties of a director. This statement is derived from case law and associated equitable principles which have been developed by the courts in Ireland over many years.

The Companies Act 2014 statement sets out eight principal fiduciary duties for directors. These are:

(i) To act in good faith in what the director considers to be the interests of the company.

(ii) To act honestly and responsibly in relation to the conduct of the affairs of the company.

(iii) To act in accordance with the company's constitution and to exercise his or her powers only for the purposes allowed by law.

(iv) 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 use has been approved by a resolution of the shareholders in general meeting.

(v) 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 director agreeing to such has been approved by a resolution of the shareholders in general meeting. However where a director 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, the director may restrict his or her judgment to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this.

(vi) 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 shareholders in general meeting.

(vii) 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.

(viii) To have regard to the interests of the company's employees in general and its shareholders.

The first of these duties may be described as the primary fiduciary duty and provides the framework on which the other duties are built. In a solvent company, the interests of the company are generally equated to the interests of the shareholders as a whole. This is based on the rationale that the shareholders' proprietary interests in the company entitle them, as a general body, to be identified with the company when questions of fiduciary duties arise. Case law indicates that, in acting, the Directors should have regard to the interests of the shareholders, both present and future, and should consider and balance the potential short-term and long-term impact of their decisions.

Where the directors become aware that a company is insolvent, the interests of the creditors intrude and become paramount for so long as the insolvency subsists. In such circumstances, the interests of the company can primarily be equated to the interests of the creditors - as the assets of the company are, in a practical sense, their assets pending a return to solvency. Directors need to take great care if continuing to trade while insolvent, and should seek professional advice at an early stage.

Fiduciary duties are owed to the company (not to individual shareholders, creditors or third parties) and only the company may take an action for breach of duty against a director. On a liquidation, this power may be exercised by the liquidator. In limited situations, shareholders may be able to bring derivative actions on behalf of the company.

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In reviewing the business decisions of directors, the Irish courts operate a deferential standard of review that is broadly analogous to the approach of the Delaware courts in the United States when applying their “business judgment rule”. In the absence of a proven breach of one of the specific duties, the Irish courts are slow to interfere in the decision making process of the directors’ as to what acts are in the interest of the company, recognising, in one leading case, that:

*“[t]he court cannot displace a decision simply because it does not like it….instead of appropriate deference to the exigencies and pressures of business…”*

In circumstances where a breach of duty is proved, a director may be required (i) to account to the company for any personal gain made from the breach and (ii) to indemnify the company for any loss or damage resulting from the breach.

The High Court of Ireland 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 Companies Act 2014 permits a nominee director (i.e., a director who has been appointed, or nominated for appointment, by a shareholder under the company’s constitution or a shareholders’ agreement) to have regard to the interests of the appointing / nominating shareholder, so long as to do so is not inconsistent with the director’s duty to act in good faith in what the director considers to be the interests of the company.

## Other Duties under the Companies Act 2014

**Compliance with the Companies Act 2014**

The Companies Act 2014 provides that it is the duty of each director to ensure that the Companies Act 2014 is complied with by the relevant company. Indeed, every director is required to make a statement to this effect in the form used to notify his or her appointment to the Irish Companies Registration Office.

The Companies Act 2014 imposes a large number and wide range of obligations on a company, including obligations to keep adequate financial records and to prepare annual statutory financial statements. Many of the acts and omissions in breach of the Companies Act 2014 are expressed to be offences by the company and by any officer in default.

A director will be an officer in default where it is proved that he or she authorised or permitted the default. A director will be presumed to have permitted a default if the director was aware of the basic facts concerning the default, unless the director can show that he or she took all reasonable steps to prevent the default or, by reason of circumstances beyond his or her control, was unable to do so.

**Directors’ Report**

The Companies Act 2014 obliges the directors to prepare, on an annual basis, a report (called a directors’ report) to accompany the annual statutory financial statements. The directors’ report must be presented to the shareholders with the statutory financial statements at the annual general meeting and is also publically filed in the Irish Companies Registration Office.

The directors’ report covers a variety of prescribed matters relating to the business, including a business review. Unless a company is entitled to avail of an audit exemption, the directors’ report is required to contain a statement that, in the case of each director, that (i) so far as the director is aware, there is no relevant audit information of which the company’s statutory auditors are unaware and (ii) 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.

**Compliance Statements**

Directors of companies that have assets exceeding €12.5 million and turnover exceeding €25 million (as shown in the statutory financial statements for a particular financial year) are required to make an additional prescribed form of compliance statement (relating to compliance with particular sections of the Companies Act 2014 and with Irish tax law) in their directors’ report.

**Registers and Transparency**

A company is obliged (and a director is obliged, within prescribed time periods, to provide information to the company necessary to enable the company) to:

- maintain an up-to-date register of its directors and secretary, which has to be available for inspection by the registered shareholders and the public during normal business hours;
- keep copies (or a written memorandum of the terms) of each director’s service contract of at least three years unexpired duration, which has to be available for inspection by the registered shareholders during normal business hours;

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- maintain an up-to-date register of 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), which has to be available for inspection by the registered shareholders during normal business hours;
- 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 (subject to a 1% disclosure threshold), which has to be available for inspection by the registered shareholders and the public during normal business hours;
- disclose in the statutory financial statements of the company certain information on (i) directors' share options and long-term incentive schemes, (ii) pension arrangements and (iii) amounts paid by or receivable from a holding company; and
- include prescribed information regarding the directors and the company on business letters and order forms of the company.

**Transacting with the Company**

Special rules apply where a director (or a person connected with a director) proposes to enter into certain transactions with a company. Such transactions include (i) the making of loans by a company to a director (or connected person), (ii) the purchasing by a company of non-cash assets from a director (or connected person) and (iii) the selling by a company of non-cash assets to a director (or connected person), in each case above de minimis values. Connected persons include close family members and controlled companies.

**Audit Committee**

Directors of companies that have assets exceeding €25 million and turnover exceeding €50 million as shown in their statutory financial statements for the most recent financial year and the immediately preceding one on a standalone or group basis (know as large companies under the Companies Act 2014) are required to (i) form an audit committee, which has at least one independent non-executive director who has competence in accounting or auditing or (ii) state in their directors' report that they have not done so and why not.

## Duties under Other Statutes

A director is subject to a variety of statutory duties and responsibilities under other legislation, including in areas such as health and safety, data protection, waste management, the environment, employment law and many others. Additionally, directors of public companies and regulated companies (e.g, in the financial services sector) are subject to additional legal obligations.

## Indemnification

Irish law imposes limits on directors' indemnification, with the Companies Act 2014 specifically providing that any provision in the constitution of, or contract with, a company:

(i) purporting to exempt any officer of a company from; or

(ii) purporting to indemnify such an officer against,

any liability which by virtue of any enactment or rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company, shall be void.

A company is permitted, however, to indemnify a director in respect of liability incurred in defending proceedings, whether civil or criminal, in which judgment is given in his or her favour or in which he or she is acquitted, or where the Irish High Court, in an application for relief, declares that he or she has acted reasonably and honestly.

A company is permitted to purchase and maintain directors' and officers' insurance, including that which covers liability for negligence, default, breach of duty or breach of trust.

## Contacts

For more information, please contact Fergus Bolster, Emma Doherty or another member of the Matheson Corporate Department.

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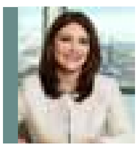

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