



Fall | 19



INTERNATIONAL LAWYERS NETWORK



**HOLMES O'MALLEY SEXTON SOLICITORS
ESTABLISHING A BUSINESS ENTITY IN IRELAND**

This guide offers an overview of legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.

ESTABLISHING A BUSINESS ENTITY IN IRELAND



“Establishing a Business Entity in Ireland”

Lawyers at
HOMS Solicitors – Dublin

I. Introduction

As a common law jurisdiction, Ireland’s legal system is similar to that of the US and the UK and businesses can be carried on in Ireland in several different ways, including as sole traders, partnerships or companies.

Companies

A company is a body formed and registered under the Companies Act 2014, which has legal personality separate and distinct from its shareholders. There are various types of companies and each has its own distinct advantages and disadvantages.

Sole Traders

A sole trader may be defined simply as an individual who sets him or herself up in business. Sole traders do not enjoy separate legal personality and are therefore liable for any losses accruing to their business. Persons engaged in business as sole traders may protect themselves to some extent from certain categories of loss which the business might incur through the purchase of insurance.

Partnerships

The Partnership Act 1890 defines a partnership as a *“relation which subsists between persons carrying on a business in common with a view to profit”*. A *“business”* is defined in the Partnership Act to include *“every trade, occupation or profession”*.

Essentially, a partnership is the coming together of two or more persons in return for

benefits received, such as extra capital and expertise from the others engaged in the venture. Partnerships, in contrast to companies, are not legal entities: there may be a name attached to the partnership, but it consists solely of the individual partners and the partnership has no independent legal existence.

The partners share the profits of their venture and, similarly, the assets and liabilities are those of the partners. It is possible to register a limited partnership in which some partners have limited liability under the Limited Partnerships Act 1907, but limited partners may not take place in the management of the business.

Whereas the affairs of a company are managed by its directors (and not by its shareholders), each partner is entitled to participate in all the activities of the partnership.

II. Types of Companies

All Irish companies are governed by the Companies Act 2014, which came into force on 1 June 2015. There are several different types of company structure provided for under the Companies Act 2014 and companies can be broadly classified as either private or public companies with limited or unlimited liability.

Companies Act 2014

The Companies Act 2014 condenses the previous 17 companies acts and related company law provisions into a single comprehensive code of company legislation. The design of the Companies Act 2014 focuses on simplification and modernisation of company law. It created new forms of company and introduced several changes to the roles of various persons in the corporate structure.

A significant portion of the Companies Act 2014 is dedicated entirely to the private company limited by shares (LTD). The LTD is the company model of choice for the vast majority of private companies in Ireland. The remainder of the Companies Act 2014 sets out the law applying to other company types, including designated activity companies (DACs), public limited companies (PLCs), unlimited companies, companies limited by guarantee (CLGs) and external companies.

1. Private Company Limited by Shares (LTD)

The LTD is the most common form of company in Ireland. Like other limited companies, including DACs, a principal advantage of LTDs is that the liability of its shareholders is limited to the amount, if any, unpaid on the shares registered in their name.

A key distinction between LTDs and DACs is that LTDs have full and unlimited capacity and are not tied to an object's clause.

Key features

- Full and unlimited capacity.
- Limited liability of shareholders.
- One-document constitution.
- Not required to have an authorised share capital.
- May dispense with holding a physical AGM, irrespective of the number of shareholders.
- Between one and 149 shareholders.
- One or more directors.
- Name must end in "Limited" or "Ltd" (or Irish equivalent).

2. Designated Activity Company (DAC)

The DAC is also a form of private limited company. The format of a DAC can be either a private company limited by shares (which is similar in many respects to the LTD) or a private company limited by guarantee and having a share capital.

Private limited companies that are trading as credit institutions or insurance undertakings are required to be DACs.

Key features

- Capacity technically limited to objects clause in memorandum of association; however, the Companies Act 2014 specifies that the *"validity of an act done by a DAC shall not be called into question on the ground of lack of capacity by reason of anything contained in the DAC's objects"*.
- Limited liability of shareholders.
- Two-document constitution, comprising memorandum and articles of association.
- Required to have an authorised share capital.
- May not dispense with holding a physical AGM if more than one shareholder.
- Between one and 149 shareholders.
- Two or more directors.
- Name must end in "designated activity company" or "DAC" (or Irish equivalent).
- Can list any debt securities for offer to the public.

3. Public Limited Company (PLC)

The PLC is also a form of limited company and its key distinguishing feature is that

there is no statutory limit to the number of shareholders it may have. Accordingly, PLCs are the chosen form of corporate structure where companies wish to list their shares on a stock exchange and offer them to the public.

A Societas Europea (SE) is the European equivalent of a PLC. The Companies Act 2014 specifies that a Societas Europea that is registered with the CRO *“shall be regarded as a PLC”* for the purposes of the relevant legislative provisions of the Companies Act.

Key features

- Capacity technically limited to objects clause in memorandum of association; however, the Companies Act 2014 specifies that the *“validity of an act done by a PLC shall not be called into question on the ground of lack of capacity by reason of anything contained in the PLC’s objects”*.
- Limited liability of shareholders.
- Two-document constitution, comprising memorandum and articles of association.
- Must have an authorised share capital and a minimum issued share capital of €25,000.
- May not dispense with holding a physical AGM if more than one shareholder.
- Must have one at least shareholder with no statutory maximum.
- Two or more directors.
- Name must end in "public limited company" or “plc” (or Irish equivalent).
- Capacity to offer, allot and issue securities to the public.
- Unless constitution provides otherwise, directors shall retire by rotation and directors’ remuneration (if any) must be determined by the shareholders in general meeting.

4. Unlimited Company

There are three types of unlimited company under the Companies Act 2014: a private unlimited company (ULC); a public unlimited company (PUC); and a public unlimited company that has no share capital (PULC).

Unlimited companies are not generally used as trading companies in Ireland as the liability of the shareholders is not limited and in a winding up situation, the shareholders are obliged to pay all the debts and liabilities of the company.

Key features

- Capacity technically limited to objects clause in memorandum of association; however, the Companies Act 2014 specifies that the *“validity of an act done by an unlimited company shall not be called into question on the ground of lack of capacity by reason of anything contained in the company’s objects”*.
- Unlimited liability of shareholders.
- Two-document constitution, comprising memorandum and articles of association.
- May not dispense with holding a physical AGM if more than one shareholder.
- Two or more directors.
- Name must end in "unlimited company" or “uc” (or Irish equivalent).

5. Company Limited by Guarantee (CLG)

The CLG does not have a share capital and, instead, the shareholders' liability is limited by its constitution to such amount which the shareholders undertake to contribute to the assets of the company in the event of it being wound up.

The CLG is the legal form of choice for charities, sports and social clubs and management companies in Ireland.

Key features

- Capacity technically limited to objects clause in memorandum of association; however, the Companies Act 2014 specifies that the *"validity of an act done by a CLG shall not be called into question on the ground of lack of capacity by reason of anything contained in the CLG's objects"*.
- Limited liability of shareholders.
- Two-document constitution, comprising memorandum and articles of association.
- Cannot, and does not, have a share capital.
- May not dispense with holding a physical AGM if more than one shareholder.
- Must have at least one shareholder with no statutory maximum.
- Two or more directors.
- Name must end in "company limited by guarantee" or "clg" (or Irish equivalent).

6. External Companies

An external company means a company that is registered outside of Ireland, either within or outside the EEA. An external

company that has limited liability and establishes a branch in Ireland must register with the CRO. External companies that do not have limited liability or do not have a branch in Ireland are not required to register in Ireland.

A "branch" is generally understood to mean a place of business which has the appearance of permanency and is equipped to negotiate business with third parties.

III. Steps and Timing to Establish

Incorporation Process

The process of incorporation and registration of a company commences with the delivery of a constitution together with the relevant application form to the CRO. On the registration of the constitution, the CRO will certify in writing that the company is incorporated and issue a certificate of incorporation. The certificate of incorporation is conclusive evidence that the Company is registered pursuant to the Companies Act 2014.

The CRO will not register a constitution unless satisfied that all the requirements in relation to the form of the constitution under the Companies Act 2014 have been complied with. The constitution of each company will vary depending on the type of company, but generally each must state:

- the name of the company;
- the type of company to be registered (i.e. LTD, DAC, PLC, etc);
- the objects of the company (if required, depending on company type);
- the limit on liability of the shareholders of the company (if relevant); and
- the share capital of the company divided into classes and nominal value of each share.

The application to incorporate a company must also include:

- the company name;
- details of where the company proposes to conduct its business
- the address of the registered office of the company;
- details of the proposed directors and company secretary (including name, date of birth and address);
- the consent of the proposed directors and company secretary to act;
- the initial shareholders and details of their shareholdings; and
- a description of the activity which the company proposes to engage in.

The application also incorporates a declaration by the proposed directors that the requirements of the Companies Act 2014 have been complied with in respect of the company.

The incorporation of a standard LTD can take approximately five days from the lodgement of the relevant application documentation with the CRO.

Companies Registration Office (CRO)

The Companies Registration Office (CRO) is the public registry in Ireland for companies. The CRO is a statutory authority and has several core functions, as follows:

- the incorporation of companies;
- the receipt and registration of companies' post-incorporation documents;
- the enforcement of the Companies Act 2014 in relation to the filing obligations of companies; and
- making information available to the public.

Office of the Director of Corporate Enforcement (ODCE)

The ODCE is an official office and is, together with the CRO, the principal authority for the enforcement of the Companies Act 2014. The primary mandate of the office is to improve the compliance environment for corporate activity in the Irish economy by encouraging adherence to the requirements of the Companies Act 2014 and bringing to account those who disregard the law.

IV. Governance, Reputation, and Ongoing Maintenance

Company Officers

1. Directors

Directors are elected personnel responsible for managing and running a company. As described above, except for the LTD, companies must have a minimum of two directors.

The Companies Act 2014 codifies the duties and responsibilities of directors, as follows:

- 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;
- To not use the company's property, information, or opportunities for his or her own or anyone else's benefit (unless otherwise permitted or approved);
- To not agree to restrict his/her power to exercise an independent judgment (unless otherwise permitted or approved);

- To avoid any conflict between the director's duties to the company and the director's other interests (including personal interests) (unless otherwise permitted or approved);
- To exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director and the knowledge and experience which the director has; and
- To have regard to the interests of its shareholders in addition to a general duty to employees.

Directors must be natural persons (i.e. another company cannot act as a director) and each director must be 18 years of age or older.

Undischarged bankrupts may not act as directors. Directors are also subject to rules regarding restriction and disqualification, with disqualification orders of other jurisdictions being recognised in Ireland.

There are some additional formalities for directors, including that directors are not permitted to hold more than 25 directorships in Ireland (with group companies treated as a single directorship).

In addition, while there are no nationality requirements for the directors or company secretary of an Irish company, all Irish incorporated companies must have at least one director that is resident in the EEA. If the company does not have a director that is resident in the EEA, the company must take out a bond to the value of €25,000. The annual cost of such a bond is approximately €1,000 and the purpose of the bond is to provide for certain fines or penalties that might be imposed as a

result of the company's non-compliance with company and/or tax law.

2. Company Secretary

Each company must have a company secretary. A director of a company can generally also hold office as the company secretary, unless it is an LTD with a single director in which case the director and company secretary must be different.

The functions of a company secretary are a mix of legislative provisions and those duties delegated to the company secretary by the directors. The functions are primarily administrative, such as ensuring that the company's filing obligations under the Companies Act 2014 are complied with and the statutory registers of the company are maintained.

It is the responsibility of the directors to ensure that the person appointed as secretary has the skills necessary to carry out the relevant duties and functions.

If an individual, a company secretary must be 18 years of age or older. However, it is also possible for another company to act as company secretary.

Statutory Registers

Companies in Ireland are required to keep and maintain certain registers. It is generally expected that the company secretary would be responsible for updating and maintaining these registers, which are usually kept at the company's registered office address.

Pursuant to the Companies Act 2014, the following registers are generally required to be kept:

- Register of members (with "members" being an equivalent term for "shareholders");

- Register of the names and details of directors and secretaries;
- Register of any shares or interests in shares held by directors and secretaries;
- Register of any instrument creating a charge; and
- Register of minutes of meetings.

In addition, with effect from 2019, Irish companies are also generally required to maintain a register of their beneficial owners and to file such details in the CRO. A beneficial owner is any natural person who ultimately owns or controls a legal entity through direct or indirect ownership of 25% or more of shares or voting rights or ownership interests.

Registered Office

Every company incorporated in Ireland must have a registered office in the state. This is an address in Ireland to which all official communications and notices may be addressed

Shareholders

1. General Meetings

Irish companies are generally required to hold an annual general meeting of its shareholders (AGM) every calendar year. As described above, certain companies may dispense with the holding of an AGM and may instead sign a written resolution to the effect of the meeting.

The directors of a company may convene an extraordinary general meeting of the shareholders of a company (EGM) whenever they consider it appropriate. A shareholder or shareholders holding 50% or more of the paid-up share capital of the company may also convene an EGM (although this percentage may be varied in the company's constitution). Shareholders holding 10% or more of the paid-up share capital of the company may request the

directors to convene an EGM. EGM's are usually convened to deal with special business of the company.

General meetings will normally be held in Ireland, unless all shareholders entitled to attend and vote consent in writing to its being held outside Ireland. At least 21 days' notice is generally required for the calling of an AGM with at least seven days' notice required for the calling of an EGM.

2. Rights and Powers of Shareholders

The Companies Act 2014 and the constitution of a company normally set out the powers of shareholders, by reference to their position as shareholders and the rights attaching to shares. Companies may, and often do, have more than one type of share (known as "share classes"). In such circumstances, each share class can have different rights attached to it, meaning that holders of different shares can have different rights in respect of matters such as attending meetings, voting power and entitlements to dividends or participation in profit.

The power to manage the business of the company is generally delegated to the directors of the company, who may exercise all such powers of the company that are not required (by the Companies Act 2014 or by the company's constitution) to be exercised by the shareholders.

3. Shareholders' Powers where the Company is in Default

Where a company or any of its officers is in default in complying with any provision of the Companies Act 2014, it is technically possible for a shareholder to serve a notice on the company or officers requiring the company or officers to remedy the default within 14 days. If the default is not

remedied, an application can be made to the High Court for an order directing the company or officer to remedy the default.

4. Shareholders' Right to Seek an Investigation of a Company

On the application of certain persons, the High Court may appoint one or more competent inspectors to investigate the affairs of a company to enquire into the matters specified. The application to the court can be by any of: the company itself; not less than 10 shareholders of the company; a shareholder or shareholders holding one-tenth or more of the paid-up share capital of the company; a director of the company; or a creditor of the company. Inspectors appointed pursuant to this procedure take their directions from, and report to, the High Court.

5. Shareholders' Right to Petition for Relief in Cases of Oppression

An application can be made to the High Court by any shareholder who considers the affairs of the company are being conducted or the powers of the directors are being exercised in a manner that is "oppressive" or in disregard of his or her or their interests as shareholders. As for what constitutes "oppressive conduct", this is understood to mean the exercise of the company's authority in a manner which is burdensome, harsh, and wrong. Examples of conduct which could potentially lead to such oppressive conduct would include fraudulent and unlawful transactions, oppressive management, and exclusion of the shareholder from the management of the company.

On such an application, the High Court can make an order: directing or prohibiting any act; cancelling or varying any transaction; regulating the conduct of the company's

affairs in future; for the purchase of the shares of any shareholders of the company by other shareholders or by the company itself; and for the payment of compensation.

V. Advantages of Establishing in Ireland

A key feature of incorporation is that the company becomes a separate legal entity, distinct from its shareholders, recognised in law as having a separate identity and enjoying certain rights that flow from that distinction. Registered companies may also benefit from limited liability such that the assets, debts, and obligations belong to the company and not to its shareholders. The following are the consequences of incorporation and could be described as the main advantages of Irish registered companies as business organisations:

- Separate legal personality;
- Limited liability of shareholders;
- Transferability of interests;
- Perpetual succession;
- Ability to give security for borrowings;
- Formation of group structures; and
- Taxation.

There are many advantages to locating a business in Ireland, not least the evolving tax system which is a key aspect of the Irish Government's support for industry. Ireland has a corporation tax rate of 12.5% on profits earned during an active business and the top rate of personal income tax is 40%. This, together with its capital gains participation exemption, generous foreign tax credit system, membership of the EU, ever expanding double tax treaty network, the R&D tax credits system & thin capitalisation rules makes Ireland an attractive destination for the registration of a Company and the establishment of a business.

Ireland has long been recognised as an ideal European country to establish a business. We have a well-educated, English-speaking workforce, an attractive tax regime and are closely situated to London and mainland Europe. Ireland has established itself as an easy location to start a business, a preferred jurisdiction for taxation and a front-runner for establishing European headquarters. Ireland has for years had a consistent policy of welcoming foreign-owned business and is well-positioned to continue to do so.