The Corporate Governance Review

Second Edition

Editor
Willem J L Calkoen

Law Business Research

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This article was first published in The Corporate Governance Review, 2nd edition (published in May 2012 – editor Willem J L Calkoen).

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Willem J L Calkoen

Law Business Research Ltd

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-32-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

A&L GOODBODY

ADVOKATFIRMAET STEENSTRUP STORDRANGE DA

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EDITOR'S PREFACE

Willem J L Calkoen

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this second edition, we can see that corporate governance is becoming a hotter topic with each passing year. What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most outside directors know the business? How much time should they spend on the function?

Governments, the European Commission and the Securities and Exchange Commission are all pressing for more formal inflexible acts, especially in the area of remuneration, as opposed to codes of best practice.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders in order to create trust.

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at GM and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national codes along the model of the Cadbury 'comply or explain' method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been many instances where imperial CEOs gradually amassed too much power and companies have fallen into bad results – and sometimes even failure. More have failed in the financial crisis than in other times, hence the increased outside interest in government acts, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists.

This all implies that executive and non-executive directors should work harder and more as a team on strategy and entrepreneurship. It is still a fact that more money is lost due to lax directorship than to mistakes. On the other hand, corporate risk management is an essential part of directors' responsibility, and especially the tone from the top.

Each country has its own measures; however, the various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons where a quick 'first look' at key issues would be helpful to general counsel and their clients.

My aim as General Editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field.

To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others.

Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
April 2012

Chapter 11

IRELAND

Paul White[1]

I OVERVIEW OF GOVERNANCE REGIME

In Ireland, the corporate governance of business organisations is derived from a mixture of corporate law,[2] statutory regulations and codes (for the most part non-binding).

In addition, for privately owned corporations, the governance architecture is often explicitly dealt with in the constitutional documents and by-laws (known as the articles of association), and is also often addressed as a matter of contract between the shareholders in a shareholders' agreement.

For the purposes of this chapter, we will focus on corporate governance in public or listed companies.

i Corporate governance requirements for listed companies

In Ireland, companies listed on the Main Securities Market are required to comply with both the UK Corporate Governance Code ('the Corporate Governance Code') and the Irish Corporate Governance Annex.

The terms of the Corporate Governance Code are dealt with elsewhere,[3] and it is not proposed to restate those terms here. An important basis or feature of the Corporate Governance Code is the 'comply or explain' approach to compliance. Under the Irish Stock Exchange Listing Rules, companies listed on the Main Securities Market are expected to comply with the Corporate Governance Code or set out an explanation for any deviation from its provisions in the annual report to shareholders.

1 Paul White is a partner at A&L Goodbody.

2 A mixture of primary legislation and common law.

3 See UK chapter.

The Irish Corporate Governance Annex asks for meaningful, evidence-based descriptions in the annual report of how the Code is applied rather than 'recycling' descriptions that replicate the wording of the Code.

The Irish Annex identifies the following key recommendations for inclusion in the annual report:

a an explanation as to why the number of non-executive directors is regarded as sufficient;

b a description of the skills, expertise and experience of each director – including government appointees;

c the process followed in selecting and appointing new directors;

d the methodology in the annual evaluations of the directors individually and collectively;

e the factors taken into account when determining a director's independence;

f a description of the work carried out by the audit committee generally, and in relation to risk oversight more specifically; and

g a description of the remuneration policy, how performance elements are deferred and any claw back arrangements.

Furthermore, companies listed on the smaller market – the Enterprise Securities Market – are also required to adopt a corporate governance code on admission to that market.

In practice, a number of them adhere to the Principles of Corporate Governance issued by the UK Quoted Companies Alliance.

ii Banks and other financial institutions

For banks and insurers in Ireland, a major development has occurred with the introduction on a statutory and mandatory basis of the Central Bank of Ireland Corporate Governance Code for Credit Institutions and Insurance Undertakings ('the Central Bank Code'). For captive insurance and captive reinsurance undertakings, the Central Bank of Ireland has recently introduced a Corporate Governance Code for Captive Insurance and Captive Reinsurance Undertakings, again on a statutory and mandatory basis, and captive insurance and reinsurance undertakings have until 31 May 2012 to introduce the necessary changes to comply with this Code ('the Captive Insurance Code'). The significance of the Central Bank Code and the Captive Insurance Code is that they are mandatory; in other words, the 'comply or explain' approach to compliance does not apply.

The Central Bank Code requirements include:

a boards must have a minimum of seven directors in major institutions and a minimum of five in all others;

b requirements on the role and number of independent non-executive directors (including internal and external evaluation, training and professional support);

c criteria for director independence and consideration of conflicts of interest;

d limits on the number of directorships that directors may hold in financial and non-financial companies to ensure they can comply with the expected demands of board membership of a credit institution or insurance company;

e clear separation of the roles of chair and chief executive officer;

f a prohibition on an individual who has been a chief executive officer, director or senior manager during the previous five years from becoming chair of that institution;

g a requirement that board membership is reviewed at a minimum every three years;

h a requirement that boards set the risk appetite for the institution and monitor adherence to this on an ongoing basis;

i minimum requirements for board committees, including audit and risk committees;

j prescriptive measures around how and when board meetings must be held and attendance by directors; and

k a requirement for an annual confirmation of compliance to be submitted to the Central Bank.

The new requirements apply from 1 January 2011 to all credit institutions and insurers based in Ireland, including reinsurance firms. Differentiated standards apply to Irish subsidiaries of foreign regulated firms in a number of areas.

II CORPORATE LEADERSHIP

i Introduction

The principal leadership role for any company is played by the board of directors. The role of the director is governed principally by the Irish Companies Acts,[4] the primary source of corporate law in Ireland, and by principles established by case law. (In this regard it is worth noting that English case law is regarded as having persuasive authority in Ireland.) This body of law is further supplemented by a growing suite of regulations, codes and guidelines, many of which have been mentioned elsewhere throughout this chapter. Below is a brief (and non-exhaustive) discourse on some of the more significant aspects of the law surrounding directors and the structures and practices of boards in Ireland.

ii Board structure and practices

One-tier structure

Generally, the board of directors of an Irish company is structured as a one-tier body (usually comprising both executive directors and non-executive directors), unlike in other jurisdictions where two-tier structures are more common. Irish law does not prohibit the two-tier board, but it does not arise in practice: were it to do so, directors would be likely to face the same liability regardless of their position within a two-tier board system.

Composition of the board

Every Irish company must have at least two directors, but the articles of association of the company (i.e., its constitution) may provide for a greater minimum number (as may any

4 The Companies Acts 1963–2009.

applicable corporate governance code that applies to the company). Sole directors are not permitted, unlike in other jurisdictions. However, the Company Law Reform Group has proposed that the new Companies Consolidation and Reform Bill, the full text of which has yet to be published, should allow new private companies limited by shares to have a single director. A body corporate is prohibited from becoming a director of an Irish company. As in other jurisdictions, a public company or a large private company will generally have a combination of executive and non-executive directors on its board, whereas a small private company will generally have all executive directors.

Authority of the directors to represent the company

A director can only enter into a proposed contract on behalf of a company where it is within his or her permitted delegated authority to do so, unless that contract, or bind, or commitment has been approved by the board. The authority of the director may be actual or ostensible. Actual authority is usually rooted in the service contract between a company and the director. It can also be implied, for example by the ordinary course of the business of the office that the director holds, such as managing director or chief executive officer. However, even where no actual authority exists, the company may still be bound by the director's actions when he or she acts within his or her ostensible or apparent authority (i.e., where he or she is held out by the company as having the authority, for example, of a particular office-holder such as managing director or chief executive officer). In grappling with the principles surrounding actual and ostensible authority, it is also necessary to bear in mind the related principle often referred to as the rule in *Turquand's* case[5] (or the indoor management rule). Essentially, if a third party is dealing with a company, he or she is not obliged to enquire into the regularity of its internal proceedings. However, this rule is not absolute and there are limits to its scope and operation.

Legal responsibilities of the board

The root source of all corporate authority lies with the shareholders. However, as in other jurisdictions, shareholders generally delegate the management of the company to the board of directors and allow the directors to exercise all such powers of the company except those that must, under statute, be exercised by the shareholders.

Chair

While the chair of a company has additional roles (and, to an extent, responsibilities) – including chairing the board of directors and shareholder meetings – he or she does so as a director. As a director, he or she is subject to the same duties and having the same authority as that of any other board member. Where a company adopts standard articles of association, the chair will enjoy a casting vote in the event of an equal number of votes being cast in respect of any matter at board level.

Significantly, for Main Securities Market listed companies, the Corporate Governance Code contains a number of provisions relating to the role of chair: the chair

5 *Royal British Bank v. Turguand* (1856) 6 E & B 327, [1843-60] All ER 435.

has responsibility to ensure that a culture of openness and debate prevails, that adequate time is available for discussion of all topics by the board and that all directors are made aware of shareholders' concerns, and must also agree and regularly review the training and development of each director.

Delegation of board responsibilities

In general, the board of directors may delegate its authority to an individual director, to employees or to committees established by the board. Having delegated powers, the directors are not absolved from all responsibility in relation to the delegated actions, as the directors will continue to be under a duty to investigate the operations of the company diligently and with skill.

It is also open to a director, subject to the articles of association of the company, to appoint an alternate to fulfil his or her duties on his or her behalf, generally in relation to a specific action or time period. Whereas the alternate is personally liable for his or her own actions, the appointing director again is not absolved and can be held responsible along with the alternate.

Chief executive officer

Not unlike the role of chair, Irish statute law is not particularly prescriptive in relation to the role of managing director or chief executive officer. In general, the powers of the chief executive officer are not fixed by law, but depend instead upon the terms of the service agreement agreed from time to time between the board and the chief executive.

In order to ensure that there is a clear division of responsibilities between the running of the board and the running of the company's business, the Corporate Governance Code and Central Bank Code (among others) recommend that the role of chair and chief executive officer should not be fulfilled by the same individual. The Corporate Governance Code also suggests that no former chief executive officer should become chair of the same company and that the division of responsibilities between the chair and the chief executive officer be clearly established, set out in writing and agreed by the board.

Committees of the board

As mentioned, Irish companies commonly delegate certain matters to committees established by the board. Audit, remuneration and nomination committees are not uncommon, depending on the size of the company. The boards of certain companies, including listed companies, credit institutions, and insurance and reinsurance undertakings, are required by law to establish an audit committee (and perhaps other committees, such as a remuneration committee, a nomination's committee and a risk committee).[6]

Board and company practice in takeovers

The two principal sources of responsibility imposed upon directors of a company in the course of a takeover offer are (1) common law and (2) the Rules of the Irish Takeover

6 See Section III, subsection ii, *infra*, for further information.

Panel (the Takeover Rules), which, unlike the equivalent rules in the UK, have the force of law in Ireland. Two other important sources of duties and obligations are (3) the Listing Rules of the Irish Stock Exchange and (4) the Irish Companies Acts.

The Takeover Rules, in particular, cover a wide range of matters relating to the takeover, and it is the responsibility of each director of the company, whether executive or non-executive, to ensure, so far as he or she is reasonably able, that the Takeover Rules are complied with during the offer period. In essence, the Takeover Rules prohibit a company from taking any action that might frustrate the making or implementation of an offer for the company or depriving the shareholders of the opportunity of considering the merits of such an offer at any time during the course of the offer or at any earlier time at which the board has reason to believe that the making of the offer may be imminent.

iii Directors

Non-executive or outside directors

Under Irish law, no distinction is drawn between the non-executive director and any other director, and so non-executive directors owe the same duties as other directors to the company, its creditors and employees.

Where non-executive directors are appointed on the nomination of a third party, most commonly a shareholder, the nominee is entitled to have regard to the appointer's interests, but only to the extent that they are not incompatible with his or her duty to act in the interests of the company.

The non-executive director has attracted much attention recently in terms of the importance of the role as independent watchdog. The Corporate Governance Code, for example, requires the non-executive directors of listed companies to 'constructively challenge' board strategy. In addition, it recommends that the board should appoint one independent non-executive directors to be the senior independent director to provide a sounding board for the chair and that the board should not agree to a full-time executive director taking on more than one non-executive directorship or the chairship in a FTSE 100 company or equivalent Irish companies (FTSE 350 equivalent).

Duties of directors

The duties of directors in Ireland are grounded in case law, legislation and related rules and codes. These duties, predictably, echo those in other jurisdictions. Ireland does not yet have a codified set of directors' duties prescribed by statute such as, for example, the UK Companies Act 2006. However, it is proposed to introduce a similar system of codification in the forthcoming Companies Consolidation and Reform Bill.

Some of the principal duties imposed on directors in Ireland are to act in good faith and honesty towards the company, to attend board meetings with reasonable regularity, to exercise such skill and care as could reasonably be expected of the director given his experience and the circumstances, to act in what the director genuinely and reasonably believes to be in the best interests of the company, to avoid conflict with personal interests, to account to the company for any profits (such as gifts or commission) arising out of the position as director and to disclose any personal interest in any contract with the company. There is also a general duty on each director and secretary to ensure that the company complies with the requirements of the Companies Acts.

Directors primarily owe their duties to the company informed by the interests of shareholders while the company is solvent, and by the interests of creditors if it is not or is likely to not be solvent; and having regard to the interests of employees. As a general rule, these duties are not owed to individual shareholders, creditors of the company or its employees.

In addition, directors of 'prescribed institutions' as defined in the Credit Institutions (Stabilisation) Act 2010 also owe statutory duties[7] to the Irish Minister for Finance to have regard of the following matters:

a the facilitation of availability of credit in the economy of the Irish state;
b the protection of the Irish state's interests in respect of the Irish bank guarantee;
c the protection of the Irish taxpayer;
d the restoration of confidence in the Irish banking sector and underpin government support measures in relation to that sector; and
e the assignment of activities of the prescribed institutions and responsibilities of its officers and employees with the public interest and other purposes of the Act.

The duties owed by the directors to the Minister for Finance under the Credit Institutions (Stabilisation) Act 2010, to the extent necessary, take priority over the duties owed to the company.

Liability of directors

Directors are not liable for the commitments and obligations of the companies they serve.

Directors can be held personally liable or be subject to fines and, in very serious circumstances, imprisonment for breaches of various statutory provisions such as those relating to company law, environmental law and health and safety law. Examples under the Irish Companies Acts include where the director engages in insider dealing or where the director makes false or misleading statements in certain circumstances.

In the context of entering a contract on behalf of a company, a director can be made personally liable where he or she commits a tort or fraud on behalf of the company (or induces the company to do so), where he or she gives a personal guarantee, or where he or she fails to make the other party aware that he or she is acting as an agent for the company.

In the context of insolvency, directors may also face personal liability in a limited number of circumstances, for example, where they engage in fraudulent or reckless trading, misapply company assets or make an incorrect declaration of solvency in the context of a voluntary liquidation. On insolvency, a director may also face restriction or disqualification for up to five years or such other period as the courts think fit.

Appointment, term of office, removal

The appointment and removal of directors is generally governed by the company's articles of association. Where standard form articles of association are adopted, the right to elect

7 Section 48 of the Credit Institutions (Stabilisation) Act 2010.

directors is reserved to shareholders save where a casual vacancy arises. The directors usually have the right to fill a casual vacancy, by a resolution of the directors passed at a board meeting or by unanimous written resolution of the directors, but this appointment might then, particularly with public companies, be subject to shareholders' confirmation at the next annual general meeting after such election. For listed companies to which the Corporate Governance Code applies, all of the directors must be reappointed annually.

Apart from the terms of the articles of association, shareholders also have a statutory right to remove directors by way of resolution passed by simple majority, subject to the director's right to attend the shareholders' meeting in question and to make representations.

Conflicts of interest of directors

The area of directors' conflicts of interest has been the subject of a number of judicial decisions over a number of years and an extensive body of case law has developed around it. The key principles are, as mentioned, that a director should not place himself or herself in a position where his or her duty to the company conflicts with his or her own personal interests, and that a director should not gain from his or her fiduciary position. Added to this common law is a host of statutory provisions setting out different checks and balances primarily aimed at the protection of shareholders and creditors.

III DISCLOSURE

i Financial reporting and accountability

Companies are required to disclose details of their accounts at their AGM and in their annual return, which is filed in and publicly available at the Companies Registration Office. Under the Company Reporting Regulations 2009 ('the 2009 Regulations'), off-balance sheet arrangements with the company that have a material risk or benefit to the company are required to be disclosed in the notes to the company's accounts. In addition, related party transactions that are material and have not been concluded under normal market conditions are required to be disclosed in the notes to the company's accounts.

Company accounts must be audited by a qualified auditor and the auditor's report is distributed to shareholders and included in the annual return.

Companies with securities admitted to trading on a 'regulated market' (in Ireland, this is the Main Securities Market of the Irish Stock Exchange) must disclose financial and other information to shareholders on a regular basis. The Transparency Regulations 2007 and related Rules issued by the Central Bank of Ireland (which implement the EU Transparency Directive (2004/109/EC)) require the publication of annual and half-yearly financial reports and interim management statements. They also require companies to publish information that is disclosed to them by persons who have acquired or disposed of voting rights in the company.

The 2009 Regulations mentioned above also impose additional disclosures on Irish-incorporated companies (public or private), including parent undertakings, credit institutions and insurance undertakings, whose securities are admitted to trading on a 'regulated market'. The 2009 Regulations provide that these companies must include a corporate governance statement in their annual (directors') report containing the following information:

a a reference to the corporate governance code to which the company is subject, including all relevant information concerning corporate governance practices applied in respect of the company, which are additional to any statutory requirement, and details of where the text of the relevant corporate governance code is publicly available. If the company departs from the corporate governance code, details of this, and of the reasons for such departure, should be included;

b a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process;

c information already required by the EU Takeovers Directive (2004/25/EC) relating to the company's share and control structures (where the company is subject to this Directive);

d the operation of the shareholder meeting and its key powers, and a description of shareholders' rights and how they can be exercised; and

e the composition and operation of the board and its committees.

The company's auditors, when preparing their report to the members to be read at the AGM, must establish that the corporate governance statement addresses the information required under the 2009 Regulations, and provide an opinion on certain aspects of the report. Companies that comply with the Central Bank Code are also required to submit an annual compliance statement to the Central Bank of Ireland (the first annual compliance statements to be submitted since the Code came into force are due to be submitted by 30 June 2012).

ii Audit committees

In May 2010, the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 ('the 2010 Regulations') were published, giving effect in Ireland to Directive 2006/43/EC on statutory audits.

Public interest entities are required under the 2010 Regulations to establish an audit committee. 'Public interest entities' are (1) companies whose transferable securities are admitted to trading on a regulated market of any Member State, namely, the Main Securities Market of the Irish Stock Exchange; (2) credit institutions; and (3) insurance and reinsurance undertakings. The responsibilities of the audit committee include monitoring the financial reporting process, monitoring the effectiveness of the company's systems of internal control, internal audit and risk management and monitoring the statutory audit of the annual and consolidated accounts. In December 2011, the 2010 Regulations were amended to reduce the number of independent directors on an audit committee from two to one, bringing the requirement back in line with the Statutory Audits Directive.

The 2010 Regulations also contain provisions on many aspects of auditing, including the approval of statutory auditors and audit firms, educational standards of auditors, the establishment of a public register of auditors, independence of auditors and arrangements regarding Third Country auditors. A notable provision of the 2010 Regulations is that statutory auditors or audit firms may only be dismissed where there are proper grounds. Divergences of opinions on accounting treatments or audit procedures are not considered to be proper grounds for dismissal.

iii Market disclosure

Listed companies must also comply with certain disclosure requirements contained in the Listing Rules, Market Abuse Regulations 2005 and the Takeover Rules. In particular, following the EU Market Abuse Directive, Irish companies listed on the Main Securities Market must release 'inside information' to the market without delay (except where limited circumstances exist for deferring such information). Similar requirements exist for companies listed on the smaller Enterprise Securities Market.

iv Disclosure of share interests

Under the Companies Acts, directors, shadow directors and company secretaries must disclose to the company, in writing, interests they have in shares and debentures in the company, its subsidiary or holding company. Specifically, they must disclose the subsistence of their interest, the number of shares of each class and the amount of debentures of each class of the company, subsidiary or holding company. The Companies Acts also provide that certain transactions and arrangements between directors and persons connected to them, and the company or its subsidiary, must be disclosed in the company's accounts.

In addition, persons discharging managerial responsibilities are obliged to disclose their interests and that of close family members in shares of companies whose shares are admitted to trading on a regulated market, under the Market Abuse Regulations 2005. Under the Transparency Regulations 2007 and related Central Bank Transparency Rules, major shareholders in issuers whose shares are admitted to trading on a regulated market in Ireland must disclose the voting rights held by them.

IV CORPORATE RESPONSIBILITY

There are no specific legal requirements or guidance in Ireland regulating corporate social responsibility. However, Irish companies are increasingly aware of corporate social responsibility issues. Most public listed companies acknowledge the need for and benefits of providing information to shareholders and the public on corporate social responsibility.

In March 2012, draft legislation was published designed to protect whistle-blowers. The Protected Disclosures in the Public Interest Bill 2012 aims to ensure workers are protected from reprisal where, in good faith and in the public interest, they disclose information relating to wrongdoing in the workplace. For employees who believe that they have been unfairly treated as a result of disclosing company malpractice, there are also remedies under employment law, and in particular unfair dismissals legislation.

V SHAREHOLDERS

i Introduction

Recent years have seen a move internationally towards enhanced rights for shareholders. In Ireland, as with other aspects of corporate law, the rights and responsibilities of shareholders are primarily determined by the Irish Companies Acts, supplemented by common law. A significant development in shareholders rights recently, and one which Ireland shares with its EU neighbours, is the Shareholders Rights Directive, implemented in Ireland by the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009. A brief introduction to some of the ever-developing law on shareholding in Ireland is set out in this Section.

ii Shareholder rights and powers

Equality of voting rights

Every registered shareholder entitled to attend meetings of an Irish company is also entitled to vote on any shareholder matter, unless the company's articles of association or the terms of issue of the shares dictate otherwise. Many private companies in Ireland have only one class of ordinary shares in issue, with each share carrying equal rights in relation to voting, dividends and on a winding-up. However it is also quite common for an Irish company to introduce different classes of shares, for example voting and non-voting, or a share class that might attach weighted voting rights either generally or on a particular matter.

Rights accrue only to those persons who are registered in the register of members of the company and not to beneficial holders. There is some suggestion that in future direct and indirect holders of shares may be given equal rights, but this has not yet materialised in Ireland.

Other rights of shareholders

Shareholders in Irish companies enjoy all the usual rights associated with membership of a company, for example the right to receive copies of financial information, pre-emption rights and the right to wind up the company.

Shareholders of some Irish listed companies also enjoy certain additional and enhanced rights following the introduction of the Shareholders Rights Regulations 2009. For example, a general meeting can now be called by members representing only 5 per cent of the voting capital of a company listed on the Main Securities Market (this was previously 10 per cent – and remains 10 per cent for companies listed on the smaller Enterprise Securities Market). In addition, members holding 3 per cent of the issued capital of a company listed on the Main Securities Market, representing at least 3 per cent of its total voting rights, now have the new right to put items on the agenda and table draft resolutions to be adopted at AGMs. Listed companies will now also be allowed to offer members participation in and voting at general meetings by electronic means (although there is likely to be debate about exactly what this means) and will also be allowed to offer the possibility of voting by correspondence in advance. However, neither of the latter provisions is mandatory and companies are merely permitted to provide these facilities.

Decisions reserved to shareholders

Generally, the shareholders do not have a role in deciding or approving operational matters, regardless of size or materiality. An exception to this principle arises under the Listing Rules of the Irish Stock Exchange in relation to large transactions.

Under Irish law, there is a list of structural matters that are reserved to be decided by the shareholders by ordinary resolution (or simple majority) of those who vote. Examples include the consolidation or sub-division of shares, the payment of compensation to former directors and the purchase 'on market' of the company's own shares. Certain other actions are also reserved but require a special resolution (or 75 per cent of the votes). Examples of these matters include the alteration of the memorandum and articles of association of company, the giving of financial assistance in connection with the purchase of the company's own shares and the reduction of share capital.

Rights of dissenting shareholders

A number of remedies are open to disgruntled shareholders under Irish law. Perhaps the remedy that is most often talked about is the statutory right of minority shareholders to seek potentially far-reaching redress under Section 205 of the 1963 Act on the grounds of majority shareholder oppression where shareholders can also apply to court to have the company wound up on just and equitable grounds. Here it must be shown that the act or measure complained of has as its primary motive the advancement of the interests of the majority shareholder(s) as opposed to the interests of the company as a whole. Mere dissent by a minority is insufficient to support a claim for redress.

iii Shareholders' duties and responsibilities

Controlling shareholders

The Irish company is legally separate from its shareholders, even its controlling shareholder. The powers, rights, duties and responsibilities of the controlling shareholder, like any other shareholder, will be determined by the terms of issue of the shares, the articles of association of the company and any applicable shareholders' agreement. However, the actions of a controlling shareholder should always be measured in the context of the various remedies open to minority shareholders.

Institutional investors

Corporate governance is currently a key concern for institutional investors, along with so many other interested parties. The UK Stewardship Code sets out good practice for institutional investors when engaging with UK listed companies and will be relevant to how those institutional investors engage with Irish listed companies. Although there are currently no plans to introduce a similar code in Ireland, it is likely that Irish institutional investors will view this code as the standard of best practice in the area.

iv Shareholder activism and shareholder remedies

Shareholder activism is relatively underdeveloped in Ireland. However, there are a number of signs of change.

Shareholders can bring proceedings where the directors are exercising their powers or conducting the affairs of the company in a manner oppressive to the shareholders or in disregard of their interests. As indicated above, courts can grant relief under Section 205 where it can be proved by a member that the affairs of the company have been conducted in an oppressive manner against him or her or any of the members of the company, including members who are directors themselves.

Aggrieved members may also take a derivative action (i.e., an action in the name of the company itself) where the company has been wronged, with one shareholder representing the body of shareholders. This typically arises in circumstances where the directors of a company are responsible for taking actions in the company's name and refuse to take such action. Derivative actions will be permitted where an *ultra vires* or illegal act has been perpetrated against the company, where more than a bare majority is required to ratify the wrong in question, where members' personal rights have been infringed or where fraud has been committed on a minority of members.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

Under the Transparency Regulations 2007, companies whose securities are admitted to trading on a regulated market are required to publish annual and half-yearly financial reports. The annual report contains audited financial statements, a management report and responsibility statements. The half-yearly report contains a condensed set of financial statements, an interim management report and responsibility statements. Responsibility statements contain certain confirmations, including that the financial statements represent a fair and true view of the financial status of the company.

Companies must also publish interim management statements. These must cover each six-month period in their financial year and explain material events and transactions that have taken place in that period and the impact of this on their financial position.

Members enjoy the right to access certain information from the company, including the company memorandum and articles of association, resolutions and minutes of general meetings, company registers and the annual financial statements, directors' reports and auditor's reports. However, in private companies, members are not entitled to receive the more interesting operational, trading or business information. This is usually reserved to the board of directors unless otherwise provided in the articles of association or negotiated in any shareholders agreement.

Listed companies follow the Corporate Governance Code, which sets out the best practice guidelines for corporate governance. Under this Code, listed companies must comply with the Code or explain any deviations to shareholders. In addition, the Irish Corporate Governance Annex to the Listing Rules encourages Irish listed companies to provide more detailed explanations of their actions and in particular any deviation from certain aspects of the Corporate Governance Code in order to promote dialogue with shareholders.

21 days' notice must be given for an AGM. In the case of private companies, seven days' notice is required for an EGM. However, if it is proposed to pass a special resolution at the EGM, then 21 days' notice must be given. EGMs of listed companies (other than meetings for the passing of a special resolution) may be held on 14 days' notice, but only where the company offers all members the facility to vote by electronic means at general meetings and the company has passed a special resolution, approving the holding of EGMs on 14 days' notice, at its immediately preceding AGM or at a general meeting held since that meeting. However, if it is proposed to pass a special resolution at the EGM of the listed company, then 21 days' notice must be given.

For listed companies, 20 business days is the minimum period recommended under the Corporate Governance Code.

VI OUTLOOK

i Gender diversity

In the UK, the Davies Report entitled Women on Boards was published on 24 February 2011. In October 2011, the Financial Reporting Council amended the UK Corporate Governance Code to require listed companies to report annually on their boardroom diversity policy, including gender. These changes apply to financial years beginning on or after 1 October 2012.

Recent research indicates that, within the top Irish listed companies, 10.6 per cent of directors are women. We believe that gender diversity is set to remain on the agenda.

ii EU Corporate Governance Framework

On 5 April 2011, the European Commission published a public consultation based on a Green Paper: The EU Corporate Governance Framework. The consultation focuses on three areas: boards of directors, shareholders' engagement and, most interestingly, the 'comply or explain' approach.

The primary focus is on banks and insurance companies. However, it includes a set of questions in respect of the remuneration of directors of listed companies.

Other topics that will remain on the agenda include:

a board effectiveness and a breakdown of 'group think' recent FRC Guidance;

b increased focus on risk and business models in banks and other financial institutions as considered in recent FRC Guidance;[8]

c increased regulatory scrutiny of remuneration policies in banks and other financial institutions; and

d heightened awareness of ethical issues, including corporate responsibility, for listed companies.

In November 2011, the European Commission published a feedback statement on the consultation. The next step is for the Commission to consider whether any legislative proposals are required. In general, the feedback statement does not suggest any controversial changes are planned that might impact on Irish companies.

8 Financial Reporting Council: *Boards and Risk*, September 2011; Financial Reporting Council: *Responding to Increased Country and Currency Risk*, January 2012.

Appendix 1

ABOUT THE AUTHORS

PAUL WHITE

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Paul White is a partner in the corporate department specialising in the areas of corporate & commercial law, mergers and acquisitions, corporate restructurings, corporate governance and corporate finance.

He is recommended by a number of leading publications and directories, including *Best Lawyers* 2010; *Chambers Global* 2008, 2009, 2010 and 2011; *The Legal 500* 2008 and 2010; *Chambers Europe* 2008; and *European Legal Experts* 2009. Sources praise him as 'a very experienced and cool character; his excellent counsel incorporates a long-term strategic view' (*Chambers Global* 2011).

He has been a partner with the firm since 1996, managed A&L Goodbody's London office from 1999 to 2004 and was head of the corporate department from 2005 until May 2010. He is currently chair of A&L Goodbody.

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