CEA

Údarás um Fhorfheidhmiú Corparáideach
Corporate Enforcement Authority

INFORMATION NOTE 2024/1

CIRCUMSTANCES LEADING TO DISQUALIFICATION UNDER THE COMPANIES ACT 2014 AND THE ASSOCIATED CONSEQUENCES

CONTEXT

The primary purpose of company law is to facilitate continuity and encourage entrepreneurial activity. It does so by providing for separate legal personality and limited liability, thereby circumscribing personal exposure to risk. In return for these privileges, company law sets down a framework within which:

- company directors are expected to operate,
- certain transparency requirements must be complied with,
- certain protections are afforded to shareholders, creditors, and the wider public, and
- sanctions, both civil and criminal, are provided for in respect of certain non-compliance.

As part of that accountability for companies and their directors, the recent resumption of the Companies Registration Office's (CRO) strike-off programme means that many companies which have failed to file their annual returns now face the prospect of being struck off the register. Where a company is struck off the register and subsequently dissolved, it ceases to exist and its remaining assets are vested in the Minister for Public Expenditure, NDP Delivery and Reform in accordance with the provisions of the State Property Act 1954.

The CRO's strike off programme is being rolled out on an incremental basis as 2024 progresses and, in the context that being the director of a company that has been struck off is a ground for disqualification, the directors of many such companies will face scrutiny by the Corporate Enforcement Authority (CEA).

The CEA's examination in this context involves considering the conduct of directors of companies that, at the date of strike off, had undischarged debts. This consideration may lead to enforcement action being taken and, ultimately, may lead to the disqualification of these persons from acting as company directors.

The consequences of disqualification are significant and, in that context, the CEA considers it timely to remind company directors and other interested parties of:

- the broader range of circumstances in which a person can be disqualified or prohibited from acting as a company director, and
- the consequences of acting in contravention of a disqualification order.

In that context, this Information Note also provides general information about the duration of disqualification orders and points interested parties towards recent judicial consideration of these issues.

THE ROLE OF THE CEA

The CEA's functions, as prescribed by the Oireachtas in the Companies Act 2014 (the Act), are to encourage compliance with the Act and to take appropriate enforcement action in response to non-compliance.

The CEA encourages adherence to company law through a range of strategies, including through the provision of independent information and guidance, such as this Information Note, other publications available on the CEA's website, and through various outreach and stakeholder engagement activities. This encouragement of compliance assists company directors in meeting their duties and obligations, members/shareholders and creditors in understanding and vindicating their rights and serves to improve standards of corporate governance more generally.

To enable us to discharge our enforcement role, we have an extensive suite of investigative powers at our disposal including:

- the power to require the production of documents (including electronic documents) by companies and relevant third parties,
- powers of search and seizure,
- the power of arrest, i.e., by CEA officers who are seconded members of An Garda Síochána, and
- the right to request the courts to approve certain additional investigative measures.

In discharging our enforcement mandate, we supervise the corporate insolvency process and conduct financial and related investigations across the full spectrum of companies, from SMEs and not-for-profits to companies whose securities are publicly listed.

Where our investigative activities identify non-compliance with company law, our enforcement options include:

- civil responses, including:
    - directing companies and their officers to take certain corrective measures,
    - the restriction and disqualification of company officers, and
- criminal sanction, including prosecuting in the CEA's name or the referral of matters to the Director of Public Prosecutions (DPP) for her consideration as to whether charges should be preferred on indictment.

The subject matter of this Information Note is the circumstances in which company directors can be disqualified or prohibited from so acting.

DISQUALIFICATION UNDER COMPANY LAW - OVERVIEW

What is disqualification?

In the context of company law, '*disqualified*' means a person being disqualified from:

- being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator, or examiner,
- being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation, or management of each of the following:
    - a company within the meaning of section 819 of the Act,
    - any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014,
    - any society registered under the Industrial and Provident Societies Acts 1893 to 2014,

There are two primary instances in which the possibility of the disqualification of company directors arises, namely:

- in the context of liquidators' reporting on the conduct of the directors of insolvent companies under section 682 of the Act, and
- in the context of the CEA, other others, making applications to the High Court under section 842 of the Act.

Section 842 of the Act

Section 842 of the Act sets out grounds under which certain specified parties may apply to the High Court to have a person disqualified. The specified parties include the CEA, the DPP, the Registrar of Companies, or a liquidator under section 844 of the Act. This is known as 'discretionary disqualification'. Two other instances of disqualification arise, namely automatic and deemed disqualification, and these are explained below.

A person against whom such an order is sought will be aware of the application because they will, as of right, have been served with the proceedings - or the Applicant will have made efforts to the satisfaction of the Court to ensure that they are aware of the application (section 845(1)).

Of all the parties authorised to make such applications, the CEA has the broadest range of grounds at its disposal under which to make an application for disqualification, i.e., under section 842(a) to (j). The other parties entitled to apply for disqualification have a narrower range of grounds at their disposal. While those grounds are well known to practitioners and legal advisors, for the benefit of company directors, it is worth restating them to highlight the grounds upon which a court may disqualify a director from so acting. They include:

(a) that the person has been guilty, while a promotor, officer, statutory auditor, receiver, liquidator, or examiner of a company, of any fraud in relation to the company, its members, or creditors,

(b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator, or examiner, of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator, or examiner,

(c) that a declaration has been granted under section 610 of the Act in respect of the person,

(d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator, or examiner of a company makes him or her unfit to be concerned in the management of a company,

(e) that, as disclosed in a report of inspectors appointed by the court or the CEA under the Act, the conduct of the person makes him or her unfit to be concerned in the management of a company,

(f) that the person has been persistently in default in relation to certain relevant requirements (relevant requirements mean any provision of the Act requiring returns, accounts, or other documents to be filed with the CRO),

(g) that the person has been guilty of 2 or more offences under section 286 of the Act (section 286 creates the offence of failing to maintain accounting records (see also sections 281 to 285),

(h) that the person was a director of a company when a notice was sent to the company under section 727 of the Act and the company, following the taking of the other steps under Chapter 1 of Part 12 consequent on the sending of the notice, was struck off the register under section 733 of the Act (i.e., that the person was a director of a company struck off the register by the Registrar),

(i) that:

  i. the person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking, and

  ii. it would have been proper to make a disqualification order against the person otherwise under this section if his or her conduct or the circumstances otherwise affecting him or her that gave rise to the foreign disqualification had occurred or arisen in the State, or

(j) that the person has contravened section 4 or 5 of the Competition Act or Article 101 or 102 of the Treaty of the Functioning of the European Union.

Section 842(h) of the Act is discussed further below in the context of the CRO's recent resumption of its strike off programme and the CEA, as a consequence, recommencing its programme of seeking disqualification of the directors of certain struck off companies.

What is the purpose of disqualification?
The primary, but not sole, purpose of disqualification is to protect the public from persons whose past record has shown them to be a danger to creditors and others. Disqualification also serves to improve corporate governance generally, as well as to deter similar such behaviour on the part of others in the future.

How prevalent is disqualification?
In the year ended 31 December 2023, 25 persons were disqualified under section 842 of the Act (with a further 68 restricted). In the ten-year period preceding 31 December 2023, a total of 257 directors were disqualified under section 842 of the Act, 114 by way of court order and 143 on foot of the acceptance of Disqualification Undertakings.

How long does disqualification last for?
Disqualification periods vary depending upon:

- the underlying facts and circumstances, and
- the means by which a disqualification has been imposed.

The period of disqualification under section 842 of the Act can vary while the periods for disqualification undertakings, automatic and deemed disqualification are set out under the Act (see also sections 839, 840, and 851(6)(a)). The courts have determined that disqualification under section 842 of the Act for periods in excess of 10 years should be reserved for particularly serious cases, and examples of such cases are referenced at the end of this Information Note.

How does disqualification arise?
In summary, disqualification can arise in the following ways:

i. by way of undertaking offered by the CEA,
ii. by way of an application to the High Court by a liquidator,
iii. by way of an application to the High Court by the CEA, and
iv. automatically in certain circumstances.

I. DISQUALIFICATION BY UNDERTAKING OFFERED BY THE CEA
Where it appears to the CEA that a director should appropriately be disqualified (for example, by virtue of having been a director of a company that was struck off the register while having outstanding debts), the CEA may offer the individual concerned the opportunity to submit to a disqualification undertaking, rather than bringing disqualification proceedings of its own volition. The disqualification undertaking scheme is provided for by the Act and the offer of disqualification undertaking is laid out by way of prescribed form (S.I. No. 646/2022 - Companies Act 2014 (Disqualification and Restriction Undertakings) Regulations 2022 (irishstatutebook.ie).

Acceptance of a disqualification undertaking is entirely voluntary on the part of a company director. However, a decision not to accept an undertaking will result in the CEA initiating proceedings in the High Court to have the relevant director disqualified by court order. There are time and financial costs associated with defending such proceedings and one aspect of the policy rationale underpinning the introduction of the undertakings regime was to provide directors with a means of avoiding those costs should they so wish.

A person who accepts a disqualification undertaking is, in the same manner as a person who is disqualified by order of the High Court, prohibited from acting as a director or other company officer, as an auditor, receiver, liquidator, or examiner, and from being concerned in any way, directly or indirectly, in the promotion, formation, or management of a company for the duration of that undertaking. Under the Act, the maximum duration of a disqualification undertaking is 5 years.

In the (relatively infrequent) circumstances where a liquidator recommends that a director be disqualified rather than merely restricted, the CEA will only offer an undertaking if it appears that the period of disqualification warranted by the director(s') conduct would be no greater than 5 years. In this context the CEA has regard to the general principles which are applied in assessing section 682 reports and the principles outlined in High Court jurisprudence in relation to disqualification.

II. DISQUALIFICATION BY WAY OF AN APPLICATION TO THE HIGH COURT BY A LIQUIDATOR

Where a liquidator reports to the CEA under section 682 of the Act, the CEA is required to either grant or refuse relief to the liquidator from their statutory obligation to bring restriction proceedings in the High Court. Where such relief is not granted, and where the offer of a restriction undertaking is not accepted by a director, proceedings must be commenced by the liquidator within 2 months of the CEA having informed the liquidator of the decision not to grant relief.

The obligation to seek the restriction of directors who are considered not to have acted honestly and responsibly in their management of the company's affairs prior to the company having entered into insolvent liquidation is the minimum required under the Companies Act 2014. In cases where there is evidence of wrongdoing of a sufficiently grave character, the liquidator may instead indicate that disqualification proceedings rather than restriction would be appropriate. As outlined above, if the CEA determines that the directors' conduct merits a disqualification period in excess of 5 years, it will advise the liquidator that an undertaking is not considered appropriate and that, accordingly, an application to the High Court is warranted.

There are also circumstances in which a liquidator will seek to have a director disqualified in the context of other litigation against directors (for example, as a relief in fraudulent trading proceedings), rather than as a standalone application for disqualification.

Section 848 of the Act

The High Court can also disqualify a person, as a result of actions by a liquidator, where that person:

- was previously the director of a separate insolvent company that was wound up and the person was restricted as a company director at that time, and
- the person is subsequently the director of a company which commences being wound up within the period of 5 years from the first winding up proceedings above.

III. DISQUALIFICATION BY WAY OF APPLICATION TO THE HIGH COURT BY THE CEA

As noted above, the CEA is entitled to apply under a broad range of grounds for the disqualification of directors, including based on liquidators' reports, and on the basis that a person's conduct makes them unfit to be concerned in the management of a company. Such applications arise in instances where either a disqualification undertaking offer has not been accepted by the director, or where the conduct of the director is of sufficient gravity that the offer of an undertaking would, in the CEA's assessment, be inappropriate and the CEA considers that the matter should, more appropriately, be considered by the High Court.

In the context of the CRO's strike-off programme, however, the CEA focusses primarily in this Information note on section 842(h) of the Act.

Section 842(h) of the Act
Section 842(h) recognises that:

- it is not appropriate for the directors to, in effect, abandon or walk away from the company and to fail to continue to file annual returns in respect of the company with the CRO,
- rather, where a company becomes insolvent, the appropriate course of action on the part of the directors is to ensure that the company is wound up in an orderly manner, and
- where the directors, in effect, abandon the company without winding it up in an orderly manner, in the absence of an appropriate provision, the directors would evade the liquidator reporting process, and associated CEA supervision, referenced above.

For those reasons, company law provides that:

- if the company fails to file its annual returns, the Registrar can strike the company off the register, and
- the CEA can, where a company that is struck off had debts outstanding at the date of its strike off, seek the disqualification of the directors of such companies.

Struck-off companies are dissolved (i.e., cease to exist) after completion of the CRO's strike-off process.

From the enforcement perspective, the CEA characterises as "*dissolved insolvent companies*" those companies that:

- are struck off the register for failure to file their annual returns; and which
- at the date of strike off, had liabilities, whether actual, contingent, or prospective.

While, as above, it is open to the CEA to apply to the High Court for the disqualification of the directors of such struck off companies, company law also provides that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike-off or that those liabilities had been discharged before the initiation of the disqualification application.

IV. AUTOMATIC DISQUALIFICATION OR PROHIBITION

IMPORTANT

IGNORANCE OF THE FACT OF BEING DISQUALIFIED OR PROHIBITED FROM ACTING AS A COMPANY DIRECTOR DOES NOT ABSOLVE A DISQUALIFIED DIRECTOR FROM THE CONSEQUENCES OF THEIR DISQUALIFICATION

In the circumstances noted above, i.e., disqualification as a result of having accepted an undertaking from the CEA or on foot of a court application, a disqualified person will, in all likelihood, be aware that they are the subject of a disqualification order.

There are, however, also circumstances in which a company director may be automatically disqualified.

There are three particular instances of this that the CEA wishes to highlight in this Information Note. One is of very broad applicability and the other two arises in far more discrete sets of circumstances. Nonetheless (and in light of the consequences of breaching a disqualification order that are recounted below), it is important for directors and their advisers to be aware of them.

Automatic disqualification on conviction of certain indictable offences (section 839 of the Act)
Section 839(1) of the Act renders '*automatically disqualified*' a person convicted on indictment of:

- **any** offence under the Act,
- **any** offence involving fraud or dishonesty, or
- **any** other offence under a prescribed enactment relating to a company.

This disqualification is for a period of 5 years (or longer or shorter period if a court decides, on the application of either party to the case). Such a disqualification is as if the person was subject to be a disqualification order (section 839(3)). Thus, a person convicted of a fraud or dishonesty offence under, for example, the Criminal Justice (Theft and Fraud Offences) Act 2001 (examples in that regard including Theft, Deception, False Accounting, and the Use of a False Instrument), or the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as amended), if convicted on indictment, is automatically disqualified under company law.

The CEA wishes to highlight this to directors or other persons convicted on indictment as being an automatic consequence of their conviction, and one that directors, and their professional advisors, ought to be aware of and advise their clients as being a consequence of conviction.

Prohibition from acting as a director or secretary (section 132 of the Act)
While a prohibition rather than a disqualification, a person who is an undischarged bankrupt and acts as either a director or secretary of a company commits a Category 2 offence, unless they have the leave (i.e., permission) of the court.

A person who so acts as a company director while an undischarged bankrupt, and is duly convicted of so acting, is subject to a deemed disqualification order from the date of their conviction and for such period as the court specifies (unless they are already disqualified).

Deemed disqualification – foreign disqualification (section 840)
Ordinarily, if a person is disqualified from acting as a company director in another jurisdiction, they are not automatically considered to be disqualified as a director under Irish company law. However, a person disqualified from acting as a company director in another jurisdiction must both:

i. notify the Irish company of which they are a director, and

ii. provide information to the company to permit it, under sections 150(1) and 150(10) of the Act, to file a Form B74A with the CRO (the purpose of that Form being to alert members of the public to the fact that the individual concerned has been disqualified in another jurisdiction.

Failure to notify the Registrar is a criminal offence (Category 3) and section 150 creates other offences arising from this default. In the event of failure to file a Form B74A with the CRO, the director concerned is deemed to be disqualified under Irish company law, from either 14 days from the failure to comply where the director is in default (section 840(3)(a)(i)), or on the date of delivery of the materially false or misleading statement to the to the Registrar (section 840(2)(b)) and which disqualification continues for the unexpired periods of disqualification (section 840(3)(a(ii)). Dual directors of Irish and foreign companies are reminded of the strict time limits that apply and that circumstances can conceivably arise where persons can become disqualified without their knowing this to be the case.

IMPORTANT

THE RESPONSIBILITY RESIDES WITH COMPANY DIRECTORS TO ENSURE THAT COMPANIES OF WHICH THEY ARE DIRECTORS COMPLY FULLY WITH THE RELEVANT PROVISIONS TO ENSURE THAT THEY DO NOT BECOME DISQUALIFIED UNDER IRISH COMPANY LAW AS A RESULT OF A FAILURE TO FILE RELEVANT DOCUMENTATION WITH THE CRO.

CONSEQUENCES OF BREACH OF A DISQUALIFICATION ORDER

Offence of contravening a disqualification order

The CEA also wishes to draw directors' and company employees' attention to the consequences of acting in breach of a disqualification. Specifically, that:

- whether aware of the existence of a disqualification order or not, a person who acts in a prohibited capacity, or

- a person who, while a company director, acts pursuant to directions given by a person, knowing that the person giving the directions is in contravention of such an order,

is committing a Category 2 offence (see also sections 856 and 871).

Disqualification/Further disqualification

A person giving the directions is liable on conviction under section 855 to either disqualification (if they were restricted previously) or disqualification for a further period of 10 years (or other additional period deemed appropriate by the court on application) (section 855(3)(a)).

A person who, while a director, knowingly follows the directions of a person in breach of an order is themselves liable to a period of automatic disqualification if convicted of an offence under section 856 (unless already disqualified at the date of conviction).

Personal liability

A person acting in breach of a disqualification undertaking or order may also:

- be liable to the company recovering consideration for any act or service performed while the person was so acting (section 858), and/or

- be personally liable for the debts or liabilities of the company contracted during the period of disqualification, and, where winding up proceedings are commenced, within 12 months of the person so acting (section 859).

A person knowingly acting under the direction of a disqualified person and convicted on indictment under section 856 may also be held personally liable for debts incurred during this period (section 860).

APPLICATION FOR RELIEF FROM DISQUALIFICATION

Any disqualified director may seek relief from the High Court under section 847 of the Act on the ground that such relief would be just and equitable. A person making such an application is required to notify the CEA and the CEA carefully examines all such applications. By way of example, in a recent case in which relief was applied for, the CEA sought significant assurance from disqualified directors and the company regarding proposed future governance arrangements before deciding on its stance towards that application for relief (*In the matter of SB Steel Limited* [2022] IEHC 513).

FURTHER GUIDANCE ON DISQUALIFICATION PERIODS

The CEA also wishes to draw the attention of interested parties to the decision of Finlay Geoghegan J. in *Bovale* ([2013] IEHC 561), where the Court set out the principles grounding the purpose of disqualification. In that case, the Court stated that:

(i) a primary, but not the only, purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others,

(ii) it is also a purpose of an order of disqualification to improve corporate governance,

(iii) a further purpose of an order of disqualification is that it acts as a deterrent, both in respect of the respondent director and other directors of companies. Hence, the period of disqualification should contain deterrent elements,

(iv) the period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the Court in relation to the relevant sub-paragraphs of (section 842) in respect of which the order of disqualification is being made,

(v) a period of disqualification in excess of 10 years should be reserved for particularly serious cases, and

(vi) the Court should firstly assess the correct period in accordance with the foregoing and then take into account any mitigating factors prior to fixing the actual period of disqualification.

Disqualification for periods of longer than 10 years have been imposed in a number of cases recently. The principles for disqualification of such duration were set out in the case of *In Re Custom House Capital Ltd.*, ([2016] IEHC 689) where Keane J. decided that the appropriate period of disqualification was 15 years, stating, at paragraph 73 of the judgment, that the following factors justified that order:

> *"The conduct of the respondents* [...] *was deeply dishonest; continued over a protracted period of time until, for a variety of reasons, it could no longer be concealed; and was devastating on those innocent persons who had the grave misfortune to entrust the company with their pensions or savings…."*

For information purposes, the CEA draws the attention of interested parties to the following relevant judgements of the Superior Courts, where lengthy periods of disqualification have been imposed on company directors:

- *In the Matter of Bovale Developments; Director of Corporate Enforcement -and- Bailey* December 2013 ([2013] IEHC 561),
- *Kirby -and- Rabbitte* January 2020 ([2020] IEHC 703),
- *In the Matter of Pembroke Dynamic Internet Services Limited (In Liquidation)* July 2021 ([2021] IEHC 475),
- *Powers -and- Greymountain Management Limited (In Liquidation)* October 2022 ([2022] IEHC 599),
- *In the Matter of Eurosurgical Limited (In Liquidation)* January 2022 ([2022] IEHC 10), and
- *In the Matter of Irish Gold and Silver Bullion Limited* July 2023 ([2023] IEHC 392).

Further information
Further information regarding the CEA and its activities can be accessed at www.cea.gov.ie

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8 APRIL 2024

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