

LEGAL PERSONALITY

Methods of Trading

A company is a legal association formed under the Companies Acts 1963–2009.

A company must be distinguished from other forms of business entities, e.g. sole traders and partnerships.

A sole trader is simply an individual who sets himself or herself up in business. A sole trader has no separate legal personality, and is liable for any losses made by the business.

A partnership is defined by the Partnership Act 1890 as an association of two or more parties carrying on a business in common with a view to a profit. A partnership is like the coming together of two or more sole traders, where all partners share the profits and losses. Like a sole trader general partnership has no separate legal personality (see chapter 19).

Types of Companies

There are different methods of forming companies, depending on the type of company to be formed.

A company formed under charter is a company which was created under a charter or permission from a British monarch. Such companies are not formed in Ireland today, but some still exist, e.g. the Royal College of Surgeons.

A company formed under statute is a company which is formed under legislation other than the Companies Acts. Occasionally, legislation may create a company for a national purpose such as Bus Éireann. Such companies are still governed by the Companies Acts.

A company formed by registration under the Companies Acts 1963–2009 is the most common type of company. Registration is the formal process of creating the company according to law. A registered company may be limited or unlimited. A limited company may be limited by shares or by guarantee. A company limited by shares may be a private limited company or a public limited company.

An Unlimited Company

An unlimited company is very similar to a partnership in that the company members are liable for the debts of the company. They may be liable without limit, or the liability of each member may be limited to a certain figure, e.g. €1,000.

A Company Limited by Guarantee

A company limited by guarantee is a company where the members guarantee to pay its debts up to a certain limit in the event of the company being wound up. Such companies are comparatively rare, and are usually non-profit organisations.

A Company Limited by Shares

A company limited by shares is the most common type of company, where the liability of shareholders for the debts of a company is limited to any amount unpaid on their shares. This type of company is often simply referred to as a limited company, and may be a private or public limited company.

Public and Private Limited Companies

Section 2 of the C(A)A 1983 defines a public limited company as ‘a company which is not a private company’.

The requirements of a public limited company are:

1. The memorandum must state that it is a public company, see section 5, C(A)A 1983.
2. The name must end with the words ‘public limited company’ or ‘plc’, see section 4, C(A)A 1983.
3. The nominal value of the share capital must be at least €38,100, see section 19, C(A)A 1983.

A company which does not comply with these requirements is a private company. A private company is defined in section 33, CA 1963.

A public company may be created as such, or a private company already in existence may re-register as a public company.

Differences between Private and Public Companies

1. Reason for formation: Private companies are generally formed to take advantage of separate legal personality and limited liability, whereas public limited companies are usually formed to raise

- investment from the public. A private company may not invite the public to subscribe for its shares.
2. There is no minimum nominal value for the authorised share capital in a private company, whereas a public limited company must have a minimum nominal value of €38,100.
 3. A private company needs only a certificate of incorporation to commence trading, whereas a public limited company, if formed as such, must also obtain a certificate to commence trading.
 4. There must be some restriction on the transfer of shares in a private company. In a public limited company shares are freely transferable.
 5. Since the EC (Single Member Private Company) Regulations 1994, a private company can have one shareholder. The maximum number is ninety-nine. A public company must have at least seven shareholders, see section 5, CA 1963.
 6. Small and medium sized private companies are exempt from some of the provisions of the Companies (Amendment) Act 1986 in relation to the provision of financial information. The Companies (Amendment) (No. 2) Act 1999, as amended by the Companies (Auditing and Accounting) Act 2003, removed the statutory audit for small private companies.
 7. A private company may have a 'director for life' under section 182, CA 1963 (see chapter 11).
 8. The name of the company will reflect whether a company is private or public, as will the memorandum of association.

The Companies Consolidation Act

The forthcoming Companies Consolidation Act will create a new category of Company Limited by Shares, or CLS. A CLS will be the model, or standard, company in the new CCA, and the CCA provides for conversion of an existing company to a CLS. A CLS can have up to 99 shareholders.

A public limited company may also be created under the CCA. A plc is defined in the CCA as a company limited by shares or guarantee, the constitution of which states that the company is to be a plc.

Listed and Unlisted Companies.

A listed company is a public company the shares of which are bought and sold on the Stock Exchange. Only a small percentage of plcs are listed companies; the others are referred to as unlisted companies.

Group Companies

In a group of companies, a holding company will hold shares in a number of subsidiaries. A company may wish to separate its areas of business for management and administration reasons.

Under section 155 of the CA 1963, a company is a subsidiary of another if that other:

1. is a member of the company and controls the composition of the board of directors, or
2. holds more than half the nominal value of its equity share capital, or
3. holds more than half the nominal value of its shares carrying voting rights (other than voting rights which arise only in specified circumstances), or
4. the first mentioned company is a subsidiary of any company which is the other's subsidiary.

The CCA updates the definition of subsidiary companies.

Features of a Company

1. Separate Legal Personality

The company becomes a legal person in its own right, distinct from the shareholders and management. Separate legal personality allows this artificial legal person to make contracts, employ people, borrow and pay money, sue and be sued in its corporate name etc as a person would.

Salomon v A Salomon & Co Ltd (1897)

Held: Mr Salomon was a separate legal personality from the defendant company which he formed and was the major shareholder in that company.

2. Limited Liability

Limited liability results from separate legal personality. The liability of the shareholders of a company for the company's debts is limited to any money they owe for their shares.

3. Perpetual Succession

Once a company is formed perpetual succession ensures it will continue until it is wound up. The death of some or all of the shareholders has no effect on the legal existence of the company.

4. *Transferability of Shares*

Shares in a public limited company are freely transferable. Shares in a private limited company may be transferred subject to some restrictions (see chapter 6).

5. *Assets and Liabilities Belong to the Company*

All the assets and liabilities of a company belong to the company as a separate legal personality, not to the shareholders or management.

Macaura v Northern Assurance Co Ltd (1925)

Macaura incorporated his forestry business as a company. Some months later, the forest was destroyed by fire and it was discovered that the insurance was still in Macaura's name.

Held: The insurance claim failed because the forest belonged to the company and was uninsured by the company.

7. *Capital Maintenance*

Companies are subject to strict rules on maintaining the capital invested in the company (see chapter 7).

8. *Ownership and Management*

Companies are owned by the shareholders, but managed by the directors. In some companies these positions are held by the same people.

9. *Regulation*

Companies are regulated externally by the Companies Acts 1963–2009 and EC legislation, and internally by their own memorandum and articles of association.

(Note: The above list can also be regarded as a list of the advantages of trading as a company.)

The disadvantages of trading as a company are:

1. The cost of incorporating and administering a company may be a deterrent to a very small business.
2. The Companies Acts have made the regulation of a small company unnecessarily complex, so some businesses may prefer to stay as sole traders or partnerships.

3. A company must make certain information available to the public. However, allowances are made for a small private company in relation to what it needs to disclose, notably removal of the statutory audit for small private limited companies by the Companies (Amendment) (No. 2) Act 1999 (see chapter 3).

Corporate Personality

The key feature of a company is that it is separate in law from its shareholders, i.e. it is a separate legal person. This separation is known as the corporate veil.

Salomon v A Salomon & Co Ltd (1897)

Mr Salomon incorporated his business, selling it for 99 per cent of the shares and a debenture of €12,700. A Salomon & Co Ltd went into insolvent liquidation.

Held: Mr Salomon as a secured debenture holder was separate from A Salomon & Co Ltd, which he had formed. A Salomon & Co Ltd had to repay Mr Salomon first as a secured creditor.

Macaura v Northern Assurance Ltd (1925)

The separate corporate personality of the company and its main shareholder-director meant that the company's main asset was uninsured.

Lee v Lee's Air Farming Ltd (1962)

Held: Mr Lee as an employee was separate from Lee's Air Farming, the company which he had formed and run.

Battle v Irish Art Promotion Centre Ltd (1968) Ire.

The plaintiff who was the major shareholder and Managing Director of Irish Art Promotion Centre Ltd sought to represent the company in court.

Held: As a consequence of a company's separate legal personality only counsel or a solicitor may address the court. The plaintiff was therefore unable to do so.

Lifting the Corporate Veil

The corporate veil can be lifted in two ways, by specific provision in legislation and by discretion of the courts. The three main reasons why this may be done are:

1. to enforce the provisions of company law (when legislation lifts the corporate veil, it is mainly for this reason)

2. to avoid fraud (the most commonly used category by the courts)
3. to deal with a group of companies.

1. *Lifting the Veil by Legislation (takes place automatically)*

(a) **Minimum Membership**

Section 36, CA 1963: A shareholder who knows that the company is carrying on business with less than the statutory minimum membership, for more than six months, is severally liable for the debts of the company contracted during that time.

(b) **Failure to Use Proper Name**

Section 114, CA 1963: If a company fails to affix its name properly on its place of business, letters, documents, cheques or bills of exchange, the company and officers will be liable to a fine.

Durham Fancy Goods v Michael Jackson (Fancy Goods) Ltd (1968)

The defendants endorsed a cheque made out to 'M Jackson (Fancy Goods) Ltd'.

Held: The plaintiffs had accepted an incorrect version of the name, and therefore could not rely on section 114.

Lindholst & Co A/S v Fowler (1988)

The defendant was a director of the Corby Chicken Co Ltd. The defendant signed cheques referring to the 'Corby Chicken Co'.

Held: The defendant was liable under section 114.

(c) **No Certificate to Commence Trading as a Public Limited Company**

Section 6, C(A)A 1983: The officers of a newly incorporated plc which trades without a certificate to commence trading will be liable to a fine.

(d) **Fraudulent Trading**

Section 297, CA 1963 (as inserted by section 138, CA 1990): Any person knowingly a party to fraudulent trading may be personally liable without limit for the debts of the company (see chapter 18).

(e) **Reckless Trading**

Section 297, CA 1963 (as inserted by section 138, CA 1990): Any officer knowingly a party to reckless trading may be personally liable without limit for the debts of the company (see chapter 18).

(f) **Taxation**

Legislation dealing with Income Tax, Corporation Tax and Capital Gains Tax contains many instances where the corporate veil may be lifted to treat companies and their owners together.

2. *Lifting the Veil by the Courts (this is discretionary)*

(a) **The Company was Formed for Fraudulent Purposes**

Gilford Motor Co v Horne (1933)

Held: A company set up to avoid an employment restraint of trade clause was formed for an improper purpose and the veil of incorporation was lifted.

Jones v Lipman (1962)

L contracted to sell his house to J, but then formed a company and conveyed the house to it to prevent the sale.

Held: The company was a 'device or sham' formed for an improper purpose. The corporate veil was lifted and the house was sold to J as agreed.

Roundabout Ltd v Beirne (1959) Ire.

Held: A company set up to break a trade dispute was 'a legal subterfuge' but a legitimate one.

(b) **Group Companies**

The courts will lift the veil in cases of group companies if to do so reflects the economic and commercial realities of the situation.

Power Supermarket v Crumlin Investments and Dunnes Stores (Crumlin) Ltd (1981) Ire.

In a dispute over restrictive trading covenants in supermarket leases, it emerged that each Dunnes Stores shop traded as a separate company, controlled by the same people.

Held: The court lifted the corporate veil to consider the reality of the Dunnes Stores group of companies, because 'the justice of the case so requires it'.

State (McInerney & Co Ltd) v Dublin County Council (1985) Ire.

Held: A subsidiary company could not to seek to raise the corporate veil by arguing that it was part of the holding company, as 'the corporate veil is not a device to be raised or lowered at the option of the parent company or group. The arm which lifts the corporate veil must be that of equity'.

Lac Minerals Ltd v Chevron Minerals Corporation of Ireland Ltd and others (1995) Ire.

Held: Where it is sought to lift the corporate veil in relation to a group of companies, two requirements must be satisfied:

- (i) the acts of one company must be factually identified with another company, and
- (ii) there must be circumstances where justice would be served only if the court ignores the distinction of the separate companies.

Fyffes plc v DCC plc (2005) Ire.

Held: A company and its wholly owned subsidiaries which had no economic activities of their own could be treated as one economic entity for the purpose of enquiry into insider dealing. Otherwise legislation on insider dealing could be avoided.

3. *If the Court is Exercising a Discretion (this is a catch-all category)*

Re Bugle Press Ltd (1961)

Held: A company set up to take over another company against the will of a minority shareholder was formed for an improper purpose.

Re Murph's Restaurant Ltd (1979) Ire.

Two shareholder-directors removed the third from the company after their personal relationships soured. In response, the third man sought to wind up the company under section 213(f), CA 1963 on the grounds of oppression as provided for in section 205, CA 1963.

Held: It was just and equitable to lift the corporate veil and wind up the company, because the removal of the third man damaged a relationship based on 'mutual trust and confidence' which was more akin to a partnership than a company.

Reynolds v Malocco trading as 'Patrick' (1998) Ire.

The plaintiff sought an injunction to prevent publication of a defamatory magazine article. The courts considered the likelihood of his recovering damages from a newly formed company with a €2.50 share capital, by lifting the corporate veil and looking at the reality of the situation.

The decisions in *McInerney's* and *Lac Minerals* can also be seen as examples of the court exercising its discretion based on the justice of the case.

FORMATION OF A COMPANY

Incorporation

To incorporate a company, documents must be prepared and lodged with a fee in the Companies Registration Office in Parnell Square, Dublin. Where a public company is being formed, the initial sale of shares to the public, the ‘flotation’, will be done through an issuing house and will be subject to detailed scrutiny and regulation. The person who forms the company is known as the ‘promoter’.

Promoter

A company promoter as defined in *Twycross v Grant* (1877) is ‘one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose’. The promoter is usually the person who decides to set up the business.

Promoters must use due skill and care in the performance of their duties, and owe fiduciary duties to the company they are forming (i.e. a duty to act in the best interest of another.) The promoter’s duties cover the avoidance of a conflict of interest and the making of full disclosure of profit or interest. A typical nineteenth-century fraud by a promoter was the sale of his own property to the newly formed company at a large, undisclosed profit without disclosure of ownership. If a promoter was found to be in breach of his duty to a company, the contract for the sale of property could be rescinded and damages recovered. This problem rarely arises with modern companies.

Pre-incorporation Contracts

Section 37, CA 1963: A company may adopt or ratify a pre-incorporation contract made on its behalf after it has been incorporated. However, the company is not bound to ratify such a contract, and in such a case the promoter is personally liable on the contract. To cover the possibility that the company might not ratify the contract, the promoter will usually seek to exclude personal liability for any contracts she/he made on behalf of the company. As this is obviously

unsatisfactory to the party contracting with the promoter, very few pre-incorporation contracts are made in practice.

Registration Documentation

The promoter prepares the documentation and presents it to the Registrar of Companies, along with the appropriate fee. If everything is in order, the Registrar issues a Certificate of Incorporation. A Certificate to Commence Trading for a plc will be issued by the Minister shortly after incorporation. The incorporation is advertised in *Iris Oifigiúil*.

Documents for Registration

The documents which must be registered are:

1. The Memorandum of Association
2. The Articles of Association
3. Form A1. The form A1 is a form which contains details of:
 - particulars of the first directors and secretary (who must also sign the form)
 - the address of the company's registered office
 - a statutory declaration by a solicitor engaged in the formation of the company or by a person named as director or secretary that the registration requirements of the Companies Acts 1963–2009 have been complied with
 - a statement of capital, detailing the classes of shares, nominal value and number of shares authorised and issued. If the company is a public limited company it must register with a minimum authorised share capital of €38,100.

A fee must be paid on registration.

If the registration documents are in order, a Certificate of Incorporation will be issued and also a Certificate to Commence Trading in the case of a plc.

The Certificate of Incorporation proves:

- that the company has been registered and upon what date
- whether it is a private or public company
- that the requirements of the Companies Acts 1963–2009 have been complied with.

A Certificate to Commence Trading in a plc, under section 6, C(A)A 1983, states:

- that the nominal value of allotted shares is not less than €38,100
- the amount of paid-up allotted capital (which must be at least 25 per cent of the nominal value of allotted shares)
- details of any preliminary expenses
- details of any benefits to a promoter.

It is an offence to trade without a Certificate to Commence Trading, but any contracts made by the company are still valid. The corporate veil may be lifted and a company may be struck off the register for failure to get such a certificate, as explained in the last chapter.

The Companies Consolidation Act simplifies the registration procedure. Under the CCA one or more persons may form a private company limited by shares (CLS), by subscribing their names to a prescribed application for incorporation.

A CLS may be incorporated by use of a single document, the constitution. The constitution of the company must state its name, that it is a private CLS, and its authorised share capital.

Re-registration

It is possible for a private company to re-register and thereby change its status from a private company to a plc. A special resolution must be passed and an application made to the Registrar of Companies. Additionally,

- the share capital must be at least €38,100 with one quarter paid up
- net assets must be at least equal to the total of the called up share capital and undistributable reserves.

Such re-registration is common and no Certificate to Commence Trading is required.

To re-register as a public company, the private company must pass a special resolution to alter its articles of association to add the four restrictions on a private company in section 33, CA 1963 (see above).

It is also possible, but less common, for a public company to re-register as a private company. A limited company may re-register as an unlimited company with the consent of all the shareholders.

Registered Office

Every company must have a registered office for keeping statutory registers and the delivery of official documents.

Companies Registration Office

The Companies Registration Office is the central state office dealing with practical aspects of company law, such as the incorporation of new companies and the filing of the annual return. It is run by the Registrar of Companies under the Department of Enterprise, Trade and Employment, and is located in Parnell Square, Dublin. The registration and other documents which a company is obliged to file are open to inspection by the public on payment of a small fee. The Companies Registration Office website is at www.cro.ie.

Electronic Filing Agent

Under the Investment Funds, Companies and Miscellaneous Provisions Act 2005, a company can authorise a person known as an electronic filing agent to act on its behalf for the electronic filing of company documents, and delivery of such documents to the CRO.

Company Records

The following company records must be kept at the registered office of a company:

1. the register of members, under section 116, CA 1963
2. the register of debenture holders, under section 91, CA 1963
3. the register of directors and secretaries, under section 195, CA 1963
4. the register of directors' and secretaries' interests in shares, under section 59, CA 1990
5. the register of interests in shares in public companies, under section 80, CA 1990
6. a directors' conflict of interest book, under section 194, CA 1963
7. copies of instruments creating charges, under section 109, CA 1963
8. the books containing minutes of general meetings and directors' meetings, under section 145, CA 1963
9. the books of account, under section 202, CA 1990.

Company Accounts

A company is obliged to maintain a number of basic account records. These are:

1. Books of account (or primary records). According to section 202, CA 1990 (replacing section 147, CA 1963), every company must keep 'proper books of account' of company transactions, which are

available to company officers only. These accounts must comply with the requirements of legislation and give a true and fair view of the company's financial situation.

2. Balance sheet and profit and loss account. These are available to company shareholders at general meeting. Under section 149, CA 1963, the accounts must comply with legislation and give a true and fair view of the profit or loss of the company for the financial year.
3. Accounts to be filed in Companies Registration Office (the 'annual return'). Small and medium sized companies, based on certain features, are given concessions in relation to what has to be published under the 1986 Act. The Company Law Enforcement Act 2001 provides sanctions for failure to comply with filing obligations.

Small Private Company

A small private company is one which satisfies two of three conditions:

- a balance sheet total of less than €1.9 million
- turnover of less than €3.81 million
- average number of employees less than 50.

A small private company does not file a profit and loss account and files an abridged balance sheet and certain notes to the accounts.

Medium Sized Company

A medium sized company must satisfy two of three conditions:

- a balance sheet total of less than €7.6 million
- turnover of less than €15.24 million
- average number of employees less than 250.

A medium sized company files a profit and loss account which begins at gross profit, i.e. it need not disclose turnover and cost of sales.

Large Private Company

A large private company is any company which does not come within the above two categories. A large company is not given any concessions from publication.

The CCA changes the thresholds for small and medium sized companies.

Removal of Statutory Audit

Sections 31–39 of the Companies (Amendment) (No. 2) Act 1999 (as amended by section 53 Companies (Auditing and Accounting) Act 2003 and the Investment Funds, Companies and Miscellaneous Provisions Act 2006), removes the requirement for a statutory audit for certain private limited companies. In a suitable company where:

- the turnover does not exceed €7.3 million
- assets of company are less than €3.65 million at the end of the financial year
- the average number of employees does not exceed 50
- it is not a subsidiary, a bank or an insurance company

the directors can decide to avail of the exemption from having accounts audited. (Thus section 160, CA 1963 will not apply, and a company may remove its auditor (see chapter 12).) A shareholder with ten per cent of the votes may prevent a company from availing of the exemption in a given year.

Publication of Company Information

The following information about a company is available:

1. The company's file at the Companies Registration Office in Parnell Square, which can be accessed by the public.
2. The company's statutory registers and books which must be kept at the company's registered office. Some of these are available to the public, and some are only available to company shareholders.
3. Iris Oifigiúil (an official government publication) – certain notices, such as the incorporation or liquidation of a company, must be published in Iris Oifigiúil and/or a daily newspaper.
4. The letterheads and documents of a company give basic information about the directors, the registered number of the company and the address of its offices.