The Corporate Governance Review

Seventh Edition

Editor
Willem J L Calkoen

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PREFACE

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

In this seventh edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. 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, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive 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 non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on 'norms' by codes and influential investor groups.

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

What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury 'comply or explain' model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders' regulations and the press?

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

My aim as 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 and best practice by reading about the laws and practices 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
March 2017

Chapter 17

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 constitution or 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 that those terms be restated 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.

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;

1 Paul White is a partner at A&L Goodbody.
2 A mixture of primary legislation and common law.
3 See UK chapter.

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 clawback arrangements.

Furthermore, companies listed on the smaller market – the Enterprise Securities Market – are also encouraged 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

Banks and insurers in Ireland follow, on a statutory and mandatory basis, separate Corporate Governance Requirements issued by the Central Bank of Ireland in 2016. Banks are required to follow the Corporate Governance Requirements for Credit Institutions 2015 (the Credit Institutions Requirements) and insurance undertakings follow the Corporate 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.

These separate Requirements replaced the Central Bank Corporate Governance Code for Credit Institutions and Insurance Undertakings 2013, and the Corporate Governance Code for Captive Insurance and Captive Reinsurance Undertakings 2013. The requirements apply to all credit institutions and insurers based in Ireland, including reinsurance firms. Different standards apply to Irish subsidiaries of foreign-regulated firms in a number of areas.

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

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

l the use of videoconferencing where 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 reflected in the Requirements also. For example, the Credit Institutions Requirements provide that a chief risk officer must be appointed to oversee the institution's risk management function and a risk committee must be established. The chairman 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

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 Act,[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 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 Companies Act 2014 was enacted on 1 June 2015, 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.

4 The Companies Act 2014 (the Act was commenced on 1 June 2015).

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. Under the Companies Act 2014, private limited companies have the contractual capacity of a natural person. The board of directors and individuals authorised by the company are entitled to bind it. Persons authorised may be registered on a register maintained in the Companies Registration Office as being entitled to bind the company, although this is not a mandatory requirement.

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 the 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 has the same authority as that of any other board member. Where a company adopts a standard constitution or 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 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

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

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 constitution or 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.

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 Requirements (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 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 common law and the Rules of the Irish Takeover Panel (the Takeover Rules), which, unlike the equivalent rules in the United Kingdom, have the force of law in Ireland. Two other important sources of duties and obligations are the Listing Rules of the Irish Stock Exchange and the Irish Companies Act.

The Takeover Rules, in particular, cover a wide range of matters relating to takeovers, and 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. 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 such an offer may be imminent.

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

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 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). There are some recent sources of guidance for non-executive directors on care, skill and due diligence, which are available to Irish non-executive directors.

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.

Since 1 June 2015, a codified set of principal directors' duties has been in force in Ireland, under the Companies Act 2014. The list of eight 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 that have been enumerated in the Act are as follows:

a the duty to act in good faith in what the director considers to be in the interests of the company;

b the duty to act honestly and responsibly in relation to the conduct of the company's affairs;

c the duty to act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;

d the duty to not use the company's property, information or opportunities for his or her own or anyone else's benefit unless this is expressly permitted by the constitution or approved by resolution of the members in a general meeting;

e the duty to not agree to restrict the director's power to exercise an independent judgement, unless this is expressly permitted by the company's constitution, or the director believes in good faith that it is in the interests of the company for a transaction or arrangement to be entered into for him or her to fetter his or her discretion in the future by agreeing to act in a particular way to achieve this, or the directors agreeing to this has been approved by resolution of the members in general meeting;

f the duty to avoid any conflict between the director's duties to the company and his or her other, including personal, interests unless the director is released from this duty in accordance with the constitution, or by a resolution of the members in general meeting;

g the duty to exercise the care, skill and diligence that would be exercised in the same circumstances by a reasonable person having both (1) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and (2) the knowledge and experience that the director has; and

h the duty 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 in the same way as any other statutory duties owed by the director to the company. The 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.

Directors' compliance statement

As a result of a new obligation introduced by the Companies Act, public limited companies are required to include a compliance statement in the directors' annual report accompanying their company's financial statements. This requirement applies in respect of financial years commencing on or after 1 June 2015.

Directors must acknowledge that they are responsible for securing their company's compliance with its 'relevant obligations' (which includes obligations under tax law and other company law provisions that impose serious penalties for non-compliance).

Directors must also, on a comply or explain basis, confirm: (1) that they have drawn up a 'compliance policy statement', appropriate to their company, setting out the company's policies regarding compliance; (2) that appropriate arrangements or structures are in place that are, in the director's opinion, designed to secure material compliance with its relevant obligations; and (3) that they have reviewed, during the financial year, the arrangements or structures that have been put in place to secure this material compliance. If these statements, confirmations and reviews have not been made or carried out, the directors must specify in their directors' report the reasons why not.

Statutory audit confirmation

The Companies Act introduced a new statutory obligation on the directors of all companies to include a statement in their directors' report that so far as each director is aware, there is no relevant audit information of which the company's auditors are unaware, and each director has taken all the steps that he or she ought to have taken as a director to make himself or herself aware of any relevant audit information, and to establish that the company's auditors are aware of that information. This is similar to the obligation that has existed in the United Kingdom since 2006.

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 Act include where the director engages in insider dealing or where the director makes false or misleading statements in certain circumstances.

Under the Companies Act, a new streamlined Summary Approval Procedure (the SAP) has been created to enable companies to carry out certain activities that would otherwise be prohibited. The SAP is only available to public limited companies for a members' voluntary winding up, the prohibition on pre-acquisition profits or losses being treated in a holding company's financial statements as profits available for distribution, and the prohibition on entering into loans or quasi-loans to directors or other connected persons.

Under the SAP rules, a directors' declaration of solvency and shareholder approval is required, and in some cases, a confirmatory auditors' report is also required. The SAP rules provide that a court may declare a director personally responsible without any limitation of liability, for all or any liabilities of the company where a declaration is made without having reasonable grounds for the opinion on the solvency of the company as set out in the declaration.

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 for five years 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 constitution or articles of association. The right to elect directors is generally 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 (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 of 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 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 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 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 (as amended, most recently twice in 2015) 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. 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 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 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 shareholder's 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 Companies Act, 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.

In June 2016, the European Union (Statutory Audits) Regulations 2016 (the 2016 Regulations) came into effect in Ireland. The 2016 Regulations give effect to the Statutory Audit Directive 2014/56/EU, which amended the original Statutory Audit Directive (Directive 2006/43/EC) in various ways.

The new regime was designed to enhance (1) the independence of statutory auditors and (2) the quality and credibility of statutory audits, across the EEA.

Public listed companies are regarded as 'public interest entities' (PIEs) for the purpose of the legislation and the following new provisions now apply to them:

a PIEs are obliged to rotate their auditor firm after a maximum of 10 years (from date of initial appointment);

b there are tighter restrictions on the provision of non-audit services by auditors to PIEs;

c the selection and appointment of the statutory auditors must adhere to specified procedures, which must be established by the PIE; and

d there are detailed requirements regarding the establishment of audit committees in PIEs.

ii Audit committees

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

In December 2011, the 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. These Regulations, as amended, were not revoked by the Companies Act 2014 and as a result, public interest entities must continue to comply with the requirements of the Regulations with regard to audit committees.

'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.

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.

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.

The provisions of the Companies Act and the Regulations are consistent in relation to the responsibilities of the audit committee and its composition.

The Companies Act provides that the requirement to establish an audit committee applies to public limited companies that do not fall within the scope of the Regulations. In such cases, the provisions relating to 'large private companies' apply to the relevant public limited companies irrespective of the balance sheet amount or the amount of turnover of that public limited company.

Listed companies following the UK Corporate Governance Code must additionally comply with the relevant provisions relating to audit committees, or explain why not.

Financial institutions and insurance undertakings must also comply with the relevant provisions on audit committees contained within the Central Bank of Ireland's Corporate Governance Code for Credit Institutions and Insurance Undertakings, which operates on a statutory basis, rather than a comply or explain basis.

iii Market disclosure

Listed companies must also comply with certain disclosure requirements contained in the Listing Rules, the new EU Market Abuse Regulation (MAR) (as implemented in July 2016) and the Takeover Rules. Pursuant to the earlier EU Market Abuse Directive, Irish companies listed on the Main Securities Market have been required to release 'inside information' to the market without delay (except where limited circumstances exist for deferring such information). Under the MAR, companies listed on the smaller Enterprise Securities Market are within the scope of the market abuse regime for the first time and such companies are now required to put systems in place to ensure both their initial and their ongoing compliance with market abuse legislation. The MAR also introduces more significant record-keeping and reporting obligations where 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, 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. Under the Companies Act, the threshold at and above which that interest in a public company just be disclosed has been reduced to 3 per cent. The Companies Act also provides 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 MAR. 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.

v Beneficial ownership

In 2016, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation. All corporate and other legal entities, but excluding companies listed on an EU 'regulated market', must comply with the Regulations. The Regulations require entities incorporated in the state to hold adequate, accurate and current information on the controllers and beneficial owners of more than 25 per cent of their entity.

Listed companies on the Main Securities Market and Enterprise Securities Market of the Irish Stock Exchange are not required to comply with the Regulations, as they are subject to disclosure requirements that are consistent with this law.

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.

Legislation exists in Ireland that is designed to protect whistle-blowers. The Protected Disclosures Act 2014 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. Employers are required to publish and put in place policies and procedures to deal with whistle-blowing. The Act protects workers in all sectors. 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

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, and one that Ireland shares with its EU neighbours, is the Shareholders Rights Directive, implemented in Ireland by the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009. Since 2014, preliminary steps have been taken by the European Commission to amend the Shareholder Rights Directive to improve engagement with shareholders, among other goals. Proposals include a requirement for public interest entities to publish information country by country, on profits or losses before tax, taxes on profits or losses and public subsidies received. Other proposals being considered are provisions that would enable shareholders to vote at least every three years on a listed company's remuneration policy for directors.

Agreement on the substantial requirements for an amending Directive was made in December 2016, and it is expected to be adopted by the European Council and Parliament in 2017.

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, 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 yet to materialise 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 be called by members representing only 5 per cent of the voting capital of a company listed on the Main Securities Market (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, 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, 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 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 memorandum and articles of association 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 under Section 212 of the 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 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 compensation for any loss or damage as a result of oppressive conduct.

ii 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 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, 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.

iii 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 212 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 that 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.

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 the board ensure that their actions do not amount to 'frustrating actions' and that a level playing field is afforded to all potential bidders.

A company that has received a bid is not prevented from seeking alternative bids elsewhere (though 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

Mandatory and best practice reporting to all shareholders

Under the Transparency Regulations 2007 (as amended), 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.

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 auditors' 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. 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 to promote dialogue with shareholders.

Twenty-one days' notice must be given for an AGM. In the case of private companies, seven days' notice is required for an extraordinary general meeting (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. The Companies Act 2014 contains a provision that allows private limited companies to dispense with holding a physical AGM. A unanimous written resolution of all members must be passed instead, acknowledging receipt of financial statements, etc.

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

VI OUTLOOK

i New legislation in the pipeline

Companies (Accounting) Bill

The Companies (Accounting) Bill is expected to be enacted during 2017. The Bill will transpose the Accounting Directive (Directive 2013/34/EU (as amended) into Irish law. Among other provisions, the Accounting Bill proposes to give effect to a specific requirement of the Accounting Directive, which is to eliminate the existing non-filing of accounts exemption for unlimited companies with a particular non-EU/EEA shareholding structure.

Directive on disclosure of non-financial and diversity information

The EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups had a transposition deadline of 6 December 2016, with companies expected to publish their first reports in 2017. Implementation of the Directive is still awaited in Ireland.

The Directive makes amendments to the Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts (Directives 78/660/EEC and 83/349/EEC respectively), to include new provisions on the disclosure of non-financial information, and new provisions on boardroom diversity.

The Directive applies to large public-interest entities that exceed, on their balance sheet dates, the criterion of the average number of 500 employees during the financial year.

a non-financial disclosures will be comprised of a statement in the company's annual report including material relating to environmental, social and employee-related matters, respect for human rights, and anti-corruption and bribery matters (on a comply or explain basis); and

b diversity policy disclosures will be comprised of specific information on the company's diversity policy for its administrative, management and supervisory bodies, to be disclosed in the company's corporate governance statement (on a comply or explain basis). Information on all aspects of the diversity policy will be required, including age, gender, geographical diversity and educational or professional background.

The Directive is expected to be implemented into Irish law in Q1 or Q2 of 2017, following the enactment of the Companies (Accounting) Bill.

Appendix 1

ABOUT THE AUTHORS

PAUL WHITE

A&L Goodbody

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, Chambers Global, The Legal 500*, *IFLR1000* and *Chambers Europe*.

'Commended by several [. . .] he has very strong communication skills, is very commercial, very professional and good to work with' (*IFLR1000* 2017); 'Ability to deliver advice at a high level and to summarise complex strands of advice [. . .] expert knowledge of complex ECM matters [. . .] he is responsive, commercial, in tune with our needs' (*Chambers Global* 2016); 'a corporate law specialist with broad industry knowledge and expertise in equity capital markets and M&A' (*Chambers Global* 2014).

He has been a partner with the firm since 1996; managed A&L Goodbody's 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.

A&L GOODBODY

IFSC
North Wall Quay
Dublin 1
D01 H104
Ireland
Tel: +353 1 649 2000
Fax: +353 1 649 2649
pwhite@algoodbody.com
www.algoodbody.com