

Chapter 4

Business organisation in Ireland

In considering business entities in Ireland, a distinction needs to be made between unincorporated and incorporated bodies. A significant feature of an incorporated body is that it has a legal status separate from its owners and is capable of suing and being sued in its own name. Incorporated bodies include private limited companies, public limited companies and unlimited companies. An unincorporated body may be a sole proprietorship or a partnership.

Private limited company

Private limited companies are the most common form of business entity used in Ireland. The essential features of a private limited company are that the liability of members is limited to the amount of share capital subscribed to and that certain obligations imposed on public limited companies do not apply to private limited companies.

Definition

To qualify as a private limited company the company must:

- limit the maximum number of members to 50 with a minimum of one
- restrict the members' right to transfer shares and
- prohibit any invitation to the public to subscribe for shares or debentures of the company.

A private limited company is required to show the word "Limited" (which may be abbreviated to "Ltd") in its name. Capital duty of 0.5% is payable on the issue of shares in limited companies. Stamp duty is payable at a rate of 1% on the transfer of shares in all companies.

Memorandum of Association

The constitution of a private limited company is made up of the Memorandum of Association

and the Articles of Association. The Memorandum of Association regulates the relationship of the company with the outside world and will contain clauses dealing with:

- the name of the company
- the objects of the company
- the nature and amount of share capital (for example ordinary, preferred etc) which it may issue.

Articles of Association

The Articles of Association regulate the internal organisation of the company and contain clauses dealing with matters such as the issue and transfer of shares, the appointment and removal of directors, the conduct of shareholders' and directors' meetings, payment of dividends etc.

Both the Memorandum and Articles of Association may be amended by the members of the company in general meeting or, if the Articles so permit, by written resolution.

Share capital

The share capital of a private limited company may be denominated in any currency and the currency adopted is generally dictated by the company's commercial requirements. The maximum amount of shares to be issued will be dictated by the authorised share capital as specified in the Memorandum of Association. The amount of authorised share capital may be revised by amendment of the Memorandum of Association. The minimum number of issued shares for a private limited company is one share per shareholder.

Reduction of share capital

A private limited company may redeem or buy back its own shares in accordance with the provisions of the Articles of Association and the Companies Acts 1963-2003. However, where shares are redeemed or bought back, the company must transfer an equivalent

amount of retained earnings to a non-distributable reserve, which is treated as part of the company's capital. In practice, this means a company cannot readily reduce its share capital. However, such reduction may be permitted on application being made to the courts. In considering a request for a reduction, the courts will be concerned primarily to ensure that the interests of creditors and other persons transacting business with the company will not be materially affected by such a reduction.

Company directors

The executive powers of a company lie with the directors who are responsible for the day to day running of the company. A company is required to have at least two directors (there is no maximum unless provided for in the Articles of Association). Any individual may act as a director, provided he or she has not been legally disqualified from holding such an office. Corporate entities are not permitted to act as directors.

The directors are required to act in accordance with the Articles of Association and generally:

- to act in good faith in the interests of the shareholders
- to use their directorship powers properly
- to apply the assets of the company properly.

The directors of the company are collectively known as the board and their primary function is to manage the company on behalf of the members. The business of the board is generally undertaken by meetings of the board; such meetings may be held as often as agreed by the members or as laid down in the Articles of Association. Directors' meetings are usually held to discuss and approve policy decisions and there is a statutory obligation to hold at least one board meeting in each calendar year to approve the annual financial statements of the company and convene the Annual General Meeting.

A director who does not carry out his or her duties properly and diligently may be held personally liable to the company or members for any damage they may have suffered and may also be prosecuted for non compliance with the Companies Acts.

Company secretary

Every company is required to have a company secretary and individuals or corporate entities may hold this position. The company secretary is normally responsible for administrative matters such as ensuring compliance by the company with the various filing obligations as set out in the Companies Acts. A company secretary may be one of the directors acting in a dual capacity.

Single member private limited company

It is also possible to form what is known as a "single member company".

The most significant differentiating features of such a company are that it may be formed with only one member and it may choose to dispense with the holding of an annual general meeting.

The single member company is an ideal vehicle for inward investors since it reduces administration requirements and eliminates the need for nominee shareholders.

In other respects, single member companies are similar to private limited companies. The minimum number of issued shares required for a single member company is one share.

Public limited company

Public limited companies have the same essential characteristics as private limited companies ie the liability of members is limited to the amount of nominal capital subscribed, but the key differences are:

- shares in a public limited company are freely transferable
- there is no restriction on the number of members but the minimum number is seven
- shares may be issued to the public and may be listed on a stock exchange
- additional reporting and capital requirements apply to such companies.

The word "public" refers not to the listing of the company's shares on a stock exchange, but rather to the facility to issue shares under a general public offering. Any limited

company that does not qualify as a private company is deemed to be a public limited company.

As with private limited companies, the Memorandum and Articles of Association set out the objects and rules of the company. There is no upper limit on the level of the issued share capital, but a minimum of €38,092 of share capital must be issued, of which 25% must be paid up. The name of a public limited company must include the letters "plc". In all other respects, public limited companies are similar in nature and form to private limited companies.

In practice, public limited companies are seldom used by inward investors since the facility to issue shares to the public is generally not of interest to such investors, while the minimum requirements in relation to the number of members and issued share capital can prove unnecessarily burdensome.

Unlimited company

This is a form of business entity where there is no limit on the member's liability in the event that the company's assets are insufficient to discharge the creditors. As a result of the risk of unlimited liability, inward investors do not often use these companies unless such risk can be eliminated. This can be achieved by having a limited liability company as the parent of the unlimited company. A number of advantages arise from this form of body corporate and these can be summarised as follows:

- capital duty at 0.5% is not payable on the issue of shares in a private unlimited company
- an unlimited company may, without undue formality and subject to the Articles of Association, purchase its shares from its members and may reduce its share capital without recourse to the courts
- an unlimited company is not required to file a copy of its annual accounts with the Registrar of Companies provided at least one of its members is either an individual or a non-EU unlimited company. Unlimited companies not required to file accounts are required to prepare and file a special auditor's report. The auditor prepares a separate report to the directors which confirms that the accounts for the relevant

year were audited. A copy of this auditor's report must be certified by a director and the secretary of the company and attached to the company's annual return.

- if all the members of the unlimited company are companies with limited liability, the unlimited company is required to file its accounts with the Registrar of Companies.

On application to the Registrar of Companies, an unlimited company may be converted into either a private or a public limited company and vice versa. However this process is not reversible.

An unlimited company is required to have at least two members, one of which may act as nominee for the other. In all other respects, unlimited companies are similar in form to private limited companies.

In practice, the use of unlimited companies is confined to particular situations where greater flexibility is required in terms of share capital movements. In addition the members may wish to avoid either the public disclosure associated with filing of accounts with the Registrar of Companies, or the 0.5% capital duty arising on the issue of shares. Alternatively, an entity may be required that will be disregarded or treated as transparent under the law of the investing country.

Partnerships: general and limited

A partnership, under Irish law, is defined as the relationship that exists between "two or more persons carrying on business in common with a view to profit". In practice, most partnerships are between individuals but a partnership may exist between individuals and companies and indeed between companies alone. The partnership entity does not have a legal personality separate from that of its partners. In the legal sense, the partnership does not enter into contracts in its own name, but in the names of its partners. Similarly, for legal purposes the assets of the partnership usually belong jointly to the persons making up the partnership and, subject to the comments below regarding limited partnerships, each partner is jointly and severally liable for the debts of the partnership. A partnership other than a limited partnership is described as a general partnership.

Partnership arrangements are often formalised by way of a written partnership agreement. Where such an agreement is not in place, a general partnership is governed by the provisions of the Partnership Act 1890. It is usual for a partnership to prepare accounts showing the results of the partnership business. General partnerships are not obliged to file these accounts on the public record.

It is also possible to establish what is known as a limited partnership. A limited partnership is comprised of at least one general partner (who has unlimited liability) and one or more limited partners. Limited partners are liable for partnership obligations only to the extent of the cash and property they contribute. Capital duty of 0.5% is payable on amounts subscribed as capital to a limited partnership. Where no written partnership agreement is in existence, limited partnerships are governed by the Limited Partnership Act 1907. If the general partner is a limited company, the limited partnership is obliged to file its accounts for public record with the Registrar of Companies. A partnership, limited or general, is required to register the business name of the partnership with the Registrar of Business Names.

Sole proprietorship

An individual setting up business as a sole proprietor is the simplest business form. There are few legal formalities or costs associated with the operation of a business as a sole proprietorship and this form of business entity appeals primarily to small enterprises.

Because the business is undertaken directly by the owner, he or she is personally liable for the business' obligations and may be required to pledge personal assets as collateral when borrowing funds. However, the owner has absolute managerial control and direct access to profits.

Companies incorporated in other countries trading in Ireland

Foreign companies (ie companies incorporated outside Ireland) may conduct business in Ireland either through a branch or a place of business depending on the level of independence of the Irish operation.

Branch operations in Ireland

For Irish company law purposes, a branch is a division of a foreign company trading in Ireland that has the appearance of permanency, has a separate management structure, has the ability to negotiate contracts with third parties and has a reasonable degree of financial independence (ie can contract in its own name with third parties).

EU regulations have been implemented that impose a similar registration regime on branches as that imposed on local companies. A foreign company setting up a branch in Ireland is required to file basic information with the Registrar of Companies. This includes the date of incorporation of the company, the country of incorporation, the address of the company's registered office, details regarding the directors of the company and the name and address of the person responsible for the branch's operation. A certified copy of the foreign company's constitution, certificate of incorporation and a copy of the latest audited accounts must also be filed with the Registrar of Companies.

A foreign company trading in Ireland through a branch is required to file the company's financial statements with the Registrar of Companies within eleven months of the parent company's year end or at the same time that they are filed by the parent company, whichever is earlier. Separate branch financial statements are not required. As with Irish incorporated entities, changes in previously notified information must be reported to the Registrar of Companies.

Place of business in Ireland

A foreign company undertaking business in Ireland from a fixed place of business, not being a branch, must file a copy of its constitution together with a list of the directors of the company and the address of its established place of business in Ireland with the Registrar of Companies.

Foreign companies that have a place of business in Ireland (not being a branch) and that would be regarded as a public limited company if registered in Ireland are required to file annual accounts with the Registrar of Companies.

Incorporation of an Irish company

The following is a brief summary of the main requirements when incorporating a company:

- a company must have the intention of carrying on an activity in Ireland in the immediate future and it must disclose such activities in both the main objects of the Memorandum of Association and the application form. This may be any activity that a company may lawfully be formed to carry on and includes the holding, acquisition or disposal of property of any kind
- details of the place or places in Ireland where it is proposed that the company will carry on its activity and the place where the central administration of the company will normally be carried on (full business postal address) must be provided
- a name search with the Companies Registration Office to ensure that the intended name of the company is not already being used or is too similar to the name of an existing company. The Registrar will not permit the use of similar names which could give rise to confusion in the marketplace
- at least one of the directors is required to be resident in Ireland. The requirement to have at least one resident director does not apply where there is a bond or certification in place for a company. A bond is issued by an insurance broker, to the value of €25,394.76 and provides a guarantee against any fines that may be imposed under provisions of the Companies Acts or Taxes Acts. Alternatively, a certification can be issued from the Registrar of Companies where a company has a real and continuous link with one or more economic activities that are being carried on in Ireland. A certification can only be issued once the company is up and running.

This information must be disclosed on the documentation lodged at the time of incorporation of each new company.

The proposed directors and the company secretary of a new company must sign their consent to act as officer of the company. In addition, one of the directors, the company secretary or a solicitor engaged in the formation of a new company must swear compliance with the requirements as outlined

before a practising solicitor, Commissioner for Oaths or a Notary Public. The completed documentation and the Memorandum and Articles of Association must then be lodged with the Registrar of Companies. It is likely to take approximately two to four weeks to incorporate a new company and the Registrar will then issue a certificate of incorporation.

Company obligations

Annual accounts

Irish companies are obliged to prepare financial statements annually and circulate these to shareholders along with the Directors' Report for the year.

Compliance statement

Irish companies and their directors will be required to prepare certain compliance statements once relevant sections of the Companies (Auditing and Accounting) Act 2003 have commenced. Commencement is by Ministerial Order and this is not anticipated before 1 July 2005.

When commenced, most Irish companies with the exception of private limited companies with turnover not exceeding €15,236,856 and a balance sheet total not more than €7,618,428 will be required to follow the Act's compliance statement regime.

The regime requires directors to prepare a policy statement in writing to be considered and approved by the Board of Directors and reviewed by them at least every three years. The policy statement is to be published in the Directors' Report. The policy statement is required to describe the:

- company's policies on compliance with its relevant obligations
- internal financial and other procedures in place to secure compliance
- arrangements made to implement and review effectiveness of these policies and procedures.

The relevant obligations consist of all company and tax law as well as any enactment that provides a legal framework within which the company operates and that may materially affect the company's financial statements.

In addition to this policy statement, the law, once commenced, will require directors to include an annual statement of compliance in the Directors' Report. The annual statement will consist of:

- an acknowledgement of the directors' responsibility for the company's compliance
- a confirmation that internal financial and compliance procedures are in place, or an explanation if this is not the case
- a confirmation that the directors have reviewed the effectiveness of the procedures for the year
- the directors' opinion, based on the procedures, that they have used all reasonable endeavours to secure compliance. If the directors are not able to give this opinion, the law requires specific reasons to be given.

The company's auditors are obliged to give an annual opinion as to whether each of the directors' statements is "fair and reasonable". If the directors have not prepared these statements, the auditor is obliged to report the matter to the Office of the Director of Corporate Enforcement.

Financial record-keeping

Irish companies are required to keep proper financial records. The directors are also required to prepare accounts on a periodic basis, which give a true and fair view of the state of affairs and results of the company for its financial period.

Statutory audit

Irish incorporated companies are required to have their financial accounts audited by a registered auditor, subject to the exceptions listed below. The audit includes an examination, on a test basis, of evidence relevant to the amounts and disclosures in the financial statements. It also includes an assessment of the significant estimates and judgements made by the directors in the preparation of the financial statements, and of whether the accounting policies are appropriate to the company's circumstances, consistently applied and adequately disclosed. If the auditor is satisfied with the above, a formal (unqualified) audit report will be issued. Audited financial statements must be laid before the members each year at the annual general meeting (AGM).

Legislation requires auditors to report certain instances of their clients, or officers, committing indictable offences under the Companies Acts and to report any suspicions of theft, fraud or money laundering in their client companies.

Exemption from audit for small companies

To qualify for exemption from the requirement to have its accounts audited, a company must satisfy all the following conditions in respect of the preceding year as well as the current year, unless the financial year for which the exemption is being sought is the company's first financial year:

- turnover (sales revenue) does not exceed €1.5 million
- balance sheet does not exceed €1,904,607
- average number of employees does not exceed 50.

This exemption does not apply to:

- parent or subsidiary companies
- banks and financial institutions
- insurance companies and
- financial intermediaries.

This is an exemption from an audit only. It does not obviate the need to prepare financial statements or file them at the Companies Registration Office.

Accounting principles

Accounting standards generally accepted in Ireland in preparing financial statements giving a true and fair view are those published by the Institute of Chartered Accountants in Ireland and issued by the Accounting Standard Board. Accordingly, Irish accounting principles are similar to those prevailing in the UK.

There are differences between Irish accounting principles and International Accounting Standards/International Financial Reporting Standards (IAS/IFRS) and US Generally Accepted Accounting Principles (US GAAP).

All listed companies in the EU must prepare consolidated financial statements under IAS/IFRS from 1 January 2005. Non-listed companies may elect to prepare annual accounts under IAS from 1 January 2005.

Accounting date

The accounting date is at the discretion of the company and can be changed at any time by a resolution of the directors. No formal notification is required to Companies Registration Office.

Annual general meeting (AGM)

Where a company has more than one shareholder, the Companies Acts require that an AGM is held each year so that the accounts can be put before the members. The first AGM of the company must be held within 18 months of the date of incorporation of the company and thereafter within 9 months of the end of the company's accounting period and within 15 months of the previous AGM. A single member company may, if it wishes, dispense with AGMs. Other business at the AGM includes reappointment of directors, appointment of auditors and declaration of a final dividend (if applicable).

Annual return

An annual return is a document setting out the statutory details of the company which is filed once a year, together with the financial statements, at the Companies Registration Office.

As well as attaching a copy of the company's financial statements (audited accounts) if applicable, the annual return must contain current information on the following:

- authorised and issued share capital of the company
- any transfer of shares since the last annual return
- shareholders of the company
- directors and secretary
- registered office of the company
- political donations.

The Companies Registration Office allocates each company an annual return date (ARD) and a company has 28 days from this date in which to complete its filings. The ARD must be no more than 9 months after the financial year-end of the company (eg a company with a 31 December year end must have an ARD of 30 September or earlier). The company can only change its ARD once within 5 years.

If the annual return and financial statements are filed more than 28 days from its ARD, late filing penalties will be levied against the company.

Financial statements for public filing

The financial statements to be filed with the annual return may be abridged financial statements if the company satisfies two out of the three criteria set out in company legislation to enable it to be classified as a small or medium sized company. The criteria are:

	Small company	Medium company
Turnover (sales revenue)	€3,809,214	€15,236,856
Balance sheet total	€1,904,607	€ 7,618,428
Average number of employees	50	250

Companies that qualify as small or medium sized companies are permitted to exclude some information from the accounts filed with the Company Registrar.

If the accounts being filed are the consolidated accounts of a group, it is not possible to file abridged accounts, irrespective of the size of the group. Where consolidated accounts are filed, there is no requirement to file entity accounts for group members; however, each entity is required to file a separate annual return. Where the Irish company is a subsidiary of an EU incorporated parent it need not file its own accounts, if the parent company supplies a guarantee in respect of the liabilities of the Irish subsidiary and a copy of the parent's consolidated accounts is annexed to the annual return of the Irish company.

Other statutory filings

Apart from the annual filing requirement, any changes to the Memorandum and Articles of Association, authorised and issued share capital, directors or secretary of the company or the registered office of the company must be submitted to the Registrar of Companies within the time limits as set out in the Companies Act 1963-2003 (most changes must be notified to the Companies Registration Office within 14 days).

Business names

Where a company or person uses a business name that is different from its legal name, the business name must be registered with the Registrar of Business Names. Unlike incorporated companies, there is no name protection on business names. Hence it is possible for several companies to have the same business name.

Information to be included on public documents

All companies carrying on business in Ireland are required to include prescribed information on letterheads and other documents issued to the public. The information required is:

- the full name of the company
- its business name, if any
- the address of its registered office
- the company's place of registration and registration number
- the names of directors and their nationality (if not Irish).

Corporate insolvency

Irish law contains a number of mechanisms to address the issues raised by corporate insolvencies.

Receivership

A receiver or receiver and manager may be appointed by a debenture-holder on foot of a debenture document or by the court under a specific statutory power. The function of a receiver appointed by a debenture-holder is to take possession of the assets subject to the debenture-holder's charge. A receiver and manager takes over from the management of the company as far as the assets which are the subject of his debenture are concerned. Typically, the assets will then be realised and the debenture-holder paid off. A receiver and manager may, in certain circumstances, continue to trade with a view to increasing the value of the company's assets or selling the business as a going concern. A receiver or receiver and manager will be discharged on completion of the work and distribution of available funds. In the event that there are

surplus assets after the receivership, a liquidator is generally appointed to deal with the unpaid ordinary creditors.

Examinership

This "court protection" procedure allows the company or its creditors to seek the appointment of an examiner where the court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertakings as a going concern. The appointment of an examiner gives a company protection from its creditors for a period of 70 days. During this period the examiner will seek to formulate a compromise or scheme of arrangement with creditors, which will enable the company to continue in operation after the protection of the court is lifted. In the event that the examination process fails, the company may be wound up by way of a creditors voluntary liquidation or by the court, or a receiver may be appointed by the chargeholder.

Liquidation

The life of a company can be terminated through the formal process known as liquidation or winding up. A liquidation may be initiated by way of a resolution of the members or creditors of the company or through an application to the High Court. A liquidator is appointed to effect the process of liquidation. Liquidation involves the collection and realisation of the company's assets, the payment or part payment of its liabilities in accordance with legal priorities and the distribution to the members of any surplus that remains after paying the costs and expenses of the liquidation. The distribution of the surplus among the members is made in accordance with the rights attaching to their shares as set out in the Memorandum and Articles of Association.

Dissolution

Following the completion of a liquidation, a company will be dissolved after the notices of the final meetings or court certificate are lodged with the Companies Registration Office.

A company may also be dissolved by way of strike-off. An application for strike-off may be made to the Registrar of Companies where a company has ceased trading and has no

assets and no liabilities. This is a cost effective and simple method of terminating the life of a company. However, companies are required to obtain tax clearance and advertise before such an application can be made.

Domain registry in Ireland

The .ie domain is the top level internet domain for Ireland and is administered by IE Domain Registry Limited (www.domainregistry.ie)

All applicants for a domain name must demonstrate a real and substantive connection with Ireland. This can be by way of having "a place of business" in Ireland which it has registered or by providing documentation of an intention to trade in Ireland. If the applicant has a branch registered in Ireland, the company registration number must be included on the application form.

The steps to registering a new domain are as follows:

- contact an internet service provider (ISP), also known on the IE Domain's website as a "reseller"
- check the IE Domain Registry's domain listings to ensure chosen name is not currently registered
- submit an online application together with any required documentary to hostmaster@iedr.ie.

There is a registration fee of €135.52 (inclusive of VAT at 21%), which is also charged as a maintenance fee annually thereafter. An alternative method is to allow the ISP to make the application. This usually results in a lower registration and maintenance fee as the ISP may have acquired domains in bulk, thereby reducing the cost.

(Source: IE Domain Registry)