THE CORPORATE GOVERNANCE REVIEW

Thirteenth Edition

Editor
Will Pearce

THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-164-5

ACKNOWLEDGEMENTS

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

A&L GOODBODY LLP

ALLEN & GLEDHILL

BASAN ATTORNEY PARTNERSHIP

BOWMANS

BREDIN PRAT

DAVIS POLK & WARDWELL LONDON LLP

DELFINO E ASSOCIATI WILLKIE FARR & GALLAGHER LLP STUDIO LEGALE

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PREFACE

Over the past 40 years, corporate governance rules applicable to publicly traded companies have developed around the world, building on the basic corporate law framework governing the relationship between a company, its directors and its shareholders. These rules have taken a different form and legal status depending on the jurisdiction in question, usually ranging from mandatory compliance, or voluntary compliance with mandatory regular public disclosure of non-compliance, through to simple voluntary compliance with best practice or investor expectations.

In general terms, a common framework for corporate governance rules now seen across many jurisdictions comprises some combination of mandatory compliance with corporate law and stock exchange rules (the former focused on substance and the latter focused on disclosure) and voluntary compliance with guidance or best practice recommendations from national or supranational accounting or governance bodies or organisations representing investors.

Initially, corporate governance rules – led in large part by action taken by the Securities and Exchange Commission in the US, following the collapse of Penn Central in 1970 and other corporate scandals of the 1970s and 1980s, and by the publication of the UK's Corporate Governance Code by the Cadbury Committee in 1992 – focused on best practice recommendations for the composition of public company boards (including the important role of independent non-executive directors); the role, responsibilities and composition of board committees; and, in the UK, the separation of the roles of CEO and chair.

Driven by accounting scandals, audit failures and a perceived lack of checks and balances on the risk taken by public company boards, including the collapse of Enron, which declared bankruptcy in 2001, corporate governance rules sought to strengthen the powers and expectations of and oversight exercised by audit committees and the role of internal audit, notably through the adoption of Sarbanes-Oxley in the US in 2002.

Over the 15 years that followed, investor focus switched to the risks taken by and rewards offered to executive management, ultimately resulting in a number of jurisdictions adopting some form of 'say-on-pay' regime to help guard against outsized compensation packages driving excessive risk-taking. Investors also demanded greater gender diversity on public boards, with a consensus view emerging that a more balanced board would offer better decision-making and improved long-term stewardship of public companies for the benefit of all investors. Having made significant progress on gender diversity, a similar approach (with industry-set targets for representation and regular public disclosure of progress) has been adopted in a number of jurisdictions to help progress ethnic diversity.

Most recently, the 'g' of governance has been joined by the 'e' of environmental and the 's' of social, with traditional governance teams at investors now expecting public companies to take a more holistic ESG approach to business. This has driven a number of jurisdictions

to require mandatory disclosure by public companies on environmental issues; the pay gap between executive management and the 'average' employee; and sustainability, supply chain and modern slavery issues.

To assist public companies, advisers and market participants alike, who are seeking to navigate this ever-evolving landscape, we are delighted to present the 13th edition of *The Corporate Governance Review*.

In this edition, we have included chapters covering 21 different jurisdictions. Each chapter provides an overview of the applicable corporate governance regime, roles and responsibilities of directors, details of required public disclosures of corporate governance-related matters, the rules of engagement with shareholders and the extent to which a public company can defend a takeover, together with an update of recent and forthcoming developments.

While every author has taken care to make this review comprehensive, up to date and accurate as at the publication date, please remember that each chapter provides only a summary and overview of a large body of law, regulation and market practice. If readers wish to explore specific issues that are of interest or pertinent to them, we suggest they seek detailed advice from suitably experienced counsel. Contact details for the authors are set out at the end of this review.

Finally, thanks to all of the authors, my colleague Sophie Vacikar Bessisso and Emily Wolfin at *The Law Reviews* for helping to pull together this edition.

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Davis Polk & Wardwell London LLP
London
April 2023

Chapter 9

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). 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 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) (the Companies 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 Corporate Governance Code is applied rather than 'recycling' descriptions that replicate the wording of the Corporate Governance Code.

Companies listed on the smaller Irish securities market, Euronext Growth, are encouraged to adopt a corporate governance code on admission to that market. 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 separate corporate governance requirements issued by the Central Bank of Ireland (CBI).

The significance of the CBI's governance requirements is that they are mandatory; in other words, the comply or explain approach to compliance does not apply.

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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.

These 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;

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

f board membership must be reviewed at a minimum every three years;

g boards must set the risk appetite for the institution and monitor adherence to this on a continuing basis;

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

i prescriptive measures around board meetings; and

j 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's governance requirements. For example, credit institutions are required to appoint a chief risk officer to oversee the institution's risk management function and to establish a risk committee.

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 Companies Act and by principles established by case law (English case law is generally regarded as having persuasive authority in Ireland in this area). 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). 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 have at least two directors, but the constitution may provide for a greater minimum number (as may any applicable corporate governance code that applies to the company). 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, but the management of the company is generally delegated to the board of directors. The board typically exercises all the powers of the company except for specific 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, they do so as a director. As a director, the chair 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, 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.

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 and 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 of the company, to appoint an alternate director to fulfil their duties, generally in relation to a specific action or period. Whereas the alternate director is personally liable for their own actions, the appointing director is not absolved and can be held responsible with the alternate director.

Chief executive officer

Irish law is not particularly prescriptive in relation to the role of managing director or CEO. In general, the powers of the CEO are not fixed by law but depend instead on the terms of the service agreement agreed between the board and the CEO.

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's governance requirements (among others) recommend that the role of chair and CEO 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 also require that certain listed companies constitute certain other governance committees.[4] Credit institutions, insurance or reinsurance undertakings and other regulated entities are subject to separate requirements under applicable regimes.

4 See Section III.ii of the Listing Rules for further information.

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 they are 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 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 its employees.

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 the director's 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.

Duties of directors

The duties of directors in Ireland are grounded in case law, legislation and related codes. These duties echo those in other jurisdictions.

A codified set of principal directors' duties is enshrined in the Companies Act. The list of nine codified duties has its origins in the common law developed by the courts in Ireland and the United Kingdom.

The principal fiduciary duties of directors 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 their 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 their knowledge and experience;
h to have regard to the interests of the company's employees in general and of its members; and
i to have regard to the interests of the company's creditors where the directors become aware of the company's insolvency.

This last duty was inserted into the Companies Act by the European Union (Preventive Restructuring) Regulations 2022 as of 27 July 2022. An existing common law duty, it has now been codified.

These duties are owed to the company alone and are generally enforceable by the company alone.

Appointment, term of office and removal

The appointment and removal of directors are generally governed by the company's constitution. The right to elect directors is typically 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. However, this appointment might then be subject to shareholders' confirmation at the next annual general meeting (AGM). 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, 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 CORPORATE 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 must disclose financial and other information to shareholders regularly. This includes the requirement to publish annual and half-yearly financial reports and information disclosed by persons who have acquired or disposed of voting rights in the company.

Traded companies[5] are required to include, in the directors' report, a corporate governance statement in respect of the financial year concerned. This statement must occupy a specific section of the directors' report and include the following:

a all relevant information concerning the corporate governance code applied in respect of the company and any practices additional to statutory requirements (including details of any departures from the code and the reasons for this);

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's governance requirements are also required to submit an annual compliance statement to the CBI.

ii Audit committees

Public interest entities (PIEs)[6] must establish an audit committee pursuant to the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010. The majority of members of the audit committee must be non-executive directors who possess 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.[7] Large private companies that meet certain financial thresholds are required to have an audit committee on a comply or explain basis.

The responsibilities of the audit committee include:

a informing the directors 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;

5 A traded company is a public limited company that has shares or debentures admitted to trading on a regulated market in a European Economic Area Member State.

6 Under the Companies Act, 'public interest entities' 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.

7 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.

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 also contains provisions on various other aspects of auditing.

iii Market disclosure

Listed companies must also comply with certain disclosure requirements contained in the Listing Rules, the EU Market Abuse Regulation (MAR) 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.

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, a subsidiary or a 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 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, under MAR, 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 Transparency Regulations and related CBI 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 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 keep internal registers of information about their beneficial owners (shareholdings of more than 25 per cent) and to file this information 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

The colloquially known Non-Financial Reporting Directive (2014/95/EU) was implemented in Ireland by the European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017.

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

A new directive, the Corporate Sustainability Reporting Directive (2022/2464) (CSRD), entered into force on 5 January 2023. Member States have until 6 July 2024 to introduce implementing legislation, and the first wave of companies (which includes large, publicly listed entities with listings on EU-regulated markets) will be required to report under the CSRD for financial years beginning on or after 1 January 2024.

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.

The next five years will see significant change for corporate entities in terms of their environmental, social and governance (ESG) obligations. Companies will begin reporting under the CSRD in 2025, and the Corporate Sustainability Due Diligence Directive could be finalised by the end of 2023. We are also seeing heightened expectations from investors for sustainable businesses with strong corporate governance records and cogent green agendas.

V ENGAGEMENT WITH SHAREHOLDERS

There has been a global move towards enhanced rights for shareholders over the past 15 years. A significant development in shareholders' rights was the Shareholder Rights Directive 2007/36/EC, implemented in Ireland by the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 and amended by Directive (EU) 2017/828, which was implemented in Ireland by the European Union (Shareholders' Rights) Regulations 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 UK position 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 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.

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 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 right to put items on the agenda and table draft resolutions to be adopted at AGMs.

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 redress on the grounds of oppression. Remedies open to the court include an order to buy out the oppressed shareholder or, in exceptional circumstances, to force the sale or winding up of the company. 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.

ii Shareholder duties and responsibilities

Controlling shareholders

The 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 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

The UK Stewardship Code sets out good practice for institutional investors when engaging with UK listed companies and will also be relevant to engagements with Irish listed companies. It is likely that Irish institutional investors will view this Code as a standard of market practice.

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 Takeover Rules. As a rule, in any defensive action, it is imperative that boards ensure that their actions do not amount to frustrating actions, that a level playing field is afforded to all potential bidders, and that 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 was commenced on 21 August 2020, and a number of the provisions remain in force, extended until 31 December 2023. One of these is the provision permitting companies to hold virtual and hybrid general meetings (AGMs and extraordinary general meetings) notwithstanding the company's constitution. It is expected that hybrid and virtual shareholder meetings will soon be put on a permanent statutory footing.

VI OUTLOOK

New legislation

An investment screening bill

At the time of writing, the Screening of Third Country Transactions Bill 2022 is currently progressing through the legislative process. Once enacted, the legislation will introduce a foreign direct investment screening mechanism in Ireland for the first time. The legislation will empower the Minister for Enterprise, Trade and Employment to review, investigate, authorise, condition, prohibit and unwind foreign investments from outside the European Economic Area and Switzerland, based on a range of security and public order criteria.

ISBN 978-1-80449-164-5