

COMPANY DIRECTORS DISQUALIFICATION (NORTHERN IRELAND) ORDER 2002

S.I. 2002 No. 3150 (N.I. 4)

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Company Directors Disqualification (Northern Ireland) Order 2002 (“the Order”) was made on 17th December 2002.
2. This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment (“the Department”) in order to assist the reader in understanding the Order and to help inform debate on it. It does not form part of the Order.
3. The Memorandum needs to be read in conjunction with the Order. It does not give, and is not meant to be, a comprehensive description of the Order. So where an Article or part of an Article does not seem to require any explanation or comment, none is given.

BACKGROUND

4. The present system for disqualifying unfit directors was introduced by the Companies (NI) Order 1989.
5. In particular, that Order allows a court to make a disqualification order: • against a director of an insolvent company whose conduct as a director of a company either on its own or when taken with his conduct of other companies is such as to make him in the view of the court unfit to be involved in the management of a company; or • where the director has been convicted of a criminal offence in connection with the promotion, formation or management of a limited company.
6. The application for a disqualification order is made by the Department in cases where the conduct arose in a company which has become insolvent and in cases where the director has been convicted of an offence in connection with the promotion, formation or management of a limited company and a court has not made a disqualification order in consequence of the conviction.
7. From the making of the first disqualification order on 17 November 1994 the High Court has disqualified 176 directors on the application of the Department. A further 9 directors have been disqualified by the Crown Court following criminal proceedings.
8. At present disqualification can only be achieved by means of court proceedings. Such proceedings can take a minimum of three months to hear in court but in practice often take between six and nine months even in cases where the directors are accepting that they will be disqualified and are only introducing mitigating circumstances or making representations on the period of disqualification.
9. This is an unduly long period and involves several court sittings which are expensive not only in court time but in legal costs on both sides.

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10. The power to accept undertakings which the Order will confer on the Department will mean that, where there is agreement between the Department and the director that there is evidence of unfitness, disqualification can be achieved administratively, without an application to the court, by the director giving an undertaking to the Department. This should result in earlier disqualification for those who give an undertaking. It should also save court time and the expense of a court hearing.

PURPOSE OF THE ORDER AND SUMMARY OF ITS MAIN PROVISIONS

11. The main purposes of the Order are:
- to consolidate the Companies (NI) Order 1989 and the various amendments which have been made to it since coming into effect in 1991
 - to introduce provision for disqualification of unfit directors by consent without the need for uncontested cases to be heard in court. The Order will bring Northern Ireland legislation into line with that introduced in GB by the Insolvency Act 2000 on 2 April 2001.
12. Under the current law, as re-enacted in the Order, there is only one way in which someone can be disqualified from acting as a company director and that is by means of a Court order. Most applications are made by the Department to the High Court in cases where the company has become insolvent although a very small number of orders have been made by the Crown Court in cases where the director has been convicted of an offence in connection with the formation, management or liquidation etc of a limited liability company.
13. On an application by the Department to the High Court in a case where the company has become insolvent the High Court has no discretion and must make an order if it is satisfied that:
- the person subject to the application is or has been a director of a company which has at any time been insolvent; and
 - that his conduct as a director of that company, or of that company plus any other company or companies, makes him unfit to be concerned in the management of a company.
14. In the case of an application following a criminal conviction the court has discretion about whether to make a disqualification order.
15. Disqualification can, in the main, be for between two and fifteen years.
16. Under the current law, a person subject to a disqualification order cannot be a director, liquidator or administrator of a company, be a receiver or manager of a company's property, or be concerned or take part either directly or indirectly in the promotion, formation or management of a company without the leave of the High Court. The Order will amend the law so that while it will remain possible for someone subject to a disqualification order (or who has given an undertaking) to apply to the Court for leave to be a director of a company, to act as receiver of a company's property or to take part in the promotion, formation or management of a company, they will not, however, be able to apply for leave to act as an insolvency practitioner.
17. The rights of the director will be fully safeguarded. The Department will only be able to accept an undertaking from a director if he/she consents to being disqualified for an agreed period.
18. If the director does not accept that he should be disqualified or if he considers that the Department is asking for him to be disqualified for a longer period than he considers appropriate the case can still proceed for determination in a court hearing.
19. There is also provision to allow a person who had given an undertaking to apply to the High Court for the undertaking to cease to be in force or for the period for which it was

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to be in force to be reduced. This is similar to the general legal concept in insolvency proceedings that the Court may review, rescind or vary any order.

20. The giving of an undertaking will result in the director becoming subject, for a period of between 2 and 15 years, to the same restrictions as would have occurred had a disqualification order been made against him. He will have the same rights to apply to the High Court for leave to be a director of a company or to take part in the promotion, formation or management of one as if he had been subject to a disqualification order.
21. The consequences for breach of an undertaking will be identical to those for breach of a disqualification order. Contravention would be a criminal offence attracting identical penalties and would give rise to identical civil liabilities. The new provisions are intended as an alternative to, not a replacement for the existing provisions which enable disqualification to take place on application to the High Court.
22. Such application will still be necessary in cases where agreement cannot be reached on the period of disqualification and also in cases where no undertaking was offered or any form of contact made with the Department by the director. This will include cases where the director has not made any representations to the Department following receipt of the notification that the Department considered disqualification proceedings appropriate.
23. The Order will provide in the case of disqualification by court order for the period of disqualification to begin 21 days after the making of the order unless the High Court orders otherwise. This will give the director time to put in order the affairs of any company with which he is currently involved.
24. The Order will define the term “receiver” to exclude acting as administrative receiver who is an insolvency practitioner.
25. The Order will provide for inclusion of particulars of disqualification undertakings to be entered in the register of disqualification undertakings kept by the Department.
26. The Order will include provision placing court officials in Northern Ireland under a duty to send specified details of disqualification orders to the Secretary of State (Trade and Industry) for the purpose of maintaining a comprehensive UK-wide register of disqualification orders and undertakings.
27. The Order will also provide for recognition of undertakings given to the Secretary of State for Trade and Industry in GB.
28. The Order will make it an offence to act in contravention of a disqualification undertaking, with identical penalties applying as would apply for contravention of a disqualification order made by the court, that is:
 - a term of imprisonment of not more than two years or a fine, or both, on conviction on indictment; or
 - a term of imprisonment of not more than six months or a fine not exceeding the statutory maximum, or both, on summary conviction.

OVERVIEW

29. The Order contains 26 Articles and 4 Schedules.

COMMENTARY ON ARTICLES

Articles 1-4 are concerned with introductory provisions

Articles 5-8 are concerned with disqualification for general misconduct in
connection with companies

Articles 9-13 are concerned with disqualification for unfitness

Articles 14-17 are concerned with other cases of disqualification

Articles 18-19 are concerned with consequences of contravention

Articles 20-22 are concerned with supplementary provisions

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Articles 23-26 are concerned with miscellaneous and general provisions

Article 3: Disqualification orders: general

This Article defines and sets out the circumstances in which a disqualification order may be made, provides that there is a maximum and minimum period of disqualification under such an order, establishes a time after the making of the order on which the period of disqualification begins and makes it clear that disqualification proceedings may go ahead independently of any separate criminal prosecution which might be brought.

Article 4: Disqualification undertakings: general

This Article makes provision for directors, whom the Department considers unfit, to consent to a period of disqualification without the need for court involvement by giving a disqualification undertaking to the Department. The period of disqualification would be for a maximum of fifteen years in cases where the company has become insolvent or on the basis of a report produced by an inspector who has been appointed to investigate its affairs.

Articles 5-11 and 13-22

These Articles restate with consequential amendments Articles 5 to 21 of the Companies (Northern Ireland) Order 1989.

Article 23: Admissibility in evidence of statements

This Article defines the basis on which statements may be used in evidence in proceedings under *Articles 9 to 14, or 19 or Schedule 1* (i.e. civil proceedings) and prohibits their use in non-insolvency related criminal proceedings.

Paragraph (1) provides that a statement made for the purposes of *Article 9 to 14 or 19 or Schedule 1* (i.e. civil proceedings) or for the purpose of any other provision of this Order under the Insolvency Order may be used in evidence in any proceedings against any person who either made or concurred in making it. It is immaterial whether the proceedings are under this Act or some other statutory provisions.

Paragraph (2) prohibits the use by the prosecution in criminal proceedings against a person of evidence obtained in statements under *Article 9 to 14 or 19 or Schedule 1*. It also prohibits the asking of questions by the prosecution in relation to the statement unless first introduced by the person making the statement.

Article 24: Interaction with the Insolvency Order

This Article provides that certain provisions of the Insolvency Order should be read as one with certain provisions of this Order and specifies that certain provisions of that Order bind the Crown.

Schedule 2: Transitional provisions and savings

Schedule 2 makes provision for the transition from the previous legislation to this Order.

Paragraph 2 ensures continuity of the law following repeal of Part II and Schedules 1 to 3 of the Companies Order (NI) 1989. It provides that where those provisions had specified a period of time which is running before the Order comes into operation that period of time continues to run as if the Order had not come into operation. It also provides that any rights, priorities, reliefs under the Companies Order (NI) 1989 Part II and Schedules 1 to 3, obligations, requirements, powers, duties or exemptions dependent in any way on that specified period of time shall not be affected by the Order coming into effect.

COMMENCEMENT

30. A power is included in the Order to bring its provisions into force by way of statutory instrument rather than bringing it into force on Royal Assent or on a date (or dates) specified in the Order.