

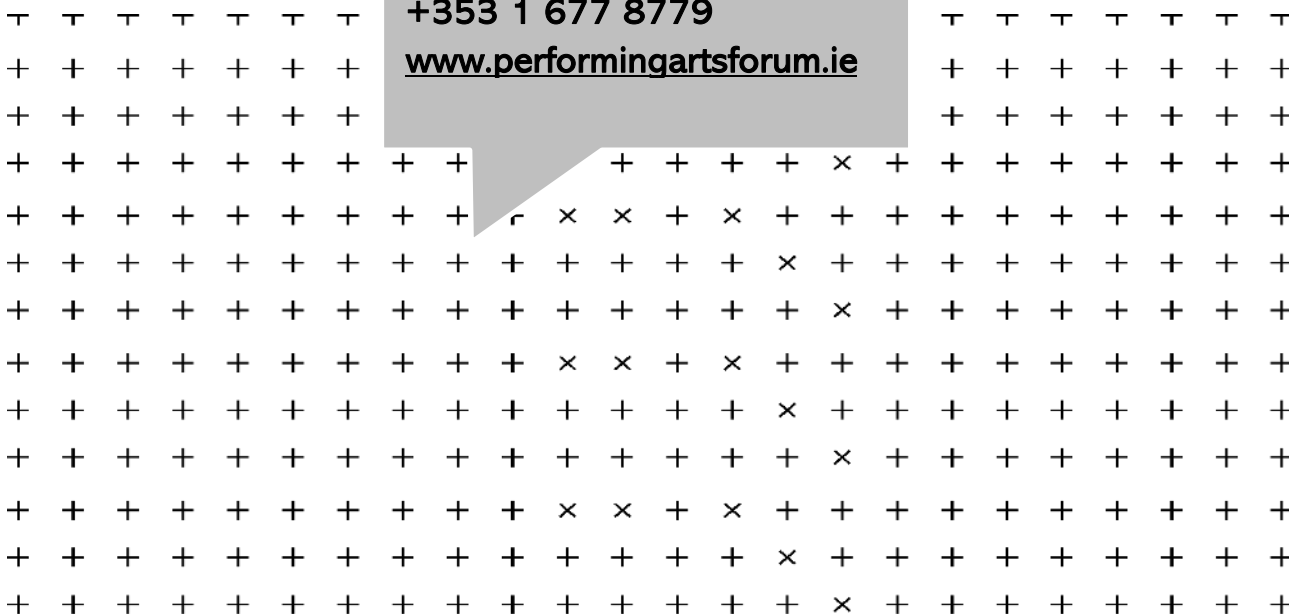
# PERFORMING ARTS FORUM

## DIRECTORS' DUTIES, RESPONSIBILITIES AND LIABILITIES // FACTSHEET

info@performingartsforum.ie

+353 1 677 8779

[www.performingartsforum.ie](http://www.performingartsforum.ie)



## **Governance for Arts Organisations Factsheet**

### **Directors' Duties, Responsibilities and Liabilities**

While this Factsheet is intended as a general guide, it should not be substituted for professional legal advice.

#### **Directors' Duties**

Directors have a duty to act in the best interests of the company. Directors' Duties are defined by the Companies Act 2014, which came into operation on 1 June 2015:

- Act in good faith and in the interests of the company
- Act honestly and responsibly in relation to the conduct of the affairs of the company
- Act in accordance with the constitution and exercise powers only for purposes allowed by law
- Not to misuse the company's property, information or opportunities
- Not to fetter \*independent judgment
- Avoid conflicts of interest
- Exercise care, skill and diligence
- Have regard to members' interests.

\*To fetter independent judgment – a director giving away their decision-making role.

### **Company Structures**

#### **Company Limited by Guarantee (CLG)**

A common form of company structure for arts organisations is a Company Limited by Guarantee (CLG), without share capital, and limited to the amount guaranteed by the shareholders/members usually a nominal amount such as €1. A CLG must have a minimum of two directors, it can be a charity, and it is usually required to have an annual audit. If certain conditions are fulfilled, it may not need an audit though audits are generally required by funders and grant givers.

#### **Designated Activity Company (DAC)**

A Designated Activity Company (DAC) structure with the status of a private company might also be used by those arts organisations having a share capital. A DAC must have a minimum of two directors, it can be a charity, and it is usually required to have an annual audit. If certain conditions are fulfilled, it may not need an audit though audits are usually required by funders and grant givers. CLGs and DACs are regulated by the Companies Act 2014.

#### **Who are the officers of the company?**

The officers of the company are the directors, the company secretary, and others who share legal liability for the actions of the company. These can include the Chief Executive Officer

(CEO) or Managing Director, Artistic Director and Chief Financial Officer (CFO). The appointment, co-option, election, rotation and retirement of company officers are spelt out in Memorandum & Articles of Association which, from next year, will be described as the organisation's Constitution.

### **Directors' Responsibilities**

Directors have some key responsibilities:

- Directors should take reasonable steps to ensure proper books of account are kept and that if required, an annual audit is carried out.
- Directors must ensure that Annual Returns are made to the Companies Registration Office (CRO).
- Directors are responsible for legal and regulatory compliance, particularly compliance with the Companies Act
- Directors are responsible for identifying material risks to the company, and setting systems in place for dealing with these risks.

### **Company Secretary Responsibilities**

Often the Company Secretary is a director or an executive but need not hold either of these positions. However, it's especially important that company secretaries are well-informed on all governance issues as much of the responsibility for ensuring compliance is theirs.

### **Directors' Liabilities**

Directors have a duty of care as well as a duty to act in the best interests of the company. In difficult financial circumstances, this can involve finding measures to keep the company solvent, such as close scrutiny of the company's financial affairs, cost-cutting, debt negotiation as well as the direction or organisation of additional fundraising activities.

### **Reckless trading**

A Director is guilty of reckless trading if, by continuing the business of the company, loss is caused to any of the creditors of the company; or, if the director was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts. In order to be found guilty of reckless trading, an officer of the company must *knowingly* carry on the business of a company in a reckless manner. If reckless trading is proven the directors, by order of the court, can be made personally liable, without limitation, for the company's debts from the time they knew the company was insolvent.

### **Insolvency**

There are two commonly used methods to determine insolvency.

- The Cashflow Test - can the company pay its debts, such as payroll and taxes, when they fall due?

- The Balance Sheet Test - are the company's assets greater than its liabilities? Or do we owe more than what others owe to us?

As part of the financial statements, a rolling 6 months Cashflow statement is useful to flag up times when cash won't be available.

### **For organisations in financial difficulties**

There are a number of steps directors should take to improve the organisation's financial circumstances and to be able to defend themselves against possible charges of reckless trading:

- Convene more frequent board meetings, and encourage frequent meetings of the management team. Call an EGM of members if applicable.
- Take careful minutes and note down decisions taken, carefully noting the reasons and basis for the decisions. Ensure the minutes are complete and accurate and are carefully saved.
- Obtain financial advice, preferably from a qualified accountant.
- Prepare frequent management accounts to get a realistic picture of the company's state of affairs.
- Prepare a budget and a realistic business plan. It is better to hold early discussions with your bank and to keep them informed.
- For largest creditors, keep them informed of your plans and if necessary, negotiate payment plans with them. Only make promises that you can keep.
- If your organisation is insolvent, get advice from insolvency practitioner or a qualified accountant.

### **Winding Up**

There are various forms of winding up of a company. One common form is a voluntary liquidation by the members. This is a form of winding up whereby the members decide for commercial reasons to wind up the company. In order to avail of this process, the company is required to be solvent. Under this process, all creditor debts must be paid in full.

Winding up options when a company is insolvent; the directors can voluntarily liquidate the company by passing a resolution at a general meeting of the members of the company to call a *creditors voluntary liquidation*, and to appoint a liquidator; they must also call a creditors meeting. The Directors must prepare a statement of affairs and a list of creditors and an estimate of what is owed to each.

It is advisable to seek the advice of your auditors or a qualified accountant if you are insolvent or if you intend to wind up your organisation. Remember charities cannot dispose of assets to other than another charity.

### **Resources:**

The Companies Registration Office website: [www.cro.ie](http://www.cro.ie)

The Governance Code: [www.GovernanceCode.ie](http://www.GovernanceCode.ie)

The Wheel: [www.wheel.ie](http://www.wheel.ie)

## **Publications**

The Arts Council (2015): *A Practical Guide for Board Members of Arts Organisations*  
<http://www.artscouncil.ie/uploadedFiles/BoardMembers-June15.pdf>

The Companies Acts: *Government Publications Office* or [www.irishstatutebook.ie](http://www.irishstatutebook.ie)

The Wheel (2012): *Solid Foundations*

*ArtsGovernance* provides advice and services to boards, directors and managers seeking to improve their organisation's financial circumstances and corporate governance.

[www.artsgovernance.com](http://www.artsgovernance.com)