Duties of directors under Irish Law - Insurance Sector

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO

Table of Contents

DUTIES OF DIRECTORS AND OTHER ASPECTS OF DIRECTORSHIPS

Introduction

An Irish incorporated company must have a minimum of two directors. There is no single code of conduct for directors in Ireland as the duties of directors are derived from various sources, including case law, legislation and the articles of association of the company concerned.[1] However, it should be noted that the directors of a regulated entity may be subject to an industry specific Corporate Governance Code.[2]

Under the Companies Act, 1963, the Companies Act, 1990, the Companies (Amendment) (No. 2) Act, 1999, the Company Law Enforcement Act, 2001, the Companies (Auditing and Accounting) Act, 2003, the Investment Funds, Companies and Miscellaneous Provisions Act, 2006, and the Companies (Amendment) Act 2009 (each an "**Act**", together the "**Acts**") duties of directors can be classified under four headings:-

(A) Those arising at common law, which can be further classified as:

- (i) fiduciary duties; and
- (ii) duties of care, skill and diligence.

(B) Those arising under statute;

(C) Those arising under contract; and

(D) Those arising by regulation, whether under the Purple Book (Model Code[3]) or otherwise.

[1] The Companies Bill, 2012 was published in December 2012 and aims to reform the structure and constitutional make up of the existing Irish private limited company. See Appendix 1 for further details.
[2] Such as the Corporate Governance Code for Credit Institutions and Insurance Undertakings, the Corporate Governance Code for Captive Insurance and Reinsurance Undertakings and also the Corporate Governance Code for Collective Investment Schemes and Management Companies (For more details see Appendix 2) .
[3] Irish Stock Exchange Listing Rules (Appendix 1 to Chapter 6).

A. Common law duties[4]

(i) The fiduciary duty of a director

These duties are principally owed to the company, but as discussed later, a director may owe parallel duties to the company's creditors and/or to individual shareholders.

(a) A director must act in good faith and in what they consider to be the best interests of the company as a whole rather than in the interests of a particular shareholder or shareholders. A director is prohibited from entering into transactions with the company in the absence of full disclosure or unless permitted by the articles of association of the company. Furthermore, a director may not make a secret profit or take a bribe, or personally avail of business opportunities properly belonging to the company;

(b) A director is under a fiduciary duty not to act *ultra vires,* i.e. outside, the powers of the company or in an illegal manner. In essence, directors must not act in breach of the law or in breach of the limitations set out in the memorandum and articles of association. If directors act in breach of company law or the memorandum and articles of association, they may be personally liable for such acts.

Section 8 (i) of the 1963 Act provides that although an ultra vires transaction may be enforced against the company by outsiders who are unaware that it was beyond the company's capacity, any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof.

It is also established law that ultra vires acts are incapable of ratification by the company in general meeting. Under the Companies Bill 2012, private companies will not have an objects clause and therefore, will not be subject to the ultra vires doctrine which will make the law more transparent. It removes concern around a company's capacity to take certain actions and gives the private company "full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction". In effect, the private limited company will have legal capacity equivalent to that of a natural person.

(c) Directors must not exceed their powers as directors even if their actions are intra vires the powers of the company. An example of this situation is where the articles of association put a limitation on the amount directors may borrow without a shareholders resolution. Acts which are intra vires the powers of the company but

[4] The Companies Bill, 2012 confers directors' common law and equitable duties as they have been developed by case law.

are ultra vires the powers of directors under the articles of association are capable of ratification by the company in general meeting; and

(d) Directors must avoid putting themselves in a position where their personal interests conflict with those of the company.

(i) In dealing with the company, a director must disclose any interests which he has in a contract being entered into by the company. If he does not, the contract may be avoided at the instance of the company. If rescission is no longer possible, the company may still be able to recover from the director any profit he made from the transaction.

The effect of this rule is modified in most cases by the articles of association which usually provide that the director may enter into a wide range of contracts; and

(ii) In accordance with his duty to avoid a conflict of interest, a director must not divert to himself a business opportunity which the company would otherwise have obtained. If he does, he will be accountable to the company for the profits.

(ii) The duty of care, skill and diligence

There is a duty on directors of a company to exercise their powers with reasonable skill and care. However, the skill and care required is the skill and care of a reasonable person placed in the position of that individual director and with the expertise and experience of that individual.

Neville J. in a case *Re: Brazilian Rubber Plantations and Estates* Limited[5] stated this in the following terms:-

"He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business, he must give the company the advantage of his knowledge when transacting the company's business."

[5] [1911] 1CH.

Interestingly enough, if a director expresses great expertise in a particular field, he will be judged on what he professes to know and not on his actual knowledge, if it falls far short of what he professes.

Directors therefore at common law will not be liable for errors of judgement but will be liable for gross negligence.

Clearly, the subjective test applied at common law has been overtaken by the somewhat higher objective standard imposed by statute at least where the company has become insolvent.

Commenting on the common law duties imposed on directors, it would have to be said that although the standard of skill and competence imposed upon directors has traditionally been fairly minimal, it can be seen that as regards the director's fiduciary duties, a rigorous and exacting standard is applied. Directors must keep within their powers; they must avoid any conflict of interest and must exercise their powers in good faith and for the benefit of the company as a whole. The practical problems which have arisen in enforcing these duties have been to a large extent, overcome by the growing number of statutory provisions.

B. Statutory duties and obligations

The overriding principle of company law is that a director's duties are owed to the company and not to individual shareholders or employees. However, the duty of a director to the company can be extended to each of the shareholders, the employees and the creditors in certain circumstances. For example, directors will have a duty to shareholders where they have undertaken, often implied by their actions, or volunteered to act on the shareholders behalf. In this regard, a director is considered to be the agent of the shareholders.

The provisions of section 205 of the 1963 Act impose a duty on directors not to conduct the affairs of the company so as to cause oppression to any member. Similarly, under section 188 of the 1963 Act, directors are obliged to take all reasonable steps to ensure notice is sent to the shareholders of any compensation payable to directors for loss of office in the event of a take-over bid. The groups to whom duties are owed have been further extended by section 52 of the 1990 Act which provides that a director shall, in the performance of his functions, have regard to the interests of the company's employees.

The duties to creditors and the consequences for breach of these duties have been extended by the provisions of the 1990 Act. In particular, section 297 of the 1963 Act which rendered persons found

guilty of defrauding creditors liable for the debts of the company has been expanded[6] to include the concept of reckless trading. In other words, directors are under a duty not to trade recklessly.

There is a very comprehensive list of duties, obligations and liabilities imposed by statute on directors set out in the Acts. Many of these provisions are very onerous and in some cases, while they undoubtedly help to provide protection against suspect practices, they inadvertently make certain legitimate business and financing transactions fraught with dangers for the unwary. Accordingly, every director of an Irish company should become familiar with the duties and obligations he or she owes to the company. The following represents a summary of the provisions under the Acts relating to directors:

(i) Duty as company officer

It is the duty of each director to ensure that the requirements of the Acts are complied with by the company. Section 100 of the Company Law Enforcement Act, 2001 provides that a director, as company officer, is presumed to have permitted a default by the company unless the director can establish that he took all reasonable steps to prevent it or that by reason of circumstances beyond his control, was unable to do so.

(ii) Loans to directors

The 1963 Act does not contain any provisions restricting the making of loans by the company to directors although it was a requirement that such loans be disclosed in the company's accounts. Section 31 of the 1990 Act has altered this situation and prohibited the making of loans by companies to directors except in a limited number of circumstances. The section catches quasi loans, credit transactions and similar transactions including the giving of guarantees. Inter-group transactions are not caught. A director or person connected with him who enters into any of the prohibited transactions is liable to account to the company for any gains he made as a result, as is any director who authorised the transaction. Such persons must also indemnify the company against any loss or damage which it suffers. A director will not be liable if he can show that he took all reasonable steps to secure compliance with section 31. In addition, a prohibited transaction can be set aside at the option of the company. Section 78 of the Company Law Enforcement Act, 2001 replaces section 34 of the Companies Act, 1990 and sets out a procedure whereby certain transactions, previously prohibited by section 31, are now valid provided the requirements of the amended section 34 are complied with. Section 7 of the Companies (Amendment) Act, 2009 extends the scope of section 31 to encompass not only directors, but all officers of the company who are in default. There is also a potential personal liability for the director if the company goes into liquidation.

[6] By section 137 Companies Act, 1990.

(iii) Other transactions with directors

Part III of the 1990 Act has introduced special rules and restrictions in relation to certain specific transactions in which directors, including shadow directors or persons connected with them are interested. The following is an additional list of transactions which are now regulated by the 1990 Act:-

(a) *Dealings in options in listed securities.*

Section 30 makes it an offence for a director of a company to deal in options over existing quoted shares or debentures of that company or any company within the same group where such shares or debentures are dealt in on a stock exchange.

(b) *Contracts of employment*

Section 50 of the 1990 Act provides that a company may not enter into a contract of employment or a consultancy or similar contract with a director under which his employment in the company or within the group may continue for a period of more than five years if during that time the company may not terminate the contract by notice or may only terminate it in specific circumstances unless that contract or rather the relevant term thereof is first approved in general meeting by the shareholders. The effect of breaching this provision (that is, if shareholders' approval is not obtained) is that the relevant provisions of the employment contract will be void and the company will be entitled to terminate the employment agreement at any time by giving reasonable notice.

(c) *Substantial property transactions*

Section 29 of the 1990 Act requires that certain property transactions entered into between a company and its director, or a person connected with him must first be approved by a resolution of the shareholders in general meeting. The provisions catch transactions involving non cash assets in excess of €63,487 or 10% of the amount of the company's relevant assets. The effect of breaching the provisions is to make the contract voidable at the option of the company. The director or any person connected with him who authorised the transaction will be liable to account to the company for any profit and to indemnify the company for any loss. A connected person under the Act includes the director's spouse, parent, brother, sister, child, partner or a company controlled by a director and/or one or more such people. The provisions do not apply to inter-group transactions.

(iv) Disclosure of interests

Part IV of the 1990 Act contains special provisions relating to the disclosure of interests in shares and Chapter I of that part deals with share dealings by directors, secretaries and their families.

There is an obligation upon the directors and secretary of every company to notify the company of his interest in shares or debentures in the company or an associated company and every company must maintain a register of such interests. For the purposes of notification, a director includes a shadow director and the interests of directors and secretaries include the interest of their spouses and children under eighteen. Any notification under section 53 must expressly state that it is given in fulfilment of the obligation under that section or the obligation to notify will not be fulfilled. This is to avoid the situation where a person might claim that the company was fully aware of the director's interest. As well as a criminal sanction, any breach of these provisions will render the director's right or interest in respect of the shares void and they will be unenforceable by him.

A director of a company must notify the company in writing of the occurrence, while he is a director of any of the following events and the date on which it occurred:-

a) Any event in consequence of which he becomes, or ceases to be interested in shares in, or debentures of, the company or any other body corporate, being the company's subsidiary or holding company or a subsidiary of the company's holding company;
b) The entering into by him of a contract to sell any such shares or debentures;
c) The assignment by him of a right granted to him by the company to subscribe for shares in, or debentures of, the company; and
d) The grant to him by another body corporate, being the company's subsidiary or holding company or a subsidiary of the company's holding company, of a right to subscribe for shares in, or debentures of, that other body corporate, the exercise of such a right granted to him and the assignment by him of such a right so granted, stating the number or amount, and class, of shares or debentures involved.

A director shall be taken to have in interest in shares or debentures if:-

a) he enters into a contract for their purchase by him (whether for cash or other consideration); or
b) not being the registered holder, he is entitled to exercise any right conferred by the holding of those shares or debentures or is entitled to control the exercise of any such right.

Section 194 of the 1963 Act places an obligation on a company director to declare, at a meeting of the company, the nature of any interest he has in a contract or proposed contract with the company. The importance of compliance with this section should not be under-estimated, as section 2 of the Companies (Amendment) Act, 2009 has amended section 194 to provide the Office of the Director of Corporate Enforcement ("**ODCE**") with the power to inspect the register or book within which such contracts are noted.

(v) Section 60 declarations

Subject to certain exceptions, section 60(1) of the 1963 Act prohibits a company from giving financial assistance for the purpose of or in connection with a purchase or subscription by that person of shares in the company or in its holding company. Section 60(1) is drafted in very wide terms in that it prohibits such assistance from being given "directly or indirectly" and "whether by means of a loan, guarantee, the provision of security or otherwise".

If a company carries out a transaction which is prohibited by section 60, the transaction is voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such breach. Every officer (including directors) who is in default is liable to imprisonment for a term not exceeding two years and to a fine not exceeding €3,175.

(vi) Section 256 and declarations of solvency

Where a declaration of solvency is sworn in a members' voluntary winding up, any director who did not have reasonable grounds for an opinion that the company would be able to pay its debts may become personally responsible without limitation of liability for the debts of the company.

(vii) Section 297 and 298 - fraudulent and reckless trading

We have already referred to circumstances where directors can be made liable for fraudulent or reckless trading.

(viii) Residence requirements

Part IV of the Companies (Amendment) (No. 2) Act, 1999 contains miscellaneous provisions including provisions relating to directors. Section 43 (as amended by section 10 of the Companies (Amendment) Act, 2009) provides that subscribers to new companies will have to ensure that the company has a director who is resident in a Member State of the EEA. An alternate director appointed to the company does not satisfy the above residency requirements.

Alternatively, the provision provides that where none of the directors of the company are resident in the EEA a bond of the value of €25,394.80 has to be maintained by the company. The object here is to ensure that the revenue authorities and the Companies Registration Office (the "**CRO**") have a definite person within a Member State of the EEA to pursue where a company fails to comply with its obligations. It is possible to obtain an exemption to the requirement to hold a bond if the company can satisfy the Registrar of Companies that there is a real and continuous link with one or more economic activities being carried on in Ireland.

(ix) Maximum number of directorships

Section 45 of the Companies (Amendment) (No. 2) Act, 1999 introduces a limitation on the number of companies of which a person can be a director, or shadow director, to 25. Directorships in companies within the same group of companies are aggregated for the purpose of this requirement.

For instance, where there is prior screening of directors, as happens in the case of companies that operate in the regulated sectors, holding of such directorships can be exempted from the prohibition on holding more than 25 directorships. The section contains a mechanism whereby applications can be made in the first instance to the Registrar of Companies and subsequently in certain instances appeals can be made to the Minister for Jobs, Enterprise and Innovation.

Further restrictions as to the number of directorships that may be held may apply in particular regulated industries (i.e. collective investment schemes, credit institutions and insurance undertakings. For the latter, see Appendix 2).

(x) Resignation of directors

A director may resign from office at any time by serving notice in writing on the company secretary. The company secretary is obliged to notify the CRO of the resignation in the prescribed form.

(xi) Duty to keep proper books of account

Section 202 of the 1990 Act requires all companies to keep proper books of account. Section 204 of the 1990 Act provides that, if a company is wound-up and is found to be insolvent, if Section 202 has not been complied with, any director may have unlimited liability for all or part of the company's debts (and may be liable to criminal prosecution) where that breach contributed to the insolvency or resulted in substantial uncertainty regarding the company's assets or liabilities or otherwise interfered with the liquidation.

It is a defence to such an action if the director concerned took all reasonable steps to secure compliance with the acts or has reasonable grounds for believing and did believe that a competent and reliable person acting under the supervision or control of a director of the company had been formally allocated the duty of insuring the proper books on account where kept.

(xii) Duty to file accounts

Section 148 of the 1963 Act requires the directors to prepare and present to the annual general meeting a profit and loss account and balance sheet prepared in accordance with the Acts. Subject to certain exceptions, the directors are also obliged to ensure that the profit and loss account and balance sheet are submitted to the Companies Registration Office on an annual basis with the company's annual return. A company which has not filed its annual return in respect of any one year is eligible to be struck off the Register of Companies and dissolved. Directors are also liable for prosecution in this event.

(xiii) Duty to have company audited on annual basis

Directors are generally obliged to have the accounts audited at least once a year, subject to certain exceptions.

(xiv) Duty to maintain a register of members

Companies, and by extension directors, are obliged to maintain the following registers and other documents:-

(a) Register of members;
(b) Register of directors and secretary's interests;
(c) Register of debenture holders;
(d) Minute books;
(e) Director's service contracts;
(f) Contracts to purchase own shares.

C. Contractual duties

Most executive directors will have a service contract with the company which will specify the duties and obligations of the director to the company and the obligations of the company to the director. The contract will usually provide that the director be employed as an executive for a fixed term of years and it will provide for the circumstances in which the contract can be terminated at an earlier

stage by either party. Even where a director is removed from office, it does not automatically follow that they cease to be employees of the company. Where a director is removed from office, he will not be precluded from seeking any remedy which he might be entitled to under his contract of employment. This is made clear by section 182(7) of the 1963 Act (the section relating to the removal of directors from office) which provides that:-

"Nothing in this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the determination of his appointment as director or compensation or damages payable to him in respect of the determination of any appointment terminating with that as director...."

Any duty owed by the director to the company in his capacity as an employee of the company will be contained in his contract of employment. In some cases there may not be a written contract of employment but rather an implied contract. In such cases, the duties will be established by construction of that implied contract.

D. Listings, listing requirements and procedures of the Irish Stock Exchange and Model Code

There are special obligations which arise for directors in circumstances where a company is listed on the Irish Stock Exchange ("**ISE**") and indeed where its shares are offered for subscription whether on a stock exchange or not.

Where a listed company offers its shares to the public, there is an obligation on the company to meet the requirements of the Prospectus Regulations, 2005 (the "**Regulations**"). The purpose of the Regulations is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market. The objective of the Regulations is to ensure investor protection and market efficiency, in accordance with high regulatory standards.

Section 41 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (the "**2005 Act**") (which repeals section 49 of the 1963 Act) provides for civil liability to attach *inter alia* to directors for misstatements in a prospectus. Damage may be caused by any untrue statement contained in a prospectus or the omission of information required by EU prospectus law to be contained in the prospectus. Certain exceptions and exemptions to the provisions of section 41 are set out in section 42 the 2005 Act.

The sanctions which are set out in section 48(2) of the 2005 Act for a breach of section 41 include for liability on summary conviction, a fine not exceeding €5,000 or imprisonment for a term not

exceeding 12 months, or on conviction on indictment, a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both.

In addition, the Rules of the ISE[7] state that a company's prospectus must be approved by a competent authority[8] as a prerequisite to listing.

While the Rules of the ISE impose few requirements directly on the directors of a listed company, they do state that the board of directors of a listed company is required to have sufficient collective knowledge, competence and experience to perform the company's activities effectively.

The provisions of the Market Abuse Directive require that a company must disclose inside information without delay and maintain a list of insiders who may have access to inside information.

In addition to the statutory requirements, the general law of contract imposes an obligation upon the promoters/directors to clearly and truthfully inform the public of the purpose to which their money is intended to be applied. The investors therefore are entitled to be informed of every known fact which if disclosed would prevent a prudent man from taking shares at all, and also every known fact which materially qualifies or alters the effect of the previous representations made to induce persons to subscribe.

The remedies for an aggrieved investor are the right to rescind the contract or to sue for compensation. In this context, rescission is the most valuable remedy due to the fact that it is easier to recover for misrepresentation under statute than at common law.

The ISE listing rules (the "**Listing Rules**") impose a similar responsibility on directors relating to the content of the prospectus which constitutes listing particulars for the purposes of the listing. Further, the Listing Rules impose an ongoing obligation on the directors to take responsibility for compliance with the "Continuing Obligations" of the ISE. These requirements are set out in chapters 1 and 8 of the Listing Rules.

Directors of listed companies must also have regard to the ISE's Model Code for directors (the "**Model Code**").[9] The principle upon which the Model Code is based is that a director should not deal in any of the securities of the company at any time when he is in possession of unpublished price sensitive information in relation to those securities. It is obvious that there is a significant amount of overlap between the requirements of the Model Code and the new laws on insider dealing imposed by the Market Abuse Regulations 2005.[10] In addition, extended requirements issued by the Central

[7] Rules of the Irish Stock Exchange Limited, Release 14, 12 October 2009.
[8] The authority designated by each Member State in accordance with Article 48 of Council Directive 2004/39/EC ("MiFID"). In Ireland, this is the Central Bank of Ireland.
[9] Irish Stock Exchange Listing Rules (Appendix 1 to Chapter 6).
[10] Market Abuse Directive 2003/6/EC, as implemented by S.I. No. 342/2005, specifically section 5; "Insider Dealing".

Bank of Ireland **("Central Bank**") under the Market Abuse Regulations 2005 oblige directors to monitor whether changes in the circumstances of the issuer are such that an announcement obligation via a Regulatory Information Service ("**RIS**") is required.[11]

Regulations on Accounts and Consolidated Accounts (S.I. 450 of 2009 as amended by S.I. 83 of 2010).

S.I. 450 of 2009 (which was amended by S.I. 83 of 2010) was signed into law on 18 November, 2009. It implements Directive 2006/46/EC, which sought to establish an improved EU regime for clarification of the responsibility of board members for financial statements and key non-financial information, transparency in intra-group transactions and transactions with related parties and disclosure regarding corporate governance. It also amends the 4th Company Law Directive, the 7th Company Law Directive, the Credit Institutions Directive and the Insurance Undertakings Directive.

The key changes introduced by the new provisions include the following:

- Irish incorporated companies (excluding investment companies and special purpose vehicles) whose securities are admitted to trading on a regulated market or on a multi-lateral trading facility will be required to prepare and include a Corporate Governance Statement in the annual (directors') report for financial year's ending on/after 18 November, 2009 (S.I. 83 of 2010); and

- the requirement to include a description of the main features of the internal control and risk management systems of the company in relation to the financial reporting process and the auditor's opinion on same must be included for financial year's beginning on/after 18 November, 2009 (S.I. 83 of 2010).

S.I. 450 of 2009 also introduced requirements to disclose off-balance sheet transactions and related party transactions:

- Under regulation 6[12], where an Irish company engages in a business transaction that is not included in its balance sheet, it must disclose the nature and business purpose of that transaction in the notes to the accounts of the company in so far as the disclosure is necessary for assessing the true financial position of the company; and

[11] Market Abuse Rules: Rules issued under section 34 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005. Central Bank of Ireland, March 2006.
[12] Amending paragraph 36 of Part IV of the Schedule to the Companies (Amendment) Act 1986.

- Also under regulation 6[13], if an Irish company enters into a material transaction with a related party which has not been concluded under normal market conditions, particulars of that transaction are required to be outlined in the notes to the accounts of the company.

E. Sanctions for breaches of directors' duties

(i) Restrictions and disqualification of directors

There are two forms of sanction that may be imposed upon company directors: restriction and disqualification, which are laid down in Part VII of the 1990 Act.

Restriction of directors

Section 150 of the 1990 Act[14] provides for the restriction of a director of a company in liquidation unless the director proves to the satisfaction of the court that he acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no reason why it would be just and equitable that he should be subject to a restriction. Section 150 is mandatory in its terms: unless satisfied otherwise, the court shall impose a restriction.

In the course of a winding-up, the liquidator is obliged to apply to the High Court for a restriction order within six months of his appointment unless relieved by the ODCE of the duty to do so under section 56(2) of the 2001 Act. Any person who acted as a director of an insolvent company within twelve months of the commencement of the winding up may be restricted from acting as director or secretary or being in any way concerned in the management of a company for a period of up to 5 years.

Section 150(3) of the 1990 Act also outlines certain requirements which must be complied with before such a restricted person could be appointed as director or take part in the promotion or formation of any company, namely:

(a) The nominal value of the allotted share capital of the company shall:-

(i) in the case of a public limited company, be at least €317,435; and
(ii) in the case of any other company, be at least €63,487;

[13] (See 11 above).
[14] As amended by section 41 of the Company Law Enforcement Act, 2001 and section 11 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

(b) each allotted share to an aggregate amount not less than the amount referred to in subparagraph (i) or (ii) of paragraph (a), as the case may be, shall be fully paid up, including the whole of any premium thereon; and

(c) each such allotted share and the whole of any premium thereon shall be paid for in cash.

As noted, the court is not obliged to make the restriction order if satisfied that the officer has acted honestly and responsibly and there is no other reason why it would be just to make the order. In the recent case of *In the matter of Tralee Beef and Lamb Ltd (in liquidation) Kavanagh -v- Delaney & ors*[15], the appellant successfully appealed his restriction. Hardiman J. in his judgement criticised the section 150 regime for requiring the liquidator to seek relief from the ODCE of the obligation to bring section 150 restriction proceedings. The ODCE was also criticised for refusing relief without explanation.

Disqualification of directors

Section 160 of the 1990 Act[16] provides for automatic disqualification from acting as a director, auditor, other officer, receiver, liquidator or examiner, for a period of five years or such other period as the court may order where the person has been convicted of an offence involving fraud or dishonesty or an offence involving a company. Such application may be made by a prosecutor in criminal proceedings. Initially section 160 was only applicable where convicted of indictable offence (upon application by DPP) but the ODCE can now also bring proceedings for the disqualification of a director.[17]

Section 160(2)(h) of the 1990 Act provides that a director of a company may also be disqualified if the company has its name struck off the register for failing to file its annual returns after receiving proper notice of such failure. However, a court will not make a disqualification order against a director who can evidence that the company had no liabilities (whether actual, contingent or prospective) at the time its name was struck off the register, or that any such liabilities that existed at that time were discharged before the date of the application for disqualification. In considering the penalty to be imposed under section 160,

[15] [2008] IESC1.

[16] As amended by section 42 of the Company Law Enforcement Act, 2001 and section 11 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

[17] In addition directors should be aware that in England, the Companies Act 2006 allows the Secretary of State to bring in new regulations that would have the effect of extending the restriction on acting as a director (or being otherwise involved in a company), and the provisions regarding personal liability when in breach, to persons who are subject to legal restrictions in some other country based on criteria of unfitness or misconduct.

a court may as an alternative where a disqualification order is not justified, restrict a director under section 150 of the 1990 Act.

A director may also be disqualified if a person is disqualified under the laws of another state and the court is satisfied that if the conduct of the person or the circumstances otherwise affecting him that gave rise to the foreign disqualification order had occurred in the state, it would have been proper to make a disqualification order against him. A director must not act on the instructions of a director to whom he knows to be disqualified.

The Director of Corporate Enforcement has recently shown a willingness to bring applications for the disqualification of directors under section 160(2)(h). Recent court decisions have indicated that the failure to make annual returns is to be regarded as more than a just a technical breach of directors' obligations under company law, and the courts have proceeded to disqualify directors accordingly. The practical implication for directors is that the claims of creditors must be addressed and companies must be terminated and disposed of properly. Otherwise, directors face the possibility of being disqualified.

Section 11 of the Investment Funds Companies and Miscellaneous Provisions Act, 2006 amends sections 150 and 160 of the Companies Act, 1990, namely, the provisions relating to the costs of High Court proceedings in relation to applications for the restriction and/or disqualification of directors or other persons. In both cases, it gives the High Court discretion to order that the directors against whom the restriction or disqualification order is made shall bear not only the costs of the application but also the investigative and associated evidential costs and expenses incurred by the applicant.

(ii) Removal of directors

The directors of a company may be removed at any time by ordinary resolution of the company in general meeting. This power is given by section 182 of the 1963 Act and cannot be removed or abridged by the articles of association. It is subject to one qualification in Ireland: where a director is appointed for life by the articles of association, such a director can only be removed if the correct procedure for the alteration of the memorandum or articles is followed. Extended notice of at least 28 days must be given of any resolution to remove a director under the section and notice of the resolution must be sent to the director concerned, who is then entitled to be heard on the resolution at the meeting. This is so, whether or not he is a member of the company. He is also entitled to make representations in writing to the company when he receives a notice of such resolution. Provided that they are received in time, the company must state that such representations have been received in any notice of the resolution given to members and must send a copy of them to every member to whom notice of the meeting is sent. If they are not received in time, or if the company fails to send them to members, the director is entitled to require them to be read

out at the meeting. However, if the court is satisfied that the right to make representations is being abused to secure 'needless publicity for defamatory matter, they need not be communicated to shareholders'.[18]

A director whom it is sought to remove from office may also be employed by the company. His removal from office does not mean that his employment with the company is automatically terminated. This is of particular importance in the case of a managing director, who will very often have a written service contract with the company (see section C "Contractual Duties" at page 12 above).

The dismissal of a director who is an employee of the company may also afford him rights under the Unfair Dismissals Act, 1977. This provides for the payment of compensation to an employee who is unfairly dismissed and for his reinstatement in his position if a tribunal adjudicating on his complaint considers that appropriate. It also provides for his re-engagement where that is appropriate, in an equivalent position.

It should also be noted that there is nothing to prevent the articles from conferring on the board of directors the power to remove one or more of their number from office. This is made clear by section 182(7) of the 1963 Act which provides that nothing in the section is to be taken as derogating from any power to remove a director which exists independently of section 182.

F. To whom are directors' duties owed?

Whilst the directors duties are owed in the first instance to the company this principle has been extended over time by statute to include shareholders, creditors and employees of the company which provisions are outlined briefly below.

1. *The company*

Directors' duties are primarily owed to the company itself as a director once appointed, is an agent of the company. Accordingly where an action is being brought against the directors for breach of their duties the proper plaintiff is in fact the company itself.

2. *The shareholders*

The provisions of section 205 of the 1963 Act protect minority interests in a company. Any member of a company who feels that the affairs of the company are being conducted or that

[18] section 161(4) Companies Act, 1963.

the powers of directors are being exercised in a manner oppressive to him/her, may apply to the court for an order under this section.

3. *Creditors*

Section 297 of the 1963 Act makes provision for the imposition of personal liability for all or any part of the debts (as the court may direct) of a company if in the course of its winding up it is established that a director was knowingly a party to the carrying on of the business in a reckless manner or with intent to defraud creditors or for any other fraudulent purpose.

4. *Employees*

Section 52 of the 1990 Act provides that the directors of a company shall have regard to the interests of the company's employees generally as well as the interests of its members in the discharge of their functions. Section 52(2) provides that such rights shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

G. The board of directors

The board of directors of a company has collective responsibility for managing and directing the company's affairs. A distinction should be made however, between those duties which may only be discharged by the board such as, for example exercising the borrowing powers of the company and the day to day management of the company which is carried out by the management and employees of the company.

While the directors are authorised under Regulation 105 of Table A Part I to delegate any of their powers to committees any such delegation is subject to any regulations that may be imposed on the committee by the board on the establishment thereof. Regulations 105 to 108 inclusive of Table A, Part I of the 1963 Act govern the operation of committees.

Committees of the board

It is important when establishing a committee that its powers and responsibilities are clearly set out in the terms of reference of the committee for the purpose of clarity and transparency and to avoid confusion at a later date. It is also important to specify the extent of the power of the committee to obtain independent advice in relation to the matters under discussion.

It should be noted that committees, whilst they have power to make recommendations to the board, do not actually have any decision making power which should rest with the board as a whole.

Audit committee

Section 42 of the Companies (Auditing & Accounting) Act, 2003 (the "**2003 Act**") requires the board of directors of certain companies to establish and adequately resource an audit committee.[19] It is important to note that section 42 of the 2003 Act has not yet been commenced. This provision will apply to certain public limited companies and private companies limited by shares exceeding a €25 million balance sheet total and a €50 million turnover in both of the previous two financial years. Qualifying private companies must establish an audit committee or can decide not to do so, but if they decide not to so, they must provide reasons for such a decision in the director's report.

Section 42 of the 2003 Act provides for certain duties and responsibilities to be carried out by the audit committee and include but are not limited to the following requirements:

(i) review the accounts, determine if they give a true and fair view and recommend their approval (or not);
(ii) advise the board on the auditors appointment, monitor its work and independence and recommend award of non-audit work;
(iii) be satisfied as to the internal audit arrangements/resources;
(iv) report on the committee's work in the director's report.

In addition to the requirements of section 42 of the 2003 Act, the European Communities (Statutory Audits)(Directive 2006/43/EC) Regulations, 2010 (the "**Statutory Audits Regulations**") impose a statutory requirement on public-interest entities[20] to establish an audit committee. This audit committee must include no less than two non-executive directors who possess the requisite degree of independence so as to enable them to contribute effectively to the committee's functions. At least one of the independent non-executive directors must have a competence in accounting or auditing. The responsibilities of the audit committee include the monitoring of the financial reporting process, the effectiveness of the entity's systems of internal control, internal audit and risk management, the statutory audit and the independence of the statutory auditor or audit firm.

It should be noted that subsidiaries of undertakings which comply with the Statutory Audits Regulations, UCITS funds and most EU non-UCITS funds are exempt from the requirement to have an audit committee.

[19] "The Combined Code on Corporate Governance", 2003 (revised in 2006), UK Financial Reporting Council recommends the establishment of an audit committee, remuneration committee and nomination committee in certain companies. Determining the remuneration of executive management is a key function of the Board and a separate remuneration committee is often established to consider the issue. The purpose of a nomination committee is to identify and recommend new directors. Although the recommendations are non-binding in Ireland, they are endorsed by the ODCE and provide guidance on best practice with respect to audit committees.

[20] Which include credit institutions, insurance undertakings and certain listed companies.

H. The chairman

Regulation 104 of Table A, Part I permits the board of directors to appoint a chairman. A chairman so appointed by the board will be responsible for managing and conducting both meetings of the board and of the shareholders or members of the company.

I. Categories of directors

A number of different terms are used to describe directors of companies which are as follows:

(i) Executive and independent non-executive directors

The distinction between executive and non-executive directors does not have its basis in company law but in corporate governance best practice. The term executive director generally relates to a director who is actively involved in the management of a company and who is also typically an employee of the company. Such person may also hold another office such as the chief executive officer or managing director of the company in question. Non-executive directors (who should be independent) are not employed by the company but because of their expertise in a particular business area they are appointed to the board. Generally speaking, they make an important contribution to the board given their experience and independence. Their role includes contributions in areas such as the development of strategy and monitoring management, performance and activity. There is no requirement to appoint independent non-executive directors under Company Law, however, quoted companies are frequently required by the rules of the relevant stock exchange to have a certain number of independent non-executive directors appointed to the board. In addition, the Central Bank generally requires regulated entities to appoint an independent non-executive director and for certain regulated entities such as collective investment schemes, insurance undertakings and credit institutions this is a requirement under the Corporate Governance Code applicable to that type of regulated entity (see Appendix 2 for more details). Once appointed, independent non-executive directors have the same powers and are subject to the same obligations as executive directors. In this regard it is important to note that there is no distinction between executive and non-executive directors in relation to their liability.

(ii) Alternate directors

Regulation 9 of Table A, Part II provides for the appointment of alternate or substitute directors. An alternate director, while he holds office shall be entitled to receive notice of board meetings and to attend and vote at such meetings in place of the director by whom he/she was appointed. For the purposes of section 42 of the Companies (Amendment) (No.

2) Act, 1999, as amended, an alternate director will not satisfy the requirement that at least one director be resident in a Member State of the EEA. An alternate director shall not be entitled to remuneration from the company but can be remunerated from the remuneration of the director appointing him/her.

To be effective any such appointment under this regulation must be by notice in writing given by the director who wishes to appoint the alternate to the company secretary. Any appointment of an alternate director may be revoked at any time by the person appointing him/her or by a majority of the other directors or by the company in a general meeting.

Revocation of such an appointment must be notified in writing by the director who appointed the alternate to the company secretary.

(iii) Shadow directors

A shadow director is defined in section 27 of the 1990 Act as "a person in accordance with whose direction or instruction the directors are accustomed to act". Such a person is not formally appointed as a director but may nonetheless be deemed to be a director and in fact may be subject to the provisions of the Companies Acts as if he or she was formally appointed as a director.

The definition of shadow director is not deemed to include professional advisers such as auditors or legal advisers to the company who are expressly excluded therefrom.

(iv) Nominee directors

A nominee director is usually appointed to the board by a particular shareholder or group of shareholders for example such as a venture capital company to protect their interests and their investment in the company. Such a director once appointed by the company is obliged to act in the best interests of the company notwithstanding the origin of its appointment as a nominee to represent the interests of a particular shareholder or group of shareholders. Nominee directors have the same duties and responsibilities as all other directors to the company, its shareholders, creditors and/or employees as the case may be.

(v) *De-facto directors*

Section 223 of the Companies Bill, 2012 introduces the concept of a "de-facto director" as being "a person who occupies the position of director but who has not been formally appointed director". Again professional advisers are expressly excluded from this concept.

J. The company secretary

Every company is obliged by law to appoint a company secretary and unlike directors a body corporate can act as company secretary. A director can also act as company secretary as provided by section 175 of the 1963 Act. Where an act is required to be performed by a director and the secretary of a company it cannot be done by the same person acting both as director and secretary at the same time, for example, where a document is required to be executed under seal by the company, two signatures are required to witness the affixing of the corporate seal. The signatures can either be two directors or one director and the Company Secretary but not by one person acting as both company secretary and director together.

K. Auditors

Pursuant to the provisions of section 160 of the 1963 Act, every company is obliged to appoint an auditor whose appointment, re-appointment and remuneration must be approved at the annual general meeting ("**AGM**") of the company each year.

A company may, for good corporate governance or other internal reasons, appoint an audit committee of the board, however, this is not sufficient to satisfy the requirements of section 160. The auditor must be independent and properly qualified by one of the recognised accountancy bodies. The Companies (Auditing and Accounting) Act, 2003 contains many new provisions relating to auditors and their duties in respect of companies in the new increased corporate governance environment including the establishment of the Irish Auditing and Accounting Supervisory Authority.

L. Appointment of directors

Directors may be appointed from time to time by the board provided that the number of directors so appointed does not exceed the maximum number (if any) specified in the articles of association of the company (the "**Articles**"). The appointment of any such director must be approved by the company at the next Annual General Meeting.

In the case of a company that is deemed by the Central Bank to be a regulated financial service provider then the role of a director (executive, non-executive and chairman) is classed as a Pre-Approval Controlled Function and the appointment is subject to the Central Bank's Fitness and Probity regime as set out in:-

i) Part 3 of the Central Bank Reform Act, 2010;
ii) Central Bank Reform Act 2010 (sections 20 and 22) Regulations, 2011;
iii) the Central Bank Reform Act 2010 (sections 20 and 22)(Amendment) Regulations, 2011;

iv) Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act, 2010); and
v) Guidance issued by the Central Bank.

A regulated financial service provider shall not permit a person to perform this function unless it is satisfied on reasonable grounds that the person has agreed to abide by and continues to comply with the Standards of Fitness and Probity. In order to comply, a director is required to be:-

i) Competent and capable;
ii) Honest, ethical and to act with integrity; and
iii) Financially sound.

Directors must provide information that is candid and truthful and shall be full, fair and accurate in all respects and not misleading to the best of his or her knowledge.[21]

Where relevant, directors must also ensure that they are also compliant with the Minimum Competency Code[22] issued by the Central Bank.

M. Remuneration of directors

The directors are entitled to receive fees for acting as such. The remuneration of the directors however must be approved by the company in a general meeting. In addition to remuneration the directors are entitled to be repaid their out of pocket expenses such as travelling, hotel and other expenses provided that they are reasonable. Additionally, many companies now require the expenses to be properly vouched.

N. Retirement of directors

The standard articles of association as contained in the Companies Act, 1963 provide that one third of directors, apart from the managing director, retire each year at the AGM and may, if they wish, offer themselves for re-election. However the company is not obliged to adopt the retirement by rotation provisions and the majority of companies have amended the standard articles to provide that these provisions will not apply. Regulations 92 to 96 of Table A, Part I of the 1963 Act contain the provisions pertaining to the retirement of directors.

[21] Section 2.3 of the Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act, 2010)
[22] Minimum Competency Code 2011 issued pursuant to section 50 of the Central Bank Reform Act, 2010

O. Meetings of directors

Frequency of meetings

There is no specific legal requirement specifying the frequency of directors meetings. Regulation 101, Table A, Part 1 of the 1963 Act, provides that meetings must be held "as often as the directors think fit". Good corporate governance would dictate that meetings should be held quarterly and most companies would operate on this basis.

Notice

Failure to notify all of the directors in a timely manner of a board meeting may invalidate the meeting and any resolutions subsequently passed thereat. As in the case of frequency of meetings, the Acts do not specify precisely what period of notice must be given. Clearly, reasonable notice must be given to allow the directors an opportunity to attend the meeting and to prepare properly for it. What is reasonable may vary depending on the circumstances of each case.

It should be noted also, however, that where the articles of association of the company permit, board meetings may be held by telephone or video conference link.

Agenda

Although there is no specific legal requirement to provide an agenda, it is considered good corporate governance to do so. It is also essential that the directors are notified of all of the business to be transacted at the meeting as failure to give proper notice of any business may result in any resolutions pertaining to that matter subsequently being declared invalid.

It is also useful for the directors to be fully informed of the business proposed to be discussed at the meeting to enable the directors to give sufficient consideration to such matters.

Quorum

The quorum for a board meeting is a minimum of two directors unless some other figure is specified in the articles of association of the company.

Regulation 103 of Table A, Part 1 contains an exception permitting directors who have been reduced to a number below the specified quorum to meet for the purposes of increasing the number of directors or convening a general meeting of the company for such purpose.

It should be noted that any director who has an interest in any contract to be entered into with the company must declare his interest pursuant to section 194 of the 1963 Act and cannot vote or be counted in the quorum for the resolution in respect of such contract.

Resolutions

Although the Acts do not expressly provide as such, decisions of directors are usually referred to as resolutions. There are no specific provisions in the Acts dealing with the form or content of board resolutions.

Table A provides that decisions of directors are made by a majority of votes and where there is an equality of votes the chairman (as discussed in paragraph H above) of the company (or if none, the chairman of the meeting for the time being) shall have the second or casting vote.

Section 145 of the 1963 Act provides that minutes must be kept of all general meetings including both annual general meetings and extraordinary general meetings of the company, board meetings and the meetings of any committees appointed by the board. Any minutes purporting to be signed by the chairman of the meeting are deemed to be prima facie evidence of the proceedings at that meeting. Failure to comply with the provisions of this section and to maintain minutes is an offence and every officer of the company who is found to be in default shall be liable to a fine not exceeding €1904.61.

P. Written resolutions

Regulation 109 of Table A, Part 1 provides that resolutions of the board may be passed in writing. It is important when including such a provision in the Articles to further provide that the written resolution may consist of several counterparts which means that the directors can each sign a separate resolution, otherwise they would all be required to sign on the same page.

The original written resolution should also be kept in the minute book of the company as it is a valid record of the decision taken by the directors.

Annual general meeting

Every company is required to hold its first annual general meeting within 18 months from the date of its incorporation and to let not more than 15 months elapse between each annual general meeting thereafter.

The following business must be transacted at each AGM:-

1. To review the notice of the AGM;

2. To adopt the financial statements of the company for the year end;

3. To re-elect the directors (if required);

4. To approve the remuneration of the directors;

5. To re-appoint the auditors of the company;

6. To approve the remuneration of the auditors; and

7. To declare a dividend (if any).

All other business transacted at an AGM shall be deemed to be special business.

Extraordinary general meeting

All business that is transacted at an Extraordinary General Meeting ("**EGM**") of the company shall be deemed to be special business.

21 days' notice in writing of the AGM is required and is also required for an EGM at which it is proposed to pass a special resolution.

As outlined previously above, minutes of all meetings must be taken and kept in the minute book of the company. Minutes signed by the chairman of a meeting shall be prima facie evidence of the business transacted at the relevant meeting.

Q. The ODCE

The ODCE plays an important role in ensuring compliance with company law by investigating and assessing alleged breaches of company law and, in the event that it is determined that a breach of company law has taken place, taking appropriate actions against the company or the responsible company officers. These actions may involve taking proceeding summarily, or on indictment against the responsible party.

The recent Companies (Amendment) Act, 2009 has extended the powers of the Director of Corporate Enforcement by increasing the power of search and seizure granted under section 20 of the Companies Act, 1990[23]. The ODCE now has the power to remove paper and electronic

[23] section 5 of the Companies (Amendment) Act, 2009.

information from premises being searched for subsequent examination elsewhere in order to determine their relevance to matters under investigation, notwithstanding the fact that the information may form part of any non-material information. The OCDE is also permitted to remove information which may be protected by legal professional privilege provided the information can be kept confidential until such time as a determination as to its status can be made by the court[24].

[24] section 23 (1B) of the Companies Act, 1990 (as amended).

Appendix 1: The Companies Bill 2012

The Minister for Jobs, Enterprise and Innovation, Richard Bruton published the Companies Bill, 2012 (the "**Bill**") on 21 December 2012. The Bill aims to reduce the costs associated with incorporating companies in Ireland and to reduce certain administrative red tape with which companies in Ireland must currently comply. It also proposes to make company law obligations easier to understand. The Bill, which is issued in 2 volumes, proposes to consolidate the existing 16 Companies Acts, which date from 1963 to 2012, into a single Act.

Volume 1 will govern the private company limited by shares which account for over 90% of the companies in the State. Volume 2 will govern other corporate entities including Public Limited Companies, Unlimited Companies and a new type of company the Designated Activity Companies ("DACs") amongst other corporate forms.

The following significant reforms of Irish Company Law are proposed:

- the private company limited by shares will be the model company under the legislation (rather than the public company, as is currently the case);

- currently, a private company limited by shares must have two directors. The Bill provides that a private company limited by shares will be permitted to have only one director but must have a separate company secretary;

- a single document constitution is envisaged replacing the current requirement for a memorandum and articles of association;

- the abolition of the doctrine of "ultra vires" which operates to render a contract, purportedly entered into by a company, void and unenforceable to the extent that it is not contemplated in the company's memorandum of association. The private company limited by shares will be given the contractual capacity of a natural person;

- the codification of directors' fiduciary duties and inclusion of a non-exhaustive list of fiduciary duties which a director owes to a company. e.g. the requirement to act in good faith, to avoid conflicts of interest etc; and

- a private company limited by shares may dispense with the requirement to hold an annual general meeting where the members unanimously agree to do so. The members will also be permitted to pass a majority written resolution.

Other proposed changes include:

- simplification and removal of anomalies pertaining to the various modes of winding up companies and the appointment of liquidators, examiners and receivers. New qualification requirements will be introduced for liquidators and mandatory indemnity insurance is proposed;

- "summary approval procedures" which will allow companies to carry out certain activities by means of a directors' declaration and a shareholders' resolution for those activities which under the current law would require High Court approval (for example, certain transactions with directors, capital reductions, and solvent windings up);

- new procedures regarding mergers and divisions;

- implementing changes to section 45 of the Companies (Auditing and Accounting Act), 2003 which has not as yet come into effect. Directors of companies, unless otherwise exempted, will be required to provide a compliance statement and a related statement, the latter of which must confirm that there is material compliance with the company's relevant obligations which will extend only to indictable offences under the Companies Acts and Irish tax law. The previous provisions of section 45 were unduly onerous and will be replaced with a less prescriptive approach as detailed in the Companies Bill.

- offences, subject to a small number of exceptions, will be categorised into a more streamlined four tier scheme.

While the Government has indicated that it will prioritise the progress of this Bill through the Oireachtas, it is unlikely to be enacted before the end of 2013 due to its size and the fact that it is a reforming Bill.

Appendix 2: Corporate Governance Code for Credit Institutions and Insurance Undertakings

Introduction

The Central Bank of Ireland published its "Corporate Governance Code for Credit Institutions and Insurance Undertakings (the "Code") on 8 November 2010. The Code took effect on 1 January 2011 but institutions had until 31 December 2011 to comply with the Code where changes to board membership were necessitated. The Code requires an institution to submit an annual compliance statement to the Central Bank. It is also important to note that unlike other corporate governance codes, the Code is mandatory in nature. The Central Bank intends to monitor adherence to the Code through its ongoing supervision of institutions. The Central Bank also published FAQ's in May 2011 to accompany the Code. The FAQ's provide that if a conflict arises between the Code and another corporate governance obligation or standard, the stricter of the obligations or standards should be met so as to ensure compliance with both sets of obligations.

A contravention of the Code exposes an institution to certain penalties including sanction under the Administrative Sanctions framework or criminal prosecution. It may also result in the Central Bank refusing to appoint proposed directors or suspension, removal or prohibition of an individual carrying out a controlled function under the Central Bank Reform Act 2010.

The Code imposes duties on directors of certain types of companies. These companies are:-

- Banks licensed under Section 9 of the Central Bank Act 1971;
- Building societies authorised under the Building Societies Act 1989;
- Credit institutions registered as a designated credit institution under the Asset Covered Securities Act 2001;
- An insurance undertaking holding an authorisation within the meaning of paragraph (a) of the definition of 'authorisation' in Article 2(1) of the EC (Non-Life Insurance) Framework Regulations 1994 or Article 2(1) of the EC (Life Assurance) Framework Regulations 1994; and
- Reinsurance undertakings as defined in Article 3 of the European Communities (Reinsurance) Regulations 2006.

The Code adopts a two-tiered approach whereby it imposes minimum core standards on all credit institutions and additional requirements upon entities which are designated as "major institutions" by the Central Bank.

Composition of the Board

The Code provides that the board is collectively responsible for corporate governance within an institution at all times and no one individual may have unfettered powers of decision.

Any director who has a material concern about the overall corporate governance of an institution shall report the concern without delay to the board in the first instance and if this concern is not satisfactorily addressed by the board within 5 business days to the Central Bank advising of the background to the concern and any proposed remedial action.

All institutions subject to the Code must maintain a board of directors comprising of at least five directors with a majority of independent-non executive directors (this may include the Chairman). However in response to pressure from industry which was concerned about the international competitive impact on Irish subsidiaries of foreign credit institutions and insurance undertakings, the Code provides that in the case of subsidiaries of groups the majority of the board may be group non-executive directors, provided that the subsidiary shall have at least two independent non executive directors.

Availability of Directors

The directors must attend each board meeting unless they are unable to attend due to circumstances outside their control e.g. illness. The Code stipulates that directors would be expected to attend the majority of meeting physically but recognises that this may not always be possible in which case videoconferencing or teleconferencing may be permissible on occasion.

The Central Bank requires that each director shall have sufficient time to devote to the role of director and associated responsibilities. Furthermore the Code provides that an institution shall ensure that a majority of its directors are reasonably available to the Central Bank at short notice, if required, however no guidance is provided as to what is meant by “at short notice”. In this regard the Central Bank imposes a limit on the number of directorships which an individual may hold. These limits do not apply to other directorships within a financial services group, i.e. where all the companies within the group are credit institutions or insurance undertakings, in which case all directorships shall be counted as one. The group exemption is not automatic for non-financial directorships.

An individual may not hold more than five directorships of credit institutions and insurance undertakings (for the director of a major institution the limit is three) and may not hold more than eight directorships in undertakings other than these (for a major institution the limit is five), except with the prior approval of the Central Bank.

In applying these limits the Central Bank shall exclude directorships held in the public interest on a voluntary and pro bono basis provided that such directorships shall not interfere with the director’s ability to properly fulfil his or her role and functions as a director of a financial institution.

Board Membership

Institutions shall review board membership at least once every three years and they shall formally review the membership of the board of any person who is a member for nine years or more. The board shall document the rationale for the continuance of any director who has been on the board for nine years or more and advice the Central Bank in writing.

Chairman

Every board subject to the Code must appoint a Chairman who is responsible for leading the board. The Chairman must have relevant financial services expertise, qualifications and background or be required to undertake relevant and timely comprehensive training.

The Chairman must be an independent non-executive director, except in the case of a subsidiary where the Chairman may be a group director and shall be proposed for election or reappointment on an annual basis.

The role of Chairman and CEO shall be separate. An individual who has been the CEO, executive director or member of senior management of an institution during the previous 5 years shall not advance to the role of Chairman of that institution.

The Central Bank must give its prior approval if the Chairman takes on any other directorships (other than within the group). Furthermore the Chairman shall not hold the position of Chairman or CEO of a credit institution or insurance undertaking for more than one institution at any one time. The FAQ's provide that while the Code does not explicitly prohibit a Chairman or CEO from holding a deputy Chairman or CEO position in another institution, it would usually be inappropriate to hold both positions as circumstances may arise where an individual may end up chairing two boards or being the Chairman of one and the CEO of another.

Chief Executive Officer

The Chief Executive Officer is the top executive responsible for the institution with ultimate responsibility for the institution's operations, compliance and performance and serves as the main link between the board and the executive. The Chief Executive Officer must have relevant financial services expertise, qualifications and background or be required to undertake relevant and timely comprehensive training.

Independent Non-Executive Directors

The independent non-executive directors shall comprise individuals with relevant skills, experience and knowledge (such as accounting auditing and risk management knowledge) who shall provide an

independent challenge to the executive directors of the board. The board must satisfy itself with a proposed director's independence.

The Code provides that the following shall be considered when determining if a director is independent:-

- Any financial or other obligations the individual may have to the financial institution or its directors;
- Past employment by the institution;
- Past provision of professional services to the financial institution;
- Whether the individual is or represents a significant shareholder;
- Previous terms as an independent non-executive director of the institution;
- Additional remuneration received from the institution; or
- Any close business or personal relationships with any of the company's directors or senior employees.

Non-Executive and Executive Directors

The role of the executive directors is to propose strategies to the board and following board scrutiny, to execute the agreed strategies to the highest possible standards.

A non-executive director is defined as "*A director without executive management responsibilities for the institution but who may have executive management responsibilities assigned to him or her within the Group".* The role of the non-executive directors, under the Chairman's leadership is;

- Ensuring an effective executive team is in place;
- Constructively challenging strategies proposed by the executive team;
- Participation in the board's decision making-process;
- Participation on board committees;
- Oversight of the executive team.

Role of the Board

The board of each institution is responsible for:-

- The effective, prudent and ethical oversight of the entity;
- Setting the business strategy for the institution; and
- Ensuring that risk and compliance are properly managed in the institution.

The board shall formally review its overall performance and that of individual directors, relative to the board's objectives, at least annually. The FAQ's provide that the factors that should be taken into account in carrying out these reviews should incorporate attendance, level of contribution, expertise

relative to the institution's needs/strategy, independence, conflicts of interest and compliance with the Code obligations.

The board of directors is responsible for establishing a documented risk appetite for the institution and for ensuring that the risk management framework and internal controls reflect the risk appetite of the institution. The risk appetite must allow for tracking of performance and for compliance with agreed strategy and shall be subject to annual review by the board. The board shall ensure that the institution's remuneration practices do not promote excessive risk taking.

The board shall have;

- Necessary knowledge, skills, fitness, probity and integrity;
- A full understanding of the nature of the institution's business;
- A full understanding of their individual and collective responsibilities; and
- An understanding of the institution's financial statements.

Appointments

The board shall have certain duties relating to the appointment of individuals' within the organisation.

The board shall be responsible for appointing the CEO and senior management with appropriate integrity and adequate knowledge, experience, skill and competence for their roles. It shall also be responsible for endorsing the appointment of people who may have a material impact on the risk profile of the institution and monitoring on an ongoing basis their appropriateness for the role. The board is also responsible for the appointment of non-executive directors or where appropriate, identifying and proposing the appointment of non-executive directors to shareholders.

The board shall define and document the responsibilities of the board of directors, board committees and senior management and shall ensure that no single person has unfettered control of the business.

Board Meetings

The board shall meet as often as is necessary in order to discharge its responsibilities effectively and prudently and in any event at least quarterly (eleven times in a calendar year in the case of major institutions). A detailed agenda of items for consideration at each board meeting together with minutes of the previous board meeting shall be circulated in advance of the meeting. Detailed minutes of each meeting should be prepared and document any conflicts of interest which arise.

Committees of the Board

The board may delegate to sub-committees or management to act on its behalf but where it does so, it shall have appropriate measures in place to monitor the exercise of delegated functions and the board can not abrogate its responsibilities for functions so delegated. The institution must establish an audit committee and a risk committee subject to the exceptions below. Where the institution is considered by the Central Bank to be a major institution in addition to any audit committee and a risk committee it shall establish a nominations committee and a remuneration committee.

Committees shall report regularly to the board and the minutes of all sub-committees shall be circulated to the board in advance of board meetings.

Audit Committee

The board must establish a separate Audit Committee. An exemption applies where the institution is part of a wider group which has a Group Audit Committee, and in that case an institution may rely on that committee provided that the board is satisfied that it is appropriate to the specific circumstances of the institution.

The audit committee shall be composed of non-executive directors, the majority being independent and neither the Chairman of the board nor the CEO may be a member. While the CEO or the Chairman of the board may be invited to attend meetings of the Audit committee, this must be managed to ensure that the committee's independence is maintained. The Chairman of the Audit Committee shall be an independent non-executive director.

Risk Committee

The board must establish a Risk Committee, save where there is a Group Risk Committee or where the Central Bank gives its prior approval for the board to carry out the functions itself which would otherwise be delegated to a Risk Committee. The Risk Committee shall oversee the risk management function.

Conclusion

Directors of firms that are subject to the Code must be mindful of these additional obligations which the Code imposes on them.

Date: **March 2013**

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Cayman Islands
Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022
Fax: +1 345 945 0042

Hong Kong
604, 6/F, Printing House
6 Duddell Street
Central
Hong Kong
Tel: +852 35210352

New York
245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Mary Canning
e-mail: mary.canning@dilloneustace.ie
Tel ; +353 1 673 1759
Fax: + 353 1 667 0042

Breeda Cunningham
e-mail: breeda.cunningham@dilloneustace.ie
Tel : +353 1 673 1846
Fax: + 353 1 667 0042

Michele Barker
e-mail: michele.barker@dilloneustace.ie
Tel : +353 1 673 1886
Fax: + 353 1 667 0042

Matthew Ryan
e-mail: matthew.ryan@dilloneustace.ie
Tel : + 353 1 673 1716
Fax: + 353 1 667 0042

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO