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The International Comparative Legal Guide to:

Corporate Governance 2009

A practical insight to cross-border corporate governance

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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

The vast majority of Irish registered companies are private companies, with approximately 160,000 private companies on the Register of Companies. There are approximately 1,700 public companies registered, with 41 public companies listed on the Irish Stock Exchange ("**ISE**"). The ISE is authorised as a market operator by the Irish Financial Services Regulatory Authority. A further 27 public companies are listed on the Irish Enterprise Exchange (the "**IEX**"). The IEX is the ISE's market for small to mid-sized companies. A number of public companies are dual listed on foreign exchanges and must also abide by the rules of those exchanges.

Our answers below concentrate on (i) officially listed public limited companies whose securities are admitted to listing on the ISE ("**listed companies**") and (ii) IEX quoted public limited companies whose securities are admitted to trading on the IEX.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The primary corporate legislation governing all companies is the Companies Acts 1963 to 2006 which is supported by secondary legislation such as ministerial orders or statutory instruments.

The Office of the Director of Corporate Enforcement ("**ODCE**") is charged with monitoring compliance with the Companies Acts and has a number of investigative and enforcement functions including the prosecution of persons for suspected breaches of the Companies Acts. The Companies (Amendment) Bill 2009, which, as of April 2009, is before the Irish houses of parliament, proposes conferring additional powers on the ODCE with regard to access to information.

All companies have a memorandum and articles of association which reflect the contract and relationship between the shareholders and set out the internal rules and regulations, the objects of the company and other provisions including shareholder meetings, borrowing powers, powers and duties of directors and many other aspects relating to the governance of the company. The articles should be consulted on all governance issues.

The listing rules of the ISE (the **"Rules**") apply to companies with, or seeking, admission of securities to the official list of the ISE and include continuing obligation requirements. In addition to the Rules, companies with or seeking admission of securities to trading on the main market of the ISE must abide by Admission to Trading Rules. Admission to trading and admission to listing occur simultaneously and are notified to the market by the ISE in a single announcement.

The UK Combined Code on Corporate Governance (the "**Code**") has been annexed to the ISE's listing rules. The Code has the same persuasive effect in Ireland as it does in the UK. Irish listed companies are required to report on how they have applied the principles of the Code or where they have not applied the principles to justify any instance of non-compliance in their annual reports. It is then a matter for shareholders and other stakeholders to evaluate such explanations. In recent years, for listed companies with institutional shareholders, this "comply or explain" approach has largely been interpreted as amounting to an obligation simply to "comply". The Code sets out principles of good governance under such headings as directors, directors' remuneration, relations with shareholders, accountability and audit, internal control and audit committees.

The Market Abuse Regulations deal with insider dealing and implement the EU Market Abuse Directive and we understand are outside the scope of this publication.

IEX companies are more lightly regulated than listed companies and must abide by the IEX Rules which are complimentary to the AIM Admission Rules in the UK thereby allowing Irish companies the option of co-ordinating admission to both markets using the same timetable and essentially the same admission document. Many of the companies listed on the IEX are also listed on the AIM. Other than IEX Rules requiring applicant companies to have a minimum market capitalisation of €5 million, the IEX Rules and the AIM Rules are broadly the same. The Code is not expressly applicable to companies whose shares are traded on the IEX however it is common practice for IEX companies to have regard to the principles of the Code and to apply those principles in the manner appropriate to the size and nature of the company in question.

1.3 What are the current topical issues, developments and trends in corporate governance?

The current economic global difficulties and their impact on the Irish economy has put corporate governance, particularly in relation to the banking sector, right at the top of the Irish news agenda. Corporate governance topics such as prohibiting the Chairman and the Chief Executive Officer being one and the same, incorporating the Code into legislation, the supervisory role of non-executive directors and limiting the number of boards on which the same individuals can sit, the role of remuneration and the role of the audit committee are all the subject of debate.

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An advisory body, the Company Law Review Group (the "**CLRG**") has been charged with advising the government on the review and development of company law and it has produced a general scheme of a Companies Consolidation and Reform Bill, which if enacted would generally overhaul and modernise Irish company law including corporate governance.

A significant corporate governance topic in recent years has been the proposed requirement for comprehensive annual directors' compliance statements. Following much debate, the CLRG has reported back to the government resulting in an announcement that new legislation will be enacted in this area and there is growing pressure on the government for such reforms. It is anticipated that this may be addressed in the Consolidation and Reform Bill referred to above.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

The shareholders control the composition of the board of directors and, through the articles of association, the shareholders delegate the day to day running of the company to the board. However, the articles of association and legislation reserve certain powers to the shareholders through the passing of shareholder resolutions including the power to change the articles of association, change the objects of the company, increase the share capital and authorise the directors to allot shares.

In addition, the Companies Act 1990 (the "**1990 Act**") in certain circumstances requires shareholder approval in relation to substantial property transactions between directors and the company and loans to directors.

For listed companies, shareholders must approve specific transactions, details of which are set out in the Rules and include acquisitions and disposals of a certain size as well as related party transactions.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Listed and IEX companies are public limited companies and as such shareholders' liability is limited to the amount of their investment in the shares for which they have subscribed. This, together with the principle of corporate personality means that in only extenuating circumstances will the Irish courts look behind the "corporate veil" and hold shareholders liable for debts of the company. It is, however, clear from case law, that the courts will not permit incorporation to be used for fraudulent, illegal or improper purpose. If a shareholder acts as a shadow director that is someone in accordance with whose directions the directors are accustomed to act, then he could have the same duties and potential liabilities as that of a director.

2.3 Can shareholders be disenfranchised?

Generally no, however under the Companies Act 1963, upon takeover of a company, where 80% of the shares have been acquired by the bidder, the remaining 20% may be compulsorily acquired on the same terms by that bidder. This 80% figure rises to 90% for companies falling within the jurisdiction of the EU Takeover Directive which includes listed companies but not IEX companies.

2.4 Can shareholders seek enforcement action against members of the management body?

The powers and duties of directors are those which the company has delegated to them. The directors occupy a fiduciary position towards the company but in carrying out their duties must have regard to the interests of the shareholders. Generally the most usual course for an unhappy shareholder is to sell his shares; however, while the courts generally will not interfere with the internal management of companies, where the directors acted fraudulently or recklessly in disregard of the interests of the minority or there has been unfairly prejudicial conduct against shareholders, the shareholders may have some recourse. Individual shareholders may also take an action against directors in specific circumstances such as where misleading statements have been made in a prospectus or in relation to a takeover.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities by shareholders?

There are no statutory limitations on the number of securities a shareholder can hold, or the speed with which he can build a stake in a company. However, takeover rules which are beyond the scope of this publication must be considered and also the articles of association must be consulted.

For listed companies, the Rules require that notification of acquisitions in excess of 5% be notified to the ISE. The 1990 Act introduced detailed statutory controls on disclosure of interests in shares. Directors, secretaries and their families (including minors) must notify acquisitions by individuals or groups of beneficial interests in shares amounting to 5% or more of the issued share capital of a public company. The company itself must make regulatory announcements of this information. There is also an obligation to notify the ISE of any acquisitions or disposals of officially listed shares carrying voting rights in a public company which brings a person's holdings above or below certain specified percentages. Every public company must keep a register of interests in its shares.

A public company may, by virtue of the 1990 Act, carry out an investigation of the ownership of shares in the company, by issuing a notice in writing to require any person, whom it knows, or has reasonable cause to believe, is interested in any voting shares within the preceding three years and require them to confirm or notify the company if they are not so interested. This investigation may also be requested by a proportion of the members, holding not less than one tenth of the shares carrying voting rights.

2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

The two principal shareholder meetings are annual general meetings ("**AGM**") and extraordinary general meetings ("**EGM**").

The AGM must be held once in every calendar year and must be held within 9 months of the financial year end of the Company, except for the first AGM, which must be held within 18 months of the date of incorporation. Certain business, known as ordinary business, as set out below, must be dealt with at the AGM, however additional items of ordinary business may be set out in the articles of association of the Company. Ordinary business generally includes declaration of a dividend, receiving the audited financial statements, election of directors in place of those retiring, reappointment of retiring auditors and fixing the remuneration of those auditors

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Any other meeting of shareholders is known as an EGM and may be convened by the board as required.

It is the usual practice for the board to call shareholder meetings; however, shareholders of both listed and IEX companies holding not less than 10% may upon requisition require the directors to convene an EGM and to put resolutions to that meeting. Shareholders are entitled to receive notices of all meetings. The Electronic Commerce Act 2000 supplemented by the Electronic Commerce Regulations 2003 provides for the use of electronic communications in business communications and e-commerce activities making it possible for companies to use electronic communications for all shareholders who consent to receipt of communications in this way.

Voting at general meetings either requires an ordinary resolution (requiring a simple majority of those voting in person or by proxy) or a special resolution (requiring a majority of not less than 75% of those voting in person or by proxy).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Companies are managed by a board of directors. All companies must have at least two directors, at least one of whom must be an Irish resident (save where an insurance bond is in place). The Companies Acts prohibit a body corporate from becoming the director of an Irish company. While it is generally accepted business practice to have non-executive directors and executive directors forming part of the board, there is no distinction in Irish law and both director types have the same legal duties and responsibilities. The Code states that the board should identify in the annual report of the company each non-executive director it considers to be independent and where the board determines that a director is independent notwithstanding the existence of certain relationships or circumstances which are likely to affect, or could appear to affect, the director's judgment then the board must give reasons for its determination.

Generally as provided for in the Code, companies will usually have a chairman and chief executive who ideally should be separate. As mentioned above, instances of Irish companies where the chairman and chief executive is one and the same person is the subject of much debate at present. The chairman generally will oversee the running of the board, while the chief executive will manage the day to day activities of the business of the company. Frequently there is key management below the board of directors to whom directors will delegate certain functions.

The company's articles of association are likely to set out some parameters for the management of the company, though it is more usual for the articles to allow the directors to manage the company as they see fit. In compliance with the Code, the board should have a balance between executive and non-executive directors, incorporating some independent non-executive directors, with the ideal under the Code being a majority of directors being non-executive.

The articles of association generally provide for committees of the board, which should also comply with the requirements of the Code. The recommended committees are the nomination committee, dealing with recruitment of board members and key executives, the remuneration committee, responsible for establishing policy on pay and benefits for executive directors and senior management; and an audit committee, who oversee standards and accuracy of the financial reporting and who liaise closely with the company's auditors during the audit process. Ideally under the Code, the recommended committees should be comprised solely of non-executive directors.

3.2 How are members of the management body appointed and removed?

Generally shareholders retain control of any appointments to the board. The shareholders appoint the initial board on incorporation and have the power to remove a director either by not re-electing them when they come up for rotation at the AGM, or by an ordinary resolution of the company. The articles of association will usually provide that where a vacancy arises during the year, the directors can fill that vacancy. The Code also contains provisions designed to ensure effective appointments and re-appointments of directors including requirements for rigorous review of directors being re-appointed for more than a certain number of terms.

Directors of the company may be removed by ordinary resolution of the company and an extended notice of 28 days is required. In addition the director must also be provided with the opportunity to address the meeting at which the resolution for his removal is being proposed.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

Companies are obliged to keep at their registered office a copy of every contract of service with a director or a director of a subsidiary. The 1990 Act provides that a fixed term contract of employment with a director which exceeds five years must be approved by a resolution of the company, particularly where the contract cannot be terminated except in special circumstances.

The Code recommends that a notice period for a director be one year and generally in most listed companies, this would be the case.

A director has no automatic right to remuneration for acting as a director, however generally the articles of association will contain some provisions for their remuneration. The amount of such remuneration is a matter for the company and it does not have to be paid out of profits, nor is it unlawful if it is paid out while the company is insolvent, however if it is in excess of what is authorised by the articles of association, the director may be compelled to repay the excess to the company or any liquidator.

The Companies Act, 1963 requires disclosure in the financial statements of remuneration and other payments to directors. In addition, directors are entitled to their expenses incurred in the performance of their duties as a director.

The Code's guidelines on remuneration focus on linking remuneration to performance, and time commitments to the role. The Code also recommends that the remuneration committee, which should be made up of non-executive directors have terms of reference and should have delegated responsibility for setting remuneration for all executive directors and the chairman, including pension rights and any other compensation. The Code also recommends that the committee would review other senior management payments.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body?

For listed and IEX companies, directors are permitted to own shares in their companies and there is no limit. The 1990 Act requires

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directors and secretaries to notify the company, in writing of their interests in the company's shares or debentures and of any dealings by them in those shares. If any interests are held in the company's holding company any fellow subsidiaries or its own subsidiaries, these interests must also be disclosed. The requirement to disclose also extends to interests held by spouses and minor children of directors or any shares held in trust.

In addition any contracts entered into by any director to sell shares or debentures or any assignment of any rights to subscribe for such interests must be disclosed. The disclosure obligation also extends to any grant by the holding company, subsidiary or fellow subsidiary of any right to subscribe for shares or debentures or where the director exercised or assigned any such right.

Other areas of law which will affect the ability of directors to deal in securities but which are beyond the scope of this publication are insider dealing provisions as set out in the Rules and Market Abuse Regulations.

3.5 What is the process for meetings of members of the management body?

Generally, the articles of association of a company will allow directors to regulate their meetings as they see fit. The Code requires that directors meet sufficiently regularly to allow them to discharge their duties.

3.6 What are the principal general legal duties and liabilities of members of the management body?

Directors occupy a fiduciary position towards the company and must always act in good faith, in the best interests of the company even if this conflicts with the interests of the group of companies to which the company belongs. As well as to the company, directors owe duties to other stakeholders. Directors' duties are the same for executive and non-executive directors. Under the 1990 Act, the directors have a duty to have regard to the interests of the company's employees as well as the shareholders. Where a company is insolvent, directors owe the same fiduciary duties to creditors.

A director is prohibited to enter into any contracts which may fetter his discretion and prevents him from exercising his duties as a whole.

A director must exercise due skill and care in the performance of his duties. However, a director is not expected to have a greater skill than may be reasonably expected of a person of his knowledge and experience. A director is not expected to give continuous attention to the affairs of the company, he may delegate duties to others who he reasonably believes and where no suspicions indicated otherwise, were capable of carrying out such responsibilities. Directors must never make a secret profit and are required to disclose any interests in contracts with the company.

The above are directors' principal general duties. Directors will also generally be required to have regard to other specific duties under legislation such as Health and Safety, Data Protection, and Environmental legislation in the discharge of their duties.

The directors can be personally liable for a range of offences under the Companies Acts unless they can demonstrate that they took all reasonable steps to prevent a default by the company or that by reason of circumstances beyond their control, they were unable to do so. Liquidators and regulators such as the ODCE are increasingly vigilant with respect to the conduct of directors. A liquidator of an insolvent company is compelled to report to the ODCE on the conduct of the company's directors and must bring a restriction application against such directors unless the ODCE relieves the liquidator of this obligation. Once a restriction application is brought before the courts, the court must restrict the director unless the director can prove that he acted honestly and responsibly and that there is no other reason why it would be just and equitable to restrict him. A restriction order prohibits a person from acting as director or from being otherwise involved in the promotion or formation of a company unless that company meets certain minimum issued share capital requirements.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

The directors are responsible for the success of the company and must provide effective leadership of the company with due regard to prudent and effective internal controls, which allow the directors to assess and manage risk to the shareholders' investment and the company's assets. Under the Code, the directors should annually perform a rigorous evaluation of their own performance. There should be clear division of responsibilities between running the board and running of the business. A balance of executive and non-executive directors is required and the board should receive timely and appropriate information to allow the directors to discharge their duties. An effective communication with shareholders should be established with effective dialogue around both directors' and shareholders' understanding of the company's objectives. All directors are charged with this responsibility.

3.8 What public disclosures concerning management body practices are required?

Listed companies are expected to disclose their compliance with the Code in their annual report. The Code recognises that there will be times when a company, particularly smaller companies, will not be in a position to comply fully with the Code, but every company must give careful consideration to their disclosures. The financial statements must also give certain financial and other disclosures in the financial statements, which are outside the scope of this publication.

Under the legislation, the directors must make certain disclosures public, by filing them at the Companies Registration Office, relating to appointments and resignations to the board, changes in share capital and of certain resolutions of the shareholders. Listed companies must also comply with the Rules' requirements on disclosure under their continuing obligations, such as director's dealings in shares and options and other relevant information.

Listed companies must publish the terms of reference of their nomination, remuneration and audit committees, the terms and conditions of appointment of their non-executive directors and for all resolutions after a vote has been taken (except on a poll), and prescribed information about the results of the voting.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

The extent to which a company may indemnify its directors under the legislation is very limited. There is a general prohibition on a company indemnifying a director against any liability for negligence, breach of duty or breach of trust of which he may be guilty in relation to the company. Any provision contained in the articles of association of the company, or any contract with the company or otherwise which attempts to indemnify any director of the company in this way will be deemed void. However, a company

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may indemnify a director with respect to the payment of costs relating to a successfully defended civil or criminal action or where a court decides that the director acted honestly and reasonably and ought fairly to be excused either wholly or partially from his liabilities. A company can, however, take out insurance cover for directors against loss in respect of the forms of liability mentioned above. Naturally the insurance will not cover loss due to fraud or dishonesty, wilful default or criminal behaviour.

4 Corporate Social Responsibility

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

There is no law or regulation regarding corporate social responsibility in Ireland although many companies are working voluntarily to integrate social and environmental concerns in their everyday business operations.

4.2 What, if any, is the role of employees in corporate governance?

There is no specified role for employees in corporate governance. For example, unless stated otherwise in the articles of association, there is no requirement to have employee representatives on the board.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

The board of directors have the ultimate responsibility for disclosure and transparency.

5.2 What corporate governance related disclosures are required?

Companies' financial statements must be published annually and for listed companies are required under the listing rules to "comply or explain". This means that generally companies are expected to comply with the provisions of the Code, however if under certain circumstances, they cannot comply, for reasons of size or expense, then they must disclose why they are not complying.

5.3 What is the role of audit and auditors in such disclosures?

Every company is required to appoint auditors, who will review and audit on an annual basis a company's books and records and financial statements and then produce the auditors' report to the financial statements. The auditors will review compliance with the statutory and other required statements, such as certain parts of the company's corporate governance statement and provide their opinion in their report on the adequacy of the disclosures and their view as to whether the annual accounts give a "true and fair view" of the state of affairs of the company. The auditor can give a qualified audit report if they are not satisfied with any such disclosures.

5.4 What corporate governance information should be published on websites?

Companies must publish certain information on their websites, including the name of the company and its legal form, the names of the directors and their nationalities, if not Irish, the registered number of the company and its registered office. If the company is in the process of being wound up that information must also be disclosed. Under the Code, listed companies should display on their websites the terms of reference of the nomination, remuneration and audit committees and the terms and conditions of appointment of non-executives. IEX companies under the IEX Rules must also maintain a website on which prescribed information should be available including a description of the business, the names and bio's of the directors, a description of the board's responsibilities and any committees, copies of constitutional documents, details of any other exchanges on which the company trades or has applied to trade, the number of IEX securities in issue and the percentage not in public hands together with the indemnity and percentage holdings of its significant shareholders and most recent annual and half yearly reports.

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