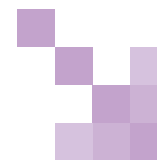


# Dominican Republic



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## CORPORATE ENTITIES

The main corporate entities that are commonly used in the Dominican Republic are share companies (*compañías por acciones*), as these offer numerous benefits to their shareholders including limited liability.

Other entities available that are rarely used are:

- Companies in silent partnerships (*compañías en comandita*).
- Partnerships (*sociedades en participación*).

This chapter focuses on corporate governance applicable to share companies.

## LEGAL FRAMEWORK

### 1. What is the regulatory framework for corporate governance and directors' duties?

Corporate governance and directors' duties are regulated by:

- The Dominican Code of Commerce (Code of Commerce), which sets minimum requirements for corporate governance.
- Law 3-02 on Mercantile Registry which requires each entity:
  - to be registered and have their corporate documents filed to be made public;
  - to issue a report on the audited financial statements of the company issued by its vigilance officer (see *Question 13*).
- The company's bye-laws.

For listed companies and those in a regulated sector, such as banking or insurance, the following apply:

- Law 183-02 Finance and Monetary Law (Finance Law), for financial entities (this includes banks, and savings and loans associations).
- Resolutions of the Monetary Board.
- Law 87-01 on the Dominican Social Security System, for pension fund administrators and health risk fund administrators.

- Law 146-02 on Insurance and Securities (Insurance Law).
- Law 19-00 on the Dominican Stock Market (Stock Markets Law) and its application rules adopted by Presidential Decree No. 729-04.
- Letters issued by the superintendent of the stock market.
- Resolutions issued by the National Stock Market Board, for companies engaging in stock market activity.

In certain industries (such as telecommunications and electricity) prior authorisation from the relevant regulatory authority must be obtained for any transfer of shares resulting in a change of control in the company (including mergers).

## BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

### 2. What is the management/board structure of a company? In particular:

- **Is there a unitary or two-tiered board structure?**
  - **Who manages a company and what name is given to these managers?**
  - **Who sits on the board(s)?**
  - **Do employees have a right to board representation?**
  - **Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?**
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- **Structure.** Companies usually have a unitary board structure, but this is not mandatory.
  - **Management.** The company's board of directors (board) has ultimate responsibility for the management of the company. In some cases the board appoints a general manager (who can also be a director of the company) for the day-to-day running of the company. If the general manager is not a director appointed by the shareholders or an officer recognised by the company bye-laws and is appointed solely by the board (or one of the directors), then the board (or the director delegating the powers) remains liable to the company for the actions of the general manager (*Articles 31 and 60, Code of Commerce*).

- **Board members.** The company's directors sit on the board.
- **Employees' representation.** Employees are not entitled to board representation unless this is permitted under the company's bye-laws.
- **Number of directors or members.** Generally, there is no statutory maximum number of directors although the minimum is one. However, the following exceptions apply:
  - commercial banks must have at least five directors (*Finance Law*);
  - listed companies must have at least seven directors (*Stock Markets Law*).

### 3. Are there any age or nationality restrictions on the identity of directors?

#### Age restrictions

Generally, there is no age limit imposed on directors of share companies (except as set out in the bye-laws). However, directors of companies operating in the stock market must be over 25 years of age (*Stock Markets Law*).

#### Nationality restrictions

There are no nationality restrictions on directors of share companies (except as set out in the bye-laws). However, insurance companies need to obtain a licence to operate and this is only granted if the majority of its directors and officers reside in the Dominican Republic (*Insurance Law*).

### 4. In relation to non-executive, supervisory or independent directors:

- **Are they recognised?**
  - **Does a part of the board have to consist of them? If so, what proportion?**
  - **Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?**
  - **What is the scope of their duties and potential liability to the company, shareholders and third parties?**
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- **Recognition.** Non-executive and independent directors are not expressly prohibited but neither are they recognised or required. Generally, larger companies have a board that supervises the business of the company and a chief executive officer (CEO) or general manager (*see Question 2, Management*).
  - **Board composition.** There are no mandatory requirements on board composition of independent directors.
  - **Independence.** See above, *Recognition*.

- **Duties and liabilities.** The duties and liabilities of independent directors are the same as for any directors (*see Question 14*).

### 5. Are the roles of individual board members restricted? For example, can one person be the chairman and chief executive?

There are no legal restrictions on combining the role of CEO and chairman. The roles of the board members are usually set out in the company bye-laws.

### 6. How are directors appointed and removed? Is shareholder approval required?

#### Appointment of directors

The board is appointed by a simple majority vote of those present in the general meeting (*Code of Commerce*). The founders of the company can appoint the first directors according to the bye-laws without shareholder approval, although this is subject to certain limitations (*see Question 7*).

#### Removal of directors

Directors can be removed by a simple majority vote in the general meeting, without the requirement of just cause. Additionally a company's bye-laws can specify conditions for removal, including:

- Failure to attend meetings.
- Negligence or misconduct.
- Bankruptcy.
- Loss of civil rights (for example, the loss of the right to vote due to felonies or criminal convictions).
- Criminal convictions.

### 7. Are there any restrictions on a director's term of appointment?

Directors cannot be appointed for a term greater than six years. However they can be re-elected. The first board cannot be appointed for more than a three-year term.

### 8. Do directors have to be employees of the company? Can shareholders view directors' service contracts?

#### Directors employed by the company

Directors do not have to be employees of the company.

#### Shareholders' inspection

Directors' service contracts are not mandatory and do not require shareholder approval.

### 9. Are directors allowed or required to own shares in the company?

Individuals who do not own shares in the company can be appointed as directors, unless prohibited by company's bye-laws (*Code of Commerce*).

Where directors are required to own a certain number of shares in the company, those shares are automatically assumed to be a guarantee for any acts committed by the directors (*Code of Commerce*). These shares must be issued as registered shares (as opposed to bearer shares), are non transferable and are marked with a special seal indicating that they are inalienable. It is established practice that these shares certificates are kept in the company's custody.

### 10. How is directors' remuneration determined? Does it need to be disclosed? Is shareholder approval required?

#### Directors' remuneration

Directors' remuneration is not regulated by law. However, generally the bye-laws establish whether directors are remunerated and if this requires shareholder approval.

#### Disclosure

There are no specific laws on the disclosure of directors' remuneration.

#### Shareholder approval

See above, *Directors' remuneration*.

## MANAGEMENT RULES AND AUTHORITY

### 11. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

A company's internal management is regulated by its bye-laws. The bye-laws typically contain provisions relating to the:

- Appointment, remuneration and removal of directors.
- Powers of directors.
- Proceedings of directors.

### 12. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

#### Directors' powers

The bye-laws generally determine the directors' powers, including whether they can act individually, collectively and whether they

can delegate general or specific powers to one or more of the directors. It is common for companies to delegate powers of administration and management to a general manager or president.

Shareholders do not normally have any management powers. However, the shareholders can (*Code of Commerce*):

- Appoint the board, although the directors alone can decide to fill any vacancy on the board if the bye-laws permit this.
- Appoint the vigilance officer (*comisario de cuentas*) (see *Question 13*).
- Review and decide on the company's annual accounts and balances.
- Amend the company's bye-laws.
- Decide on the dissolution and liquidation of the company.
- Decide on the increase, reduction or any amendment of the company's capital. Although the directors can authorise the subscription of new shares, the subscription must be ratified in a general meeting held every six months.
- Approve the initial contributions made by the founders of the company and approve the contributions in kind to be made to the company's capital.
- Approve the execution of transactions made by the company with any third party related directly or indirectly with any of the directors of the company.

#### Restrictions

When dealing with third parties the company is bound by the acts of its president, even when he acts beyond his powers, unless the company can prove that the third party was aware, or had reason to be aware, that the acts were beyond his powers. Mere publication of the company bye-laws is not sufficient to prove this knowledge.

### 13. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

The company bye-laws usually allow the board to delegate any of its powers to an individual director or a committee of directors. However, the board remains accountable to the company for the delegate's actions (*Code of Commerce*).

The vigilance officer, who is appointed at a general meeting, is solely responsible for auditing the company's annual accounts. He must present a report to the shareholders at the annual general meeting (AGM). The vigilance officer is an organ of the company but not a member of the board.

## DUTIES AND LIABILITIES OF DIRECTORS

14. What is the scope of a director's duties and personal liability to the company, shareholders and third parties? Please distinguish between civil and criminal liability under each of the following (if relevant):

- **General duties.**
- **Theft and fraud.**
- **Securities law.**
- **Insolvency law.**
- **Health and safety.**
- **Environment.**
- **Anti-trust.**
- **Other.**

■ **General duties.** The general duties of the directors are to manage the company and keep its records. Additionally, they must maintain records of all of the company's commercial activities and maintain the company's finances. The directors are also liable for the following (*Code of Commerce*):

- the first directors of the company are civilly liable for damages caused to the company or to third parties if its incorporation is declared nullified;
- the distribution of any sham dividends, which is a criminal act punishable as fraud (*see below, Theft and Fraud*).

In regulated companies (*see Question 1*) additional obligations apply, including a duty to:

- disclose any conflicts of interest and any position held in similar companies;
- preserve the confidentiality of privileged information;
- in listed companies, act in the best interests of the company and not make a personal gain;
- approve the annual budget and supervise its execution.

- **Theft and fraud.** Civil and criminal liabilities apply for directors involved in theft and fraud. Directors of finance intermediation companies can face up to ten years' imprisonment and fines (*Finance Law*). Similar provisions are included in the *Stock Markets Law*.
- **Securities law.** A director of a listed company can be criminally liable if he gives misleading statements or engages in misleading practices, which might induce others to buy or sell shares or other securities (*Stock Markets Law*).

- **Insolvency law.** Under insolvency provisions, directors are liable to shareholders and third parties for any fraud committed.
- **Health and safety.** No relevant provisions apply under health and safety law.
- **Environment.** Civil and criminal liabilities apply for directors involved in any environmental damages.
- **Anti-trust.** There are no general anti-trust laws. However regulations exist for specific industries such as intellectual property (IP) and telecommunications. IP law does not provide any sanctions for anti-trust practices but does deem them illegal. Under telecommunications law, fines apply.

15. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

A director is not personally liable when acting on behalf of the company, except where he has acted fraudulently (*see Question 14*).

Companies can indemnify directors against their liabilities.

16. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Directors can obtain insurance against personal liability and the company can pay for this if the bye-laws permit it.

17. Can a third party (such as a parent company or controlling shareholder) be liable as a director (even though such person has not been formally appointed as a director)?

In case of fraud, it is possible for courts to lift the corporate veil and hold a parent company liable. This concept is recognised specifically for fiscal matters, under the *Finance Law*, and labour matters.

## TRANSACTIONS WITH DIRECTORS AND CONFLICTS

18. Are there general rules relating to conflicts of interest between a director and the company?

Directors have a duty to:

- Disclose an interest in any contract or proposed contract with the company.
- For finance intermediation companies, disclose loans from the company to themselves or other involved parties (excluding loans of a small amount).
- Seek shareholder approval if the company proposes to enter into any transactions with them.

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**19. Are there restrictions on particular transactions between a company and its directors?**


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Directors cannot take a direct or indirect interest in any contract or business venture made with the company, unless it has been previously authorised by shareholders. A special report must be presented at a general meeting before executing these transactions (*Code of Commerce*).

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**20. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?**


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It is a criminal offence for directors (and others) to buy or sell publicly-traded securities if they are in possession of confidential unpublished, price sensitive information (*Stock Markets Law*).

If a director is required to be a shareholder of the company, according to its bye-laws, his shares are not transferable while he remains a director (*see Question 9*).

## DISCLOSURE OF INFORMATION

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**21. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?**


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There are various detailed disclosure obligations for public companies, including the following:

- Financial entities must have their financial statements audited by an external firm and submit them to the superintendence of banks. The accounts must be published annually in a national newspaper. Records of all business operations must be kept for at least the last ten years.
- Insurance and securities companies must submit their accounts, audited by a certified public accountant, to the superintendent of insurance. Preliminary accounts must be sent to the superintendent of insurance at the end of every trimester. The accounts must be published annually in a national newspaper.
- Listed companies must disclose their accounts to the superintendent of the stock market. They must also disclose any other relevant information, such as acts or information that could alter the price of the shares or influence an investor's decision to buy or sell stock.

## COMPANY MEETINGS

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**22. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?**


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All share companies must hold an AGM. The specific date is generally set in the company's bye-laws.

The following issues must be addressed by all companies:

- The adoption of audited accounts. The board must present the annual accounts to the company, together with:
  - a directors' report;
  - the vigilance officers' report.
- The approval of dividends.
- The election of directors.
- The appointment of one or more vigilance officers (*see Question 13*).

Additionally, listed companies must discuss the following issues:

- The annual objectives of the company.
- Any relevant future risks.
- The policies and structure of the company's internal corporate government.

All shareholders can request, at least 15 days before the AGM, a copy of:

- The company's balance sheet.
- A list of the company's assets.
- The reports of the board and the vigilance officer.
- A register of shareholders.

Any provision in the bye-laws restricting these shareholder rights are considered void.

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**23. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?**


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A company's bye-laws usually provide that the holders of a certain percentage of the company's issued share capital can:

- Call a general meeting.
- Ask that a matter or draft resolution be put on the agenda of the general meeting.

In listed companies, shareholders that either together or individually hold a minimum of 10% of the issued share capital can call a general meeting, through their representative or the vigilance officer, and submit issues to the assembly (*Stock Markets Law*).

## MINORITY SHAREHOLDER ACTION

### 24. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

#### Protection of voting rights

Voting rights are protected through the quorum requirements for general meetings and the number of votes granted to each shareholder. The quorum requirements must be adhered to, although these vary depending on the decision to be discussed and adopted in the meeting.

No shareholder, regardless of the size of their shareholding, can have more than ten votes in the first general meeting held on incorporation (*Article 57, Code of Commerce*). This is to ensure equal voting rights on resolutions on the incorporation of the company, including approval of the bye-laws.

#### Information rights

Shareholders can:

- File a civil liability claim against the administrators or directors of the company for an abuse of rights that affects minority shareholders' rights.
- Jointly file a civil liability claim for actions taken by the company's administrators known as *ut singuli*.

In addition, shareholders that together represent at least 5% of the issued share capital can delegate to a representative the right to initiate actions against the administration of the company (*Commercial Code*).

For financial entities, the Finance Law prevents companies from including in their bye-laws, any provisions that injure the rights of minority shareholders or that contain excessive limitations regarding control of the company.

In addition, even though preferred shares are allowed, subject to the approval of the Monetary Board, these cannot grant their bearer preferential rights:

- Over voting.
- To be paid dividends in an anticipated form.
- To be paid dividends regardless of the company's economic results.

Voting rights can be reserved for investors holding a certain percentage of shares. However, that percentage cannot be greater than 0.01% of the issued share capital, and there is no limitation on minority shareholders grouping to achieve that minimum. Compliance with these provisions is supervised by the Monetary Board and the superintendence of banks.

## INTERNAL CONTROLS, ACCOUNTS AND AUDIT

### 25. Are there any formal requirements or guidelines relating to the internal control of business risks?

Generally there are no formal requirements. However, all business ventures are taken into account in the year end audit carried out by the vigilance officer.

Finance intermediation companies cannot conduct operations that entail too much risk. There are also specific dispositions for credits to tied parties and the Finance Law requires companies to establish minimum internal control regulations and policies.

### 26. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

Directors must approve the company's annual accounts and are primarily responsible for their accuracy. The annual report (which contains the accounts) must be presented to shareholders and the vigilance officer at least 40 days before to the AGM. If accounts are not presented to the AGM or if they are not reasonably accurate, the directors could be civilly liable. Similarly, if false statements have been made or fraud committed, directors can be held criminally liable (*see Question 14*).

### 27. Do a company's accounts have to be audited?

Annual accounts of all share companies must be audited by the vigilance officer (*see Question 13*).

Finance intermediation companies, insurance companies and listed companies must also have their financial statements audited by independent external auditors from an authorised audit firm.

### 28. How are the company's auditors appointed? Is there a limit on the length of their appointment?

The company's internal auditing is performed by the vigilance officer (*see Question 13*). The vigilance officer is appointed by a simple majority at each AGM for a term of one year and can be re-elected. If one is not appointed, the president of the commercial court must appoint one at the request of any interested party.

The external auditors required for listed companies, insurance companies and finance intermediation companies can be appointed by the board from a list approved by the relevant regulator.

### 29. Are there restrictions on who can be the company's auditors?

Generally, the only restriction on a vigilance officer is that he cannot, at the same time, hold a position on the board. Additionally,

companies operating in the stock market must be independent and not related to members of the board or other allied companies (*Presidential decree No. 729-04*).

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**30. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?**

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There is no ban on non-audit work by a company's auditors.

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**31. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?**

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Generally, auditors are potentially liable to the company and its shareholders if the accounts and directors' report are materially inaccurate or misleading and they have been negligent in reporting the inaccuracies to the shareholders.

In listed companies, the vigilance officer is jointly responsible with the board for their acts or omissions leading to a breach of the applicable law, the company's bye-laws and shareholders' resolutions (*Presidential decree No. 729-04*).

External auditors can be subject to civil liability for professional negligence and criminal liability in cases of fraud.

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## CORPORATE SOCIAL RESPONSIBILITY

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**32. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.**

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Dominican companies do not report on social, environmental and ethical issues and there are no requirements to do so.

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## ROLE OF GENERAL COUNSEL

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**33. Is it common for the general counsel to be on the company's board or to have a formal role in corporate governance?**

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There are no rules regarding the appointment of general counsel.

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## ROLE OF INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

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**34. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.**

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The Dominican Republic has limited experience of shareholder groups in companies. Although the Stock Markets Law allows for shares to be offered on the stock market, there are currently no Dominican companies offering their shares to the public. Therefore, shareholders tend to be limited to related individuals or institutions.

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## WHISTLEBLOWING

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**35. Is there statutory protection for whistleblowers (persons who disclose criminal activity or other serious malpractice within a company)?**

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There are no statutory protections for whistleblowers.

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## REFORM

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**36. Please summarise any impending developments or proposals for reform.**

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The following proposals for reform have been made:

- Reform of the Dominican Code of Commerce (a code which was adopted in 1884).
- A new law on corporations (not yet submitted to congress), to incorporate several types of corporate entities, including limited liability companies, into Dominican Law. It also seeks to:
  - set out strict rules and regulations for the administration and audit of listed companies;
  - strengthen the role of vigilance officers in share companies, requiring them to be authorised accountants and broadening their functions.

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