Duties & Responsibilities of Directors
Foreword

CMS is delighted to present the third edition of its Guide to Duties and Responsibilities of Directors.

With increased consolidation of business across Europe, executives of multinational groups can find that they are required to become directors of companies in a variety of jurisdictions, often at short notice. The regulatory regimes applicable to companies are getting tougher, and there is ever increasing scrutiny over management decisions.

The rules relating to directorships vary considerably from jurisdiction to jurisdiction. This Guide is intended to provide an overview of the duties and responsibilities of directors across 21 countries in Europe, together with Brazil, China, Mexico, Oman, Russia, Turkey, UAE and Ukraine, answering the most frequently asked questions for directors from another jurisdiction.

In many jurisdictions, there are various forms of company available, and the rules for directors vary according to the type of company used. This Guide focuses principally on the most common form of company for each jurisdiction, and on the rules which apply to executive/managing directors, covering the following key areas: eligibility requirements, method of appointment, method of removal, authority and representation, working rules of the board, contractual relationship with the company, conflicts of interest, director’s duties, liability, limitation of liability, immigration issues, taxation and social security.

This Guide is only intended to provide a general overview of the matters covered. It is based upon the law in each of the countries as at 1 January 2015. The information contained in this Guide is not comprehensive and does not purport to be professional advice.

We do hope that this Guide is both interesting and helpful to you and your daily work. For further information on rules for directors of private companies in Europe, contact any of the people listed in the section ‘Contacts’ from page 154, or your usual contact at CMS.

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This guide focuses on the rules relating to private limited companies (‘Gesellschaft mit beschränkter Haftung’, ‘GmbH’). It does not address the rules for other forms of entities, such as the public limited company (‘Aktiengesellschaft’, or ‘AG’). However, rules for private and public limited companies are similar in many cases.

Introduction

Austrian private limited companies generally have a management board (‘Geschäftsführung’). All directors of the management board are managing directors. An additional supervisory board (‘Aufsichtsrat’) is mandatory if:

— the stated share capital exceeds EUR 70,000 and the number of shareholders exceeds 50;
— the number of employees of the company exceeds 300;
— the company centrally manages or, by means of a direct interest exceeding 50%, controls private or public limited companies, and the total combined number of employees of the controlling and controlled companies exceeds 300;
— the company is a general partner (‘Komplementär’) of a private limited liability partnership (‘Kommanditgesellschaft’) and the total combined number of employees of the company and the private limited liability partnership exceeds 300; or
— employee representatives have the statutory right to nominate members of the supervisory board pursuant to Part VIII of the Austrian Labor Relations Act (‘Arbeitsverfassungsgesetz’) as a result of a cross-border merger.

The articles of association may provide for an optional supervisory board. The supervisory board has a controlling function, and thus its directors are non-executive.

Eligibility requirements

There are few restrictions on who can become a director. In particular, a director is not required to be resident in Austria, and there is no nationality requirement. Only a physical person with full legal capacity can be appointed as a director. A legal entity or a partnership may not be appointed. Special provisions apply to directors who are shareholders. A company may have one or more managing directors. Usually the articles of association determines the number of managing directors.

The company must be effectively managed from within Austria. Otherwise it might be regarded as liquidated and taxed on built-in gains. A supervisory board must consist of at least three directors. Additional members may be appointed unless the number of members is restricted by the articles. Usually the number of directors of the supervisory board is determined by the articles.

Members of the supervisory board may not simultaneously be managing directors, permanent substitutes for managing directors, or employees of the company. Also, an individual must not be a member of the supervisory board of more than ten private or public limited companies (in certain cases 20; the role as chairman of a supervisory board accounts for two supervisory board positions) and he must not be a managing director of a subsidiary of the company. If the employees have established a works council (which requires a minimum of five employees), the works council may
nominate one additional member to the supervisory board for every two members of the supervisory board elected by the shareholders.

**Method of appointment**

Managing directors are appointed by shareholder resolution. Managing directors may also be appointed by a provision in the articles of association, if, and as long as, they are shareholders. The period of appointment is not limited unless the articles provide otherwise.

Notification of the appointment, signed by the managing director(s), together with certified evidence of the appointment, as well as a certified sample signature of the managing director, must be filed with the Commercial Register. A small fee is payable.

The directors of the supervisory board are appointed by shareholder resolution. The period of appointment must not exceed five years. Notification of the appointment, signed by the managing director(s), must be filed with the Commercial Register. Again, a small fee is payable.

**Method of removal**

A director may be removed at any time by a resolution of the shareholders. A director may resign at any time by giving notice to the company. However, such a resignation may constitute a breach of duty or a breach of contract. The resignation has immediate effect where there are substantial grounds for it to do so, otherwise it is effective after 14 days following notification of the general assembly or of each shareholder. Even if only one managing director was appointed, resignation is still possible. A director has certain obligations to clarify to the company any business activities carried out by him in the course of his term and during the five years following his removal or his resignation. If directors are appointed for a fixed term, or are subject to ‘rotation’, their appointment will terminate if they are not re-appointed.

Notification of the removal or resignation of a director, signed by the new or remaining managing director(s), must be filed with the Commercial Register. A small fee is payable.

**Authority and representation**

The managing directors can only represent the company together. The articles of association may provide for a different form of representation and usually provide that one or two managing directors or, if there is more than one managing director, one managing director together with a ‘Prokurist’ (authorised signatory with limited power to represent) may jointly represent the company.

The actions of managing directors properly representing the company – i.e. exercising such powers as are conferred by law or by the articles – are valid and binding towards third parties regardless of whether or not prior approval by the shareholders or by the supervisory board is required.

A managing director has full authority to manage the company. However, such authority may (for internal purposes only) be restricted by the articles or by shareholder resolution. In many cases the articles will provide that certain key managing acts will be subject to prior approval of the shareholders or supervisory board. With few exceptions, a breach of a restrictions on a managing director’s authority to represent the company does not invalidate the director’s actions vis-à-vis third parties.

**Working rules of the board**

All directors have the same rights and duties and are jointly obliged to manage the company. However, and notwithstanding each director’s overall responsibility, certain management roles may be allocated to specific persons by the articles, by shareholder resolution, by resolution of the supervisory board, by internal guidelines for directors and/or by the management board itself.

The shareholders may give binding instructions to the directors on any managing acts unless otherwise provided by the articles or unless there is a supervisory board.

**Contractual relationship with the company**

Appointment of a director by a shareholder resolution does not of itself constitute a contract with the company, or entitle a director to remuneration. A company’s articles will generally only entitle members of the supervisory board to reimbursement of expenses. Supervisory board directors’ fees commensurate with their duties may be payable to the extent specified in the articles of association or approved by a resolution of shareholders.

A managing director may also have a contractual relationship with the company, for example as an employee under a service agreement or as an independent contractor providing services under a consultancy agreement. Termination of any such contract will not automatically terminate the directorship. Termination of the directorship will not automatically terminate, but may constitute a breach of, the related contract.
Conflicts of interest

In the case of a conflict of interest, a director must refrain from any action that might be detrimental for the company.

A managing director cannot represent the company in dealings with himself or herself, or with a third party represented by himself or herself, unless the company consents by shareholder or supervisory board resolution or unless the company’s interests are not negatively affected. A managing director who is the sole shareholder of the company may represent the company in dealings with himself (in some cases, such self-dealing will require the drawing up a document certified by a notary public).

Directors must not accept any loans from the company without prior approval of the shareholders or the supervisory board.

The managing directors must neither transact business within the company’s line of business for their own account or for the account of others, nor may they be general partner of a partnership or a member of the management or supervisory board of another company in the same line of business, without prior approval of the shareholders or of the supervisory board.

Duties of a director

The duties of a director are owed to the company. A director’s duties are not owed to any one shareholder or to the company’s creditors.

A managing director must manage the company and act on behalf of the company in line with the business purpose, in the best interests of the company and in accordance with instructions of shareholders, with the diligence of an orderly businessman (without regard to his own, individual level of skill and experience).

Directors are subject to a wide range of specific statutory duties. Such specific duties include, but are not limited to:

— setting up financial statements and disclosing financial statements to shareholders and to the public;
— setting up an accounting and a controlling system;
— submitting quarterly reports, an annual budget, and reports on extraordinary circumstances to the supervisory board;
— convening shareholder meetings (annually and in case of loss of half of the stated share capital);
— initiating court proceedings in case of insolvency; and
— in the case of directors of the supervisory board, supervising management.

Liability

A director is fully liable to the company, but not to shareholders, for wilful or negligent breach of duty. In the case of wilful or negligent breach of duty by two or more directors, they are jointly and severally liable.

In cases of insolvency of the company or failure to file for insolvency proceedings in a timely manner due to wilful misconduct or negligence, a director may also be directly liable to creditors. Wilful or negligent injury to creditors’ interests or failure to file for insolvency proceedings on time may constitute a criminal offence.

In cases of wilful or negligent default in paying taxes or social security contributions, a managing director may be personally liable to the tax authorities for amounts outstanding, or may even commit a criminal offence. A managing director may also be criminally liable for wilfully incorrect statements, including financial statements, statements to shareholders or the supervisory board or filings with the Commercial Register.

Limitation of liability

A director’s liability to the company cannot be limited by agreement. However, it is common practice to pass a resolution on the approval of the director’s acts amounting to a discharge of liability vis-à-vis the shareholders (‘Entlastung’) after the close of each business year, thus waiving any recognisable claims of the company.

A director’s liability to the company is excluded, if the shareholders give their consent by a shareholder resolution. A private limited company may purchase directors’ liability insurance in favour of its directors.

Immigration issues

Foreign directors generally require:
— a residence permit for Austria; and
— a work permit.

EU, European Economic Area and Swiss nationals are exempt from these requirements. Nevertheless, if EU, European Economic Area and Swiss nationals reside in Austria for a period longer than three months, they must register with the competent authority in order to obtain a registration card (Aufenthaltsbescheinigung). After five years of uninterrupted residence, they are entitled to apply for a permanent registration card (Daueraufenthaltskarte), which is valid for ten years.

In all other cases a residence permit and a work permit are required. There are different types of residence permits. The permits for highly qualified persons
(e.g. Rot-Weiβ-Rot-Karte, Blaue Karte EU) include the work permit. They are not subject to quotas, but are rather issued in consideration of the applicant’s qualifications. Other permits do not directly entitle the holder to access the job market, but require an additional work permit, which may be issued subject to availability of quotas. The first-time work permit is restricted to a certain employment relationship and is granted for a period of one year. Subsequent permits are granted for a maximum period of two years and entitle the holder to access the job market in the whole region. Similarly, residence permits are limited in time, but are eligible for extension.

Directors holding 25% or more of the shares of the company, while exempt from the requirement of a work permit, nonetheless require a quota-bound residence permit.

Directors holding less than 25% are only exempt from the usual work permit requirement if the authority confirms the exercise of essential influence on the management of the company.

Furthermore, under the new Austrian immigration laws, applicants – apart from certain exceptions – are required to prove basic German language skills (level A1 of the European Common Frame of Reference) when the application for the residence permit is filed.

**Social security**

If a director qualifies as an employee, pension contributions, health insurance, casualty insurance and unemployment insurance are mandatory. Social security contributions amount to 39.80% of gross salary (21.73% employer contribution and 18.07% employee contribution). The basis for the year 2014 is capped at EUR 4,530 per month.

If a director qualifies as an independent contractor (this will generally be the case if his or her share exceeds 25%), pension contributions, health insurance, provision for self-employed persons and casualty insurance are mandatory. The basis again is currently capped at EUR 5,285 per month.

Individuals contributing to the above schemes are entitled to payments in cash or in kind in case of retirement, sickness, disability, injury, in case of an employed individual unemployment and so on, subject to specific pre-conditions under each scheme (for example minimum contribution periods).

**Taxation**

If an individual is resident in Austria, his or her worldwide income is subject to Austrian income tax. If an individual is not resident in Austria, only certain sources of income, including income from employment in Austria or consultancy services provided in Austria, are subject to Austrian income tax. Numerous double taxation treaties limit Austria’s or the foreign country’s right to tax, in particular, if the director performs his services partly or totally outside of Austria, his income may be exempt from income tax in Austria.

Income is generally taxed at a progressive rate, with rates reaching from 0% to 50% for income exceeding EUR 60,000 per year. The average tax rate is approximately 44%. The tax treatment of service fees depends on whether the director is qualified as an employee or as an independent contractor (this will generally be the case if his or her share exceeds 25%). The tax rate is generally the same, except where the director qualifies as employee

— one sixth of employee fees is taxed at a flat rate of 6%; and
— the income tax is levied by way of withholding i.e. the employer has to retain the income tax on the remuneration and forward it on behalf of the employee to the competent tax authority.
This guide focuses on the rules relating to companies limited by shares (‘naamloze vennootschap’/’société anonyme’) only.

Eligibility requirements

There are few legal restrictions on who can be a director of a company limited by shares (examples include minors and individuals who are personally bankrupt). The articles of association may contain certain conditions, such as a specific diploma or profession. However, these conditions may not limit the choice of shareholders to appoint directors at a general meeting.

An individual director is not required to be resident in Belgium, nor is there a nationality requirement. Directors residing abroad are deemed to elect domicile for the entire duration of their appointment at the registered office of the company, where all notifications may validly be made to them.

A company can be appointed as a director, but must appoint an individual to act as its permanent representative. This permanent representative must be a shareholder, director or employee of the company director.

In the case of listed companies, at least a third of the directors must be the opposite sex to the majority of the directors.

Method of appointment

Directors are appointed by a general meeting of shareholders. On formation of a company, the directors may be appointed in the deed of incorporation by the general meeting. If there is a vacancy on the board of directors, the remaining directors have a right to fill such a vacancy temporarily by co-opting a director, unless the articles of association provide otherwise. The next general meeting then confirms the director’s appointment.

Co-opting is only mandatory if there are less than three directors in office. A general meeting of shareholders must always have a free choice of appointment. The articles of association prescribe the duration of the director’s term of office, which may not exceed six years. Unless the articles of association provide otherwise, the directors are eligible for reappointment. In the event of an early vacancy, a newly appointed director serves for the remaining term of the person he or she replaces.

Method of removal

A general meeting of shareholders may remove any director at any time. A director may resign at any time. However, his or her resignation must not cause damage to the company and should therefore be done carefully. A director may be required to settle any current business. The removal or resignation of a director must be published in the Belgian Official Journal and filed with the office of the Commercial Court in the district in which the company has its registered office within fifteen days.

The removal or resignation of a director does not shield him from liability. He or she can still be liable for faults committed during his or her office, even if the damage occurs after his or her removal or resignation.

Authority and representation

The board of directors has all of the powers that are necessary or useful to implement the company’s
corporate object, save for those powers expressly reserved for the general meeting of shareholders by law or by the articles of association. The board of directors represents the company towards third parties.

The articles of association may grant one or more directors the power, solely or jointly, to represent the company in all acts, deeds and before the courts and public authorities. Such authority must be published in the Belgian Official Journal.

**Working rules of the board**

A company limited by shares must have at least three directors. However, if the company has only two shareholders, the board may consist of only two directors. There is no maximum number of directors, unless the articles of association provide otherwise.

The board of directors is a collegiate body. Its decisions are taken with a majority of votes, unless the articles of association provide otherwise. The directors can take decisions in writing (i.e. without a formal meeting) only if such decisions are taken unanimously and are absolutely necessary in the interests of the company. If such possibility is provided for by the articles of association of the company, the board of directors may appoint an executive committee (‘comité de direction’ – ‘directiecomité’) to whom the management of the company is entrusted.

The members of the executive committee are appointed by the board of directors and need not be directors. The working rules of the executive committee are set out in the articles of association or, if no such working rules are mentioned, are decided on by the board of directors. If a member of the executive committee has a direct or indirect personal and conflicting interest of a financial nature within the authority of the executive committee, the same procedure applies as for a conflict of interest within the board of directors.

**Contractual relationship with the company**

A director in a company limited by shares is an agent (‘lasthebber’) of the company. A director may, but need not, be remunerated. The general meeting of shareholders determines the remuneration of the directors, unless the articles of association grant this power to the board of directors.

A director can also be an employee of the company, provided his or her tasks as an employee are separate from his or her duties as a director. A management company, being a company that contracts with the company to provide the director’s services, is allowed.

**Conflicts of interest**

If a director has a direct or indirect personal and conflicting interest of a financial nature in a decision or transaction within the authority of the board of directors, he or she must disclose such interest to the other directors prior to such decision or transaction. If the company has one or more statutory auditors, the director concerned should also inform the auditors of his or her conflicting interest.

The statement from the director and the reasons justifying his or her conflict of interest must be recorded in the minutes of the board meeting. Directors who have a conflicting interest at a board meeting in a company which has made a public offer of securities may not participate in the discussions of the board regarding the decision or transaction concerned, nor vote on such matter.

The directors are personally and severally liable for any loss sustained by the company or by a third party as a result of decisions or transactions which have secured an unlawful financial advantage for them (or one of them) to the prejudice of the company, even if such decisions or transactions took place in accordance with the above-mentioned disclosure rules. The company may request that decisions or transactions which have taken place in breach of the conflict of interest rules be set aside.

**Duties of a director**

Each director must act in the best interests of the company as a whole and not only for its shareholders. The directors must make and implement their decisions in the ‘corporate interest’ of the company. The board of directors has a duty to determine the strategy of the company and to implement such strategy. The board of directors is also required to inform the shareholders in certain circumstances and for specific operations, mainly relating to the company’s share capital.

The board of directors is entitled to do whatever is necessary or useful for the implementation of the corporate object of the company, except for certain decisions reserved by law or by the articles of association to the general meeting of shareholders. In particular, the following powers of the general meeting of shareholders cannot be delegated to the board of directors:

— appointment and removal of directors or statutory auditors;
— approval of annual accounts and distribution of profits;
— liability suits against directors; and
— amendments to the articles of association.
The articles of association may limit the powers granted to the board of directors. Such restrictions, however, may not limit the fundamental powers of the board of directors (for example the power to call a general meeting of shareholders or the preparation of the annual accounts).

Restrictions on the powers of the board are not enforceable as against third parties, even if such restrictions have been published in the Belgian Official Journal. It is possible to allocate certain powers of the board of directors to certain individual directors. Such allocation cannot, however, be invoked against third parties, even if such restriction has been published.

A director can be liable for shortcomings in the implementation of his or her duties, as well as for a breach of the provisions of the Commercial Companies Code or the articles of association of the company.

Appointment of managing directors

The day-to-day management of the company and the representation of the company in relation to management matters, may be entrusted to one or more managing directors. A managing director is appointed and removed by the board of directors. As a rule, the articles of association regulate the appointment, the removal and the powers of managing directors.

Managing directors act jointly or severally as provided in the articles of association. The appointment and removal of one or more managing directors must be published in the Belgian Official Journal. Notice of the appointment and removal must also be filed with the office of the Commercial Court in the district in which the company has its registered office within 15 days.

Liability

The directors are not personally liable for any obligations of the company. The company is bound by the acts of the board of directors and of individual directors representing the company as well as the managing directors. The company is bound even if such acts are beyond its corporate object, unless the company proves that the third party was aware of this.

A particular liability for directors is provided in articles 527 and 528 of the Commercial Companies Code. Pursuant to article 527 of the Commercial Companies Code, each director is individually liable to the company for management faults. In other words, if a director fails to exercise reasonable care in managing the company (‘duty of care’), the general meeting of shareholders may decide to sue such director for damage to the company.

Moreover, pursuant to article 528 of the Commercial Companies Code, directors are jointly liable to the company, as well as to third parties, for breaches of the Commercial Companies Code or breaches of the articles of association. As the directors’ liability for breaches of the Commercial Companies Code or of the articles of association is a joint liability, it also applies to directors who are not actively involved in the management of the company, unless these ‘passive’ directors are able to demonstrate:

— that they did not in any way participate in the breach; and
— that they reported the breach to the general meeting of shareholders in due time. Article 528 thus forces every member of the board to monitor the management of the company and to refer to the general meeting of shareholders whenever a breach of the articles of association or of the Commercial Companies Code has been committed.

Liability suits against directors on the basis of articles 527 and/or 528 of the Commercial Companies Code can be brought either by the general meeting of shareholders or by an individual shareholder acting on behalf of the company (‘derivative suit’). Shareholders not only have the right to see the company managed in a proper way (‘duty of care’), they also may expect the rules on conflicts of interest to be strictly observed (‘duty of loyalty’).

Article 523 of the Commercial Companies Code provides that if a director has a personal interest in a decision or transaction to be acted upon by the board of directors, he or she must declare such interest to the board and apply for the board to refer it to the general meeting of shareholders. Liability may result from omitting to implement such procedure or from personally obtaining an unlawful financial advantage, which prejudices the company.

Moreover, a special provision of the Commercial Companies Code (article 530) provides that, in the event of bankruptcy, the receiver in bankruptcy or an individual creditor may bring a liability suit against the former directors of the company for gross negligence. If the court finds the directors’ gross negligence to have contributed to the bankruptcy, the directors can be forced to assume all or part of the company’s obligations and liabilities. With effect from 1 September 2006 directors may, in the event of bankruptcy, also incur several and personal liability for unpaid social contributions. This liability is only triggered when a serious mistake on their part was at the origin of the bankruptcy or if they were previously involved in at least two bankruptcies (or similar situations) where outstanding debts were owed to the social security institutions.

In addition, with effect from 28 July 2006, the liability of the directors can also be triggered for the failure
of their company to pay wage withholding tax ('précompte professionnel'/‘bedrijfsvoorheffing’) and VAT. Any failure of a director(s) in charge of the daily management to pay wage withholding tax and/or VAT will trigger the several liability of the director(s) if it is demonstrated that he (they) has (have) committed a fault in running the company. This liability can be extended to other directors whose faults have contributed to such failure.

Finally, the permanent representative of a company director is severally liable with the company director for the carrying out of its duties as a director.

However, it is worth noting that, pursuant to article 554 of the Commercial Companies Code, the annual general meeting of shareholders is required to expressly decide whether or not relief from liability should be granted to the members of the board. If the annual meeting decides to grant such relief, the directors are, as a rule, shielded from liability to the company for the period prior to the annual meeting. They will not, however, be shielded from liability to individual shareholders or to third parties.

A guarantee arrangement can be entered into to limit the liability of the directors. Such arrangement guarantees the director against the financial consequences of liability incurred. This does not affect the liability itself but only the financial consequences thereof. Such arrangement may not guarantee the director against criminal fines or against an intentional fault or fraud. The guarantee arrangement can be provided by a shareholder, a parent company or a third party.

Another possibility to limit the financial consequences of director liability is to take out insurance. The company or the director can take out such insurance. The insurance does not cover the director against criminal fines or against intentional fault or fraud. Again, the insurance does not affect the liability of the director but only its financial consequences. All proceedings against directors become time-barred after five years.

**Immigration issues**

As a rule, if the director does not become a resident of Belgium and is not remunerated, there are no immigration issues. In other cases, a distinction must be made between EU residents and non-EU residents. EU residents have the right, in accordance with European Community Law, to work in any Member State.

There are no special requirements, except the obligation to register with the town hall where the director has his or her residence. Non-EU residents must fulfil two obligations if they come to live in Belgium and are remunerated by the company.

Firstly, an authorisation to stay in Belgium for more than three months must be requested from the Belgian embassy or the Belgian consulate in the director’s home country. If the authorisation is granted, a stamp will be put on the director’s passport. Secondly, the director must obtain a professional card. This professional card can be obtained from the Belgian municipality where the director has his or her domicile or from the Belgian embassy or consulate in his or her home country if the director does not yet reside in Belgium. A professional card is valid for a maximum of five years and should be renewed at least three months before expiry. Such professional card must also be obtained by directors that are non-EU citizens and whose office is not remunerated.

**Taxation**

A director who resides in Belgium will be taxed in Belgium. To calculate the tax, all forms of remuneration are taken into account, such as director’s fees and all benefits granted to the director in the context of the exercise of his or her function.

The tax rate is progressive. The costs related to the exercise of the director’s function are tax deductible. The director may deduct a flat amount, fixed by the tax administration, or he or she can prove his or her real costs. The company is required to withhold an advance tax payment. If the director is a member of the board of several companies, each company must separately withhold an advance tax payment. Because of the progressive tax rate, these advance tax payments will be less than if the whole remuneration was paid by one company.

**Social security**

A director is deemed to be self-employed, even if he or she does not receive remuneration for his or her function as a director. Immediately after the start of his or her activity, he or she must be registered with a social insurance company. However, this presumption is rebuttable. A director can provide proof that he should not be considered self-employed.

Based on new rules, the Social Security Administration may require the payment of a contribution fee to foreign directors of a Belgian company, even though they are not remunerated by the Belgian company.
This guide focuses on the rules relating to the management of private limited liability companies. It does not address the rules relating to other types of companies.

Introduction

The legal structure of Bosnia and Herzegovina ("BiH") is very complex, which directly impacts on legislation as well as policies regulating and supervising companies and their directors. BiH consists of two separate and distinct administrative entities: Federation of Bosnia and Herzegovina ("FBiH") and Republika Srpska ("RS"), as well as the Brčko District which belongs to both of the above entities. The two entities and the Brčko District have their own governmental structures as well as legislation, regulations and policies so company law may be subject to legislative provisions at entity level i.e. FBiH or RS or Brčko District. In preparing this guide, we have taken into account relevant legislation at all levels in order to provide a comprehensive overview of the situation in BiH.

Company law is regulated at the entity level, through the Company Act of Federation of Bosnia and Herzegovina ("ZPD FBiH"), the Company Act of Republika Srpska ("ZPD RS"), as well as the Company Act of the Brčko District ("ZOP BD").

Pursuant to ZPD FBiH, the management of a company is run by one or more members of the management board, but since the provisions relating to joint-stock companies are expressly applied mutatis mutandis, this means that one director or one director with one or more executive directors run the company. There is an established hierarchy between a director and executive director(s), as the extent of an executive director’s authority is determined by a written resolution of the company’s director(s).

According to ZPD RS, a company may have a single director or a management board as a collective management body, which is determined by the company’s memorandum of association.

ZOP BD states that the management of a company may have one or more members i.e. directors.

The existence of a supervisory board is discretionary pursuant to ZPD FBiH and ZOP BD, however under ZPD FBiH it is compulsory for a company which has either more than ten shareholders or an initial capital of more than BAM 1m and at least two shareholders. The ZPD RS does not envisage a supervisory board; however, an internal auditor, an audit board or an independent auditor may be established or appointed by the company.

Eligibility requirements

Any natural person with full legal capacity may become a director, an executive director or a member of management board (hereinafter referred to as “management member/s”). In addition, the company laws specify certain restrictions on who can be a management member, namely relating to persons who have been convicted of financial crimes, fraud, violations of laws relating to labour relations, social security, management of natural resources, or who have violated the provisions of company law relating to unlawful payments. ZPD FBiH, through an analogy with a joint-stock company, provides that a management member may not be older than 65 years on the day of appointment. Restrictions of ZOP BD and ZPD FBiH also relate to persons barred or suspended from their professions, while ZPD RS expressly states the
incompatibility between the functions of any bodies vested with oversight duties (since ZDP RS does not envisage one supervisory board) and management functions. Additionally, unlike ZPD RS, its restrictions set out in ZOP BD and ZPD FBiH are of a temporary nature.

**Appointment**

Pursuant to ZPD FBiH the company determines the method and duration of appointment of management members in its articles of association and memorandum of association.

ZPD RS and ZOP BD provide that the shareholders assembly appoints the management member(s), although ZPD RS states that the first director/management members board may be named in the company’s memorandum of association. ZPD RS leaves the determination of the number of members of the management board to the memorandum of association or the articles of association, but also stipulates that a management board will have a president elected by the members of that management board. ZOP BD delegates the appointment of the member(s) of management to the supervisory board (if such supervisory board is established), and further states that the articles of association may envisage that the members(s) of management can be appointed for a limited period of time, but not for less than two years.

**Removal**

Pursuant to ZPD FBiH the rules for removal of the management member(s) are set out in the company’s articles of association. However, an analogy with the joint-stock companies would indicate that removal may be effected by the shareholders assembly if: the management or any of its members lose the confidence of shareholders; if the shareholders assembly refuses to adopt the company’s annual report; or, if the shareholders assembly determines that actions of the management or a management member conflict with the interests of the company.

ZPD RS and ZOP BD appoint the shareholders assembly as the body that can remove management member(s) with or without giving the reasons for such removal. ZOP BD expressly provides indemnity rights to the management member(s) of if it/they is/are removed without a justifiable reason, while ZPD RS states that the removal does not affect the rights of the management member(s) following their removal as provided for in the contract with the company.

**Authority and representation**

Unless otherwise provided in the memorandum of association or the articles of association, the management member(s) have full authority to manage the company.

In general, the directors or the management board, or the president of the management board under the ZPD RS, represent the company. Additional persons (e.g. authorised representatives – “procurators”) may be authorised to represent the company through the memorandum of association or articles of association. Management members are either entitled to represent the company jointly, or they can be granted sole power of representation if the memorandum of association or articles of association so provide. The method of representation is registered in the registry of companies. Persons thus registered are authorised to undertake all acts and conclude contracts that are usually performed or arise from the tasks entrusted to that person. The company is liable for any obligations that have arisen from acts of a management member who has exceeded his authority, if a third party did not know or did not have a means to know that the management member had exceeded his authority.

**Working rules**

ZPD FBiH provides that if the management board has more members, their respective authorities and responsibilities are determined in the articles of association. ZOP BD states, in similar manner, that when there is more than one management member, the articles of association determine whether they manage the company jointly or separately.

Under the ZPD RS the general rule when there is a management board, is that all management board members are vested with the same rights and duties, and every member may act individually unless otherwise provided by the memorandum of association. If it is provided that a decision can only be made jointly then the approval of all members of the management board is required, except if a delay would adversely affect the company. The memorandum of association may also determine that a member of the management board must follow the instructions of another member of the management board.

If a member of the management board deems such instruction to be inappropriate, he may inform the other members so that they can take a joint decision on such specific issue. The management board may form one or more committees, which may be composed of its members or other persons and also determine their conditions and methods of work. Decisions of such committees will be subject to prior approval by the management board, unless otherwise stated in the memorandum of association or articles of association.
**Contractual relationship with the company**

In accordance with the labour legislation of FBiH, management members are considered to be employees of the company, and must have an employment contract as well as an established and concluded employment relationship. On the other hand, under RS labour legislation, members of management may either be employees of the company or may have their relationship regulated in a different manner i.e. through special or service contracts.

**Conflict of interest**

ZPD FBiH and ZOP BD state, in a similar manner, that management member(s) may not be engaged in an activity which is or may be in conflict with the business of the company, whether as an employee of a different company, or as an independent entrepreneur. The articles of association may determine that this prohibition will survive the end of their term of appointment for up to two years. ZOP BD further provides that a management member may not enter into a contract on behalf of and on account of the company, among other things, if the implementation of this would give rise to an unlawful gain for him or certain third parties.

The conclusion of contracts between a company and another company in which a management member of the first company has an indirect interest needs to be approved either by the supervisory board, the shareholders assembly or by another shareholder body. Indirect interest arises where the other contractual party is a family member of the management member or a legal person in which a family member of a management member has a material or financial interest, or is a responsible person in such an entity.

ZPD RS regulates this matter in more detail through a specific loyalty clause indicating that a management member may not use the assets of the company or privileged (insider) information for his personal interest, or commit any abuse of his position in the company for his personal gain. ZPD RS defines personal interest as when (i) a management member or his family members (a) is a contractual partner of the company; or (b) appears to be in a financial relationship with a person who has concluded a contract or other act with the company, and it can be reasonably expected that such a relation would adversely affect his conduct with respect to the interests of the company; or (ii) a person entering into a contractual relationship with the company has a controlling influence over the management member which can reasonably be expected to adversely affect his conduct vis-à-vis the company. ZPD RS broadly defines family members to include any person living in the same household as the management member.

Also, a management member may not be directly or (through his family members) indirectly involved in a competing company unless he receives permission in accordance with ZPD RS. This prohibition may survive termination of the appointment as a management member for a period of up to two years.

**Duties**

The management i.e. its members must manage the company in line with its business purpose, in the best interests of the company, with the diligence of an orderly businessman and with a reasonable belief that they are acting in the company’s best interests. In general, management members are subject to a wide range of different statutory duties, including:

- to represent the company and manage the company’s business;
- to ensure that all statutory fillings are made;
- to maintain accounts;
- to manage the share register;
- to convene the shareholder meetings and determine the proposed agenda for such meetings;
- to set a date for:
  - determining a list of shareholders entitled to receive notice;
  - determining dividend amounts;
  - determining dividend payments;
  - voting and other question;
- to conclude loan agreements;
- to deal with other matters stipulated by the articles of association or by the contract.

**Liability**

In general, management members must act in accordance with the due diligence standard and with the belief that they are acting in the company’s best interests. If management relies on information that it knows or should have known is incorrect, it will not have satisfied this test.

Any party suffering damage caused by management member(s) acting intentionally or as a result of misconduct or negligence has the right to an indemnity from management. In general, although the company is liable to third parties for damage caused by its employees, it may receive compensation from individual members of the board who caused damage, if they acted intentionally or negligently, or if the damage was caused as a result of their misconduct. However, the different Company Acts provide for slightly different bases for this. ZOP BD provides that the company may reimburse the expenses that the responsible persons incurred as a result of litigation because of their position in the company, if they acted with due diligence or...
reasonably believed that they acted in the best interest of the company and not contrary to law. The company will have to compensate the management member for “all founded expenses” if he was successful in such litigation, and the member can bring a claim against the company if it does not comply with this obligation.

**Limitation of liability**

It is not possible to limit the liability of the management in respect of misconduct or negligence by agreement. There are no express provisions allowing a company to release or waive its claims against a director.

D&O insurance is not common in practice, although it should be noted that most insurance companies offer general insurance policies to companies covering damage claims by third parties.

**Immigration issues**

A foreign person who is appointed as a management member of a company has to obtain the following prior to his appointment and the conclusion of the employment relationship:

— an entry visa;
— a work permit (which is issued for a period of one year but can be extended); and
— a residence permit (on the basis and for the duration of the work permit).

However, a foreign person holding a permanent residence permit in BiH, or international protection in BiH, or temporary protection, is entitled to work in RS on the same basis as citizens in RS, without having to obtain a work permit.

Foreign individuals appointed as management members have to register with the closest police office within 48 hours of entering the country and be issued with a “white carton” confirming their residence address and their contact details. This document is critical for obtaining work and residence permits.

The procedure for obtaining work and residence permits is highly bureaucratic and complex in nature. The competent authorities have great discretionary powers to approve or deny work or residence permits to foreign professionals.

According to the recent draft of the new law on employment of foreigners of FBiH, a foreign person appointed to a director’s position in a company where the majority shareholder is a foreign company will not be required to obtain a work permit. However this law has not yet been adopted.

**Taxation**

Management members are considered employees for personal income tax purposes. In FBiH, personal income tax amounts to 10% of the net wage (net wage represents the amount an employee receives as actual salary i.e. the amount remaining after obligations towards the state, such as social security payments and other taxes, are deducted from gross wages).

The personal income tax rate is now equalised across the country and amounts to 10% of the net wage in all BiH territorial units.

**Social Security**

Social security payments (in BiH, called “contributions”) have to be made by management members in the same way as any other employee.

Part of the contribution is paid by the employee and part is paid by the employer. The proportion payable by each party is set out below:

**Employees** pay:

— FBiH: 17% pension insurance, 12.5% health insurance, 1.5% unemployment insurance (total of 31% of the gross wage).
— RS: 18.5% pension insurance, 12% health insurance, 1% unemployment insurance, 1.5% child protection (total of 33% of the gross wage).
— Brčko District: 17% for pension insurance, 12% for health insurance, 1.5% unemployment insurance (total of 30.5% of the gross wage).

**Employers** pay:

— FBiH: 6% pension insurance, 4% health insurance, 0.5% for unemployment insurance (total of 10.5% of the gross wage).
— RS no contributions paid by employer.
— Brčko District: 6% pension insurance (in total: 6% of the gross wage for employers who apply FBiH Law).
This guide focuses primarily on the rules in the Civil Code (Law 10,406 of 2002) relating to the private limited liability company, or 'sociedade empresária limitada' ("limitada"), which is the most common type of company in Brazil. However, where relevant we have given some details on the structure of a corporation, or 'sociedade anônima' ("SA"), which may be subject to additional rules. This guide does not cover the rules governing partnership, sole traders or other corporate entities.

Eligibility requirements

A limitada must have at least one ‘administrator’ (similar to a director) and at least two ‘quota-holders’.

An administrator of a limitada must be an individual Brazilian resident or a foreigner with a permanent residence permit: neither foreigners with temporary visas nor corporate entities are permitted. An administrator does not have to be an employee of the limitada, but must be at least 18 years old and not prevented from exercising an administrator’s duties by law or criminal conviction for certain offences. CMS lawyers have acted as administrators for a number of foreign companies establishing subsidiaries in Brazil.

Quota-holders may be Brazilian or foreign resident individuals or corporate entities. Capital is divided into quotas (similar to shares) with a nominal value. Except where certain specific legislative requirements apply, there is no minimum quota capital and no need to pay it up within a particular period. Quota-holders living overseas must grant power of attorney to a resident Brazilian (who must be another quota-holder or a lawyer) to receive service of notices and represent them at quota-holders’ meetings. A local representative is also required under federal tax legislation.

Method of appointment

The most usual way to appoint an administrator is by amendment to the articles of association (contrato social). Quota-holder approval is required to do this, with the level of approval depending on whether or not the administrator is also a quota-holder. The appointment of an administrator who is also a quota-holder is subject to approval by a simple majority of quota-holders. The appointment of an administrator who is not a quota-holder is subject to unanimous approval (if the quota capital has not been fully paid up by the quota-holders), or to approval by two thirds of the quota capital (if the quota capital had been fully paid up by quota-holders). All amendments to the articles of association, quota-holders’ resolutions and minutes of quota-holders’ meetings must be filed with the Company Registry (Junta Comercial) in the state of incorporation.

Method of removal

Dismissal of an administrator is a similar process requiring an amendment to the articles of association and quota-holder approval. For the dismissal of the quota-holding administrator, the required level of approval is two thirds of the total quota capital if the articles of association are silent on this, or such other level established by the articles of association, subject to a minimum approval of 50% of the quota capital plus one quota. Dismissal of a non-quota-holding administrator is subject to approval by a simple majority. An administrator may be removed at any time.
Authority and representation

Although the administrators’ powers generally derive from the law, usually such powers are also specifically set out in the articles of association. This may establish routine actions that can be performed by one administrator acting alone and provide that certain strategic matters are subject to joint representation (co-signature) with another administrator or require the prior approval of the majority of the quota-holders. The limitada has a one-tier governance structure, which means that it has no separate supervisory board.

Working rules of the board

The Civil Code does not establish a formal management structure for a limitada, nor does it provide for a board system (although, where there is more than one administrator, the administrators together might be regarded as ‘the board’).

SAs, on the other hand, have an executive board (diretoria) and a board of directors (conselho de administração), instead of an administrator, with the conselho de administração being optional for private corporations. The diretoria comprises at least two Brazilian resident individuals and the conselho de administração comprises three shareholders (either individual shareholders or individuals representing corporate shareholders), who are not required to be resident in Brazil.

Contractual relationship with the company

Where the administrator is also a quota-holder, which is common, the administrator remains subject to the articles of association regarding quota-holders and the obligations in any quota-holders’ agreement which is in force. Where the administrator is not a quota-holder, the administrator is often an employee of either the limitada or a parent company. Quota-holding administrators may receive specific compensation for such duties which may or may not be by way of an increased dividend. Administrators who are also employees generally receive no extra salary. An administrator who is neither an employee nor quota-holder would usually negotiate a service agreement which would establish the terms for the performance of his activities as the company’s administrator and remuneration.

Conflicts of interest

Brazilian law does not have specific legal provisions regulating conflicts of interest relating to administrators of a limitada. Nevertheless, it does establish conduct rules, specifying that the administrators shall have a duty of loyalty towards the limitada. It is generally accepted that administrators should not make decisions when there is a conflict of interest situation (i.e. the administrator has a personal interest which may not be in line with the limitada’s interest). In such cases, the administrator may be liable to the limitada for any damages resulting from breach of this duty.

Although it is not provided by law, unless the quota-holders give their consent, administrators should not conduct, directly or indirectly, any competing activity with the limitada. Brazilian law does establish a general prohibition on the limitada entering into agreements with the administrators, unless the quota-holders have previously passed a resolution approving this. In addition, Brazilian law also establishes a specific prohibition on the limitada facilitating loans to administrators, making payments on their behalf or creating guarantees to cover their obligations, unless previously authorised by the quota-holders.

Liability

Administrators are not liable where their acts, performed on behalf of the limitada, are regular, in the interests of the limitada, comply with applicable law and comply with the articles of association. Administrators are only personally liable to the limitada or its quota-holders for losses or damages caused by actions carried out on behalf of the limitada which:

— are contrary to the instructions of the quota-holders;
— are contrary to, or exceed, the corporate purposes of the limitada;
— exceed their powers as administrator;
— are illegal; or
— constitute fraud.

An administrator might also be found personally liable for crimes defined in Brazil’s Criminal Code, especially...
for economic or environmental crimes committed during the performance of his duties.

Limitation of liability

An administrator's liability cannot be fully excluded by any kind of general agreement. The limitada may, however, indemnify the administrator against liability to the limitada or third parties, except where such liability arises through a breach of Brazilian law. As mentioned above, the limitada can allocate specific responsibilities in its articles of association to specific administrators. However, if the articles of association specifically establish that the administrators shall act as a board by consensus, all management decisions are considered as decisions of all the administrators. Therefore the administrators are jointly and severally liable, except if a dissenting administrator requires such dissent to be recorded, in which case such administrator may be exempt from liability for such action. Quota-holders are generally only liable for the amount of capital they have subscribed in the company.

Immigration issues

The immigration policy for foreign nationals intending to work in Brazil is co-ordinated by the Brazilian Immigration Council, a body of the Ministry of Labour and Employment. A foreign national can only exercise remunerated activities in Brazil if he/she holds the appropriate visa. Foreign nationals wishing to apply for a permanent visa will have to register with the Federal Police shortly after arrival in Brazil and apply for a Foreigner’s Registration Number (REN). It may also be worth applying for a Tax Registration Number (CPF) with the federal tax authority (Receita Federal) since a CPF is essential in Brazil for many activities, such as opening bank accounts and buying property.

Foreigners must have a permanent residence permit to act as an administrator of a limitada but there are no restrictions on the nationality of quota-holders.

Social Security

If the quota-holding administrators receive additional remuneration through increased dividends, no Brazilian social security contributions will apply. If administrators are also employees and are compensated with an increased salary or bonus, compensation paid will be subject to the same social security contributions as salary. If the administrator is neither an employee nor an administrator, but simply remunerated based on his appointment, by way of ‘pro labore’ payments, then social security contributions will apply at a lower rate than contributions on an employee’s salary. This is because ‘S-System’ contributions do not apply to pro labore payments. Contributions to a severance compensation fund known as FGTS (which is mandatory for employees) are not mandatory for pro labore payments. It is very unusual for the company and the administrator to opt to pay these.
This guide focuses on the rules relating to limited liability companies (“LLC”) and joint stock companies (“JSC”) only.

The Bulgarian Commercial Act (the “Commerce Act”) published in the State Gazette No. 48, dated 18 June 1991 (as amended) defines five types of companies: general partnerships, limited partnerships, limited liability companies, joint-stock companies, and partnerships limited by shares. Only the types of company set out in the Commerce Act may be established in Bulgaria. General and limited partnerships are personal, whilst joint stock companies, limited liability companies, and partnerships limited by shares are equity companies.

The duties and responsibilities of the directors vary depending on the type of company.

The management bodies of a JSC are: (i) the general meeting of the shareholders, and (ii) either a board of directors (one-tier system) or a supervisory board and a management board (two-tier system).

A JSC is managed by the executive members of the board of directors in the one-tier system, or by the members of the management board in the two-tier system. In a two-tier system the members of the supervisory board supervise the management of the company.

The management bodies of an LLC are: (i) the general meeting of the quotaholders and (ii) the manager (s). Often the quotaholders are closely involved in the management of the LLC.

Where the shares/quota of a company are held by one person, the functions of the general meeting of the shareholders/quotaholders are performed by the sole owner.

Eligibility requirements

**Joint Stock Company**

A board member can be an individual or a legal entity, where the articles of association of the company so provide. Where the board member is a legal entity it must designate a representative for the performance of its duties on the board of the JSC. The liability of the legal entity arising from the actions of its representative on the board is unlimited and is joint and several with the other board members. However, Bulgarian law stipulates that a person may not be a director if he or she:

— has been a board member of a company which has been dissolved on the grounds of insolvency within the two years preceding the date of his appointment and the claims of its creditors were not fully satisfied;
— has been a manager or a board member of company which has breached its obligations in respect of reaching and maintaining set levels of stocks under the Oil and Oil Products Stocks Act; or
— does not meet other requirements provided for in the articles of association of the company.

Board members must be registered in the Commercial Register of the Bulgarian Registry Agency (the “Commercial Register”) by filing a notarised consent and a statement certifying that there are no obstacles to them becoming board members.

**Limited Liability Company**

The manager of an LLC does not necessarily have to be a quotaholder but must be an individual rather than a legal entity. An LLC may have more than one manager who can represent the company jointly or severally, depending on the provisions of the company’s articles of association. The managers of an LLC must be registered in the Commercial Register and they must file a notarised consent and a statement certifying that there are no obstacles to them becoming board members.
consent to manage the company and a specimen signature at the Commercial Register. The same restrictions as those for board members of a JSC apply to the managers of an LLC.

Appointment

**Joint Stock Company**
The members of the board of directors (one-tier system) or of the supervisory board (two-tier system) are elected and removed from office by the general meeting of shareholders.

The general meeting also determines the remuneration of the supervisory board members, including their right to receive part of the company’s profits or to acquire shares and debentures of the company.

Board members are elected for a term of office not exceeding five years. However, the term of office for the members of the first board upon incorporation of the company cannot be longer than three years. Board members may be re-elected without limitation. The general meeting of shareholders can remove board members from office at any time.

**Two-Tier System**
— The company is managed by a management board which is controlled by the supervisory board. Members of the management board are appointed by the supervisory board, which also determines their remuneration and may remove them from office at any time. One person cannot serve on both the management board and the supervisory board simultaneously.
— The number of members of the management board ranges between three and nine and is determined by the articles of association. The rules of procedure for the management board are approved by the supervisory board.
— The supervisory board may not take part in the management of the company. The supervisory board represents the company only in its relationship with the management board. Members of the supervisory board are appointed by the general meeting of shareholders. There may be between three and seven members.
— The supervisory board adopts its own rules of procedure and appoints a chairperson and vice-chairperson from among its members. The supervisory board meets regularly and at least quarterly. The chairperson calls meetings of the supervisory board on his own initiative, as well as upon requests of members of the supervisory board or members of the management board.

**Limited Liability Company**
The manager is appointed by the general meeting of the quotaholders of the company, which also determines the manager’s remuneration and may release him or her from liability.

Removal from office

**Joint Stock Company**
A board member may be removed from office at any time by the general meeting of shareholders or by the supervisory board. A board member may request his or her removal from office by serving a written notice addressed to the company. The company must apply for de-registration of the board member from the Commercial Register within six months of the receipt of such notice. If the company fails to do so, the board member may notify the Commercial Register directly and personally file the notice for the removal from office. The board member will then be de-registered from the Commercial Register regardless of whether another person has been elected to replace him or her on the board.

**Limited Liability Company**
The manager may be removed from office by the general meeting of quotaholders at any time. The manager may request his or her removal by serving a written notice addressed to the company. The company must apply
for the registration of the discharge with the Commercial Register within one month of receiving such notice. If the company fails to do so, the manager may notify the Commercial Register directly and personally file the notice for the removal from office. The manager will then be de-registered from the Commercial Register regardless of whether another person has been elected to replace him or her as manager.

The removal from office has effect in relation to third parties acting on good faith as of registration at the Commercial Register.

Authority and representation

Joint Stock Company

The members of the board of directors or the management board represent the company collectively, unless otherwise provided by the articles of association. The board of directors or the management board (subject to approval by the supervisory board) may delegate the authority to represent the company to one or more of its members. Authority so delegated may be revoked at any time.

The names and specimen signatures of the authorised representatives of the company are registered in the Commercial Register.

A company’s articles of association may provide that certain transactions can be entered into only with the prior approval of the supervisory board, or upon the unanimous decision of the board of directors. Such restrictions may also be imposed by the supervisory board or the board of directors. By law, the following transactions require a resolution of the shareholders at a general meeting:

— transfer or right to use the entire business;
— disposal of assets (the total value of which for the current year exceeds half of the value of the total assets of the company as per its latest audited annual financial statements);
— assumption of liabilities or the provision of collateral to one person or to related parties, the amount of which in the current year exceeds half of the value of assets of the company as per its latest audited annual financial statements.

The company’s articles of association may expressly provide that the above transactions will be within the powers of the board of directors or the management board, in which case a unanimous resolution of the board of directors or consent from the supervisory board given in advance will be required.

Any transaction concluded in breach of those requirements will be valid with respect to third parties, but the person who concluded it on behalf of the company will be liable for any damages incurred by the company.

Limited Liability Company

The manager organises and directs the activities of the company in accordance with the resolutions of the general meeting of quotaholders. Without the consent of the company, the manager may not: (i) effect commercial transactions which are similar to those of the company on his or her own behalf or on a third party’s behalf; (ii) participate in partnerships, partnerships limited by shares, or in limited liability companies; or (iii) hold management positions in other companies. The manager is required to indemnify the company for any damage caused to the company from a breach of his or her obligations.

Rules of Procedure

Joint Stock Company

The executive members of the board of directors, or the members of the managing board, jointly manage the company’s operations. The shareholders may modify this requirement and allocate certain tasks to one or more board members. Furthermore, the board’s internal rules of procedure may provide for a more specific allocation of the tasks between the board members. Nevertheless, such distribution of responsibilities cannot override the joint responsibility of the board members for the operations of the company.

Limited Liability Company

Even if an LLC has more than one manager, the managers of the company do not constitute a collective body. Rather, each of them is responsible for the management of the company’s operations. The articles of association determine whether the managers can represent the company severally or jointly.

Contractual relationship with the company

Joint Stock Company

Two-Tier System

— The relationship between the company and the members of the management board is governed by a management agreement. The agreement is executed in writing on behalf of the company by the chairperson of the supervisory board or another board member authorised by the chairperson.
— The relationship between the company and the members of the supervisory board is governed by a services agreement. The agreement is executed on behalf of the company by a person authorised by the general meeting of the shareholders or by the sole owner.

One-Tier System

— The relationship between the company and the executive members of the board of directors is governed by a management agreement. The agreement is executed in writing on behalf of the company by the chairperson of the board of directors.
The relationship between the company and the non-executive members of the board is governed by a services agreement executed on behalf of the company through a person authorised by the general meeting of shareholders or by the sole owner.

**Limited Liability Company**

The relations between the company and the manager are governed by a management agreement. The agreement is executed in writing on behalf of the company, by a person authorised by the general meeting of quotaholders or by the sole owner.

**Conflicts of interest**

Unless the company consents, a board member or a manager in a JSC or LLC may not: (i) enter into commercial transactions on his/her own behalf or on a third party’s behalf; (ii) participate in partnerships and partnerships limited by shares or in limited liability companies; or (iii) hold managing positions in other companies when the activities carried out are similar to those of the company.

**Duties**

Board members have equal rights and obligations, regardless of any internal allocation of responsibilities or management and representation powers amongst them. Board members must perform their functions with the highest professional care and in the interests of the company and of all the shareholders.

Members of a board of directors and the management board may not, whether on their own behalf or on behalf of others, execute business transactions or serve as procurators, managers or board members of other companies or co-operatives, if these compete with the company. This restriction does not apply where the articles of association expressly allow such competing activities or where the body which elects the board member has given its express consent.

Board members may not disclose any confidential information which has come to their knowledge in relation to the performance of their duties if such disclosure could affect the activities or the interest of the company. The confidentiality obligation survives the board member’s removal or resignation from office.

Specific obligations for managers and board members arise where the company becomes insolvent. The manager or the executive director of the relevant company must file for insolvency within 30 days. If the manager/executive director fails to fulfil this obligation, he or she will be liable towards the creditors for the damages incurred. In addition, the defaulting manager/executive director may be subject to criminal liability.

The manager of an LLC must schedule a general meeting of the shareholders immediately if the losses of the company are more than one quarter of the capital of the company and the value of the LLC’s assets falls below the value of the LLC’s registered capital.

**Liability**

The directors of a joint stock company are required to deposit a guarantee for their potential liability of an amount determined by the general meeting of shareholders. This amount cannot be lower than three months gross remuneration of the board member and can be deposited with the company in the form of cash, shares or debentures.

The directors are jointly and severally liable to the company for any damage caused as a result of their actions. Any director may be released from liability if it is established that he or she has no fault for the damage suffered by the company. Shareholders holding at least 10% of the company’s equity may file a claim demanding that board members be held liable for damage caused to the company.

Board members of JSCs must notify the board of directors in writing when they or parties related to them enter into agreements with the company out of the ordinary scope of activities of the company or outside normal market conditions. Such agreements may only be executed following the approval of the transaction by the board of directors. However, if executed without the board’s approval, such a transaction is valid but the person who has knowingly executed it is liable for damages to the company. Much stricter rules concerning related party transactions apply to public companies. A member of a management board or board of directors or a manager may be liable for the amount of uncollected taxes due from the company if such member or manager conceals facts and circumstances which under law he or she is obliged to reveal to the relevant revenue body and as a result the outstanding taxes or social security liabilities cannot be collected.

A member of the management board or a manager who: (1) unscrupulously disposes of assets of the company or makes cash payments which constitute hidden profit distribution or payment of dividends; or (2) disposes of assets of the company without remuneration or for a price much lower than the market value, which results in a decrease of the company’s assets and inability to pay taxes and social securities, is liable up to the amount of the relevant payment or up to the amount of the decreased value of the assets.

**Release from liability**

The general meeting of shareholders may release the board members of the JSC from liability. A general
Duties & Responsibilities of Directors

A meeting of quotaholders may release the manager of the LLC from liability. Normally, such releases from liability are made yearly at the time of approval of the annual financial statements and the annual management report by the general meeting.

Immigration issues

A foreign manager or director working under a management agreement in Bulgaria is not required to obtain a work permit and can apply for a long-term residence permit in Bulgaria provided that the company managed by the foreign manager or director has at least ten Bulgarian employees throughout the whole term of residence of the foreigner.

Taxation and social security

Personal income tax at a flat rate of 10% is levied on the remuneration of managers and directors, net of mandatory social and health insurance contributions.

The remuneration of managers and directors would normally be subject to social and health insurance contributions of about 29% of their gross income (split between the company and the director in specific ratios) capped at EUR 1,200 per month. Therefore, any remuneration which exceeds EUR 1,200 per month is not subject to social and health insurance contributions.
This guide focuses on the rules relating to limited liability companies with a focus on foreign invested enterprises. It does not address the rules for other forms of entities, such as companies limited by shares, partnerships etc. However, rules for limited liability companies and companies limited by shares are similar in many aspects.

Introduction

Most foreign invested enterprises are established as limited liability companies under PRC law. The advantage is that shareholders are generally liable only for their contribution to the registered capital of the company.

The highest authority of a limited liability company is the shareholders’ meeting. As a rule, these companies also have a Board of Directors, which must consist of three to 13 members. However, limited liability companies with a relatively small number of shareholders or which are relatively small in scale may have one single Executive Director instead of a Board of Directors.

If the foreign invested enterprises are established in the form of joint ventures, the structure is different. The highest authority of joint ventures is the Board of Directors. There is no shareholders’ meeting.

All limited liability companies including joint ventures must have a Supervisory Board consisting of three members. One member of the Supervisory Board must be an employee representative. To avoid this, companies which operate on a small scale or which have a small number of shareholders can choose to have only one or two supervisors instead of a Supervisory Board. Supervisors are appointed by the shareholders. Directors and managers may not simultaneously serve as supervisor of the same company.

Eligibility requirements

There are few legal restrictions on who can become a director. In general, any natural person with full civil capacity may become a director. In particular, a director is not required to be resident in China and there is no nationality requirement.

However, according to the PRC Company Law, any person who was convicted of certain financial crimes, who was personally liable for the bankruptcy of a company in which he or she acted as director or manager or who was personally liable for the revocation of the business license of a company of which he or she was the legal representative, can only be appointed as director again after a certain time period (three or five years) has passed. Also, persons who have a relatively large amount of debts due but unpaid cannot act as directors. A supervisor cannot act as a director or manager of the same company at the same time.

Method of appointment

The members of the Board of Directors are appointed by the shareholders. The term of office of the directors is stipulated in the Articles of Association of the company, but each term of office may not exceed three years.

A director can be reappointed upon expiry of his or her term of office and hold consecutive terms. If no timely reappointment is carried out after the expiry of the term of office of a director, or if the number of the members of the Board of Directors is less than the quorum due to the resignation of some directors from the Board of Directors prior to the expiry of their term of office, the original directors shall continue to perform their
functions as directors according to law before the newly appointed directors assume their roles.

According to the PRC Regulations on Administration of Registration of Companies, the appointment of directors must be filed with the competent Administration for Industry and Commerce for recording in order to be effective towards third parties.

Removal of directors

A director is subject to removal by the shareholder which appointed him or her at any time. A director may also resign from his or her office at any time by giving notice to the company, unless the Articles of Association of the company stipulate otherwise.

According to the PRC Regulations on Administration of Registration of Companies, the removal of directors must be filed with the competent Administration for Industry and Commerce for recording in order to be effective towards third parties.

Authority and representation

Under PRC law, a company only has one legal representative. The legal representative must be registered with the company registration authority, i.e. the Administration for Industry and Commerce. Persons other than the legal representative may only represent the company on the basis of a power of attorney issued by the legal representative.

The Chairman of the Board of Directors or the Executive Directors is usually registered as the legal representative. Alternatively, a manager may be registered as legal representative.

A specific PRC characteristic to note is that the company seal has the same validity as the signature of the legal representative, i.e. contracts and documents affixed with the company seal are valid and legally binding, even if they have not been signed.

Working rules of the board

According to the PRC Company Law, a Board of Directors must have between three and 13 members.

For limited liability companies, the law only requires that the Board of Directors of joint ventures hold a meeting at least once a year. For other types of limited liability companies, there is no minimum number of board meetings under statutory law. Normally a limited liability company has at least one board meeting every year. Meetings of the Board of Directors are convened and presided over by the Chairman of the Board of Directors. Each director has one vote.

The discussion methods and voting procedures of the Board of Directors of limited liability companies are flexible and are subject to the requirements of the Articles of Association.

However, in joint ventures, the following items require unanimous consent by all directors present at a board meeting: amendment of the Articles of Association, termination of the joint venture, changes to the registered capital and merger or division of the company. In wholly foreign owned enterprises, resolutions on the above-mentioned items must be passed by a two-thirds majority of the shareholders’ meeting.

Contractual relationship with the company

It is not mandatory for a company to sign a service contract or employment contract with its board members for their services. Also, it is not mandatory for a company to pay any remuneration to board members except if the Articles of Association of the company provide so.

Conflicts of interest

The PRC Company Law sets out restrictions on a director’s activities so as to prevent conflict of interest situations. The Articles of Association may stipulate additional limitations. Under the PRC Company Law, a director of a company:

- is prohibited from entering into contracts or conducting transactions with the company unless otherwise provided in the company’s Articles of Association or with the consent of the shareholders;
- is not allowed to take advantage of his or her position to exploit for himself or herself or third parties commercial opportunities that should belong to the company, or to operate on his or her own behalf or for third parties in the same type of business as that of the company without the consent of shareholders.

Duties of a director

As part of the Board of Directors, the duties of the individual board members are limited to participation in the joint decision making of the Board of Directors. Besides that, directors, with the exception of the Chairman of the Board of Directors, do not have any independent duties unless specifically entrusted to them by the Board of Directors.
Directors owe obligations of fidelity and diligence to the company. Directors should not infringe the interests of the company by taking advantage of his/her relationship with the company, e.g. directors may not use their functions and powers to accept bribes or other illegal income, misappropriate the company’s funds, deposit the company’s funds into an account under their own names, use the company’s property to provide loans or guarantees to a third party without consent of the shareholders’ meeting, seize property belonging to the company, take commissions on transactions between others and the company, take advantage of his or her position to exploit for himself or herself or third parties commercial opportunities that should belong to the company, or operate on his or her own behalf or for third parties in the same type of business as that of the company without the consent of shareholders. Besides, the PRC Company Law imposes a statutory confidentiality obligation on directors.

**Liability**

If directors of a company breach the law, administrative regulations or the Articles of Association of the company in the performance of their functions and cause losses to the company, they are liable to compensate the company. With regard to third parties, the company as a legal person bears civil liability for the operational activities of its personnel including directors. Therefore, as a basic principle, in respect of civil liability, a board member of a company is personally liable towards a third party only for his personal actions but not for his or her corporate actions.

In addition to the civil liabilities mentioned above, the directors of a company may also be subject to criminal liabilities. Criminal liability of board members can occur through providing false financial and accounting reports and, thereby, causing damages to the shareholders or the public; concealing property in the process of liquidation and, thereby, impairing the interests of creditors; tax evasion of more than 10% of the tax payable and more than RMB 10,000; forging VAT invoices; misappropriation of corporate funds; misuse of credit; insurance fraud; smuggling; money laundering; fraudulent use or violation of intellectual property rights; disclosure of confidential information and corruption. In all of the above cases, a director's criminal liability requires the criminal act to have been committed within the area of responsibility of the relevant person and the relevant person to have been at fault and to have acted at least with gross negligence.

**Limitation of liability**

In practice, the liability risks for directors can be mitigated through the following measures:

- An indemnification clause can be included in the Articles of Association stipulating that if directors in performing their duties on behalf of the company incur liability towards third parties, they shall be indemnified by the company except for intentional or gross negligence or serious dereliction of their duties. Such a clause protects the directors against any remaining risk of compensation or monetary fines in case of negligent breach of their duties.
- Companies may wish to take out a Director and Officer Liability Insurance in order to protect directors from liabilities incurred when they perform their duties on behalf of the Company.

**Immigration issues**

Normally, foreign directors of PRC companies perform their duties in their own country. Under such circumstances, they do not need to obtain work permits or residence permits in China. If a foreign director needs to come to China for a short time, he or she can enter China by holding a business visa, i.e. M visa.

Only when a foreign director concurrently holds a work position in the PRC company or otherwise works in China, will he/she obtain a work permit and residence permit in China. In such a case, the foreign director can either conclude a local employment contract with the Chinese company or be seconded to work in the Chinese company by his/her overseas employer.

**Taxation**

Where a director is not an employee of the company, the fees received by him/her for acting as director are taxed as service income at progressive tax rates of 20%, 30% and 40%. For a foreign individual receiving director’s fees for acting as a director of a PRC company, the director’s fees are also taxed in China under PRC tax law, unless the applicable double taxation treaties concluded between China and other countries provide otherwise. According to the director fee clause of most double taxation treaties between China and other countries, China has the taxation right.

Where a director is also an employee of the company, the director fees and salaries received by the director are combined and taxed together as salary income at progressive tax rates of 3% – 45% in seven tax brackets.

**Social security**

Foreign directors who perform duties in their own country, but do not work in the PRC, are not required to participate in the PRC social security scheme.
A foreign director working in China and holding a work permit and residence permit must participate in the PRC social security scheme, including pension, medical insurance, work-related injury insurance, unemployment insurance and maternity insurance. Both the PRC company and the employee must pay contributions to these social security funds according to statutory law. The contributions which are payable by the employee are withheld from his/her salary and remitted by the PRC company. The calculation basis and rates for the social insurance contributions are the same as those for local Chinese employees.

A foreigner may be exempted from parts of the Chinese social insurance scheme provided his/her home country has concluded a treaty with China to avoid double payment of social insurance premiums. So far, China has only concluded social insurance treaties with Germany and South Korea.
This guide focuses on the rules relating to the management of limited liability companies. It does not address the rules relating to other types of companies. This guide reflects Croatian legislation applicable on 1 January 2015.

**Introduction**

A Croatian private limited liability company (the ‘company’) will generally have one board, usually a Management Board, consisting of one or more directors. Directors represent the company in business dealings and other situations where representation is required, for example before a Court, in administrative board procedures or in employment matters.

The Management Board members conduct the business of the company in accordance with the Companies Law, the company’s articles of association, decisions of the founders and the mandatory instructions of a general meeting of shareholders (the ‘Assembly’), together with the instructions of the Supervisory Board of the company, if one is established.

Directors are responsible for representing and running the company, but they are not personally liable for the company’s acts or for contracts concluded on behalf of the company, except in the cases below.

**Eligibility requirements**

There are few legal restrictions governing who can be a director of a company. An individual director is not required to be resident in Croatia and there is no nationality requirement. However, only a physical person with full legal capacity and who is a capable businessperson can be appointed as a director.

The Companies Law also contains provisions that restrict the appointment of persons as directors who have been convicted for financial crimes, barred from certain professions or convicted for crimes conducted in company insolvency procedures.

Furthermore, the articles of association may contain certain conditions or set additional requirements for the nomination of directors, such as holding specific diplomas or having requisite professional skills. However, these conditions may not limit the free choice of the Assembly to appoint directors.

**Appointment**

Directors are appointed by a resolution of the Assembly, unless otherwise stated in the articles of association. The appointment is effective upon adopting the relevant resolution. In practice however the appointed directors will only be able to prove their authority after being registered with the Commercial Court’s Register. The period of appointment of a director is not limited unless the company’s articles provide otherwise.

Notification of the appointment signed by any and all director(s), together with certified evidence of the appointment, certified acceptance of appointment, as well as a certified sample signature of the director(s), needs to be filed with the Commercial Court’s Register.

Any change in the particulars of directors registered with the Commercial Court’s Register (e.g. director’s residence etc.) must be re-filed.

Prospective directors (who are non-Croatian citizens) are now required to obtain a Personal Identification Number (in Croatian “OIB”) before filing notification of the
appointment. The Personal Identification Number is issued by the relevant Tax Office at the request of such prospective director.

Removal

Generally, pursuant to the Companies Law, the Assembly can remove a director at any time without giving a reason for the removal.

Removal of a director is subject to any entitlements the director may have arising from his employment contract or management agreement (a type of service agreement), or the provisions of Croatian employment legislation. Note that Croatian employment legislation does not apply to the management agreement. However, it could be the subject of a dispute if a director is only employed under a management agreement or an employment agreement. Therefore, such agreements should be carefully drafted.

Dismissing a director from their position removes their authority to represent the company but does not affect any agreements signed between the company and the director.

Although a director’s dismissal has immediate effect, third parties may rely on the director’s authority to represent the company as long as the director is still registered in the Commercial Court’s Register. Therefore any appointment/revocation should be immediately registered with the Commercial Court’s Register.

Authority and representation

Under Croatian law, the Management Board members jointly represent the company.

The articles of association may provide a different form of representation and usually provide that one or more directors each solely or two directors jointly or, in cases of more than one director, one director together with a ‘Procurist’ (agent with limited power to represent) are entitled to represent the company. The method of representation is registered with the Commercial Court Register, thereby notifying third parties of the extent of authority granted to particular individuals.

A director has full authority to manage the company. However, such authority may be restricted by the articles of association or by shareholder resolutions, for example: by requiring the approval of the Assembly prior to certain decisions being made; by providing for a particular way of rendering decisions; or by requiring approval for certain transactions.

These limitations on a director’s authority have no legal effect vis-à-vis third parties, so if the authority is exceeded, the company will be bound and the validity of a contract cannot be challenged on the basis of a director’s lack of authority. If a director exceeds his authority in this manner, the company can sue him personally for damages.

Working rules of the board

Under Croatian law, all directors are vested with the same rights and duties. Generally, the directors are required to jointly manage the company. The shareholders, articles of association, internal guidelines for directors and the Management Board itself may modify this concept and allocate certain tasks to one or more director(s).

Nevertheless, such distribution of responsibilities does not affect the overall responsibility of each director for the company’s business as a whole.

Contractual relationship with the company

Appointment to the position of a director does not in itself create a contractual relationship between the director and the company.

The company therefore usually enters into a management contract with the director, specifying the director’s duties and remuneration, as well as other important aspects of the relationship with the director such as confidentiality, non-compete provisions, termination provisions and benefits in kind.

Under Croatian law, the directors are entitled to remuneration proportionate to their engagement, as well as the company’s business results.

Removal of a director does not automatically terminate his or her management agreement and vice versa. The management agreement may, however, expressly stipulate that if an individual ceases to be a director, then his or her management agreement shall automatically terminate as if notice of termination had been given.

Conflicts of interest

A director is subject to a statutory covenant not to compete with the company’s business during the term of his directorship. Any non-competition and non-solicitation covenants going beyond the statutory covenant must be set out in the management agreement.

Directors cannot, without the consent of the Assembly, engage in business activities of the company for their own benefit or for the benefit of others. Furthermore, directors are prohibited from acting as members
of the Management Boards or the Supervisory Boards of companies that engage in the same business activities as the company of which they are directors.

If the Assembly has knowledge that the directors they appoint are engaged in the above-mentioned prohibited activities and still appoint such persons as directors without explicitly seeking that they desist from such activities, the Assembly will be deemed to have consented to the activities. Consent can be revoked at any time, even if it is a deemed consent.

A breach of the above-mentioned prohibitions entitles a company to seek legal recourse. The company can either seek damages for the breach, or request that the director pays the proceeds from the prohibited activity to the company. In any event, the director can be dismissed from his or her position.

Duties of directors

A director must manage the company and act on behalf of the company in line with its business purpose, in the best interests of the company and in accordance with instructions given by shareholders, with the diligence of an orderly businessman. Conduct is not defined by law but by the courts on a case-by-case basis.

A director is subject to a wide range of specific statutory duties, requiring him or her to, inter alia:

— ensure that all statutory filings were made;
— conduct internal reviews;
— comply with the statutory requirement to maintain accounts;
— submit financial statements to the Assembly and the Supervisory Board (if any). Directors of “small companies” are not required to submit annual financial reports (in Croatian “izvješće o stanju društva”) to the above named bodies unless otherwise stated in the articles of association;
— uphold the principles of capital maintenance (i.e. not to pay back to the shareholders the stated share capital of the company);
— initiate company insolvency procedure within a period of three weeks from the day when the cause for insolvency arose (as defined by the Croatian Insolvency Act). From such day, the directors are generally required to refrain from executing any payments. This was already a directors’ obligation but only according to the Insolvency Act.

Liability of directors

Due standard of care

The standard of due care for directors is to act in the manner of a prudent businessperson and to keep confidential the business secrets of company that they represent.

Directors that breach this standard are jointly and severally liable to the company. In proceedings to establish whether a breach exists, the directors bear the burden of proof to show that they exercised due care.

Actions specifically defined as breaches by the Companies Law

Pursuant to the Companies Law, breaches of due care related to the following are considered as exceptionally grave:

— returning assets invested in the company to the members of the company;
— making payments in the event that the company becomes insolvent or over-indebted;
— distributing the assets of the company;
— paying interest or profits to company members;
— acquiring treasury securities in the company, and
— issuing securities in the company before the corresponding contribution for the securities is paid to the company in full.

Also, a breach of the director’s obligations under tax and social security legislation may lead to the imposition of fines in accordance with special laws.

Limitations periods for filing claims

The limitation period for filing claims arising from a breach of the duty of due care is five years from the date on which the claim arises.

Unlawful return of capital

Apart from the payment of dividends, the Companies Law prohibits the return of contributed share capital to the shareholders. Therefore, if the Management Board executes a non-arms length agreement with the company’s shareholder(s), the company’s creditors would be entitled to claim damages from the shareholders and the Management Board members.

Additionally, if such payments are made to the company’s shareholders abroad, and result in a reduction of the company’s profit, the Croatian Tax Authorities would be entitled to tax the Croatian company as if such an agreement had an arm’s length consideration.

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* “Small companies” is a term defined by the Croatian Accountancy Act. The “small company” is any company which does not fulfil two of the following conditions: (1) overall assets in the amount of HRK 32.5m, (2) income of HRK 65m and (3) average no. of employees during the business year up to 50.
**Limitation of liability**

Directors may be excused from liability if there are justified grounds for such exclusion, or if the directors succeed in proving that they have acted in compliance with the due care standard. According to the Companies Law, directors will be exempt from liability if their actions are based on lawful decisions of the Assembly.

Despite this exemption, where debts cannot be settled from the company's assets, the creditors can claim damages from the directors, if the directors breached the due care standard.

**Immigration issues**

A foreign person who is appointed as a director of a company and works or resides in Croatia for more than 90 days has to obtain the following:

- entry visa (unless the respective country and Croatia have stipulated differently); and
- residency and work permit (issued for a maximum period of one year).

Work permits can be granted on a quota basis or otherwise. The quotas are defined by the Government of the Republic of Croatia. However, the quota policy does not apply to certain categories of employees; including EU citizens holding managing directors’ positions and some other specified cases.

**Taxation**

If a director is a Croatian resident, his or her income will be taxed under Croatian Income Tax provisions according to the ‘world income’ principle. If the director is not a Croatian resident, only certain income connected to his or her activities in Croatia will be taxed under Croatian Income Tax. The income tax rates vary from 12% to 40%. Croatia has entered into many double taxation treaties, which ease the taxation burden on foreigners who are subject to Croatian income tax.

**Social security**

If a director is also an employee of the company, the respective pension (20%), health (15%), unemployment (1.7%) and casualty (0.5%) contributions must be paid on the prescribed basis (currently the average salary in Croatia). Exemptions are available based on the EU Regulation on the Coordination of Social Security Systems (883/2004).
The Czech law has been significantly changed since 1 January 2014 when the new Act on Business Corporations became effective. This change has affected, amongst other things, the internal structure of companies and the rights and duties of board members.

This guide focuses on the law relating to directors’ duties in respect of directors of joint stock companies (JSC) and private limited companies. It does not cover the rules of partnership, state enterprises or other legal forms of organisations operating in the non-profit sector.

All comments relate to both types of companies, unless otherwise specified.

**Eligibility requirements**

A natural person or a legal entity may become a director. A director may not simultaneously be a director of another company with an identical or similar business activity, unless the companies have the same holding company (i.e. they are part of one group). However, this restriction may be overcome if the approval of all shareholders is obtained.

**Method of appointment**

In the case of a JSC:

- the method for the appointment of a director is determined by the general meeting, unless the articles of association expressly provide for appointment of directors by the supervisory board. The appointment period is one year unless the articles of association or the performance agreement provide otherwise. The directors may be re-elected;

- the number of directors is three unless otherwise provided for in the articles of association; and

- the articles of association must include the precise number of members of the board.

The Act on Business Corporations allows joint stock companies to implement a single director or “monistic” structure. The executive powers are carried out by the statutory director and the controlling powers are carried out by the administrative committee. The statutory director is appointed by the administrative committee for a period of one year unless otherwise provided for in the articles of association. Only an individual person may be appointed as the statutory director.

In the case of a limited liability company:

- a director is appointed at the general meeting, or by a written resolution of the shareholder(s); and

- the minimum number of directors is one (or such higher number as is prescribed by the memorandum of association). The law does not limit the term of office and the appointment is usually made for an unlimited term.

In both cases, the appointment is effective immediately or from the date determined in the decision. The name, address, date of birth and the date of appointment of the director must be registered with the Commercial Register (Companies Register) kept by Regional Courts.

**Method of removal**

A director may resign from his/her office by giving notice of his/her resignation to the relevant statutory body (i.e. the supervisory board or at the general meeting) which appointed the director.
However, he may not be able to resign at a time inconvenient for the company. The director’s tenure terminates one month after the receipt of the notification (unless the relevant statutory body of the company approves a different date at the request of the director).

A director is always subject to removal by resolution of the general meeting (or by the Supervisory Board/administrative committee, if the articles of association so provide). If directors are appointed for a fixed term, their appointment will terminate if they are not re-appointed at the relevant time.

Any change in the director’s office has to be registered in the Commercial Register kept by the relevant Regional Court. The registration has a declaratory effect towards third parties.

**Authority and representation**

The directors are ‘statutory bodies’ ("statutární orgány") of the company and their actions are deemed to be the actions of the company itself. This means that the directors have full authority to represent the company (solely or jointly – see below) and that this authority can not be limited in any way towards third parties. There is no need for the directors to have special authorisation for certain acts to be valid (for example, the sale of real property), although certain material legal actions do require the approval of the general meeting or Supervisory Board/administrative committee. If the joint stock company implements the sole director structure, the statutory director is the “statutory body”.

The directors will always bind the company, unless a director acts outside the powers conferred by general law. For example, if under general law the consent of the general meeting is required for a contract, and such consent is not obtained, then a contract signed by a director would be invalid. Under the general law, a general meeting must decide (amongst other things) on: changes to the registered capital, changes of directors (limited liability company) or members of the board of directors (JSC) or Supervisory Board/administrative committee members, and decisions as to a sale of the business or (in the case of a JSC) a decision to seek permission for shares to be publicly traded, and on such other matters set out in law or the memorandum of association of the company.

In the case of limited liability companies, the memorandum of association specifies whether each director may bind the company or whether two or more signatories are necessary. This information is one of the prerequisites for the incorporation of the company and will be entered on the publicly accessible Commercial Register. If there is no information concerning signing authority, each director may act independently.

The statutory body of a JSC is its board, which consists of three directors (unless otherwise provided for in the articles of association). Board decisions are by a majority of votes, unless otherwise specified in the articles of association of the company. The articles of association specify whether relevant members of the board of directors may bind the company individually or whether two or more signatories are necessary. This information is one of the prerequisites for the incorporation of the company and will be entered on the publicly accessible Commercial Register. If there is no information concerning signing authority, each member of the board of directors may act independently.

Notwithstanding the above, and regardless of whether the internal signing requirements are publicly accessible, the company will be bound by an act of a director (limited liability company) or the board of directors (JSC) towards third parties; even if such an act is contrary to the memorandum and articles of association of the company (but is otherwise lawful).

Any limitation on the authority of the directors to represent the company (apart from the limitation described above, whereby a director acts contrary to the law) which is included in the memorandum or articles of association, or is given by a decision of the general meeting, will have no effect towards third parties. However, the company may sue the director who acted outside his or her authority for damages.

**Working rules of the board**

A single director can manage a limited liability company but the company’s memorandum or articles of association may provide for virtually any number of directors. If more directors are appointed, the memorandum or articles of association may state that each of them acts on behalf of the company separately, or that certain numbers of directors (or even all of them) must act jointly.

The board of directors of a JSC has three members (unless otherwise provided for in the articles of association) and, again, the law sets no maximum limit. In the sole director structure, only one individual may be a statutory director.

The directors/board members may be individuals or legal entities.

The board of directors adopts its resolutions by a simple majority of votes of the total number of its members, unless the company’s articles of association provides for a qualified majority. The company’s articles of association may even permit voting in writing, or by means of communication with persons outside the meeting room, if all members of the board concerned agree.
**Contractual relationship with the company**

Any payment by the company to a director that is not specified by law, or the internal rules of the company, can only be made with the general meeting’s approval – unless such payment is explicitly stated in a performance agreement concluded between the director and the company.

The company may not make such payment if the director’s performance has contributed to the company’s adverse business results or if the director has failed (deliberately or negligently) to fulfil his or her duties. If the company becomes bankrupt, an insolvency trustee may request that the directors return the salary that they received for last two years where the directors have not adopted relevant precautions to protect the company from the bankruptcy.

**Conflicts of interest**

The Act on Business Corporations sets out restrictions on a director’s activities so as to prevent conflict of interest situations. The articles of association may stipulate additional limitations. Under the Act on Business Corporations, a director may not:

- carry on, either on his or her own behalf or on behalf of a connected person, any business activity that is of the same kind as, or is connected to, a business activity of the company, or enter into business relationships with the company;
- mediate business activities of the company for other persons;
- take part in the business activities of another company as an associate with unlimited liability, or hold a controlling interest in another company with the same or similar scope of business; and/or
- perform the office of a director or other statutory or other body, or be a member, of another legal entity which carries on the same or similar business, unless the companies are members of the same holding group.

**Duties of a director**

The duties of a director are set out in the Act on Business Corporations, and are supplemented by a number of other binding rules. The directors must keep all mandatory evidence, accounting books and a list of shareholders and keep shareholders informed of matters regarding the company.

The directors must convene a general meeting at least once a year. This period may be shortened, but not prolonged, by the company’s memorandum or articles of association, or by law.

The directors must follow the principles and instructions adopted by the general meeting, provided that they conform to law and the articles of association. The directors must exercise their range of powers with due managerial care (i.e. the directors are obliged to act (a) in favour of the company (i.e. loyalty) and (b) with diligence and knowledge) and not disclose confidential information and facts to third parties if such disclosure might be detrimental to the company.

The directors must act in the best interests of the company. The burden of proof lies with the director if he or she is allegedly in breach of such duty of care.

The directors must file, without undue delay, an insolvency petition to initiate insolvency proceedings in respect of the company if the conditions stipulated by insolvency law are met. If this duty is breached (even negligently) the directors will be liable for the damage corresponding to the difference between the amount of the receivable identified in the insolvency proceedings and the amount of the receivable that the creditor actually received.

The directors are, in certain cases, obliged to convene a general meeting of the company (for example, upon shareholder’s request or if the company is in a poor financial situation etc).

The directors must produce minutes from general meetings (and for private limited companies, distribute these to all shareholders) and prepare (as required by law) notifications to the Commercial Register and other authorities, relevant decisions of the general meetings and updated versions of the corporate documents, annual financial statements etc.

**Liability**

Although the company will be liable for any breach, a director is also personally liable for ensuring the company complies with all of the following requirements:

**Commercial law**

A director will be held liable for breaches of contractual obligations. This is an objective liability, i.e. no negligent or intentional conduct is required. All obligations in the Commercial Code have to be complied with.

**Taxation law**

A director will be held liable for ensuring that the company pays its taxes and advances in time and submits tax declarations.

**Financial law**

A director will be held liable for ensuring that the company makes payments in time, especially those regarding the company’s employees’ social security
insurance, health insurance and contribution to the State Employment Policy.

**Criminal law**  
A director might be found personally liable for crimes defined by the Penal Code, especially economic crimes committed by him during the performance of his or her duties.

**Administrative law**  
A director must ensure that all administrative law requirements are fully met and in a timely manner, especially those concerning business licences or other business permits and environmental law requirements etc.

**Labour law**  
A director must ensure that the requirements of the Labour Code and any secondary legislation regarding employees’ conditions are met.

**Civil law**  
A director must ensure that the company meets all the liability requirements specified in the Civil Code under special provisions relating to liability for “special liability” cases.

**Insolvency**  
The directors must submit an insolvency petition to the court without undue delay if the company becomes insolvent under the Insolvency Act. The term “insolvency” is defined in the Insolvency Act. A breach of this obligation results in the directors effectively guaranteeing liabilities of the company arising after they knew or should have known that the obligation to submit the insolvency petition had arisen.

The Act on Business Corporations grants the insolvency court the right to disqualify any individual who has served as a director of a bankrupt company at the time the declaration on the insolvency of the company was issued or afterwards, from corporate directorship for a three year period where his or her behavior led the company to bankruptcy. The insolvency court may also disqualify a director if his behavior caused a decrease in assets and disadvantaged creditors. Directors will not be disqualified if they acted in compliance with the standards of care of a diligent business person.

A person must notify the shareholder(s) if he or she acted in the last three years as a director of a company against which insolvency proceedings were brought or if he or she has any impediment to their suitability to be a director.

A person who substantially influences the action of a company and as a result causes damage to the company, is obliged to compensate the company for the damage, unless he or she could reasonably have believed that he or she was acting in the interests of the company.

**Limitation of liability**  
Any arrangement between the company and a director, relieving him from liability for damage caused by him to the company, or limiting their liability, is null and void.

**Immigration issues**  
Generally, a foreign individual who wants to become a director of a Czech company, or a Czech affiliate of a foreign company, does not need a visa or work permit. However, in some specific cases individuals from outside the EU will need a visa and a work permit.

Notwithstanding the above, under Czech law a person becomes a director at the moment of effectiveness of his or her election by the general meeting. As of that moment the director can fully exercise his or her powers and owes directors duties, and the subsequent registration in the public corporate register has no further effect except publicity.

**Taxation**  
If a director works in a different EU member state to the EU member state in which the director resides, the director’s salary is subject to tax in the EU member state in which the director works (i.e. the “state of income”). International treaties may however provide that the director’s salary is subject to tax in the EU member state in which the director resides (i.e. the “state of origin”). The Czech Republic has concluded such treaties with all EU countries, the USA and many other countries.

Directors are either expected to pay tax on all of their income in their state of tax residence, or, if they stay over 183 days in the Czech Republic during a calendar year, they must pay tax on all of their income (worldwide) in the Czech Republic. Payments of social security and health insurance by foreigners in the Czech Republic can only be offset in their respective countries if an international treaty so provides.

**Social security**  
Czech directors have to pay both social security and health insurance if they receive payments in the Czech Republic. Foreign directors managing either Czech entities, or Czech affiliates of foreign companies, are also subject to Czech law if they are also employees of such companies and receive their payments in the Czech Republic. Consequently, they also must pay social security and health insurance in the Czech Republic from their income, regardless of their actual residence with respect to taxes and double tax treaties.
Duties & Responsibilities of Directors

France

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A. The Limited Company – Société Anonyme (SA)

Eligibility requirements

There are certain restrictions regarding persons who are entitled to be directors. In particular, persons who have been disqualified from acting as a director and persons without legal capacity to act (mentally impaired or non-emancipated minors) cannot be appointed as directors.

Directors do not have to hold qualifying shares. However, the articles of association may include such a requirement, except in state-owned companies.

However, in listed companies, it is recommended that directors hold a significant number of shares.

The articles of association may also contain other requirements, for example a requirement for specific skills (confirmed by a diploma or professional qualification) or an age limitation.

A director is not required to be a French national, nor must he or she be resident in France.

A legal entity can be appointed as director. In such a case, a permanent representative (représentant permanent) must be appointed to represent the legal entity on the board. This permanent representative has to satisfy all the eligibility requirements which apply to directors.

A law of 27 January 2011 provides that the composition of boards of directors in limited companies has to achieve a balance between women and men. In listed limited companies, the proportion of directors of each sex in boards of directors cannot be lower than 20% at the end of the first ordinary general shareholders’ meeting following 1 January 2014. This proportion will be increased to 40% at the end of the first ordinary general shareholders’ meeting following 1 January 2017.

In limited companies, the articles of association may provide that some directors have to be elected by employees (up to a maximum of four directors, or five if the company is a listed company).

Moreover, since a law of 14 June 2013, limited companies which employ more than 5,000 employees in France or more than 10,000 employees worldwide, including subsidiaries, have to organise the election of one or two directors by employees of the company.

Method of appointment

At the time of the company’s incorporation, the first directors are designated in the articles of association.

Following incorporation, the directors, other than directors elected by employees, are appointed at the ordinary general shareholders’ meeting.

If there is a vacancy on the board of directors (through death or resignation), the board of directors can temporarily fill such vacancy. Any such temporary appointment has to be ratified at the next general shareholders’ meeting.

All relevant information about proposed directors has to be communicated or made available to the shareholders prior to any general meeting to appoint directors. The articles of association set out the length of the directors’ term of office which may not exceed six years.
Directors are eligible for re-appointment, unless the articles of association provide otherwise. Upon the expiry of a director’s term of office, the board of directors has to convene a general meeting to consider the vacancy. The appointment of a director must be published in a legal notice bulletin, filed with the office of the commercial court (greffe du tribunal de commerce), registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. Details of directors’ remuneration are set out in a report on the annual accounts, but only in listed companies or in companies that are controlled by a listed company.

Method of removal

Shareholders in ordinary general meetings may dismiss a director at any time. There is no need to provide reasons for the dismissal. However, such a decision must not be taken in insulting or hurtful circumstances, but after a ‘proper hearing’. Otherwise the company could be liable to pay damages.

A director may resign at any time, without giving any reason. However, when the resignation is reckless, the director may be ordered to pay damages to repair any loss suffered by the company. A director who is struck by incapacity or a disqualification order must resign. The removal of a director has to be published in a legal notice bulletin, filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. The removal of a director does not put an end to his or her liability. He or she can still be liable if he or she has breached directors’ duties prior to his or her removal.

Authority of the board

The board of directors plans the company’s activities and supervises their implementation. It has all the powers to carry out the company’s corporate object, except for matters expressly reserved to the general shareholders’ meeting by law or by the articles of association. Practically, the managing director exercises most of these powers.

The board carries out such inspections and verifications as it considers appropriate. The chairman or the managing director is required to send all the documents and information needed to perform this task to each director. However, certain decisions are expressly reserved to the board (convening general meetings, drawing up the company’s accounts and annual management reports, co-appointing directors, nominating and dismissing the chairman and the managing director).

Working rules of the board

A company has to have at least three directors and at the most eighteen, excluding directors elected by employees. The articles of association set out the number of directors required within these limits.

The board of directors is a collegiate body. Its decisions have to be taken by an absolute majority of the directors present or represented. In principle, the chairman of the meeting has a casting vote.

Contractual relationships with the company

Agreements entered into between the company and a director are ‘free’ (i.e. no need for any authorisation or approval) only if they are ‘arm’s length’ agreements and relate to ordinary business. These ‘free’ agreements are no longer subjected to any formality.

Several specific agreements are prohibited: loans raised from the company, guarantees given to a director for his or her commitments towards a third party, and overdraft agreements.

All other agreements entered into, directly or indirectly, between the company and one of its directors, or one of its shareholders holding more than 10% of voting rights in the company, have to follow a specific procedure. Such agreements must first be authorised by the board of directors. If such authorisation is not obtained, these agreements may be terminated if they have been harmful to the company. Moreover, these agreements have to be approved by the general shareholders’ meeting, following the presentation of a special report from the auditors. If such approval is not obtained, these agreements may not be terminated but the directors concerned will be liable for these towards third parties.

A limited number of directors (in principle a third of the directors in office) may also be employees of the company in specific conditions:

— if, at the end of a fiscal year, the company does not exceed the following thresholds defining small and medium-sized companies:
  - 250 employees; and
  - annual turnover of EUR 50m and/or annual balance sheet total of EUR 43m, a director may become an employee of the company on the board of which he or she sits if his or her employment agreement relates to an effective job. In such a company, an employee may become a director if his or her employment agreement relates to an effective job.
— if the company exceeds the thresholds defining small and medium-sized companies detailed above, a director may not become an employee of the
company. However, an employee of the company may become a director without losing the benefit of his or her employment agreement, provided he or she still fulfills specific and effective tasks as an employee and remains in a subordinate position towards the company.

Directors are remunerated by directors’ fees of an annual basic amount, to reward their regular attendance at board meetings. Additional extraordinary remuneration may be granted by the board to directors who carry out specific activities (specific missions or mandates). This has to be approved using the specific ‘control’ procedure detailed above. The remuneration of the chairman and managing director is determined by the board of directors. Details of such remuneration are published in the report to the annual accounts, but only in listed companies or in companies which are controlled by a listed company.

Conflicts of interest

According to case law, if a director has a personal interest in a decision which is to be voted upon, he or she still may participate in the vote, unless his or her conflict of interest goes against the corporate interest. When there is a conflict between the corporate interest and his or her interests as a shareholder, a director must favour the company’s interest.

Directors’ duties

The director has to act according to the corporate object. The board of directors only has powers within the framework of the corporate object. However, this rule only has effect in relation to the shareholders. Indeed, in its relationships with third parties, the company is even bound by acts exceeding the corporate object.

The director has to attend board meetings. Even if he or she is absent, he or she is still liable for board decisions that are harmful to the company or third parties.

The director has a duty of confidentiality in respect of all the board’s proceedings.

Generally, the director must always act according to the corporate interest, and must also be particularly careful if the company has financial difficulties.

Liability

A director may be held liable for the following categories of breaches towards the company and third parties:

— breaches of the law and regulations applicable to limited companies;
— breaches of the articles of association; and
— mismanagement.

Directors are personally liable only if they have breached their duties towards third parties who are not shareholders, and if such breach is not intrinsically connected with the performance of these duties.

A director is only liable if the breach he has committed has caused personal damage to the victim.

Directors may be liable individually or jointly, depending on whether a director individually or several directors collectively have breached their directors’ duties. Directors may also be criminally liable for offences committed during the exercise of their duties. Directors may be liable for certain specific offences such as misuse of company property, misuse of power and distribution of fictitious dividends.

In the event of bankruptcy, a specific action may be brought against directors who may be ordered to pay off all or part of the company’s debts. This sanction is the only one that directors may be subjected to.

Liability suits brought against directors by third parties suffering damages, by shareholders acting individually or on behalf of the company (action ut singuli) lapse three years from the commission of the harmful act.

Limitation of liability

French law prohibits any limitation of directors’ liability in the articles of association. Articles of association which require the consent of a shareholders’ meeting for an action to be brought against a director, or provide an anticipated waiver of this action, will be ineffective. Regardless of any decision passed by the shareholders in a general meeting, a director who acted outside the scope of his or her powers may still be sued.

Immigration issues

Except as otherwise provided for in the articles of association, foreigners (EU residents or non-EU residents) may be directors of limited companies without needing to satisfy various requirements. They do not have to obtain a temporary visa (carte de séjour temporaire) or issue a statement to the prefect (préfet). This rule only applies if the foreign director is not chairman or managing director.

Taxation

Director’s fees paid to directors of limited companies are taxable in France whether or not the director lives in France. The chairman’s remuneration is subject to income tax (employees’ regime).
National insurance scheme

Directors’ fees are not subject to the national insurance scheme, as long as the director’s work is not salaried, i.e. the director is not an employee of the company. The chairman and the managing director are mandatorily subject to the national insurance scheme, even if they do not have an employment contract.

Managing directors

The chairman of the board and the managing director may be the same person if permitted by the articles of association.

The chairman of the board is in charge of organising and managing the board. The chairman makes sure that the company’s management bodies are properly run and that the directors are capable of fulfilling their offices. The chairman may not substitute himself or herself for the board of directors or for the shareholders’ general meetings. In practice, the chairman has a non-executive role whilst the managing director fulfils the executive office. The chairman is selected from the directors of the company by an absolute majority decision of the board of directors, unless the articles of association prescribe a qualified majority. The chairman may be dismissed at any time by the board of directors; provisions in the articles of association which restrict this rule are considered ineffective. There is no need to provide reasons for the dismissal, but such a decision must be taken after a ‘proper hearing’ and not in insulting or hurtful circumstances.

The managing director is in charge of the general management of the company. He or she has the power to act in the name of the company except in relation to matters which are expressly reserved to the general shareholders’ meeting or to the board of directors by law or by the articles of association. The managing director represents the company in its relationships with third parties. As regards third parties, the company is even bound by acts exceeding the corporate object, unless the company can show that the third party was aware of this. The managing director is appointed and may be dismissed at any time by the board of directors. The managing director may be assisted in the exercise of his or her duties by a maximum of five deputy-managing directors appointed by the board after a managing director’s proposal. The deputy-managing director’s status is effectively the same as the managing director.

The appointment and removal of the chairman and managing director have to be published in a legal notice bulletin, filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. The chairman and the managing director have to comply with strict rules as to the number of offices they can hold. Managing directors may hold a second office in a controlled company and a third one in a non-listed company. In principle the chairman and the managing director are liable in the same way as directors. However their liability is likely to be invoked more often since they are in charge of day-to-day management.

Management bodies of limited companies with a managing board and supervisory board

A limited company with a managing board (directoire) and supervisory board (conseil de surveillance) has two bodies: a managing board, which has the power to carry out the corporate object of the company in all circumstances and to act in the name of the company except in relation to such matters as are expressly reserved to the general shareholders’ meeting or to the supervisory board; and, a supervisory board, which has a permanent supervisory role to control management of the managing board. It therefore has specific powers such as the power to carry out any useful verification at any time, such as verification of the annual accounts.

The managing board may not appoint more than five members or seven if the company is a listed company. They must be individuals, but not necessarily shareholders of the company. They are appointed by the supervisory board. The supervisory board must comprise at least three but not more than eighteen members (without taking into account members elected by employees). The eligibility requirements for members of the supervisory board are effectively the same as those required to be a director of a limited company.

Members of the managing board may be dismissed by the general shareholders’ meeting or, if it is provided for in the articles of association of the company, by the supervisory board. Members of the supervisory board may be dismissed at any time by the ordinary general shareholders’ meeting.

Members of the managing board and members of the supervisory board have to comply with strict rules as to the number of offices they may hold. Members of the managing board may hold a second office in a controlled company, and a third one in a non-listed company. Members of the supervisory board can hold up to five offices.

The remuneration of the members of the managing board is determined by the supervisory board at the time of their appointment. The remuneration of the members of the supervisory board is similar to that of directors in limited companies (director’s fees, extraordinary remuneration following the specific ‘control’ procedure). The supervisory board votes on the chairman’s remuneration. Details of such remuneration have to be published in the report on the annual
accounts, but only in listed companies or in companies which are controlled by a listed company.

Members of the managing board are liable in the same way as directors of limited companies, if they have breached their duties. Members of the supervisory board are liable towards the company and third parties only if they have personally breached their duties. They are not liable for their acts of management.

B. The Simplified Limited Company – Société par Actions Simplifiée (SAS)

Eligibility requirements

Shareholders have the power to freely determine the organisation of the management bodies in the articles of association. However, the shareholders have to appoint a chairman who represents the company in its relationships with third parties. There are certain restrictions which apply to potential managers of a simplified limited company. In particular, such person must not carry out an activity incompatible with the duties of management of commercial companies and must not be personally bankrupt.

The articles of association may prescribe specific requirements, such as a requirement for specific skills or an age limitation or even a requirement to hold shares. A legal entity may be appointed as a manager of a simplified limited company unless the articles of association provide otherwise. In such a case, the permanent representative of the legal entity must comply with the same eligibility requirements as if he or she was manager in his or her personal capacity.

Method of appointment

The method of appointment of the chairman and other managers is freely determined by the articles of association. A collective decision of the shareholders is not necessarily required. At the time of the company’s incorporation, the first managers are appointed in the articles of association. Details of the chairman and all the persons having actual powers to manage the simplified limited company, including the permanent representatives of legal entities appointed as managers, have to be published in a legal notice bulletin, which in turn must be filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices.

Method of removal

Managers of a simplified limited company are dismissed in accordance with the procedure set out in the articles of association. The articles of association will determine whether the shareholders, a group of shareholders, or a supervising body may have the right to dismiss a manager. A dismissal decision does not have to be justified. However, such a decision must be taken after a ‘proper hearing’ and not in insulting or hurtful circumstances. Managers may resign at any time in accordance with the procedure set out in the articles of association (such as complying with notice provisions). The articles of association may provide for the payment of damages in the event of a manager’s removal and set out the basis of the payment.

Authority and representation

The chairman represents the company in its relationships with third parties. Any provisions of articles of association that restrict this rule are ineffective. He or she has all powers to fulfil the corporate object of the company in all circumstances and in the name of the company. However, the articles of association may limit the powers granted to the chairman in his relationships with the shareholders. Such restrictions are not enforceable against third parties. In the absence of specific legal provisions, the powers of the other managers have to be precisely set out in the articles of association. In principle, they are not the legal representatives of the company as regards third parties, but they may be granted a delegation of powers by the chairman (the delegated powers, however, are necessarily limited).

Contractual relationships with the company

As in a limited company, agreements entered into between a manager and the simplified limited company are only ‘free’ (i.e. do not require any authorisation or approval) if they are ‘arm’s length’ agreements and relate to ordinary business. These ‘free’ agreements are no longer subjected to any formality.

Several specific agreements are prohibited: loans raised from the company; guarantees given to a director for his or her commitments towards a third party; and overdraft agreements.

All other agreements entered into between a manager and the simplified limited company have to follow a prior approval procedure. They have to be approved by the shareholders following the presentation of a special report from the statutory auditors.

The articles of association set out the basis of remuneration of the managers of a simplified limited company. In all cases, the remuneration has to be viewed as an agreement requiring prior approval. A manager of a simplified limited company may also be an employee of the company, unless the articles
of association provide otherwise, and only if he or she still fulfills specific and effective tasks as an employee and remains in a subordinated position towards the company.

The entry into, or modification of, an employment agreement with a manager in the exercise of his or her duties has to follow the prior approval procedure mentioned above.

**Supervision of the management**

The shareholders’ meeting is considered to be a supervising body, particularly when they approve the annual accounts.

The articles of association may also provide for the appointment of a supervising body. In such a case, the articles of association provide for its composition and working rules. As in the case of limited companies, certain simplified limited companies are subject to supervision by one or more statutory auditors.

**Liability**

Managers of a simplified limited company are liable on the same basis as directors of a limited company. In other words, they may become liable for: breach of the law and regulation applicable to simplified limited companies, breach of the articles of association, and mismanagement.

They are also subject to the criminal penalties applicable to specific offences committed in the exercise of their duties such as misuse of company property, misuse of power and distribution of fictitious dividends. French law prohibits any limitation of the manager’s liability in the articles of association.

**Taxation**

Managers of a simplified limited company are subject to income tax (employees’ regime).

**National insurance scheme**

Managers of a simplified limited company are mandatorily subject to the national insurance scheme, even if they do not have an employment contract.
This guide focuses on the rules relating to companies with limited liability (‘Gesellschaften mit beschränkter Haftung’ or ‘GmbH’). It does not address the rules for other forms of company, such as joint stock corporations (‘Aktiengesellschaften’) or partnerships (‘Personengesellschaften’).

The rules which apply to the management of stock corporations differ substantially from the rules governing limited liability companies. As a general rule, the management board (‘Vorstand’) of a stock corporation can independently manage the company, subject to supervision by the supervisory board (‘Aufsichtsrat’). By contrast, the shareholders’ meeting (‘Gesellschafterversammlung’) or the sole shareholder of a limited liability company may influence every single management issue by giving instructions to the managing directors (‘Geschäftsführer’). The shareholders are therefore more closely involved in the operation of the company.

German limited liability companies have one or more managing director(s). They may have a voluntary advisory board (‘Beirat’). However, this is not very common for companies which are part of a larger group. Note, however, that due to the German co-determination rules, companies with more than 500 employees are required to have a supervisory board. Where this is the case, a number of the supervisory board members are elected by the employees.

Eligibility requirements

There are generally very few restrictions on who can become a managing director. Only individuals (as opposed to companies or other corporate entities) may be appointed as managing directors. Managing directors are not required to be German citizens and do not need to be resident in Germany. The practice of some commercial registers (‘Handelsregister’) is, however, to require foreign managing directors to be capable of entering Germany at any time.

Method of appointment

The method of appointing managing directors is determined by law and the articles of association (‘Satzung’) of the company. A managing director is normally appointed by a resolution of the shareholders or, if permitted under the articles of association, by a committee of shareholders or the advisory board. If there is a mandatory supervisory board and the company has more than 2,000 employees, managing directors are appointed by the supervisory board. In this instance, one of the company’s managing directors must be an employment director (‘Arbeitsdirektor’), with special responsibility for employment matters.

Notification of the appointment and an affidavit signed by the managing director and notarised by a notary public must be submitted to the commercial register. The minimum number of directors is one (or such higher number as is set out in the company’s articles). Where an employment director is required, the minimum number is two.

Appointments are frequently open-ended, but can also be made for a fixed term. In addition to formal appointments, companies regularly enter into service agreements with their managing directors.
Removal of directors

A managing director may resign from his or her office at any time by giving notice to the company, although such resignation may constitute a breach of contract. A managing director is subject to removal by shareholders’ resolution at any time. However, he or she may still be entitled to his or her salary and other benefits under a service agreement.

Notice of the resignation or removal of a director must be provided to the relevant commercial register in notarised form.

Authority and representation

Under German law, the authority to conduct the business of the company (‘Geschäftsführung’) and the power to represent the company in dealings with third parties (‘Vertretungsbefugnis’) must be distinguished. While the former may be limited, the power to represent the company in dealings with third parties is generally unlimited.

The managing director’s authority to conduct the business of the company is restricted by the articles of association, internal management rules, the service agreement and possibly by shareholders’ resolutions, supervisory board resolutions and decisions taken by the managing director(s) themselves. It is common practice to include a list of matters which fall outside the managing director’s authority in either the articles of association, the internal management rules or the service agreement. The managing director may not act in respect of such matters without prior approval from the competent body (usually the shareholders meeting).

Generally, the company is represented by all its managing directors acting jointly. This rule, however, is often altered by the company’s articles. For example, one of the managing directors may be granted sole power of representation, or alternatively any two managing directors together or one of the managing directors together with a holder of procuration (‘Prokurist’) may represent the company.

Contractual relationship with the company

Appointment as a managing director does not in itself create a contractual relationship between the director and the company or entitle the director to remuneration.

The company therefore usually enters into a service agreement with the managing director, specifying the managing director’s duties and remuneration and containing provisions on matters such as confidentiality, non- solicitation, non-competition and fringe benefits. The service agreement is entered into by all shareholders on behalf of the company (unless there is a supervisory board) and the managing director.

Removal of a director does not automatically terminate a service agreement and vice versa. Subject to certain restrictions, the service agreement may, however, expressly stipulate that if an individual ceases to be the managing director of the company, then his or her service agreement shall terminate as if notice of termination had been given.

Conflicts of interest

A managing director is subject to a statutory covenant not to compete with the company’s business while holding his or her office. The shareholders may release the managing director from this covenant at any time. Any non-competition and non-solicitation covenants which go beyond the statutory covenant must be set out in the service agreement. A managing director cannot represent the company in dealings with himself or herself or with a third party represented by him or her (such as another ‘affiliated’ company for which he or she also acts as managing director), unless authorised by a shareholders’ resolution. Such a resolution has to be permitted by the company’s articles and filed with the commercial register.

Duties

The duties of the managing director are complex and this section merely provides a basic introduction to the subject. A managing director must comply with mandatory provisions of the law, the articles of association, the provisions of any service agreement, and shareholders’ resolutions. He or she must, in all circumstances, act in the best interests of the company, which are not necessarily identical to the shareholders’ interests. A breach of the duty to act in the best interests of the company can normally be ratified by the company’s shareholders.

Responsibilities does not affect the overall responsibility of each managing director for the company’s business as a whole.
There are also many duties of a managing director aimed at protecting the interests of third parties such as the company’s creditors and even the general public (for example, the tax and social security authorities). If the company is in financial difficulties, there is a greater onus on the managing director to act in the interests of creditors, and in such circumstances, there is a greater risk of the managing director incurring personal liability. Professional advice should therefore be obtained as a matter of course.

In all matters concerning the company, a managing director must exercise the diligence of an ‘orderly businessman’. The test is objective and requires the director to exercise reasonable care, without regard to his or her own individual level of skill and experience.

A managing director is subject to a wide range of specific statutory duties, for example requiring him or her to:

- ensure all statutory filings with the commercial register are made;
- comply with the statutory requirement to maintain accounts;
- uphold the principles of capital maintenance (i.e. not to pay back to the shareholders the stated share capital of the company) – a doctrine that has led to very complex case law and which particularly affects intra group transactions such as cash pooling or upstream loans/upstream securities;
- prepare for and convene the annual shareholders’ meeting;
- report to the shareholders and answer their requests for information.

The managing director must also ensure that the company meets its obligations under public law – in particular tax and social security laws.

**Limitation of liability**

It is somewhat doubtful under German law whether the managing director’s liability to the company can be validly limited in advance by any kind of general agreement.

The company, however, may waive specific claims against a managing director. The shareholders of a company regularly resolve to approve the managing director’s management (‘Entlastung’) after the close of each business year. Such formal approval operates as a waiver of any claims which were identifiable at the time of the resolution.

The managing director’s potential liability towards third parties is not subject to limitation or waiver by the company. Equally, there can be no limitation or waiver where the managing director’s liability to the company is related to the interests of the company’s creditors (most particularly, in an insolvency situation). A managing director’s liability may be covered by an indemnity from the parent company – if so agreed and to the extent permitted by law. Furthermore, the company may take out D&O insurance cover in favour of its managing directors.

**Immigration issues**

A foreign managing director who wishes to establish a residence in Germany is required to obtain a residence permit (‘Aufenthaltserlaubnis’). A separate work permit is no longer required, but is part of the residence permit which generally requires the consent of the employment office. However, consent from the employment office is not needed for managing directors.

EU and European Economic Area nationals are not required to obtain a residence permit or a work permit. However, certain transitory provisions apply to Croatian nationals.
In all other cases, a residence permit will only be issued on a discretionary basis if there is a ‘special local requirement’ or ‘a major German economic interest’. Experience shows that a permit will not be refused if the director is a citizen of the country where the employer has its head office and the director meets certain professional criteria. However, a permit may also be granted to directors who do not meet those criteria. The residence permit will be issued for a limited period of time and subsequent permits are granted when necessary. Foreign managing directors other than EU and European Economic Area nationals must generally apply for a residence permit from outside of Germany. However, there are some further exceptions (for example USA, Japan, Switzerland). The processing of the application usually requires at least two months.

**Taxation**

If a managing director is resident in Germany, his or her worldwide income is subject to German income tax. If he or she is not resident in Germany, only certain sources of income, including income from employment in Germany or consultancy services provided in Germany, are subject to German income tax. Numerous double taxation treaties limit the right of Germany or the foreign country to levy taxation. Income is generally taxed at a progressive rate, ranging from approximately 15% to about 47% (including solidarity surcharge and the top tax bracket, the so called ‘Reichensteuer’).

There are various tax deductions which may apply, for example for the maintenance of two households. However there are certain restrictions in case of non-resident taxation. If the director is also a shareholder of the company, the dividends received might be subject to different rules depending on whether they qualify as salary or as income from capital investments.

**Social security**

If a director is classed as an employee, as would normally be the case, pension contributions, health insurance, personal injury insurance and unemployment insurance will be deducted on a mandatory basis, regardless of whether the director is resident in Germany or not. The director’s social security contributions amount to about 20% of his or her gross salary up to certain caps. The company has to contribute approximately the same amounts as the employee.

German social security laws do not apply to EU and European Economic Area nationals who are sent to Germany by foreign employers for not more than 12 months. Numerous treaties with other countries also limit the applicability of German social security laws.
This guide focuses on the rules of private limited companies (“Korlátolt Felelősségű Társaság” or “Kft.”). It does not address the rules for other forms of company, such as private or public joint stock limited liability companies (“Zártkörűen Működő Részvénytársaság” or “Zrt.” and “Nyilvánosan Működő Részvénytársaság” or “Nyrt.”). Special rules also apply to single-member private limited companies.

Senior officers of a private limited company are called “managing directors”.

**Eligibility requirements**

There are certain restrictions governing who can become a managing director:

— a managing director must be an adult and must be free of any restrictions on his/her legal capacity to carry out the duties of a managing director;
— a person who has been sentenced to imprisonment by a final judgment for committing a crime may not be a managing director of a company until such person is released from the negative legal consequences relating to his or her criminal record;
— a person who has been barred by a final judgment from being a senior officer may not be a managing director of a company during the effective period of such a ban;
— a person who has been banned by a final court verdict from any profession may not serve as an executive officer during the effective period of such a ban;
— a person who, at the time of the initiation of involuntary striking off proceedings (‘kényszertörlési eljárás’) or in the year of the striking off of a company or in the year preceding the striking off, served as an executive officer of a company or was a member holding exclusive or majority control over a company, for a period of five years after the striking off of the company from the companies register based on the involuntary striking off proceedings, may not be an executive officer of another company;
— if a person has been found liable by a final court decision for any claims that remained unsatisfied in the proceedings leading to the termination of a company without a legal successor (by way of liquidation or involuntary striking off) and if this person has failed to effect the payment obligations in compliance with the final court decision; or if a person failed to pay the debts of the company when it had unlimited liability; or if the Court of Registration imposed a fine on the executive officer of a company and he/she failed to fulfil his/her payment obligation under the final court decision, then this person may not be the executive officer of another company if the enforcement procedure against such a person has been unsuccessful;
— not strictly defined as restrictions but the below also apply when a new person is appointed as an executive officer (the “Relevant Person”). The Relevant Person is not eligible if he/she has been involved, as a member or an executive officer, in the operation of a company (although there are some circumstances exempt from these exclusions):

(a) that has tax arrears exceeding HUF 15m (ca. EUR 50,000) (in the case of taxpayers with the highest taxing capacity of HUF 30m, i.e. ca. EUR 100,000) on the day that it submits a request to have a tax number issued and has been continuously in arrears with tax payments over a period of 180 days, provided that the Relevant Person was an executive officer or
Managing directors may be elected either for a definite period of time, which cannot exceed five years, or, if the articles of association so permit, for an indefinite period. Managing directors may be re-elected.

Method of removal

A managing director may resign at any time by giving notice to the company. If so required for the operation of the company, any resignation will only take effect when a managing director has been appointed or alternatively, on the sixtieth (60th) day after the announcement of the resignation.

The members’ meeting may remove the managing director at any time by means of a resolution passed by way of a simple majority vote (higher voting requirements may be stipulated in the articles of association). Appointments and removals of managing directors must be registered with the Court of Registration. When a managing director who has an employment contract with the company is removed, the terms of the employment contract must also be observed in the course of the removal.

Authority and representation

The articles of association of a company will regulate whether the directors sign individually or jointly on behalf of the company. The members’ meeting may deprive a managing director of such authority only to the extent provided for in the articles of association or in the Companies Act. However, such restrictions will not apply vis-à-vis third parties. A managing director’s duties regarding the company, its bodies and other company officers may only be carried out in person and no representation is permissible.

Working rules of the board

By law, the managing directors of a Kft. do not form a board. This means that a managing director’s right to represent the company may only be restricted by stipulating a requirement for joint signatures. Although it is possible for the constitutional document to provide for a division of responsibilities between different directors, this division would not be effective vis-à-vis third parties (i.e., if a managing director signed a document outside his or her authority, the signature would still bind the company). Similarly, the articles of association may require the prior approval of the members’ meeting or the supervisory board to enter into certain agreements. However, any agreement entered into in breach of this requirement would nonetheless bind the company.

Although legally there is no board for a Kft., a quasi board can be created by prescribing joint signatory requirements and by setting out the procedural rules
Contractual relationship with the company

A managing director may, but need not, be remunerated by the company under a service or an employment agreement for acting as a managing director. It is also possible to engage the managing director under a service contract for his/her duties as a managing director and at the same time employ him/her under an employment agreement for tasks different to those carried out as a managing director. Further, a managing director may also have a contractual relationship with the company as a consultant providing services under a consultancy agreement.

The structure chosen is mainly a tax-driven decision. Termination of a directorship does not automatically terminate the employment/consultancy contractual relationship and vice versa. However, an agreement may provide that it terminates forthwith upon the individual concerned ceasing to be a managing director of the company.

Conflicts of interest

To avoid possible conflicts of interest, managing directors may not acquire ownership (except for the acquisition of shares in a public joint stock limited liability company) and may not accept an executive office in any company whose main business activity is similar to that of the company where he/she serves as an executive officer, unless the articles of association of the relevant company so permit or if a members’ meeting of the company has granted its consent. The articles of association may specify that such a restriction applies to companies pursuing the same activity (i.e. not the same main activity).

Managing directors and their relatives (including their close relatives such as a spouse, children, parents, and relatives like the parents and children of his/her spouse etc.) may not conclude contracts on their own behalf (or for their own benefit) that fall into the main scope of activity of the company, unless the articles of association permit this or unless they are considered to be everyday transactions. The managing director, his/her close relatives or common law spouse may not be elected as a member of the supervisory board at the same company.

Duties of a director

The managing directors carry out the day-to-day management that does not fall within the exclusive scope of the members’ meeting or other company bodies pursuant to law or the articles of association. The managing directors are authorised to represent the company before third parties, courts and other authorities.

Managing directors are required to report any amendments of the articles of association and any changes in the registered data of the company to the Court of Registration. Managing directors may exercise employer’s rights in relation to the company’s employees unless the articles of association provide otherwise.

The managing director is required to keep an up-to-date list of members of the company. The list of members must be amended by any changes of members or quotas (capital) held by them. The up-to-date list of members must be filed with the Court of Registration.

Managing directors are required, at the request of the members, to provide information on the affairs of the company and to allow inspection of its books and documents. The Court of Registration may compel the company to provide such information in the event of non-compliance.

Liability

Managing directors are liable towards the company for breach of contract in accordance with the rules on liability for losses or damages caused to the company by their management activity under the Civil Code. A managing director may be exempt from liability against the company if the managing director proves that the damage occurred in consequence of (i) unforeseen circumstances (ii) beyond his/her control and (iii) he could not have been expected to take action to prevent or mitigate the damage. These circumstances can only be identified in a given situation, the expectable level of control naturally varies, depending on the specific size of the company, its structure, organisation, number of executive officers, how the work is divided between them, etc.

If the managing director performs his/her duties without consideration, then relatively less stringent liability rules are applicable, i.e. (i) in that case he/she will be responsible for the damage or loss that arose in association with the service if he/she caused the loss or damage through intentional misconduct or failed to provide information on any essential characteristic of the service; or (ii) the executive officer may be exonerated from compensating any loss or damage caused by his/her service if he/she proves that his/her conduct was not actionable (he/she acted to a generally acceptable standard in the given situation).

Managing directors may be jointly and severally liable with the company to compensate aggrieved third parties for any loss or damage caused to such third parties in relation to his/her legal relationship. Such liability only arises in respect of non-contractual

in the articles of association that have the practical effect of creating a board framework.

The managing directors are authorised to represent bodies pursuant to law or the articles of association.

Duties of a director

The managing directors carry out the day-to-day management that does not fall within the exclusive scope of the members’ meeting or other company bodies pursuant to law or the articles of association. The managing directors are authorised to represent
situations. In this respect managing directors can exonerate themselves from liability if they can prove that they acted to a generally acceptable standard in the given situation.

In the following exceptional case, managing directors may be held directly liable to the creditors of the company. If a situation that threatens the solvency of the company occurs, the managing directors have to perform their management tasks by taking into consideration the interests of the creditors of the company and not the interests of the company itself. The occurrence of a threatened insolvency situation runs from the date and time from which the managing director foresaw or should have foreseen that the company would not be able to satisfy its liabilities as they fell due. If the company eventually becomes subject to a liquidation procedure or an involuntary striking off (‘kényszertörlés’) and the managing director has not complied with the above obligation, and due to this, the assets of the company have decreased or a full discharge of the creditors’ claims is not possible or environmental obligations are not fulfilled, then the managing director may be held liable to the creditors of the company. This rule applies to managing directors serving as such at the time of the initiation of the liquidation/involuntary striking off procedure and during a period of three years preceding that date. It also applies to persons exercising de facto dominant powers in the decision-making process of the company (i.e. shadow management). The company’s creditors, or in the case of a liquidation the liquidator as well, may file such a claim within 90 days from the termination of the liquidation/involuntary striking off procedure becoming final and binding.

The managing director will be exonerated from the liability described above if he/she can prove that following the occurrence of a threatened insolvency situation, he/she has taken all measures that could be expected in such a situation in order to reduce the losses to creditors and to initiate measures to be taken by the members’ meeting of the company. The creditors’ interests are deemed to have been damaged if, for example, the managing director did not comply with certain specific reporting and information obligations during the liquidation/involuntary striking off procedure.

Limitation of liability

Discharge of liability: at the request of the managing director, the members’ meeting may evaluate the work of the managing directors for the previous financial year at the same time as approving the annual report (or when the managing director’s mandate terminates) in order to decide whether to grant a discharge of liability to the managing directors vis-à-vis the company (i.e. internal liability) in respect of their management activity in the previous financial year.

By granting a discharge of liability, the members’ meeting confirms that the managing directors have performed their duties during the period under review by giving priority to the interests of the company and the company may not claim damages from the managing director on that basis. The discharge of liability will become ineffective if a court ruling subsequently declares that the information on which the discharge of liability was granted was false or incomplete.

Within their internal relationship, the company and the managing director may agree on a limitation of the managing director’s liability. With respect to external relationships (i.e. the liability of the managing director towards third parties), it is possible for the company to grant an indemnity to the managing director by which the company undertakes to compensate the managing director for certain damages or losses. A company is also permitted to purchase directors’ and officers’ insurance on behalf of its directors.

Immigration issues

As an exception from general Hungarian employment rules, no work permit is required for managing directors of companies who are foreign individuals and not Hungarian citizens or residents. This exception does not apply to other activities carried out by the managing director beyond the scope of his/her duties as a managing director.

Foreign individuals coming to Hungary from a member state of the European Economic Area (EEA) to take up a managing director’s position must apply for an EEA resident permit at the relevant regional directorate of the immigration office in Hungary.

Foreign individuals entering Hungary from a non-member state of the EEA to take up a managing director’s position must first apply for a visa or a residence permit for income-earning activities. Such visa can generally be obtained at the Hungarian Embassy or Consulate in the director’s home country. To obtain such a visa, the managing director must submit company documentation showing his or her position in the company. As a subsequent step, before the date of expiry of the visa, the managing director must apply for a residence permit without needing to obtain a visa, by lodging an application for a residence permit at the regional directorate of the immigration office in Hungary.

Taxation

Hungary has concluded double tax treaties with most European and North American countries. Based on most
of these treaties, income received by directors of companies is taxable in the country where the company is resident for tax purposes (i.e. in Hungary).

According to Hungarian personal income tax legislation, income received by managing directors (with respect to their activities as such) is considered income from a non-independent activity and the whole amount should be taken into account when calculating the taxable income. The effective tax rate of income tax is 16%.

**Social security**

Foreign managing directors of a Hungarian company are covered by the Hungarian social security system, and they are liable to pay social security contributions, except if they are exempt by relevant EU rules (i.e. Regulation 883/2004/EC).

Foreigners who are not covered by the Hungarian social security system may enter into an agreement with the Social Security Authority and pay voluntary contributions in order to be eligible for healthcare benefits in Hungary.
This guide focuses on the rules relating to companies limited by shares (‘Società per Azioni’ or ‘S.p.A’). It does not address the rules on other limited liability companies, such as the ‘Società a Responsabilità Limitata’ which are generally companies with smaller capital. Nevertheless, the liability rules relating to the directors of companies limited by shares, as well as limited liability companies, are similar.

**Introduction**

The management of Italian companies limited by shares may consist of one director (‘amministratore unico’) or a board of directors (‘consiglio di amministrazione’). The Italian Civil Code provides that the by-laws of the company should indicate the exact number of directors or the minimum and the maximum number of directors, in which event the ordinary shareholders’ meeting will set the number.

In addition to the board of directors, a board of statutory auditors (‘collegio sindacale’) has to be appointed. This is an internal supervisory body whose role is to check that the company operates in compliance with the law. The board of statutory auditors includes effective auditors and alternate auditors. At least one effective auditor and one alternate auditor must be certified auditors. If the other members of the board of statutory auditors are not certified auditors, they have to be registered on certain professional registers or be permanent professors of economy or law at university. The auditors cannot be directors of the company. The main function of the board of statutory auditors is monitoring the management of and the procedures for the functioning of the company.

Moreover, the Italian Civil Code, as modified according to the corporate law reform which entered into effect on 1 January 2004, set forth in the legislative decree of 17 January 2003, no. 6 and following amendments, and legislative decree 27 January 2010 no. 39 provide for the appointment of a certified person or company to audit of the accounts of the company. Companies that do not need to prepare consolidated annual accounts may grant this power to the board of statutory auditors.

In this case, all the members of the board of statutory auditors have to be certified auditors.

Listed companies must also have their accounts certified by external auditors. The Consob (Italian securities market Regulator) may request information, documentation, make inspections, interview the external auditors, the shareholders, the directors, the statutory auditors and the managers of the auditing firm and whoever may be informed of the relevant facts.

The Italian Civil Code, as modified according to the corporate law reform, has introduced two alternative management schemes to the ordinary system of management:

— the so-called ‘dualistic scheme’, by which a ‘management board’ carries out its duties in collaboration with a ‘supervisory board’. The appointment of the first members of the management board will be made in the articles of incorporation and any further appointment will be made by the supervisory board (for example in the event of early resignation of one of the members). The by-laws set the number of members of the management board, which may not be less than two. Such members hold office for three financial years and may be re-appointed after this time unless the by-laws provide otherwise. With
the exception of certain particular provisions, the same rules regulating the ordinary board of directors also apply to the management board. The supervisory board is comprised of at least three members. Such members need not necessarily be shareholders, but at least one of them needs to be a certified auditor. In the ‘dualistic scheme’ the supervisory board has a general duty to control the activities of the management board and also has some of the powers that commonly pertain to the shareholders’ meeting in the ordinary system, such as the approval of the annual accounts of the company.

— the entire management of the company is carried out pursuant to the ‘monistic scheme’, by a sole entity, namely the board of directors. The appointment of the first members of the board of directors is made in the articles of incorporation. Any further appointment will be made by the shareholders’ meeting. The board of directors appoints some of its members to a ‘surveillance committee’. Management is entrusted to the board of directors and the surveillance committee has the powers which commonly pertain to the board of statutory auditors in the ordinary system. At least one member of the surveillance committee must be a certified auditor.

**Method of appointment**

The method of appointment of the directors is determined by law, the articles of incorporation (‘Atto Costitutivo’), the by-laws (‘Statuto’) of the company and in some cases, by shareholders’ agreements.

Upon incorporation of the company, the directors are appointed in the constitutional documents of the company. During the life of the company, all directors must be appointed by a resolution of the shareholders’ meeting (with some exceptions for the dualistic scheme: see above). The company’s by-laws commonly contain detailed provisions relating to the appointment of directors, the quorum and majority requirements and, in some cases, the specific expertise and reputation that the director should have. Furthermore, the appointment of directors is frequently governed by provisions contained in shareholders’ agreements.

The minimum and maximum number of directors is established in the company’s by-laws.

If there are one or more vacant positions on the board of directors but the majority of the directors on the board hold office, the remaining directors have the right to co-elect a director. However, this resolution is subject to the approval of the board of statutory auditors of the company. The co-opted director will remain in office until the next shareholders’ meeting, which may confirm the appointment of the co-opted director or may appoint someone else. In the ‘dualistic scheme’, co-option of a director is not possible.

If there are one or more vacant positions on the Board of Directors and a majority of the directors on the board no longer hold office, the remaining directors must convene a shareholders’ meeting for the appointment of the requisite number of directors.

Directors’ appointments may only be for a term of up to three financial years. Such appointments expire at the shareholders’ meeting convened for the approval of the annual accounts covering the last financial year of such term of office. If directors resign or are removed from office prior to the expiry of the term, a new director will need to be appointed, serving for the remaining period of office of the person he or she replaces. The directors may be re-elected if the company’s by-laws do not provide otherwise.

The by-laws very often provide for a “simul stabunt simul cadent” clause (if one director resigns, all other members of the board of directors cease to hold office).

The board of directors often delegates its powers to an executive committee consisting of some of its members, or to one or more managing directors (‘amministratori delegati’). The relevant mandate, which is always revocable, may be of a general nature or limited

**Eligibility requirements**

Certain restricted groups of people are not eligible to become directors of a company limited by shares (i.e. minors, bankrupts, legally incapacitated persons). Corporate bodies may not be appointed as directors. In addition to these restrictions, Italian statutory provisions also provide for the following restrictions:

— government employees, members of Parliament, brokers, magistrates, members of supervisory authorities (for example ‘Consob’) etc, may not be members of the board of directors;
— practising lawyers may be appointed to the board of directors provided they are not appointed as sole directors, managing directors or chairman of the board of directors vested with representative powers; and
— individuals who have been appointed to the board of statutory auditors may not be appointed to the board of directors of the same company.

The articles of incorporation may provide for additional specific eligibility requirements.

As a general rule, there are no nationality requirements nor do the directors have to be domiciled in Italy, except for nationals of a state which prevents Italian citizens from becoming a director of a company in that country (principle of reciprocity). Any person who has been appointed as a director of an Italian company is required to elect a domicile in Italy and to apply for an Italian tax code number.
to single acts. However, some powers cannot be delegated (for example the drafting of the annual financial statements).

Once appointed, the directors need to register with the Companies Register within 30 days of acceptance of the appointment and will need to specify whether or not they have been granted representative powers and, if so, whether these have to be exercised jointly or not.

**Method of removal**

A director may resign from office at any time by notice to the board of directors and to the chairman of the board of statutory auditors, stating the reasons for the decision. Resignation is effective immediately. However, in the event of a resignation of the majority of the directors or of the sole director, resignation will only be effective once the majority of the new board or a new sole director have been appointed.

The shareholders’ meeting has the exclusive right to remove a director from his or her office at any time, although the director in question has the right to challenge such a decision. If the removal is not for a ‘just cause’, the director may claim damages and seek compensation. Removal is immediate and the shareholders’ meeting will need to nominate an immediate replacement.

Normally the by-laws of the company will contain provisions relating to the removal of members of the board of directors in the event of one or more directors ceasing to hold office or in the event the company’s equity holders change substantially.

The board of statutory auditors must notify the termination of office of any director to the Companies Register within 30 days of such termination.

**Authority and representation**

The board of directors has all the necessary powers to pursue the company’s objectives, save for those powers expressly reserved to the shareholders’ meeting by law or by the by-laws. All members of the board of directors represent the company in its relations with third parties unless the articles of incorporation or the by-laws provide for restrictions on such representative powers. In practice, authority is commonly delegated to one or more managing directors or to an executive board. It is also common practice to appoint a chief executive (‘direttore generale’) who is not a member of the board of directors. If such person is appointed by the shareholders’ meeting, he has the same responsibilities as a board member.

Restrictions on the powers of the directors contained in the by-laws or resulting from decisions taken by the competent bodies do not affect the rights of third parties, even if such decisions are duly made public, unless it can be proven that such third parties intentionally acted in a manner which was prejudicial to the company.

**Working rules of the Board**

As previously stated, the management is carried out either by a sole director (‘amministratore unico’) or by the board of directors (‘consiglio di amministrazione’). All directors have the same rights and duties and manage the company jointly.

The board of directors is a collective body and its meetings are validly held with the majority of the directors in office. Its decisions must be taken by 50% and the majority of the directors attending the meeting. However, the by-laws may provide for higher attendance quorums and voting requirements.

The by-laws commonly contain provisions describing in detail the duties, responsibilities and powers of each director and the rules governing the board meetings.

**Contractual relationship with the company**

Directors are entitled to remuneration for the services provided. The amount due will be fixed in the by-laws of the company or by the shareholders’ meeting. When special tasks are delegated to a director by the board of directors, additional remuneration may be granted by the board.

A director may also be an employee of the same company, as long as his or her working relationship with the company meets all the requirements of subordinate employment.

**Conflicts of interest**

Any director must inform the other directors and the board of statutory auditors of any interest he has, directly or as a representative of third parties, in a transaction or business with the company. If the director is a managing director, he must abstain from carrying out the transaction and require the relevant resolution be passed by the board of directors. If the director is a sole director he must also inform the shareholders at the next meeting.

In the above cases, the resolution of the board of directors must be adequately justified by explaining the reasons for the transaction and the advisability of it for the company.

In addition, any resolution of the board of directors may be challenged within a period of ninety days, by any director, provided that he or she did not attend the meeting or voted against the relevant resolution, and by the board of statutory auditors, on the basis that:
— the resolution is damaging to the company; and
— the above-mentioned ‘information duties’ have not been complied with, or the resolution would probably not have been passed without the vote of the interested director.

Moreover, unless authorised by the shareholders’ meeting, a director cannot:

— be an unlimited partner in another company carrying out competing activities;
— carry out competing activities for himself or on behalf of third parties; or
— hold office as director or chief executive in another company carrying out competing activities.

**Duties of a director**

The responsibilities and obligations of directors are to manage the company in accordance with applicable statutory rules and by-laws. Directors must act in the best interests of the company. They have a duty to oversee the management of the company and to intervene in order to prevent or limit damages, which the company may incur.

The law provides that directors must comply with specific obligations relating to:

— the keeping of the statutory books;
— the keeping of accounts;
— the fulfilment of registration requirements;
— the calling of Shareholders’ Meetings;
— the verification of assessment reports relating to contributions in kind;
— the observance of deadlines in respect of reductions of the company’s equity, mergers and acquisitions etc; and
— commencing insolvency proceedings.

There are additional strict prohibitions in relation to directors’ actions which are aimed at safeguarding the interests of the company and third parties. For example a director may not:

— represent a shareholder at the Shareholders’ Meeting;
— distribute profits illegitimately;
— disclose insider information; or
— receive loans from the company.

The Italian Civil Code as amended, provides for certain additional duties for directors of a company belonging to a group. Such directors must properly record any decision of the company involving either the parent company, or any other company in the group, in the minutes of meetings of the board of directors. Furthermore, the directors must state in all correspondence and acts of the company that the company is controlled by a parent company and must register the company in a list of ‘controlled companies’ with the Company Registry. These references must be deleted and the registration in the list of controlled companies must be cancelled as soon as the company is no longer a member of the group. Directors who do not comply with the above requirements are directly liable for any damage suffered by the shareholders or any third party as a consequence of their failure to do so.

**Liability**

Directors are not personally liable for the commitments of the company. Directors are liable for damages for non-compliance with their statutory duties and prohibitions (see above). Normally, all directors of the board are jointly liable towards the company, the shareholders and third parties for all damages due to the unlawful conduct of one member of the board.

The company may bring legal action against a director within five years of the termination of the director’s office, provided that the shareholders’ meeting approves such proceedings. Approval of the resolution by shareholders representing at least one-fifth of the share capital will result in the automatic removal of the director against whom the legal proceedings are commenced.

Even without a resolution of the shareholders’ meeting, minority shareholders representing at least one-fifth of the company’s capital (one-fortieth or less in listed companies) or a different percentage (not higher than one-third of the company’s capital) as provided in the by-laws, may institute legal proceedings on behalf of the company in respect of the liability of the directors for the breach of their corporate duties.

It is commonly accepted that the creditors of the company may hold the directors liable for damages if they did not comply with their statutory duties to safeguard the company’s equity (for example omitting to call a shareholders’ meeting to raise the company’s capital in case of losses) or if the directors’ negligent management causes the company’s insolvency. For a period of five years, the board of directors is liable for damages to individual shareholders or third parties for any fraudulent conduct in its management duties (for example, false information).

**Limitation of liability**

A director will not be held liable in the event that:

— he did not attend the relevant board meeting, provided that he verified the minutes, recorded his disagreement in the relevant corporate book, and informed the chairman of the board of the statutory auditors immediately of the unlawful resolution; or
Duties & Responsibilities of Directors

— he attended the relevant board meeting but voted against the resolution and informed the chairman of the board of the statutory auditors.

Crimes committed by directors pursuant to legislative decree no. 231/2001

The Legislative Decree n. 231 of 8 June 2001 (the “Decree”) provides for an administrative liability of a company for criminal actions committed directly by its directors, chief executive officers or employees in the interest of and/or to the advantage of the company itself.

More precisely the company may be held liable for criminal actions committed by: directors, chief executive officers or persons with organisational or managerial roles within the company, and employees subject to the control of such directors, chief executive officers or persons with organisational or managerial roles.

Criminal actions committed by such directors / officers / employees may also lead to liability of the company if they are deemed to have been executed in the interest of or in order to bring an advantage to the company.

Moreover, if the criminal action is committed by the persons subject to the control and supervision of directors/chief executive officers, the company will be held liable if the criminal action was executed as a consequence of a failure to comply with the duty to control their activity.

The Decree provides for a list of possible crimes which may be committed by directors/officers/employees and which, under certain circumstances, may lead to the liability of the company. Only by way of example, these crimes include corruption, bribery, misappropriation to the detriment of the State, false accounting, corporate crimes, health and safety breaches, money laundering, cybercrimes, environmental crimes etc.

One or more of the following penalties may be imposed on a company for a criminal action committed by one of its directors/officers/executives (if a proper Model, as explained below, has not been implemented and concretely followed within the company): a monetary penalty and, in some circumstances, a penalty prohibiting the practice of the activity or the suspension of the administrative authorisations needed for business, or other provisional measures.

According to the Decree, a company will not be deemed liable, if it can prove that:

— control on the implementation of the Model was assigned to a particular body of the company with management and control tasks (the “supervisory body” or “Organismo di Vigilanza”). According to recent new rules, the board of statutory auditors may be appointed as Organismo di Vigilanza of the company;
— the criminal action was committed in breach of the rules provided for in the Model; and
— the supervisory body, which must control the implementation of the Model, correctly fulfilled its obligations.

To consider a Model adequate, it is necessary that:

— it identifies the activities of the company specifically exposed to the risk of crimes;
— it provides proper protocols that seek to plan the basis on what the company’s decisions are taken and implemented;
— it provides for information duty in favour of the supervisory body;
— the procedures for management of financial resources are suitable to avoid the commission of crimes;
— it provides a disciplinary system to sanction breaches of the Model.

Immigration issues

Employees from outside the EU must first be employed by an Italian company in order to obtain a work permit. The application must be made by the employer who has to guarantee, amongst other things, an adequate remuneration to the employee. Once the employer has obtained the work permit, the employee may apply for a residence permit, which has a maximum duration of two years. The Italian government has limited the number of non-EU residents allowed to work in Italy. This limitation does not apply to directors or to other highly specialised members of personnel who have been employed at least six months prior to their temporary transfer (for example seconded workers). Holders of regular residence permits (students, families etc) may seek a change to the scope of their permit in order to work in Italy.

Tax issues

All fees received by the directors for services in Italy are subject to income tax, whether or not the director is resident in Italy. In calculating the amount due, all forms of remuneration are taken into account, such as director’s fees and all payments in kind and benefits granted to the director in connection with the exercise of his or her functions. Costs are only deductible within the limits set out by the Italian Tax law. The company to which the director provides his services is required to withhold an advance tax payment. The income of the director is subject to a progressive tax rate.
Social security

If a director also holds the position of employee of the company, he may benefit from certain Italian social security services and benefits, such as:

— sickness and maternity benefits;
— invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
— old age benefits;
— survivors’ benefits;
— benefits in respect of accidents at work and occupational diseases;
— death grants;
— unemployment benefits; and
— family benefits.

Social security contributions are mandatory and have to be paid by the company for all employees regardless of their nationality, with some exceptions for seconded workers. Reduced social security contributions are payable in respect of directors who are not employees of the company.

Introduction

This guide focuses on rules relating to Luxembourg public limited liability companies ("société anonyme") and private limited liability companies ("société à responsabilité limitée") provided for in the Luxembourg law on commercial companies dated 10 August 1915, as amended (the "Company Law"). It does not address the regulations applicable to other business entities, such as partnerships or organisations operating in the non-profit sector.

For public limited liability companies, the Company Law stipulates that the management is conducted either by (i) a single tier management board or (ii) a two tier structure.

— A single tier structure consists of a board of directors composed of at least three members or a minimum of one director if the company only has one shareholder.

— A two tier structure consists of a management board ("directoire") exercising the same duties/liabilities as the board of directors under the supervision of a supervisory board ("conseil de surveillance").

For private limited liability companies, the Company Law stipulates a one tier management structure. The company is managed by one or several managers. If there are several managers, they can form a board.

In Luxembourg, directors of a public limited liability company are commonly referred to as directors ("administrateurs") whereas directors of a private limited liability company are commonly referred to as managers ("gérants").

This guide relates to both Luxembourg public limited liability companies and private limited companies, unless stated otherwise. As such, all reference to (a) director/directors will include a reference to (a) manager/managers and vice versa.

Eligibility requirements

The general principle is that the shareholders of a company can freely designate the director(s), who can either be individuals or corporate entities. There are practically no legal limitations on the suitability criteria for electing directors. However, minors, incapacitated persons and persons declared bankrupt may not be appointed as directors.

Furthermore, neither qualification nor Luxembourg nationality is required to be appointed as a director, even though from a tax perspective and for substance reasons, it may be advisable to appoint a Luxembourg resident as a director.

With the exception of Luxembourg general partnerships (sociétés en nom collectif) it is not necessary for directors to also be shareholders of the company. Where a legal entity is designated as a director it must appoint a permanent representative to carry out the director’s functions and to act in the name and on behalf of the legal entity (according to the Company Law, there is no such requirement for private limited liability companies). Such representative will be held responsible and liable to the same extent as if he had carried out those functions in his own name.

Appointment

Directors are appointed by the general meeting of shareholders of the company for the period of time
stated in the articles of association of the company. The Company Law provides for a time limitation of six years applicable to the mandates of director(s) of public limited liability companies. At the end of their mandate, both directors and managers may be re-elected.

**Removal**

Directors may be removed by the general meeting of shareholders at any time with or without a fair reason. If a company removes a director without a fair reason, it will have to indemnify him/her. Where the director has been designated in the articles of association and the director is also a shareholder, he/she can only be removed by a unanimous decision of the shareholders. The director can be removed by any shareholder in the event of gross misconduct.

A director may resign at any time. However, his/her resignation must not cause damage to the company and should, therefore, be done carefully. The removal or resignation of a director must be published in the Luxembourg Official Gazette “Memorial C”. The director’s resignation will not be effective immediately; it will be effective with regard to third parties from its publication in the Memorial C.

**Authority and representation**

The board of directors has the power to take any action necessary or useful to realise the corporate object of the company, subject to any contrary provision in the articles of association and a limited number of acts which are reserved to the general meeting of shareholders (for example, the approval of the annual accounts, the appointment or removal of directors and any changes to the articles of association). Restrictions to the powers of the directors contained in the articles of association do not affect the rights of third parties. The board of directors is vested with the widest management powers, including the day-to-day management of the company.

It is possible to assign certain powers reserved explicitly to the board of directors by the articles of association to certain individual directors. This assignment cannot, however, be claimed against third parties, even if the restriction has been published in the Memorial C.

Unless otherwise provided in the articles of association, any director represents the company vis-à-vis third parties in general and in any legal proceedings. The articles of association may authorise one or more managers to represent the company in any transaction, instrument or in any legal proceedings, either individually or jointly. A clause to that effect is effective vis-à-vis third parties subject to its due publication in the Mémorial C.

**Working rules of the board**

Board meetings are held and organised either on the basis of internal procedures or in accordance with the articles of association of the company. The articles of association may, for instance, provide for a detailed meeting schedule and procedures. Thus, the articles may stipulate that directors can participate in board meetings either by telephone or by video conference or by any other similar means of communication. Attendance at a meeting by such means is deemed to constitute attendance in person. Circular resolutions are also widely used in Luxembourg.

**Contractual relationship with the company**

A director is an agent of the company. A director may, but need not, be remunerated. The general meeting of shareholders determines the remuneration of the directors, unless the articles of association grant this power to the board of directors.

A director can also be an employee of the company, provided his or her tasks as an employee are separated from his or her duties as a director. The director’s services may also be provided by a management company that contracts with the company.

**Conflict of interest**

Each director must act in the best interest of the company. If a director has an interest in a transaction that conflicts with the interests of the company and the transaction is submitted to the board of directors for their approval, the director has to advise the board of directors of his interest and a record of his/her statement must be included in the minutes of the meeting. He/she may not take part in these deliberations.

At the next general meeting, before any other resolution is voted on, a special report will be issued on any transaction in which any of the directors may have had an interest conflicting with that of the company.

If the company has only one director, transactions, where there is a conflict of interest between the sole director and the company, will be registered in the register of decisions.

These provisions do not apply to current operations carried on under normal circumstances either by the board of directors or by a sole director.

The Company Law is silent in respect of conflict of interest issues arising in a private limited liability company. In the absence of specific provisions contained in the articles of association, general agency rules and principles apply.
**Duties & Responsibilities of Directors**

Each director must act in the best interest of the company as a whole and not only for its shareholders. Directors act in name of and on behalf of the company. Their decisions must be implemented in the corporate interest of the company. The board of directors is responsible for defining the company’s business plan and improving the company’s financial results. The articles of association may specify the duties of the directors.

According to Company Law, directors have specific duties with regard to:

- general accounting and reporting obligations (for instance, the preparation of annual accounts) and an obligation to consolidate accounts if the company does not fall within an exception to the rules;
- convening shareholders meetings (a specific rule applies to public limited liability companies, the board of directors must convene a shareholders’ meeting in the event of loss of half of the corporate capital); and
- insolvency situations.

**Liability of directors**

A distinction must be made between the civil liability and the criminal liability of a director.

**Civil Liability**

In terms of civil liability, a distinction is to be drawn between: (a) contractual liability; (b) liability for breaches of the articles of association and breaches of the Luxembourg Company Law; and (c) liability in tort.

(a) **Contractual liability**

Directors are agents of a company. They are liable to the company for the fulfilment of their tasks and for any shortcomings in the performance of their duties. It is generally accepted that a claim based on this liability can only be brought by the company.

A finding of liability requires the establishment of three factors: (1) fault; (2) damage; and (3) a causal link between the fault and the damage.

Legal proceedings based on contractual liability, the actio mandati, can only be brought before the court by the company after a simple majority decision of the general shareholders meeting. The company may appoint one or several proxy holders to implement this decision. No actio mandati can be brought by the company if discharge was validly granted to the directors by the annual general shareholders meeting. Shareholders as individuals do not have the right to bring a claim against the directors on these grounds even if the general meeting refuses or neglects to proceed with a claim.

In principle, the contractual liability imposed by the Company Law is an individual liability as a personal fault must be involved. Insofar as the fault can be attributed to a specific director, his/her civil liability cannot be extended to other directors who did not commit the fault. However, in many cases, the damage results from concurring faults committed by different directors such that without the fault of one of the directors, the faults of the other directors would not have been sufficient to cause the damage. In such cases, each director will be jointly and severally liable. Directors will be held jointly and severally liable if the damage is triggered by a joint fault, i.e. where different people knowingly contributed to the act causing the damage. In such a situation, each director must account for the entire amount of the damages. Any director may be sued and the payment by one director releases all other liable directors from any obligation towards the company.

(b) **Liability for breaches of the articles of association and of the Luxembourg Company Law**

The Company Law states that directors may be held jointly and severally liable to the company and to third parties for all damages resulting from a breach of the Company Law or of the articles of association. Again, fault, damage and a causal link must be established for legal proceedings to be successful.

Legal proceedings can be brought by the company, according to the same rules as those applying to contractual liability. Third parties, such as public authorities, creditors, employees or an individual shareholder of the company may also bring a claim. A discharge granted to the directors by the annual shareholders general meeting does not bar third party claim.

If fault is proven, a presumption of joint and several liability rests on all directors. Any individual director can be held liable for the payment of the entire damage caused by a breach of the Company Law or the articles of association, without the plaintiff having to prove who specifically committed the breach.

(c) **Liability in tort**

The common rules of tort liability, provided for in the Luxembourg Civil Code, are also applicable to directors. If a tort is committed, the injured person is entitled to claim indemnification for the damage caused by the tort.

A tort is committed if the general duty of due care and diligence or a provision imposing a specific obligation of a non-contractual nature is breached.
For a director to be held liable for a tort, the essential elements (fault, damage and a causal link between fault and damage) must be proven on an individual basis. The claim must therefore relate to a breach of a director’s personal obligation.

Legal proceedings can be brought by the company itself or as third parties.

Where the fault is both a breach of an agreement between the director and the company and a breach of the general duty of due care and diligence that applies to everyone, the company can bring a claim if the actual damage is different from the damage that would have resulted from a fault in carrying out the director’s management tasks (i.e. contractual liability).

Third parties, including creditors and shareholders, can in certain conditions hold directors personally liable for all damages suffered due to a breach of a specific legal provision or the general duty of due care and diligence.

**Criminal Liability**

In addition to triggering civil liability, a fault committed by a director may also constitute a criminal offence potentially leading to criminal liability. Examples include forgery, breach of trust, fraud or the company becoming insolvent.

The Company Law and the Luxembourg Criminal Code provide for criminal sanctions if directors breach certain obligations (such as failure to claim bankruptcy within one month after the company ceased making payments and lost its creditworthiness, failure to submit annual accounts to the general shareholders’ meeting within six months after the closing of the financial year and failure to publish the annual accounts).

If a director of a company is prosecuted and punished for an offence committed by the company, the latter can be held liable under civil law for damages and the costs of the proceedings.

**Liability for breach of obligations vis-à-vis the tax authorities**

In certain circumstances, the directors can be held personally liable towards the tax authorities, for example when they fail to comply with tax filing obligations.

**The right of a public prosecutor to request the dissolution of the Company**

According to the Company Law, a Court may, at the request of the public prosecutor, order the dissolution and liquidation of any company governed by Luxembourg law which pursues activities contrary to criminal law or which seriously contravenes Luxembourg laws, including the legal obligation to request a business licence for specific activities.

**Limitation of liability**

The liability of directors is a matter of public policy ("ordre public") irrespective of whether this relates to liability towards the Company or towards third parties. Therefore it is not possible to derogate, by contract or otherwise, from the principles described above.

**Immigration issues**

As a general principle, if the director is not a Luxembourg resident and is not remunerated, there are no immigration issues. In other cases, a distinction must be made between EU residents and non-EU residents.

EU residents have the right, in accordance with European Community Law, to work in any Member State. There are no special requirements, apart from the obligation to register with the town hall where the director has his/her residence.

A non-EU resident director must obtain a residence permit to live and be remunerated in Luxembourg in their capacity as an employee of the company.

A non-EU resident director must apply for a residence authorisation from the Luxembourg Ministry of Foreign Affairs and Immigration (Ministère des Affaires Etrangères et de l’Immigration) before entering Luxembourg.

**Taxation**

Luxembourg tax resident or non-resident directors who receive more than EUR 100,000 in gross directors’ fees, or, non-resident directors who opt to be taxed by assessment, have to file a tax return in Luxembourg. For non-resident directors, directors’ fees are subject to withholding tax at the rate of 20% of the gross amount (25% if the tax is withheld on the net amount) which is levied by the company paying the fees. Such a withholding tax may satisfy, in full, a tax liability on fees received by a non-resident director earning less than EUR 100,000 per tax year (provided he has no other Luxembourg source income).

**Social security**

Directors may be registered with the social security at the beginning of their activities.

Directors can be employees or self-employed.

The manager of a private limited company with a commercial, trade, agricultural or intellectual object must register as a self-employed worker provided that he/she holds more than 25% of the company shares and he/she is listed as the holder of the business license.
on behalf of the company, as must a director of a public limited liability company to whom the day-to-day management has been delegated. Such directors must be affiliated with the Joint Social Security Centre (Centre commun de la sécurité sociale – CCSS).

Non EU resident directors must register with both the Luxembourg social security and social security authorities of their country of residence.
Introduction

The board of directors (the “BoD”), along with the shareholders and the corporate officer, forms an essential element in the operation of a corporation or a company.

When incorporating a company before a public notary, it is possible to withhold certain information involving the corporation’s administration, including, for example, information regarding the appointment of directors, how the corporation is to be administered and the powers of the directors, as the General Corporations Law (the “GCL”) allows this data to be excluded from the articles of incorporation.

If a company is incorporated this way, the relative GCL provisions will apply. In such circumstances, the company will be recorded in the Public Registry of Commerce but will not yet be permitted to carry out any activities.

In order to commence activities, the corporation has to be duly organised. This can be accomplished through the designation by the shareholders of a social representative who will serve as a director of the corporation even without a formal appointment.

It is necessary for a corporation to establish a BoD, as the BoD gives the corporation its legal capacity to organise itself internally and contract with third parties.

Eligibility requirements

The GCL highlights the personal nature of the position of director. A director’s responsibilities cannot be performed through an agent or a representative and can only be performed by an individual.

Art. 151 prohibits persons who by law are not permitted to conduct business from managing a corporation, e.g. minors, persons subject to interdicts and commercial or public notaries.

Method of Appointment

The sole method of appointing the BoD is through the ordinary shareholders’ meeting or the incorporation meeting. Cooption is not permitted under Mexican law; therefore, the BoD cannot appoint a new director when another leaves his post, whether by death, resignation or removal. In these circumstances, if the remaining directors do not meet the statutory quorum, the corporate officer will appoint a replacement director.

Minority shareholders may also appoint directors if the appointment is made by the minority group at an ordinary shareholders’ meeting. A meeting to this effect can be called at the request of any shareholder.

Legal nature of a director and the BoD.

Art. 142 of the GCL considers directors to be agents of the corporation, and art. 157 indicates that directors share “the responsibility inherent in the company’s mandate”. However, this is not a contractual mandate because: (1) the role and character of the BoD are necessary and not merely conventional; (2) a director’s duty is not derived from an agreement but from a unilateral act, i.e. his appointment by the shareholders meeting, and (3) a director has not only a representative function but also a management function.
A director is a sui generis figure who has management responsibilities, legally represents the corporation and has the power to execute corporate arrangements.

**Operation of the BoD**

The BoD of a corporation may be made up of a single or sole director or a BoD, and the operation of both varies.

In the case of a sole director, he is in charge of each and every one of the acts relating to the management and representation of the company, whether established by law, statutory provision or agreement of the shareholders meeting. He is also personally responsible for the fulfillment of his obligations with due diligence and in a timely manner.

On the other hand, a BoD is a collegiate body that functions as such. The BoD legally manages and represents the corporation, subject to any limitations imposed by a company’s bylaws and except where the bylaws indicate that special powers of management and/or administration are to be specifically granted to one or more directors.

In order to operate the company, its directors are required to hold a board meeting. Other than where the bylaws provide otherwise (by granting power to individual members), no act or decision of the BoD will be valid if made outside of a properly established meeting. For a meeting of the board to be valid, it must be called by the president or the secretary of the board, and directors must receive timely notice of the meeting.

The notice of the meeting must contain the date, place and time of meeting, the meeting’s agenda and be signed by the person calling it, except in the case of meetings of all directors where all concur and agree at the beginning of the session on the agenda submitted to them by the president.

For the meeting of BoD to be legal, the majority of its members must attend. For resolutions to be passed, there must be a majority vote in favour by the directors present at the meeting. In the event of a tied vote, the President can intervene and have the casting vote unless any provision of the bylaws apply and deprive him of it. In such circumstances, the matter will be brought before the shareholders meeting who will make the final decision.

The quorum required for a meeting of the Board may be increased by an express clause in the company’s bylaws. In practice, most companies’ bylaws contain a requirement of a high majority, either to form the BoD meeting and/or to adopt resolutions.

The bylaws may also provide a right of veto as a means to protect the minority. Many companies use this as a way to ensure that the power of control over the corporation favours minority shareholders.

It is common practice for bylaws of a company to provide for alternate directors. In the absence of the relevant director the alternate is entitled to vote and be counted in the quorum for all legal purposes. The alternate director is subject to the same requirements, guarantees and responsibilities of that of the original director.

**Labour relationship**

The BoD of the corporation is a part of and a manifestation of the corporation; its constituent members are considered a special instrument to provide services of the company. As a result, they are not subject to labour law. Instead they form a means or a legal instrument for the corporation to operate, manifest itself and act.

**Conflicts of interest between the company and directors.**

Art. 196 of CGL creates an obligation on shareholders to abstain from voting when the item under discussion may create a conflict of interest. This principle also applies to directors, because they are required to act in good faith and protect the interests of the corporation, which would be damaged if a director asserted his own interests over those of the company. However, if a director does vote on a matter involving a conflict of interest the vote will not be void. The director may be liable for damages to the company if his vote would have been decisive or necessary for the decision to be approved.

Under art. 197, in order to avoid a potential conflict of interest, directors cannot vote on resolutions concerning the adoption of the annual accounting report submitted to the ordinary shareholders meeting.

**Functions of the BoD**

The BoD has two functions: first, the management or administration of the company and secondly, the company’s representation with third parties. The first is internal, between the shareholders and employees of the corporation, and generally does not extend outside the corporation; however it is an important function because it ensures that the corporation works in a timely manner and complies with its objects.

The representative function of the BoD exists so that the corporation may contract with external or third parties and provides the means for the corporation to operate with third parties, sign agreements, acquire rights and assume obligations.

Directors fulfil these two functions through taking decisions and passing resolutions at meetings. It should be noted that these two functions are considered separate although in reality they often overlap.
Duties and powers of the BoD

In addition to a director’s important powers of management and representation, he also has the power to implement the decisions taken at shareholders’ meetings, prepare financial statements of the corporation for submitting to the ordinary shareholders meeting, appoint managers and agents and delegate his powers.

Directors are required to act on behalf of the corporation and never on their own behalf. There is a presumption that acts performed by directors are valid, and if a subsequent meeting overrides these acts, they will remain valid against third parties, unless it is established that they were made in bad faith.

BoD Liability

A director may be liable to compensate an affected party for damages caused to it as a result of the breach the director’s obligations and authority. In addition, a director may commit an offence in failing to comply with his or her obligations and authority and incur criminal liability, including imprisonment.

In contrast, it should be noted that the GCL provides directors with an exclusion from liability if the director at fault expressed his or her disagreement at the time of the resolution to approve the act in question.

The board’s liabilities can be divided into two categories:

Responsibility towards the corporation (internal)

As a general principle, the corporation holds the board liable for its actions, as usually it is the corporation that is the wronged party. Consequently, GCL requires shareholders to approve any action against the board and to give authority an individual to bring the action.

In order to protect minority interests, GCL gives shareholders representing at least 33% of the capital of the corporation the power to directly bring an action for liability against the board, as long as the following conditions are satisfied:

— the alleged infringement was committed against the corporation as a whole, and is not brought about to assist the personal interests of the minority group; and
— the petitioner did not vote in favour of any relevant shareholders’ resolution concerning the matter.

Liability towards third parties (external)

Although there is no provision under Mexican corporate law regulating the liability of the board towards third parties, it is possible that unlawful conduct of the board may result in individual liability of a director as well as of other persons or entities outside the corporation.

Liability towards third parties may be brought under the Civil Code. It should be noted that certain unlawful conduct could be considered a criminal offence and members or third parties affected may bring a claim.

It is important to note that the board has a wide scope of obligations, authority and responsibilities. Therefore, actions of the board must be recorded, from the incorporation of the company up to its liquidation, or the cancellation of the company’s registration.

The liability of directors, internal and external, can be of three types:

— Civil Liability
— Criminal Liability
— Fiscal Liability

Civil Liability

A director may incur civil liability for acts committed when managing the business of the corporation which were carried out carelessly or negligently or if the culpable act failed to implement the decisions of the shareholders’ meeting.

The principal characteristics of civil liability of company directors are as follows:

1. Civil law includes an obligation to repair damage done in order to restore the situation to that prior to the breach, or to provide pecuniary compensation for damages.
2. To establish liability under civil law, malice or negligence must be proven. This does not necessarily include breach of law.
3. A claim for damages is brought against the individual director directly, and only indirectly against the corporation.
4. Civil law claims can also be brought against other parties, including parent companies.

Civil liability gives rise to two forms of claims:

(a) Compensation in nature: to restore the position as it was before the breach.
(b) Equivalent compensation: to pay an equity value to the affected party equal to that it was deprived of and to indemnify the affected party by providing equivalent rights or interests.

Criminal Liability

Certain conduct can lead to criminal liability under the Criminal Code.

The main characteristics of criminal liability are as follows:

1. A director may be liable to repair the damage and may also face imprisonment.
2. Criminal liability can only be established when a law has been breached and malice or negligence are proven.
3. To determine the damages under criminal liability, the law takes into account the damage caused to the corporation.

4. Criminal responsibility is always exclusively personal.

**Fiscal liability**
The Federal Tax Code provides that directors are jointly and severally liable with the corporation for any contributions due and not retained by the company during a director’s term of office.

Tax obligations are not limited to payment contributions but compliance with other obligations imposed by law, including matters relating to accounting, cooperation with tax authority to provide information and not withholding contributions from third parties.

**Removal from office**
If a shareholders’ meeting decides to bring a claim against a director, that director is immediately discharged of his duties and no longer holds office. Where a director has been so removed from office, he may be only appointed as a director in the future if the court declares the action brought against him as unfounded.

**Joint and several liability**
Although art. 157 is not entirely clear on the matter of joint and several liability, art. 158 establishes that the liability of the BoD can be established from the illegal conduct of any of its members, in which case all directors will incur joint liability. The corporation will also be jointly liable with the directors, by damages caused by their unlawful acts during the exercise of their functions. The company will also be responsible for any excess amount of compensation not ratified by the shareholders meeting.

**Guarantees of directors and registration of appointment**
The GCL requires that directors appointed by the bylaws or by the general shareholders’ meeting provide security to the company in order to guarantee any liability that might be incurred in the performance of their duties. The grant of this security is provided for by art. 153 and is important because the appointment of directors can only be registered once the security is provided.

The GCL does not provide a fixed amount or any method to calculate the amount of the security; so in practice this provision is often not given effect to.

**Immigration Issues**
Under the Migration Act, for a foreigner to be a sole director or a member of the BoD of a corporation he must have a permanent residence visa that authorises him to work anywhere in the country on the basis that he will remain in Mexico. It is also possible for a foreigner to become a director if he holds a temporary residence visa issued by the National Institute of Migration, which authorises the foreigner to remain in the country for no longer than four years, with the ability to such a work permit subject to receiving a job offer with the right to enter and leave Mexico as often as desired.

**Social Security**
The sole director or the members of the BoD, as applicable, do not have social security rights because they do not have an employment relationship under the provisions of Federal Labour Law; instead they are viewed and governed as special service providers, who have no rights to such benefits.

**Taxation of Directors**
The members of the BoD must pay income tax on the fees they earn. This tax is based upon the profit that a director makes annually, which is calculated as the difference between a director’s income (during the period from the beginning of the year until the last day of the month that they have to present their tax declaration) minus authorised deductions for the same period.

**Rates of income tax for 2014 are:**
- a rate of 32% for those earning between MXN 750,000 and MXN 1m;
- a rate of 34% for those earning between MXN 1m and MXN 3m;
- a rate of 35% for those earning more than MXN 3m annually.

The payment of income tax must be made no later than the 17th of the month following the month to which the payment applies; for example, the January payment must be submitted no later than 17 February; the February payment no later than 17 March, and so on.

In addition, members of the BoD are required to pay value added tax, which must be paid monthly to the tax administration service. The rate of value added tax in Mexico is 16%.
The Netherlands

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Introduction

This guide focuses on the duties & responsibilities of managing directors (‘directors’) of the private company with limited liability (‘besloten vennootschap met beperkte aansprakelijkheid’ or ‘B.V.’) and the public company with limited liability (‘naamloze vennootschap’ or ‘N.V.’).

In the Netherlands the management structure of a company is generally based on a two-tier board system. This consists of a management board, which is the executive body, and a separate supervisory board, which advises and supervises the management board.

A supervisory board is compulsory for large companies (often N.V.’s) and voluntary for most of the other companies. As a rule, a supervisory board is mandatory when:

— the company’s issued capital plus reserves amounts to at least EUR 16m; and
— the company (or the group to which it belongs) has a works council; and
— the company and the group to which it belongs collectively employ at least 100 people within the Netherlands.

A member of a supervisory board is generally referred to as a ‘commissaris’ and a member of a management board is normally called a ‘directeur’ or ‘bestuurder’.

On 1 January 2013 the Management and Supervision Act came into force pursuant to which a statutory basis for the one-tier board system was introduced. In a one-tier board the board is made up of executives who are responsible for the company’s day to day business and non-executives, who are responsible for both supervision and, depending on the allocation of duties, the company’s day to day business. The corporate body appointing the directors determines whether a director will be an executive or a non-executive director. To implement a one-tier board, the articles of association must be amended to provide that the management tasks are divided among executive directors and non-executive directors.

Eligibility requirements

There are no legal restrictions on who can become a director. The articles of association may contain specific requirements in respect of the eligibility of directors and the right to nominate candidates.

The Dutch parliament intends to adopt new legislation in order to fight bankruptcy fraud. This new legislation will make it possible to impose a restriction on a fraudulent director of a bankrupt company on becoming a director of another company or incorporating a new company. The public prosecutor or receiver in bankruptcy can request such a ban in court, except in the case of a criminal prosecution. If the court has imposed a ban, the individual concerned is not allowed to be director, supervisory board member or policymaker of any Dutch legal entity. The ban will remain in force for a maximum of five years. Any appointment contrary to the ban is void.

An individual director is not required to be resident in the Netherlands and there is no nationality requirement, unless otherwise required by the articles of association. If the articles of association contain such a requirement, discriminating between Dutch subjects and subjects of other EU countries is not permitted.

A company – whether incorporated in the Netherlands or elsewhere – can also be appointed as a director. There
is a minimum of one and no maximum to the number of directors of a company, except for any minimum or maximum prescribed by the articles of association.

**Appointment**

A director is normally appointed by the general meeting of shareholders. If the company has a mandatory supervisory board and qualifies as a large company, the directors are appointed by such board. The supervisory board must in that case notify the general meeting of shareholders of any proposed nomination.

If the company has a works council, the works council should have the opportunity to render non-binding advice before the appointment is made. The management board is therefore required to give the works council prior notice of any proposed candidate for appointment to the board if the director will actually be managing the company.

Notification of the appointment, together with the signature of the director, must be filed by the company with the trade register of the relevant chamber of commerce. Except if the filing is performed by a civil law notary, the trade register will also require a certified copy of the director’s passport and evidence of his or her private address. A small fee is payable.

Directors are usually appointed for an indefinite period of time. Appointments for limited periods and reappointments, are possible, but unusual, and, where the director has an employment relationship with the company may be incompatible with Dutch labour law.

As of 1 January 2013 a director of a large N.V. or B.V. is prohibited from holding more than two supervisory positions at another large N.V., B.V. or Dutch foundation. In any event, such director may not occupy the position of a chairman of such a supervisory board. If an appointment causes an executive director or a non-executive director to hold more than the maximum number of supervisory positions, that appointment is null and void. However, this does not affect the validity of decisions taken by that director.

Large N.V.’s and B.V.’s have a best efforts obligation to have a balanced gender distribution on their management board, supervisory board or one-tier board. This means that at least 30% of the seats occupied by individuals are to be occupied by women and at least 30% by men. This best effort obligation will expire on 1 January 2016.

**Removal**

A director may resign his or her office at any time by notifying the company. If the director has an employment agreement with the company, such notice will automatically lead to termination of the employment relationship. Such resignation may, however, constitute a breach of the employment agreement.

A director can be removed from office at any time. Removal requires a resolution of the shareholders. If the company has a mandatory supervisory board, the directors are normally removed by such board. The supervisory board must seek the opinion of the general meeting of shareholders prior to the removal.

The director should be informed on the reasons for the proposed removal, and be given the opportunity to give his or her views prior to any contentious removal.

If the company has a works council, the works council should be granted the opportunity to render non-binding advice on any proposed removal.

If the director has an employment agreement with the company, the agreement usually terminates upon his or her removal from the board. The contractual notice period agreed in the employment agreement should be respected. If the company does not respect the contractual notice period, it must pay fixed damages to the director. In such case, the director cannot be required to comply with any non-compete obligations in the employment agreement. If the termination of the employment agreement was obviously unreasonable, unjustified or improper, the director may also be entitled to damages. In most cases a settlement is reached on the effective date of termination and the financial compensation. Suspension may also be possible. Any resignation, suspension or removal of a director must be notified to the Trade Register.

**Authority and representation**

Each director has the authority to represent the company. The articles of association may provide that the company may only be represented by two or more directors, acting jointly or with certain third parties.

The full board is always authorised to represent the company. Although the articles of association may require internal approval for specific resolutions, they cannot limit the external transactional powers of the directors in respect of specific matters or in respect of the size or nature of any one transaction.

**Working rules of the board**

The board may adopt internal working rules, which describe the duties, responsibilities and powers of each director as well as the rules applicable to board meetings. The adoption thereof can be made subject to prior supervisory board or shareholders’ approval in the
Directors, as members of the board, jointly have all the powers to manage the company, except for those limited powers which by law are, or may be, attributed to the shareholders or to the supervisory board. Those limited powers may include the right of prior approval over certain decisions of the board of directors. For listed and certain other large companies, approval of the shareholders is always required in respect of a number of important decisions regarding the core identity of the company.

The members of the board have collective responsibilities. They share responsibility for all decisions and acts of the board and for the acts of each individual director.

The main directions of a company’s policy and its financial management and any important decisions have to be decided by the board as a whole. Certain specific duties of the board may be allocated among the managing directors in or pursuant to the articles of association, for instance tasks can be divided between executive and non-executive directors in a company with a one-tier system. The basic rule of collective responsibility will continue to apply and each managing director can in principle be held liable for mismanagement. In the event of mismanagement an individual managing director can avoid liability if he proves that the mismanagement was not attributable to him – taking into account the duties allocated to him – and that, in addition, he was not negligent in taking action to prevent the mismanagement by the board.

**Contractual relationship with the company**

An appointment as a director does not in itself constitute a contract with the company or entitle a director to remuneration. Unless the articles of association prescribe otherwise, the shareholders have the right to decide on the remuneration of the directors. For listed and certain other large companies, it is in any case mandatory for the shareholders to determine the directors’ remuneration policy.

On 1 January 2014 the Clawback of Bonuses Act entered into force pursuant to which N.V.’s can adjust or claw back excessive bonuses. The supervisory board can adjust or claw back bonuses, for example if the bonus would be unacceptable under the given circumstances or if it has been awarded on the basis of incorrect information.

Besides the directorship, a director may also have a contractual relationship with the company:
- as a consultant providing services under a consultancy agreement;
- through a company or firm which contracts with the company to provide the director’s services;
- as an employee under an employment agreement.

**Board members of listed companies are as of 1 January 2013 no longer allowed to enter into an employment agreement with a company. Instead the relationship consists of an agreement for the provision of services. Employment agreements that were already in force on 1 January 2013 remain unaffected.**

The tax treatment of these options is different in each case. Termination of any such contract will not automatically terminate the directorship. Termination of the directorship, on the other hand, may constitute a breach of the related contract.

**Conflicts of interest**

As of 1 January 2013 a conflict of interest will in principle only affect the company’s internal decision-making process and not a director’s ability to represent the company externally. Neither a management board member nor a supervisory board member may participate in any deliberations or decision-making processes involving a matter in relation to which he or she has a direct or indirect interest which conflicts with the interest of the company. If the management board is unable to take a decision due to a conflict of interest on the part of one or more of its members, the decision must be taken by the supervisory board. If there is no supervisory board, the decision must be taken by the general meeting of shareholders, unless the articles of association provide otherwise.

**Duties**

The board is entrusted with the management and the representation of the company. This is a collective responsibility, for which each individual director is liable. Directors must act in the best interests of the company. As mentioned before, directors may allocate the management tasks among themselves, but the principle of collective responsibility entails that the directors must always resolve collectively on the main directions of a company’s policy and its financial management and on important issues.

Each director is under a duty of care vis-à-vis the company to ‘properly’ perform his or her part of the management task as assigned to him or her. The director is under a duty to use all reasonable endeavours to achieve this, but he or she does not have to guarantee any results.

In case of improper performance a director is, as a rule, only liable for any losses of the company in the case of serious mismanagement. From case law it seems to follow that for some cases a more severe test will be applied; would any other competent director, who acted reasonably, have made the same decisions?

In a one-tier board structure, the abovementioned basic rule of collective responsibility applies in a similar
way. Non-executive directors may find it easier though to avoid liability for mismanagement by pointing to the attribution of tasks and their role within such a management board.

Directors are also subject to a duty of good faith. The duty of good faith is part of the reasonableness and fairness requirement that is imposed on the relationship between corporate bodies such as the management board, the supervisory board, the general meeting of shareholders and the works council.

A special corporate governance code is applicable to listed companies. Listed companies are supposed to include elements thereof, as far as possible, in their own internal corporate governance structure. They are to report on the extent to which these elements have been included in their annual accounts. Specific, additional duties and obligations for directors are an important part of this corporate governance code. Various elements of the code may also be of relevance for non-listed companies.

**Liability**

A distinction should be made between liability towards the company and liability towards third parties, including in either case a receiver in bankruptcy acting as their representative. For each of these two situations only the most common types of liability of directors will be discussed.

In order for liability towards the company for mismanagement to arise there must be serious negligence on the part of the director. As already stated, a more severe test may be applied in specific cases. As a general rule the responsibility of the board towards the company is of a collective nature, but each director is also responsible to the company for the proper performance of the specific duties assigned to him or her.

If a matter falls within the scope of responsibility of two or more directors they are jointly and severally liable for mismanagement, unless a director is able to prove that the relevant shortcoming is not attributable to him or her. In order to satisfy this burden of proof the relevant director must show that he or she was not personally negligent and further, that he or she did not fail in his or her duty to take action to avoid or prevent the consequences of the mismanagement. Certain important matters are by definition always part of the tasks and duties of each director.

**Taxes**

If the company is unable to pay certain of its taxes or social premiums it must notify the relevant authorities of its inability to pay within 14 days after the due date. In the absence of such notification, or if the inability to pay is caused by apparent negligence of the management board, the directors are jointly and severally liable for the relevant taxes and social premiums. Individual directors have the right to exculpate themselves, but in practice exculpation will only be possible in exceptional circumstances. If the company is declared bankrupt the directors are personally liable for the deficit in bankruptcy, if the bankruptcy is to a significant extent caused by the apparent negligence of the management board during a three-year period prior to the date of bankruptcy.

**Financial records**

If the company has not kept proper financial records or has not filed its annual accounts with the Trade Register in a timely manner, i.e. at latest 13 months following the end of the financial year, there is a binding presumption – which cannot be challenged or proven wrong – that there has been apparent negligence and a further presumption that such apparent negligence has to a significant extent caused the bankruptcy. Again, individual directors have the right to exculpate themselves, but in practice exculpation will only be possible in exceptional circumstances. Except in certain combinations of complex and unusual circumstances, current Dutch law does not provide for shareholders’ derivative suits. A breach of the duty of care may give rise to an action by the company or the receiver in bankruptcy against the management board or members thereof for mismanagement.

**Tort**

An important legal basis for liability of the directors towards third parties is tort. Creditors of the company for example may hold a director liable on the basis of tort if he or she entered into a transaction on behalf of the company when he or she knew, or reasonably should have known, that the company would not be able to fulfil its obligations under that transaction.

Directors may also incur personal liability for example in case of environmental pollution, fraudulent transfer of assets, unjustified inequality in the treatment of creditors, erroneous or misleading financial statements, a misleading prospectus or certain breaches of the competition law. Establishing such personal liability for failure by directors to assess the admissibility of dividend distributions is being contemplated.

**Distributions**

As of 1 October 2012 the distribution of dividends and reserves requires the prior approval of the board. The board has to refuse approval if it knows or should reasonably foresee that the company will not be able to continue to pay its debts after the distribution. The consequence of a wrongful approval is joint and several liability of the directors for the deficit caused by the distribution. The recipients of a distribution can be held liable for compensation if they did not act in good faith, that is if they knew or would reasonably foresee that the company would not be able to continue to pay its debts after the distribution.
Criminal Law
Under Dutch criminal law a company can commit crimes. The individual who is directly responsible for the criminal behaviour of the company may also commit a crime. Accordingly, members of the management board may, in the event of personal liability for mismanagement under civil law, sometimes also face criminal sanctions. Finally, it should be noted that in specific instances, some form of director’s liability may also arise: (i) in respect of individuals who, without being appointed, effectively manage the company as if they were directors; (ii) for an individual who is the director of a company that is also a director; or (iii) for supervisory directors.

Limitation of liability
No statutory provision or case law exists which relates directly to the validity and enforceability of indemnities by the company. Indemnification clauses are rare because their effectiveness is generally considered to be limited. A company is permitted to take out directors’ insurance on behalf of its directors. Insurance policies usually contain many exclusions and limitations.

Immigration issues
Employees from non-EU countries, except for Switzerland, require a work permit prior to being employed in the Netherlands.

Applications must be made by the prospective employer with the competent local authority, called ‘UWV WERKbedrijf’. The procedure to obtain a work permit is limited by law to five weeks from the submission of the complete request. In general, a work permit will not be granted if suitable candidates from the European Economic Area (EEA) are available for the vacancy. The prospective employer is required to demonstrate that efforts to hire an EEA resident were unsuccessful. There are exemptions to this general rule, one of which is applicable to employees considered key personnel, who are transferred within an international group of companies. The procedure for such employees is simplified.

Apart from a work permit a residence permit has to be obtained by any non-EEA resident desiring to take up residence in the Netherlands.

Taxation
Fees paid by a company to a director for activities performed in his or her capacity as director of the company, are subject to Dutch personal income tax at the normal progressive rates, regardless of the place where the activities are performed. If the directors’ remuneration is paid by a non-Dutch group company, it may be advantageous to allocate part of the remuneration to the Dutch company by means of a salary split, so that the director can benefit from a low effective tax rate in the Netherlands on this part of his or her remuneration.

Directors’ fees paid to a foreign company which is appointed as a director of a Dutch company are normally deductible for the purposes of Dutch corporate income tax.

Service agreement
A distinction should be made between fees of a director/individual for activities performed in his or her capacity as director of a company and fees for other services, for instance services performed as a sales manager or consultant. Under most tax treaties fees for these other services provided by a foreign director/individual are only taxable in the Netherlands if the activities are actually performed in the Netherlands during more than 183 days per year.

Consultancy contract with the company/firm
Fees paid to a foreign company which performs consultancy or other services to a company are normally deductible for corporate income tax. If the foreign company is managed and controlled by an individual who actually performs the services as if he or she were an employee of the Dutch company, the fees may in certain circumstances be taxable in the Netherlands with wage tax and/or personal income tax. Foreign employees and executives of international enterprises temporarily assigned to the Netherlands for a maximum period of 96 months on the basis of their specific skills may apply for the 30% ruling within four months after the starting period of their assignment. The activities do not have to be actually carried out in the Netherlands – the 30% ruling could also be granted to directors of a Dutch company who live and work abroad.

Employees qualifying for the 30% ruling are entitled to receive a tax-free cost allowance of 30% of their gross income. The effective personal income tax rate for a foreign employee will, as a result of the 30% ruling, be considerably lower. The standard travel deduction and business deductions are also available. Furthermore, allowances paid to the employee for costs of an international school are also tax-free. Finally, a qualifying employee could, during the period of his or her Dutch assignment, ask to be considered a non-resident taxpayer, if this would be more beneficial.

Social security
A director who is also an employee of the company may be entitled to certain social security benefits, such
as disability insurance and unemployment benefits. The company is obliged to withhold social security premiums from his or her salary and pay the other part of the relevant premiums. Any director who is also a major shareholder in the company that employs him or her is not entitled to social security benefits.
Introduction

It is noteworthy that under Omani law and regulation only a joint stock company, whether this is a closed or a public joint stock company, is required to appoint a board of directors as the company’s management.

By contrast, the Omani limited liability company (abbreviated as ‘LLC’), does not have a board, but is managed instead by one or more ‘managers’, who are natural persons, and who may or may not also be shareholders in the company. The Omani LLC is comparatively simple to form and is subject to relatively straightforward annual statutory filing requirements, and it is therefore typically the vehicle of choice for most business lines in Oman.

In practice, however, the management of an Omani LLC may decide to appoint a ‘board of directors’ of sorts, notwithstanding the absence of any regulatory framework in Oman for directors to be appointed in an LLC.

What follows is a summary of the regulatory requirements which concern the Omani joint stock company only. The key item of legislation is The Commercial Companies Law (Royal Decree No. 4 of 1974).

Eligibility requirements

A natural person is eligible to become a director. However, a person who has been convicted of a criminal offence either in Oman or abroad, save where that person has been “rehabilitated”, is not eligible to act as a director.

Methods of appointment

The members of a board of directors are appointed by the ordinary general meeting. Members of a board are elected either from among the shareholders, or from elsewhere, save that if elected from among the shareholders he or she must hold the minimum number of shares specified in the company’s articles of association for eligibility for the board.

If the office of a director becomes vacant during the period between two ordinary general board meetings, save where the Articles of the company provide otherwise, the board may appoint a temporary director to assume the outgoing director’s office until the next ordinary general meeting is held.

If at any time more than half the number of directors on the board are temporary directors, the directors are required to call an ordinary general meeting in order to elect directors to replace the outgoing directors. Any such director so elected will serve for the remaining period of their predecessor in office.

Methods of removal

A director may be removed without any reason or justification by the ordinary general meeting, even though the company’s Articles provide otherwise.

Authority and representation

The company’s board has full authority to perform all the acts required for the management of the company, except as limited by law or by its articles of association.
However, the company’s board of directors can perform the following acts where expressly authorised to do so in the company’s articles, or through a resolution of the general meeting:

— making a donation, except for donations required by the business if of a small and customary amount;

— selling all or a substantial part of the company’s assets;

— pledging or mortgaging the company’s assets, except to secure the company’s debts incurred in the ordinary course of the company’s business;

— guaranteeing debts of third parties, except where the guarantee is made in the ordinary course of the company’s business for the purposes of achieving the company’s objectives.

The board of directors may with the majority consent of its members and within the limits assigned to it, delegate some of its powers to committees formed from among its members.

A joint stock company is bound by the acts of its board of directors, its chairman, managing directors and other executives, where they act in the company’s name and within the scope of their powers. Any third party in good faith has by law the right to assume that any act of the board of directors, chairman or managing director of the company in pursuance of its business is within the scope of power delegated to such person, and the company is bound thereby, save where the limitation of any such person’s authority is registered with the Commercial Registry in Oman.

The detailed duties of a member of a board of directors are set out more fully in Ministerial Decree 137/2002, and will include for example, the approval of the company’s commercial and financial policies and the company’s estimated budget; adopting the company’s disclosure procedures; supervising the performance of the company’s executive management; provision of timely information to the company’s shareholders; appointment of the company’s chief executive or general manager, and secretary to the board; and approval of the company’s financial statements.

**Composition of a board**

The management of a joint stock company is entrusted to the company’s board of directors, the numbers of members of which will be given in the company’s articles of association.

The members of the board of directors for a closed joint stock company must not be less than three, and must not be less than five for a public joint stock company.

The term of office of a member of the board of directors must not exceed three years, albeit that a member of the board may be re-elected more than once.

**Restrictions**

No one may be a member or representative of a legal entity on the board of directors of more than four publicly held joint stock companies having their principal place of business in the Sultanate of Oman, or be chairman of more than two such companies, or combine the membership on the board of directors of a public joint stock company and another closed joint stock company practising similar activities and having its principal place of business in Oman.

No person shall become a member of the board of directors of a company if he or she has been convicted in Oman or abroad of a criminal offence, unless he or she is a “rehabilitated” offender.

A member of the board of directors of any company is prohibited from the management of any business which competes with that of the company, save by approval of the general meeting, provided that such approval should be renewed annually.

Further, members of the board of directors of a company, and its senior members of staff, are prohibited from using any information which is accessible to him or her by virtue of his or her office, for the achievement of a benefit for him or herself or for his or her minor children or for any of his or her immediate relatives up to the fourth degree, as a consequence of dealing in the company’s securities. None of any such persons are permitted to hold any interest, whether direct or indirect, with any entity involved in activities intended to affect the prices of the securities issued by the company. Any infringement of the above provisions may give rise to the penalties set out in articles 109 and 110 of the Commercial Companies Law.

**Contractual relationship with the company**

A majority of the members of the board of directors of a public joint stock company are prohibited from working for the company for a fixed monthly or annual remuneration.

**Conflicts**

The Commercial Companies Law, passed in 1974, provided that a member of the board of directors or any other party related to a company is prohibited from holding any direct or indirect interest in any
transaction or contract which the company is a party to. By way of exception to this, a company may carry out certain transactions and contracts with such persons, where this is done in accordance with the regulations and provisions of the Capital Market Authority. The decision must state what is meant by ‘related parties’ and the rules as to disclosure of such transactions and contracts.

More recently, the Code of Corporate Governance, issued pursuant to Circular one of 2003 of the Oman Capital Market Authority, has added further detail. Under the Code, a director should at all times maintain transparency, avoid conflicts of interest, and disclose all contractual interests with the relevant company, with a view to avoiding any situation where a director takes improper advantage of his position, and ensuring that the director maintains high ethical standards in the performance of his duties. The Code also states that a director should not make improper use of information acquired by him in the performance of his duties, and should comply with all regulations relating to the buying and selling of the company’s shares.

Liabilities

The personal liability of a director in any Omani joint stock company is regulated in the Commercial Companies Law. In addition, the Code of Corporate Governance issued by the Omani Capital Markets Authority regulates the liabilities of a director in a public company listed on the Muscat Securities Market. The ‘Code’ sets out the basic principles of good corporate governance, and the core competencies that a board of directors should possess.

As noted above, the director’s responsibilities are further set out in Ministerial Decision 137/2002. The Ministerial Decision stresses that directors will be jointly liable for acts which contravene the provisions of the Commercial Companies Law, or acts which are detrimental to the company or the rights of its shareholders, as a result of a failure to assume the responsibilities described in the Ministerial Decision. The Ministerial Decision provides that any joint stock company must comply with the following when forming a board of directors:

- the majority of the members of the board must be persons not undertaking remunerated work with the company;
- at least one third of the members of the board must be independent members whose relatives of the first degree shall not have occupied a senior position during the two years prior to that member’s appointment, and who must not have had a relationship resulting in financial dealings with the company, its parent, subsidiary or affiliated companies;
- a legal person must not be represented by more than one member of the board of directors.

Article two of the Ministerial Decision sets out the minimum conditions which have to be complied with by any person proposed for membership of a board, including inter alia, a minimum age of 25 years, and being of good conduct and reputation (for the other key conditions necessary for appointment to a board, see the Restrictions section, above).

Directors’ liabilities under the Commercial Companies Law include:

- joint and several liability for any damage arising from the non-registration of the company within one month of the company’s constitutive general meeting;
- liability for failure to amend any discrepancy in the procedures for the establishment of a joint stock company within one month of being notified of that discrepancy;
- liability to the company, its shareholders and third parties for any damage caused by a director’s breach of law; and/or any act of the director which is ultra vires; and/or for fraud; and/or for negligence in the performance of their duties;
- liability for intentionally using or including false information in any company document, or omitting any essential fact which conceals the company’s true financial condition;
- if more than one director is liable for a breach of the Commercial Companies Law, the competent court may decide to hold each director liable for all or part of the damages thereunder.

Under the Commercial Law (Royal Decree 55/90) the directors may be held jointly or severally liable for a proportion of the debts of the company in the event of an insolvency.

The Omani Penal Code (Royal Decree 7/74) holds the directors (and the shareholders) of a company liable to imprisonment for a minimum of three years and a maximum of ten years for the creation of a ‘prohibited body’ within the company, namely a body the purpose or objectives of which is in defiance of the basic political, economic or social systems of the Sultanate of Oman.

Immigration issues

In principle, a foreign national may be eligible for appointment as a director of a company registered in Oman.

If the director is resident in Oman, he or she will need to hold an Employment Visa, which is granted at the request of the employee’s local sponsor (typically, that individual’s
employer in Oman), permitting the holder to stay in Oman for a maximum period of two years, subject to extensions for further periods of two years at a time.

An individual who is not resident in Oman is nevertheless in principle eligible to be appointed as a director of an Omani company, and for the purposes of attendance at board meetings or other visits to Oman, will need to obtain a so-called ‘Express Visa’ granted on the application of the individual’s local sponsor (typically, the company in question) which has a validity period of six months from the date of issuance of the visa, permitting the holder to stay in Oman for a maximum period of three weeks. The fee for an Express Visa, as at 1 September 2014, is 30 Omani Rials.

Taxation

In general, remuneration paid to directors, shareholders and partners in an Omani company is tax deductible subject to certain conditions. No personal income tax is payable in Oman, whether with respect to Omani nationals or foreign nationals resident in Oman.

Oman Social Insurance

Oman provides a social insurance scheme for Omani nationals administered by a state entity known as the Public Authority for Social Insurance (‘PASI’). As at 1 July 2014, the employer’s contribution to the PASI scheme with respect to cover for old age, disability and non-occupational death is 10.5% and the employee’s contribution is 7%, of the employee’s total gross salary. In addition, an employer will contribute a further 1% of the employee’s gross salary towards insurance against work related injuries and illness. The Government of the Sultanate of Oman will contribute a further 5.5% of the employee’s total gross salary into the PASI scheme. For the purposes of calculating contributions to this scheme, ‘gross salary’ is deemed to be inclusive of all allowances, whether in cash or in kind, payable to the employee, subject to a monthly gross salary cap of 3,000 Omani Rials.
This guide briefly presents the rules concerning management and supervisory boards in limited liability companies in Poland (“Spółka z ograniczoną odpowiedzialnością”, commonly abbreviated to “Sp. z o.o.”). It does not concern other forms of companies in Poland and in particular it does not apply to joint-stock companies (“Spółka Akcyjna” commonly abbreviated to “S.A.”).

Introduction

Polish law divides the decision-making and supervisory powers in a company between two separate bodies: the management board and supervisory board.

The management board is a mandatory body that runs the day-to-day business of a limited liability company and represents the company before third parties. A management board consists of at least one member. There is no maximum number of members of a management board, unless the articles of association provide otherwise.

A supervisory board is not usually mandatory. A supervisory board is only compulsory if the share capital of the company exceeds approx. EUR 119,000 (PLN 500,000) and the company has more than 25 shareholders. Generally, the supervisory board may not impose any binding instructions regarding the management of the company, however, its powers may be extended to approving major decisions regarding the company. The supervisory board mainly performs monitoring and control functions over the company’s business activity, so its directors are non-executive.

Eligibility requirements

There are certain restrictions on who can become a management board member. In particular, only a natural person may be appointed to the management board. Polish law does not allow companies to be appointed to boards. Furthermore, a management board member must have full capacity to undertake legal actions and cannot have been sentenced (within the last five years) for crimes against inter alia property, credibility of documents or for acts conducted to the detriment of the company’s interest.

It is also important to note that: (i) a management board member may not at the same time be a supervisory board member in the same company; and (ii) within a group of companies a management board member of a subsidiary company cannot be a supervisory board member of the parent or holding company.

Further restrictions may apply to companies acting in regulated sectors, for example: banking, insurance or betting services.

Method of appointment

Generally, the articles of association provide the method of appointment of a management board. Usually, management board members are appointed by shareholders. However, the articles of association may set out a different method of appointment, for example, by a resolution of the supervisory board or by means of designation by a shareholder or a third party.

The articles of association may provide that an appointment to the management board is either
for a fixed term or for an unlimited period of time. If the articles of association say nothing on that matter or if the appointment is for an unlimited period, then the mandate of a member of the management board expires on the date of the general meeting which approves the financial report for the first full financial year of his service as a member of the management board.

Generally, the appointment is effective immediately, but the resolution can specify that the appointment will be effective on a certain date or when an event occurs. Nevertheless, the appointment requires registration with the National Court Register for public information purposes. The registration process usually takes between two and three weeks.

Method of removal

A management board member may be removed from the management board by means of dismissal, resignation or due to other factors.

A management board member may resign from his position at any time by providing written notice to the company.

A management board member may be dismissed at any time without a reason, unless the articles of association provide otherwise. Usually the dismissal method is provided in the articles of association. If the articles of association do not stipulate any dismissal methods, then a shareholders’ resolution is required to dismiss a management board member.

Other removal factors include death or conviction of certain criminal offences.

Authority and representation

A management board member has the authority to both manage and represent the company.

The articles of association set out the rules on how a management board member runs the company. If the articles of association say nothing on this subject, then: (i) each management board member may manage the company individually to the extent his decisions do not exceed the scope of the ordinary acts of the company; and (ii) a management board resolution is required for acts exceeding this scope.

The articles of association may set out the rules on how a management board member represents the company. If the articles of association say nothing in this respect, then the company is represented by two management board members or by one member acting jointly with a commercial proxy.

A management board member’s right to represent the company cannot be effectively limited with regard to third parties otherwise than by imposing a joint representation requirement by the articles of association.

Management board by-laws

It is possible to set out detailed rules concerning the authority and organisation of the management board in the company’s internal corporate documents, i.e. in the management board by-laws.

The management board by-laws are only binding between the company and the management board members. This means that the by-laws are not enforceable against third parties. Consequently, if the management board by-laws provide for an internal division of duties between the management board members and if a given management board member acts outside the scope of his authorisation, then the actions of such a member are effective and bind the company against third parties, but the management board member may be held liable by the company for any loss the company has suffered as a result of his actions.

Contractual relationship with the company

Appointment to the management board establishes a legal relationship between the company and the newly appointed management board member. The scope of this relationship is regulated by Polish law, the company’s articles of association and the content of the resolution approving the appointment.

The appointment does not in itself constitute a contractual relationship with the company, or entitle a manager to remuneration for services provided.

That is why the appointment to the management board is often supplemented by an additional contract, for example: a management contract, a service contract or an employment contract. The choice of contract depends on various factors, such as tax efficiency, stability, supervision, etc. These agreements establish a contractual relationship with the company and regulate among others remuneration issues and duties.

Conflicts of interest

A management board member cannot, without the consent of the company: (i) engage in a competing business, (ii) participate as a partner in a competing partnership, or as a member of a governing body of a competing capital company, (iii) participate in another competing legal person as a member of its governing
Duties of a director

Generally, a management board member is required to manage the affairs of the company and to represent the company, in all court proceedings and out of court dealings of the company.

In particular, a management board member: (i) is obliged to perform his actions with a level of due care that corresponds to the professional character of his function; (ii) cannot, without the consent of the company, be involved in any entity which competes with the company; (iii) is obliged to avoid conflicts of interest and (iv) should act in the best interest of the company.

Liability

A management board member may be liable for the performance of his duties under civil, criminal and organisational liability.

Civil liability is liability for damage. A management board member is liable towards a company, and may be liable towards shareholders and third parties (in particular the company's creditors), as the case may be, under: (i) general rules on liability; and (ii) rules on liability set out in the Commercial Companies Code.

Under the general rules of liability, a person who culpably causes damage is obliged to compensate for such loss. This provision sets out a general base for ‘tortious’ liability of a management board member. To be successful, the claimant must prove that it suffered damage due to the culpable acts of the management board member, which may be difficult in practice. Therefore, claims based on this general provision are very rare.

Under the Commercial Companies Code, a management board member is liable towards the company for the damage the company suffered due to the member’s acts. To hold a management board member liable, the following conditions must be met: (i) the company must suffer damage; (ii) the damage must result from an act or omission of the management board member that either breached the law or the articles of association; (iii) the management board member’s act must be culpable and he must have failed to maintain the standard of due professional diligence. All these conditions must be met at the same time in order to trigger a potentially successful claim.

If more than one management board member caused damage, all members involved may be jointly and severally liable.

Management board members may be held jointly and severally liable with the company for its obligations, if enforcement against the company proves to be ineffective, provided that they did not, in appropriate time, file a petition for bankruptcy or composition proceedings or composition proceedings were not commenced. However, they can be exempted from this liability, if they prove that a petition was filed in due time or that they were not at fault, or that the creditor did not sustain any damage despite the fact that the petition was not filed or that composition proceedings were not commenced.

A management board member may be criminally liable for intentional acts or omissions. An offence is committed with intent if the perpetrator has the will to commit it, that is, is willing to commit the offence or, foreseeing the possibility of perpetrating it, chooses to do so. However, Polish law also penalises certain situations where an offence is committed unintentionally.

Organisational liability of a management board member means that a management board member can be dismissed from his position at any time.

Immigration issues

Companies looking to hire foreign employees in Poland must obtain a work permit from the relevant authority. Foreigners may only be employed for the period of time specified in the work permit (which can be issued for a maximum of three years with a possibility of extension), but no longer than for the period of stay established in a work visa or the period specified in a temporary residence permit in Poland. If on the day of submitting an application for a work permit for
a management board member, a company employs over 25 people, a work permit can be issued for up to five years. A work visa/temporary residence permit is a separate travel (or residence certification) document from a work permit and is obtained by the foreign employee himself.

Generally, work permits are not required for EU or EEA citizens or citizens of other countries linked to the EEA by bilateral agreements with EU countries and the European Community itself (e.g. Switzerland).

Subject to the above, work permits are not required if a foreign national from another country to those specified above: (i) works as a management board member of a Polish company for less than six months during any 12 consecutive months and stays in Poland on the basis of an appropriate work visa/temporary residence permit; (ii) is posted to work in Poland as a management board member of a Polish company by an employer from another EU country provided that he has a relevant work authorisation enabling him to be employed in another EU country and that he retains permanent residency in an EU country; (iii) is a citizen of Belarus, Ukraine, Russia, Georgia or Moldova and works for less than six months during any 12 consecutive months and his employer registers his employment in the relevant Labour Office.

In general, management board members who enter into an employment contract are covered by the general rules of employment law. However, there are minor exceptions to these rules, for example executives generally do not have the right to additional remuneration for work performed beyond normal working hours. In addition, different rules apply to management board members in relation to night time work, minimum rest periods and, generally, time recording.

### Taxation

The tax consequences of receiving remuneration depend on the tax residency status of the management board member.

As a rule, a management board member who: (i) has a close personal and economic relationship with Poland (i.e. has the centre of his vital interests in Poland); or (ii) stays in Poland for more than 183 days in a given tax year, is deemed to have his place of residence in Poland. Consequently, he is subject to Polish personal income tax on his worldwide income (so-called “unlimited tax liability”).

A management board member who does not have his place of residence in Poland is only subject to Polish personal income tax on income earned in Poland (so-called “limited tax liability”).

Taxation of a management board member’s income differs depending on the legal basis of his remuneration.

In case of an employment contract, a Polish company that remunerates a management board member is required to calculate and withhold monthly tax advances on his salary at the progressive tax scale of 18% for income up to PLN 85,528 PLN and 32% for income over PLN 85,528.

Income received under a management contract is subject to similar tax rules. However, the tax advances on such remuneration are withheld on a monthly basis at 18% and then the income is subject to reconciliation according to the progressive scale through an annual tax return.

Generally, if the legal basis for a management board member’s remuneration is expressly provided for in the appointment resolution, then his income is subject to standard Polish personal income tax at two rates of 18% (for amounts up to PLN 85,528) or 32% (for amounts over PLN 85,528). Tax advances are paid on a similar basis as for management contracts.

### Expenses

Any additional expenses that are incurred by the employer on behalf of a management board member (i.e. rent for accommodation, travel expenses for non-business travel etc.) constitute part of the management board member’s taxable income. However, some exceptions apply to this rule.

### Social security

Usually, the legal relationship with the manager is based not only on the shareholders’ resolution, but additionally regulated by an agreement. In the case of employment contracts, social security contributions are paid partly by the company and partly by the management board member (at approx. 17% and 14%, respectively). However, these rates apply only to the management board member’s cumulative income from the beginning of 2014 up to approx. EUR 26,885 (PLN 112,380). Any excess is excluded from the social security contributions.

Similar social security rules apply to management contracts. If a member of a management board performs his duties only on the basis of a resolution approving his appointment (which is an uncommon situation) then no social security contributions are due from the company.
This guide focuses primarily on the rules relating to private limited liability companies (“sociedades por quotas”), which are the most common type of company in Portugal. However, given the relevance of public limited liability companies (“sociedades anónimas”) within the Portuguese legal system (and corporate law in particular) and in order to provide a more comprehensive overview, where appropriate, we have also covered certain matters relating to directors of this type of company.

**Eligibility requirements**

The company’s management body may consist of either one or more individuals. When a private limited liability company has two or more directors, they may act jointly or collegiately. The articles of association of a private limited liability company may also establish that the company is managed by a board of directors, in which case this body will function on a collegiate basis.

Public limited companies are managed by a board of directors – consisting of more than one individual – but may have a sole director provided that their share capital does not exceed EUR 200,000.

Both private individuals and legal persons, such as corporations, are eligible to be appointed for directorship positions. This is specifically established for public limited companies and is also an accepted practice in relation to private limited liability companies (although there is case-law which rejects this possibility). In the event that a legal person is appointed as a director, it must appoint a private individual to represent it. The legal person will share liability with the private individual appointed to represent it.

A director is not required to be a shareholder in the company and does not need to be a resident in Portugal nor a Portuguese national. Nevertheless, a foreign director will need to obtain a Portuguese Tax Identification Number (NIF).

Minors, incapacitated persons or persons pronounced legally incapable by the courts are not eligible to act as directors.

**Method of appointment**

As a general rule, directors are appointed by the shareholders’ meeting (such appointment may also occur upon the company’s incorporation, with a provision included in the relevant incorporation document to appoint the relevant directors).

The articles of association of a public limited liability company may grant minority shareholders (with at least 10% of the shares representing the share capital of the company) the right to appoint one director.

If one or more directors of a public limited liability company are permanently absent they may be substituted by alternate director(s) – if one or more have been appointed – or if there are no alternate directors, the board of directors may co-opt a new director. If no new director is appointed by co-option, the audit board or the audit committee are entitled to appoint a new director. In both situations, such appointment requires the ratification of the shareholders in a subsequent shareholders’ meeting.

Directors of private limited companies are appointed for an indefinite term, unless the articles of association
establish otherwise. The directors of a public limited company are appointed for a period of time set out in the articles of association of the company up to a maximum of four years.

In both cases, directors can be re-elected unless the articles provide otherwise. Directors must accept the appointment (this acceptance is deemed implied if directors start acting in such capacity) and the appointment must be registered with the Commercial Registration Office.

In certain situations (in particular if the management of the company is jeopardized by the permanent or temporary absence of one of the directors or if the board does not have sufficient quorum to function), the directors or the shareholders may request the court to appoint a new director. For public limited liability companies, such request can only be submitted to the courts by shareholders.

**Method of removal**

A director may resign from office at any time by notifying the company.

The resignation of a director of a private limited liability company becomes effective eight days after the notification has been received. The resignation of a director of a public limited liability company becomes effective at the end of the month following the notification, except if a substitute director is appointed in the meantime.

Directors are also removed upon expiry of the term they have been appointed for. If a term for which the directors have been appointed has expired without a shareholders’ meeting having convened, the directors will remain in office until the next shareholders’ meeting.

In addition, a director may be removed at any time, by resolution of a shareholders meeting. Such removal may be (i) based on just cause or (ii) without just cause, in which case the company may be liable to pay compensation to the dismissed director for the damages the latter suffered as a result of the dismissal.

The compensation resulting from a removal without just cause is capped and may not exceed the amount the director would have received up to the end of the period he had been elected for. For private limited liability companies, if there is no time limitation in the articles of association of the company for the relevant term, there is a legal presumption that such period does not exceed four years.

Removal or resignation of a director is subject to registration with the Commercial Registration Office.

**Authority and representation**

The directors are the company’s managing body with full authority to represent the company in all actions related to the company’s corporate purpose.

The company will always be liable to third parties acting in good faith in respect of actions taken by its directors, even when acting outside its corporate purpose. The authority to represent the company becomes effective upon acceptance of the directorship position. However, in relation to third parties, the appointment is not enforceable until registration with the Commercial Registration Office occurs.

In case of private limited liability companies, it is not common for a board of directors to be established to manage the company. When there is more than one managing director, the respective powers and authority are exercised jointly and the company is deemed bound by the transactions concluded by the majority of managing directors.

When the company’s management body is organised as a board of directors (not common in private limited liability companies but common in public ones), corporate authority vests with the board of directors as a whole, and such authority is exercised by the directors, acting jointly. The company is bound by the majority of the directors (or ratified by such majority), unless the articles of association provide that a lower number of directors is required.

The board of directors is a collegiate body and does not have a maximum number of members. The articles of association must set out the number of members of the board, or the minimum and the maximum number of members, in which case the general meeting determines the actual number of directors for the relevant term.

A minimum attendance of a majority of the board’s members is required for a quorate board meeting.

Decisions of the board are reached by a majority of present or represented members. The chairman of the board has a casting vote in the event the board consists of an even number of members (or if the bylaws establish such a casting vote). Board minutes have to be recorded in the relevant meetings book.

It is common in public limited liability companies to delegate certain powers to a managing director (this is also possible but not as common in private limited liability companies), or to an executive committee. The delegate(s)/executive committee have the same authority to represent the company as the board within the powers that have been attributed to it. There are, however, certain powers that cannot be delegated, such as approval of the annual accounts,
creation of guarantees, mergers, transformations, share capital increases and change of registered office.

In both private and public limited liability companies, the board of directors or managing directors (with the necessary authority) can grant powers of representation to third parties to act, with full authority, on behalf of the company.

**Contractual relationship with the company**

The characterisation of the relationship of a director with the company is a disputed issue in Portugal. The appointment of a director is generally deemed to be a corporate relationship in which a “sui-generis” contractual relationship is also established between the company and the director, comprising aspects of mandate, services and employment agreements.

In public limited liability companies, it is common for an administration agreement (incorporating elements from typical services and mandate agreements) to be entered into between the company and the director.

As a general rule, the directors are remunerated, although the bylaws of a private limited liability company may establish otherwise.

In public limited liability companies, if the appointed director was previously an employee of the company, the employment agreement is automatically deemed suspended, ceasing to be effective upon appointment. It will however automatically come into force when such a person ceases to be a director, irrespective of the method of removal (i.e. resignation or dismissal).

**Conflicts of interest**

Portuguese law does not have specific rules on conflicts of interest applicable to a director. Nevertheless, it does establish conduct rules, specifying that the directors have a duty of loyalty towards the company.

It is generally accepted that directors should not make decisions when there is a conflict of interest situation (i.e. the director has a personal interest in a particular decision which may not be in line with the company’s interests). In such cases, the director may be liable towards the company for any damages resulting from breach of this duty.

To avoid potential conflicts of interest and unless the shareholders give their consent, directors are prohibited from conducting, directly or indirectly, any competing activity with the company, being liable towards the company for any breach of this obligation. Portuguese law also establishes a general prohibition for the company to enter into agreements with the directors, unless the board of directors has previously passed a resolution approving this. Portuguese law establishes a specific prohibition on companies facilitating loans to directors, making payments on their behalf or creating guarantees to cover their obligations.

**Duties of a director**

The main fiduciary duties of the director are (i) a duty of care, which entails that a director has the necessary availability, skills and knowledge of the company’s business while performing his/her functions with the diligence of a cautious, thorough and organized businessperson and (ii) a duty of loyalty, which entails acting in the company’s interest and taking into account the long term interests of the shareholders, while also considering the interests of other stakeholders (e.g. employees, clients and creditors).

These general fiduciary duties are the basis of several specific duties established in the Portuguese Companies Code which are applicable to directors of both private and public limited liability companies.

**Liability**

**Liability vis-à-vis the company**

Directors are jointly and severally liable vis-à-vis the company for unlawful actions or omissions resulting from a breach of their legal or contractual duties and which have caused damages to the company, except in the event that the director was not in attendance at the meeting when such a decision was taken or voted against it. A claim may be brought by the company or, on its behalf, by shareholder(s) holding at least a 5% stake in the company (or 2% if the company is listed). The company is not required to prove that the conduct of the directors resulted from wilful misconduct or negligence, as there is a legal presumption to that effect.

Directors will not be liable if they are able to prove that they were properly informed, that no conflicts of interest existed and that the relevant decisions were based on rational criteria from a corporate/economic standpoint or if the unlawful actions or omissions of the directors resulted from a shareholders’ resolution.

**Liability vis-à-vis the company’s creditors**

If the directors have willfully or negligently breached legal or contractual duties which are established for the protection of creditors, they may be liable vis-à-vis the company’s creditors if the assets of the company are insufficient to meet the company’s indebtedness towards its creditors. If no action is taken by the company or its shareholders (as a result of the mechanism described above), the company’s
creditors may exercise the company’s rights and claim the relevant damages from the directors for the company.

**Liability vis-à-vis shareholders or third parties**
Directors may also be liable vis-à-vis shareholders or other third parties for any direct damages that may result from the performance of their functions as directors. In this case, directors shall only be liable if all general requirements for civil liability are met, i.e. there is an unlawful action or omission by the directors, the conduct is carried out with wilful misconduct or negligence, such action or omission has caused damages and there is a link between the action or omission and the damages. Third parties will include any party which is not the company, a director or a shareholder (while acting in such capacity) and may include employees, suppliers, clients, the State or any other creditors.

**Liability arising from company’s tax debts**
In the event a company has a liability under tax law, and the company does not possess enough assets to cover such liability, directors may be jointly and severally liable for any tax debt which derives from actions or facts occurring during their term in office.

In addition, directors may also be found criminally liable for such actions or facts.

**Liability arising from labour credits**
Directors may also be jointly and severally liable for the payment of labour credits arising from the labour relationship, its breach or termination, if they are overdue for more than three months, to the extent the requirements regarding liability vis-à-vis the company’s creditors or its shareholders/third parties, as provided above apply.

**Liability arising from social security and other labour administrative offences**
Directors may be jointly and severally liable for the payment of the applicable administrative fines for social security and other labour administrative offences.

**Criminal liability**
In addition to criminal liability deriving from tax debts, there are several actions that may result in criminal liability of the directors, including: (i) refusing to provide information relating to the preparation of shareholder meetings to interested parties; (ii) misrepresentation of company information to persons with a right to receive information; (iii) irregular issuance of share or bond certificates; or (iv) rendering the company insolvent (either as a result of wilful misconduct or negligence).

**Limitation of liability**
Directors’ liabilities cannot be limited by agreement. Such clause, if it exists, is deemed null and void.

In addition, the shareholders may only waive their right to receive compensation or agree on a reduction thereof by a resolution of the shareholders representing more than 90% of the company’s share capital.

Notwithstanding the above, insurance policies may be used to cover directors’ liability. It is generally accepted that the company pays for insurance premiums. Directors are required to provide a performance guarantee to cover potential liabilities (which may be replaced by the aforementioned insurance), unless at least two of the following thresholds are not exceeded for a period of two consecutive years:
- aggregate assets – EUR 100m;
- aggregate turnover – EUR 150m; and
- number of employees – 150.

**Immigration issues**
European Economic Area (“EEA”) citizens do not have to fulfil any immigration-related requirements to become directors of a Portuguese company.

Non-EEA citizens require a residence permit which is granted on the basis of an independent or working relationship with a Portuguese entity. These rules apply to nationals from all non-EEA countries, unless otherwise established by International Treaties ratified by Portugal. In order to request a residence permit, a visa should first be sought from the Portuguese Consulate of the country of origin.

In order to evidence that there is an independent or working relationship with a Portuguese entity the director will need to present the contract that formalises the relationship – a services agreement or an employment contract. Upon issuance of the residence permit, the Immigration and Borders Services (Serviços de Estrangeiros e Fronteira or “SEF”) usually requests the company’s permanent commercial certificate (certidão permanente) showing the appointment of the said director or a copy of the relevant shareholder resolution (other documentation may be requested on a case-by-case basis).

**Direct taxation**

*When the director is a natural individual – Portuguese Personal Income Tax (IRS)*

**Resident**
Income earned by an individual who is a Portuguese resident for tax purposes is considered to be subject to IRS on a worldwide income basis (notwithstanding, notably, double taxation treaties and EU law).

IRS is assessed by dividing income received among baskets: fees received by corporate body members (e.g. directors) are considered to be a paycheck/workers’
remuneration and are thus liable to IRS at progressive rates of up to 48%. Additional income tax will be due on taxable income exceeding EUR 80,000 as follows: (a) 2.5% on taxable income exceeding EUR 80,000 up to EUR 250,000 and (b) 5% on the remaining part of the taxable income (if any). An additional surcharge at the rate of 3.5% will also be due on the amount that exceeds the annual amount of the monthly minimum guaranteed wage.

**Non-resident**

Income earned by a non-resident individual is considered to be liable to IRS on a source basis, i.e. only if it is considered to be earned within Portuguese territory (notwithstanding, notably, double taxation treaties and EU law).

Fees received by a Portuguese company’s non-resident director will usually be liable to a final withholding tax of 25%.

**When the director is a corporation**

**Portuguese Corporate Income Tax (IRC)**

**Resident or non-resident with permanent establishment**

IRC is assessed in accordance with IFRS/IAS, subject to tax law corrections and adjustments. Income earned by a Portuguese resident company for tax purposes is considered to be liable to IRC on a worldwide income basis (notwithstanding, notably, double taxation treaties and EU law). Fees or income received as a director will thus be accrued to profits and subject to IRC at a rate of 21% to which a maximum 1.5% municipality surcharge (depending on where the company or permanent establishment is incorporated) may be added. Taxable profits will also become subject to a progressive state surcharge according to which, 3% will be applicable on taxable profits between EUR 1,5m and EUR 7,5m, 5% due on taxable profits between EUR 7,5m and EUR 35m and 7% due on taxable profits exceeding EUR 35m.

Notwithstanding the fees or income received by a company as a director will be liable to a 25% withholding tax on account of the final tax to be paid.

**Non-resident (without permanent establishment)**

Income earned by a non-resident company is considered to be liable to IRC on a source basis, i.e. only if it is considered to be earned within Portuguese territory (notwithstanding, notably, double taxation treaties and EU law).

Fees or income received by a Portuguese company’s non-resident corporate director will usually be subject to a final withholding tax of 25%.

**Social security**

In general terms, a member of a corporate body (membro de orgão estatutário or “MOE”) is subject to the Portuguese Social Security contribution scheme and all effectively earned income is subject to a 29.6% contribution, the MOE being responsible for contributing 9.3% and the company for the remaining 20.3%. However, if the MOE has management or directorship functions, then the aggregate contribution rate will be 34.75%, the MOE being responsible for 11% and the company for the remaining 23.75%.

If the MOE has been appointed as a director when he has been an employee of the company for more than one year, he will still be considered to be a subordinate employee for Portuguese social security purposes and therefore the contribution due to the social security authorities will remain unchanged – an aggregate contribution of 34.75% of that MOE’s income will be due, the MOE being responsible for contributing 11% of its income and the company for the remaining 23.75%. Where the global social security contribution is 34.75%, the director is entitled to an unemployment subsidy if he is made redundant (if the remaining conditions for such subsidy are met).

For all directors registered and contributing to the Portuguese social security system as MOEs, social welfare benefits will be granted in the following situations: family charges, death, illness, incapacity, professional illnesses, parenthood and retirement.

A MOE can request his/her exemption from contributing to the Portuguese social security system, if he is registered and contributing to another national or foreign social security system and is not receiving any remuneration for his/her duties as a director in Portugal. Other specific conditions may also exempt a MOE from Social Security contributions.
This guide focuses on the rules relating to joint stock companies (‘Societate pe actiuni’ or ‘S.A.’) and to limited liability companies (‘Societate cu raspundere limitata’ or ‘S.R.L.’). It does not address the rules relating to other forms of companies.

Joint stock companies (SA)

The management structure of a Romanian joint stock company is generally based on a one-tier management system, consisting of a single director or a board of directors. Alternatively, the management structure can be based on a two-tier system, consisting of a management board and a separate supervisory board.

— the management board, which is also the executive body, carries out the management of the company on a day-to-day basis and represents the company in relation to third parties and in front of official bodies;
— the supervisory board mainly supervises the company’s activities, including those of the management board, and appoints members of the management board.

Members of the supervisory board may not simultaneously be members of the management board, or employees of the company.

Generally, the supervisory board does not have any managing powers but the constitutive deed may provide that certain matters require the prior consent of the supervisory board. The constitutive deed of the company also governs the relationship between the two bodies.

Eligibility requirements

Generally, both individuals and legal entities may be appointed as directors or members of the supervisory board. However, a legal entity must designate an individual as a permanent representative.

There are no citizenship, residency or work permit requirements for directors or for members of management or supervisory boards.

However, certain restrictions are placed on who can become a director. For example, restrictions are placed on persons who have been legally declared incapable or who have been convicted of corruption crimes, forgery, embezzlement, tax evasion and other crimes prescribed by the law. Furthermore, restrictions are also placed on persons liable for breach of Romanian Law no. 656/2002, as republished, which deals with the prevention of and sanctions for money laundering and creates certain measures for the prevention and combating of the financing of terrorism acts.

Also, it is important to note that:

— if the directors of a joint stock company are appointed from amongst the company’s employees, their employment agreement must be suspended for the term of the mandate; and
— an individual can be a director and/or a member of the supervisory board of no more than five other joint stock companies headquartered in Romania. This prohibition does not apply where the director holds 25% of the shares of the company or acts as a member of the board of directors or a member of the supervisory board of the joint stock company
owning 25% of the said shares. This restriction also applies in the case of the representatives of the directors/members of the supervisory board’s legal person.

**Method of appointment**

Directors are appointed at an ordinary general meeting of shareholders. The first directors are nominated in the constitutive deed of the company and their mandate cannot exceed two years. The mandate of subsequent directors is for four years. The directors may be re-elected, unless the constitutive deed does not permit this.

There must not be an even number of directors. Joint stock companies, whose financial statements must be audited according to the law, must have at least three directors.

The Trade Registry Office must be notified of any new appointments and resignations of managers or directors and these must also be published in the Romanian Official Gazette.

In the case of a two-tier system, members of the management board are appointed by the supervisory board for a term prescribed by the constitutive deed of the company, but their mandate may not exceed a period of four years.

Members of the supervisory board are appointed at the general meeting of shareholders but the initial members are appointed through the constitutive deed of the company and their mandate cannot exceed two years. The number of members on the supervisory board is also established in the constitutive deed and must be between three and eleven.

**Method of removal**

Directors may resign at any time by giving notice to the company. They need not give a reason for their resignation. If a sole director manages the company, he must convene a general meeting of shareholders upon his resignation.

Directors may be removed at any time by a decision of a general meeting of shareholders. Under Romanian law, directors removed without cause are entitled to claim damages.

In a two-tier system, members of the management board may be removed at any time by the supervisory board. The constitutive deed may also provide for their removal by a decision of shareholders at a general meeting. If their removal is decided without cause, they are entitled to claim damages.

**Authority and representation**

Generally, the directors are authorised to perform all acts necessary and useful for the conduct of the company’s business, other than those acts requiring the approval of shareholders at a general meeting. These acts are found in the constitutive deed of the company or are expressly provided for by Romanian law.

Directors with powers to represent the company cannot subdelegate such powers unless they are expressly authorised to do so. Failure to observe this may result in the company claiming any ensuing benefits from the person to whom the director delegated his authority. Liability in such cases is joint with the person to whom the director delegated his authority.

The directors, or, in the case of a two-tier system, the management board, acting in the name and on behalf of the company, can only acquire, alienate, lease, exchange or grant security over assets relating to the company, with a value exceeding half of the book value of the company’s assets on the date of entering into such act, with the prior approval of the extraordinary general meeting of the shareholders.

In a one-tier system, the board of directors represents the company in relation to third parties and in courts. In the absence of a different provision in the constitutive deed, the board of directors represents the company through its chairman. Furthermore, the constitutive deed may appoint the chairman and one or several directors to represent the company, acting jointly or individually.

The names and specimen signatures of the persons empowered to represent the company must be filed with the Trade Registry Office by the board of directors.

The board of directors may also delegate the management of the company to one or several managers, appointing one of them as a general manager. In the case of joint stock companies which are subject to mandatory financial audits, it is compulsory to delegate the management of the company to a manager(s).

If the board of directors delegates the management of the joint stock company to managers, the power to represent the company will be in the hands of the general manager.

A two-tier system, the management board is authorised to represent the company in relation to third parties and
in court. Unless otherwise provided in the constitutive deed, the members of the management board may only represent the company jointly. In such case the members of the management board can authorise one of them to perform certain operations or certain types of operations by a unanimous consent. The supervisory board represents the company in relation to the management board.

**Working rules of the board of directors**

The organisation and working rules of the board of directors, management board and supervisory board are usually set out in the constitutive deed of the company and in the general provisions of Romanian law.

The board of directors must appoint a chairman from amongst its members. The constitutive deed may provide for the chairman to be nominated by the shareholders in an ordinary general meeting.

The board of directors may also set up consulting committees of at least two members, who advise the board in respect of matters such as audit, remuneration of staff or nomination of candidates for various managerial positions.

For the resolutions of the board of directors, management board or supervisory board to be valid, the presence of at least half of the number of members of each of these bodies is required, unless the constitutive deed provides a higher number.

The decisions of the board of directors, the management board or the supervisory board are taken by a simple majority of the votes of the members present at the meeting, unless otherwise provided in the constitutive deed of the company. Decisions regarding the appointment and dismissal of the chairmen of such bodies are taken by the vote of the majority of the board’s members. Members may only be represented by other members. A member present at the meeting can only represent one absent member.

Unless otherwise provided in the constitutive deed, the chairman of the board of directors or of the supervisory board has a casting vote in the case of deadlock. This does not apply if the chairman of the board of directors also acts as a manager.

If the current chairman of the board of directors, management board or supervisory board cannot vote or is barred from voting within the relevant body, the other members may elect a chairman who will have the same rights as the current chairman.

In the case of deadlock and if the chairman does not have a casting vote, the motion is considered denied.

The constitutive deed of a company may also approve participation at board meetings by means of electronic communication. Also, the constitutive deed can limit decisions to be taken in such situations and can also provide for a right to object to the manner of holding the meeting in favour of a certain number of members of the relevant body.

**Contractual relationship with the company**

Under Romanian law, the legal relationship between directors and the company is regarded as a commercial mandate.

Throughout the term of the mandate, directors of joint stock companies cannot enter into employment agreements with the company. Directors may therefore be retained on the basis of management or mandate agreements, specifying their duties and remuneration/benefits, and including, inter alia, confidentiality and non-compete provisions.

The remuneration of board members, and in the case of a two-tier system, of the supervisory board members, is decided at a general meeting of shareholders or through the constitutive deed.

**Conflicts of interest**

The directors of a joint stock company must exercise their mandate with loyalty and in the interests of the company.

Any director who has a conflict of interest relating to a transaction must inform the board of directors and the auditors of such a conflict and abstain from voting in respect of that transaction. The same obligations apply in cases where the conflict of interest relates to the director’s relatives or affiliates. Failure to observe this obligation may render the director liable to compensate the company for any damage sustained by the company as a result.

A director may transact with the company for his own benefit, subject to such transactions receiving prior approval from the shareholders at an extraordinary meeting, if the value exceeds 10% of the net assets of the company.

**Duties of a director**

The duties of directors vary depending on which governance system is adopted:

— In a one-tier system, the members of the board of directors are entrusted with the fulfilment
of all acts necessary and useful for the conduct of business activities of the company, including: (i) the establishment of accounting policies and financial control systems; (ii) the supervision of managerial activities; and (iii) the drawing up of an annual report.

The shareholders at a general meeting may also delegate certain actions to members of the board of directors, such as changing the headquarters of the company and increasing its share capital (in this case, for a period of maximum five years, the board of directors/the management board is authorised to increase the subscribed share capital of the company up to a specific nominal value, by issuing new shares, provided that the nominal value of the share capital does not exceed half of the subscribed share capital of the company as at the date the authorisation is granted).

— In a two-tier system, the management board has executive powers, while the supervisory board only has a supervisory role.

**Liability**

The directors are liable to the company for the non-fulfilment of their obligations that derive from the constitutive deed of the company, the decisions of a general meeting of shareholders or the law.

Under Romanian law, the directors are jointly liable to the company for breach of obligations relating to: the contributions made by shareholders, the actual existence of paid dividends, the accuracy and existence of the company's registers, the strict implementation of resolutions of the general meetings of shareholders, the strict fulfilment of the duties imposed on them by law and by the constitutive deed of the company.

Directors' liability may also be triggered by creditors of the company (subject to the opening of insolvency proceedings) or by any third parties who incur a loss as a result of their unlawful actions. As directors act on behalf of the company, personal liability towards third parties may be triggered only if they act beyond the scope of their powers. Directors are also subject to criminal liability under Romanian company law.

**Limitation of liability**

Romanian company law does not contain specific provisions permitting the limitation of a director's liability. However, general principles of law restrict agreements limiting the liability of a debtor to cases when the debtor acted negligently or imprudently and not with intentional wrongdoing. Accordingly, a director's liability for intentional wrongdoings vis-à-vis third parties may not be limited by the company.

**Immigration issues**

As Romanian company law provides that directors and members of the management board and supervisory boards must not be employees of the company, no requirements as to work permits or residency are applicable. Under general law, there are no restrictions on companies concluding management or mandate agreements with foreign citizens.

**Taxation**

Directors' remuneration is subject to income tax in Romania, whether they are resident or non-resident. Romania has concluded double taxation treaties with most of the EU countries and many other countries. Where a director is resident in a country party to such a treaty, the income tax applied in Romania may not exceed the tax rate stipulated in the treaty. If the tax contributions are different in the internal legislation and in the treaty, the more favorable tax provisions apply.

**Social security**

It is mandatory for directors (even if they are retained based on management or mandate agreements) to pay social security contributions to the Romanian public social security system. Such requirements apply to Romanian citizens, and to foreigners domiciled or resident in Romania.

**Limited Liability Company (SRL)**

A Romanian limited liability company is managed by one or more directors, who can also be shareholders of the company.

The constitutive deed of a limited liability company must include provisions with respect to the appointment of directors, the powers granted to them and the manner of exercising these powers (whether jointly or individually).

**Eligibility requirements**

There are no residency or nationality requirements for directors of a limited liability company.

Non-resident directors must submit a statement of their responsibility to the Trade Registry Office, stating that they have no fiscal debts in Romania.
Method of appointment

Directors of limited liability companies are appointed by the general meeting of shareholders, or through the constitutive deed.

The shareholders representing the absolute majority of the share capital may appoint one or more directors from among themselves, determining the extent of their powers, the term of their mandate and their remuneration (if applicable), unless the constitutive deed provides otherwise.

Method of removal

A director can be removed at any time by a decision of a general meeting of shareholders. This requires an amendment to the constitutive deed by unanimous consent of all the shareholders, unless the constitutive deed provides otherwise.

Authority and representation

Generally, and unless otherwise provided in the constitutive deed, the power to represent the company is granted to each director. The limitations on such powers are also provided in the constitutive deed.

Directors with powers to represent the company cannot subdelegate such powers unless they are expressly authorised to do so. Failure to observe this may result in the company claiming any ensuing benefits from the person to whom the director delegated his authority. Liability in such cases is joint with the person to whom the director delegated his authority.

Contractual relationship with the company

Directors are usually retained on the basis of management agreements or mandate agreements. The Romanian law provides that the sole shareholder can be an employee of the limited liability company of which he is a sole shareholder.

Conflicts of interests

Directors of limited liability companies are not allowed to act as directors in competing companies or companies having the same object of activity, nor to carry out the same trade or competing trade on their own or on behalf of another natural or legal person without the prior approval of the general meeting of shareholders, otherwise they may be dismissed and/or are liable for damages.

Duties of a director

Generally, a director of a limited liability company is entrusted with taking all measures or acts necessary for the conduct of the business activities of the company, except for matters reserved by law or by the constitutive deed to the general meeting of shareholders.

The main responsibilities of a director include organising the general meetings of shareholders and implementing the resolutions adopted at these meetings, drawing up a shareholders’ registry, keeping the accounting records and financial statements of the company and participating in all of the company's internal meetings.

Liability

Directors are jointly liable to the company for breach of obligations relating to the actual existence of the contributions made by the shareholders, the actual existence of paid dividends, the maintenance and accuracy of the company’s registers required by law and their accuracy, the strict implementation of the resolutions passed at general meetings of shareholders and the strict fulfilment of the duties imposed on them by law and by the constitutive deed of the company.

Directors’ liability may also be triggered by creditors of the company if insolvency proceedings are started. Directors are also subject to criminal liability under Romanian company law.

Limitation of liability

As there are no specific provisions in this respect for limited liability companies, general principles of Romanian law apply. These allow agreements to be concluded limiting the liability of a debtor in cases where the debtor’s fault takes the form of negligence or imprudence and not intentional wrongdoing.

Immigration issues

Generally, a work permit may be granted to foreign citizens upon request and after obtaining a residency visa. These requirements are not necessary for EU or EEA nationals. Furthermore, citizens of states with which Romania has concluded bilateral treaties with respect to residency and work permits, are not required to obtain such permits. The above only applies in case of directors who have concluded an employment agreement with the limited liability company.
Taxation

Remuneration received by directors is subject to income tax. If directors are employees of the company, the income tax is withheld from their salary.

Social security

Social Security contributions are mandatory regardless of whether the director is an employee or works pursuant to a management or mandate agreement. These provisions apply to Romanian citizens and to foreign citizens domiciled or resident in Romania.
This chapter focuses on the rules relating to the management of Russian legal entities and the duties and liabilities of their officers. Russia has two main kinds of legal entities: a limited liability company (‘Obozhestvo s Ogranichennoy Otvetstvennostyu’ abbreviated to ‘OOO’) and a joint stock company (‘Aksionernoe Obschestvo’ abbreviated to ‘AO’) which can be either public or non-public. The limited liability company form is often used as the form of company for wholly owned subsidiaries in Russia.

Management Bodies in Russian Companies

The main management body of both a limited liability company and a joint stock company can be either:

— a sole executive body, usually referred to as the general director (hereinafter “General Director”), or
— a General Director together with a collective executive body, usually referred to as the management board (hereinafter “Management Board”), that must be chaired by the General Director unless the managerial functions are delegated to an outside management body (see below); or
— an outside management body, if the charter of the company provides that the authorities of the General Director may be delegated.

The sole executive body of either a limited liability company or a joint stock company can consist of one or several persons (e.g. directors, chairmen) who may represent the company individually or jointly. This must be reflected in the Unified State Register of Legal Entities. Either an individual or a legal entity may be appointed as the sole executive body of the company.

Both a limited liability company and a joint stock company may, and in some cases must, also have a collective management body (e.g. a supervisory board or a board of directors) (hereinafter “Board of Directors”).

A public joint stock company must have a Board of Directors consisting of at least five members. The Board of Directors is a supervisory, rather than a management body with the powers stipulated by the Civil Code of the Russian Federation and the respective laws on limited liability companies and joint stock companies.

Method of appointment

The General Director and members of the Management Board are appointed by a resolution of the general meeting of the shareholders of the company (hereinafter “General Meeting”). The resolution is by simple majority unless, in the case of a limited liability company only, the charter specifies a different majority. The charter of a limited liability company and a joint stock company can provide that the authority to appoint the General Director and members of the Management Board is delegated by the General Meeting to the Board of Directors.

The appointment of the first General Director is recorded in the minutes of the founding meeting of the company and these minutes are filed with the registration authorities. The company is required to register all subsequent changes of the General Director with the registration authorities. There is no limitation imposed by law as to the maximum number of members of a Management Board, but the charter of the company will stipulate the number of members of the Management Board. The charter may also define the period of appointment and the procedure for re-appointment. It is not necessary to file details of the Management Board members with the registration authorities.
Resignation and Dismissal of General Director and Management Board Members

The General Director may resign from office at any time by giving not less than one month notice to the company. This is an exception to the standard two weeks' notice provision for all employees provided for by the Russian Labour Code.

A General Director may be removed any time by a resolution of the General Meeting (unless this power has been delegated to the Board of Directors). The resolution is by simple majority. The charter of a limited liability company may provide for a different majority.

Similarly, any member of the Management Board may be removed by a resolution passed by simple majority at a General Meeting. In the case of a limited liability company only, the charter may provide for a different majority.

Authority and representation

The General Director’s power to act on behalf of the company arises as a matter of civil law and does not require a power of attorney. The General Director, by virtue of his office, has the authority to bind the company. The General Director may delegate his authority to any person by way of a power of attorney. The General Director deals with all issues not falling within the scope of the authority of the General Meeting and the Board of Directors (if there is one). Certain restrictions on the General Director’s authority, such as a limit on certain transactions, can be set out in the company’s charter and the internal regulations of the company. However, restrictions which are set out in the internal regulations but not in the charter will be invalid and ineffective against a third party (including a third party with actual knowledge of those restrictions).

General Director’s contractual relationship with the company

Any employment contract that is entered into between a company and a General Director or a member of the Management Board will be subject to the provisions of the Russian Labour Code, many of which are mandatory and override any contrary terms and conditions specified in the individual employment contract. As a general rule any provisions of the employment agreement which improve the state of the employee shall apply even if they contradict the obligatory provisions of the Russian Labour Code.

In a limited liability company, the employment contract with the General Director can be signed either by the chairman of the General Meeting or by a participant who has been appointed by the General Meeting to sign on behalf of the company.

Alternatively, if the power to appoint the General Director has been conferred on the Board of Directors, the employment contract may be signed on behalf of the company by the chairman of the Board of Directors or a person authorised to do so by a decision of the Board of Directors. In a joint stock company an employment contract with the General Director is signed by the chairman of the Board of Directors or a person authorised by the resolution of the Board of Directors.

The employment contract of the General Director may be terminated at any time in accordance with the provisions of the Labour Code, by a resolution passed by the General Meeting or by the Board of Directors.

Interested party transactions

Russian law contains regulations on transactions between a company and interested parties (“interested party transactions”). The rules are similar in the case of both limited liability companies and joint stock companies.

Interested party transactions require the approval of the General Meeting. Authority to approve interested party transactions may be delegated to the Board of Directors by the company’s charter but only in relation to transactions which are valued at less than 2% of the company’s assets as reported in its latest accounts.

‘Interested parties’ include the General Director, members of the Management Board, members of the Board of Directors (if established) and participants/shareholders holding, either alone or with affiliates, 20% or more of the company’s voting capital as well as their respective close relatives. There are obligations to disclose information about interested parties. Approval of interested party transactions is by a majority vote of all participants/shareholders who are not interested in the transaction.

Duties and liability

The basic principles of liability of the General Director, members of the Board of Directors and Management Board are set out in the Civil Code of the Russian Federation and the federal laws on limited liability companies and joint stock companies and are in all material aspects the same for each type of company.

Under the current law, the General Director, members of the Board of Directors and Management Board are expected to act in the best interest of the company, and to discharge their duties in good faith and in a reasonable manner. The General Director will be liable if it is proven that while exercising his/her rights and executing his/her duties he/she acted in bad faith or
unreasonably, for instance if his/her actions or omissions were not consistent with ordinary civil circulation terms or ordinary business risk.

The principles are subject to the general rule that directors are liable to the company and not to the shareholders/participants. In accordance with the Civil Code of the Russian Federation the General Director has to compensate the legal entity for the losses caused through his fault following a claim from the legal entity or the shareholders acting in the interest of the legal entity.

Russian law in its current form has only a very undeveloped concept of directors’ duties. The law provides that the General Director, members of the Management Board and members of the Board of Directors, may be liable to the company for their ‘guilty actions’ (‘виновные действия’) but fails to define this term. In practice, it is therefore difficult to impeach a director under the current law because of lack of clear regulatory guidance or precedent as to the nature of directors’ duties. Furthermore, currently members of the Board of Directors and members of a Management Board can generally escape liability by remaining passive as it seems that they will only be liable if they vote in favour of the decision which caused the loss to the company and cannot be liable if they voted against such a decision or did not participate in the voting. It follows that there are few decided cases in this area.

When considering the liability of a General Director or other officer, the court will take into account the normal conditions of business in the industry concerned, as well as other relevant circumstances.

Furthermore, the Civil Code of the Russian Federation foresees that a person who actually has the ability to determine the actions of the legal entity, for instance the ability to issue directions to the directors of the legal entity (e.g. beneficial owner of the legal entity) must act reasonably and in good faith in the interests of the legal entity and bear liability for the losses caused through its fault to the legal entity.

If the General Director, the members of the Board of Directors and members of a Management Board and/or a person who actually has the ability to determine the actions of the legal entity jointly cause losses to the legal entity, they must jointly compensate it for these losses.

An agreement seeking to eliminate or restrict the liability of the abovementioned persons (the General Director, the members of the Board of Directors and members of a Management Board and/or the person who actually has the ability to determine the actions of the legal entity) for committing acts in bad faith or unreasonably is null and void.

A General Director and a member of the Management Board or the Board of Directors can also be held liable for committing certain specified administrative offences in accordance with the Code of Administrative Offences of the Russian Federation (i.e. for breach of labour, immigration, environmental, bankruptcy or securities legislation). The penalties for an administrative offence may vary from a fine to disqualification (for a period of up to three years). By way of example, a breach of the labour legislation on a second offence can result in the disqualification of such a director for a period of three years.

A General Director and a member of the Management Board or the Board of Directors can be held liable for committing a criminal offence in cases stipulated by the Russian Criminal Code. Examples of where criminal liability is expressly stipulated include offences connected with the operation of bank accounts (unlawfully obtaining credit through the provision of false information to a bank), competition (entering into agreements limiting competition), commercial bribery, breach of legislation relating to the provision and disclosure of information to the securities market, insolvency (intentional or false bankruptcy) and tax (tax evasion).

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Other bases of legal responsibility of directors

A General Director and a member of the Management Board or the Board of Directors can also be held liable for committing certain specified administrative offences in accordance with the Code of Administrative Offences of the Russian Federation (i.e. for breach of labour, immigration, environmental, bankruptcy or securities legislation). The penalties for an administrative offence may vary from a fine to disqualification (for a period of up to three years). By way of example, a breach of the labour legislation on a second offence can result in the disqualification of such a director for a period of three years.

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Insolvency offences

Under insolvency law, generally a General Director must file an insolvency petition within one month of the applicable circumstances (‘insolvency’ as defined by insolvency laws) arising and a failure to do so may lead to the relevant officer incurring legal liability to third party creditors for allowing new debts to arise after the obligation to file an insolvency petition became due. A director will also bear subsidiary liability if the relevant obligations of the debtor company regarding accounting and reporting documents are not complied with as at the date of the commencement of supervision proceedings against the company, or as at the date of the declaration of bankruptcy.

Finally, although this section concerns the duties and liabilities of ‘directors’, it is worth noting that the insolvency legislation has developed a concept of ‘Controlling Persons’, broadly defined as an individual or a legal entity with the right to give binding instructions to the debtor or otherwise determine the debtor’s actions, including by way of pressure on the debtor’s officers or management bodies. Where the actions or instructions of controlling persons have infringed the property rights of the debtor’s creditors, and the debtor’s assets are insufficient to satisfy all of the creditor’s claims, the controlling persons may bear subsidiary liability to the creditors for the debtor’s monetary obligations and/or mandatory payments.
Insurance

Currently Russian legislation does not foresee a requirement for legal entities to take out liability insurance for directors and officers. However, in practice a lot of big Russian companies take out D&O liability insurance for their directors and officers.

Immigration issues

A personal work permit is required for any foreign national in order to be employed by a Russian company, including as the General Director. In recent years the laws governing the employment of foreign nationals have placed a heavy administrative burden on employers. A personal work permit confirms the right of a particular foreign individual to work in a particular company in Russia and is not transferable between companies. Work permits have been subject to quotas limiting the number of foreign workers a company can employ.

The beneficial regime of the ‘highly qualified specialists’ allows the permit to be issued for a term of up to three years for such individuals (a general work permit can be issued for a term of up to one year), takes this category out of the ‘quota’ regime and expedites the process for obtaining the work permit.

The simplified work regime for highly qualified specialists is currently only available to Russian commercial legal entities and Russian based duly accredited branches of foreign legal entities. Starting from 1 January 2015 accredited representative offices of foreign legal entities will also be able to apply for highly qualified specialists work visas and work permits provided they themselves and their foreign employees meet the requirements established by the legislation.

Taxation

General Directors carry out their activities on the basis of employment agreements and therefore being employees of the respective companies are subject to Russian income tax as either tax residents or non-residents.

Tax residents are taxed on their worldwide income. The General Director is considered to be a tax resident if he/she is physically present in Russia for at least 183 calendar days during a 12-month rolling period. A General Director who is a tax resident is subject to a standard flat rate of tax of 13% on his/her gross income less deductions and exemptions. Mandatory contributions to the social, pension and medical insurance funds have to be paid by the employer and are therefore not regarded as part of the gross income.

A General Director who is a non-resident has a personal income tax at a general rate of 30% imposed on his/her Russian-sourced income, irrespective of the nature of that income.

In addition, a 13% personal income tax rate applies to remuneration received from professional activities of non-residents with a highly qualified specialist status under Russian immigration law, irrespective of the term of their stay in Russia.

The same personal income tax regulations apply to members of the Management Board or the Board of Directors who carry out their activities on the basis of employment or service agreements.

Social security

The remuneration of the General Director and members of the Management Board or the Board of Directors being employees of the company are subject to mandatory insurance contributions which must be paid by the employer.

Insurance contributions are paid by the company to three separate non-budgetary funds: the Pension Fund, the Federal Social Insurance Fund and the Federal Mandatory Medical Insurance Fund.

For the year 2014, a regressive scale of insurance contributions for Russian citizens and foreigners who have a temporary or permanent residence permit is applicable: 30% is payable on the part of an employee’s annual gross remuneration that is below RUB 624,000 (EUR 11,421); and 10% is payable on the part of any remuneration in excess of this amount.

A general rate of 22% is applicable to the remuneration of the foreign employees who have no temporary or permanent residence permit. However, payments and other compensation made to foreigners who are highly qualified specialists, as well as to those temporarily employed in Russia under labour agreements concluded for a definite term of less than six months, are exempt from any social contributions.

The employer is also obliged to make contributions to the Social Insurance Fund against industrial accidents and diseases. These contributions vary from 0.2% to 8.5% of the whole monthly salary depending on the risk category of the employee. For office employees it is usually 0.2%.

In 2015 insurance contribution rates will stay the same as for 2014. However, the annual remuneration threshold of RUB 624,000 (EUR 11,421) is going to be changed. Although the final decision on this matter has not yet been taken, the draft governmental regulation provides for the following thresholds for 2015:
— RUB 670,000 (EUR 12,263) for mandatory social insurance contributions in case of temporary disability and maternity to be paid to the Social Insurance Fund;
— RUB 711,000 (EUR 13,013) for mandatory pension insurance contributions to be paid to the Pension Fund.
This guide focuses on duties and responsibilities of directors of limited liability companies (‘LLCs’) established in Serbia. It does not cover other types of companies, such as joint stock companies.

Pursuant to the new Companies Act applicable in Serbia as of 1 February 2012 (Official Herald of the Republic of Serbia, nos. 36/2011, 99/2011 and 83/2014) (the ‘CA’), limited liability companies may have one or more managing directors (unlike previous regulations that also provided for a collective management body and managing board).

Another change brought by the CA is the introduction of a one-tier (monistic) and a two-tier (dual) corporate governance system, which may be chosen by companies in their memorandum of association. This review contains information relevant to director(s) in both systems.

Eligibility requirements

A natural person with full legal capacity or a legal entity registered in the Republic of Serbia may become a director of a company in Serbia. There are no residence or nationality requirements. A shareholder of a company may be appointed managing director provided the articles of association do not provide otherwise.

The number of directors is determined by the articles of association or a resolution of the general meeting.

Method of appointment

Managing directors of an LLC are generally appointed by a resolution of the general meeting (in a one-tier system) or by a supervisory board (in a two-tier system).

The initial managing director(s) may also be appointed in the company’s memorandum of association. This is not the preferred option, as every change of a managing director would require amendments to the memorandum of association. However, under the CA amendments to the memorandum of association no longer require court authentication.

Method of removal

A managing director(s) may be removed at any time by a resolution passed by a general meeting of the shareholders (in a one-tier system) or the supervisory board (in a two-tier system). The reasons for the removal need not be given unless the articles provide otherwise.

A managing director(s) may resign from this position at any time. In certain circumstances such a resignation may constitute a breach of the director’s employment or management contract with the company. The CA allows for the de-registration of a particular director from the commercial registry to be made pursuant to his/her letter of resignation. Where a sole director resigns, he/she is obliged to continue to perform urgent directors’ duties until the appointment of a new director, but not for a longer period than 30 days from his/her de-registration from the commercial registry.

In practice, a director’s term of office is usually stated in his/her employment or any other contract regulating the rights, duties and responsibilities of a director (‘management contract’).
Authority and representation

An LLC is represented by its managing director(s). This authority may be subject to restrictions, which will be set out in the memorandum of association. However, only restrictions requiring dual signature require registration, and will bind third parties. Other forms of restriction (such as approval by the general meeting) are of an internal nature only.

Details of the individuals authorised to represent the company, including the extent of their authority, must be filed with the commercial registry of the Serbian Business Registers Agency (the ‘Agency’). Copies of identity cards or passports (in case of foreign citizens) and certified signature specimens in a prescribed format must also be filed with the Agency. The Agency must be notified of any change within 15 days.

Other persons (natural or legal) may also be authorised to represent the company, such as representatives and “procurators”.

Working rules for directors

If an LLC has two or more directors, they represent and manage the company jointly, unless otherwise specified in the memorandum of association. Where the memorandum of association prescribes that each of the directors manages the company independently, none of them may act on behalf of the company if any of the other directors disagree. If they disagree, relevant instructions should be requested from the general meeting (in a one-tier system) or from the supervisory board (in a two-tier system).

Contractual relationship with the company

An employment or management contract sets out the relationship between a Serbian company and its directors. According to the Serbian Labour Act, a director may have a permanent or temporary employment relationship with the company under his/her employment contract. All rights and obligations arising from the Labour Act are mandatory terms of the employment contract. A director’s management contract allows for more flexible arrangements between the director and the company.

A director is entitled to an adequate salary, which is determined in accordance with general Serbian legislation and his/her employment or management contract. For income tax purposes the director is treated equally under both an employment and management contract.

Personal interest, conflict of interests and competition ban

Directors are obliged to notify other directors or, in case of a sole director, to notify the general meeting (in a one-tier system) or the supervisory board about their ‘personal interests’ when acting on behalf of the company. ‘Personal interests’ are considered to be when a director (or a party related to him/her):

(a) is a party to a contract concluded with the company;
(b) is a party to legal proceedings commenced by the company;
(c) has financial relationships with a third party the company transacts with or commences legal actions against, if it can be expected that the existence of that relationship will affect his/her actions; or
(d) has financial relationships with a third party who has a commercial interest in a transaction or legal action with the company if it can be expected that the existence of that relationship will affect his/her actions.

The restrictions above will not apply if the actions are approved by a majority of the members of the general meeting (in a one-tier system) or the supervisory board (in a two-tier system). If not, a company may apply to have the transaction set aside and file a claim for damages.

However, a director will not have to compensate the company if he/she can prove that (i) the transaction was in the interest of the company, or (ii) there was no personal interest involved (in scenarios c) and d) above).

Directors must avoid conflict of interests with the company, and in particular may not:

— use the company’s assets for their own personal interests,
— misuse confidential information involving the company,
— abuse their position for personal gain, or
— use business opportunities presented to him/her as officers of the company for personal benefit.

These provisions do not apply if the director’s actions are approved by a majority of the members of the general meeting (in a one-tier system) or the supervisory board (in a two-tier system).

A director is also prohibited from engaging directly or indirectly in another company carrying out similar business activities, unless he/she is permitted to do so by the company.

Depending on the provisions of the memorandum of association, this restriction may be extended for a period following the termination of the director’s term of office, up to a maximum of two years.
This restriction may also be included in the director’s employment contract if he/she is likely to have gained important know-how, business contacts, or trade secrets during his term of office. However, such a non-compete clause would entitle the director to appropriate compensation following termination of his/her employment contract.

Directors’ Duties

Pursuant to the CA and unless specified otherwise in the company’s memorandum of association, a director(s) of an LLC represents and manages the company. As a general rule, the director(s) carries out all activities that are not vested in the general meeting (in a one-tier system) or the supervisory board (in a two-tier system).

A director(s) is also responsible for keeping business records, filing records of all resolutions passed by the general meeting, and the accuracy of financial statements. A director(s) is obliged to inform the general meeting and the shareholders about all facts relevant to the operation of the company, including extraordinary circumstances that may have a substantive effect on the business or standing of the company.

The managing director(s) is obliged to act on behalf of the company, with due care and diligence, in reasonable belief that he/she is acting in the best interests of the company. A director(s) is obliged to avoid conflict of interests, observe restrictive covenants, and keep trade secrets confidential.

Liability

Under the new CA, the liability of directors has been extended and is regulated in more detail.

A director(s) is liable for the damage caused to the company or the company’s shareholders by a breach of his/her duties, including damage caused from acting outside his/her authority (except if ratified), non-compliance with his/her obligation to inform the shareholders, or making unauthorised payments to the company’s shareholders.

A director can be held liable and may be penalised jointly with the company for minor or commercial offences committed by the company.

The new CA even provides for criminal liability of directors in the following cases: giving false statements, entering into a legal transaction or taking legal action involving personal interests, breach of duty to avoid conflict of interests and breach of limitations in his/her authority. However, directors are also liable for other criminal offences as provided for by the Criminal Code.

As a rule, a company is responsible for the damage caused to third parties by its governance bodies. However, a company is entitled to be compensated by directors who have caused the damage through their wilful misconduct or gross negligence.

Limitation of liability

As a general rule, it is not possible to limit the liability of a director (or any other person) in respect of wilful misconduct or gross negligence.

A cap on the amount of potential pecuniary compensation may be agreed, but only if it is not disproportionate to the damage suffered. If such damage is caused by wilful misconduct or gross negligence, the compensation limitation will not apply and the company will be obliged to pay the full amount.

Immigration issues

Foreign nationals contemplating employment in Serbia should have the following documentation:

— permanent or temporary Serbian residence permit; and
— consent to enter into an employment contract with the relevant company.

Foreign nationals arriving in Serbia to conduct professional services or act as company directors must apply for a temporary residence permit. Foreign nationals must report their residence within 24 hours of entering the Serbian territory.

Temporary residence permits are issued for a period of one year, as long as the applicant has a valid foreign passport for the duration of this period. If the directorship is extended for an additional period of one year, the residence permit will be extended accordingly.

Taxation

Serbian residents are taxed on their worldwide income while non-residents are only taxed on income earned in Serbia.

Income from employment and temporary employment is taxed at a rate of 10%. The basis for tax assessment is the amount of:

— the gross salary; or
— the gross salary reduced by RSD 11,242 (approx. EUR 100) for income arising from employment contracts.

Income of directors who are not employed by the company (management agreements) is taxed at a rate of 20%.
If the total amount of personal income exceeds a certain threshold, such income will be subject to an additional annual income tax. The tax basis for annual income tax is assessed by the total amount of income subject to taxation (e.g. dividends are excluded), reduced by the amount of taxes and mandatory social security contributions paid during the year (including amounts paid abroad) and also reduced for prescribed personal deductions. Tax rates are progressive: 10% for taxable income exceeding three times the average annual salary in Serbia and 15% for taxable income exceeding six times the average annual salary.

The taxation of foreign nationals depends on whether they are considered to be Serbian residents and whether there are double tax treaties in place between Serbia and the countries of origin of foreign nationals. Such treaties contain rules to determine tax residency, prescribe reduced tax rates and taxation rights for certain types of income. Serbia has a wide network of double tax treaties which includes the majority of EU member states, all countries of the former Yugoslavia and a number of other countries.

**Social security**

A director who is an employee of the company can benefit from a number of social services. These include:

— pension and disability insurance;
— health insurance; and
— unemployment insurance.

Social security contributions are mandatory and have to be paid by the company for all employees regardless of their nationality. Contribution rates are determined on the basis of the monthly salary of a director. The following rates apply:

— pension and disability insurance – 26%;
— health insurance – 10.3%;
— unemployment insurance – 1.5%.

In addition to double tax treaties, Serbia has entered into bilateral agreements on social security with all countries of the former Yugoslavia, many EU member states and several other countries, based on which directors who pay social security contributions in their home countries are not obliged to pay such contributions in Serbia for a certain period of their employment in Serbia.
This guide focuses on the rules relating to duties of directors of limited liability companies (“konatel”) and members of the board of directors of joint stock companies (“predstavenstvo”). It does not address the rules of other legal forms of corporations (e.g. cooperatives, limited/unlimited partnership companies, state enterprises or other legal forms of organisations).

The statutory body of the limited liability company is one or more directors and in case of the joint stock company it is a board of directors, which is a collective body.

The supervisory board is, as its name suggests, the supervisory body of the company, which e.g. supervises the activities of the directors, inspects business documents and the account books, examines ordinary, extraordinary and consolidated financial statements, etc. Creation of the supervisory board is obligatory in case of the joint stock company and is optional in case of the limited liability company. The supervisory board members are elected by the shareholders at the general meeting.

All information in this guide relates to both directors of a limited liability company and a joint stock company, unless otherwise stated.

**Eligibility requirements**

There are certain restrictions on who can become a director. Amongst other things, it is important to note that:

- only a natural person with full legal capacity may become a director;
- a member of a supervisory board of a company may not at the same time be a director of the same company;
- due to conflict of interests provisions (see below) a director of a company cannot be at the same time a director of another company with an identical or similar; business activity unless the companies are within the same group.

Directors of a limited liability company and members of the board of directors of a joint stock company, from the EU or OECD member states, are not required to be resident in Slovakia. There is no nationality requirement. Directors can be shareholders, or other natural persons.

**Method of appointment**

**Limited liability companies:**

A director is appointed at the general meeting by the shareholders (i.e. by the resolution of the general meeting). Upon incorporation, the first director/directors have to be designated in the articles of association of the company. The law prescribes no minimum or maximum number of directors. Directors are eligible for re-appointment and may be elected either for definite or indefinite periods of time.

**Joint stock companies:**

Members of the board of directors are appointed at the general meeting by the shareholders. The articles of association of the company may determine that members of the board of directors shall be appointed and dismissed by the supervisory board in the manner prescribed by the articles. The term of office of the members of the board of directors is provided in the articles and may not exceed five years. The number of directors is not prescribed by law and has also to be determined by the articles. Directors are eligible for re-appointment.
The articles of association may provide that the board of directors can appoint substitute directors until the next meeting of the relevant appointing body of the company, provided that the number of directors originally appointed by that body has not dropped below one half.

**Method of removal**

A director can be dismissed by a resolution of the general meeting of the shareholders or, in case of a joint stock company, by a decision of the supervisory board if the articles of association so provide.

In both types of companies the appointment or dismissal can be effective immediately or at a later date determined by the decision of the general meeting/supervisory board. If directors are appointed for a fixed term, their term of office will terminate if they are not re-appointed at the relevant time.

A director may resign at any time. The company must, however, be notified of his resignation. Subject to the memorandum of association or the articles of association, such resignation is effective as of the date of the next meeting of the company body authorised to elect a new director (i.e. the general meeting or the supervisory board). If the director resigns during a meeting of that body, the resignation is immediately effective. If the authorised body does not convene a meeting within three months after notification of the resignation, the resignation is effective after the expiry of that period. The dismissed or resigning director is required to inform the company of the steps which should be taken to avoid any potential damage to the company.

Any change in the director’s office has to be registered with the Commercial Register. Such registration only has a declaratory effect towards third parties.

**Authority and representation**

The directors are “statutory bodies” of the company and they manage all the company’s business, unless such business falls within the power of another company body. The directors have full authority to represent the company and there is generally no need for the directors to have special authorisation for certain acts to be valid. However, for certain material legal actions as specified by the Commercial Code, the approval of the general meeting or supervisory board is required (e.g. sale of business as a going concern).

Each director is authorised to act individually on behalf of the company, unless the memorandum of association (in the case of a limited liability company) or articles of association (in the case of a joint stock company) require that two or more directors act jointly on behalf of the company. The way in which the company is represented must be registered with the Commercial Register. Where a director does not act and sign on behalf of the company in accordance with the prescribed method of representation, his/her acts are invalid and will not bind the company. The authority of the directors to act on behalf of the company can be restricted by the memorandum of association or by a decision of the general meeting or supervisory board. However, such restriction, even if it is registered with the Commercial Register, will have no effect towards third parties, and the company will be bound by the acts of the director even if these are beyond his authority.

In relation to third parties, a company is bound by the conduct of its directors even if the director/directors act outside the company’s scope of business activity. Only if a director acts outside the powers entrusted by law will the company not be bound by the acts of the director.

The company may sue a director who has acted outside his or her powers for compensation by way of damages.

**Working rules**

The memorandum of association in the case of a limited liability company, or articles of association in the case of a joint stock company, may provide for virtually any number of directors and any combination of signing authorities.

The board of directors of a joint stock company is a collective statutory body. Unless the Commercial Code or the company’s articles of association provide otherwise, the board of directors may only make a decision if more than half of the board members are present at the meeting; the decision is approved if the majority of the members present vote for it. The business of a board meeting is recorded in the minutes of the meeting, which should be signed by the chairman of the board and the minute taker.

Even if a limited company has more than one director, from a legal perspective the directors do not constitute a collective body, unlike the board of directors of a joint stock company. However, according to the Commercial Code, the directors are required to take decisions relating to the company’s business management jointly and such decisions can be adopted only if they are approved by a simple majority of all directors, unless the memorandum of association requires a higher majority. On other, more common issues like signing employment contracts or issuance of powers of attorney for representation in court procedures, the directors may decide and act individually, unless joint action is required by the memorandum of association.
The company’s memorandum of association or articles of association may also permit voting in writing or by other means of communication.

**Contractual relationship with the company**

The director of a company is not an employee by virtue of acting as a director. The relationship between the company and the director is a commercial relationship and it may be regulated in a written service contract between the director and the company. If they do not conclude such a contract, the relationship between the company and director is automatically subject to the provisions of the Commercial Code governing mandate contracts. A service contract between the company and the director must be in writing and must be approved by the general meeting, providing that such contract has actually been concluded. The articles of association of a joint stock company may determine that the service contract of a member of the board of directors needs to be approved by the supervisory board of the company.

Agreements between the company and the director seeking to limit the director’s liability are prohibited. The same applies to such provisions in the memorandum of association or articles of association. Remuneration of a director will be decided by the general meeting. Joint stock companies may delegate this power to the supervisory board if the articles of association provide for this. If the remuneration is not agreed, the director is entitled to compensation commonly associated with the director’s duties. A mandate contract or service contract can also provide that the performance of the director’s office will not be remunerated.

A joint stock company may only conclude a credit or loan contract with a member of its board of directors, transfer to or grant the director use of the company’s property, or secure the director’s obligations, with the prior approval of the supervisory body and on terms which are customary in business transactions. The same applies to close relatives of directors and to persons who act on the directors’ account.

**Conflict of interests**

Directors are subject to a ban on competing business. Unless the memorandum of association (limited liability company) or the articles of association (joint stock company), impose further restrictions, a director may not:

- enter into transactions in his own name or on his own account, which are related to the business activities of the company;
- act as an intermediary in respect of the company’s business activities towards third parties;
- participate in the business activity of another company as a partner with unlimited liability; or
- act as, or be a member of, a statutory body of another legal entity engaged in an identical or similar line of business as the company, unless the companies are members of the same group.

A company, through its shareholders, may require that a director who violates this prohibition surrender to the company any benefit gained from such a transaction or that he transfers the corresponding rights to the company. These rights may be claimed against the director within three months of the company becoming aware of the prohibited act, but, in any case, no later than 12 months afterwards. The company also has the right to require the director to compensate it for any damage caused by any breach of the ban on competing business.

**Directors’ Duties**

Directors’ duties are set out in the Commercial Code, which is supplemented by a number of other binding provisions. They include:

- making arrangements to properly maintain prescribed records and accounting;
- maintaining a list of shareholders;
- informing members and shareholders, and the company’s bodies, about the company’s affairs;
- submitting annual financial statements, proposals for profit or loss distribution and annual reports to the general meeting for approval;
- applying for the proper registration of relevant facts with the Commercial Register. Directors submit proposals for the registration of (and any changes to) the relevant data with the Commercial Register and are responsible for the ensuring that the registered information is correct;
- summoning a general meeting on the basis stipulated in the Commercial Code;
- submitting to the general meeting a report on the company’s businesses and assets at least once a year;
- notifying and explaining obligations to the supervisory board (or in the case of a limited liability company, when a supervisory body is not established, to the general meeting) with regard to the main business plans, and the development of the company’s business and assets;
- immediately informing the supervisory board of all facts that can impact on important company business or assets; and
- convening an extraordinary general meeting and submitting proposals for remedies, if the company losses exceed one third of its registered capital.

Directors must exercise their range of powers with due managerial care and in accordance with the interests of the company and all of the company partners or shareholders. If a director is allegedly in breach of his duty of care, the burden of proof lies with the director. Directors are
obliged to obtain and take into account all accessible information regarding a decision and not to disclose confidential information and facts to third parties, if such disclosure might be detrimental to the company, its partners or shareholders. A director may also not put his own interests, interests of third parties or interests of his partners before the interests of the company.

The directors have to ensure that the company complies with all statutory requirements and that the company fulfils its duties and obligations in a proper way and on time (e.g. administrative law requirements, business licenses, environmental requirements, proper payments, social security insurance, payment of taxes, tax declarations, labour law, commercial law requirements). The law sets out many, particularly financial, sanctions for breaches of a director’s duties.

If the company becomes insolvent or over indebted under the Bankruptcy Act, a director must submit without undue delay a bankruptcy petition to the court. If this duty is breached (even negligently) the responsible director will be fully liable for the damage incurred to the creditors, unless the director can prove that he acted with due managerial care. A penalty is levied against the director if he/she breaches a duty to file bankruptcy on time. The maximum penalty amount is double the minimum required registered capital of a company.

**Liability**

Any directors who have breached their duties by the exercise of their functions are jointly and severally liable to compensate the company for the damage caused.

Such breach is an objective liability i.e. no negligent or intentional conduct is required. However, directors will not be liable if they can prove that they acted with due managerial care, in good faith and that the act was in the interests of company. They are also not responsible for executing resolutions of the general meeting, unless the resolution is in conflict with the law, memorandum of association or articles of association. Directors are not relieved from liability even if the supervisory board approves their acts.

A director can incur personal liability for crimes defined by the Criminal Code, especially for economic crimes (e.g. credit fraud, abuse of information in commercial relations) committed during the performance of his duties.

**Limitation of liability**

Any arrangement between the company and a director which seeks to limit or relieve the director of his/her liability for damage caused to the company is null and void. The same applies to such provisions in the company’s memorandum or articles of association.

However, there is no absolute ban on a holding company indemnifying the director of a subsidiary for such liabilities (unless this would be a breach of the parent company’s directors’ duty of care). A company may also take out directors’ and officers’ liability insurance.

The company can surrender its claims for damages against the director or enter into a settlement with the director, but no earlier than three years after these claims have arisen. Such a surrender or settlement will only be effective if the general meeting approves it and shareholders with a 10% share (5% in the case of a joint stock company) of the registered capital do not object to it.

Creditors and/or third parties are entitled to filing a claim for damages caused by the company against the director personally, provided that the claim cannot be satisfied from the company’s assets.

**Immigration issues**

A foreigner from an EU or OECD member country seeking directorship of a Slovak limited liability company or board membership of a Slovak joint stock company (or of a Slovak affiliate of a foreign company) does not require a permit. However, individuals outside the EU or OECD countries will need a residency permit. Additionally, if a director outside the EU or EEA is also an employee of the company, he will need to obtain a work permit.

**Taxation**

If a director is a resident of Slovakia, his worldwide income will be subject to Slovak income tax. If the director is not a resident of Slovakia and is in Slovakia more than 183 days during a period of twelve consecutive months (and provided that certain additional conditions are also met), income from employment in Slovakia is subject to Slovak income tax. It is necessary to take into account any relevant Double Tax Treaties, which can provide otherwise. Income in excess of EUR 34,401.74 per year is taxed at 19% or 25%.

**Social security**

If a director has social security or health insurance in any foreign country in a form comparable to Slovak health insurance, the director is not obliged to pay contributions in Slovakia whilst not employed in a Slovak company. However, if any income is earned in Slovakia, this could have an impact on the social security or health care insurance payments made by the director in other EU member states. If a director has no insurance outside Slovakia he is obliged to contribute to the social security system and pay for health care insurance in Slovakia.
A Slovenian limited liability company (hereinafter: the company) has one or more managing directors ("poslovodja"). The managing director is together with the shareholders’ meeting a compulsory body of a company. A company may also have a supervisory board ("nadzorni svet"). The managing director represents the company and manages the internal operation of the company. The managing director cannot delegate his duties to the supervisory board or shareholders’ meeting.

The managing director conducts the company’s business in accordance with Slovene legislation, the company’s articles of association and the mandatory instructions of a shareholders’ meeting.

Eligibility requirements

Any natural person with full legal capacity can be appointed as a managing director. A managing director may also be a shareholder of the company, and is not required to be a resident or national of Slovenia. It is also not mandatory that the managing director is employed by the company.

The Slovenian Companies Act (Official Gazette of Republic of Slovenia No. 42/2006 et seq., Zakon o gospodarskih družbah, hereinafter: ZGD-1) stipulates that a managing director may not be a person:

— who is already a member of a supervisory body of the same company;
— who has been convicted of a criminal offence against the economy, social security, legal business, against property, the environment, space and natural assets. Any appointment is restricted for five years after the final judgment or two years after imprisonment;
— against whom a security measure has been passed prohibiting the pursuit of a profession, for the duration of the prohibition; or
— who, acting as a member of the management or supervisory body of a company against which bankruptcy proceedings were instituted, has been found liable for damages to the creditors in accordance with the law regulating the financial operations of companies for the period of two years after the court ruling became final.

A managing director has to make a written statement about the non-existence of such circumstances that would prevent his appointment, and the director’s signed statement needs to be notarised.

Method of appointment

It is up to the shareholders to decide on the appointment procedure of a managing director. Shareholders may regulate the appointment procedure in the company’s articles of association. If there are no provisions in the articles of association, the shareholders must appoint a managing director by a shareholders’ resolution passed by a majority of all shareholders present and voting at the shareholders’ meeting. If the company has a supervisory board, this body is responsible for appointing a managing director (the articles of association may however provide otherwise).

A managing director may also be appointed in the articles of association, although this is not very practical, as with each change of a managing director, the articles of association would need to be amended as well.

A managing director is usually appointed for an indefinite term. If the appointment is made for a defined
term, it cannot be shorter than two years. The same person may be reappointed as a managing director.

The appointment of the first managing director has to take place prior to the entry of a new company into the court register. Each managing director has to be entered into the court register (however, registration itself is not a prerequisite for the validity of his appointment or the right to represent the company – it is thus only declaratory). The application form has to be submitted to the court register together with documentation proving the eligibility requirements. A decision on the appointment of the managing director and his/her written consent to the appointment should also be enclosed with the application form. If a managing director is a foreign national, his/her Slovenian tax number has to be provided in the application form.

Method of removal

If a managing director is appointed for a fixed period of time, his/her mandate ends with the expiry of the appointment period. There is no automatic renewal of the mandate or transformation of the fixed term into an indefinite term. Reappointment as a managing director is however possible.

A managing director may be removed before the end of his term. Generally, the shareholders’ meeting can remove a managing director at any time without giving a reason for the removal. However, the articles of association can provide that the managing director can only be recalled for specific reasons. The articles can also provide the supervisory board or a shareholder with the right to recall a managing director. If a company has a supervisory board and the articles do not provide otherwise, the supervisory board has a right to recall the managing director.

Contracts regulating the relationship between a company and a managing director usually stipulate that in case of an unjustified removal the managing director is entitled to a severance payment. If no such provision exists, and the removal is unjustified, a managing director can claim damages according to general legal principles.

Authority and representation

A managing director is a legal representative of a company. His/her powers to represent the company derive directly from the legislation. A managing director may carry out all legal activities on behalf of the company at his/her own responsibility. Any limitation thereof has no legal effect against third parties.

A company may have one or more managing directors. Each of the managing directors represents the company independently, unless (in case of two or more managing directors) the articles or a shareholders’ resolution provide for joint representation. The articles can stipulate that two or more managing directors or one managing director together with a proxy holder (agent with limited power to represent) may represent the company. The articles may also provide that only certain managing directors represent the company jointly or that the managing directors represent the company jointly only when dealing with certain legal transactions. Joint representation must be entered into the court register and is, if entered, enforceable toward third parties.

Apart from joint representation, no other restrictions of the managing director’s authority and representation are enforceable against third parties, even if such restrictions have been published in the court register. Thus, any other restrictions on the managing directors’ authority imposed either by the articles or by a shareholders’ resolution do not have any effect against third parties. A managing director may be held liable by the company if he seeks to circumvent these restrictions. A managing director has full authority to manage the company. Such authority may be internally restricted by the articles or by a shareholders’ resolution. In many cases the articles will provide that certain actions are subject to prior shareholder approval or approval by the supervisory board. However, neither the supervisory board nor the shareholders’ meeting may interfere with the managing director’s authority to decide on the daily business of the company.

Working rules of the board

ZGD-1 does not provide for a board system. Although there may be more than one managing director, they do not constitute a board of directors. Each of them solely represents the company and validly concludes contracts in the name and to the account of the company unless joint representation is required as stated above.

All managing directors have the same rights and duties, and decisions are not made by a majority of votes.

The articles of association, shareholders’ resolution, resolution of the supervisory board, or internal guidelines may allocate certain duties to one or more managing directors. Nevertheless, such distribution of responsibilities does not affect the overall responsibility of each managing director for the company’s business as a whole.

The shareholders’ meeting may give binding instructions to the managing directors, unless otherwise provided in the articles. Non-compliance with such instructions may lead to the recall of the managing director and potentially also to a claim for damages.
Contractual relationship with the company

Appointment to the position of a managing director does not create a contractual relationship between the managing director and the company, or entitle a managing director to remuneration.

The company and the managing director usually enter into a management contract or employment contract. A management contract is a type of service agreement specifying the managing director’s duties and remuneration, as well as other aspects of the relationship between the company and the managing director such as benefits, confidentiality, or non-compete and termination provisions.

A managing director may also regulate his relationship with the company in an employment contract. Many aspects of the relationship are then regulated by the rules of labour law. The Slovenian Employment Relationships Act (Official Gazette of Republic of Slovenia No. 42/2002 et seq., Zakon o delovnih razmerjih) specifically stipulates which elements of the relationship between the managing director and the company may be regulated differently from the statutory provisions (for example, rules regarding remuneration, working times, breaks and rests during a working day and week, conditions and limitations of a fixed-term contract, disciplinary responsibility and termination of the employment contract).

Removal of the managing director does not automatically terminate the contract, but may constitute a breach of contract. Termination of the contract would also not necessarily terminate the directorship. However, the contract can provide that it terminates upon notice of the director’s recall from his position.

Conflicts of interest

A managing director must carry out his duties in the best interest of the company and with the diligence of a good businessman. He/she is bound by professional confidentiality and must avoid any conflict between his own interests and those of the company.

A managing director may not participate as a managing director in a limited liability company, a member in a partnership, a shareholder in a private limited or unlimited company, a member of a management or supervisory board of another company, a private entrepreneur, a procurator of another company or an employee of another company, if the activity of such company or the private entrepreneur could present competition to the first company where such managing director operates.

The articles may regulate when a managing director may participate in another company that engages in the same business activities as the company of which he/she is director.

Additionally, the articles may provide that the ban on competition continues even after the managing director no longer holds his position. Such a prohibition may last up to two years, except when a managing director has been recalled by a shareholders’ meeting. In the latter case the prohibition may not last longer than six months.

If the managing director breaches the ban on competition, the company may bring a claim for damages. The company may also require the director to surrender to the company any business concluded for his/her own account, or require him/her to transfer any benefits from such business to the company.

A managing director is also restricted from entering into contracts with companies in which he or his close relatives (as defined in ZGD-1), alone or jointly, have a share of 10% or more (or are in any other way entitled to a corresponding part of the company’s profit). Such contracts require prior approval of the supervisory board or shareholders’ meeting. If such a contract is not pre-approved, it is deemed null and void. If the shareholding of the managing director and/or his close relatives is less than 10% of the company’s share capital, prior approval is not required. However, the director must to notify the supervisory board about such a contract within three working days of signing. If there is no supervisory board, he/she is obliged to inform the shareholders about the contract at the next shareholders’ meeting. The company’s articles may also impose other restrictions in this regard.

However, if the managing director or any of his close relatives, alone or jointly, hold a share of at least three quarters of the subscribed share capital or managing rights of the company, none of the restrictions above apply.

Duties of a managing director

A managing director must manage the company and act on behalf of the company in line with its business purpose, best interests and in accordance with instructions given by the shareholders and the current legislation. A managing director must act with the diligence of a conscientious and fair manager. Under the rules on financial operations, insolvency proceedings and compulsory dissolution a managing director has to act with a higher standard of diligence, as stated below.

A managing director is generally responsible for the operative management of the company. Many of the directors’ duties are regulated by law, while some additional duties may be included in the management contract, employment contract or any other contract regulating the relationship between the company and
the director. Breach, neglect or omission of his statutory or contractual duties will constitute a valid reason for the removal of the director.

Managing directors’ duties, inter alia, include the following activities:

— to enter the establishment of the company into the court register and to enter changes to the entered data;
— to convene a shareholders’ meeting;
— to prepare and execute the decisions of the shareholders’ meeting;
— to set up financial statements and disclose financial statements to shareholders and to the public;
— to execute a decision of the shareholders to decrease the company’s share capital; and
— to bring an action against a shareholder, who has not paid in his subscribed contribution(s).

Additionally, some of the director’s duties refer to the financial management of the company. The managing directors have to ensure that the company is operating in accordance with the financial operations, insolvency proceedings and compulsory dissolution laws and the rules of corporate finance. The managing directors have to act with the diligence of corporate finance professionals and endeavour to ensure that the company is always short term and long term solvent.

Duties related to the financial management of the company require managing directors to, inter alia, submit a financial restructuring plan to the shareholders or supervisory board (if existent) when the company becomes insolvent, to initiate court insolvency proceedings in due time, to submit financial statements and reports (annual, quarterly) to the shareholders’ meeting and the supervisory board (if existent) and to competent national agencies/bodies.

Furthermore, the managing director must ensure that the company meets its obligations under public law – in particular tax and social security laws.

Liability

A managing director is liable to the company for damage arising as a consequence of a breach of his duties, unless he demonstrates that he fulfilled his duties fairly and conscientiously. In case of breach of duty of two or more managing directors, they are jointly and severally liable.

A compensation claim by the company against the managing directors may also be pursued by creditors of the company if the company is unable to repay them.

The managing directors and the members of the supervisory board (if existent) are jointly and severally liable to the company, for damage arising as a consequence of a violation of their tasks, according to the rules on financial operations, insolvency proceedings and compulsory dissolution, unless they demonstrate that they fulfilled their duties with the diligence of corporate finance professionals and the corporate governance rules.

The managing directors are liable for the fulfilment of tax and social security obligations of the company, in the same manner as described in the previous paragraph.

Managing directors may also be held criminally liable in cases of wilfully incorrect statements, including financial statements, statements to shareholders or the supervisory board or filings with the court register.

Limitation of liability

Managing directors and/or members of the supervisory body do not have to reimburse the company for damage if the act that caused the damage to the company was based on a lawful resolution passed by the shareholders’ meeting.

The liability of the managing directors cannot be excluded on the basis that an act was approved by the supervisory body (if existent).

The company may only refuse compensation claims or offset them three years after the claims arose provided that the agreement of the shareholders’ meeting is obtained and provided no written objection is made by a minority holding at least one-tenth of the subscribed capital.

A single managing director is liable to the creditors for damage (if their claims were not repaid fully in the insolvency procedure) arising as a consequence of violation of his tasks under the rules on financial operations, insolvency proceedings and compulsory dissolution (particularly if certain duties, before or after the insolvency procedure started, were not fulfilled or not fulfilled in due time) only to the amount of twice his yearly income (remuneration) in the year of such violation, but not less than EUR 20,000 – small company, EUR 50,000 – midsized company, EUR 150,000 – big company. The liability is unlimited in the case of gross negligence or a wilful breach.

Immigration issues

In order to work in Slovenia, a foreign managing director would generally require a work and a residence permit. EU and EEA nationals and their family members are exempt from these requirements.
A work permit will be issued if it is covered by the employment quota and after the prior control of the labour market is performed (if there are no Slovenian nationals or people with equal employment rights as Slovenian nationals, eligible for such employment, registered in the employment office’s register of unemployed individuals) as well as if the company fulfils other criterion set it the Employment and Work of Aliens Act (Official Gazette of Republic of Slovenia No. 26/2011 et seq., Zakon o zaposlovanju in delu tujcev). Nevertheless the Ministry of Labour may determine cases where a working permit is issued without a prior control of the labour market. The work permit is granted for a period of one year and can be renewed, if it can be proven that the foreign managing director has been registered with the social insurance since the day of registration. The application for a work permit is filed by the employer.

A Slovenian company that has up to ten employees can acquire only one work permit for a foreign managing director (representative) and one work permit for a foreign managing director (representative) of its branch, notwithstanding the number of branches. A foreign company having more than one branch in Slovenia can acquire one work permit for a managing director of each branch, even if the branch has ten or fewer employees. A foreign company having at least one branch in Slovenia may acquire two work permits for the managing directors of each branch, if the relevant branch has up to 50 employees. A work permit for a managing director may be issued for a maximum period of two years and may be renewed if certain statutory conditions are met.

Having obtained a work permit, a managing director has to apply for a residence permit. The employer may apply for the residence permit on behalf of the managing director. The residence permit is issued in accordance with the duration of the employment, for a maximum of one year. A renewal of the residence permit is possible if the conditions for the initial application are still met. A joint permit allowing for entering, residing and working in Slovenia may also be granted for the term of the employment, for a maximum of one year. Such a joint permit can be renewed for another two years. A foreigner residing in Slovenia for more than five years may apply for a permanent residence permit.

**Taxation**

If an individual is resident in Slovenia, his or her worldwide income is subject to Slovenian income tax. If an individual is not resident in Slovenia, only the income sourced in Slovenia is subject to Slovene personal income tax.

An individual, regardless of his or her nationality, is resident in Slovenia for personal income tax purposes if he or she has a formal residential tie (i.e. has permanent residence in Slovenia) or an actual residential tie with Slovenia (i.e. has a habitual abode or center of personal and economic interests or is present more than 183 days in a taxable year in Slovenia). Each individual is treated as a separate taxpayer (no spouse or family taxation). The tax year is the calendar year.

In order to avoid double taxation, bilateral agreements on double taxation avoidance (DTA) have been concluded with several countries. As of 1 January 2014 Slovenia has DTAs in force with 54 countries, and a number of new DTAs are currently being negotiated. Moreover, the Personal Income Tax Act (Official Gazette of Republic of Slovenia No. 13/2011 et seq., Zakon o dohodnini) also provides for double taxation avoidance.

Generally, income is taxed at a progressive rate, ranging from 16% to 50%. Income earned in 2014 will be taxed as follows:

- for net taxable amount\(^1\) up to EUR 8,021.34 the income tax is 16%.

<table>
<thead>
<tr>
<th>Tax base</th>
<th>Tax rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over EUR 8,021.34 to</td>
<td>16%</td>
</tr>
<tr>
<td>EUR 8,021.34</td>
<td></td>
</tr>
<tr>
<td>EUR 8,021.34 to EUR 18,960.28</td>
<td>27% above EUR 8,021.34</td>
</tr>
<tr>
<td>EUR 18,960.28 to EUR 70,907.20</td>
<td>41% above EUR 18,960.28</td>
</tr>
<tr>
<td>EUR 70,907.20</td>
<td>50% above EUR 70,907.20</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^1\) the “net taxable amount” is the gross income reduced by the employee’s social security contributions, predetermined allowances and expenditures (if applicable)
— for net taxable amount exceeding EUR 8,021.34 and below EUR 18,960.28, the income tax is EUR 1,283.41 + 27% of the amount exceeding EUR 8,021.34;
— for net taxable amount exceeding EUR 18,960.28 the income tax is EUR 4,236.92 + 41% of the income exceeding EUR 18,960.28;
— for net taxable amount exceeding EUR 70,907.20 the income tax is EUR 25,535.16 + 50% of the income exceeding EUR 70,907.20.

Dividends, interest, rental income and capital gains are not included in the progressive taxation as they are taxed at a flat rate.

According to Slovenian tax legislation all the income which the managing director receives as a natural person on the basis of an employment contract is subject to taxation. For income tax purposes, work or services of a managing director and carrying out functions of management (for example, holding the office of a managing director) are always qualified as employment – i.e. also the management fee received on the basis of a business contract is considered as income from employment.

Any fringe benefits given by employers or other persons to their employees or family members of employees in connection with employment, such as the private use of company cars, rental benefits, zero-interest loans, discounts on products and services, gifts and share options, are also taxable.

Reimbursement of travel expenses, usage of own equipment, car mileage (for using a private vehicle on business trips) and meal allowances may be non-taxable, provided that specific conditions are met and suitable evidence is kept.

Tax assessment is based on an annual tax return for the previous calendar year. In most cases the annual tax return is prepared by the tax authorities as provisional calculation of the income tax. Taxable persons – residents receive a provisional calculation of the income tax by 15 June each year. Under certain conditions such provisional calculation can be considered as a final decision on income tax. Taxable persons – residents, who do not receive such calculation in due time, need to file a tax return by 31 October.

There are monthly tax prepayments, based on the income tax rates – see above. Any such advance tax payment of a resident is treated as a prepayment of tax, with the difference being paid or credited based on the annual tax assessment. In the case of a non-resident, the advance payment is treated as a final tax.

### Social security

If a managing director qualifies as an employee (according to the labour law), the contributions for pension, disability, health, and unemployment insurance and parental protection are mandatory.

Social security contributions amount to 38.2% of a gross salary (22.1% is deducted from the employee’s salary, and 16.1% is paid by the employer).

<table>
<thead>
<tr>
<th>Found</th>
<th>Employee (%)</th>
<th>Employer (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pension and disability insurance</td>
<td>15.50</td>
<td>8.85</td>
</tr>
<tr>
<td>Health insurance</td>
<td>5.96</td>
<td>5.96</td>
</tr>
<tr>
<td>Unemployment insurance</td>
<td>0.14</td>
<td>0.06</td>
</tr>
<tr>
<td>Paternal protection</td>
<td>0.10</td>
<td>0.10</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>22.10</strong></td>
<td><strong>16.10</strong></td>
</tr>
</tbody>
</table>

Social security contributions are also mandatory if the managing director provides management services on the basis of a business contract. The rates applicable depend on whether the managing director is already paying into the compulsory social security scheme in Slovenia through other forms of employment.

Persons who pay pension contributions and disability insurance abroad can under certain conditions apply for a waiver of such social security contributions (based on EU regulation or bilateral international treaties). Persons, who pay health insurance abroad, do not, under certain conditions, need to pay health insurance in Slovenia.

Directors contributing to the above schemes are entitled to payments in cash or in kind in cases of retirement, sickness, disability, casualty and unemployment, subject to specific pre-conditions under each scheme.
This guide focuses primarily on the rules relating to private limited liability companies and does not address in detail the rules relating to public limited companies.

The company’s managing body may consist of either an individual, two or more individuals acting jointly or jointly and severally, or a board of directors with a minimum of three members. The managing body of a listed company consists of a board of directors.

The board is a collegiate body without a maximum number of members for a public limited company. However, the ‘Good Government Unified Code’ (2006) recommends the number to be not less than five and not higher than fifteen. The maximum number of directors for a private limited liability company is twelve. The articles of association must set out the number of members of the board, or the minimum and the maximum number of members, in which case, the general meeting determines the actual number of directors. The board of directors must meet at least on a quarterly basis.

Members of the board may appoint a chairman and a secretary from among themselves. The secretary, with a counter signature of the chairman, has the power to certify the board minutes. The chairman is entitled to convene meetings of the board. A minimum attendance of half plus one of the board’s members is required for a valid quorum of a public limited company. There is no legal minimum attendance requirement for private limited companies, but a minimum of two attendees must be present to validly constitute the meeting.

Decisions of the board of a public limited company are reached by absolute majority of present or represented members. Decisions in a private limited liability company are made by majority and the articles must state whether this majority is calculated by reference to the board’s members or attendees. Despite this, a company’s articles may require a higher majority to reach decisions as long as unanimity is not required. The articles may also provide for a casting vote for the chairman in the event of an equality of votes. Board minutes are drafted by the secretary and must be recorded in the meetings book.

Eligibility requirements

The company’s managing body may consist of either an individual, two or more individuals acting jointly or jointly and severally, or a board of directors with a minimum of three members and a maximum of twelve members. Both individuals and legal persons, such as corporations, may become directors. A director is not required to be a shareholder in the company and need neither be resident in Spain nor be a Spanish national. Nevertheless, a foreign director needs to obtain a Spanish Tax Identification Number (NIE). Minors and incapacitated persons cannot be directors.

The following are restrictions on who can become a director:

— persons barred by reasons of bankruptcy or undischarged insolvency; those barred from holding public office by a judgment; and those who have seriously breached the law or social rules;
— persons whose current positions are incompatible with a directorship, for example, those who cannot trade by reason of their post (Magistrates, judges etc.); high public officers (Members of government); public Administration Civil Officers; and
— persons who may not become company directors for other reasons, for example if they are the company’s auditors (note this prohibition lasts for three years from
A director may resign from office at any time by notifying the board of directors or the shareholders at a general meeting. In this case, the director may be required to settle current business.

Directors can be removed at any time without good reason by a resolution of a general meeting and without the necessity of the cessation proposal being included in the shareholders’ meeting agenda. A director’s appointment may expire if he or she is not re-appointed. In the event of a director’s appointment expiring before a shareholders meeting is in session, his office is extended until the next general shareholders’ meeting. A director who is disabled from acting as a director, as referred to above, must be removed.

A director may be dismissed from his post for miscellaneous reasons such as death, court decision, or the commencement of a liability claim against him. Removal or resignation of a director must be registered in the Mercantile Register. Resignations, other than in writing, have not always been legally recognised.

Authority and representation

The directors are the company’s managing body with full authority to represent the company in all acts related to the company’s corporate purpose. This authority cannot be limited as regards third parties. The company will always be liable to third parties acting in good faith in respect of the acts of its directors, even when acting outside its corporate purpose. The authority to represent the company becomes effective upon acceptance of the post. However, in relation to third parties, the appointment is not recognised until the post is registered in the Mercantile Register.

When the company’s managing body is organized as a board of directors, the board as a whole has the authority to represent the company. Since this representation is cumbersome when decisions are carried out, it is common practice to delegate the board’s powers to a managing director or to an executive committee. In this case, the delegate(s) have the same authority to represent the company as the board as a whole. However, the powers to render the company’s accounts and to present the company’s balance sheet and other documents that relate to the company’s accounts to the general shareholders’ meeting, are expressly reserved for the board and cannot be delegated. Unless the articles of association provide otherwise, managing directors can grant powers of representation to third parties. Notwithstanding this power, the grantee can never be considered the company’s managing director. To be effective before third parties, both the delegation and the powers of representation, must be registered in the Mercantile Register.

Contractual relationship with the company

The appointment of a director does not constitute a contract itself, but rather a corporate relationship. As a rule, the office of a director is not remunerated, unless otherwise provided in the company’s by-laws. In listed companies, the office of a director is remunerated, unless the company’s by-laws provide otherwise. However, remuneration is agreed in most companies. In this case, the company’s articles need to state the remuneration system. The remuneration system sets out different forms of remuneration for directors, including a fixed fee structure, assistance allowances and profit sharing. The maximum amount of the annual remuneration available for all the directors must be approved by the general meeting of the company. In any event, the remuneration of directors must be reasonably established in the context of the company’s financial situation.
When the company appoints a managing director, it has to enter into a contract with the managing director. The contract is subject to prior approval by the board of directors and has to include the remuneration to be received by the managing director. The managing director may not receive any remuneration that has not been expressly agreed in the contract.

Under Spanish law, activity limited to the mere exercise of the position of a member of the board or management bodies is excluded from the scope of employment law, provided that the activity is limited to the functions inherent to such a position. Consequently, a director’s relationship with a company is not an employment relationship but a mercantile relationship. Notwithstanding this, if a person holds the position of a director and other positions in the company through an ordinary employment contract, compatibility between the mercantile relationship and the employment relationship is possible, provided that the functions corresponding to each position are clearly differentiated with the employment contract describing a function other than the generic management activity of a company.

Therefore, a director can receive remuneration by virtue of a services or employment contract with the company.

A special labour relationship of senior executive employees exists whenever the employee executes powers inherent to the legal ownership of a company and related to the company’s general objectives, and acts with independent authority and full responsibility, only restricted by the criteria and instructions given by a director or members of the board who are considered executives.

The Spanish Supreme Court has established that the functions of a director and of a senior executive employee are the same. Therefore, in cases where the same individual occupies both positions in a company, a dual mercantile and labour bond would co-exist in such individual, but not implying diversification of the functions to be performed. In such cases, Supreme Court case law favours the prevalence of the mercantile relationship over the labour one. In some exceptional cases, case law has acknowledged the compatibility of both relationships whenever the by-laws of the company envisage the possibility of entering into a senior executive employment contract with a director, differentiating clearly the functions to be performed in each position.

Conflicts of interest

A conflict of interest between the directors and the company may arise when the interests of the director conflict with those of the company. In accordance with the main obligations under their loyalty duties, directors must avoid conflicts of interest. The duty to avoid a conflict of interest obliges the director to refrain from i) entering into transactions with the company, except for transactions of no material importance entered into in the ordinary course of business on standard terms ii) using the name of the company or using the position of a director to unduly influence a private transaction, iii) making private use of the company’s assets, iv) taking advantage of the company’s business opportunities, v) obtaining advantages or remuneration from third parties in relation to the performance of his office or vi) engaging in activities on his own or on behalf of another which involves competing with the company or in any other way leads to a permanent conflict with the company’s interests. In this case, unless a director resigns, he will be likely to incur personal liability. Usually, this situation occurs when a director is appointed as a director of a competing company or of a company with opposing interests. Consequently, a permanent conflict of interests arises. A director may then be removed at the request of any shareholder and by the general meeting. A general meeting of a private limited liability company can expressly authorise its directors to act as directors of a competing company. In some cases the company may release a director from restrictions relating to the aforementioned conflict of interest by a general meeting or by a resolution of the board of directors.

Duties of a director

Duties of directors are broadly defined under Spanish company law. The directors of a company must comply with the duties imposed on them by the Spanish company law and by the by-laws of the company. Directors must act with diligence, caution and loyalty, taking the appropriate measures for the proper governance of the company. Similarly, when discharging their duties, directors have the duty to acquire and the right to gather from the company all the information necessary for carrying out their obligations as directors. They are subject to a duty of confidentiality, even after their removal or resignation. They shall inform of any situation that may involve conflict of interest and are under specific prohibitions of competition or of taking advantage of business opportunities.

Directors of public limited companies have, amongst others, the following main duties: lodging the incorporation deed at the Mercantile Register; informing the company’s shareholders of onerous acquisitions involving more than 10% of the share capital of another company (during the first two years after incorporation); issuing share certificates; calling ordinary and extraordinary general meetings; assisting at general meetings; representing the company; preparing and disclosing annual accounts and the director’s report (if applicable); proposing distributions of profits; appointing experts; calling a general meeting to dissolve the company; and challenging resolutions of the general meeting when they are contrary to the interests of the company; and keeping the minutes book.
Directors of private limited companies have, amongst others, the following main duties: lodging the incorporation deed at the Mercantile Register; updating the shareholders’ book; calling general meetings; representing the company; preparing and disclosing the annual accounts and the directors’ report; calling a general meeting to dissolve the company; challenging resolutions of the general meeting when they are contrary to the objects of the company; and keeping the minutes book.

**Liability**

Directors will be liable for unlawful actions or omissions which cause damage to the company, provided that there is sufficient causality between the action and/or omission and the damage. Directors are also liable if they do not dissolve or request the insolvency of the company when they should do so. Directors are jointly and severally liable, unless they can prove that they were not aware of the decision or act causing the damage, or that despite being aware of it, they did everything in their power to avoid the damage or expressly opposed such unlawful decision or act. Not only de jure directors, but also de facto and shadow directors could also be declared liable. The legal representative of a legal person acting as a director of the company will be jointly and severally liable together with the legal person. All the duties and responsibilities characteristic to the office of directors are also extended to facto directors and the managers of the company.

There are two main legal claims in relation to a director’s liability for unlawful actions: (i) corporate legal action; and (ii) individual legal action. A corporate legal action is appropriate when damage is suffered by the company, whilst an individual action is relevant in the event of damage suffered by shareholders or third parties. In both scenarios, the limitation period for bringing liability actions against directors is four years from the day that the relevant act was committed.

**Corporate legal action**

Corporate legal actions aim to recover damage suffered directly by the company as a consequence of a director’s actions or decisions. Such actions can be brought by the company itself, by the shareholders or by the company’s creditors. Exercise of legal claims by the company needs to be approved at a general meeting. Corporate legal action brought for breach of the duty of loyalty does not need to be approved by the General Meeting. The resolution to bring about such a claim can be passed even if it was not stated in the agenda of the meeting. Public limited companies require a simple majority of votes of the attendees at the meeting in favour of the action. However, private limited liability companies require a majority of the attendees’ votes representing at least one third of the share capital. The by-laws cannot increase or modify those requirements.

Exercise of corporate legal action either by individuals or shareholders: The shareholders’ claim is secondary. Shareholders with legal authority to call a general meeting must exercise the liability action when the duty of loyalty is considered to have been infringed. An action can be brought in the following situations:

- if the directors have not called the general meeting required to approve the exercise of the corporate legal action of the company;
- if a month has elapsed since the general meeting at which it was agreed to bring the claim and such claim has not yet been filed; or
- if the general meeting has not approved bringing the claim.

Exercise of corporate legal action by creditors:

Creditors can bring a corporate legal action if neither the company nor the shareholders bring it and the company’s assets are not sufficient to pay liabilities owed to them.

Corporate legal actions may be brought within four years from the day that the relevant act was committed.

**Individual legal actions**

These actions are personal indemnity actions which aim to re-establish the individual assets of those shareholders or third parties who have suffered direct loss to their assets as a consequence of a director’s act. In the event of illegal behavior by a director acting as such, shareholders or a third party affected will be able to bring an individual claim against the directors themselves, separate from any claim against the company. Corporate legal claims and individual legal claims may be brought simultaneously. As with corporate legal claims, individual claims must be brought within four years from the day that the relevant act was committed.

**Tax liability**

Directors are jointly and severally liable for breach of the company’s obligations under tax legislation.

**Criminal liability**

Directors may be personally found to be criminally liable for crimes defined by the Penal Code, including:

- misrepresentation of company information;
- harmful abusive agreements;
- taking advantage of harmful agreements agreed by fictitious majorities;
- denial of rights (i.e. the information right);
- disloyal and/or fraudulent administration; and
- obstructing administrative supervision and inspection.

Liability may also arise in respect of administrative, environmental or other issues.

**Liability in case of insolvency**

Directors’ liability in case of insolvency is regulated under the Spanish Insolvency Act, which provides
special rules for the liability of directors should the insolvency proceeding be declared tortious and the directors deemed responsible for causing or aggravating the insolvency situation. The judgment declaring an insolvency proceeding as tortious will identify the individuals – usually the directors – liable for having caused or aggravated the company’s insolvency.

Among other consequences, such a judgment could provide the following: directors being declared personally and jointly liable for any company debt not fully paid to creditors, directors being disqualified from managing a company for a given number of years and directors losing any right that they may have against the insolvent company’s estate.

For this purpose, the Insolvency Act sets out a list of acts that can be presumed to have caused or aggravated the insolvency. Court decisions have not been homogeneous on the nature of this liability, differing on the consequences in terms of distribution of liability among different directors or the need of proof of damages and the causal relationship between them and the directors’ acts.

Limitation of liability

A director’s liability cannot be limited by agreement. Notwithstanding this, directors may enter into insurance contracts which cover liability in relation to the company and third parties. This insurance cannot cover wilful misconduct.

Immigration issues

A director who is a national of countries outside the European Economic Area needs work and residence permits when he has an employment contract with the company and before the commencement of his service for the company. The company has to obtain a prior administrative authorization to employ a foreign person (a national outside the EEA) and has to pay a rate to the Spanish government. International treaties ratified by Spain may provide otherwise. European Union nationals have the right, in accordance with European community law, to work in any Member State.
This section focuses on the rules relating to the share corporation pursuant to Articles 620 et seqq. of the Swiss Code of Obligations (CO). It does not address the rules applicable to other legal entities under Swiss company law, which are the simple partnership, the general partnership and the limited partnership, the limited liability company and the co-operative.

**Eligibility requirements**

The only Swiss specific mandatory requirement prescribes that at least one person domiciled in Switzerland must be able to validly represent the company (i.e., have sufficient signatory power). Such a person can either be a board member or an officer. If such a person does not have sole signatory power, the requirement can also be met by two persons domiciled in Switzerland having joint signatory power (i.e., being able to validly represent the company jointly).

Further, the law provides that at least one board member (whether domiciled in Switzerland or abroad) must be in a position to validly represent the company (i.e., have sole or joint signatory power with another director).

Swiss company law no longer contains a shareholding requirement. Directors are, however, entitled to attend shareholders’ meetings and to propose resolutions.

Unlike in other jurisdictions, companies – whether or not incorporated in Switzerland – cannot be appointed as directors. Only the individuals who represent these companies can be appointed as such.

**Appointment**

Generally, a director may only be appointed by resolution of the shareholders’ meeting. In the absence of particular quorum requirements in the articles of incorporation, the appointment must be approved by an absolute majority of the votes of shares represented at the meeting. The chairman is either appointed by the members of the board of directors or, if the company’s articles of incorporation so provide or if the company is listed, by the shareholders’ meeting. Further, the board of directors may establish a nomination committee setting out the governing rules for the selection of candidates and for their re-election.

Notification of the appointment, signed by two members of the board of directors or one member with sole signatory power, must be filed with the Commercial Register of the canton where the corporation is incorporated. The minimum number of directors is one (or such higher number as is prescribed by the corporation’s articles of incorporation). However, if there are different classes of shares, the articles of incorporation must provide for at least one representative of each class to the board. There is no maximum number of directors unless so provided by the corporation’s articles of incorporation.

Appointments are generally made for a fixed term of three years, unless otherwise provided in the articles of incorporation; a director’s term of office must, however, not exceed six years. In listed companies, the maximum term of office is limited to one year. Reappointment at the end of the term is possible, both in listed and non-listed corporations.
**Resignation and removal**

A director may resign from the board at any time by notice to the corporation (although such resignation may constitute a breach of contract).

Further, a director may be removed by resolution of the shareholders’ meeting at any time and without cause by an absolute majority of the votes of shares represented at the meeting unless the articles of incorporation provide for a different quorum. Delegates (i.e. managing directors or officers) may on the other hand be removed from their position by the board of directors at any time. Such removal may, however, constitute a breach of contract (cf. para. ‘Contractual relationship with the company’ below) between the corporation and the respective director or delegate.

In any case, resignation or removal of a board member or delegate must be filed with the Commercial Register of the canton where the corporation is incorporated. Although the liability of a board member usually ends with removal from the board, such removal must be filed with the Commercial Register immediately. The resigning or removed board member may notify the Commercial Register itself if the company fails to do so.

**Authority and representation**

As a general rule, each member of the board of directors has the authority to represent the corporation individually and can perform all legal acts that may arise within the corporation’s purpose. If a special delegation of powers of the board to a managing director, a committee of directors or to independent external officers has been validly made (cf. para. ‘Working rules of the board’ below), the delegates have the same authority to represent the corporation. Internally (i.e. between a director or delegate and the company), organisational or other regulations or the contract between the director (or any other representatives) and the company may limit such authority.

However, internal restrictions on the powers of directors to represent the company are not enforceable against third parties acting in good faith (so-called bona fide third parties) unless those restrictions were filed with and entered into the Commercial Register. They can relate to the fact that (i) the company may only be validly represented collectively by several directors (usually two) or (ii) the authority of certain directors is limited to the representation of either the principal establishment or a given branch. Bona fide third parties are protected by the fact that courts usually interpret the corporate purpose – within which a director may validly represent the company – very broadly.

Moreover, third party’s good faith is presumed unless the party knew or should have known that there was an internal limitation of authority.

Finally, notwithstanding the restrictions registered in the Commercial Register, bona fide third parties may also be protected under concepts of apparent and ostensible authority, respectively (e.g. in case of a delegate’s transgression of such restrictions which the board was aware of and tolerated; misleading statements of the board about the representative’s authority to represent the company).

**Working rules of the board**

The Swiss share corporation normally has a one-tier board of directors which may take decisions on all matters which by law or the articles of incorporation are, to the extent permissible, not allocated to the shareholders’ meeting. Except for the (few, but substantial) statutory non-transferrable and inalienable duties of the board of directors (cf. para ‘Duties’), the CO allows for a delegation of the company’s management to a managing director, to a committee of the board or to independent external officers, which may in fact lead to a two-tier management structure. Such (limited) delegation of the board’s powers is admissible provided that the articles of incorporation expressly authorise the board of directors to do so according to the company’s organisational regulations. These regulations regulate the management of the company’s business, stipulate the required bodies, define their duties and, in particular, regulate the company’s internal reporting. If these requirements are met, the delegates have the authority to act – within the matters defined in the organisational regulations – in the name and on behalf of the corporation without prior board approval. The liability of the delegating members of the board of directors is then limited (cf. para. ‘Limitation of liability’ below).

If the company’s articles of incorporation provide for the possibility of a delegation, the establishment of a second-tier management structure still falls within the competence of the board of directors which has to issue the respective organisational regulations (non-transferrable and inalienable duty of the board of directors) provided that the appointment of any director will be approved by the shareholders’ meeting. Members of the board of directors as well as delegates of the board have to be registered in the Commercial Register of the canton where the corporation is incorporated.

**Contractual relationship with the company**

The appointment of a director creates a basic legal relationship with the company containing both contractual and corporate aspects. Further, a director may have an additional contractual relationship with the company based on an employment agreement (in particular managing directors) or a service/mandate agreement (in particular external directors). In any case, according to Swiss case law as well as the prevailing opinion
of legal scholars, a director is entitled to reasonable remuneration in exchange for his services. The rules regarding the determination of the remuneration depend on whether the company is listed or not.

In non-listed corporations, such remuneration is determined by the board in compliance with general principles of company law (e.g. duty of care and loyalty, reimbursement of unjustified benefits). The company may also set up a compensation committee which issues the rules governing directors’ and senior management’s remuneration.

On 1 January 2014, the ordinance against excessive compensation came into force which implemented the key elements of a constitutional amendment (the so-called ‘Minder Initiative’), namely increasing the shareholders’ rights to have a say on the compensation of the board of directors and executive management. Pursuant to the new regulation which is only applicable to listed companies, the shareholders’ meeting has to vote annually (binding vote) on the aggregate amount of the remuneration for each of the board of directors and executive management; the articles of association have to specify the mechanism of the say-on-pay vote (various mechanisms are possible). Further, disclosure requirements apply to listed companies regarding remuneration and loans granted to its directors and officers.

As regards termination of a directorship, different considerations apply for the corporate aspects (cf. para. ‘Resignation and removal’ above) and the contractual aspects of such termination. A contractual termination will not automatically terminate the directorship (although the contract may require that the director resigns in such circumstances) and the (corporate) removal of the director will not automatically terminate the director’s contract. The termination of the directorship pursuant to corporate law may constitute a breach of the related contract.

Conflicts of interest

Generally, a director must disclose to the board any conflict of interest and not participate in a decision making process if there are conflicting interests. Equally, the other directors should ensure that she/he does not do so.

A director may not enter into a transaction with the company (self-dealing) except in cases where either (i) the transaction has been approved by the board or by the shareholders’ meeting or (ii) the transaction does not jeopardise the company's interests, i.e. is carried out at arm’s length (market prices; fairness opinion). Whenever a director acts for himself (or a third party) and for the company, the underlying transaction must be concluded in written form to be valid unless the value of the consideration given by the company in such transaction does not exceed CHF 1,000 and qualifies as an ordinary business transaction. These rules are relevant for both the authority and representation of the corporation as well as the director’s liability.

As a consequence of his fiduciary duty, a director must not take personal advantage of corporate opportunities in which the corporation itself may have an interest.

If the board member’s remuneration is determined by the board itself (in non-listed companies), conflicts of interests inevitably arise in relation to the board members’ remuneration.

Duties

Directors have a general duty of loyalty towards the company and must safeguard its interests. In a group of companies, a director must generally safeguard the interests of the company where he is a director and not of the group as a whole (however, when determining the individual interests of a specific company, the fact that such company belongs to a group of companies may be considered).

Directors must perform their duties with due care, i.e. with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. Further, the shareholders must be treated equally in like circumstances.

A director’s general duty of care under Swiss law entails numerous specific duties, which cannot all be listed here.

The law defines some particularly important duties of the board which are non-transferable and inalienable. The decision-making process as regards these non-transferable duties cannot be delegated to a committee of the board, to a managing director or to independent outside officers; however, the board of directors may “delegate” the preparation and implementation of its decisions. The following duties are non-transferable:

- strategic management of the company and the issuing of necessary directives;
- establishment of the organisation of the company;
- organisation of the accounting, financial control and financial planning systems as required for the management of the company;
- appointment, supervision and removal of persons entrusted with managing functions;
- preparation of the annual report and the financial statements as well as – for listed companies – the compensation report;
- preparation of the shareholders’ meetings; and
- notification of the courts in case of over-indebtedness of the corporation.
With the exception of these non-transferrable duties, the board of directors may fully delegate (including the delegation of the decision-making process) the management of all or part of the company’s business. If the board has validly delegated all or part of its transferrable duties to a committee of the board, to a managing director or to an independent external officer, the standard of care to be observed by the respective delegates is determined by the specific scope of the delegation.

With regard to the company’s creditors, directors are under a legal duty to call a shareholders’ meeting and propose adequate restructuring measures if the last annual balance sheet shows a capital loss (i.e. half of the share capital and the legal reserves are no longer covered by the company’s net assets). Moreover, in case of substantiated concern of over-indebtedness, an interim balance sheet must be prepared and submitted to the auditors for examination. If the interim balance sheet shows that the company’s liabilities are no longer covered (whether the assets are appraised on a going concern basis or at liquidation value), the board of directors is under a legal duty to notify the court unless certain company creditors subordinate their claims to those of all other company creditors in the amount of the over-indebtedness.

Upon receiving such notification, the court opens insolvency proceedings. Nevertheless, on application by the board of directors or by a creditor, the court may grant a stay of insolvency proceedings provided that there is a prospect of financial restructurings (i.e. prospect of sustainable financial reorganisation of the company and recovery of its profitability); in such case the court prescribes measures to preserve the company’s assets. Further duties of the directors concern the timely and duly payment of social security contributions for the company’s employees and the payment of certain taxes.

**Liability**

The members of the board of directors, any delegate of the board and any persons engaged in the management of the company (including shadow directors) are personally liable towards the company, its shareholders and creditors for any damage caused by intentional or negligent violation of their duties (cf. para. ‘Duties’ above). The legal standing to claim such damages depends on (i) whether such damage was suffered by the company or (directly) by a (individual) shareholder or creditor, respectively, and (ii) whether the company is insolvent or not.

The damage suffered by the company may not only be claimed by the corporation itself, but also by the shareholders and – upon opening of insolvency proceedings of the company – by creditors. If the company is not insolvent, the compensation claimed by the corporation or a shareholder, respectively, has to be paid to the company. Upon opening of bankruptcy proceedings, the right of shareholders and creditors to sue the liable persons is, however, suspended and the bankruptcy trustee is first entitled to recover damages in favour of the company or the bankruptcy estate, respectively. Where the bankruptcy trustee waives its right to bring such a claim, any shareholder or creditor is entitled to claim the damage suffered by the (insolvent) company.

Apart from liability towards the company, the relevant persons may become directly liable towards individual shareholders or creditors (in particular in case of misrepresentation and fraud).

In addition to civil liability, the Swiss Penal Code provides for criminal liability of directors in the event of (amongst others) false statements about the commercial business (i.e. statements made in a prospectus for a public offer of shares), filing false statements with the Commercial Register, the artificial reduction of assets to the prejudice of creditors, disclosing trade or commercial secrets, mismanagement, granting of preferences to certain creditors, appropriation of seized property, economic espionage, and the failure to comply with accounting regulations.

Criminal (and administrative) liability for insider trading and price manipulation is governed by the Stock Exchange Act.

A recent study of the University of St. Gallen (HSG) has shown that in Switzerland every year around 1500 directors are sued in court due to violation of their duties pertaining to an aggregate loss amount of CHF 140m. The majority of the liability actions refer to (civil) liability of directors for failing to promptly notify the courts of the company’s over-indebtedness and for unpaid social security contributions in order to overcome liquidity shortage.

**Limitation of liability**

Generally, directors cannot limit their responsibility by agreement or in the articles of association beyond the general possibility to limit the board’s liability by delegating certain duties, if admissible (cf. para. ‘Working rules of the board’ above). The responsibility of the directors for properly delegated tasks is limited to using due care in selecting, instructing and supervising the delegated persons.

The director’s liability to the company is also excluded if the shareholders have granted them a full and unqualified discharge (‘Entlastung’). Such discharge, however, is only valid with regard to (i) facts that have been duly disclosed to the shareholders and (ii) claims of the company and of those shareholders who have consented to the discharge resolution. Shareholders who have not consented to given resolutions have six months to file their claim.
Further, the company may take out D&O insurance coverage in favour of the directors which de facto also “limits” the directors’ liability.

Immigration issues

Two significantly different regimes apply for EU/EFTA-nationals on the one hand and other nationalities (third-country nationals) on the other hand in respect of residence and work permits for foreign directors.

Under the bilateral Agreement on the Free Movement of Persons between Switzerland and the EU dated 21 June 1999 (FPA), EU/EFTA-nationals (except for citizens of Romania and Bulgaria) enjoy unrestricted free movement rights and are generally entitled to a resident and work permit in Switzerland provided that they provide the authorities with (i) an employment contract with a Swiss employer or (ii) a confirmation regarding their self-employed status.

Under the FPA, citizens of Bulgaria and Rumania still face broad material restrictions until 31 May 2016 at the latest and are subject to quotas, the priority rule, as well as to restrictions regarding wages and working conditions.

However, on 9 February 2014 the Swiss population approved an initiative aiming at limiting immigration in general. This may lead to a radical change in Swiss immigration policy and the effects on the privileged treatment under the FPA are still unresolved. For the time being, the FPA remains in force just as before the approval of the initiative.

Third-country nationals are only admitted to work and reside in Switzerland, if (i) their skills are required; (ii) they are well qualified and (iii) no Swiss or EU/EFTA-national can be recruited for the vacant position (priority rule). In addition, the admission of third-country nationals is subject to quotas.

Taxation

Directors’ fees constitute taxable income subject to federal, cantonal and municipal taxation. The tax liability of a foreign director can be unlimited or limited, depending on how long he or she stays and works in Switzerland.

Unlimited tax liability

If the foreign director is considered a Swiss tax resident, his or her income will be subject to taxation at source, i.e. the employer is liable for withholding the correct amount of tax from the director’s income.

Tax at source is imposed on the gross income, taking into account standard deductions as part of the (progressive) tariff and settling all federal, cantonal and municipal tax liabilities. However, if the director’s annual income exceeds a certain amount (in most cantons CHF 120,000) he or she will subsequently be asked to file an ordinary tax return, allowing him or her to claim individual deductions but applying a different tariff.

Additional itemised deductions are available for expats who are seconded to Switzerland for a limited period of time; however the practice of the competent tax administrations varies in this respect with a tendency of becoming more restrictive.

Limited tax liability

If the foreign director stays and works in Switzerland for less than 30 days or is nevertheless not considered a Swiss tax resident due to the rules of an applicable DTT, he or she will be subject to limited tax liability for the remuneration earned in Switzerland. The employer is liable for withholding the correct amount of tax from the director’s income. For foreign resident directors, the applicable tax at source is generally a flat tariff (e.g. 25% on the gross director’s fees) hereby settling all federal, cantonal and municipal tax liabilities.

Income of a foreign director under a service contract (e.g. fees) will generally not be subject to Swiss taxation as long as the foreign director neither qualifies as a Swiss tax resident nor has a permanent establishment in Switzerland. However, such arrangements will often bear the risk of being disregarded for tax avoidance, by qualifying the alleged consultant as a factual employee.

Social security

Social security in Switzerland includes old age and survivors’ insurance, disability insurance, supplementary benefits for old age, survivors’ and disability insurance, unemployment insurance, compulsory employee pension and medical and accident insurance. For Swiss social security legislation purposes, a foreign director of a Swiss corporation normally qualifies as a (formal or factual) employee of such corporation. Consequently, the corporation will be under a legal obligation to pay Swiss social security contributions on the remuneration paid to its director. Exemptions may apply under international social security treaties.
This guide focuses on the rules relating to the directors of limited liability companies (Limited Şirket) only. Other forms of company stipulated under the Turkish Commercial Code (the ‘Code’) are not covered by this guide.

**Eligibility requirements**

The Code stipulates specific eligibility requirements. For example, a person who is bankrupt or subject to an interdiction cannot be appointed as a director. Furthermore, public officials are not allowed to be appointed as directors. In addition to the Code, articles of association may also specify certain eligibility requirements.

An individual director is not required to be resident in Turkey, and there is no Turkish nationality requirement. Legal entities can also be appointed as directors, regardless of whether they are incorporated in Turkey or not. If a legal entity is appointed as a director, a real person representative must also be appointed to perform the functions of a director.

It is not necessary to be a shareholder of the company in order to be appointed as a director. However, at least one of the company’s shareholders must be appointed as a director to represent and manage the company.

**Method of appointment**

There is no provision in the Code which restricts the maximum number of directors, but the company must have at least one director.

The first directors of a newly incorporated company whether they are real persons or legal entities and their real person representatives, are required to be appointed according to the articles of association of the company.

The appointment of subsequent directors is subject to a resolution of the shareholders’ general assembly, and this authority is non-delegable. A notarised copy of the resolution of the shareholders’ general assembly appointing director(s) must be filed by the directors with the Commercial Registry having jurisdiction in the area where the company’s head office is located.

If the company has more than one director, one of the directors will be appointed by the shareholders’ general assembly as the chairman of the board of directors. It is important to note that the chairman may be appointed regardless of whether he or she is a shareholder of the company. However, a legal entity director may not be appointed chairman.

At the end of his/her term of office, reappointment is possible; however, appointments are usually made for an indefinite term.

**Method of Removal**

A director may resign his or her office at any time if he meets the specific conditions stipulated under employment law and his employment contract with the company, such as justified reasons or notice period. The same applies to the company wishing to terminate the contractual relationship with the director. Furthermore, the director’s appointment is terminated ipso iure at the end of his/her term of appointment if the director has been appointed for a defined term.
The director's term of appointment will also be terminated ipso iure if the director no longer meets the eligibility requirements, i.e. if he/she becomes bankrupt or subject to an interdiction. The termination of appointment must be filed with the Trade Registry.

Unless otherwise stated in the articles of association, a resolution to remove a director(s) is to be passed by the shareholders' general assembly. A notarised copy of the resolution must be filed by the directors with the Trade Registry having jurisdiction in the area where the company's headquarters are located.

In addition, each shareholder can make an application to court for the removal of a director when there are justified reasons, such as a material breach of the duty of care or loss of qualifications necessary to properly manage the company.

**Management and representation**

The authority to manage the company and the power to represent the company towards third parties are distinguished from one another.

Directors are authorised to decide all issues in relation to the management of the company which are not explicitly reserved by law or the articles of association for resolutions of the shareholders' general assembly. In principle, directors use this authority jointly; however, it is common to share management tasks among directors through internal regulation.

Unless provided otherwise by the articles of association and unless the company has only one director, a company is represented through the signatures of at least two directors. However, in practice the articles of association are drafted to allow the representation of the company through a single signature.

The scope and extent of management authorities, to the extent not determined by law or the articles of association, is determined by a shareholders' general assembly resolution indicating the persons authorised to represent the company. A copy of the resolution must be notarised and filed with the Trade Registry having jurisdiction in the area where the company's head office is located. Following registration, any legal defect regarding the appointment of representative directors can only invalidate transactions if the third party had knowledge of the legal defect. In addition, restrictions on representational power cannot be raised against third parties acting in good faith. However, restrictions aimed at limiting the powers of representation solely to the business of the head office or a branch, or to require a joint exercise of such powers, are valid if these restrictions are registered and published.

**Working rules of the board**

If there is more than one director, directors may jointly be regarded as a board of directors. All directors exercise their duties jointly unless certain tasks are delegated to one or more of the directors in person. Decisions of directors are passed with a majority of votes and the chairman has a casting vote where votes are tied.

It is possible to hold non-physical meetings between directors provided that the articles of association permit this.

**Contractual relationship with the company**

A shareholders resolution appointing a director to that office does not constitute an immediate legal relationship between the future director and the company. The consent of the director is also necessary and the parties should enter into a contractual relationship in conjunction with the shareholders' general assembly resolution. Usually this contractual relationship is in the form of an employment contract or an agency contract, which regulates issues such as the director's term of office, duties and responsibilities, remuneration, business transactions subject to approval, confidentiality, non-competition, and termination of the relationship. It is not mandatory to conclude such a contract in writing unless the director is also a shareholder.

A director is entitled to seek remuneration in exchange for his services. It is possible to provide in the articles of association that the directors shall receive dividends. The shareholders' general assembly has the sole authority to determine directors' salaries.

**Conflicts of interest**

A director is obliged to protect the company's interests in good faith. He/she is therefore required to place the interests of the company before his own or those of a third party.

The Code sets out specific prohibitions in respect of voting rights. For instance, it is not possible for persons who have participated in the company's management to vote on shareholders' general assembly resolutions in respect of the release of directors. In addition, a director cannot vote on resolutions regarding the approval of his or her own activities and whether they were conducted in accordance with his or her duty of loyalty or non-compete obligation. Moreover, directors who are shareholders are prohibited from borrowing money from the company in certain circumstances.
A director cannot perform any activity which may compete with the company unless such an activity is expressly permitted in the articles of association or by written consent of the shareholders’ general assembly.

In practice companies and directors usually also conclude agreements which regulate in detail the non-competition duty of the director and transactions which are subject to the approval of the shareholders.

**Duties of a director**

Directors are authorised to act in relation to all issues which are not explicitly reserved for shareholders by law or in the articles of association. While fulfilling these duties, the directors must comply with the mandatory provisions of the law, the articles of association, the contractual relationship between the director and the company, and, if applicable, any resolutions of shareholders’ general assemblies. Even though the duties of the directors are owed to the company, directors are also under a limited duty of care towards the shareholders and creditors of the company.

Directors are subject to a wide range of duties which are not all specified by the Code; however, the Code defines some of the duties and responsibilities of directors, which are not allowed to be delegated, as follows:

- to execute ultimate direction and management;
- to determine the company’s management organisation;
- to supervise people to whom management functions have been delegated;
- to establish a committee for early risk detection and management;
- to prepare the company’s financial statements and annual report;
- to organise shareholders’ meetings and to implement shareholders’ resolutions;
- to notify the court if the company’s liabilities exceed its assets.

It is also possible to extend the scope of non-delegable duties through the articles of association.

**Liability**

Directors are liable towards the company for any damage incurred if they fail to fulfil their duties. In this regard, it is necessary to prove fault on the part of the directors. If more than one director is held liable for the same damage, each of the directors is severally liable for such damage to the extent to which such damage may be attributed to that director personally.

In the event of a breach of duty, the company, its shareholders and creditors may be entitled to bring a claim against the relevant director. However, creditors are only entitled to bring a claim against directors for indirect damages if the company becomes insolvent. In this case creditors must first make an application to the Bankruptcy Administration to file a compensation claim against the directors.

Unless it is proven that the directors have appointed a third party to fulfil delegable duties without due care, the directors will not be liable for the damages arising from the acts and decisions of the person to whom the duties have been delegated. This remains the case even in light of the director’s general duty of care and supervision.

In addition to damages incurred as a result of a breach of duty, directors may also be held liable if the company fails to meet its public debts, such as tax obligations and social security payments. However, this joint and several liability only extends to directors who have been authorised to represent the company. Therefore, directors who are not signatories of the company cannot be held liable in this respect. If the directors in office are different from those directors who were in office when the relevant liabilities arose, the current directors will be jointly and severally liable with the former directors to pay the relevant public debts. To bring a claim against directors for the recovery of these debts, it is necessary for the outstanding amounts not to be collected or to be considered impossible to collect from the company itself. It is important to note that there is no requirement to establish fault or negligence in performing the duties in this regard.

In addition to civil liability for public debts, the Code also provides for directors to be criminally liable in specific circumstances. This includes drafting of inaccurate documents regarding the incorporation of the company, committing fraud in the valuation of in kind- capital contributed, making false declarations for registrations at the Trade Registry, improper maintenance of the company’s records, and a failure to file insolvency proceedings.

**Limitation of liability**

Directors’ liabilities can be discharged either by the passing of the statutory limitation period or through release by a shareholders’ general assembly resolution.

Unless other time limits are provided for in criminal matters, the right to bring an action against a director is subject to a two year limitation period starting from the time the claimant became aware of the damage and the identity of the liable director and, otherwise, five years from the occurrence of the event. After the relevant period has elapsed, the liability of the directors is deemed discharged.

The liability of directors may be limited or discharged in full following a shareholders’ general assembly
resolution of release. This resolution is only effective for disclosed facts and only against the company and those shareholders who approve the resolution or who have since acquired their shares in full knowledge of the resolution. However, those shareholders who do not vote in favour of the release are still entitled to bring claims for a period of six months after the date of the release. The liability of directors arising from incorporation of the company or an increase of share capital continues for four years from the registration of the company, even if the directors are released during this period.

The release of directors by a shareholders’ general assembly resolution constitutes an affirmation by the company that the director’s actions during the term covered by the resolution have been in compliance with the law and in the interests of the company. The resolution may be adopted by simple majority of votes represented at the meeting. This resolution cannot be withdrawn by another shareholders’ resolution. However, a court decision ordering the cancellation of the resolution may be granted under certain conditions (e.g. conflict with the articles of association or with applicable legal provisions).

**Immigration issues**

Individuals who are directors or real person representatives of legal entity directors do not need to have a residence permit in Turkey in order to be duly appointed.

However, if a director or a representative of a legal entity holding foreign citizenship wishes to establish residency in Turkey he or she is required to obtain a work permit and a residence permit (unless otherwise provided in international treaties).

Foreign citizens who are resident abroad should apply for a work permit at the Turkish Consulate, which forwards the application to the Ministry of Labour and Social Security (the ‘Ministry’). Foreign citizens holding a residence permit for at least six months for reasons other than education are allowed to apply directly to the Ministry in Turkey. The Ministry may also issue work permits for foreign citizens in consideration of special local requirements or the economic interests of the country.

On first application a work permit is issued for a duration of one year. At the end of the first year, the permit may be extended for up to three years and at the end of the first three years in office, the permit may be extended for up to six years.

**Taxation**

Taxation of a director’s income depends on whether the director is resident in Turkey. Since residency is not necessary for appointment as a director, the director may be considered as a ‘limited’ tax payer. In this case, the director is taxed only on his or her income sourced in Turkey, whereas directors who are resident in Turkey are taxed on their worldwide income. However, there are numerous double taxation treaties which limit the right to levy taxation.

Income is taxed at a progressive rate, generally ranging from 15% to 35%. Tax legislation also provides for varying scales for differently sourced incomes. In other words, it distinguishes between employment-based income and non-employment-based income. In addition, different tax brackets will also be applicable. Wage and salaries, supplementary income such as allowances, bonuses, commission, premiums and compensation in exchange for dependent personal services are considered employment-based income.

As an example of tax rates, for employment based income, an annual income of TRY 27,001 will be taxed TRY 4,850 and the excess (from TRY 27,001) of up to TRY 97,000 will be taxed at a rate of 27%; whereas for non-employment based income, an annual income of TRY 27,001 will be taxed TRY 4,850 and the excess (from TRY 27,001) of up to TRY 60,000 will be taxed at a rate of 27%. There are various tax deductions and exemptions available. For instance, contributions to pensions or for various insurances can be deducted from gross income.

**Social Security**

Directors who have concluded an employment contract with the company and directors who are shareholders of the company (regardless of whether they have concluded an employment contract with the company), must contribute to social security.

Directors who have undertaken the assignment under an agency agreement, as may be the case if the company and the director do not conclude an employment agreement, do not have to contribute to social security.

Foreign individuals, appointed as directors, who have been authorised to represent a foreign company in Turkey, will not be subject to social security deductions in Turkey provided that they are insured abroad. Foreign directors employed under employment contracts by a Turkish company must contribute to social security. However, Turkey has concluded various treaties which may provide for different regulations in this regard.
This guide focuses on the rules relating to limited liability companies ("Tovarystvo z obmezhenoyu vidpovidalnistyu" or "TOV"), the most common type of company used by foreign investors to establish subsidiaries in Ukraine.

Ukrainian limited liability companies ("LLCs") are companies which have a charter capital divided into participation interests, the size of which is determined in the constitutioned documents and which correspond to each participant’s contribution to the charter capital. The maximum number of participants of an LLC is 100 persons. The highest governing body of the LLC is the general meeting of participants. The management of the LLC may be carried out either by an individual director acting on his/her own or by a board of directors, depending on the provisions of the LLC’s charter. The board of directors is headed by a ‘general director’, and a ‘director’ is a common term for an individual manager. For the purposes of this guide, the term ‘Director’ refers to both a director, in his/her capacity as an individual manager, and a general director, as the head of the board of directors.

Ukrainian law provides for the creation of a mandatory audit commission, whose members are appointed from the participants at the general meeting of participants (the main governing body of the LLC). Legal entities represented by individuals may also be appointed to the audit commission. The audit commission’s functions include controlling the financial affairs of the LLC and reviewing the annual accounts before their approval by the general meeting of participants.

A supervisory body may also be appointed in accordance with the LLC’s charter, although this is not a mandatory requirement under Ukrainian law. If appointed, the supervisory body performs continuous control over the commercial and financial activities of the LLC.

All members of the board of directors, supervisory body (if any) and the head of the audit commission are considered to be officers of the LLC. Ordinary members of the audit commission are not officers of the LLC.

Eligibility requirements

Only an individual with full legal capacity can be appointed as a Director. The law does not establish any restrictions regarding the nationality of the Director, however as a practical matter (due to certain peculiarities of Ukrainian law) at the moment of establishment of a new LLC only a Ukrainian citizen may be appointed as the Director. After the registration of a new LLC a Ukrainian Director may be replaced with a foreign national subject to obtaining a work permit.

A participant may also be the LLC’s Director as long as this is an individual. In certain businesses, such as insurance or banking, only individuals having the required level of education and professional qualifications can be appointed as the Director.

The Director and the members of the board of directors cannot simultaneously occupy a position in a controlling body of the LLC, such as the audit commission or the supervisory body, or be the chairman of the meeting of participants, alongside their board appointment.

Method of appointment

The Director is appointed by a resolution of the general meeting of participants requiring a simple majority vote of participants present. Participants have an amount of votes proportional to the size of their participation interests in the charter capital.
Ukrainian law provides for a possibility of concluding an “employment contract” with the Director which can be distinguished from a regular employment agreement as described in more detail below.

In all cases, an appointment must be formalised by a written internal order of the LLC. However, even in the absence of an order, a person is deemed to be employed and an employment agreement is deemed to have been concluded when the individual is allowed to start work.

The State Registrar, the State Statistics Committee and the Tax Authorities must be notified of an appointment of the Director. Upon such notification, the State Registrar updates the Unified State Register of Legal Entities and Private Entrepreneurs of Ukraine (the “State Register of Companies”).

The State Registrar must also be notified of the appointment of any other managers of the LLC or other individuals, who may be authorised to represent the LLC vis-à-vis third parties pursuant to the LLC’s constituent documents. There is no requirement to notify the authorities about the appointment of any other manager.

There are no limits imposed on the term of office for the Director under Ukrainian law. However, when a Director is a foreign national his/her term in office is always limited by the term of validity of his/her work permit.

Method of dismissal

Removal of the Director must be in compliance with both general corporate and employment laws. Essentially, the Director can be dismissed by a resolution of the general meeting of participants by a simple majority of votes.

Previously owners of the LLC were relatively restricted in their right to part ways with the Director due to the excessive dismissal protection they were granted under Ukrainian labour law as employees of the LLC. This resulted in a complicated and burdensome termination procedure which often required the Director’s consent and bargaining on the exit compensation package (especially if no proper written employment contract was in place).

Recent changes to the Ukrainian legislation now provide that the mandate of the Director can be terminated or suspended at any time and for no cause. However, the minimum mandatory severance payment to be paid to a terminated Director in the event of his/her termination on the above ground amounts to his/her respective six month average salary.

Under general Ukrainian employment legislation, the Director may voluntarily resign at any time by giving two weeks’ notice to the LLC. There is no requirement to notify the State Registrar, the State Statistics Committee or the Tax Authorities about the dismissal or resignation of the Director. However, the above authorities must be notified about the appointment of a new Director so that the respective changes to the State Register of Companies are made. It is in the best interests of the LLC to make the notification as soon as possible after the appointment is made, since third parties may rely on information in the State Register of Companies.

Authority and representation

The Director is entitled to represent the LLC in relation to third parties without a power of attorney and his/her actions will be binding upon the LLC. The Director may also delegate his/her authority by granting a power of attorney to third parties.

The LLC’s charter may restrict the powers of the Director, for example, the execution of certain agreements by the Director on behalf of the LLC by requiring prior approval of these by the supervisory body or by the participants at a general meeting. However, if the Director exceeds the authority granted to him/her, his/her actions will be binding on the LLC if the LLC subsequently approves them.

The Director may be held liable for exceeding the extent of her/his authority when representing the LLC vis-à-vis third parties. However, as a practical matter holding a Director liable in such cases may be difficult.

The State Register of Companies contains information on the extent of authority granted to the Director to represent the LLC in relation to third parties and on other officers of the LLC authorized to represent the LLC without a power of attorney. It also contains information on any restrictions on this authority. The information in the State Register of Companies is considered to be accurate and can be relied on by third parties in cases of disputes regarding the authority of the Director to represent the LLC.

If the LLC fails to update the information in the State Register of Companies, new information that is not on the register cannot be subsequently used in disputes against third parties, except when such third parties knew or could have known about it.

Working rules of the board

The LLC may be managed by a single Director or a board of directors. The working rules of the board are usually provided for in the charter of the LLC and may be further specified in internal regulations of the LLC. The corporate documents normally specify the scope and the distribution of duties, responsibilities and powers
between the members of the board, as well as rules applicable to convening and holding the board meetings etc.

The decisions of the board are generally taken by a majority of votes of members of the board present at the board meeting with the chairman of the board (usually, the chairman of the board is the General Director) having the casting vote.

The Director of the LLC and members of the board have to adhere to the job descriptions ("posadova instruktsia") which are adopted by the LLC for each employee, including the Director or the board member, if the LLC wishes to specify his/her duties as set forth in the charter. The job description provides specific job responsibilities, entitlements and liabilities of each employee. Introducing such job descriptions, although advisable, is not obligatory for the LLC.

**Contractual relationship with the company**

Ukrainian employment legislation is designed to protect employees. The employment agreement is concluded between an employee and an employer. As a matter of principle an employment agreement can be entered into both in verbal and written form. Under the agreement, an employee commits to fulfil the job requirements and comply with the employer’s internal labour regulations, and an employer commits to compensate the employee for work and maintain working conditions as required by applicable law and the employment agreement.

The LLC may also enter into an “employment contract” (i.e. in addition to an employment agreement) with the Director. The employment contract is a special form of a regular employment agreement pursuant to which the Director gains additional rights and obligations.

Although not obligatory, having a written employment contract in place with the Director is highly recommended because the parties to such contract have more discretionary powers in setting the terms of employment that can deviate from standard terms provided by the Labour Code.

These “deviations”, however, must not make the position of the Director worse than if the contract were governed by employment law. The parties may, in particular, agree on the following:

- the parties’ rights, obligations and liabilities, including the term of employment, the terms of the employee’s material (financial) liability;
- the remuneration and organisation of the employee’s labour; and
- additional grounds for termination of the contract.

Any provisions of the employment contract less favourable than those guaranteed by law are invalid.

The employment contract with the Director must be signed by a person who has been specifically authorised to do so by the general meeting of participants.

The employment relationship can be governed by Ukrainian law only, unless a specific national law or an international agreement provides otherwise.

Any disputes arising from employment relationships governed by Ukrainian law fall within the competence of the national authorities.

**Directors’ Duties and conflicts of interest**

The Director is required to act in the best interests of the LLC, in good faith, reasonably and within his/her authority. The Director cannot represent the LLC in transactions which benefit him/her personally or for the benefit of a third party if that third party is represented by him/her.

As a general rule, the Director manages all matters of the LLC’s activity apart from those that lie within the exclusive competence of the participants. There are also certain specific statutory duties of a Director, which include:

- setting up a system of accounting and documenting of all transactions;
- organising financial reporting, signing and submitting tax returns and financial reporting to the relevant authorities on the LLC’s behalf;
- filing statements confirming records about the LLC with the State Registrar, including disclosure and update of beneficial ownership information;
- submitting financial statements to the participants of the LLC (as provided by the LLC’s charter); and
- initiating court proceedings in case of insolvency.

Additional duties and powers of the Director may be specified in the LLC’s charter and employment contract with the Director.

**Liability**

The Director is liable to the LLC and not to its participants. In accordance with Ukrainian law and the LLC’s charter, officers of the LLC are liable to the LLC for direct damage and loss of profit caused by them. For example, the law provides that the Director (members of the board of directors) may be personally and jointly liable for damage caused to the LLC if they act on behalf of the LLC beyond their authority. Recent changes to Ukrainian legislation also provide for the Director’s financial liability to the LLC for causing both direct and consequential damages
to it through his/her willful misconduct or negligence. The LLC’s charter and/or employment contract may also establish additional grounds for liability of the LLC’s officers to the LLC.

Moreover, the Director may also face criminal liability for:

— illegal dismissal of employees for personal reasons and other gross violations of employment laws;
— illegal opening or use of the LLC’s currency accounts in foreign countries and other types of embezzlement or fraud;
— causing the LLC’s failure to fulfil a court judgment or to pay taxes and other mandatory duties;
— causing the LLC’s insolvency in the interests of a third party or concealing such an insolvency;
— deliberate disclosure of the LLC’s commercial secrets;
— causing substantial damage by abuse of trust under Ukrainian penal law, etc.

In addition, criminal liability arises if an authorised person (such as the Director or other persons entitled to act on behalf of a legal entity) commits any of the following offences on behalf and for the benefit of the LLC:

— legalisation (laundering) of the proceeds of crime;
— use of funds resulting from illicit traffic of drugs, psychotropic substances, toxic or potent substances or toxic or potent medicines;
— bribing officials of other legal entities or persons engaged in professional public services, such as, auditors, appraisers, notaries, arbitrators, etc.;
— offering or giving undue advantage to an official, or undue influence.

If the LLC is found guilty of any of the above crimes, it can be punished with a penalty ranging from UAH 85,000.00 to UAH 1,275,000 (i.e. approximately from USD 7,000.00 to USD 99,000.00).

**Limitation of liability**

The Ukrainian Civil Code does not limit the liability of the Director. According to Ukrainian labour law, the Director may be subject to full or limited material (financial) liability depending on the type of damage caused to the LLC.

Generally, the material liability of employees of the LLC, including the Director, is limited to one average monthly salary of a liable person.

Unlimited liability for direct and indirect damages caused to the LLC by its Director applies if so provided under his/her employment contract with the LLC.

Irrespective of the provisions of the employment contract, full material liability is applied in the following cases:

— the Director has obtained certain property or cash values of the LLC;
— damage caused by the Director under the influence of drugs; and
— the Director has caused damage by illegal dismissal or transfer of an employee, unjustified delays in salary payments, criminal action, abuse of his/her duties as the LLC’s representative, etc.

**Immigration issues**

Any foreign national seeking to work in a Ukrainian company requires a work permit, unless otherwise provided by an international treaty. The work permit is obtained by the company for a specific individual for a maximum term of one year, although this term can be extended. Such extension may not, however, exceed one year. The permit can only be used to work for the company which applied for the work permit and is not transferable.

Foreign citizens working in Ukraine without a work permit are subject to immediate deportation at the expense of their employer, which, in addition, could face considerable fines. The permit serves as a basis for a foreign national to obtain a visa type D to enter Ukraine for employment purposes.

Additionally, the LLC should notify the relevant employment authority within three business days from the commencement of employment and ensure the registration of the foreign national’s passport at the relevant local internal affairs authority (Central Immigration Authority). The same actions must be taken in case of termination of the foreigner’s employment.

In addition to the type D visa, a foreign employee may obtain a temporary residency permit. The advantage of the temporary residency permit is that it allows multiple entries into Ukraine during the validity of the work permit, while a work visa is a single entry visa and allows a foreign national to stay legally in Ukraine for 45 days only.

**Taxation**

Persons who are tax residents in Ukraine are subject to personal income tax ("PIT") on their worldwide income, whereas non-residents are only taxed on income originating from Ukraine. Hence, if a director is a Ukrainian tax resident, his or her worldwide income is taxed in Ukraine, whereas only a non-resident director’s salary paid by a Ukrainian employer is subject to Ukrainian PIT.

A residency test (based on the one used in the OECD Model Tax Convention) is used to determine an individual’s permanent place of residence and whether or not he/she
is a Ukrainian tax resident. As a matter of practice
Ukrainian tax authorities primarily consider whether
an individual has stayed in Ukraine for more than
183 days in determining whether that individual can be
viewed as a Ukrainian tax resident. Generally, a standard
PIT rate of 15% applies to a Ukrainian tax resident’s
income for the portion of income equivalent to
up to ten times the official minimum wage (around
UAH 12,180 (approx. USD 800)), while any income
in excess of this amount is subject to tax at a 20% rate.
The same approach applies to taxation of dividends
payable on preferred shares, royalties and income from
the sale or lease of real estate in Ukraine depending
on the circumstances.

Certain types of income are subject to reduced tax rates
(e.g. a 5% rate applies to dividends payable on ordinary
shares). Interest on bank deposits, interest on bonds
etc. are taxed at the rate of 20%. However, certain
types of income are subject to increased tax rates.
For example, prizes and winnings are subject to 30%
tax (except for the state lottery which is subject
to the standard tax rate).

Income received by non-residents is generally subject
to the same tax rates as above unless provisions
of applicable double tax treaties apply.

Also, any income received by individuals (including foreign
income) is subject to a military levy at the rate 1.5%.

Social security

The salary paid to the Director is subject to social security
levies. These contributions range from 16.4% to 41% of
the employee’s gross salary depending on certain criteria
(the average salary in the company, the average amount
of single social contribution per insured person, etc.).
Additionally, 3.6% of the gross salary is paid by the
employee. The ceiling for social security levies is currently
set at a gross salary amount of around UAH 8,000 per
month (approx. USD 600).
Scope

The United Arab Emirates ("UAE") is a union of seven Emirates. Its legal regulation is broadly comprised of federal laws, which generally apply in all of the Emirates, and local laws, which apply to specific Emirates only. The Emirates of Dubai and Abu Dhabi are, perhaps, the two best known Emirates within the UAE.

There are approximately 37 “free zones” in the UAE, each of which has its own set of internal rules and regulations which apply to companies registered in that free zone. This guide does not address the specific rules relating to free zones; neither does it address the rules relating to general partnerships, simple limited partnerships or partnerships limited by shares.

Instead it focuses on the duties and liabilities of directors and managers in relation to UAE companies¹ (private joint stock companies ("JSCs") and limited liability companies ("LLCs")).

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¹ Article 216 – all provisions stipulated in the CCL concerning public JSCs shall apply to private JSCs except those on public subscription.
— a duty to preserve the company’s rights;
— a duty to work honestly and faithfully; and
— a duty not to act ultra vires.

At this stage, however, the exact date for the Draft Law coming into force is not yet known.

Eligibility Requirements

**LLC**
There are no restrictions on who can become a director of an LLC. An LLC must be managed by a minimum of one and a maximum of five directors (commonly known as “managers”). A manager can be a shareholder or any other person.

**JSC**
Restrictions exist under the JSC company structure, whereby the Chairman must be a UAE national, and the majority of directors must be UAE nationals. If the percentage of UAE national members falls below the mandatory number required within Article 100 of the CCL, this must be rectified within a maximum period of three months, otherwise the resolutions of the board adopted after the lapse of this period are void.

A director of a JSC must not be convicted of a “crime against honour or involving dishonesty”, unless the competent authorities of the relevant Emirate (the “Competent Authority”) have pardoned him.

Method of appointment

**LLC**
Under an LLC structure, managers can be appointed on incorporation under a memorandum of association or by separate agreement. If the memorandum appoints and lists the managers, each time a manager is replaced an amendment of the memorandum is required, which in turn requires the foreign shareholder to appear in front of the Dubai notary public with a fully legalised power of attorney.

If the LLC opts to manage the appointment and replacement of managers under a separate agreement, the process will be set out within that document.

**JSC**
The method of appointment of a director in a JSC is determined by the constitution of the company. The articles of association must specify the method of composition, the number of its members and their term of membership, provided that the number of members is not less than three and not more than fifteen and their term in office does not exceed three years. A director may be elected for more than one term.

Directors are elected by secret ballot at the annual general meeting. As an exception, the founding members may appoint from amongst them the first board of directors provided that its term in office may not exceed three years.

Method of removal

**LLC and JSC**
A director (or manager in the case of an LLC) may resign his or her office at any time by notice to the company. However a director may be liable for loss suffered if he resigns at a time likely to cause damage to the company (Article 667 of the Civil Code).

This could be of particular relevance to managers of an LLC in financial difficulties: while the temptation may be to resign from the company in an effort to minimise exposure to potential shareholder or third party claims, in doing so the manager may put himself in breach of the Civil Code if his resignation were to deprive the company of important skills and experience at a time when it was most in need of them.

A director is always subject to removal by resolution of the shareholders. If it is resolved to dismiss a member of the board of directors, the member may not be re-nominated for membership of the board before the expiry of three years from the date of adopting the dismissal resolution.

Where a director is appointed for a fixed term, the director will seek reappointment periodically but their appointment will terminate if they are not reappointed at the relevant time.

In the event that a director is replaced, the company must also ensure that the power of attorney under which that director derives his authority to act is removed from the commercial register, because this will remain in force until such time as it is removed, regardless of whether the individual remains a director of the company.

Authority and representation

**LLC**
A manager is not regarded as having ostensible authority to bind the company as regards third parties. Case law from the Court of Cassation is clear that an LLC is entitled to claim that the contract with the third party did not validly come into effect and that the third party would instead have a personal claim against the manager who acted ultra vires under Article 665(3) of the Civil Code.

It is partly for this reason that, although the memorandum and articles of a company may state that
the manager has full capacity and authority to manage the company and to bind it, third parties will usually request a specific power of attorney before entering into a transaction with a UAE company. From the perspective of a third party, a claim against a corporate entity would be preferable as the corporate entity is likely to have deeper pockets than an individual manager. A specific power of attorney also allows the manager to demonstrate that he was acting in accordance with his corporate authorisations to avoid personal liability to the company for mismanagement.

**JSC**
Directors must act within the powers given to them by the articles of association and memorandum of association as a result of Article 111 of the CCL which makes directors liable for a breach of the JSC’s memorandum of association. The chairman of the board of a JSC has the power to bind the company (as representative of the board of directors).

However, as with LLCs, it is common for directors to operate under a power of attorney granting them specific authority to enter into contracts with third parties.

Article 110 of the CCL provides that the company shall be liable to pay compensation for loss caused by the unlawful actions of its directors in the course of managing the company.

**Contractual relationship with the company**

**LLC and JSC**
Federal Labour Law No.8 of 1980 governs most aspects of the contractual relationship between the individual and the LLC or JSC. Normally an employment contract is required, especially if the director (or manager in the case of the LLC) is a non-UAE national, as it is pursuant to that contract that the company sponsors the individual’s work visa.

It is therefore common to see two contracts in existence between the company and the director. A two page director’s service contract and a more detailed employment contract setting out further employee provisions. In practice, the two page service contract is the one used by the company to sponsor the individual’s work visa.

**Working rules of the board**

**LLC**
Where an LLC has more than one manager, its meetings are regulated by the LLC’s memorandum, subject to which managers have full power to manage the LLC and make binding decisions on its behalf. If the LLC has more than seven shareholders, Article 240 of the CCL states that the memorandum must provide for a supervisory board of at least three shareholders which monitors the LLC’s performance and can require the managers to submit reports on their management.

Under Article 242 of the CCL, the members of the board of supervisors shall not be liable for the actions of the managers unless they become aware of the faults committed and fail to mention these faults in their report presented to the general assembly of shareholders.

**JSC**
As required by Article 101 of the CCL, every JSC must provide the Ministry of Economy and Commerce (the “Ministry”) and the Competent Authority for each Emirate (e.g. Dubai Department of Economic Development) with a detailed list, certified by the chairman of the board of directors, of his name and the names of the members of the board, their capacities and nationalities before 1 January of each year. The company must immediately notify the Ministry and the Competent Authority of any changes occurring to the list.

Directors must not conclude loan agreements for periods in excess of three years, nor sell or mortgage the company’s real estate or its place of business under Article 103 of the CCL. Directors may not absolve company debtors of their liabilities, nor attend conciliation or agree to arbitration unless permitted under the articles of association or set out in the company’s objects.

**Conflicts of interest**

The CCL contains, by way of positive duties to act, a requirement for directors to avoid conflicts of interest. Article 109 states that a director must notify the board of directors of any personal interest in a transaction presented to the board for approval if that interest conflicts with the company’s interests. In such circumstances, a director is not entitled to vote on the board resolutions relating to that transaction and the interest must be disclosed prior to the company entering into the transaction.

Furthermore, Article 108 of the CCL states that a director is not entitled to compete with the business of the company or carry out activities on his own account which are the same as any of the businesses carried on by the company, unless prior approval is obtained from the shareholders in a general meeting and this approval is renewed annually.
No person may be a director of more than five JSCs or chairman of more than one JSC.

**Other directors’ duties**

The CCL requires directors to regularly review strategic and financial matters. The directors have overall responsibility for establishing financial and other reporting procedures, and to provide them on a reasonable basis on which to make proper judgments as to the financial position and prospects of the company.

As per Article 244 of the CCL, directors should convene at least one meeting per year during the first four months after the end of the financial year.

It is of paramount importance that directors strictly adhere to UAE laws while executing their duties and also give appropriate consideration to how any action against the company (and themselves personally) might be properly defended.

**Liability**

**LLC and JSC**

Article 237 of the CCL states that provisions pertaining to the liabilities of JSC directors apply equally to LLC managers. This section therefore considers the liabilities that both directors and managers are exposed to, unless otherwise stated.

Article 111 provides that directors are liable to the company, the shareholders and third parties for all fraudulent acts, abuses of power, and violations of the law or the company’s articles, in addition to mismanagement.

Liability for mismanagement under Article 111 creates a dangerous and rather subjective “catch-all clause” scenario with the potential to extend a director’s liability well beyond the customary boundary of liability for directors’ duties in other jurisdictions.

In the event of a breach of one of the duties set out in Article 111, all managers are jointly liable under Article 112 if such breach arises from a resolution adopted unanimously. It is therefore important for any manager who does not agree with a proposed action to vote clearly against that resolution – and to have his objection noted in the minutes. Simply not being present at the meeting in question is not a defence under the CCL and a manager, if not present, must show that he was not aware of the proposed action or, if he was aware of it, was unable to object.

In addition, Article 115 of the CCL states that it is not possible for managers to relieve themselves of liability simply by procuring a resolution of the shareholders endorsing a particular decision or course of action. However, such a resolution does have the benefit of limiting the prescription period for any action against the managers to a period of one year from the date of the relevant shareholder resolution, except where there has been criminal action.

Article 322 of the CCL sets out a number of areas that may expose a director or manager to criminal sanction, which include:

- entering false information on corporate documents or knowingly distributing the same;
- inviting the public to subscribe for shares in an LLC;
- distributing dividends in a manner inconsistent with the provisions of the CCL or the company’s memorandum or articles;
- wilfully entering false information in the company’s accounts or wilfully omitting substantial information; and
- divulging company secrets for personal gain or for the benefit of third parties.

Managers of LLCs should be mindful that potential criminal liability exists, not only under the CCL but also under:

- the Penal Code – for matters such as fraud, embezzlement, disclosing confidential information for personal benefit and writing a company cheque which is subsequently dishonoured;
- the Commercial Code – under which managers of an insolvent company can be criminally liable in certain circumstances; and
- the Civil Code – under Article 665(3) for losses sustained by the company as a result of an act outside the scope of the director’s or manager’s authority; and under Article 667 if the manager resigns at a time likely to cause damage to the company.

**Penalties for breaching directors’ duties**

In addition to liability for third party loss, as discussed earlier in this section, directors are liable to imprisonment and fines. Without prejudice to more severe punishments under other laws, contraventions of the CCL can trigger fines of between AED 10,000 and AED 100,000 under Article 323.

Directors are also liable to fines of up to AED 100,000 where they are found to be in contravention of the Commercial Code.

In general, a director will be automatically disqualified if he is declared bankrupt, is convicted of a crime of honour or honesty, or fails to attend three consecutive board meetings without valid excuse (as determined by the board).
**Limitation of liability**

There are a range of very broad obligations on directors and managers of companies in the UAE, e.g. liability for abuses of power and violations of the law. Directors’ duties have become a topic of increasing importance in the UAE and when the Draft Law codifies these duties, the ways in which directors are able to limit their liability will become far more critical.

Comprehensive directors and officers (“D&O”) insurance is becoming increasingly important to attract and retain talented directors. The demand for D&O insurance is likely to increase when the Draft Law is introduced as directors and managers could face an increasing level of claims in the future.

Directors have commonly sought to limit their liability by inserting indemnity wording into their powers of attorney. This is another method by which directors are seeking protection in the event of a claim against them.

Finally, directors may seek to rely on board and shareholder resolutions to limit liability where major issues are at hand. However as previously discussed, directors and managers must be wary of Article 112 of the CCL.

**Immigration issues**

Employment visas are required for foreign nationals to work in the UAE. In addition, please note the eligibility requirements above in relation to directors of a JSC in the UAE.

**Taxation**

The UAE does not currently impose any personal income taxes on either UAE nationals or non-UAE national employees.
This guide focuses on the rules relating to private limited companies. It does not address any specific rules for other forms of company, such as the public limited company (“PLC”). Most of the duties of a director of a PLC are the same as for a private limited company. Also, where a PLC is quoted on a stock exchange, more complex rules regarding corporate governance apply. Those rules are not addressed in this guide.

In the UK, private limited companies have a single board, which may comprise both executive directors and non-executive directors. This guide concentrates on the rules applicable to executive directors; that is, directors who have an executive role within the company. However, in general, the law does not distinguish between executive and non-executive directors. Consequently much of the information in this guide will apply equally to non-executive directors.

In the UK, the concept of managing director is different from the concept of executive director. A managing director will have certain powers delegated to him or her by the board – sometimes these powers are almost as wide as those of the board itself. No separate filing is necessary in connection with the appointment of a managing director.

Eligibility requirements

There are few restrictions on who can become a director. In particular:

— an individual director is not required to be resident in the UK, and there is no nationality requirement;
— a company need not have more than one director. A sole director cannot also be company secretary (but a private company need not have a company secretary).

At present another company – whether incorporated in the UK or elsewhere – can be appointed as a director as long as at least one director is a natural person, but under proposed legislation corporate directors are to be banned except in certain (as yet unspecified) cases where their use is not considered to hinder transparency.

A director is required to disclose personal details to the company, including his or her full name, home address and date of birth. Normally a service address is also provided so that this appears with the other personal details on the public register at Companies House instead of the home address. Under proposed legislation the director’s date of birth will be excluded from the public register.

Method of appointment

It is necessary to distinguish between appointment as a director and appointment as an executive, since each is legally a separate matter. The method for appointment of a director is determined by the constitution (that is, the articles of association) of the company. However:

— a director can normally be appointed either by the existing directors, or by resolution of shareholders;
— in the case of a subsidiary, the parent is often permitted to make an appointment by written notice to the company;
— notification of the appointment, authenticated by the director, must be filed with Companies House. No fee is payable;
— the minimum number of directors is one (or such higher number as is prescribed by the articles of association);
— there is no maximum number of directors unless a maximum is prescribed by the articles of association.
Appointments are generally made on an open-ended basis, and not for a fixed term, as the term will be a function of the related contractual relationship. If desired, the articles of association can provide for fixed term appointments, with the option of reappointment at the end of the term.

Appointment as an executive director involves the creation of an additional contractual relationship. The forms which this can take are discussed below. This aspect of the appointment is normally a matter for the board.

Persons who have not been formally appointed but who in reality act as directors can be liable in the same way as directors who have been formally appointed. Also, persons in accordance with whose instructions or directions the board is accustomed to act can have certain obligations as shadow directors, especially if the company goes into insolvent liquidation. Under proposed legislation it is to be made clear that these obligations will include, as far as possible, the general duties owed by directors (see below).

Method of removal

A director may resign his or her office at any time by notice to the company (although this may constitute a breach of his or her employment or consultancy contract). A director is always subject to removal by resolution of shareholders under a statutory procedure, which gives the director the right to protest. The articles of association (particularly in the case of a wholly-owned subsidiary) will often permit the parent company to remove a director by notice to the company. It is unusual for directors to be able to remove one of their number from the board, although the board may resolve to terminate the director’s service contract, termination of which may require the director’s immediate resignation. If directors are appointed for a fixed term, or are required to seek reappointment periodically, their appointment will terminate if they are not reappointed at the relevant time. The resignation or removal of a director must be notified to Companies House.

Authority and representation

As an internal matter, unless approved by the board (for example, by the delegation of powers to a managing director, or by the passing of a specific resolution), no director is entitled to commit or act on behalf of the company. In practice, directors are usually granted a level of delegated authority consistent with their role in the company.

As regards third parties, a director will be regarded as having ostensible authority to bind the company, even if he or she has no actual authority to do so.

Consequently, a director acting without proper authority (and therefore in breach of his or her duties) may nevertheless cause the company to become liable to a third party, but not if the third party knows that the director is not authorised.

Working rules of the board

Generally, a company is permitted considerable flexibility regarding the operation of the board. All directors must be given notice of each meeting, although there are no specific requirements as to the form this should take, unless the company chooses to prescribe rules in its articles. Some companies’ articles provide that notice need not be given to a director who is out of the country. This can often be inappropriate and can be changed. The articles usually permit the board to delegate most of its powers to committees, which may include non-directors. Typically such delegation is for specific purposes – for example, to allow the efficient handling of an M&A transaction.

The articles of association often allow directors to appoint alternates – that is, a person (including, but not necessarily, another director) who can act as a director in the appointor’s absence. The alternate is regarded as a fully-fledged director (and, for example, is subject to the same disclosure requirements as a director and while acting as alternate owes the same duties to the company as a director does).

Contractual relationship with the company

Appointment as a director does not of itself constitute a contract with the company. The articles of association will generally entitle a director to remuneration on terms agreed by the board and to reimbursement of expenses. An executive director will also have a contractual relationship with the company:

— as an employee under a service agreement;
— as a consultant providing services under a consultancy agreement; or
— through a company or firm which contracts with the company to provide the director’s services.

The tax treatment of these options is different in each case. Broadly, shareholder approval is required if the agreement gives the director a guaranteed term of more than two years (unless the company is wholly-owned by another corporation). Termination of any such contract will not automatically terminate the directorship (although the contract may require that the director resigns in such circumstances). Termination of the directorship may constitute a breach of the related agreement.
Conflicts of interest

It is important that directors realise – especially if they have other business interests – that it is not a simple matter to shift between roles and to treat themselves as free of their duties when not wearing their director hat. The Companies Act 2006 imposes duties relating to conflicts of interest: to avoid actual or potential conflicts of interest (especially in relation to the exploitation of property, information or opportunities that come to them by virtue of their role), not to accept benefits from third parties and to declare any interest in a transaction or arrangement that the company proposes to enter into. A director must also declare his or her interest in an existing transaction or arrangement of the company if not declared before it was entered into. As a rule, no breach will occur where the conflict is authorised by non-conflicted directors or by shareholders, or the relevant interest is appropriately declared, but the authorisation or the articles of association may impose restrictions that prevent the conflicted director from taking part in decision-making as regards the matter giving rise to the conflict.

Other duties of a director

The Companies Act 2006 also imposes a number of other general duties on directors: to act within their powers; to promote the success of the company; to exercise independent judgement; and to exercise reasonable care, skill and diligence. Of these, the duty to promote the success of the company is usually seen as the most fundamental. It requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so to have regard (amongst other matters) to:

- the likely consequences of any decision in the long term.
- the interests of the company’s employees;
- the need to foster the company’s business relationships with suppliers, customers and others;
- the impact of the company’s operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standards of business conduct;
- the need to act fairly as between members of the company.

Directors are also subject to a wide range of statutory duties (for example, health and safety) and specific duties under the Companies Act 2006 (such as the duty to keep accounting records). There are also restrictions on certain dealings between the company and its directors (and persons connected with them), such as sale and purchase transactions, and on loans to directors.

Liability

Most of the general duties under the Companies Act 2006 are fiduciary duties and as a result a director in breach may be liable to compensate or account to the company without the company having to prove a loss. As well as being liable to fines and other penalties for breaches of various statutory duties and offences (for example, under the Bribery Act 2010), directors can also be personally liable to the company in other ways, such as for making unlawful distributions of the company’s assets. It is also possible for directors to assume personal liability to third parties if the circumstances show that they held themselves out as doing so, or if they led the third party to believe that they had authority to act on the company’s behalf when in fact they did not.

If the company goes into insolvent liquidation directors can be ordered to contribute to the company’s assets where losses are due to their failure to stop the company from trading when there was no reasonable prospect of its avoiding the liquidation; and there are other insolvency-based remedies against directors.

There is a statutory regime for derivative claims, enabling members, subject to the court’s permission, to require action to be brought on behalf of the company against directors who are or have been in breach of their duties or have been negligent. In the case of private limited companies, the main threat of legal action against directors for breach of duty is likely to emerge only in the event of the company’s insolvency.

Limitation of liability

Companies may grant indemnities to their directors in respect of third party liabilities. The articles of association need to be checked to see whether there are any restrictions on the granting of such indemnities and that directors are authorised to protect themselves in this way.

If so, companies may agree to indemnify a director in respect of liabilities (such as damages, costs and interest) in a civil action by a third party (i.e. not the company itself or a UK company in the same group) and also in respect of defence costs as the action proceeds, even if judgment is given against that director. A director cannot be indemnified for his or her liability to the company itself where judgment is given against the director. Although a company may agree to lend funds to a director for defending a claim by the company itself or any criminal proceedings, the loan must be repayable immediately if judgment is given against the director or he or she is convicted.

Directors cannot be indemnified for any fine in criminal proceedings or any penalty imposed by a regulator, or any costs incurred in defending criminal proceedings.
where the director is convicted. A company is permitted to purchase directors’ and officers’ insurance on behalf of its directors.

Immigration issues

Nationals of countries outside the European Economic Area and Switzerland require immigration permission before they are able to take up employment in the UK. UK immigration has a five tier Points Based System (“PBS”) to cover most economic migrants, including Croatian nationals who require registration certificates to live and work in the UK. Directors who wish to work in the UK are required to apply for permission to work under the PBS, unless they can derive an immigration status from their relationship with a person present and settled in the UK or an EEA national, or through ancestry. There are three main routes for a foreign national to enter the UK to take up the role of a director; these are via the Tier 1 or Tier 2 route of the PBS or as a Business Visitor, if his function is simply to attend board meetings or undertake other non productive activities in the UK.

Tier 1 (Investor) and Tier 1 (Entrepreneur)

Tier 1 (General) was the most common category previously used by high level, high earning directors. This was closed to all new entrants in April 2011. From 6 April 2015 those who hold a Tier 1 (General) visa will no longer be able to extend their permission to remain under this category and they will only be able to apply for Indefinite Leave to Remain under this category until 6 April 2018. Directors may wish to seek either a Tier 1 (Investor) visa which requires transferring at least GBP 1m to the UK and investing at least GBP 750,000 in UK Government bonds or in share or loan capital of UK registered companies. Investors can work in the UK and may qualify for indefinite leave to remain after five years (this may be accelerated if larger amounts are invested). Alternatively the Tier 1 (Entrepreneur) route may provide an option. This requires an investment of at least GBP 200,000 in a UK business and the creation of at least two full time jobs for settled workers in the UK with indefinite leave to remain achievable after five years (or sooner if higher investment is made and more jobs are created). In practice however, Tier 2 is the most used solution for employees as it removes the need for personal investment and/or directly attributable job creation.

Tier 2 (skilled worker)

To apply under this category the director must have a job offer from a licensed sponsor (an employer), who will issue a valid certificate of sponsorship (“CoS”) once the individual has passed the points-based assessment. Points are awarded based on the level of the role on offer, prospective earnings, English language skills, whether s/he satisfies the resident labour market test or qualifies as an intra company transfer (“ICT”) and maintenance funds must also be shown (As an alternative to showing he has the necessary funds himself, an A rated sponsor may certify that if necessary they will maintain and accommodate the director during his first month of employment in the UK to the amount of GBP 945 and GBP 630 per dependant). Applicants are all required to apply for entry clearance at an overseas diplomatic post (or apply to the UK Border Agency if they are based in the UK, in a category which allows switching). The two types of Tier 2 permission which would be applied for a director are:

Tier 2 (General)

This category is for migrants coming to the UK with a skilled job offer. If the position attracts a guaranteed annual salary of more than GBP 153,500, the sponsor can apply for an unrestricted Certificate of Sponsorship (“CoS”) and the application will not be considered as part of the annual quota of 20,700. If the role will pay less than GBP 153,500, the sponsor must complete the resident labour market test and show that no suitably qualified settled worker is able to fill this vacancy. The test is satisfied by showing that an adequate recruitment search has been carried out in line with the Home Office guidance. If the role of director pays less than GBP 71,600 it must be advertised on Jobcentre Plus and by one other method as prescribed by the appropriate Code of Practice (which can be found on the UKBA website at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305304/Tier_2_5_Sponsor_Guidance_04-14.pdf). If it pays between GBP 71,600 and GBP 153,500, the requirement to advertise on JobCentre Plus is removed. However, advertising will still have to be undertaken via one other appropriate media, as outlined in the Code of Practice. The requirement to search the resident labour market cannot be waived in any other circumstances. If the appointment is intended to be permanent (i.e. more than five years) an application should be made under Tier 2 (General) as this is the only Tier 2 category which can lead to settlement.

Any Tier 2 (General) migrants who entered after 6 April 2011 will be required to apply for indefinite leave to remain at the end of either year five or before the end of their sixth year in the UK if they do not apply or cannot qualify they will be required to leave the UK. They will then be barred from returning as a Tier 2 migrant for either the same sponsor or any other UK sponsor for 12 months. This is known as the “cooling off period”. For those who earn GBP 153,500 or above the cooling off period does not apply and they can return to the UK immediately in any Tier 2 category.

Tier 2 (Intra Company Transfer) (“ICT”)

The ICT category is for employees of multi-national companies who have worked for an entity connected to the UK sponsor for at least 12 months and are being transferred to a skilled job in a UK-based branch of the organisation, without displacing a UK worker. They must not be subject to any cooling off period imposed as the
result of previous UK employment with any UK sponsor. There is no requirement to satisfy the resident labour market test. The ICT route does not lead to settlement and for all migrants entering under this category after 6 April 2011, they will have to leave the UK at the end of the five years (if they have come in as a Long Term ICT migrant), six years (if they spent the first 12 months as a Short Term ICT migrant) or nine years (if they earn GBP 153,500 and above). The cooling off period will then apply to preclude them from coming back as a Tier 2 migrant for 12 months from that date unless they are paid GBP 153,500 or more in which case the cooling off period does not apply and they can return to the UK immediately in any Tier 2 category.

On 6 April 2014, the Home Office introduced the option for migrants to immediately apply for a five year visa. This means that renewal applications are no longer required for specific Tier 2 (General) migrants and Tier 2 (Intra Company Transfer) migrants who wish to stay for over three years in the UK.

Business Visitor
Visitors are not allowed to work in the UK, although they can transact business directly linked to their employment or business abroad. The Home Office publishes a list of activities which visitors are permitted to undertake in the UK. These include attending meetings and negotiating and signing contracts with UK businesses. As a result, a non-EEA national employed overseas who is a director of a UK company and wishes to travel to the UK solely in order to attend board meetings may be able to do so as a visitor. However, if the director is paid in the UK (although s/he may receive a fee for attending the meeting and reasonable expenses) or wishes to undertake productive work in the UK, it will be necessary to apply under PBS for appropriate immigration permission.

General grounds of refusal
It is also crucial to note that the general grounds of refusal mean that a mandatory ban will be imposed on any individual who works in the UK illegally or overstays their visa by more than 28 days. This may mean that the individual could be refused entry for up to ten years.

Taxation

General
As holders of an office directors are subject to income tax on the earnings from their office.

Benefits in kind and expenses
In general, the amount of any benefit and expenses payments are treated as earnings chargeable to tax subject to a deduction for any items qualifying for an expenses deduction and any amounts for which the director reimburses the person making the payment or providing the benefit. Where an Inspector of Taxes is satisfied that no tax would be payable because an equivalent expenses deduction would be due, a dispensation can be given which exempts the expenses and benefits from charge.

In general, three requirements must be satisfied if an expense is to be deductible. First, it must be incurred in performing the duties in question. Secondly, the expense must be necessarily incurred in the performance of the duties. This is an objective test in that the expenditure must arise from the nature of the director’s contract and not from his or her personal choice. The third requirement is that the expense should be incurred ‘wholly and exclusively’ in the performance of the duties. In practice, the harshness of these requirements is mitigated by a number of concessions by HM Revenue & Customs and by certain statutory deductions. Where a benefit is provided, the amount that is to be brought into charge depends on the nature of the benefit that is received. There are specific rules for certain benefits. In some cases, the amount brought into charge will be the cost to the person providing it and in others it may be a scale charge or some other amount. In some cases, benefits received may be made specifically exempt from any charge.

The receipts basis
Earnings are assessed as income for the year in which they are received. For directors the date of receipt is the earliest of:

- the time when the payment is made of or on account of the earnings; or
- the date when the director becomes entitled to the payment; or
- the date the earnings are credited in the company’s records or accounts; or
- the end of the period of account if the earnings for that period are determined before the period ends; or
- the date earnings are determined if the amount is not determined until after the period ends.

Earnings are regarded as being credited in the company’s accounts even if the director cannot immediately draw the money or if the account credited is not in the director’s name. However, if the amount credited represents an amount to which the director will only be entitled if certain conditions are met, it will not be ‘received’ until the conditions are met. The crucial distinction is between a condition that must be satisfied before there is a right to eventually receive remuneration and a legal provision which delays the time at which remuneration will be paid. If the former has not been satisfied, no taxable remuneration has arisen. If the later delay has not yet been overcome, taxable remuneration has still arisen, even though the sum in question has not yet been paid.
**Foreign element**

The scope of the income tax charge is dependent on the director’s residence and domicile status. The underlying principle is that those with the strongest links to the UK should pay more UK tax than those whose connections are weaker. The concepts of residence and domicile are used to measure the strength of an individual’s links with the UK and determine their UK tax position. With effect from 6 April 2013, a statutory residence test was introduced to determine an individual’s residence. This test replaced the pre-existing case law based residence rules and led to the abolition of the ‘ordinary residence’ principle.

**Resident**

Where the office holder is resident in the UK, he or she will be taxable on all worldwide earnings on an arising basis unless such earnings equate to ‘chargeable overseas earnings’, in which case the earnings for duties performed wholly outside the UK are taxed on a remittance basis (see ‘Remittances’ below). Chargeable overseas earnings are defined as earnings of a person not domiciled in the UK from an office with a person who is not resident in the UK (or the Republic of Ireland). Where such a director performs duties in the UK, which are merely incidental to his or her work abroad, such duties will be treated as being performed outside the UK. The test as to whether duties are incidental or not is one of quality rather than quantity.

Therefore, it is the nature of the work rather than the amount of time spent in the UK that is the important factor, although HM Revenue & Customs will not ordinarily accept duties as being ‘merely incidental’ where the director works in the UK for more than three months in any tax year. Attendance at a director’s meeting in the UK by a director of the company who normally works abroad will not be considered ‘merely incidental’ to his or her overseas duties.

*Please note that terms that appear in bold above are defined below.*

**Not resident**

Where the office holder is not resident in the UK, tax is charged on earnings received in respect of duties performed in the UK. Any such duties which are merely incidental to the overseas duties will be treated as performed outside the UK. Where the director works under a single service contract under which he or she performs duties outside the UK (which fall outside the scope of UK income tax) and duties within the UK then an apportionment of his or her emoluments will need to be made. HM Revenue & Customs would ordinarily accept an apportionment by reference to the number of days spent working in the UK as compared with the number of days spent working overseas unless the remuneration was clearly significantly increased to take into account the fact that the employment now covers duties performed in the UK.

**Remittances**

Where a UK resident director is either not domiciled or not resident in the UK he or she may make a claim for the “remittance basis” to apply. The effect of making such a claim is to exclude unremitted foreign income/gains earned in a specific tax year from UK tax. Those who make a claim will lose the annual allowances and exemptions that are otherwise available to UK taxpayers (these are in effect amounts that one can earn without incurring a liability to tax). The remittance basis will apply automatically (and annual allowances and exemptions be preserved) if unremitted foreign income/gains for a tax year are less than GBP 2,000 (or the director has no UK income/gains and no remitted foreign income/gains for that tax year).

The rate of the remittance basis charge (“RBC”) is dependent on how many years the director has been resident in the UK. If the director has been resident for seven out of the last nine years (including the year in which a claim is made) then the annual RBC will be GBP 30,000. If the director has been UK resident for more than 12 of the last 14 tax years (including the year in which a claim is made) then the annual RBC will be GBP 50,000.

The RBC is paid on nominated foreign income/gains not remitted to the UK in a particular year and is in addition to any tax liability on any remitted income/gains in the same tax year. However, where nominated income/gains, in relation to which the RBC has been paid, are remitted to the UK in any subsequent year there will be no further tax to pay on their remittance to the UK (although where a director has both nominated income/gains, on which the RBC has been paid, and untaxed income/gains that remain unremitted, then the untaxed income/gains are treated as being remitted first, and so would be taxed on remittance).

**Double taxation relief**

An office holder may well find that he or she is subject to tax on certain earnings in the UK and overseas. For example, a director resident in the UK may find that he or she is taxed in the UK in respect of duties performed overseas and also subject to tax in the country in which he or she performs his or her duties. Where the UK has entered into a double taxation agreement with an overseas country the treaty will determine which country is entitled to tax the earnings. Where the UK has not entered into a double taxation agreement with that particular country, UK unilateral relief may be available.

**Dual contracts**

A tax planning technique that may be beneficial where the director is not domiciled in the UK is the use of dual service contracts. The foreign domiciliary resident in the UK who performs some duties abroad might have one contract for his or her duties in the UK and a separate contract for his or her duties outside.
the UK. Earnings from the overseas employment will be taxed on the remittance basis. It should be borne in mind however, that the HM Revenue & Customs have power to adjust the earnings attributable to the UK contract where they have been manipulated in order to reduce the UK tax charge. Clearly, there also need to be separate employers in order to have genuinely separate contracts and the commercial implications of separate contracts should be considered. It is also necessary to give substance to the respective contracts by clearly defining the respective duties to be performed under each. Legislation has been included in the Finance Act 2014 to prevent the perceived artificial use by non-domiciled individuals of dual employment contracts. The legislation applies from 6 April 2014 and takes certain employment income out of the scope of the ‘chargeable overseas earnings’ rules.

**Taxation definitions**

**Residence**

A person is deemed to be resident in the UK for a given tax year if:

- the automatic residence test is met; or
- the sufficient ties test is met.

The automatic residence test is met for a given tax year if:

- none of the automatic overseas tests are met; and
- at least one of the automatic UK tests are met.

**Automatic overseas tests:**

- the person was resident in the UK for one or more of the previous three tax years and spends less than 16 days in the UK;
- the person was not resident in the UK for one or more of the previous three tax years and spends less than 46 days in the UK;
- the person works full time abroad, and spends less than 91 days in the UK in the tax year, and less than 31 days where working in the UK for more than three hours; and
- the person dies abroad having not been UK resident for two years and spent less than 46 days in the UK.

**Automatic UK tests:**

- the person spends 183 days in a tax year in the UK;
- the person has a home in the UK available for more than 90 days and visits that home for 30 days in the tax year and either (i) this is the person’s only home; or (ii) the person has an overseas home but does not use it for at least 30 days in the tax year;
- the person works full time in the UK for 365 days or more without a significant break and in any one tax year more than 75% of these days are in the UK; and
- the person dies and they were UK resident in each of the three preceding years and broadly have a home in the UK when they died.

A person meets the sufficient ties test if

- none of the automatic overseas tests or automatic UK tests are met; and
- he or she has sufficient UK ties.

The test comprises two separate sliding scales that use the number of days spent in the UK and the individual’s UK ties in the tax year. The sliding scale that applies to the tax year depends on the individual’s residence status in the previous three tax years – whether they are a leaver or an arriver. Leavers are those individuals who have been resident in the UK for any of the past three years. Arrivers are those individuals who have not been resident in the UK for any of the past three years.

The following table illustrates the number of days that can be spent in the UK under the sufficient ties test without triggering UK residence:

<table>
<thead>
<tr>
<th>Number of ties to the UK</th>
<th>Maximum number of days return to the UK</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Leaver</td>
</tr>
<tr>
<td>1</td>
<td>120</td>
</tr>
<tr>
<td>2</td>
<td>90</td>
</tr>
<tr>
<td>3</td>
<td>45</td>
</tr>
<tr>
<td>4</td>
<td>15</td>
</tr>
</tbody>
</table>

There are five types of UK tie:

- family tie – this exists if an individual’s spouse, civil partner, ‘common law’ partner or child under 18 years is resident in the UK;
- accommodation tie – exists if the individual has a ‘place to live’ in the UK which is available to them for a continuous period of at least 91 days in that year, and at least one night is spent there;
- work tie – an individual has a work tie if they work (more than three hours a day) in the UK for at least 40 days (continuously or intermittently) in that year;
- 90-day tie – exists if an individual has spent 91 days or more in the UK in either or both of the two tax years preceding the current tax year, and
- country tie – exists if the UK is the country in which the individual is present at midnight for the greatest number of days in that year.

**Domicile**

Domicile is distinct from citizenship or residence. A person may be resident in more than one country but at any given time he can only be domiciled in one. A person acquires a domicile of origin at birth and this is...
normally the domicile of his or her father and therefore is not necessarily the country where he or she is born. A person retains this domicile until he or she acquires a different domicile of choice. A domicile of choice can only be acquired by someone over the age of sixteen. If, before reaching sixteen, the person whose domicile determined the minor’s domicile of origin acquires a new domicile of choice, the minor’s domicile changes in line with this.

To acquire a domicile of choice a person must sever his or her ties with the country of his or her domicile of origin and settle in another country with the clear intention of making his or her permanent home there.

Social security

As an ‘employed earner’ a director is liable for Class 1 employees National Insurance Contributions ("NICs") unless he or she has reached pensionable age (65 for men and 60 for women (but will gradually increase to 65 for women between 2010 and 2020)). Employers are obliged to pay employer’s NICs of 13.8% on all earnings above the ‘Threshold’ (GBP 7,956 in the 2014/15 tax year) and directors are liable to pay employees NICs of 12% on earnings between the Threshold and the ‘Upper Earnings Limit’ (GBP 41,865 in the 2014/15 tax year). In addition, directors have to pay a 2% contribution on all earnings above the Upper Earnings Limit.

Foreign element

Where a director arrives from abroad and takes up employment with a UK employer he will generally be required to pay UK NICs but there are some exceptions to this rule.

— Arriving in the UK from an EU country

If an employer in another EU country sends the director to work in the UK for up to two years, the director may be able to continue paying social security contributions in that country. If form A1 is issued by the foreign social security institution, confirming that the director continues to contribute to the foreign scheme, he will not have to pay UK NICs.

— Working in two member states

If the director works in two EU member states at the same time he will be subject to social security contributions in either:

- the member state in which he resides if he spends;
- 25% of his working time or is employed by various employers whose registered office or place of business is in different member states; or
- in the member state in which his sole employer has its registered office or place of business if he does not spend 25% or more of his working time in the member state in which he resides.

In the UK an application for a certificate confirming the member state in which contributions are payable is made on form CA8421. In consideration of an application the other member state is consulted.

— Arriving in the UK from a country with a bilateral agreement

If the director is sent to work temporarily in the UK by an employer in a country with which the UK has a bilateral Social Security Agreement covering NICs, the director may be able to continue paying foreign social security contributions. If a certificate is issued by the foreign social security institution, confirming that the director continues to contribute to the foreign scheme, the director will not have to pay UK NICs.

— Arriving in the UK from another country which is not within the EU and does not have a bilateral agreement covering NICs with the UK

If the director is sent to work temporarily in the UK by an employer in a country which is outside the EU and not covered by a bilateral agreement, the general rule is that neither the director nor the employer has to pay UK NICs for the first 52 weeks of employment in the UK. NICs are payable from the 53rd week. If the foreign employer does not have a place of business in the UK, NICs are due from the UK ‘host’ employer.

If the director is sent to work permanently in the UK by such a foreign employer, the director will be liable to pay NICs from the outset of his employment in the UK.
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