Institute of Directors Ireland

McCann FitzGerald

A Handbook for Directors of Regulated Financial Services Companies in Ireland

Fourth edition

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About the Institute of Directors Ireland

The Institute of Directors (IoD) Ireland is the leading membership body for directors and business leaders. Our purpose is to instill stakeholder trust and confidence in organisations by educating, informing, and supporting directors and business leaders to lead successfully and sustainably. Our vision is for Ireland to be an exemplar of corporate governance.

About McCann FitzGerald LLP

With over 600 people, including over 400 lawyers and professional staff, McCann FitzGerald LLP is one of Ireland's premier law firms. McCann FitzGerald LLP is recognised as being a market leader in a range of practice areas and such pre-eminence is endorsed by clients and market commentators alike.

The firm provides a full range of services, including in-depth expertise in corporate governance issues. McCann FitzGerald LLP also advises boards, directors and shareholders of listed, unlisted and public sector companies on their obligations and rights under the Corporate Governance Code, other governance regimes and related regulatory and company law requirements including investor protection committee guidelines and compliance with Stock Exchange listing and disclosure obligations. McCann FitzGerald LLP also has a depth of experience in advising on contentious shareholder/director conflict.

This publication is based on law and regulations in force as at 30 August 2022. It is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed in this publication.

1 Foreword

In many financial services firms, the role of director - critical to the success, and in some cases, to the survival of the business – has never been more onerous. Directors should lead their businesses to success, but do so within a framework of prudent and effective leadership. As importantly, directors must demonstrate a high level of professionalism and expertise in discharging their responsibilities and contributing effectively to board decision-making.

As the regulator of this sector, the Central Bank of Ireland has made it very clear that it attaches considerable importance to improving corporate governance standards including through reliance on codes of conduct and fitness and probity requirements, as well as the pursuit of an active enforcement policy. As well as dealing with business pressures which are particularly acute in the financial services sector, directors of financial services companies have the added challenge of familiarising themselves with the Central Bank's Corporate Governance Requirements.

Since the last edition of this Handbook in 2018 there have been significant changes in domestic and EU laws relating to financial services companies. In July 2022 the Corporate Enforcement Authority (CEA) was established as a standalone agency, to replace the Office of Director of Corporate Enforcement. The CEA has been given additional resources, and in due course will get additional powers, to, amongst other mandates, promote compliance with company law (through education, investigation of suspected breaches and enforcement).

Also, at a domestic level, the Central Bank of Ireland published Corporate Governance Requirements for Investment Firms and Market Operators which took effect on 1 July 2019. In July 2022, the Central Bank (Individual Accountability Framework) Bill was published. When this draft law is implemented, the responsibilities of directors in financial service companies will need to be clear and documented under the "Senior Executive Accountability Regime" or "SEAR". It is anticipated that SEAR will be phased in within different areas of regulated financial services rather than being applied to all financial services companies immediately. Under the proposed new law, financial service companies, and their directors, will be subject to new conduct standards and directors will need to take reasonable steps to ensure that their firm does not breach its obligations under financial services legislation.

Like the earlier editions, this updated Handbook sets out in clear terms the general duties imposed on all directors as well as the considerable additional burdens imposed on directors of a financial services company. It will hopefully be of some assistance in helping directors to comply with applicable legal requirements while remaining focused on the core challenge of business performance.

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2 Types of Director

Company law recognises a number of types of company director:

Registered director: a person formally appointed by the board or by the shareholders and who is registered in the Companies Registration Office as being a director of the company. A registered director can be either executive or non-executive.

De facto director: a person who performs the duties of a director even though he or she has not been appointed formally. Such a person has the same duties as a registered director.

Shadow director: a person who has not been appointed formally as a director but in accordance with whose directions or instructions the directors of a company are accustomed to act. A shadow director is subject to most – but not all – of the legal responsibilities of a registered director.

Alternate director: a director who has been appointed formally to attend a board meeting on behalf of a director of a company where the principal director is unable to attend, in the nature of a 'substitute' director. The alternate director is not an agent of the principal director and has the same rights to attend, speak and vote at the board meeting as the principal director has.

The Corporate Governance Requirements for Credit Institutions (2015) (the "Corporate Governance Requirements") issued by the Central Bank of Ireland (the "Central Bank") (and separate requirements for insurance undertakings) define the following classifications of directors for the purposes of those requirements:

Non-Executive director: a director without executive management responsibilities for the institution or, in the case of an institution that is part of a group, who may have executive management responsibilities assigned to him or her within the group (to which the bank or insurance undertaking belongs).

Group director: a group director may be an executive director, a non-executive director or an independent non-executive director of an entity within the group.

Independent non-executive director: a non-executive director who satisfies the criteria for director independence.

"Director Independence" is defined as the ability to exercise sound judgement and decision-making independent of the views of management, political interests or inappropriate outside interests. Certain criteria should be considered when determining if a director is independent.

These include:

- any financial or other obligation an individual may have to the regulated bank or insurance undertaking or its directors;
- whether the individual is or has been employed by the regulated bank or insurance undertaking or a group entity in the past and (if so) the post(s) held;
- whether the individual is providing or has provided professional services to the regulated bank or insurance undertaking in the recent past;
- whether the individual represents a significant shareholder;
- circumstances in which the individual has acted as an independent non-executive director of the regulated bank or insurance undertaking for extended periods;
- any additional remuneration received in addition to director's fees, related directorships or shareholdings in the regulated bank or insurance undertaking; and
- any close business or personal relationships with any of the regulated bank or insurance undertaking's directors or senior employees.

3 What is the required number of directors?

A private company limited by shares may have a single director[1]. Every other type of Irish company must have at least two directors who act together as a board of directors.

The Corporate Governance Requirements state that the board must be of sufficient size and expertise to oversee adequately the operations of the relevant bank or insurance undertaking.

More specifically, a bank or insurance undertaking must have a minimum of five directors unless the Central Bank has designated it as a High Impact Institution under PRISMTM (Probability Risk and Impact SystemTM) ("High Impact Institution"), in which case it must have a minimum of seven directors.

According to the Corporate Governance Requirements for Captive Insurance and Captive Reinsurance Undertakings, the board must have a minimum of three directors. This is also the required minimum under the Irish Fund's Corporate Governance Code for Collective Investment Schemes and Management Companies and under its Corporate Governance Code for Fund Service Providers.

1. See Appendix 1 for an explanation of the various types of company under the Companies Act 2014.

4 Who may be a director?

Subject to certain prohibitions, any natural person who is at least 18 years old may be a director. While there is no specific qualification required to be a director, those who hold directorships will often have significant management experience. It is also common for directors to undertake training for the role, either through participation in professional training courses or more extensive development programmes. The European Banking Authority ("EBA") and the European Securities and Markets Authority ("ESMA") have published guidance to assess the suitability of members of the management body and key function holders which applies to credit institutions and investment firms ("Joint Guidelines"). As set out in the next sections, there are also limits on the number of directorships a person may hold and certain residency requirements.

Who may not be a director?

Unlike the position in the UK, a body corporate (such as a company) may not be a director of an Irish company, although it may be its secretary.

Certain persons are prohibited from being a director. These include a person who is bankrupt, as long as his or her debts remain unpaid or until he or she is excused by a court from paying those debts. In addition, if a court finds a director guilty of serious misconduct, it may disqualify him or her from acting as a director for a certain period.

Similarly, if a court finds that a person has acted dishonestly or irresponsibly in a company that has failed to pay its debts, the court may restrict him or her, i.e. the person may serve as a director but onerous conditions are imposed on that company (such as a requirement to have an enhanced level of paid-up capital).

In the financial services sector the role of director is subject to special rules both regarding the type of person who may be a director and regarding the overall composition of the board.

A director of a company authorised and regulated by the Central Bank ("regulated company") must comply with the Central Bank's fitness and probity standards, which generally require such a person to be: (i) competent and capable; (ii) honest, ethical and to act with integrity; and (iii) financially sound. Where a person does not comply with these standards, the Central Bank will not approve his or her appointment to the position of director of a regulated company.

Moreover, if already appointed, that person may be removed from such a position and prohibited from becoming a director of a regulated company in the future. In the case of credit institutions considered to be "significant" for the purposes of certain capital requirements regulations ("Significant Institution") and credit institutions applying for authorisations, the fitness and probity assessments are carried out by the European Central Bank.

Regarding the overall composition of the board, generally the governance structure put in place should ensure that there is sufficient oversight of the activities of the regulated company taking into consideration the nature, scale and complexity of the business being undertaken.

More particularly for banks and insurance undertakings, the majority of the board must be "independent non-executive directors".

However, in the case of a bank, or an insurance undertaking that is a subsidiary of a group, the majority of the board may be "group non-executive directors", provided that in every case the subsidiary has at least two independent non-executive directors, or three in the case of a High Impact Institution. In addition, the board of a High Impact Institution must put in place a formal skills matrix to ensure that there is an appropriate skills mix across members of the board and potential new members must be assessed against that matrix during the appointment process.

For investment firms, the board must be composed of a majority of independent non-executive directors, subject to an exception for firms which are subsidiaries of groups in which case certain specified combinations of group and independent non-executive directors apply depending on the firm's PRISM Impact rating.

Captive (re)insurance undertakings are not subject to equivalent requirements.

However, in the investment funds sector, it is recommended that the board comprises a majority of non-executive directors and at least one independent non-executive director. Fund service providers must have at least one independent non-executive director.

5 Is there a limit to the overall number of directorships that a person may hold?

Subject to exceptions, a person may not hold more than 25 directorships in Irish companies: certain directorships are not included for the purpose of calculating the number of directorships held.

In addition, special rules exist for banks and insurance undertakings, including, in particular a Significant Institution and a High Impact Institution.

In general, a director must not hold more than five directorships of a bank or insurance undertaking, including credit institutions, insurance undertakings and reinsurance undertakings authorised outside the State.

A director must not hold more than eight non-financial directorships. In the case of a High Impact Institution, these limits are three and five directorships, respectively. The Central Bank must give its prior approval in each case where it is proposed that a person holds more than the permitted number of directorships.

A director of a Significant Institution may not hold more than a total of one executive directorship with two non-executive directorships, or four non-executive directorships. The Central Bank may authorise a director to hold one additional non-executive directorship.

The number of directorships held by a director of a captive (re)insurance undertaking is limited by the amount of time required to properly carry out the role and functions of a director in the captive undertaking, subject to an overall limit of 25 directorships.

In the investment funds sector, there is a rebuttable presumption that a maximum of eight non-fund directorships may be held without impacting on a director's availability to fulfil his or her role and functions as a director of a corporate collective investment scheme or management company. There is no equivalent presumption for fund service providers.

Generally, for the purpose of applying the numerical limits on directorships, directorships held in the public interest on a voluntary and pro bono basis are not taken into consideration. The limits applicable in the case of a Significant Institution only apply to directorships in organisations which pursue predominantly commercial objectives.

6 | Are directors subject to residency requirements?

Every Irish registered company must have at least one director resident in an EEA member state, failing which, an insurance bond is required or a certificate (from the Registrar of Companies) stating that the company has a sufficient economic link with Ireland.

Regulated companies must have at least one director resident in the State. In addition, under Central Bank requirements, a regulated company's "heart and mind" must be located in Ireland. Accordingly, a regulated company that has its registered office in Ireland must ensure that it has sufficient resources available to it to conduct its business and that the strategic direction, decision-making, control and accountability of the company is located in Ireland.

In the case of collective investment schemes, management companies and fund service providers, a minimum of two of the board's directors must be resident in Ireland.

7 Central Bank standards of fitness and probity

The Central Bank has published fitness and probity standards for persons performing prescribed functions within a regulated company. The prescribed functions include the role of director of a regulated company. A regulated company must not permit a person to act as a director unless satisfied on reasonable grounds that the person meets the required standards of fitness and probity. Furthermore, as the role of director is a "pre-approval controlled function" a person must not be appointed as a director of a regulated company without the Central Bank's prior approval.

The fitness and probity standards require a person who is to be appointed as a director of a regulated company:

- to be competent and capable;
- to be honest and ethical and to act with integrity;
- to be financially sound; and
- in providing information pursuant to the standards to the Central Bank or to any regulated company, to do so candidly and truthfully and in a manner that is full, fair and accurate in all respects and not misleading to the best of the person's knowledge.

More particularly, a person must:

- have the necessary qualifications, experience, competence and capacity;
- have the necessary organisational knowledge;
- not have been refused an authorisation, licence, etc. to carry on a business (in any country) or have been subject to any suspension or restriction, etc.;
- have an acceptable disciplinary record in his or her business and professional life;
- not have been convicted of any relevant criminal offence; and
- manage his or her own financial affairs in a sound and prudent manner.

As stated above, a person must not be appointed as a director of a regulated company without the Central Bank's prior approval. Before being appointed, the person will be required to complete, and submit to the Central Bank, an individual questionnaire.

In completing the individual questionnaire, the person is required to provide information on a range of matters including information relating to his or her experience, education and training, reputation and character, previous regulatory approvals, details of shareholdings in financial services firms and details of other directorships held.

It is open to the Central Bank to interview a person proposed for appointment as a director of a regulated company, especially larger regulated companies.

The Central Bank has the powers to, inter alia, suspend a person from performing the role of director of a regulated company and, ultimately, prohibit a person from performing that role. In order to prohibit a person from carrying out the role of director, the Central Bank must have reasonably formed the opinion that the person is not fit and proper to perform the role.

8 Procedure for appointing a director

The procedure for appointing a director raises two considerations:

- legal requirements; and
- recruitment issues relating to appointments at this level.

Legal requirements

A private company limited by shares may have a single director. Every other type of Irish company must have at least two directors.

The first director(s) of a company is/are appointed at the time of its registration. On registration, the person(s) named in the Form A1 will be deemed to have been appointed as the first director(s).

Subsequent appointments of directors are governed by the constitution of the company but any shareholders' agreement should also be considered. Generally, elections or re-elections of directors following retirement by rotation, and the removal of directors, are reserved to the company in general meeting.

However, typically, the constitution will provide for the board of directors itself to appoint a new director to fill a casual vacancy, or to appoint additional directors up to the maximum number permitted by the constitution. The board of directors will need to pass a resolution in the normal way ensuring that proper notice of the meeting is given, that it is quorate and the resolution is passed by a majority of the votes cast (including any qualified majority for which the company's constitution or any shareholders' agreement may provide).

Alternatively, a written resolution may be used if permitted by the company's constitution. To protect the shareholders, the Companies Act requires directors appointed by the board of directors to retire at the next AGM and to seek reappointment by the shareholders. The company's constitution may alter this default position under the Companies Act.

A director must signify his or her consent to being appointed by signing a Form B10; if the director is to hold an executive position, he or she should also be given a service agreement which is in accordance with employment law. The Form B10 must be filed at the Companies Registration Office.

A director should be reminded to acquire the share qualification (if any) specified in the company's constitution. Additionally, a director must disclose any interests in shares or debentures in the company and should be invited to give a general notice of any interests in contracts involving the company.

Under the Central Bank's fitness and probity regime, the position of director of a regulated company is a "pre-approval controlled function". This means that, in each case, before any person is appointed or elected to the position of director of a regulated company, the Central Bank must give its prior approval to his or her appointment or election.

Recruitment

Because a director plays such an important role in a company, recruitment demands a correspondingly systematic and professional approach.

Key factors to take into account are:

- the board should use a skills matrix to clearly identify the skills gap that it wishes to fill, based on its corporate objectives and priorities over the next five years. Doing so will make it easier to provide an accurate profile of the ideal candidate to be appointed;
- a search plan should be devised to target prospective candidates, in which regard it may be cost-effective to use a specialist search firm;
- a remuneration package should be offered that is both compatible with the company's financial resources and is likely to attract the calibre of candidate that the company requires.

The Corporate Governance Requirements state that it is the responsibility of the board to appoint non-executive directors or identify and propose the appointment of non-executive directors to shareholders. The board of a captive (re)insurance undertaking is similarly responsible for the appointment/identification of directors.

Some companies will establish a nomination committee as part of their overall corporate governance structure and the primary role of the committee will be to identify suitable candidates to be appointed to the board of the company. Both a High Impact Institution and a Significant Institution must establish a nomination committee.

Increasingly, gender balance and diversity on boards have become important corporate governance considerations for well-run companies. Banks and investment firms that fall within the scope of the European Union (Capital Requirements) Regulations 2014 ("capital requirements regulations") must put in place a policy promoting diversity on the management body. In addition, certain large companies[2] must include a diversity report in their corporate governance statements. In such a case, the diversity report will detail the diversity policy applied in relation to the company's board of directors with regard to matters such as age, gender or educational and professional backgrounds.

In June 2022 EU institutions reached political agreement on proposals to improve gender balance on boards of certain companies and a Directive is expected shortly, with the mandatory targets to be implemented by relevant entities by mid-2026.

2. S28OH of the Companies Act (as amended): any company that has a balance sheet total of more than €20million, a net financial turnover of more than €40 million and more than 250 employees in a given financial year.

9 The role of the board of directors

The key purpose of the board is to ensure the company's prosperity by collectively directing the company's affairs, while meeting the appropriate interests of its shareholders and other relevant stakeholders.

Increasingly environmental, social and governance (ESG) criteria, being promoted at EU level and elsewhere, are used by investors and others to evaluate the extent to which a company works on behalf of social goals that go beyond the role of a company to maximize profits on behalf of shareholders.

It is for the board to judge, on a case-by-case basis, which stakeholders it treats as relevant and which of their interests it is appropriate to meet, taking into account the law, relevant regulatory requirements and commercial considerations. In pursuing this key purpose, a board of directors faces a uniquely demanding set of responsibilities and challenges. It also faces a range of objectives that can sometimes seem contradictory.

The EBA has published Guidelines on internal governance under Directive 2013/36 which apply to banks and investment firms that fall within the scope of the capital requirements regulations. Moreover, as mentioned, the Joint Guidelines provide guidance on assessing the suitability of management body members and key function holders.

The Corporate Governance Requirements set out requirements for the composition and role of the board of banks and insurance undertakings. While it is only directly applicable to banks and insurers, the general requirements can be regarded as being

best practice and so be applied to regulated companies depending on the nature, scale and complexity of their operations.

Composition

The board must have:

- the necessary knowledge, skills,
- experience, expertise, competencies, professionalism, fitness, probity and integrity to carry out its duties;
- a full understanding of the nature of the regulated company's business, activities and related risks and their individual direct and indirect responsibilities and collective responsibility; and
- an understanding of the regulated company's financial statements.

Role

The board of a regulated company is responsible for the effective, prudent and ethical oversight of the regulated company. Among other things, it must set and oversee:

- the business strategy for the regulated company;
- the amounts, types and distribution of both internal capital and own funds and ensure that these are adequate to cover the risks of the regulated company;

- the strategy for the on-going management of material risks including liquidity risk;
- a robust and transparent organisational structure with effective communication and reporting channels;
- a remuneration framework that is in line with the regulated company's risk strategies; and
- an adequate and effective internal control framework, that includes well-functioning risk management, compliance and internal audit functions as well as an appropriate financial reporting and accounting framework.

The effective board

Within a company, the board of directors is the principal agent of risk-taking and enterprise and the principal maker of commercial and other judgements. Discharging these responsibilities means thinking not only about particular tasks but also about ways of working as a board and ensuring that individual directors are fully equipped to play their part.

Again, there are four particular areas worthy of directors' time and energy:

- determining board composition and organisation;
- clarifying board and management responsibilities;
- planning and managing board and board committee meetings; and
- developing the effectiveness of the board.

These activities are normally undertaken by the chairperson of the board, part of whose role is to manage the board's business and act as its facilitator and guide. The role of the chairperson is outlined in chapter 11.

A board should decide what it needs to do in order to achieve its overall purpose and identify any gaps or deficiencies in what it is already doing. The board should decide which tasks it must or wishes to undertake itself and which should more properly be carried out by senior management.

An effective board should be supported by up-to-date documentation, such as a director induction manual and a board handbook, providing each director with an overview of the company's business, management, governance and strategies and setting out key policies and procedures documents.

Company policies

The board of directors is responsible for adopting and ensuring the implementation of company policies, which are a core component of corporate governance.

The development and implementation of company policies (often called codes of conduct) can serve to illustrate the strategic direction and development of the company, as well as demonstrating compliance or transparency with a company's legal or regulatory obligations.

Certain company policies, such as corporate social responsibility programmes, may not stem from legislative or industry-specific requirements, but rather demonstrate that the company is a good "corporate citizen".

Company policies may be required by legislation, as in the case of health and safety requirements and the disclosure of non-financial and diversity information for certain companies (see chapter 8).

Company policies may also serve to facilitate the company's compliance with legislative provisions (for example, a competition law compliance programme) and evidence of the implementation of those policies can assist a company in the event that it is subject to enforcement procedures.

Evidence of a robustly enforced company policy on workplace bullying and harassment may assist in the recruitment and retention of staff, provide a healthy workplace and act as a mitigating factor in an enforcement action initiated against the company, or for a company to present as part of any engagement with regulatory bodies.

Company policies may be devised and implemented to evidence best practice in the workplace, such as a policy on the proper use of email technology, or redress and grievance procedures as part of a workplace policy to combat bullying and harassment. Typically, policies would also cover anti-corruption and corporate hospitality.

There is also a risk that failure to devise policy and set out a procedure may result in employees feeling insecure and drive them to seek external resolutions to address any perceived issues encountered in the workplace. This is particularly relevant in the context of making protected disclosures ("whistleblowing").

If policies are adopted, it is important that they are published and explained to relevant stakeholders (through training, etc.), monitored and applied. Failure to observe a policy might be used against a company in legal proceedings by an employee, for example.

Documentation

The roles and responsibilities of the board should be clearly documented, including responsibility for:

- appointing a chief executive officer and senior management;
- establishing a documented risk appetite for the regulated company, ensuring that the risk management framework and internal controls reflect the risk appetite and that adequate arrangements exist to ensure there is regular reporting to the board on compliance with risk appetite;
- satisfying itself that key functions such as internal audit, compliance and risk management are independent of business units and have adequate resources and authority to operate effectively;
- exercising adequate control and oversight over the activities of the regulated company's subsidiaries;
- establishing and effecting oversight of committees of the board; and
- regularly reviewing the performance of the board.

The board should define and document the responsibilities of the board, committees of the board and senior management to ensure that no single person has unfettered control of the business. The board should establish a formal schedule of matters specifically reserved to it for decision. Where a committee of the board is established,

it should have documented terms of reference setting out all functions delegated by the board to the committee.

Meetings

The Corporate Governance Requirements specify that the board of a bank or an insurance undertaking must meet as often as is appropriate to fulfil its responsibilities effectively and prudently, reflective of the nature, scale and complexity of the business.

In any event, the board shall meet at least four times per calendar year and at least once in every six-month period. If a bank or insurance undertaking is a High Impact Institution, it must meet at least six times during every calendar year and at least three times in every six-month period.

Where permitted by the constitution of the company, directors may attend meetings of the board by means of teleconference or video conference.

Different meeting requirements apply to captive (re)insurance undertakings, funds and fund service providers. Specifically, captive (re)insurance undertakings must meet at least twice annually, funds must meet quarterly and fund service providers must have at least two meetings every six months.

Reporting

Any person appointed to a pre-approval controlled function, including a director of a regulated company, must disclose information to the Central Bank relating to the commission of an offence or prescribed contravention as soon as it is practicable to do so.

The Central Bank expects a director of a regulated company to raise material concerns about overall corporate governance with the board. If the concern is not satisfactorily addressed within five business days, the director must promptly report the concern directly to the Central Bank. This is without prejudice to the director's ability to report directly to the Central Bank.

Where a bank or insurance undertaking, or a captive (re)insurance undertaking becomes aware of a material deviation from the relevant requirement, that institution must report the deviation to the Central Bank within five business days.

These reporting obligations are additional to the requirement to submit an annual compliance statement to the Central Bank in respect of the institution's compliance with the Corporate Governance Requirements.

Review

Generally, bank and insurance undertakings and (re)insurance undertakings must review board membership at least once every three years. A board of a High Impact Institution or of a Significant Institution must formally review its overall performance at least annually, as must the board of an investment fund and that of a fund service provider (see appendix 4).

10 General duties of a director under the Companies Act 2014

This chapter considers the general duties of directors (whether registered, de facto or shadow) under Part 5 of the Companies Act. It is, however, noteworthy that the Act does not provide a comprehensive statement of all the duties to which directors are subject, as these may also arise under other legislation.

Ensure compliance with the Companies Act: a director has a duty to ensure that the company complies with the Companies Act. When completing a Form B10, which is used to register particulars of a director's appointment in the Companies Registration Office, a director must acknowledge that he or she has duties under the Companies Act.

Have regard to employees' interests: while a director must have regard to the interests of the company's employees in general as well as to the interests of its members, this duty is owed to the company alone and is enforceable only by the company.

Have regard to creditors interests: a director must have regard to the interests of its creditors where the directors become aware of the company's insolvency, this duty is owed to the company alone and is enforceable only by the company.

Directors' compliance statement[3]: directors of all public limited companies (PLCs), or of companies limited by shares (LTDs), designated activity companies (DACs) and companies limited by guarantee (CLGs) which meet certain financial thresholds must in the Directors' Report acknowledge their responsibility for ensuring the company's compliance with the Companies Act and also must either include certain compliance-related confirmations in that report or explain why they do not do so. Unlimited companies are unaffected.

Company secretaries: a company secretary must discharge such duties as the board delegates to him or her as well as any other duties imposed under statute. Directors must ensure that the person appointed as company secretary has the skills or resources necessary so as to enable him or her to maintain or procure the maintenance of the records (other than accounts) that are required to be kept in relation to the company.

Fiduciary duties of directors: the Companies Act consolidates directors' common law and equitable duties which have been developed by the courts over past centuries. The nine duties, set out overleaf, are expressed to be owed by directors to the company and to the company alone. A breach of directors' duties will not invalidate any contract or other transaction or undermine the enforceability of such (other than by the director in breach) unless the third party has been an accessory to that breach or has knowingly benefited from it.

3. See Appendix 1 for further information on compliance statements.

A director must:

1. act in good faith in what the director considers to be the interests of the company: this imposes a subjective test on a director to act in what he or she believes to be the interests of the company.

2. act honestly and responsibly in relation to the conduct of the affairs of the company: this was not a common law duty but has been considered in detail by the Irish courts in the context of defending applications to have directors restricted.

3. act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law: this requires a director to be aware of the company's constitution and to exercise his or her powers in the interests of the company only.

4. 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 general meeting: this reflects the common law position that directors are similar to trustees and control property owned by the company. A director may not use or benefit from company property (including business opportunities) by diverting them to him or herself, to companies controlled by the director or to other third parties.

   A company, acting by its members in general meeting, may relax or release a director from this duty.

5. not agree to restrict the director's power to exercise an independent judgment 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 to fetter his or her discretion or the director's agreement to so restrict is approved by the company in general meeting: this duty recognises that a director must be independent and bring an independent judgment to decisions facing the company. However, it recognises that, in some cases, it will be in the company's interests to agree to do something or to refrain from doing something at a future point in time and so permits this.

6. 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: this duty provides that a director must avoid conflicts of interest, e.g. taking a decision as to the company's position on a particular matter where the direct or indirect effect of that position is to benefit the director. The company acting by its members in general meeting can release a director from this duty or the constitution can provide for particular conflicts and release a director from this duty in relation to those conflicts.

7. exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably

be expected of a person in the same position as the director and with the knowledge and experiences which the director has: this requires a director to perform his or her functions with care, skill and diligence. The standard by which a director is to be judged in relation to this duty is a quasi-objective standard: while the director must exercise the same care, skill and diligence as a reasonable person would exercise, that reasonable person is to be taken to be someone with that director's knowledge and experience. For example, a director who is an accountant will be expected to exercise the same skill as a reasonable person who is an accountant.

8. in addition to the general duty owed to employees, have regard to the interests of its members: this requires a director to have regard to the interests of members, they being the owners of the company. This duty also demonstrates that it is permissible to have regard to various parties' interests but still be required to act in the interests of the company. A director is also permitted to have regard to the interests of a particular member where that director has been appointed or nominated for appointment by that member exercising a right under the constitution of the company or a shareholders' agreement.

9. in addition to the duties under section 224A (directors to have regard to certain matters where company is, or is likely to be, unable to pay its debts), have regard to the interests of its creditors where the directors become aware of the company's insolvency.

Other interests of directors: subject to the constitution of a company, a director is permitted to become an officer of, or otherwise be interested in, any company promoted by the company or in which it is interested as a shareholder or otherwise, but without prejudice to the director's fiduciary duties.

Power to act in a professional capacity for the company: subject to a company's constitution, a director is permitted to act in a professional capacity for the company and is entitled to be remunerated for such work.

Duty to disclose interest in contracts: a director of a company who is, in any way, whether directly or indirectly, interested in a contract or proposed contract with the company, must declare the nature of his or her interest at a meeting of the directors of the company. In the case of a proposed contract, a director must make a declaration at the directors' meeting at which the question of entering the contract is first considered and, in the case of a director becoming interested in a contract after it is made, the mandatory declaration should be made at the first board meeting thereafter. The Companies Act requires such declarations to be entered in the register within three days of the making or the giving of the declaration.

The Companies Act states that the duty to disclose does not apply in relation to an interest that is reasonably considered as not giving rise to a conflict of interest. Nor does it apply to any contract where the decision to enter that contract is not taken by the board of directors or by a committee of which the director is a member.

Duty to disclose interest in shares: a director must disclose certain interests in shares or debentures in the company and in associated companies. The Companies Act eases this obligation and exempts 'de minimis' interests from the requirement to disclose. This means that no disclosure is required where shares held by a director (aggregated with those of connected persons, such as spouses and children) are in aggregate one per cent or less of the company's issued share capital of a class of shares carrying voting rights or where the shares or debentures do not carry a right to vote at general meetings (save a right to vote in specified circumstances).

11 The Role of the chairperson

The chairperson's primary role is to ensure that the board is effective in its tasks of setting and implementing the company's direction and strategy. The chairperson is appointed by the board and the position may be full-time or part-time. In smaller companies the role is often combined with that of managing director, however, the joint role is not considered appropriate for larger or publicly listed companies.

The Corporate Governance Requirements set out requirements for the role of the chairperson, as do the EBA's Guidelines on Internal Governance.

While the Corporate Governance Requirements are only directly applicable to banks and insurance undertakings, the general requirements describe best practice and can be applied to every regulated company, depending on the nature, scale and complexity of its operations.

According to the Corporate Governance Requirements, a chairperson must be an independent non-executive director (except in the case of a subsidiary, in which case the chairperson can be a group director). The role of chairperson must not be combined with that of the chief executive officer ("CEO"). An individual who has been CEO, executive director or member of the senior management during the previous five years cannot become chairperson.

In the case of investment firms, the chairperson must be an independent non-executive director (except where the investment firm is a subsidiary, in which case the Chairperson may be a group director).

In the case of investment funds and fund service providers, the chairperson must be a non-executive director.

In the case of banks, insurance undertakings and (re)insurance undertakings, the chairperson must be proposed for election or reappointment on an annual basis. However, in the investment funds sector, and in the case of fund service providers, it is recommended that the post of chairperson be reviewed at least once every three years.

According to the Corporate Governance Requirements, the chairperson's role is to lead the board, encourage critical discussions, challenge mindsets and promote effective communication between executive and non-executive directors. The chairperson is required to attend and chair board meetings.

If the chairperson does not have relevant financial services expertise, qualifications and background, he or she should be required to undertake relevant, timely, and comprehensive training. This is in order to ensure that the chairperson has the necessary knowledge, skills and experience (or training) to comprehend:

- the nature of the regulated company's business, activities and related risks;
- his or her individual direct and indirect responsibilities and the board's responsibilities; and
- the regulated company's financial statements.

The chairperson must have the necessary personal qualities, professionalism and integrity to perform his or her obligations.

For a bank or insurance undertaking, as the required time commitment for a chairperson may be significant, the Central Bank's approval must be obtained prior to that person taking any other directorship (other than within the group).

The effective chairperson

An effective chairperson will:

- uphold the highest standards of integrity and probity;
- set the agenda, style and tone of board discussions to promote effective decision-making and constructive debate;
- promote effective relationships and open communication, both inside and outside the boardroom, between non-executive directors and the executive team;
- build an effective and complementary board, initiating change and planning succession in board appointments, subject to board and shareholders' approval;
- promote the highest standards of corporate governance and seek compliance with the provisions of applicable codes wherever possible;
- ensure a clear structure for, and the effective running of, board committees;
- ensure effective implementation of board decisions;
- establish a close relationship of trust with the chief executive, providing support and advice while respecting executive responsibility;
- provide coherent leadership of the company, including representing the company and understanding the views of shareholders.

The chairperson should also ensure that, upon joining a board, each new director receives a full induction, preferably with a pack of supporting documentation. The chairperson should also regularly review the training and development needs of each director.

12 The role of the non-executive director

Executive versus non-executive director

Under company law, there is no distinction between an executive and non-executive director. Irish company law does not see the roles as distinct and therefore generally does not distinguish between the responsibilities attached to them[4].

The non-executive director's role can be seen as balancing that of the executive director, so as to ensure the board, as a whole, functions effectively. The independent non-executive directors provide an independent challenge to the executive directors on the board.

Where the executive director has an intimate knowledge of the company, the non-executive director may be expected to have a wider perspective. Where the executive director may be better equipped to provide an entrepreneurial spur to the company, the non-executive director may have more to say about ensuring prudent control.

The Corporate Governance Requirements, which set out the different classifications of directors, recognise the concept of non-executive director and require that for banks and insurance undertakings, the majority of the board must be independent non-executive directors (including the chairperson). However, in the case of a group, the majority of the board may be group non-executive directors, provided that in all cases there are at least two independent non-executive directors, or three in the case of a High Impact Institution.

For investment firms, the board must be composed of a majority of independent non-executive directors, subject to an exception for firms which are subsidiaries of groups in which case certain specified combinations of group and independent non-executive directors apply depending on the firm's PRISM Impact rating.

In the investment funds sector, it is recommended that the board of a corporate collective investment scheme or management company is comprised of a majority of non-executive directors and at least one independent director. The board of a funds service provider must have at least one independent non-executive director.

The role of the non-executive director

Every director should be capable of seeing company and business issues in a broad perspective. Nonetheless, usually a non-executive director is chosen because he or she has a breadth of experience, is of an appropriate calibre and has particular personal qualities.

4. The Companies Act requires that, where a company is required to establish an audit committee (see chapter 13), at least one member of that committee must be an independent non-executive director with competence in accounting or auditing. Otherwise, that Act does not distinguish between executive and non-executive directors.

A non-executive director must also have knowledge and an understanding of the business, risks and material activities of the regulated company to enable him or her to contribute effectively as a non-executive director. Moreover, a non-executive director may have some specialist knowledge or experience (such as in respect of accounting, auditing or risk-management) that will help provide the board with valuable insights or perhaps key contacts in related industries.

The non-executive director's independence from the management of the company and from any of its interested parties is of the utmost importance as this helps ensure that he or she can bring a degree of objectivity to the board's deliberations, and can play a valuable role in monitoring executive management.

Functions of the non-executive director

The Corporate Governance Requirements provide that, for banks and insurance undertakings, the role of the non-executive director is to:

- ensure that there is an effective executive team in place;
- participate actively in constructively challenging and developing strategies proposed by the executive team;
- participate actively in the board's decision-making process;
- participate actively in board committees (where established); and
- exercise appropriate oversight in the execution by the executive team of the agreed strategies, goals and objectives and to monitor reporting of performance.

Terms of appointment for a non-executive director

The following core information will usually need to be included:

Conditions of appointment

Details of when the appointment will start, the length of the initial engagement period, and conditions relating to the review of the appointment. The conditions and/or circumstances under which either the company or the non-executive director can terminate the position should also be included.

Duties

Core duties and periodic responsibilities should be listed. Typically, these will include: membership of any board committees; the non-executive director's expected time commitment; and any other performance- related issues.

Fees and expenses

Details of remuneration, which should reflect the time commitment and responsibilities of the role, the frequency of payment and the entitlement, if any, to expenses and how they should be claimed.

Confidentiality

The rules about non-disclosure of commercially sensitive information and/or any types of information as specified by the company. These should apply to the non-executive director not only while he or she holds office, but also subsequently.

Other obligations

A committment on behalf of the non-executive director that he or she will comply with:

- all statutory requirements relating to the company's register of directors and the register of directors' interests;
- for listed companies, the Model Code for Securities Transactions by Directors; and
- the Fitness and Probity Standards set by the Central Bank (see chapter 7).

Company property and documents

Provision, in the event of a non-executive director's appointment being terminated, for the return of any property or documents relating to the company's affairs.

Other provisions

The company should include other provisions such as:

- Induction process;
- An obligation to disclose any outside interest which may cause a conflict;
- Directors' and Officers' liability insurance held by the company;
- Access to independent professional advice.

For how long should a non-executive director serve on a board?

Best practice dictates that every director should stand for re-election annually[5]. However, this may not be feasible for every organisation and, in those circumstances, it is recommended that a non-executive director should stand for re-election every three years as this is considered an appropriate interval during which to assess the value to the company of the particular non-executive director.

The term of appointment for a non-executive director should be fixed, albeit subject to renewal for another term. It is important to recognise that a non-executive director's effectiveness may improve with experience of the company.

5. For example, under the UK Corporate Governance Code (applicable also to companies listed on the Main Securities Market of the Irish Stock Exchange) all directors should be subject to annual re-election.

The board must, however, recognise that, with the passage of time, individual non-executive directors may become less able to make an independent contribution, as over a period of years, a person may become 'institutionalised' and lose his or her freshness and originality of approach.

The Corporate Governance Requirements state that the board of a bank or insurance undertaking reviews the performance of each director annually and that it reviews board membership at least once every three years. Such institutions must also formally review any person on the board who is an independent non-executive director for longer than a maximum of nine years. The Corporate Governance Requirements state that, where a director is to continue beyond nine years, the board must document the rationale for the continuance and advise the Central Bank in writing. The Corporate Governance Requirements for Captive Reinsurance Insurance Undertakings contains a similar requirement but which is applicable to all board members.

Remuneration guidelines for non-executive directors

Normally, the board as a whole should set the remuneration of non-executive directors. Where a remuneration committee exists, it will comprise non-executive directors and will be responsible for setting the remuneration of the company's executives.

In determining remuneration, it is important to have regard to the level of commitment, the expertise required and the levels paid by similar entities, in the context of the financial resources of the company.

A non-executive director should be compensated adequately for the total time, in preparation, visits, and meetings spent on the company's business. However, it is important that a non-executive director should not be dependent on the company for a significant part of his or her income as this may compromise independence.

Generally, remuneration varies and depends largely on how much time and effort a non-executive director is asked and able to give to his or her duties, including any special functions that are to be undertaken. Where a non-executive director has additional responsibilities, such as membership and/or chair of a board sub-committee, the remuneration should reflect this. The remuneration for a non-executive role should adequately match the responsibilities.

With regard to the treatment of fees, non-executive directors and non-resident directors of an Irish incorporated company are within the charge to income tax and the Universal Social Charge (USC). A company must deduct income tax at source under the PAYE system and deduct the USC at source under the USC scheme.

In rare circumstances, the fees paid to a non-resident director may be relieved from a charge to income tax and the USC under a relevant double taxation agreement where the relevant director satisfies the Revenue Commissioners that relief under the relevant double taxation agreement is appropriate.

In determining the amounts and form of remuneration, the board should have regard to any applicable legal requirements and in particular the rules around variable compensation, including bonuses.

13 The role of board committees

Usually, the constitution of a company empowers the board of directors to appoint committees. For certain-sized companies[6], the Companies Act requires there to be an audit committee or that the company explains in its annual report why it has decided not to appoint such a committee. Moreover, credit institutions and investment firms that fall within the scope of the capital requirements regulations and are themselves significant, must establish risk, nomination and remuneration committees.

Usually, matters such as who can be on a particular committee and how committees regulate their meetings will also be dealt with in the company's constitution.

It should be remembered that, as a committee is the creation of the board, the powers of a committee are derived from the board and they must therefore always remain under the board's control. Each committee's status and functions should be specified clearly in written terms of reference.

The non-executive directors and, in particular, independent non-executive directors should play a leading role in board committees.

The Corporate Governance Requirements mandate the establishment and roles of various committees. While the Corporate Governance Requirements are only directly applicable to banks and insurance undertakings, the general requirements can be applied to every regulated company (depending on the nature, scale and complexity of its operations).

The Corporate Governance Requirements state that banks and insurance undertakings must establish, at a minimum, an audit committee and a risk committee. Where appropriate, the board should also consider appointing a remuneration committee and a nomination committee. High Impact Institutions must establish audit, risk, remuneration and nomination committees, as must Significant Institutions.

In the case of investment firms, the board must establish, at a minimum, an audit and risk committee. High Impact investment firms must also establish a remuneration committee.

The following general requirements in relation to the activities of committees of the board should apply:

- the agenda and all relevant material for the meeting should be circulated to all committee members in a timely manner in advance of the meeting;
- detailed minutes of all committee meetings should be prepared, recording time of meeting, location held, attendees and all key discussions and decisions;

6. The annual turnover of which exceeds €25 million and a balance sheet total of which exceeds €50 million (these figures can be altered by regulations).

- when appointing committee members, the board should review and satisfy itself as to the relevant expertise and skill of members and their ability to commit appropriate time to the committee;
- committee members should attend committee meetings regularly. Where a member is unable to provide sufficient time to attend over the medium to long-term, the board should remove that member from the committee and replace him or her with a member with appropriate availability, experience and expertise;
- a director who is a member of a committee should attend each committee meeting in person, wherever possible. Video conferencing or teleconferencing is permissible, where a director is unable to physically attend a committee meeting;
- cross-committee membership by an individual should be managed by the regulated company to ensure that no one individual exercises excessive influence or control;
- committee membership should be reviewed by the regulated company and subject to renewal by the company with an appropriate frequency. The renewal frequency should consider the balance of experience and independence sought; and
- committees should report regularly to the board and the minutes of all committee meetings should be circulated to the board in advance of board meetings.

The role of the audit committee

This committee is intended to provide a link between the external auditor and the board, independent of the company's executives, since the latter are responsible for the company's accounting functions and procedures that are the subject of the audit.

Where an audit committee is required under the Companies Act, its role is to monitor the financial reporting process; monitor the effectiveness of the internal control, risk and audit systems; monitor the statutory audit; and review the independence of the company's external auditors (in particular, the provision of additional services by the audit firm).

Under the Companies Act, an audit committee must include at least one independent non-executive director who has competence in auditing or accounting. According to the Corporate Governance Requirements, the audit committee must comprise non-executive directors, the majority of whom are to be independent.

The chairperson of the committee must be an independent non-executive director.

In the case of High Impact Institutions, the audit committee and the risk committee must have at least one shared member. All investment firms must ensure that the audit and risk committee have at least one shared member.

The responsibilities of the audit committee must include at least the following:

- monitoring the effectiveness and adequacy of internal control, internal audit and IT systems;
- liaising with the external auditor, particularly in relation to their audit findings;
- reviewing the integrity of financial statements and ensuring that they give a "true and fair view" of the financial status of the company;
- reviewing any financial announcements and reports and recommending to the board whether to approve the annual accounts (including, if relevant, group accounts); and
- assessing auditor independence and the effectiveness of the audit process.

Key individuals, such as the chief executive officer, chairperson of the board, external auditor, head of internal audit or finance director may be requested to attend meetings.

The role of the risk committee

According to Corporate Governance Requirements, the risk committee must have at least three members and the number of members should be sufficient to handle the nature, scale and complexity of the business of the company. The risk committee must comprise a majority of non-executive directors, independent non-executive directors or a combination of both. In the case of High Impact Institutions, the risk committee must share at least one member with the audit committee and the remuneration committee. In the case of a Significant Institution, the risk committee must exclusively comprise non-executive directors.

The chairperson of the risk committee must be a non-executive director or independent non-executive director.

For investment firms, the chairperson of the risk committee must be a non-executive director or an independent non-executive Investment firms must ensure that the risk committee is composed of a majority of non-executive directors or independent non-executive directors or a combination of both.

The risk committee's role is to:

- advise the board on risk-appetite and tolerance for future strategy;
- oversee the risk management function;
- liaise regularly with the Chief Risk Officer to ensure the development and ongoing maintenance of a risk management system that is effective and proportionate to the nature, scale and complexity of the risks inherent in the business; and
- advise the board on the effectiveness of strategies and policies with respect to maintaining, on an ongoing basis, amounts, types and distribution of internal capital and own funds adequate to cover risks.

In particular, a risk committee should:

- consider the risks of cyber attacks as they have become an important consideration for most companies, not least financial services entities. (See IoD publication, "Cyber Security for Directors").
- review the company's capability to identify and manage new types of risk;

- monitor the effectiveness of the company's internal financial controls, internal controls and risk management systems; and
- review and approve the statements to be included in the annual report concerning internal controls and risk management.

The role of the nomination committee

One of the board's crucial functions is to decide on new appointments to the board and to other senior positions in the company. As a matter of good practice, the selection process of directors should be carried out by the nomination committee, which then makes recommendations to the full board. Where implemented, the appraisal of directors is often tied directly into the selection and nomination process.

The majority of members of the nomination committee must be independent non-executive directors. In the case of a Significant Institution, all members of the nomination committee must be non-executive directors.

For investment firms, the Chairperson of the risk committee must be a non-executive director or an independent non-executive director. Investment firms must ensure that the risk committee is composed of a majority of nonexecutive directors or independent non-executive directors or a combination of both.

In considering appointments, the nomination committee must prepare a comprehensive job description, taking into account for board appointments, the existing skills and expertise of the board and the anticipated time commitment required. The nomination committee should also be involved in succession planning for the board and for the role of chief executive officer, bearing in mind the future demands on the business and the existing level of skills and expertise.

In the case of a Significant Institution, the nomination committee not only plays a key role in relation to new appointments but also in reviewing the existing management body and its individual members.

The role of the remuneration committee

Devising the appropriate remuneration packages for the executive directors can be one of the most contentious issues a board faces not least because of the publicity that executive pay attracts.

It is vital that decisions regarding executive remuneration, benefits and bonuses are seen to be taken by those who do not stand to benefit directly from them.

Therefore, in listed companies and in some large private companies, policy on executive remuneration is usually decided by a committee of non-executive directors.
As a matter of good practice, executive directors should not be responsible for determining their own remuneration.

According to the Corporate Governance Requirements, where possible all the members of the remuneration committee, and in any event the majority of its members, must be independent

non-executive directors. In the case of Significant Institutions, all members of the remuneration committee must be non-executive directors.

High Impact investment firms are required to establish a remuneration committee. An investment firm must ensure that, where possible, all members of the remuneration committee are independent non-executive directors but, in any event, that the majority of members of the committee are independent non-executive directors. Where a High Impact investment firm is part of a wider group, that firm may rely on a group remuneration committee, provided that the board is satisfied that it is appropriate to the specific circumstances of the firm, and that the board has documented its assessment in this regard. In such cases, the firm is required to promptly inform the Central Bank and the Central Bank retains the discretion to require the firm to establish its own remuneration committee.

How the remuneration committee should prepare

Rewarding executives requires informed judgement. Remuneration committee members do not need expert knowledge, but they do need data to make sound decisions on levels of remuneration, on the link between remuneration and performance, and on the structure and cost of all elements of the executive package.

A remuneration committee must have a thorough understanding of the company and the forces that shape executive directors' remuneration. In addition, they should have an understanding of any applicable legal requirements, such as, in the case of a Significant Institution, those set out in the capital requirements regulations.

Understanding the business

Executive directors' remuneration levels vary greatly from business to business. The key factors in decision-making are:

- Business 'size': size can affect all aspects of pay, including base salary levels, annual bonus design, performance measures and the type of long-term incentive plans that are appropriate. However, it is a variable concept. It can be measured in terms of revenues, capital employment, margins and financial structures. Market capitalisation is seldom the main factor in executive directors' remuneration.
- Performance record and prospects: is the company a new business, an established business with a steadily improving performance, a business that is going through recovery or a turnaround? Are there clear strategic challenges to address? Is it fast growing with an unpredictable future, or stable with limited but fairly certain prospects?

- Sector: both business sector and the position of the business within it are significant.
- Internationalisation, complexity and innovation: should a group follow Irish pay norms? How should it accommodate European or US pay norms for its overseas directors? Should the pay of directors in international or high-technology companies differ from that of directors in companies of equivalent size that operate only in Ireland, or in low-technology or regulated industries?
- Cashflow and debt levels: both of these might place an important limitation on smaller organisations in which the pay of directors can be a significant proportion of business costs.
- Key performance measures: these should provide the essential underpinning when it comes to designing incentives, be they short-term or long-term. What are the important performance measures that are associated with increasing shareholder value? How is the company doing in comparison to its competitors on these measures? What are the critical short-term and long-term indicators of performance?

Understanding company culture and values

Every organisation has its own culture and values, and frequently these are reflected in remuneration, whether in the design of incentives or the type of benefits available or, indeed, in the level of remuneration itself. The remuneration committee needs to be able to recognise deeply held values that are associated with success and to avoid cutting across these values when it comes to remuneration arrangements.

Understanding current arrangements

Remuneration committees are rarely given the luxury of starting with a clean slate. Before the first meeting, it is useful to get a full briefing from fellow committee members, the chief executive officer or the human resources director. In particular, the committee should know:

- the overall remuneration philosophy: the positioning of total remuneration relative to the market place, the definition of the market place, the approach to short-term and long-term incentives, the benefits policy etc.
- contract details: notice periods, severance arrangements, compensation for loss of office, special arrangements (if any) in relation to changes of control.
- details of individual directors' remuneration for the past three to five years: including base salary, bonuses, long-term incentive grants and exercise values.

- how far current remuneration complies with guidelines: for example, those of the Irish Association of Investment Managers, the Association of British Insurers, National Association of Pension Funds etc.
- any immediate changes planned: for example, as a result of the expiry of a share option plan or of a change in the strategy of the business.
- any special arrangements for individual directors and why they exist: for example, new hires or executives approaching retirement might have been offered something different.

Understanding stakeholder interests

Within the confines of the law and Stock Exchange listing requirements, directors' remuneration is chiefly a matter for the company, its shareholders and executives. However, decisions are watched closely by a wide range of other people and institutions. Executive pay can come under fire when an interest group's view of the company clashes with the way the board is being rewarded. As a result, understanding interest groups and their perceptions of the company is vital in ensuring smooth implementation of remuneration committee recommendations.

Special considerations arise in the case of directors' remuneration being paid by financial institutions that have benefited from the State financial guarantee.

Understanding the market

The final element of preparation is to understand markets and market data. Remuneration committees should take particular care in the use of surveys.

However, market data is an important input into remuneration committee deliberations. Market data is there to be questioned and interpreted. It defines the parameters of normality, the boundaries of what is reasonable.

14 The role of the company secretary

The secretary is an officer of the company and his or her duties arise under law as well as being those delegated by the directors.

The role of company secretary is not a "pre-approval controlled function" so a person who is appointed to the position does not need to be approved by the Central Bank. However, where an individual in the position of company secretary exercises significant influence, a regulated company must not permit a person to take up that position unless satisfied on reasonable grounds that he or she meets the required standards of fitness and probity. The role of company secretary can be fulfilled by a body corporate; an individual must be at least 18 years of age to be a company secretary.

Under the Companies Act, a director must ensure that the person appointed as company secretary has the skills or resources necessary to enable him or her to maintain or procure the maintenance of the records (other than accounts) required to be kept in relation to the company.

The role of secretary usually entails the following:

- Maintaining the company's statutory registers or books, which should include:
  - a register of present and past directors and secretaries;
  - a register of all shareholders, past and present and their shareholdings;
  - a register of any charges on the company's assets;
  - minutes of general meetings and board meetings; and
  - a register of the debenture holders (typically banks).
- Filing annual returns to the Companies Registration Office – other documents that must be filed include the directors' report and auditors' report (unless the company is exempt), and financial statements, including details of the company's assets and liabilities.
- Arranging meetings of the directors and shareholders – this responsibility will involve issuing proper notices of meetings, preparing the agenda, circulating relevant papers and taking and producing minutes to record the business transacted at the meetings and the decisions taken.
- Informing the Companies Registration Office of any significant changes in the company's structure or management, for example the appointment or resignation of directors.
- Establishing and maintaining the company's registered office as the address for any formal communications.

- Ensuring that all the company's business stationery carries its name, registered number, country of registration and registered address. These details must also appear on the company's website, emails and order forms.
- Ensuring the security of the company's legal documents, including for example, the certificate of incorporation and the company's constitution.
- Deciding on the company's policy for the filing and retention of documents.

Additional duties

Typically, a company secretary will be required to take on a variety of additional administrative duties. These may include:

- insurance;
- company pension scheme;
- administration of share schemes;
- PAYE and payroll;
- VAT registration;
- management of the company's premises and facilities;
- office management;
- compliance with data protection and health and safety requirements;
- intellectual property; and
- advising directors on their duties and ensuring that they comply with company law and the constitution of the company.

For public companies, the company secretary will also be responsible for compliance with the requirements of the Stock Exchange, management of the company's registers and compliance with the UK Corporate Governance Code (which, with limited amendments, applies also to companies listed on the Irish Stock Exchange).

In many ways, the company secretary is seen as a guardian of the company's proper compliance with the law and best practice.

15 | Key differences between directors and managers

There are many fundamental differences between the role of a director and that of a manager. Below is a detailed breakdown of the major differences between directing and managing.

Leadership

Directors: the board of directors provides the intrinsic leadership and direction at the top of the organisation.

Managers: managers carry through the strategy on behalf of the directors.

Decision-making

Directors: directors must determine the future of the organisation and protect its assets and reputation. They also need to consider how their decisions relate to stakeholders and the regulatory framework. Generally, stakeholders are seen to be the company's shareholders, creditors, employees and customers.

Managers: managers are concerned with implementing the decisions that are made and the policies that are set by the board.

Duties and responsibilities

Directors: directors, not managers, have the ultimate responsibility for the long-term prosperity of the company. A director is required in law to apply skill and care in exercising his or her duty to the company and is subject to fiduciary duties. If a director breaches any such duty or acts improperly, he or she may be liable personally in both civil and criminal law. On occasion, a director can be held responsible for the acts or omissions of the company. A director also owes certain duties to the stakeholders of the company.

Managers: a manager has far fewer legal responsibilities than a director, although a manager may be liable personally in criminal law for certain wrongs of the company if the manager has contributed to the wrongdoing.

Relationship with shareholders

Directors: directors are accountable to the shareholders for the company's performance and can be removed from office by them. The shareholders may pass a special resolution requiring the directors to act in a particular way. Directors act as "fiduciaries" of the shareholders and should act in their interests, while taking into account the interests of the company (as a separate legal entity) and other stakeholders.

Managers: usually, managers are appointed and dismissed by the directors or more senior managers and do not have any legal requirement to be held to account.

Ethics and values

Directors: directors have a key role in the determination of the values and ethical position of the company.

Managers: managers must give effect to the company's ethos, taking their direction from the board.

Company administration

Directors: directors are responsible for the company's administration.

Managers: while the related duties associated with company administration can be delegated to managers, the ultimate responsibility for them resides with the directors.

Statutory provisions on insolvency

Directors: if a company becomes insolvent, various duties and responsibilities are imposed on directors, breach of which may involve personal liability, criminal prosecution and disqualification.

Managers: these statutory provisions do not usually affect managers.

Statutory provisions in general

Directors: many other statutory provisions can create offences on strict liability under which a director may face penalties if the company fails to comply. A wide range of statutes impose duties on directors.

Managers: increasingly, managers can be held responsible under various statutes where a company commits an offence with the consent, connivance or neglect of the manager.

Disqualification

Directors: a director can be disqualified from being, or be restricted in his or her entitlement to be, an officer of an Irish company..

Managers: control over the employment of a manager rests with the company. A manager can be subject to disqualification under the Companies Act and the fitness and probity regime if occupying a 'pre-approval control function'.

16 Key differences between a chairperson and a chief executive / managing director

This chapter compares and contrasts the role of a chairperson of a company and its chief executive / managing director. It is best corporate governance practice that the roles of chairperson and CEO are performed by different people, although in a small company it may be the case that the roles are combined.

Nature of the position

Chairperson: the chairperson of a company should be a non-executive director.

CEO: typically, a CEO is an executive director of the company although sometimes a CEO does not hold a board position. A managing director necessarily is an executive director.

Role

Chairperson: the role of the chairperson is primarily to guide the board in its task of setting and helping to implement the company's strategic policies. The chairperson is appointed from his or her fellow board members. The chairperson will work closely with the CEO in a 'bridge' role between the board and the executive management team.

CEO: the CEO has the responsibility of ensuring that the day-to-day running of the company and its performance is in accordance with the strategic goals that the board has determined. Typically, a CEO is a director of the company but this is not a legal requirement. The CEO usually reports to the chairperson.

Decision-making

Chairperson: the chairperson can only make decisions on matters entrusted to him or her by the board. However, the chairperson should ensure that the decision-making processes of the board are effective and that the board sufficiently and effectively challenges major proposals that are put forward by the executive management team as represented by the CEO. The chairperson should encourage every board member to engage in board meetings by which strategic decisions are taken and to engage in meetings of the committees of which he or she is a member.

CEO: the CEO is tasked with achieving the strategic goals of the company by directing human and material resources to the appropriate areas and monitoring the performance of those resources. Operational and financial decisions should be made with regard to the running of the company in order to achieve the goals that the board has determined.

Strategy

Chairperson: the chairperson sets the agenda for the board's deliberations. That agenda should focus on strategy, performance, accountability and the creation of value for shareholders. The issues relevant to these areas should be reserved for decision by the board exclusively and reserved matters should be identified clearly in writing and made known to the CEO.

CEO: the CEO is responsible for implementing company policy. He or she should direct strategy towards the profitable growth and operation of the company. Longer-term objectives and priorities which are established by the board should be developed. The CEO has a crucial role in ensuring that these strategies are in fact implemented and delivered. Frequently, the CEO contributes views to the chairperson to assist the board in devising company strategy.

Communication

Chairperson: the chairperson has a responsibility to ensure effective communication with shareholders and other stakeholders. In order to make informed decisions, board members should be given a timely flow of high-quality supporting information.

CEO: the CEO should, on a timely basis, provide the board with adequate impartial information to enable the board to make decisions.

Ethics and values

Chairperson: the chairperson should set clear expectations concerning the company's culture, values and behaviours and the style and tone of board discussions.

CEO: the CEO should promote the company's cultures, values and behaviours through both the CEO's own example and the day-to-day working environment of the organisation. He or she should ensure that the standards of performance are accepted and understood by management and the employees.

Risk management

Chairperson: the chairperson should ensure that the board determines the nature, and extent of the risks that the company is willing to embrace in the implementation of its strategy, and to have in place effective monitoring of compliance (legal and regulatory, in particular).

CEO: the CEO should put in place operational planning and financial control systems, consistent with the strategy determined by the board, and ensure that there is adequate oversight of these areas.

Administration

Chairperson: the administration and running of the business ought to be left to the CEO and the executive management team. Serious friction, and blurring of respective roles, can occur between a chairperson and CEO if a chairperson attempts to interfere in matters that have been delegated exclusively to the CEO or otherwise in the day-to-day management of the company's business.

CEO: the CEO is responsible for the day-to-day running of the company's business.

Finance

Chairperson: the chairperson should ensure that the strategic decisions of the company are informed by consideration of the financial resources and constraints of the company.

CEO: the CEO should monitor closely the operating and financial results of the company against plans and budgets (as determined by the board). It is a key role of the CEO to deliver the strategic goals of the company, within budget.

Business development

Chairperson: frequently, the chairperson is the company's leading representative and presents the company's goals, business and values to shareholders, the public and, in some cases, the media.

CEO: the CEO should represent the company to major customers and professional associations and to the media.

Staff

Chairperson: the chairperson should, on a regular basis, consider succession planning and the current and future composition of the board and executive management team. The chairperson should take the lead on issues of director development, including through induction programmes for new directors and regular reviews with all directors and of the senior executive management team.

CEO: the CEO should build and maintain an effective management team and effective management structures within the organisation. The CEO should maintain an on-going dialogue with the chairperson to impart information and as a source of advice.

Evaluation

Chairperson: the chairperson should act on the results of any board evaluation. He or she should also provide constructive feedback for the CEO from a board perspective.

CEO: the CEO should ensure that effective reporting mechanisms exist within the organisation to provide feedback at all levels of management. He or she should also establish what action should be taken in respect of any area in which a need for improvement is identified.

17 Financial difficulty and insolvency

Regulated companies are generally required to comply with minimum capital and reserve requirements and, in the case of certain regulated companies, liquidity requirements. A regulated company must inform the Central Bank as soon as it becomes aware that it is failing to meet the requisite minimum requirements.

The legal duties of directors when a company is in financial trouble or insolvent can differ from their general duties. Highlighted in this chapter are those legal duties specific to insolvency-related cases.

A related duty is a duty to take steps to prevent insolvency (for example consider examinership or other methods to avoidliquidation) and the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company.

To consider the interests of creditors above those of members: when a company is clearly solvent, directors must act in the interests of the shareholders in general. When a company is insolvent and even when it is of doubtful solvency, the position changes: creditors come first.

A related duty is a duty to take steps to prevent insolvency (for example consider examinership or other methods to avoidliquidation) and the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company.

Not to act for any personal or additional purpose: a director should separate his or her own personal interests (as shareholder, executive, creditor, etc.) from the company's interests. The duty of a director is to act in the interests of the company.

To take steps to avoid loss to creditors: under insolvency legislation, a director will be liable personally for reckless trading if a liquidator can show that the director knew or ought to have concluded that there was no reasonable prospect of avoiding liquidation but continued to conduct 'business as usual'. Liability will not arise if the director can show (to the court's satisfaction) that he or she took every possible step to minimise the potential loss to the company's creditors. The director must be seen to have tried actively to do this.

A director should never allow a company to accept credit if, in his or her view, there is no reasonable expectation of the creditor being paid at, or shortly after, the time when the debt becomes due. Anyone knowingly party to a transaction in such circumstances, may be ordered by the court to make contributions to a company's assets and may be guilty of the criminal offence of fraudulent trading.

Not to enter into transactions at an undervalue or make preferences: insolvency legislation permits a liquidator of a company and certain other parties to apply to a court to set aside or to vary transactions at an undervalue as well as preferences entered into within a specified period before insolvency proceedings began.

In setting a transaction aside, a court will make an order to restore the position to what it would have been had the transaction not taken place. This may result in personal liability for one or more directors of the company and disqualification proceedings against any director responsible for the transaction concerned.

Actions that minimise the risks of liability

It is important not only that the steps explained below are carried out, but also that they are seen to be carried out, as the behaviour of directors may be carefully scrutinised by a future liquidator or administrator. Actions taken in the interests of a company and its creditors should be documented and explained methodically. All meetings must be minuted. Directors must give reasons for their decisions and cite the advice they have taken. A director who can show that he or she acted in good faith on the advice of suitably qualified professionals will be more likely to avoid reckless trading or unfair preference allegations, even if the liquidator believes that the relevant advice was wrong.

Monitoring the financial position of the company

A director should regularly review the company's financial position in order to assess whether the company is solvent and to determine its prospects of avoiding insolvent liquidation. This will generally involve the preparation of regular statements of affairs and cash-flow projections and other current financial information, in collaboration with auditors and other advisers as necessary.

Directors should establish a procedure for the finance director to keep the board informed of the performance and prospects of the company. This will generally involve frequent board meetings.

Under changes to the Companies Act made in July 2022, a director of a company who believes, or who has reasonable cause to believe, that the company is, or is likely to be, unableto pay its debts (widely defined), must have regard to –

a. the interests of the creditors,

b. the need to take steps to avoid insolvency, and

c. the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business of the company.

Directors should be satisfied that, taking into account their duties to creditors, shareholders and employees, the company may properly continue to trade. Each director should consider carefully the company's ability to pay before arranging for the receipt of any further goods or services on credit, and

the board should regularly review the company's financial position. These reviews should be fully minuted.

Individual directors should raise any concerns over solvency with the board as a whole. If a director's fears are not heeded, he or she should repeat them and take steps to protect his or her own position.

If a director believes the minutes of a board meeting do not properly reflect the views that he or she put forward, he or she should ask for a correction and, failing that, write to the chairperson (copying the letter to other board members) re-stating his or her position. It is important that there is a written record of what a dissenting director said, and when it was said, whether that record appears in the official board minutes or elsewhere.

When going through a difficult period, each director must regularly ask whether the company fails the solvency test. A company will be regarded as insolvent when it is unable to pay its debts or the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Taking advice

Often the directors of a company in financial difficulties face a dilemma. Causing a company to cease to trade, putting it into examinership or liquidation, or seeking to have a receiver appointed prematurely, can be as damaging to the creditors' interests as allowing a company to carry on trading against all odds.

Directors must act responsibly, resisting, on the one hand, their natural tendency to be optimistic or to refuse to accept defeat and, on the other hand, the temptation to succumb to despair without considering the options available. Their analysis of the company's performance and prospects should be based on up-to-date financial information, fully minuted and should almost certainly involve consultation with professional legal and financial advisers.

Advisers can offer a range of 'restructuring options', including finding a buyer to maximise the value of the company's assets.

Accurate, complete and up-to-date information and access to financial and legal advice from appropriately qualified professionals will strengthen significantly a director's position in the event of a court hearing.

Formulating a viable strategy

If the company's performance and prospects demand it, a board should formulate a strategy for restoring a company to a healthy financial position and avoid formal insolvency proceedings. The action plan may involve one or a number of the following:

- alternative trading strategies;
- disposals;
- maximising existing asset values;
- cutting overheads;
- delaying capital investment;
- further bank finance;
- converting debt to equity, converting short-term debt to long-term debt, or raising new equity;
- an informal arrangement with major creditors or a voluntary arrangement;
- arranging alternative sources of funding from other financiers, particularly where a bank is unlikely to advance further money.

The chosen strategy must have the support of the board. In addition, its viability must be reviewed by appropriate advisers and its implementation constantly monitored. At each meeting, the board will need to review whether the strategy is being implemented as envisaged and whether the underlying assumptions are still reasonable. All decisions made and the reasons for them should be recorded in the minutes, as should any advice taken.

Holding regular meetings

Board meetings should be held at regular scheduled intervals. Every director should endeavour to be present in person or by phone / conference facility. Detailed minutes should be kept of all meetings and circulated promptly. Additional meetings should be called as and when new significant events occur. Briefing papers should be circulated before such meetings to promote informed discussion. Any absent director should be told as soon as possible of critical decisions that have been taken at board meetings.

Involving all directors

Undoubtedly, the involvement of the finance director and any members of the management team responsible for credit control and assessing the current and future financial performance of a company will be key. Depending on the nature of a recovery strategy, input from sales, marketing and production executives may also assume a greater importance.

In most cases, however, it will be the non-executive directors who are best placed to assess whether a company is able to continue trading and whether it can justify incurring fresh liabilities. Non-executive directors bring objectivity, experience and financial independence to the board. Where a company's prospects for survival are uncertain, their involvement will ensure that the interests of creditors and shareholders are not overlooked and will facilitate discussions with banks and other lenders.

Keeping major creditors informed

It is important that the distribution of information to creditors' groups is handled in an orderly manner. Information to be released to creditors should be discussed with and, in some circumstances, presented by the company's advisers. Where a strategy to be implemented requires creditors' support (principally that of the lending banks), a careful and clear presentation is required.

18 Essential compliance for directors

Directors understand that they may face civil and criminal liability for their actions and omissions. Those risks, be they legal, operational, business, compliance or financial, can be greatly reduced if the company has in place an ongoing programme to identify the risk, measure it and manage or avoid it.

Under the Companies Act, directors of certain limited companies[7] must prepare annual compliance statements concerning tax law and certain material provisions of company law. A regulated company can be required to provide a compliance statement to the Central Bank.

Often directors are uncertain as to how to undertake a compliance programme. This chapter concentrates on legal and regulatory risk although many aspects that are considered are of wider application to other areas of risk. While some tasks can be delegated by the board, ultimately it is in the interests of each director to be confident that the company has properly considered compliance.

For banks and insurance undertakings, the Corporate Governance Requirements state that the board must satisfy itself that all key control functions, such as compliance and risk-management, are independent of business units and have adequate resources and authority to operate effectively. The board must ensure that it receives timely, accurate and sufficiently detailed information from risk and compliance functions. This is a general consideration that should apply to all regulated companies depending on the size, nature and complexity of the business.

A compliance system must be proportionate to the objective that has been set for it.

An inappropriately burdensome compliance system can in fact be an impediment to compliance as maintaining and operating the system can require such a level of resources and such an amount of time that merely operating and maintaining the system distracts from actual compliance. In this way, care should be taken to balance the burden of operating any particular compliance procedure with the materiality of the risks that it is seeking to manage or eliminate.

7. ie the annual turnover of which exceeds €25 million and the balance sheet total of which exceeds €12.5 million (the thresholds can be altered by regulations). See Appendix 1 for more detail.

The two key steps are to:

Identify compliance obligations

Legal and regulatory compliance obligations can stem from a range of sources, although the most obvious are legislation (primary and secondary) and the mandates of any regulatory authority, such as the Central Bank. However, other sources include:

- specialist bodies, the standards advocated by which are significant in an industry (such as the 2018 UK Corporate Governance Code); and
- requirements of a shareholder or other stakeholder (such as the Department of Public Expenditure and Reform's "Code of Practice for the Governance of State Bodies", 2016 Edition).

It is prudent for an organisation to maintain a list of the material obligations to which it is subject (materiality being assessed in the manner suggested in the following paragraphs). The formulation and updating of that list should typically be informed by the personnel who are working in different areas of the company's business.

Assess materiality and risk sensitivity

The materiality of a compliance obligation should be assessed according to two criteria: hazard (the risk of occurrence) and consequence (the implications of a compliance failure). This assessment may be primarily legal but will inevitably and properly be informed by a degree of intuition.

The assessment will vary from company to company as the compliance landscape for any two particular entities may well differ.

Further, each hazard and consequence describes a tendency rather than absolutes, e.g. the risk of any particular compliance failure occurring may be very high or 'merely' high or moderate, or it may be almost non-existent etc.

Nonetheless, the following may assist a company in assessing hazard and consequence in the case of any particular compliance obligation:

Assessing hazard (i.e. assessing the likelihood of a breach occurring)

- Whether the obligation is technical: the more technical a provision is, the greater the possibility that a breach could occur inadvertently or by reason of misinterpretation or human error. The more straightforward a provision is, the less likely it is that a breach might occur for any of those reasons.

- The frequency with which an obligation might be expected to arise: as a starting point, the greater the frequency with which an obligation must be performed, the greater the likelihood of an omission (such as by oversight or other human error) on one or more of those frequent occasions. Some broad scenarios can be relevant:

  – Where an obligation (inherently) arises infrequently, or arises in scenarios that occur infrequently or even rarely, then the likelihood of a breach occurring should be discounted accordingly (even if the consequence of a breach might be onerous).

  – Where an obligation arises frequently but unpredictably, then the lack of predictability in itself increases the risk-hazard, because, statistically, an oversight may be more likely to occur.

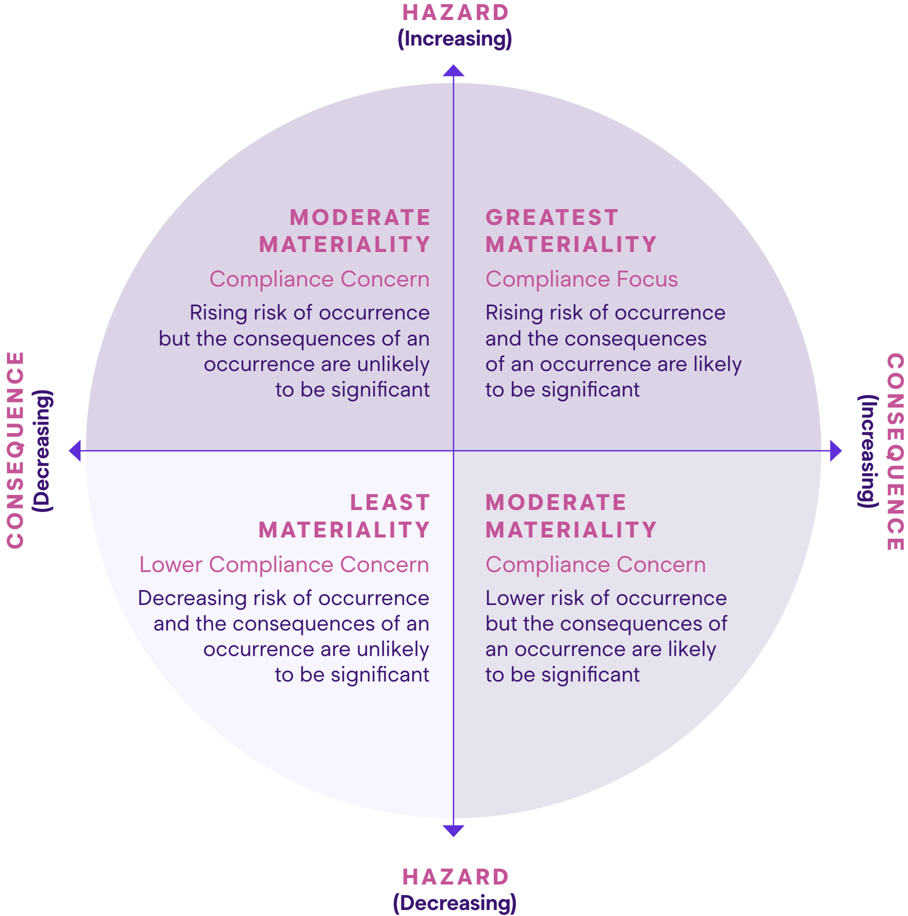
  – Where an obligation arises at predictable times or dates (i.e. it is recurring) or arises in predictable, process-based scenarios, the greater predictability can be viewed as reducing the risk-hazard (on the basis that processes, systems and checklists can more readily be developed to address the obligation).

Assessing consequence (i.e. assessing how onerous the consequences of a breach seem likely to be)

- Whether the obligation creates an offence: if breach of an obligation is a criminal offence, then it is likely to have at least a moderate risk-consequence, on the basis that a responsible company is likely to regard a criminal prosecution as an outcome that it would be particularly keen to avoid.

- How close the obligation comes to the critical elements of the company's business: the closer that an obligation comes to the core business of the company, the potentially more significant the consequences of any compliance failures. For example, where a breach of a compliance obligation might jeopardise a company's regulatory licence or authorisation, this breach ought to be assessed as carrying a much higher risk of a significant adverse consequence than the consequences flowing from (say) a breach of company law regarding filing changes in particulars of registered directors.

- Other relevant considerations: at any given point in time, an obligation (or obligations of a type) may assume greater practical, regulatory, law enforcement or public relations significance than they would have at other times. There may also be reputational issues to which the company would have regard in assessing materiality.


HAZARD
(Increasing)
MODERATE MATERIALITY
Compliance Concern
Rising risk of occurrence but the consequences of an occurrence are unlikely to be significant
GREATEST MATERIALITY
Compliance Focus
Rising risk of occurrence and the consequences of an occurrence are likely to be significant
CONSEQUENCE
(Decreasing)
CONSEQUENCE
(Increasing)
LEAST MATERIALITY
Lower Compliance Concern
Decreasing risk of occurrence and the consequences of an occurrence are unlikely to be significant
MODERATE MATERIALITY
Compliance Concern
Lower risk of occurrence but the consequences of an occurrence are likely to be significant
HAZARD
(Decreasing)

Tips for directors

When starting a compliance exercise, a director might consider the following steps:

- identify the areas of activity in which the company engages and the personnel in those areas who can influence compliance with legal and regulatory requirements;
- make a preliminary assessment of the materiality of the various activities to the company and the consequences of compliance failure in any of them;
- assess existing compliance-related materials in each area;
- (if necessary, with the assistance of external advisers) identify the key legal and regulatory obligations in respect of each identified material area of activity;
- (if necessary, with the assistance of external advisers and drawing on existing resources) develop training and compliance materials that are appropriate to the relevant activity and material risk that is to be addressed. These materials may be, say, (in the case of a set of obligations that are recurring and technical) a compliance calendar and (in the case of a set of obligations that are open-ended or infrequent) text-based training materials;
- on a systematic and regular basis that takes into account materiality, audit compliance in the different areas of the company's activities; and
- on an ongoing basis, review the training needs and the experience of personnel who have primary responsibility for compliance in respect of material risks.

An effective compliance programme, tailored to the specific needs of a particular business, has many advantages over the alternative approach of reacting on an ad hoc basis to isolated problems as they arise. It enables directors to take decisions regarding the company's commercial objectives and behaviour, confident that these conform to the requirements of law and are, therefore, unlikely to be attacked either by authorities or by third parties. It gives a director more confidence that the risk of personal liability, civil or criminal, attaching to those decisions is reduced, thereby allowing him or her to focus on the core business of the company.

Such a programme greatly reduces the risk of infringements occurring through inadvertence or negligence, and thus helps to avoid the costs and disruption which would otherwise occur. It also helps to spread an understanding of the relevance of compliance throughout the company and thereby cultivates attitudes and behaviour which are likely to render the company more competitive and efficient and, therefore, more profitable on a long-term basis.

19 Procedure for removing directors

The office of director may be vacated by operation of a legislative provision, upon his or her death or under a provision in either the constitution of the company or of a shareholders' agreement.

Vacation of office under the Companies Act arises if:

- a director becomes bankrupt;
- a director is disqualified from being a director by a court order or where he or she is deemed to be disqualified;
- a director fails to take a share qualification that is required by the company's constitution, within two months of the appointment (most constitutions exclude this requirement);
- the appointment of a director exceeds the maximum permitted number of directorships.
- Further methods of vacating office may be included in the company's constitution. Typically, these are if:
- a director resigns;
- a director is absent from board meetings for a specified period (typically six months);
- a director becomes bankrupt or makes any compromise or arrangement with his or her creditors generally;
- a director suffers from a mental disorder;
- a director is subject to a restriction order under the Companies Act;
- a director fails to meet a residency requirement; or
- a director is not a fit and proper person for the purposes of the Central Bank's standards.

The Central Bank has the powers to, inter alia, suspend a person from performing the role of director of a regulated company and, ultimately, prohibit a person from performing that role. In order to prohibit a person from carrying out the role of director, the Central Bank must have reasonably formed the opinion that he or she does not meet the requisite standards to perform the role.

Clearly, conflict with a director can be difficult for a company. Usually, the easiest way to manage conflict is to seek to persuade the director to resign in return for a severance package. Shareholder approval of the severance package may be required under the Companies Act.

Alternatively, the company's constitution may provide for the removal of a director.

However, if the foregoing is not practicable, then a director may be removed by the following procedure under section 146 of the Companies Act:

- the member(s) who wish to remove a director must give 'extended notice' to the company at least 28 days before the meeting at which the resolution is to be moved;
- on receipt of the notice, the company must send a copy of the resolution to the relevant director. A board meeting must also be called to convene a general meeting;
- the relevant director is entitled to make written representations to the company and to request that the company communicates these representations to the members. The director may also speak at the meeting on the resolution concerning his or her removal;
- the board may, if it so wishes, make a representation to the members, whether the board members are for or against the resolution and even if they are divided. However, the proposers of the resolution may only make representations at the general meeting;
- an ordinary resolution (i.e. '50 per cent plus one' of the votes cast) of the members at the general meeting suffices.

Removal of a director under these procedures does not affect his or her rights to compensation under the terms of the appointment. An executive director is an employee of the company whether there is a written contract or not, and the dismissal of an executive director is governed by employment law as well as companies legislation. Therefore, if a director is removed from office and this also terminates his or her employment, the dismissal may be unfair under the Unfair Dismissals Acts: a director who is removed from office may have a substantial compensation claim against the company.

If the director is also a shareholder then, depending on the circumstances, he or she may also have a remedy for oppression in the conduct of the company's affairs, under section 212 of the Companies Act.

Professional legal advice should be sought in every case in which a company is contemplating removing a director from office.

20 Offences and administrative sanctions

Offences

Regulated companies operate under primary and secondary legislation and regulatory requirements issued by the Central Bank.

Failure to comply with provisions of relevant legislation and relevant regulatory requirements may be an offence for which a regulated company may be prosecuted as a matter of criminal law. Furthermore, where an offence is committed by a regulated company, and it is proved to have been committed with the consent, connivance or approval of or to have been attributable to wilful neglect on the part of any person, being:

- a director, manager, secretary or other officer of the body corporate; or
- a person who was purporting to act in any such capacity,

that person, as well as the body corporate, commits an offence and may be subject to prosecution and sanction.

In certain cases, a regulated company may also be held liable for acts committed by a person for the benefit of the legal person where the commission of those acts is attributable to the requisite degree of supervision or control not having been exercised by the legal person.

Reporting criminal offences

It is an offence if a person who has information which he or she knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or securing the apprehension, prosecution or conviction of any person for a relevant offence fails, without reasonable excuse, to disclose the information to the Gardaí. There are approximately 130 such relevant offences which relate to breaches of company law and financial services legislation in general.

Directors must be cognisant of their duties and ensure that, where necessary, matters are disclosed to the Gardaí.

Administrative sanctions regime

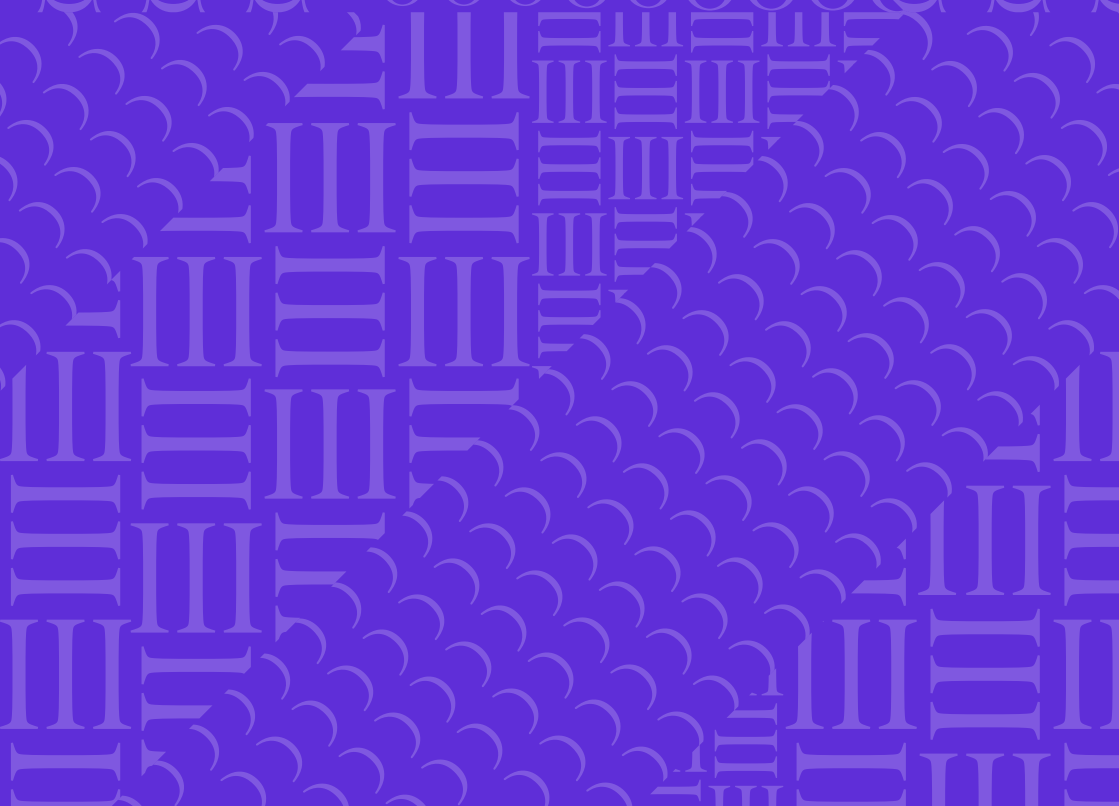
The Central Bank may impose sanctions in respect of prescribed contraventions of relevant legislation and regulatory requirements by regulated companies and persons concerned in the management of regulated companies, including directors.

The Central Bank may impose the following sanctions in respect of a director of a regulated company where, at the end of an inquiry, the Central Bank is satisfied that a prescribed contravention has occurred:

- a monetary penalty not exceeding €1,000,000; and
- a direction disqualifying a person from being concerned in the management of a regulated company for a prescribed period of time.

The Central Bank has established a specific enforcement division which has been active in sanctioning regulated companies and individuals for breaches of relevant legislation and regulatory requirements.

Appendices



1 Companies Act 2014: An overview

Overview

The Companies Act 2014 (in this Appendix, the "Act") consolidates the then-existing Companies Acts and many of the related statutory instruments into a single statute and introduced significant reforms to Irish company law. The Act came into force on 1 June 2015.

Since coming into force, the Act has been amended by the Companies (Accounting) Act 2017, the Companies (Amendment) Act 2017 and other regulations to give effect to various EU company law-related directives and regulations (such as the Audit Directive.) This overview reflects amendments made to the Companies Act up until August 2022.

Structure of the Act

The Act regards the private company limited by shares (an "LTD") as the paradigm type of company. Accordingly, the Act is drafted to apply primarily to an LTD, with modifications to that default law being made in respect of each other type of company, grouped together in a part of the Act dedicated to the relevant type of company. For example, the provisions dealing with the winding up of a company (Part 11) apply to an LTD and, unless modified by any other part of the Act, apply to each other type of company also. The modifications to the general provisions applicable to an LTD are then arranged in a part of the Act that deals only with a particular type of company, such as a public limited company (a "PLC") (Part 17) or a designated activity company (a "DAC") (Part 16). Under the Act, an LTD cannot carry on business as a credit institution (which term includes banks, insurance companies and certain other financial services entities), so most financial services entities would either be DACs or PLCs (especially where shares are to be listed on a stock exchange).

Key changes

The key changes include provision for new types of companies as well as changes to those companies' constitution, governance, capacity, organisation and procedures.

Company types

The Act provides for several new types of company, into one of which every existing company migrated upon commencement of the Act or, if a private company limited by shares existed at the time of commencement, it will have migrated by the end of a transition period of 18 months:

- an LTD (the new form of the private company limited by shares);
- a DAC (a private company limited by shares, including what previously was a company limited by guarantee and having a share capital);
- an unlimited company with a share capital (a "ULC");
- a public unlimited company with a share capital (a "PUC");

- a public unlimited company not having a share capital (a "PULC"); and
- a company limited by guarantee not having a share capital (a "CLG").

The PLC continues to be recognised.

Re-registration of one company type to another company type is facilitated by the Act and is more flexible than under previous company law.

These company types are indicated in new suffixes to company names, such as "NewCo designated activity company" or "NewCo dac", replacing the previous "Ltd" and "Teo". However, confusingly, the suffix "Ltd" applies in the case of an LTD, while under the previous law it described what now is a DAC.

The memorandum and articles of association of a company existing on commencement of the Act can continue to be used provided that no provision conflicts with mandatory provisions of the Act (if such a conflict exists, the Act prevails).

Constitution

An LTD has a single constitutional document, effectively amalgamating what, in a private limited company under the previous law, would have been the memorandum of association and the articles of association.

Single member

The Act permits a company of any type to be incorporated with a single member (a company other than an LTD will continue to require at least two directors).

Membership

An LTD is permitted to have a maximum of 149 members.

Governance

- **Single director:** an LTD may have a single director (the previous entitlement to have a single member will be retained) but a sole director is not permitted to be the company secretary, therefore, requiring a second person to perform that role.
- **Fiduciary duties of a director:** see chapter 10.
- **Director's personal details:** regulations provide that the usual residential address of a director or secretary need not appear on a company register or on a register kept by the Companies Registration Office, if following stipulated considerations, it is determined that the circumstances of the relevant officer's personal safety or security warrant such an exemption.

- **Director's duty of disclosure:** see chapter 10.
- **Powers of the board:** by default, the directors are empowered to borrow money and to charge the property of the company as security.
- **Company secretary:** the Act provides that the directors have a duty to ensure that the company secretary has the skills or resources necessary to discharge his or her statutory and other duties and includes the case of an appointment of one of the directors of the company as secretary.
- **Compliance statements:** the directors of a PLC (other than an investment company), and of an LTD, a DAC and a CLG, the balance sheet of which exceeds €12.5m and the turnover of which exceeds €25m, must prepare a compliance policy statement (the "Statement"). Unlimited companies are not subject to this requirement.

  The Statement must set out the company's policies (that are, in the opinion of the directors, appropriate to the company) in respect of the company's compliance with "relevant" obligations under the Act. Relevant obligations are those obligations imposed on a company the contravention of which is a category 1 or 2 offence, or a serious Market Abuse or Prospectus offence, and tax law (the "Obligations").

  Directors of an in-scope company must include with their directors' report for every financial year, a statement acknowledging that they are responsible for ensuring the company's compliance with the Obligations and confirming that the company has drawn up a Statement, that it has put in place appropriate structures to secure material compliance with the company's Obligations and that it reviews those structures during the financial year. If these actions have not been taken, an explanation of the reasons why must be provided.

  In relation to putting in place these structures, the Act recognises that the advice of specialists (outside of the company) on compliance with the Obligations may be required. The structures must provide a reasonable assurance of compliance in all material respects with the Obligations.
- **Annual general meeting ("AGM"):** subject to conditions, an LTD (whether having a single member or multiple members) may adopt written procedures in place of an AGM. Any DAC, PLC, CLG and unlimited company having more than one member, will not be allowed to dispense with the requirement to hold an AGM.
- **Disclosure of interests:** see chapter 10.
- **Decision-making:** subject to conditions, the members of an LTD and certain other companies are entitled to adopt majority written resolutions (both ordinary (>50% of the total voting rights) and special (>75% of the total voting rights)).
- **Legislating for governance:** the Act recasts many of the optional provisions that are suggested for the constitution of a company (often called "Table A" under the Companies Acts 1963 to 2013, now repealed) as requirements of law.

Capacity

- **Objects:** an LTD is not permitted to have an objects clause, so that an LTD has the same unqualified legal capacity to do anything that a natural (i.e. a human) person may lawfully do. Therefore, the doctrine of ultra vires ("beyond the legal powers") no longer applies to an LTD, and an LTD is – by default – empowered to do anything lawful that its directors determine.
- **Ultra vires:** where a company (necessarily other than an LTD) retains an objects clause, a third party dealing with the company in good faith will not be prejudiced if the company exceeds its capacity.
- **Corporate authority:** the Act introduced an ability for a company to register with the CRO the name of every person who has unqualified legal authority to bind the company and to authorise others to do so. Once authorised by the board of directors and registered with the Companies Registration Office, a "registered person" is taken to be duly authorised until the Companies Registration Office is notified to the contrary (notwithstanding any resolution by the board of directors).
- **Public offers:** an LTD is prohibited from offering securities (equity or debt) to the public.

Organisation

- **Group company relationships:** the Act effectively combines the definitions of holding and subsidiary companies in section 155 of the Companies Act 1963 and the separate definitions of "parent undertaking" and "subsidiary undertaking" in the Group Accounts Regulations to produce complex new definitions of "holding company" and "subsidiary company". A "wholly owned subsidiary" is defined for the first time in companies legislation.
- **Mergers and divisions:** the Act introduces procedures for the merger and division (within Ireland) of companies of any variety. Previously, this was restricted to PLCs and, for private companies limited by shares, to a cross-border merger.

Practice and procedure

- **Summary approval procedure:** the Act introduces a simplified written approval process (a "whitewash") by directors and / or members, not requiring any court order, for certain transactions with a director, a capital reduction, a members' voluntary winding-up, the use of pre-acquisition profits, etc. The Act allows most companies to reduce share capital by either using the Summary Approval Procedure (without any court involvement) or by using the procedure of passing a resolution to be confirmed by court.

- **Financial assistance:** the Act relaxes the prohibition on giving financial assistance for the acquisition of a company's own shares by focusing on the provision of financial assistance for the purpose of an acquisition of shares in the company or of its holding company, rather than, as was the case, prohibiting financial assistance "in connection with" such a purchase or subscription.
- **Charges and debentures:** the definition of a "charge" has been modified (including removing from it a charge created over an interest in cash or in the balance of a financial account or a deposit and a charge over shares, bonds or debt instruments), and registration procedures have changed considerably. In addition to a single stage procedure similar to the previous registration procedure, there is also a new optional two-stage procedure which permits a lender, by filing an advance notice with the Companies Registration Office, to improve the priority of its security by the time that the detailed notice is filed (within 21 days of the charge being created). Also, unless the priority of a charge is governed by another legal regime (such as Property Registration Authority rules), the priority of a charge is now determined by reference to the date on which the Companies Registration Office receives the prescribed particulars.

Accounts and auditing

- **Accounts** (financial statements): under the Act, accounts are referred to as "financial statements"; reference to proper books of account will henceforth be to "adequate accounting records"; and "financial year" is defined (it will not be permitted to exceed 18 months). The Act permits the voluntary revision of defective accounts ("financial statements"), and the audit exemption will be extended to dormant companies and may be available in group situations.
- **Accounting:** in certain circumstances in which a company acquires another company through a share issue, it is not necessary to create a share premium. In effect, this is a form of merger relief and will facilitate companies using merger accounting rules. It is possible to disapply the prohibition on a company using as its realised profits the profits of a subsidiary relating to the period before the subsidiary became a subsidiary of the relevant company.
- **Audit exemption (conditions):** an LTD and a DAC may avail of the audit exemption where at least two (and not all three) of the prescribed conditions in respect of the particular year are satisfied (i.e. any two of (a) the balance sheet total of the company does not exceed €6m, (b) the amount of the turnover does not exceed €12m; and (c) the average number of persons employed by the company does not exceed 50).

- A company that has availed itself of the audit exemption in respect of a financial year is obliged to provide to the Corporate Enforcement Authority ("CEA"), if requested, such access to, and facilities for, inspecting and taking copies of the books and documents of the company and to furnish to the CEA any such information as the CEA may reasonably require to satisfy himself or herself that the company was entitled to avail of the audit exemption.
- **Unlimited companies:** the statutory rules on distributions are disapplied in the case of an unlimited company, while the pre-existing exemption for certain types of unlimited companies from having to file accounts with the Companies Registration Office continues (although changes made by the Companies (Accounting) Act 2017 require a greater number of unlimited companies to file accounts).

Penalties

The Act provides for a new four-tier categorisation of offences for breaches of the Act, although even the least serious breach carries a maximum penalty of a fine not exceeding €5,000.

Comparison between an LTD and a DAC

Company limited by shares under the Companies Act	Designated activity company
It may have just one director (but it must have a separate secretary).	It must have at least two directors (one of whom can be secretary).
It may have as few as one and a maximum of 149 members (exceptions exist for employee and pensioner shareholders).	It may have as few as one and a maximum of 149 members (exceptions exist for employee and pensioner shareholders).
It does not need to hold an AGM.	It does not need to hold an AGM if it has only one member; otherwise an AGM must be held.
It has a one-document constitution which replaces the need for a memorandum and articles of association.	It has a constitution document which includes a memorandum and articles of association.
It must not have an objects clause because it has full unlimited capacity to carry on any legal business, subject to any restrictions in other legislation.	It has a memorandum in its constitution which states the objects for which the company is incorporated.
It may claim eligibility for audit exemption and dormant company audit exemption.	It may claim eligibility for audit exemption and dormant company audit exemption.
It has limited liability and has a share capital.	It has limited liability and has a share capital or is a company limited by guarantee with a share capital.
It may pass majority written resolutions.	It may pass majority written resolutions unless its constitution states otherwise.
The name must end in "Limited" or "Teoranta" (i.e. it cannot claim an exemption).	The name must end in "Designated Activity Company" or "Cuideachta Ghníomhaíochta Ainmnithe" unless qualified for an exemption.

2 Corporate governance: What you need to know

A number of corporate governance codes exist in Ireland and the UK, under which many Irish organisations operate.

Corporate governance requirements issued by the Central Bank

The Central Bank has issued the corporate governance publications listed below which impose minimum core standards upon the regulated companies to which they are addressed:

- Corporate Governance Requirements (and the equivalent for insurance undertakings);
- Corporate Governance Requirements for Captive Insurance and Captive Reinsurance Undertakings; and Corporate Governance Requirements for Investment Firms and Market Operators.

In addition, the Irish Funds Industry Association has published a corporate governance code which contains recommended standards for Irish authorised corporate collective investment schemes and Irish authorised management companies. It has also published a Corporate Governance Code for Fund Service Providers.

Source: Central Bank of Ireland

Fitness and probity standards

The Central Bank has issued fitness and probity standards and related guidance. The fitness and probity standards are the minimum requirements that a person must comply with when performing certain prescribed functions.

Source: Central Bank of Ireland

UK Corporate Governance Code

The Financial Reporting Council's (FRC) UK Corporate Governance Code (latest edition 2018 and formerly known as the Combined Code) sets out standards of good corporate practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders.

The UK Corporate Governance Code operates the 'comply or explain' rule. Listed companies must comply with the Code's detailed provisions or explain why they do not. Non-compliance with a term of the Code is not a breach, but failure to explain is. The key point is that the Code and its provisions are not compulsory; they are there for guidance and represent best practice.

Companies listed on the Irish Stock Exchange (ISE) are required to report on how they have applied the main principles of the Code and these companies also follow the Irish Corporate Governance Annex.

Source: Financial Reporting Council

Code of practice for the governance of State bodies

The 2016 edition of this Code sets out the governance framework agreed by the Irish Government for the internal management, and the internal and external reporting relationships, of commercial and non-commercial State bodies, including State-owned financial institutions.

The Code provides a framework for the application of best practice in corporate governance by both commercial and non-commercial State bodies. State bodies and their subsidiaries are required to confirm to the relevant Minister that they comply with the up-to-date requirements of the Code in their governance practices and procedures. The requirements should be applied in all trading subsidiaries and, as appropriate, in joint ventures of the State bodies. Appropriate confirmation should be provided to the relevant Minister in relation to these. The Code makes provision for certain requirements to be applied proportionately to smaller bodies.

Source: Code of Practice for the Governance of State Bodies (2016 Edition)

The EBA's Guidelines on Internal Governance

The Guidelines on Internal Governance complete the various governance provisions in Directive 2013/36, which applies to credit institutions and certain investment firms, and which is transposed into Irish law by the European Union (Capital Requirements) Regulations 2014. Taking into account the principle of proportionality, the Guidelines specify the tasks, responsibilities and organisation of the management body, and the organisation of institutions, including the need to create transparent structures that allow for supervision of all their activities. The Guidelines also specify requirements aimed at ensuring the sound management of risks across all three lines of defence and, in particular, set out detailed requirements for the second line of defence (the independent risk management and compliance function) and the third line of defence (the internal audit function).

Source: Guidelines on internal governance under Directive 2013/36

Joint ESMA and EBA Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders under Directive 2013/36/EU and Directive 2014/65/EU

The Guidelines apply to credit institutions and investment firms as well as certain other institutions. They provide common criteria to assess the individual and collective knowledge, skills and experience of members of the management body as well as their good repute, honesty and integrity, and independence of mind.

To ensure that members of the management body commit sufficient time to performing their functions, the Guidelines set a framework for assessing the time commitment expected of members of the management body and specify how the number of directorships is to be counted. They also determine how diversity is to be taken into account in the process of selecting members of the management body and provide guidance on the provision of training to members of the management body.

Source: Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders

The OECD Principles of Corporate Governance

The OECD Principles of Corporate Governance provide specific guidance for policy makers, regulators and market participants in improving the legal, institutional and regulatory framework that underpins corporate governance, with a focus on publicly traded companies. The Principles also provide practical suggestions for stock exchanges, investors, corporations and other parties that have a role in the process of developing good corporate governance.

The Principles cover six key areas of corporate governance – : ensuring the basis for an effective corporate governance framework; the rights of shareholders; the equitable treatment of shareholders; the role of stakeholders in corporate governance; disclosure and transparency; and the responsibilities of the board.

Key to the success of the Principles is that they are principles-based and non-prescriptive so that they retain their relevance in varying legal, economic and social contexts.

Source: The OECD Principles of Corporate Governance

The Basel Committee on Banking Supervision Principles for Enhancing Corporate Governance

The Basel Committee on Banking Supervision's Principles for Enhancing Corporate Governance set out best practices for banking organisations. Key areas of particular focus include: the role of the board; the qualifications and composition of the board; the importance of an independent risk-management function, including a chief risk officer or equivalent; the importance of monitoring risks on an on-going firm-wide and individual entity basis; the board's oversight of the compensation systems; and the board and senior management's understanding of the bank's operational structure and risks. The Principles also emphasise the importance of supervisors regularly evaluating the bank's corporate governance policies and practices as well as its implementation of the Committee's Principles.

Source: The Basel Committee on Banking Supervision

3 Directors' dos and don'ts

Key things that a director must do

- Act in the interests of the company.
- Act honestly and diligently and keep good records of how the company is directed and controlled.
- Take good advice whenever necessary.
- Keep knowledge up-to-date.
- Show leadership and discharge directors' duties.
- Disclose conflicts of interest.
- Treat staff and individuals with respect.
- Ensure a culture of good communications.
- Be informed and make sound judgements.
- Attend board and committee meetings and engage in discussions.

Key things that a director must not do

- Never act in the interests of anyone other than the company.
- Never act dishonestly or recklessly.
- Never be involved in wrongful or fraudulent trading.
- Never take bribes or make personal gain (other than agreed remuneration and expenses).
- Never withhold information that is relevant to the board's decisions.
- Never break the law.
- Never make assumptions or fail to challenge.
- Never allow the company to trade while insolvent.
- Never act for competitors.

4 Director development and board performance evaluation

For directors of regulated financial services companies, the Central Bank requires that each director has the qualification, experience, competence and capacity appropriate to the role of director. More specifically, the Corporate Governance Requirements state that the boards of regulated institutions must have the necessary knowledge, skills, experience, expertise, competencies, professionalism, fitness, probity and integrity to carry out their duties. In addition, the board must have a full understanding of its individual direct and indirect responsibilities and collective responsibilities.

Training

The Corporate Governance Requirements explicitly require the board to ensure that adequate on-going training is provided to board members and that this is routinely updated to ensure that they make informed decisions. In addition, new non-executive directors must be provided with adequate induction training about the institution's operations and performance.

Board performance evaluation

The Corporate Governance Requirements require the board of a bank or an insurance undertaking to formally review its overall performance and that of individual directors, relative to the board's objectives, at least annually. The review must be documented.

In addition, where a bank or an insurance undertaking is designated by the Central Bank as a High Impact Institution, it must be evaluated by an external evaluator every three years. Where the external evaluation is critical of the performance of the board, the Central Bank may increase the frequency of subsequent evaluations until acceptable performance is noted. Any such evaluation must be provided to the Central Bank.

5 Frequently asked questions

Am I eligible to be a director?
A person cannot be appointed to the position of director of a company regulated by the Central Bank without the Central Bank's approval. There are a number of instances whereby a person can be prevented from becoming a director at certain times. These include:

- bankrupts (who are prohibited from being directors while their debts remain unpaid or until a court excuses them from paying those debts);
- those found guilty of serious misconduct;
- those disqualified from being a director by the courts; and
- persons prohibited from so acting by the Central Bank. A person under the age of 18 cannot be a director. A body corporate (such as a company) may not itself be a director. Directors of regulated financial services entities are subject to the fitness and probity requirements of the Central Bank.

What are my duties and responsibilities as a director?
A director is subject to a large number and wide range of obligations from many areas of law, depending on the activities of the company. These can include data protection law, employment law, health and safety law, regulatory requirements and so forth. Company law is only one source. However, for its part, companies legislation imposes many specific obligations on a director, such as ensuring that the company complies with the Companies Act and ensuring that the company's auditors have all relevant audit information. The Companies Act also imposes important "fiduciary" obligations on every director, such as to act honestly, responsibly, in good faith and in the interests of the company, to exercise care, skill and diligence and to avoid conflicts of interest.

What is the difference between an executive and a non-executive director?
Under companies legislation there is no distinction between an executive and a non-executive director. However, the Corporate Governance Requirements define classifications of directors for the purposes of the Requirements, including non-executive directors (see chapter 2).

The non-executive director's role can be seen to balance that of the executive director. Executive directors have an intimate knowledge of the company and generally provide an entrepreneurial spur, whereas the non-executive director is generally expected to have a wider perspective of the business community at large and often has more to say about prudent control.

How do I become a non-executive director?

One of the best and most transparent ways to seek appointment to a board as a non-executive director is to register with a specialist recruitment provider. Often a company that is interested in appointing a non-executive director will source potential candidates through a search agency, such as the IoD's Boardroom Centre. Non-executive directors will be recommended to a company based on skill, suitability and expertise; however, the final decision regarding appointment rests with the client company.

What are the Central Bank's Fitness and Probity Standards?

Directors of regulated companies are subject to fitness and probity standards set down by the Central Bank. Generally, "fitness" requires that a person appointed as a director has the necessary qualifications, skills and experience to perform the duties of that position. "Probity" requires that a person is honest, fair and ethical.

If I am a non-executive director of a regulated company, how many directorships may I hold?

When it is proposed that a person holds more than five directorships of banks or insurance undertakings (or three where one of the directorships is held in a bank or insurance undertaking designated by the Central Bank as a High Impact Institution), the prior approval of the Central Bank is required.

The Central Bank's prior approval is also necessary where it is proposed that a person who is a director of a bank or insurance undertaking hold more than eight non-financial directorships (or five where one of the directorships is in a designated High Impact Institution).

Special rules also apply to captive insurance and captive reinsurance undertakings, as well as to the investment funds sector (see chapter 5).

What can I expect to be paid as a non-executive director?

Generally, remuneration varies and depends largely on how much time a non-executive director is expected to give to his or her duties, including any special functions undertaken, such as sitting on sub-committees of the board. Remuneration should therefore adequately match the responsibilities of the role.

With regard to the treatment of fees, non-executive directors and non resident directors of an Irish incorporated company are within the charge to income tax and the Universal Social Charge (USC). A company must deduct income tax at source under the PAYE system and deduct the USC at source under the USC scheme. In rare circumstances, the fees paid to a non- resident director may be relieved from a charge to income tax and the USC under a relevant double taxation agreement where the relevant director satisfies the Revenue Commissioners that relief under the relevant double taxation agreement is appropriate.

For how long can I serve on a company board as a non-executive director?

It is recommended that every non-executive director is re-elected every three years and, in order to maintain independence, it is recommended that a non-executive director should not serve on a board for longer than three terms of three years. Certain types of companies call for annual re-election.

Under the Corporate Governance Requirements, a bank or insurance undertaking must review membership of its board every three years and, where an independent non-executive director is to continue beyond nine years, the board must document the rationale for the continuance and advise the Central Bank in writing.

If I have been the chief executive officer, executive director or member of senior management of a regulated company, can I then become its chairperson?

An individual who has been chief executive officer, executive director or member of senior management during the previous five years cannot advance to the role of chairperson.

What is expected of me as chairperson of a board?

The chairperson's primary role is to ensure that the board is effective in its tasks of setting and implementing the company's direction and strategy. The effective chairperson will also uphold integrity and probity, promote effective relationships and open communication, initiate change and planning succession, promote the highest standards of corporate governance, ensure clear structure and implementation of board decisions and most importantly, provide coherent leadership.

Corporate Governance Requirements require that a chairperson must be an independent non-executive director (except in the case of a subsidiary: the chairperson may be a group director) and must be proposed for election or reappointment on an annual basis.

How often should the board of a regulated bank or insurance undertaking meet?

Corporate Governance Requirements require the board of a bank or an insurance undertaking to meet as often as is appropriate to fulfill its responsibilities effectively and prudently. The board should meet at least four times in a calendar year and at least once in every six month period. In the case of a bank or an insurance undertaking which has been designated by the Central Bank as a High Impact Institution, the board should meet at least six times during any calendar year and at least three times in every six-month period.

What are the duties of the company secretary?

The duties of the company secretary can be wide ranging. Typically, the company secretary is responsible for maintaining the company's statutory registers or books, filing annual returns to the Companies Registration Office, arranging meetings of the directors and shareholders, informing the Companies Registration Office of any significant changes in the company's structure and ensuring the security of the company's legal documents.

As a director do I have any responsibility for the financial statements?

Yes. It is the directors' responsibility to prepare financial statements for each financial year, consisting of a balance sheet, a profit and loss account and related notes. A statement acknowledging the directors' responsibility for keeping proper accounting records and preparing financial statements is usually included in the annual report.

I know that my company is about to enter into a contract with a company in which I own shares. Do I need to do anything?

As a director, you must disclose to the board the nature of any direct or indirect interest that you or a person connected with you, may have in any contract or proposed contract with the company.

As a manager do I have the same legal responsibilities as a director?

No. Directors, not managers, are required in law to apply skill and care in exercising their duty to the company and are subject to fiduciary duties. A very wide range of statutes impose duties on directors, under which managers are generally not held responsible.

However, a manager too may be liable under legislation if the company commits a criminal wrong and the manager has contributed to that wrongdoing, and a manager is likely to owe contractual duties of care, skill etc. to the company, as the manager's employer.

What is the procedure for removing a director?

Clearly, conflict within a board can present difficulties. If it is necessary to remove a director, the easiest way to do so is normally to persuade the director to resign in consideration for a severance package. However, if this is not possible then the director may be removed by a statutory procedure (see chapter 19).

The Central Bank has the powers to, inter alia, suspend a person from performing the role of director of a regulated company, and, ultimately, prohibit a person from performing that role. In order to prohibit a person from carrying out the role of director, the Central Bank must have reasonably formed the opinion that a person does not meet the requisite standards to perform the role.

What are my legal duties as a director of a company that faces insolvency?

The legal duties of a director when a company is in financial trouble differ from those when a company is solvent. In insolvency-related cases a director should:

- consider the interests of creditors above those of shareholders;
- separate his or her own personal interests from the company's interests; (a director's duty is to act in the interests of the company);
- take steps to avoid loss to creditors;
- not enter into transactions at an undervalue or make preferences.

I want to develop my knowledge as a director, what resources are available to me?

The Institute of Directors Ireland is the premier information source for directors in this country. Directors can access a wide range of information about their duties and responsibilities through training, events, resources and publications.

The IoD also offers Ireland's most prestigious director qualification – Chartered Director - which combines learning and actual professional experience, with a syllabus focused on all-round knowledge and skills.

6 Useful links

Institute of Directors Ireland
iodireland.ie

McCann FitzGerald LLP
mccannfitzgerald.com

Institute of Directors UK
iod.com

Central Bank of Ireland
centralbank.ie

Companies Registration Office
cro.ie

Department of Jobs, Enterprise and Innovation
djei.ie

Corporate Enforcement Authority
cea.ie

Irish Statute Book
irishstatutebook.ie

BAILII – British and Irish Legal Information Institute
bailii.org

Irish Stock Exchange
ise.ie

The Competition and Consumer Protection Commission
ccpc.ie

Financial Reporting Council
frc.org.uk

European Commission
ec.europa.eu

Chartered Accountants Ireland
charteredaccountants.ie

The Bar Council
lawlibrary.ie

Institute of Management Consultants and Advisers
imca.ie

The Corporate Governance Association of Ireland
cgai.ie

Irish Takeover Panel
irishtakeoverpanel.ie

Institute of Chartered Secretaries and Administrators
icsa.org.uk

Law Society of Ireland
lawsociety.ie

Irish Tax Institute
taxinstitute.ie

The Institute of Certified Public Accountants in Ireland
cpaireland.ie

Organisation for Economic Co-operation and Development (OECD)
oecd.org

MCCANN FITZGERALD

Institute of Directors Ireland
iodireland.ie

McCann FitzGerald LLP
mccannfitzgerald.com