Practical Law™

GLOBAL GUIDE 2016/17
CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

ACC Association of Corporate Counsel

Corporate governance and directors' duties in Ireland: overview

Pat English and Madeline McDonnell
Matheson

global.practicallaw.com/9-502-2950

CORPORATE GOVERNANCE TRENDS

1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

The Companies Act 2014 (Act) came into force on 1 June 2015. The Act consolidated and modernised Irish company law and is the largest piece of substantive statute law in Irish legislative history. The transitional period under the Act expired on 30 November 2016 meaning that private limited companies which had not undergone a prescribed conversion process by that date automatically defaulted to the new model company type on 1 December 2016. The Act is in the process of being amended by the Companies (Accounting) Bill 2016 (Accounting Bill) which is expected to be signed into law in early 2017. The main purpose of the Accounting Bill is to transpose EU Accounting Directive 2013/34/EU into Irish law; it also introduces a new concept of "micro company" into Irish law with relaxed accounting and disclosure obligations. Significantly, it also effectively abolishes the so-called "non-filing structure" which allowed certain unlimited companies not to publicly file their audited accounts at the Companies Registration Office (CRO). Such structures will no longer be available in respect of financial periods beginning on or after 1 January 2017.

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (2016 Regulations) came into operation on 15 November 2016 meaning that most Irish companies must gather and maintain information on individuals described as their ultimate beneficial owner. Ireland acted early to implement these measures mandated by the Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive). Each EU member state must establish a national beneficial ownership register. It is likely that, when the remaining provisions of the Fourth EU Anti-Money Laundering Directive are transposed into Irish law, the national beneficial ownership register will be publicly accessible.

Draft legislation to transpose the Non-Financial Reporting Directive 2014/95/EU is expected to be published in early 2017. The new law will introduce mandatory sustainability reporting for large companies using a "comply or explain" model. Companies within its scope will be required to report on environmental matters, social and employee matters, respect for human rights, and anti-corruption and bribery, using existing national or international optional reporting frameworks.

The Regulation (EU) 596/2014 on market abuse (Market Abuse Regulation) took effect in Ireland on 3 July 2016 and extended the rules concerning market abuse and inside information beyond issuers with shares admitted to trading on EU regulated markets to include issuers of securities traded on multilateral trading facilities (such as the Global Exchange Market and Enterprise Securities Market of the Irish Stock Exchange). More stringent requirements in relation to the compilation and maintenance of insider lists and the handling of insider information were introduced. In Ireland, the European Union (Market Abuse) Regulations 2016 transposed the Directive 2014/57/EU on market abuse (MAD II) and elements of the Market Abuse Regulation.

Three related pieces of legislation came into force on 17 June 2016, reforming the law on the conduct of audits and the regulation of auditors: the EU Statutory Audit Regulation, applicable only to public-interest entities, the Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (Statutory Audit Directive), applicable to all statutory audits and the Irish Audit Regulations, some parts applicable to public-interest entities only and some parts of general application. The new measures will impact public-interest entities most by reforming the auditor selection and appointment process, curtailing non-audit services that the auditor can provide and introducing mandatory auditor rotation for those entities. All Irish companies which are subject to statutory audit are affected to some degree by the new measures. An expansion in scope of the auditor's report under the Act is likely to result in additional information concerning the company being sought by auditors.

CORPORATE ENTITIES

2. What are the main forms of corporate entity used in your jurisdiction?

Limited liability companies

The main form of corporate entity used in Ireland is the limited liability company. Limited liability companies can be private (and, in turn, limited by shares or by guarantee) or public.

Private limited liability companies

Private companies limited by shares are the most common form of corporate entity in Ireland. In such companies, the liability of a shareholder is limited to the amount, if any, that is unpaid on the shares registered in the name of that shareholder.

- Private limited liability companies cannot offer their shares to the public.
- The number of members of a private limited liability company must be limited to 149 or fewer persons.

Under the Act, there are now two distinct types of private company limited by shares:

Model private company (LTD). This has a one-document constitution and unlimited corporate capacity.

Designated activity company (DAC). The DAC:

- Has a two-document constitution, retaining an objects clause.
- Must have at least two directors.

© Thomson Reuters
This article was first published in the Corporate Governance and Directors' Duties Global Guide 2016/17 and is reproduced with the permission of the publisher, Thomson Reuters.
The law is stated as at 1 January 2017.

THOMSON REUTERS™

- Is close in form to the private limited company incorporated under the Companies Acts 1963 to 2013.

Any existing private company limited by shares that had not undergone the conversion process to one of the new company types by the end of the 18-month transition period after the Act became operative automatically converted to a LTD on that date (that is, 1 December 2016).

Private company limited by guarantee (CLG)

Private companies limited by guarantee have no share capital and the liability of a member is limited to the amount which that member has agreed in the constitution to contribute to the company in the event of its winding up. Such companies are typically used in the not-for-profit sector such as charities, clubs and property management.

Public limited liability companies

Public companies:

- Can offer their shares to the public.
- Can be incorporated with one shareholder.
- Must have an issued share capital of at least EUR25,000, of which 25% of the nominal value of each share and the entire share premium must be paid up.
- Can have their shares admitted to trading on stock markets (in Ireland or elsewhere), but this is not a requirement.

Unlimited companies

The primary characteristic distinguishing unlimited companies from limited companies is the potential for the members of an unlimited company to be held liable on an unlimited basis for the debts of the company in the event of it entering insolvent liquidation. Unlimited liability companies do however have certain advantages. The rules on distributions are disapplied in relation to such companies and an exemption from the public filing of financial statements exists in relation to certain unlimited companies, although unlimited companies whose ultimate shareholders have the benefit of limited liability protection will become subject to the requirement to file financial statements upon the entering into force of the Accounting Bill in early 2017.

The Act recognises that there are three distinct types of unlimited company:

- Private unlimited company with a share capital (ULC).
- Public unlimited company with a share capital (PUC).
- Public unlimited company without a share capital (whose liabilities are guaranteed by its members) (PULC).

An unlimited company must have at least two directors. ULCs must not offer for sale or list any securities but a PUC and PULC can list debt securities. The registered name of all three company types must end in "unlimited company" which may be abbreviated to "UC" in subsequent usage. However, an exemption from this requirement is available in special circumstances.

LEGAL FRAMEWORK

3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.

Principal sources of regulation for both public and private Irish companies

The following are the principal sources of regulation for Irish companies (both public and private):

- **The Companies Act 2014.** The Act consolidated and reformed the Companies Acts 1963 to 2013, which were repealed.
- **Constitutional documents.** Each company must have a constitution. In an LTD, the constitution comprises a one-part document in a form prescribed by Schedule 1 of the Act. In other company types, the constitution comprises a two-part document, the memorandum (containing the company's objects) and articles of association, the Act prescribing a specific form of constitution for each company type. The constitution of a company contains the publicly registered internal rules of the company and binds the company and its members. The Act contains default internal company rules, some of which are mandatory and some of which can be disapplied or modified in the constitution. In theory, a company's constitution could be a one page document adopting all the default provisions in the Act. However, in practice, the constitution of a company will tend to include many supplemental regulations tailored to the company's specific requirements.
- **Generally applicable legal provisions.** For example, tax, employment and criminal legislation (and so on), and the common law. Court decisions in relation to companies under the common law, previous companies' law and the Companies Act 2014 are also relevant to Irish companies.
- **The Office of the Director of Corporate Enforcement (ODCE) guidance notes.** The ODCE (*www.odce.ie*) plays an important role in enforcing and encouraging compliance with Irish company law. The ODCE has published a number of non-binding best practice guidelines that seek to promote transparency and accountability and a series of Information Booklets on the Act.
- **Information leaflets and guidance notes.** The Companies Registration Office (CRO) (*www.cro.ie*) is the statutory authority for registering companies in Ireland. It also plays an important role in relation to the enforcement of Irish companies' filing obligations and has issued a number of useful information leaflets and guidance notes in that regard.

Additional regulations for listed companies

Public companies listed on the Main Securities Market of the Irish Stock Exchange (ISE). The following additional regulations apply to public companies listed on the Main Securities Market of the Irish Stock Exchange (ISE) (which is a regulated market for the purposes of EU securities law):

- The ISE Listing Rules (Listing Rules). The Listing Rules set out conditions for listing and the continuing obligations that apply to companies listed on the Main Securities Market (MSM) of the ISE. The ISE website (*www.ise.ie*) contains market and regulatory information applicable to listed companies. It also provides access to the Listing Rules and the Irish Corporate Governance Annex published by the ISE (Irish Annex). In July 2016, the ISE issued revised rulebooks to reflect EU-wide changes to market abuse legislation.
- The UK Corporate Governance Code as supplemented by the Irish Annex (Code).
- Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive), the Prospectus Regulations 2005 (Prospectus Regulations) and the Prospectus Rules issued by the Central Bank of Ireland. The Prospectus Regulations and the Prospectus Rules govern the preparation and publication of prospectuses.
- Irish Takeover Panel Act 1997 (1997 Act) and Irish Takeover Rules 2013 published by the Irish Takeover Panel (Takeover Rules) and the Substantial Acquisition Rules. The Irish Takeover Panel monitors and supervises takeovers to ensure compliance with the 1997 Act and the Takeover Rules.

- Transparency (Directive 2004/109/EC) Regulations 2007 (Transparency Regulations) and the Transparency Rules published by the Central Bank of Ireland (Transparency Rules). The Transparency Regulations and the Transparency Rules seek to enhance the transparency of information provided by issuers on a regulated market. The Transparency (Directive 2004/109/EC) (Amendment) (No. 2) Regulations 2015 became law in November 2015 and revised Central Bank of Ireland Transparency Rules were issued at that time. The new regulations transpose Directive 2013/50/EU, which further amended the Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market (Transparency Directive). New notification requirements were introduced relating to the holding of instruments with a similar economic effect to shares.
- The Market Abuse Regulation which took effect in July 2016 and has direct effect in all EU Member States and the Irish (Market Abuse) Regulations 2016 which transposed the MAD II and elements of the Market Abuse Regulation, and Market Abuse Rules published by the Central Bank of Ireland (Market Abuse Rules). The Market Abuse Regulation and the Market Abuse Rules impose significant obligations on issuers and strengthen the rules in relation to insider trading and market manipulation.

Companies listed on the Enterprise Securities Market (ESM). The following additional regulations apply to companies listed on the Enterprise Securities Market (ESM) (which is an unregulated market for the purposes of EU securities law):

- ESM rules, which are published by the ISE (ESM Rules).
- Irish Takeover Panel Act 1997, the Takeover Rules and the Substantial Acquisition Rules.
- ESM-listed companies are encouraged to comply with the Code or with certain key aspects of the Code.
- The Market Abuse Regulation and the Irish (Market Abuse) Regulations 2016 with effect from July 2016.

There are a number of Irish public listed companies listed on markets outside of Ireland such as the NASDAQ, NYSE and the London Stock Exchange (main and AIM markets) and these companies are subject to additional rules applicable to those markets.

Institutional investors

The Irish Association of Investment Managers (IAIM) is the representative body for institutional investment managers in Ireland. IAIM aims to ensure that the best standards are adopted throughout the industry and has issued guidelines for best practice in corporate governance. While these guidelines are not legally binding, they reflect the requirements of institutional investors in Ireland and, to that extent, are frequently observed by listed companies.

4. Has your jurisdiction adopted a corporate governance code?

Public companies listed on the Main Securities Market (MSM) of the ISE (but not the ESM) must adhere, on a comply-or-explain basis, to the corporate governance standards set out in the Code.

The Code sets out principles of good corporate governance under the following headings:

- Leadership.
- Effectiveness.
- Accountability, including internal control, audit committees and external auditors.
- Remuneration.
- Relations with shareholders.

In the event of non-compliance with the Code, the company must provide a clear rationale for its deviation in its annual report.

There are no prescribed governance requirements for ESM companies. However, many companies adopt at least some elements of the Code. Some ESM companies also look to the corporate governance guidelines for smaller quoted companies (QCA Code). The QCA Code applies key elements of the Code and other relevant guidelines where, because of the cost or complexity, full compliance with the Code may not be appropriate. The QCA Code is voluntary rather than mandatory.

CORPORATE SOCIAL RESPONSIBILITY AND REPORTING

5. Is it common for companies to report on social, environmental and ethical issues? Highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

Companies must disclose political donations that exceed a certain threshold specified in the Electoral Act 1997 in their financial statements.

Companies other than small- to medium-sized companies must also include information in their financial statements in relation to key performance indicators relevant to the particular business. This includes information relevant to environmental and employee matters to the extent necessary to understand the company's development, performance or position.

Other than this, there are no specific legal requirements imposed on companies to report on social, environmental and ethical issues. However, greater awareness of corporate social responsibility has resulted in many larger companies reporting on their policies for these matters in their annual financial statements. The Non-Financial Reporting Directive 2014/95/EU will introduce mandatory sustainability reporting for large companies using a "comply or explain" model. Draft implementing legislation is due to be published in early 2017.

BOARD COMPOSITION AND RESTRICTIONS

6. What is the management/board structure of a company?

Structure

Irish companies are managed by a single tier board of directors (board).

Management

Day-to-day management of the company is typically delegated to the board in the constitution with certain fundamental decisions relating to the company being reserved to the shareholders (for example, changes to the company's constitution).

Board members

The directors of a company together constitute the board.

Irish company law restricts certain persons from being appointed as directors, such as minors, bodies corporate and unincorporated bodies of persons, undischarged bankrupts and persons who are disqualified from acting as director.

Employees' representation

There is no general provision for employee representation on the boards of Irish companies (other than certain state bodies). However, a company's constitution or an agreement with a third party (such as a trade union) can provide for employee participation.

Number of directors or members

An LTD may have one director (but in that case must have a separate company secretary). Other company types must have a minimum of two directors.

There is no upper limit on the number of directors that can be appointed, unless provided for in a company's constitution.

7. Are there any general restrictions or requirements on the identity of directors?

Age

Under the Act, directors must be at least 18 years old. There is no maximum age limit for directors.

Nationality

Every Irish company must have at least one director who is resident in the European Economic Area (EEA), unless either:

- The company has filed a non-resident bond to the value of EUR25,000 with the CRO.
- The company holds a certificate from the CRO confirming that the company has a real and continuous link with one or more economic activities in Ireland.

The constitution of a company may specify additional nationality requirements.

Gender

At present, Irish company law does not provide for gender quotas on boards or any related disclosure requirements. New requirements to be introduced under the Non-Financial Reporting Directive will require large companies to report on their diversity policies, regarding aspects such as gender, in relation to the company's management and supervisory bodies.

For listed companies, the Code recommends that appointments to the board should be made with due regard for the benefits of diversity, including gender.

8. Are non-executive, supervisory or independent directors recognised or required?

Recognition

Irish law recognises non-executive directors. However, they are subject to the same duties and obligations under Irish company law as executive directors.

Board composition

The Act introduced the requirement for large companies reaching prescribed balance sheet and turnover thresholds to either form an audit committee, with at least one independent non-executive director who has competence in accounting or auditing, or to state in their annual statutory directors' report that they have not done so and the reason for this. Otherwise, private companies can, but are not obliged to, appoint non-executive directors.

For listed companies, the Code recommends that the board should include an appropriate combination of executive and independent non-executive directors.

Independence

The Code recommends that, except for smaller companies (below FTSE350), at least half the board, excluding the chairman, of listed companies should comprise independent non-executive directors. For smaller listed companies, the Code recommends having at least two independent non-executive directors.

The Code indicates that the following factors are relevant to determining whether a particular director is independent:

- Whether the director has been an employee of the company or group within the previous five years.
- Whether the director has or has had within the previous three years, a material business relationship with the company either directly or as a partner, shareholder, director or senior employee of a body that has a relationship with the company.
- Whether the director has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme.
- Whether the director has close family ties with any of the company's advisers, directors or senior employees.
- Whether the director holds cross-directorships or has significant links with other directors through involvement in other companies or bodies.
- Whether the director represents a significant shareholder.
- Whether the director has served on the board for more than nine years from the date of their first election.

Duties and liabilities

The duties and liabilities of non-executive directors are the same as those for executive directors. Where a shareholder or third party nominates a non-executive director to the board, that nominee is entitled to have regard to the appointer's interests but only insofar as those interests do not conflict with the director's obligation to act in the company's interests.

9. Are the roles of individual board members restricted?

For private companies, Irish company law does not restrict the same person from acting as both chairman and chief executive officer (CEO) (or as managing director, which is the equivalent role referred to in the Act).

For listed companies, the Code recommends that the chairman and CEO should be separate individuals.

10. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

The first directors of a company are determined by the subscribers to the constitution (that is, the members) on incorporation. The Act contains default provisions in relation to the subsequent appointment of directors, which may be modified or disapplied in the constitution. Typically, the constitution allows for the appointment of directors by board resolution. For listed companies, the Code recommends that there should be a formal, rigorous and transparent procedure for the appointment of new directors. It recommends the establishment of a nomination committee to lead the appointment process, of which a majority of the members should be independent non-executive directors.

Removal of directors

Shareholders can remove directors using a statutory procedure set out in the Act, which requires compliance with specific formalities, including observance of an extended notice period.

The constitution of a company can facilitate removal by the other directors in certain instances. This process must be used bona fide in the interests of the company and not for an improper purpose.

Additionally, if a director of a company is also an employee of the company, that director's contract of employment may provide that if the director ceases to be an employee of the company, the director will also be deemed to resign as a director with immediate effect.

Where a director is involuntarily removed, this is without prejudice to any claim that the director may have against the company for compensation for termination of his/her position under the employment contract.

11. Are there any restrictions on a director's term of appointment?

Contracts of employment of directors with a term exceeding five years are subject to shareholder approval. The constitution can contain restrictions on the term of appointment of a director of a private company.

For listed companies, the Code recommends that contract and notice periods should not be longer than one year.

DIRECTORS' REMUNERATION

12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Directors do not have to be employees of the company. In practice however, executive directors are frequently employed by the company, while non-executive directors are generally engaged under service contracts.

Shareholders' inspection

Directors' service contracts must be made available for inspection by members without charge (*see Question 14*).

For listed companies, the Code requires that the terms and conditions of appointment of non-executive directors be made available for inspection by any person at the registered office and for 15 minutes before, and during, the annual general meeting of the shareholders (AGM).

13. Are directors allowed or required to own shares in the company?

Directors are allowed, but not required to own shares in the company. If desired, the company's constitution can specify a shareholding qualification for directors.

Where directors hold shares or interests in shares in the company or any company in the group, they are required to notify the company of these interests. This information will also be included in the company's annual financial statements which (subject to exemptions) must be publicly filed at the CRO. The Act introduced de minimis thresholds for notification of interests in shares and share options which should substantially reduce or eliminate disclosure requirements for many directors. No disclosure is required where shares held by a director (aggregated with those of connected persons) represent 1% or less of the company's share capital.

For listed companies, directors must disclose to the company transactions conducted on their own account, such as the acquisition or disposal of shares. There are also restrictions on a director dealing in options to buy or sell shares in a public company.

Under the Transparency Regulations, shareholders must make a disclosure when they acquire (directly or indirectly) control of voting rights equal to 3% or more of the total voting rights in certain listed companies. Further disclosures must be made if the shareholder increases or reduces his or her interests in the voting rights by a further 1%. The Act contains a separate disclosure regime for unlisted public companies or companies listed on unregulated markets. Under this regime, the disclosure threshold is 3% and each further 1% interest.

In addition, the Code recommends that for listed companies, a non-executive director's remuneration package should not include the granting of share options. In exceptional cases where the remuneration package does include options, advance shareholder approval should be obtained and where these options are exercised, the non-executive director should hold the shares for at least one year after leaving the board.

14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

The determination of directors' remuneration is generally a matter for the board, subject to any restrictions set out in the constitution.

For listed companies, the Code recommends that the remuneration committee should determine directors' remuneration. The Code also recommends that the remuneration committee should judge where to position their company relative to other companies but that they should use such comparisons with caution and should avoid paying more than is necessary.

Disclosure

Certain information in relation to directors' salaries and remuneration must be disclosed in the company's annual financial statements, which (subject to exemptions) must be publicly filed at the CRO. Additionally, directors' service contracts must be made available for inspection at a company's registered office, principal place of business or another place within Ireland, although the Act permits the use of computers for the keeping of company records.

For listed companies, the Listing Rules also require a remuneration report to be sent to the shareholders annually, which contains a wide range of disclosures on executive directors' remuneration.

Shareholder approval

Except where the company's constitution provides otherwise, a director's remuneration does not require shareholder approval unless the engagement is for more than five years.

For listed companies, the directors' remuneration scheme must be submitted to a shareholders' vote. However, this does not affect the director's right to the remuneration. Additionally, shareholder approval must be obtained for long-term incentive schemes that do not meet certain criteria set out in the Listing Rules.

MANAGEMENT RULES AND AUTHORITY

15. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

The Act contains default provisions concerning the internal management of the company but these may be disapplied or modified by the constitution. Directors are generally left considerable discretion to manage the company.

The constitution can address the following:

- **Quorum.** The statutory default of two is usually adopted, except in the case of a single director LTD.
- **Notice requirements.** The constitution is frequently silent on notice requirements for directors' meetings, in recognition of the fact that board meetings often need to take place on an ad hoc, last-minute basis. The statutory default position is that all directors are entitled to reasonable notice of meetings but that it is not necessary to give notice of a meeting to an Irish resident director who is absent from Ireland. This default position may be modified.
- **Voting requirements.** Directors generally have one vote and voting takes place by a show of hands. The statutory default position set down by the Act is that questions arising are to be decided by a majority of votes and where there is an equality of votes, the chairman has the casting vote. Directors can also vote by unanimous written resolution.

16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

Managerial power is usually delegated to the directors. Certain fundamental decisions relating to the company are reserved to the shareholders by law or under the constitution. There is no concept of a supervisory board.

Restrictions

Irish company law requires that certain fundamental decisions relating to the company must obtain shareholder approval, including but not limited to:

- Changing the company's constitution.
- Changing the company's name.
- Converting from a limited to an unlimited company or a private to a public company or vice versa.
- Providing financial assistance in connection with the acquisition of shares in the company or its holding companies.
- Entry into substantial property transactions with directors.

The constitution can specify additional matters that require shareholders' approval.

In addition, the Listing Rules and ESM Rules require listed companies to obtain the prior approval of its shareholders in respect of certain significant transactions.

17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

Subject to any restrictions in the constitution, the directors are generally entitled to delegate responsibility for specific issues to individual directors or committees of directors. However, this delegation does not relieve the directors from their own general duties to the company. In these circumstances, the directors continue to have a residual duty to ensure that the delegated powers are exercised by the relevant director or committee of directors competently and in the best interests of the company.

Public-interest entities as defined by the EU Statutory Audits Regulations 2016 are obliged to establish an audit committee. Public limited companies that do not fall within that definition, and large private companies, are required by the Act to establish an audit committee or explain why they have not done so. Listed companies subject to the Code must establish an audit committee, nomination committee and remuneration committee.

DIRECTORS DUTIES AND LIABILITIES

18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

Previously, directors' duties were contained in a range of statutes and common law. The Act codified directors' common law fiduciary duties but the many other statutory duties of directors have not been affected by the Act. A director's fiduciary duties under the Act include:

- The duty to act in good faith in the interests of the company.
- The duty to act honestly and responsibly in relation to the conduct of the affairs of the company.
- The duty to act in accordance with the company's constitution and to use powers only for the purposes allowed by law.
- The duty to avoid conflicts of interest.
- The duty to 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 experience which the director actually has.

A director's additional statutory duties include various duties of disclosure, as well as duties to ensure that the company keeps adequate accounting records and that it meets various company secretarial compliance obligations.

Directors' duties are owed to the following:

- **The company.** Directors primarily owe their duties to the company.
- **Shareholders.** The Act provides that a director must have regard to the interests of its shareholders (but this is subject to the overriding obligation to act in the best interests of the company).
- **Employees.** The Act provides that directors must have regard to the interests of employees in the performance of their functions.
- **Creditors.** Where a company is insolvent, even if not yet in liquidation, directors must also have regard to the interests of the company's creditors.
- **Appointing shareholder.** The Act allows a "nominee" director who has been appointed by the company's shareholder to have regard to the interests of that appointing shareholder but this is without prejudice to the directors' general obligation to act in the best interests of the company.

The Code sets out additional obligations for directors of listed companies.

19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

Irish laws prohibiting theft, fraud and bribery are a combination of common law and statutory law, the main statutes applicable to directors being the Prevention of Corruption Acts 1906 to 2010 and the Criminal Justice (Theft and Fraud Offences) Act 2001. A draft Corruption Bill was published in 2012 which proposes to repeal the numerous pieces of Irish anti-corruption legislation and replace

them with one consolidated statute. This draft legislation is currently in the early stages of the legislative process.

Under the Act, where it appears that a director was knowingly a party to the carrying on of the business with intent to defraud creditors or for any fraudulent purpose, a court can find the director guilty of fraudulent trading. Fraudulent trading attracts both civil and criminal liability. Civil liability can also be imposed on a director for the lesser crime of reckless trading, where it appears he/she was knowingly a party to the carrying on of the business in a reckless manner.

The Act also makes it an offence for a director to falsify, conceal, destroy or otherwise dispose of a document or record relevant to an investigation into the company by the Director of Corporate Enforcement.

20. Briefly outline the potential liability for directors under securities laws.

Directors of listed companies have a duty to ensure the accuracy of company information contained in a prospectus, and in particular to ensure that the prospectus does not include any untrue statement and does not omit any information required by EU prospectus law. The Act provides that directors can incur civil liability for misstatements in a prospectus. Of particular importance is the creation of new "super offences" by the Act (outside the four-fold categories of offences applicable to other breaches of the Act). These offences relate to breaches of market abuse, prospectus and transparency law. A market abuse offence can attract a maximum fine of EUR10 million and/or imprisonment for up to ten years (although some technical difficulties with the implementation of this provision have been identified and are expected to be remedied). An offence under prospectus or transparency law can attract a maximum fine of EUR1 million and/or imprisonment for up to five years.

Under the common law, a director can also face civil liability for misstatements or omissions in a prospectus. It is also possible that the directors could be sued for damages under the torts of deceit, fraudulent misrepresentation or negligent misstatement.

Directors may face civil liability for insider dealing under the Act or for breach of the Market Abuse Regulations.

21. What is the scope of a director's duties and liability under insolvency laws?

The law of corporate insolvency is primarily governed by the Act.

The Act provides for a series of offences that may be committed by the directors of a company during the course of a liquidation, such as the failure to disclose information to the liquidator. A director can face either civil or criminal liability for these offences. A court can also impose liability on directors if a company fails to keep adequate accounting records, where the court considers this failure has contributed to the company's inability to pay all of its debts, resulted in substantial uncertainty as to the assets and liabilities of the company or substantially impeded the orderly winding up of the company.

In certain cases where a company is insolvent, a director may owe duties to company creditors. Restriction and disqualification orders may be imposed on the directors of insolvent companies.

22. Briefly outline the potential liability for directors under environment and health and safety laws.

Environment

Ireland has a range of more than 300 pieces of legislation relating to the environment. Much of this legislation implements European environmental legislation.

Some of the principal pieces of Irish environmental legislation are:

- Environmental Protection Agency Acts.
- Waste Management Acts.
- Air Pollution Acts.
- Local Government (Water Pollution) Acts and Water Services Acts.
- Planning and Development Acts.

Directors can be held personally liable for environmental offences. Much of Ireland's environmental legislation provides that, where a criminal offence is committed by a company and the offence is committed with the consent, or connivance or approval of, or attributable to any neglect on the part of any director, that director may also be guilty of an offence. This "criminal charge" section can be in slightly different terms in the environmental statutes. The company does not have to be prosecuted first, or at all, for the offence, in order for the director to be successfully prosecuted. Each case will depend on its particular facts and on the actual part played by the director.

Penalties under environmental legislation on summary conviction (for minor offences) can be up to a maximum fine of EUR4,000 and/or up to 12 months imprisonment. On indictment, fines of EUR15 million and/or up to ten years imprisonment are available under certain legislation although no fine of that level has ever been imposed.

The Irish courts have imposed personal civil liability on company directors to pay for the environmental clean-up costs of unauthorised waste in circumstances where the company is insolvent and the director is considered to be a polluter or a "holder" of waste.

Health and safety

Directors can be held liable for various offences under the Safety, Health and Welfare at Work Act 2005, where the director authorised or consented to the acts that constituted the offence or if the act was attributable to connivance or neglect by the director. If proven that a director's duties included making decisions that could have significantly affected the management of the company, there is a presumption that the director authorised/consented to the act or acts that constituted the offence or the act was attributable to the director's connivance or neglect. Sanctions include fines of up to EUR3 million and/or two years' imprisonment.

23. Briefly outline the potential liability for directors under anti-trust laws.

Company directors can be held personally liable for breaches of competition law, even where the company has not been prosecuted, provided that the director authorised or consented to the breaches. The Competition (Amendment) Act 2012 increased the potential penalties for individuals to include fines of up to EUR5 million and imprisonment for up to ten years as well as potential disqualification from acting as a director.

24. Briefly outline any other liability that directors can incur under other specific laws.

If a company commits certain revenue offences, a director can be deemed guilty where the offence is shown to have been committed with the consent or connivance, or attributable to any recklessness, of the director in question. The list of revenue offences includes failing, without reasonable excuse, to file tax returns or knowingly or wilfully furnishing an incorrect tax return.

A director can be held liable for offences under the Data Protection Acts 1988 and 2003 where a company commits an offence with the director's consent or connivance, or the offence is attributable to neglect on the director's part. Similar liability arises under the European Communities (Electronic Communications Networks and Services)(Privacy and Electronic Communications) Regulations 2011. As individuals, directors can also face liability for the unlawful use of a computer under the Criminal Justice (Theft and Fraud Offences) Act 2001.

In certain limited circumstances, a director may be liable for acts of the employees of the company where a criminal offence has been committed by the company and the director has not taken reasonable steps to ensure that the relevant offence was not committed.

25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

The extent to which Irish companies can indemnify directors is limited. A company can only indemnify a director for:

- Liability that does not involve negligence, default, breach of duty or breach of trust.
- Costs incurred by a director in successfully defending a case against him/her.

Where the constitution of a company or a contract seeks to indemnify a director in relation to matters restricted by the Act, the provisions will be void.

26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Companies are permitted to purchase insurance for the potential civil liability of directors for negligence, default, breach of duty or breach of trust. Typically, a Directors and Officers Liability Insurance (D&O) policy will contain a wide range of exclusions and cover will not extend to criminal fines or regulatory penalties that can be imposed on a director for fraudulent, dishonest or illegal acts established by a court judgment.

27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

A person who is not formally appointed to the board but acts as a director and effectively occupies the position of director can be liable as a de facto director. A de facto director is bound by the same duties and obligations and is subject to the same liabilities as formally appointed directors.

Parent companies or controlling shareholders can be treated as "shadow directors" (persons in accordance with whose directions or instructions the directors of a company are accustomed to act). For certain purposes, Irish company law treats these persons as directors and holds them to the same duties and liabilities.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

28. Are there general rules relating to conflicts of interest between a director and the company?

Under the Act, directors must avoid any conflict between their duties to the company and other (including personal) interests unless the director is released from that duty by the constitution or by shareholder resolution. Directors must not use the company's property, information or opportunities for their own benefit unless expressly permitted by the constitution or approved by shareholder resolution. Directors may be liable to account to the company for any profit that they secretly derive from their position.

Directors also have specific duties of disclosure relating to conflicts of interests under the Act. For example, directors must give notice to the company of any interest they have in a contract or proposed contract involving the company.

However, the duty to disclose does not apply in relation to an interest that is reasonably considered not to give rise to a conflict of interest.

29. Are there restrictions on particular transactions between a company and its directors?

A company is prohibited from entering into certain transactions with its directors (and in some cases, persons connected with its directors), except in limited circumstances where the consent of shareholders has been obtained and/or a formal statutory validation procedure has been complied with. Restricted transactions include:

- Making loans, quasi-loans, guarantees or credit transactions with directors outside the ordinary course of business of the company.
- Substantial property transactions with directors where the value of the arrangement is over 10% of the company's net assets or more than EUR65,000.
- Contracts of employment of directors with a term exceeding five years.

The Act introduced changes to the evidential provisions regarding certain transactions with directors. Where a company makes a loan to a director and its terms are not in writing or are ambiguous, it is presumed that the loan is repayable on demand and bears interest. Where a director claims to have made a loan to the company, and the terms are not in writing, it is presumed that the loan is not repayable.

For directors of companies listed on the MSM of the ISE, the Listing Rules require shareholder approval for certain additional related-party transactions.

30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

The purchase or sale of shares in a company (public or private) by a director must be disclosed to the company.

The Listing Rules contain restrictions on the granting of discounted options to acquire shares in a listed company or its subsidiary undertakings.

Under the Listing Rules, a director of a listed company must not deal in any securities of the company without first notifying the chairman and receiving clearance to deal from him/her. In circumstances where clearance to deal is granted, the director must deal within two business days of clearance being obtained. In general, a director will not obtain clearance to deal during a "prohibited period", which includes the period of 60 days preceding the publication of the company's annual financial report and any period where the director has inside information in relation to the company.

It is also unlawful for a director of listed companies to deal in the company's securities if, because of his/her connection, he/she has price-sensitive information not generally available. The Takeover Rules prohibit persons (including directors) who are privy to confidential price-sensitive information concerning an offer or contemplated offer, from dealing in the securities of the buyer, from the time the director has reason to believe that an offer is being made until the announcement of the offer or the termination of discussions.

The Market Abuse Regulation has introduced a prohibition on trading by directors and other "persons discharging managerial responsibilities" in defined "closed periods" except in certain circumstances.

DISCLOSURE OF INFORMATION

31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

Generally (subject to certain exceptions), companies must present their annual audited financial statements to the AGM and publicly file a copy with the company's annual return in the CRO. The Act requires a directors' report on the state of affairs of the company and its subsidiaries to be attached to the balance sheet laid before the AGM.

Certain information regarding the company must also be disclosed to the Revenue Commissioner when making tax returns.

Companies listed on a regulated market are subject to the following additional disclosure requirements:

- Under the Market Abuse Regulations (which has been extended to apply to the ESM), an issuer must make a disclosure of inside information either to the Regulatory Information Service or indirectly to the Companies Announcements Office of the ISE.
- The Transparency Regulations require the publication of annual and bi-annual financial reports. In addition, listed companies must publish interim management statements that contain an explanation of material events and transactions that have taken place during the relevant period and a general description of the company's financial position.
- The Listing Rules and ESM Rules require the disclosure of certain information in a company's annual report and in the report to shareholders.
- The Prospectus Regulations require a prospectus to contain all information necessary to enable investors to make an informed assessment of the company's financial position and the rights attaching to the securities. A prospectus must be approved by the Central Bank before publication and once approved, it must be filed in the CRO.

SHAREHOLDER RIGHTS

Company meetings

32. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

The Act provides that companies must hold an AGM once every calendar year. However, all LTDs and other company types with a single member can adopt written procedures in place of holding an AGM.

The Act sets out the business of the AGM, including:

- The consideration of the company's annual financial statements.
- The appointment or re-appointment of the company's auditors.
- The approval of final dividends (if any).

33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Notice of shareholder meetings must be given to all members, the directors and to the statutory auditors:

- An AGM requires 21 days' notice (unless a longer period is provided for in the constitution).
- An extraordinary general meeting (EGM) (other than a meeting for the passing of a special resolution) must be called on at least seven days' notice (subject to any longer period provided under the constitution).
- An EGM where a special resolution is being proposed requires 21 days' notice.
- Where a resolution is proposed by persons other than the directors to remove a director or a resolution is proposed to replace an auditor, extended notice of 28 days must be given to the company by the requisitioning members. 21 days' notice of the actual meeting must then be given to the members (even though the relevant resolution is an ordinary resolution).

Shareholder meetings may be held on short notice with the written consent of members and the auditors. The quorum for shareholder meetings is set out in the Act:

- Unless otherwise provided for in the constitution, two members present (in person or by proxy) is a quorum.
- For single-member companies, that single member (present in person or by proxy) is a quorum.

Voting at general meetings is usually by show of hands unless a poll is called. Teleconferencing is not provided for but voting by unanimous written shareholder resolution is permitted. The Act introduced majority written resolutions for private companies.

34. Are specific voting majorities required by statute for certain corporate actions?

The Act requires certain corporate actions to be decided by special resolution of the company, being 75% of members entitled to vote at general meetings of the company. These corporate actions include:

- Alteration of the company's constitution.
- Variation of class rights attaching to shares.

- Approving financial assistance for the purpose of own-share acquisitions.
- Entry into substantial property transactions with directors and connected persons.

35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Shareholders holding at least 5% of the paid up share capital of the company in the case of companies listed on a regulated market, or 10% of the paid up share capital of the company in all other cases, can require an extraordinary general meeting (EGM) to be convened. Additionally, a shareholder or director of a company can apply to the court for an order requiring a general meeting of the company to be called and held in any manner that the court thinks fit.

The Act introduced a new right whereby registered shareholders of a limited company holding, or together holding, 50% or more (or such other percentage as specified in the constitution) of the shares of the company carrying voting rights can directly convene an EGM.

Shareholders holding at least 3% of the voting shares of a listed company can place items on the agenda of an AGM, provided that each item is accompanied by either stated grounds justifying its inclusion or a draft resolution to be adopted and can also table a draft resolution for an item on the agenda of a general meeting (whether an AGM or an EGM).

Minority shareholder action

36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

Any member of the company can petition a court for relief where the member believes that the affairs of the company are being conducted or the powers of the directors are being exercised in an oppressive manner or in disregard of their interests.

In exceptional circumstances, a shareholder can also bring a derivative action where a majority in control of the company are committing a fraud on the minority.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

37. Are there any formal requirements or guidelines relating to the internal control of business risks?

The Act requires the directors of all public limited companies and those private companies which reach prescribed thresholds to (on a comply or explain basis):

- Confirm that the company has prepared a statement of compliance with company and tax law (this confirmation is to be included in the directors' report contained in the annual financial statements).
- Ensure that the company adopts appropriate compliance measures.

Companies listed on the ISE MSM are subject to certain risk management and internal control systems under the Code:

- The board must at least annually conduct a review of the effectiveness of the company's risk management and internal control systems. The review must cover all material controls, including financial, operational and compliance controls.
- The board must also establish an audit committee that will review the company's internal financial controls and internal control and risk management systems.

Under the Listing Rules, companies listed on a regulated market must attach a statement to their annual report confirming whether or not the company has complied with the provisions of the Code. Under the Act, a corporate governance statement must be included in the directors' report of a traded company (a company having shares or debentures admitted to trading on a regulated market in an EEA State). The statement must include a reference to the corporate governance code to which the company is subject and all relevant information concerning corporate governance practices which are additional to any statutory requirements. It must also contain a description of the main features of the internal control and risk management systems of the company.

38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

Directors have a duty under the Act to ensure that the company keeps adequate accounting records that correctly record and explain the transactions of the company and enable, at any time, the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy:

- A director who fails to take all reasonable steps to secure compliance or is the cause of default is guilty of an offence and liable to a fine and/or imprisonment.
- In circumstances where the company is insolvent and the failure to keep adequate accounting records contributed to the company's insolvency or substantially impeded its winding up, a director can be held personally liable and can also be restricted or disqualified from acting as a director for a period of up to five years.

Under the Act, directors are required to state in their directors' report that:

- So far as each director is aware, there is no relevant audit information of which the company's auditors are unaware.
- Each director has taken all steps necessary to be aware of any relevant audit information, and to establish that the auditors are aware of that information.

39. Do a company's accounts have to be audited?

Companies must have their financial statements audited each year. However, a private company can take advantage of an audit exemption where two of the three following conditions are met:

- The amount of turnover of the company does not exceed EUR8.8 million.
- The balance sheet total of the company is less than EUR4.4 million at the end of its financial year.
- The average number of employees does not exceed 50.

Under the Act, groups of companies falling in aggregate below the prescribed thresholds and dormant companies can also use an audit exemption. To use the audit exemption, filings of the annual return for the financial year in question and the previous financial year must have been made on time. Thresholds for the audit exemption will be raised under the Accounting Bill.

40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

The directors of the company usually appoint the first auditors at the first board meeting. The auditors will automatically be re-appointed at every AGM after the initial appointment unless the shareholders pass a resolution either objecting to the re-appointment or proposing the appointment of another auditor.

Under the new Statutory Audit Directive, a public interest entity (PIE) must appoint a statutory auditor for an initial engagement of at least one year (which can be renewed). Mandatory rotation of statutory auditors must take place after ten years. Following rotation, a statutory auditor cannot be re-appointed for at least four years. In exceptional circumstances, a competent authority can grant an extension of time for up to two years. PIEs are:

- Entities whose transferable securities are listed on an EEA regulated market.
- Credit institutions regardless of listed status.
- Insurance undertakings regardless of listed status.
- Entities designated as PIEs by member states such as those that, due to the nature of their business, size or employee numbers, are deemed to be of public interest.

Ireland has not designated additional entities as PIEs.

41. Are there restrictions on who can be the company's auditors?

The auditors must be a member of a body of accountants recognised by the Irish Auditing and Accounting Supervisory Authority (IAASA) (or have an equivalent qualification) and hold a valid practising certificate from that recognised body. Auditors who qualify in other EU member states can carry out audits in Ireland if they pass an aptitude test. Auditors that qualify in non-EU member states can also obtain approval from the IAASA. The Statutory Audit Regulations also require certain standards of continuing education, professional ethics, integrity and objectivity.

Bodies corporate and certain individuals are not permitted to be auditors of the company. Restricted individuals include:

- Officers and employees of the company, their partners and close family members.
- Undischarged bankrupts.
- Individuals who have been disqualified from acting as auditors.

42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

The Statutory Audit Regulation contains a list of non-audit services that cannot be provided by the statutory auditor in relation to a PIE. Blacklisted activities include the provision of:

- Certain tax services.
- Services involving the management of the PIE.
- Most legal services.
- Services relating to the PIEs internal audit function.

The Irish Statutory Audit Regulations contain a derogation to these restrictions so that certain tax and valuation services can be provided to PIEs once they have no direct, or have immaterial, effect on the audited financial services of the PIE and principles of independence are adhered to. A limit on fees for non-audit work has been introduced so that total fees for such services cannot exceed 70% of the average audit fee in the last three consecutive financial years for the PIE group.

Where non-audit work is carried out, it must be recorded in the financial statements of the company. The Code provides that if the external auditor provides non-audit services, the company's annual report must contain an explanation of how auditor objectivity and independence are safeguarded.

43. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

The auditors of the company are under a general duty to carry out the audit with professional integrity and must exercise the skill, care and caution of a reasonably competent, careful and cautious auditor. If the auditors do not comply with this duty they can be liable for damages to the company, the shareholders and any third parties that suffer loss as a result of the inaccurate audited accounts. This liability cannot be limited or excluded.

44. What is the role of the company secretary (or equivalent) in corporate governance?

All companies, including single member companies, must have a company secretary. The functions and duties of a company secretary are essentially administrative, as opposed to managerial. Primarily, the secretary is responsible for maintaining the company's statutory registers. Under the Act, the directors have a duty to ensure that the company secretary has the skills or resources to discharge their statutory and other duties, or has the necessary resources available to do so.

Directors of public companies have a duty to choose a secretary who meets certain further standards, specified by the Act. The Code identifies the company secretary as one who should advise the board, through the chairman, on all governance matters.

ONLINE RESOURCES

Irish Statute Book

W www.irishstatutebook.ie

Description. This official government website is an online resource for up-to-date Irish legislation.

Irish Stock Exchange

W www.ise.ie

Description. This is the website maintained by the Irish Stock Exchange and contains market and regulatory information relating to listed companies.

UK Financial Reporting Council

W www.frc.org.uk

Description. This website, maintained by the UK Financial Reporting Council, provides information relating to corporate governance and financial reporting, as well as access to the UK Corporate Governance Code.

Central Bank of Ireland

W www.centralbank.ie

Description. The Central Bank acts as a financial regulator to certain financial service providers and funds carrying on business in Ireland. Their website provides regulatory information for this industry.

Practical Law Contributor profiles

Pat English

Matheson
T +353 1 232 2330
F +353 1 232 3333
E pat.english@matheson.com
W www.matheson.com

Professional qualifications. Ireland, 2004

Areas of practice. Corporate and commercial law and general counsel to international businesses.

Recent transactions

- Advises international corporations in establishing their Irish operations and is standing corporate counsel to numerous international corporations in respect of their Irish operations.
- Advises Fortune 100 US corporations on group-wide international restructurings and leading international corporations on the Irish legal aspects of substantial pre and post merger and acquisition reorganisation, integration and consolidation projects.
- Provides ongoing strategic advice and counselling for a range of international corporations including in relation to cash and dividend repatriation strategies.

Madeline McDonnell

Matheson
T +353 1 232 2768
F +353 1 232 3333
E madeline.mcdonnell@matheson.com
W www.matheson.com

Professional qualifications. Ireland, 2009

Areas of practice. Corporate law; public and private M&A; equity capital markets; securities law; corporate governance.

Recent transactions

- Advised on the US$18 billion merger of Willis and Towers Watson.
- Advised on Allergan's US$66 billion merger with Actavis.
- Advised on Medtronic's US$42.9 billion acquisition of Covidien.
- Advised on the Actavis US$8.5 billion acquisition of Warner Chilcott.