The Corporate Governance Review

Twelfth Edition

Editor
Petra Zijp

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TWELFTH EDITION

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PREFACE

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

In this 12th edition, we are seeing that corporate governance has become an even more vital and all-encompassing topic, especially this second year after the start of the covid-19 pandemic – a year in which we have continued to see climate issues, political instability, technological change, a steady increase in attention to environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. As this Review's previous editor mentioned in his preface, we all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? And how do corporations report? It has become increasingly relevant that corporations report on not only financial information, but also on reliable and comparable sustainability information – non-financial information that investors and other stakeholders need.

We fortunately continue to see proposals for new laws, regulations and other initiatives for a global framework of sustainability disclosure that is based upon the needs of investors and the financial markets. I should like to highlight two developments in this respect. First, the EU Corporate Sustainability Reporting Directive (CSRD) proposal of April 2021. It forms part of the European Green Deal. This proposal should assist companies in meeting the increasing demands for sustainability information. Companies within the scope of the CSRD proposal would have to report on a whole range of sustainability issues relevant to the company's business. Sustainability information would cover not just environmental factors but also social and governance factors. Governance factors encompass the role of the corporation's administrative, management and supervisory bodies (including with regard to sustainability matters and their composition; business ethics and corporate culture, including anti-corruption and anti-bribery; the corporation's political engagements, including its lobbying activities; the management and quality of relationships with business partners, including payment practices; and the corporation's internal control and risk management systems, including for the reporting process). The EU has indicated that it is clearly in the interest of the EU and European companies and investors to have standards that are globally aligned, and has indicated that EU standards should aim to incorporate the essential elements of globally accepted standards currently being developed.

This touches upon the second development I want to mention. The trustees of the IFRS Foundation announced the formation of the International Sustainability Standards Board (ISSB) on 3 November 2021 at COP26 in Glasgow. The ISSB will develop – in the public interest – standards that will result in a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets. The aim of the ISSB's standards is to cover important sustainability topics (environmental, social, governance – ESG) on which investors would like to be informed. Climate-related information will be dealt with first, given the urgency in this field. The ISSB has indicated that it will build on the work of existing investor-focused reporting initiatives to become the global standard-setter for sustainability disclosure for the financial markets. These two initiatives – on a regional and a global scale – may prove to bring about a sea change in the way corporations report and – maybe – conduct their business.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as the new editor of this Review will continue to be to achieve a high quality of content so that the Review will be seen 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 would like to thank my partner and wonderful colleague Willem Calkoen for his outstanding work over the past years as editor of this Review. It is an honour to take over from him, and I fully realise that I have some big shoes to fill. For now, I would like to thank all the contributors who have helped with this project. I hope this book will give you food for thought. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Petra Zijp
NautaDutilh
Amsterdam, The Netherlands
March 2022

Chapter 10

IRELAND

Paul White and Michelle McLoughlin[1]

I OVERVIEW OF GOVERNANCE REGIME

The corporate governance of business organisations in Ireland is derived from a combination of corporate law,[2] statutory regulations and codes (for the most part non-binding). In addition, for privately owned corporations, although the governance architecture is explicitly dealt with in the constitutional documents and by-laws (known as the constitution or articles of association), it is also often addressed as a matter of contract between the shareholders in a shareholders' agreement. The primary legislation relating to companies in Ireland is the Companies Act 2014 (as amended) (Companies Act or 2014 Act).

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

i Corporate governance requirements for listed companies

Companies listed on the principal Irish securities market, Euronext Dublin, are required to comply with both the UK Corporate Governance Code[3] (the Corporate Governance Code) and the Irish Corporate Governance Annex (on a comply or explain basis).

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

Companies listed on the smaller Irish securities market, Euronext Growth, are encouraged to adopt a corporate governance code on admission to that market. They are required to publish details of the corporate governance code they have chosen to apply and how it complies with that code, or a statement that no code has been adopted, if that is the case. In practice, a number of these companies adhere to the Principles of Corporate Governance issued by the UK Quoted Companies Alliance.

ii Banks and other financial institutions

Banks and insurers in Ireland follow, on a statutory and mandatory basis, separate corporate governance requirements issued by the Central Bank of Ireland (CBI). Banks are required to follow the Corporate Governance Requirements for Credit Institutions 2015 (the Credit Institutions Requirements) and insurance undertakings follow the Corporate

1 Paul White is a partner and Michelle McLoughlin is a knowledge lawyer at A&L Goodbody LLP.
2 A mixture of primary legislation and common law.
3 The updated Corporate Governance Code applies to accounting periods beginning on or after 1 January 2019.

Governance Requirements for Insurance Undertakings 2015 (the Insurance Undertakings Requirements). Captive insurance and reinsurance undertakings are required to follow the Corporate Governance Requirements for Captive Insurance and Captive Reinsurance Undertakings 2015.

The significance of the Credit Institutions Requirements and the Insurance Undertakings Requirements (together, the CBI Requirements) is that they are mandatory; in other words, the comply or explain approach to compliance does not apply.

The CBI Requirements include the following:

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 of an institution 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 a continuing 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 at board meetings by directors;

k a requirement for an annual confirmation of compliance to be submitted to the CBI;

l the use of video-conferencing when a director cannot attend a meeting; and

m the audit committee as a whole must have relevant financial experience, and one member must have an appropriate qualification.

Corporate governance themes such as diversity and risk are also reflected in the CBI Requirements. For example, the Credit Institutions Requirements provide that a chief risk officer must be appointed to oversee the institution's risk management function, and that a risk committee must be established. The chair of this committee must be a non-executive director and the committee must be composed of a majority of non-executive directors. The audit and risk committees must have a minimum of three members.

The board or nomination committee is also required to establish a written diversity policy for consideration in future board appointments.

II CORPORATE LEADERSHIP

The principal leadership role for any company is performed by the board of directors. The role of the director is governed principally by the 2014 Act, the primary source of corporate law in Ireland, and by principles established by case law (in this regard, English case law is generally regarded as having persuasive authority in Ireland in many areas). This body of law is further supplemented by a growing suite of statutory regulations, codes and guidelines, many of which are mentioned elsewhere in 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.

i 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 public company must currently 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 applicable corporate governance code that applies to the company). Since the enactment of the Companies Act, private companies limited by shares are permitted to have a sole director, but they must also have a separate company secretary. 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.

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 them to exercise all the powers of the company except a specific number of matters that must, under statute, be exercised by the shareholders.

Chair

Although the chair of a company has specific 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 has the same authority as that of any other board member. If a company adopts a standard constitution or articles of association, the chair will enjoy an additional vote in the event of an equal number of votes being cast in respect of any matter at board level.

Significantly, for companies listed on Euronext Dublin, the Corporate Governance Code contains a number of provisions relating to the role of chair.

Delegation of board responsibilities

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

Chief executive officer

Irish 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 on the terms of the service agreement agreed from time to time between the board and the chief executive.

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 CBI Requirements (among others) recommend that the role of chair and chief executive officer should not be fulfilled by the same individual.

Committees of the board

Irish companies commonly delegate certain matters to committees established by the board. Under Irish company law, public limited companies are required to establish an audit committee. The Listing Rules of Euronext Dublin require that certain listed companies are further required to constitute certain other governance committees.[4] Credit institutions, insurance or reinsurance undertakings and other regulated entities are subject to separate requirements under applicable authorisation regimes.

Board and company practice in takeovers

The two principal sources of responsibility imposed on directors of a company in the course of a takeover offer are common law and the Rules of the Irish Takeover Panel (the Takeover Rules), which have the force of law in Ireland. Two other important sources of duties and obligations are the Listing Rules and the Companies Act.

The Takeover Rules, in particular, cover a wide range of matters concerning takeovers and the principles underpinning the Takeover Rules envisage substantive offers for the company being generally considered by the shareholders (as opposed to the board alone). It is the responsibility of each company director, whether executive or non-executive, to ensure, so far as he or she is reasonably able, that the Takeover Rules are complied with during offer periods. 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 such an offer may be imminent.

ii Directors

Non-executive or outside directors

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

4 See Section III.ii for further information.

When 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 role has attracted much attention in terms of the importance of the role as an 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 director 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 chair in a FTSE 100 company or equivalent Irish company (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.

A codified set of principal directors' duties has been in force under the Companies Act. The list of eight codified duties has its origins in the common law historically developed by the courts in Ireland and the United Kingdom.

The principal fiduciary duties of directors that have been enumerated in the Companies Act are:

- *a* to act in good faith in what the director considers to be in the interests of the company;
- *b* to act honestly and responsibly in relation to the conduct of the company's affairs;
- *c* to act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- *d* to not use the company's property unless authorised;
- *e* to not restrict their power to exercise an independent judgement, unless approved or in other limited circumstances;
- *f* to avoid any conflicts of interest or competing duties unless permitted;
- *g* to exercise the reasonable care, skill and diligence of a person with his or her knowledge and experience; and
- *h* to have regard to the interests of the company's employees in general and of its members.

These duties are owed to the company and are enforceable by the company. The 2014 Act provides that these principles are based in common law and equitable principles, and that the new statutory duties must be interpreted and applied as such.

Appointment, term of office, removal

The appointment and removal of directors is generally governed by the company's constitution or articles of association. The right to elect directors is generally reserved to shareholders. 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 (AGM) after such an election. Under the Companies Act, the directors of a public limited company are required to retire by rotation unless the company's constitution provides otherwise. For listed companies to which the Corporate Governance Code applies, all the directors must be reappointed annually.

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

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 with and publicly available at the Companies Registration Office. Under the Companies Act, 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 Euronext Dublin) must disclose financial and other information to shareholders regularly. This requirement includes the publication of annual and half-yearly financial reports and the requirement to publish information that is disclosed to them by persons who have acquired or disposed of voting rights in the company.

The Companies Act provides a definition of a traded company for the first time in Irish law. A traded company includes a public limited company that has shares or debentures admitted to trading on a regulated market in an EEA member state.

Traded companies are required to include, in the directors' report, a corporate governance statement in respect of the financial year concerned. This statement must be included as a specific section of the directors' report and must include 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 the 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 European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 relating to the company's share and control structures (where the company is subject to this Directive);
- *d* the operation of the shareholders' 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 considered at the AGM, must establish that the corporate governance statement addresses the information required under the Companies Act, and provide an opinion on certain aspects of the report. Companies that comply with the CBI Requirements are also required to submit an annual compliance statement to the Central Bank of Ireland.

ii Audit committees

The requirement for public interest entities (PIEs) to establish an audit committee has been in place in Ireland since the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (the 2010 Regulations) were published, giving effect to Directive 2006/43/EC on statutory audits.

Under the Companies Act, PIEs are defined as companies whose transferable securities are admitted to trading on a regulated market of any Member State, credit institutions, and insurance and reinsurance undertakings. The Companies Act provides that the directors of a PIE, with a number of exceptions, must establish an audit committee. The majority of members of the audit committee must be non-executive directors, who must have the requisite level of independence to enable them to contribute effectively to the committee's functions. Irish law provides for an exemption to this obligation for PIEs that are small or medium-sized enterprises and companies listed on an EU-regulated market (such as Euronext Dublin) with an average market capitalisation of less than €100 million for the previous three years.[5]

The responsibilities of the audit committee include:

a informing the directors of the entity of the outcome of the statutory audit and explaining how the statutory audit contributed to the integrity of the financial reporting;
b monitoring the financial reporting process;
c monitoring the effectiveness of the company's systems of internal control, internal audit and risk management; and
d monitoring the statutory audit of the annual and consolidated accounts.

The Companies Act contains provisions on various aspects of auditing, including:

a the approval of statutory auditors and audit firms;
b the educational standards of auditors;
c the establishment of a public register of auditors;
d the independence of auditors; and
e arrangements regarding third-country auditors.

Under the Companies Act, large private companies that meet certain financial thresholds are required to have an audit committee on a comply or explain basis.

iii Market disclosure

Listed companies must also comply with certain disclosure requirements contained in the Listing Rules, the EU Market Abuse Regulation (MAR) (as implemented in July 2016) and the Takeover Rules. Pursuant to MAR, Irish listed companies are required to release inside information to the market without delay (except when limited circumstances exist for deferring this information). Under MAR, companies are required to put systems in place to ensure both their initial and their continuing compliance with market abuse legislation. MAR also introduces more significant record-keeping and reporting obligations when market disclosure has been delayed.

5 This latter exemption does not apply to any captive insurance or reinsurance undertaking owned by a credit institution or with securities admitted to trading on a regulated market.

iv Disclosure of share interests

Under the Companies Act, 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 number of debentures of each class of the company, subsidiary or holding company at or above 3 per cent. Certain transactions and arrangements between directors and persons connected to them, and the company or its subsidiary, must also be disclosed in the company's accounts.

In addition, persons discharging managerial responsibilities are obliged to disclose their interests and those of close family members in shares of companies whose shares are admitted to trading on a regulated market, under the MAR. Under the Transparency Regulations 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.

v Beneficial ownership

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the Regulations) came into force on 22 March 2019 and brought Ireland's beneficial ownership rules for corporates in line with the Fourth Anti-Money Laundering Directive, as amended by the Fifth Anti-Money Laundering Directive.

Corporate and legal entities are required to file information about their beneficial owners (of more than 25 per cent) with a central beneficial ownership register. The central register in Ireland is maintained by the Companies Registration Office.

Listed companies are not required to comply with the Regulations, as they are subject to disclosure requirements that are consistent with this law.

vi Non-financial and diversity information

Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups was implemented in Ireland in July 2017, by means of the European Union (Disclosure of non-financial and diversity information by certain large undertakings and groups) Regulations 2017.

The Directive amended the Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts[6] by including new provisions on the disclosure of non-financial information, and new provisions on boardroom diversity.

The Regulations provide for two separate reporting requirements, as follows:

a The directors of companies that are categorised as public interest entities and large, and that have more than 500 employees, and companies that are ineligible entities (companies that do not qualify for audit exemptions) must include a statement containing specific non-financial information in the company's directors' report. The non-financial statement must include information about environmental, social and employee matters, respect for human rights and bribery and corruption. If a company does not have policies in any of these areas, it must explain why not.

b Large traded companies must include a diversity report in their company's corporate governance statement. The report must include a description of the company's diversity

6 Directives 78/660/EEC and 83/349/EEC, respectively.

policy, and must contain information on the age, gender or educational and professional backgrounds of board members. If a company does not have a diversity policy, it must explain why not.

The Regulations apply to financial years beginning on or after 1 August 2017.

IV CORPORATE SOCIAL RESPONSIBILITY / ESG

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.

V SHAREHOLDERS

There has been a global move towards enhanced rights for shareholders. A significant development in shareholders rights, and one that Ireland shares with its EU neighbours, is the Shareholders Rights Directive,[7] implemented in Ireland by the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009.

Directive (EU) 2017/828, amending Directive 2007/36/EC, has been implemented in Ireland by the European Union (Shareholders' Rights) Regulations 2020 and came into operation on 30 March 2020.

Among the provisions of note are the right for companies to be able to identify their shareholders, the transmission of information between companies and shareholders, and provisions concerning remuneration policies of directors. These provisions substantially reflect current practice in the Irish market, which has been developed as a result of Irish listed companies that are also listed on the London Stock Exchange opting to comply with the position in the United Kingdom on a number of these issues.

i 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 constitution or 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 and 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 direct and indirect holders of shares may be given equal rights in the future, but this has yet to materialise.

7 Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

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. For example, under the Companies Act, a general meeting can be called by members representing only 5 per cent of the voting capital of a company listed on Euronext Dublin (10 per cent for companies listed on the smaller Euronext Growth). In addition, members holding 3 per cent of the issued capital of a company listed on Euronext Dublin, representing at least 3 per cent of its total voting rights, have the new right to put items on the agenda and table draft resolutions to be adopted at AGMs. Listed companies are 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, 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 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 a simple majority) of those who vote. Examples include the consolidation or subdivision 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 constitution of the 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 on the grounds of majority shareholder oppression, where shareholders can apply to court to have a forced sale of the company or to have the company wound up on just and equitable grounds. It must be shown that the act or measure complained of has as its primary motive the advancement of the interests of the majority shareholders as opposed to the interests of the company as a whole. Mere dissent by a minority is insufficient to support a claim for redress. The Companies Act permits the courts to award a wide range of remedies, including forced sale, winding up and compensation for any loss or damage as a result of oppressive conduct.

ii Shareholder 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, as any other shareholder, will be determined by the terms of issue of the shares, the constitution or 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, and 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 a standard of market practice in the area.

iii Shareholder activism and shareholder remedies

Shareholder activism is relatively underdeveloped in Ireland. However, there are a number of activist developments.

Aside from claims of minority oppression (above), the principal actions of activists tend to be to have the board removed or activist representatives appointed – or to have strategic direction given to the board at shareholder meetings.

iv Takeover defences

Certain takeover defence mechanisms may risk conflicting with the Irish Takeover Panel Rules. As a rule, in any defensive action, it is imperative that boards ensure that their actions do not amount to frustrating actions, and that a level playing field is afforded to all potential bidders and shareholders have an opportunity to consider the merits of an offer.

A company that has received a bid is not prevented from seeking alternative bids elsewhere (although this may possibly be subject to any inter-party agreement). The offer of the third party may be announced at any time except where the Takeover Panel directs that the third-party white knight make its intentions clear. In general terms, the directors must provide equality of information to all parties.

v Contact with shareholders

Virtual and hybrid AGMs

The Companies (Miscellaneous Provisions Covid-19) Act 2020 (the 2020 Act) was commenced on 21 August 2020 and at the time of writing will apply until 30 April 2022. The new measures derive, in part, from recommendations of the Irish Company Law Review Group put forward in response to difficulties faced by Irish companies during the covid-19 pandemic – notably virtual and hybrid shareholder meetings. It is expected that hybrid and virtual shareholder meetings will soon be recognised in general.

VI OUTLOOK

New legislation

Companies (Corporate Enforcement Authority) Act 2021

This Act, which is expected to commence in 2022, establishes a stand-alone authority with autonomy. It also introduces safeguarding measures to verify the identity of directors and incorporates some amendments in relation to shares and share capital.

Gender Pay Gap Reporting Information Act 2021

This Act, which is expected to commence in 2022 once regulations have been developed, will provide for mandatory reporting on the remuneration differences between female and male employees, including any bonuses, together with a statement to explain the reason for differences and the measures (if any) being taken or proposed to be taken to eliminate or reduce the differences. Initially it will apply to organisations with 250 or more employees.

Investment Screening Bill

Plans have been announced to draft an Investment Screening Bill to give full effect to the EU Regulation on foreign direct investment screening.[8] Under the proposed legislation, the Minister for Enterprise, Trade and Employment will be able to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside the European Union, based on a range of security and public order criteria. At present, no such investment screening mechanism exists in Ireland.

8 Regulation (EU) No. 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

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 and commercial law, mergers and acquisitions, corporate restructurings, corporate governance and corporate finance.

Paul was awarded 'Ireland Corporate Lawyer of the Year 2016' by Client Choice. He is recommended by a number of leading publications and directories, including *Best Lawyers*, *Who's Who Legal*, *Chambers Global*, *The Legal 500*, *IFLR1000* and *Chambers Europe*.

'A leading individual . . . very experienced and knowledgeable' (*The Legal 500* 2018); 'Exceptional lawyer with great commercial and legal abilities . . . his knowledge of technical and commercial realities is very strong' (*Chambers Global* 2018); 'A very experienced lawyer. He displays very sound judgment and commercial understanding' (*IFLR1000* 2018); 'Top-class for capital markets . . . very accomplished, very articulate: good commercially and technically. Very calming, competent, a good communicator, efficient and proactive' (*Chambers Global* 2017).

He has been a partner with the firm since 1996; managed the London office from 1999 to 2004; served as head of the firm's corporate department between 2005 and 2010, and as chairman of the firm between 2010 and 2016; and continues actively to serve clients on a range of corporate and commercial law matters. Paul also carries management responsibility for a number of the firm's key relationships.

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Michelle has more than 20 years' experience as a corporate transactions lawyer in Ireland. She has advised both domestic and international clients on mergers and acquisitions, equity fundraisings, joint ventures and reorganisations. Michelle supports the firm's corporate lawyers by providing updates on legal developments, transactional support and training on all aspects of corporate law.

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