Shareholder Activism & Engagement

Contributing editors
Arthur F Golden, Thomas J Reid and Laura C Turano

2018

GETTING THE DEAL THROUGH

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Davis Polk & Wardwell LLP

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Shareholder Activism & Engagement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur F Golden, Thomas J Reid and Laura C Turano of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Ireland

Ciaran Healy and Naomi Barker
Matheson

General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The Companies Act 2014 (the Companies Act) applies to all Irish incorporated companies and became effective on 1 June 2015. The Office of Director of Corporate Enforcement was established under the Company Law Enforcement Act 2001 to enforce and encourage compliance with company law. The Companies Registration Office is the body responsible, for among other things, the incorporation of companies, registration of business names, filing obligations and ensuring certain information is publicly available.

The Irish Takeover Rules are made by the Irish Takeover Panel under the powers granted to it by the Takeover Panel 1997 Act and by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended. They apply to public companies incorporated in Ireland whose shares are, or have in the previous five years been, traded on the Irish Stock Exchange (ISE), the London Stock Exchange, the New York Stock Exchange or the NASDAQ. The Irish Takeover Panel is responsible for ensuring compliance with the Irish Takeover Rules.

Companies with primary listings on the Main Securities Market (MSM) of the ISE are subject to continuing obligations under the MSM Listing Rules, which regulate matters such as disclosure of information, shareholder approval of significant transactions, shareholder approval of related-party transactions, and terms and conduct of capital raisings.

Companies with a primary listing on the MSM are also subject to the continuing obligations set out in the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (Transparency Regulations) concerning the disclosure of financial information and significant shareholders. The Central Bank of Ireland is the administrative authority for the purpose of these regulations.

These companies must also comply with the UK Corporate Governance Code issued by the Financial Reporting Council (the Code) and the Irish Corporate Governance Annex (the Irish CG Annex), or explain in their annual reports why they have not done so.

Companies with a secondary listing on the MSM are subject to very few continuing obligations. These are largely related to disclosure of capital changes and maintaining free float requirements.

Regulation (EU) 596/2014 on market abuse applies to companies listed on the MSM and the Enterprise Securities Market (ESM). It principally regulates insider dealing, disclosure of inside information, dealings by directors and market conduct.

The ESM Rules apply to companies listed on the ESM – the Irish equivalent of the AIM market. The continuing obligations under the ESM Rules are more limited than the MSM. For example, shareholder approval of transactions is not required unless they constitute a fundamental change of business.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Similar to the UK, corporate governance best practice and investor protection committees, which represent the interests of large institutional shareholders, have a key influence on shareholder activism and engagement.

The ISE recognises that the Code has set the standard for corporate governance internationally. Since the 1995 Irish Stock Exchange Act, the MSM Listing Rules have required every company listed on the MSM to 'comply or explain'. The ISE's current intention is to retain the provisions of the Code, but given the particular focus on corporate governance in the Irish market after the financial crisis, the ISE also adopted nine recommendations arising from the report commissioned by the ISE and the Irish Association of Investment Managers (IAIM). These largely relate to board and reporting matters. The Irish CG Annex is addressed to companies with a primary equity listing on the MSM. Irish companies are also expected to provide meaningful descriptions of how they apply the provisions of the Irish CG Annex.

The UK Stewardship Code is complementary to the Code and sets out additional principles to promote effective engagement from institutional shareholders. There is an onus on institutional shareholders to give weight to all relevant factors when evaluating a company's governance arrangements and to take responsibility to make considered use of their voting rights. Institutional shareholders are also advised to apply the principles set out in the Institutional Shareholders' Committee's Code on The Responsibilities of Institutional Investors.

Proxy advisory services such as Institutional Shareholder Services and Glass Lewis are playing an increasingly major role in proxy solicitations and ordinarily favour activists over management. They have issued proxy voting guidelines for the UK and Ireland.

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

Many of the larger institutional investors such as Blackrock, Fidelity and State Street have established proxy departments and it is therefore important for Irish companies to be aware of their voting policies and guidelines.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

At an Irish macro level there is still a general market perception that shareholder activism is comprised predominantly of hostile and agitating corporate raiders whose primary goal is to cause disruption for short-term gain.

However with the growing number of high-profile international and domestic examples of activism, it has increasingly become an issue for consideration by Irish executives over the past few years. While activism in Ireland (and Europe more generally) is still well behind the US, there is now a greater understanding that no public company is completely immune or insulated from activist campaigns.

At boardroom level there has also been a growing awareness and acceptance of the potential benefits of activism as demands for increased returns continue. There appears to be a wider recognition that activism can manifest itself in many different forms and involve many different categories of activists. There is also a growing appreciation of the constructive role that activists can sometimes play in effecting corporate change.

Examples of shareholder activism in Ireland have not been confined to particular industries. It is usually influenced by key vulnerability factors such as (i) companies experiencing significant change, (ii) board composition or remuneration issues, (iii) earnings underperformance, or (iv) undervalued companies.

However one group that is worth flagging are the smaller Irish companies listed on the ESM. Given the relative smaller size of a number of companies listed on the ESM, they are clearly more susceptible to activist influence and demands. There are also a group of Irish companies listed on NYSE and NASDAQ. Shareholder activism for those Irish companies tends to be aligned with activism activities and behaviour in the US rather than Ireland or the UK.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

In recent years the Irish market has seen a broad variety of activists ranging from individual shareholders to hedge funds and from proxy advisory firms to the Irish government itself through their shareholdings in the Irish banks.

However the majority of activist campaigns have originated from hedge funds and private individuals. There is no specific time horizon attached to their shareholding, but very often their views have been considered more marginal and they have struggled to gain the support of traditional shareholders. With the growing presence and influence of the proxy advisory firms, institutional investors are expected to be more vocal over the coming years particularly in relation to 'say on pay' (see question 6).

As regards the Irish companies listed on the NYSE or NASDAQ, activists tend to be based in the US or in other international jurisdictions.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention

Shareholder activism has focused primarily on board composition and remuneration. Corporate governance issues, underperformance by management and inflated executive pay are generally perceived to be the main drivers for unseating board members. This was evident in the activist campaigns relating to Elan Corporation plc, Kingspan plc and Independent News & Media plc.

Irish companies are therefore scrutinising board composition and carrying out self-assessment checks more regularly.

Some other corporate changes that activists have sought in Ireland include demanding strategic change such as the sale or spin-off of a business division or financial change in the form of dividends or share buybacks. One notable recent high-profile example of an activist promoting corporate change was Orange Capital LLC's attempt to persuade C&C Group plc to divest itself of its US interests. It is reported that Orange Capital initially approached C&C privately with a presentation on their proposals before the proposal entered the public domain.

Actavis plc acquired Irish company, Allergan plc, in 2015. This deal came about following a long-running hostile takeover campaign related to Allergan led by Valeant Pharmaceuticals and Bill Ackman.

The most high-profile example of socio-political activism relates to the Irish banks that were recapitalised by the Irish government during the financial crisis. The boards of AIB, Bank of Ireland and Permanent TSB have all been the subject of some degree of public scrutiny and protest at their AGMs given the public interest in the banks. While sociopolitical activist campaigns are not yet widespread, Irish companies are increasingly aware of corporate social responsibility (CSR) issues and the majority of Irish public companies proactively provide information on their CSR policies and initiatives to shareholders.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

The Companies Act reserves various decisions for the approval of shareholders. An ordinary resolution is passed by a simple majority of the shareholders and a special resolution is passed by at least 75 per cent of the shareholders. As is the case in the UK, these thresholds are determined by reference to those shareholders who vote at the meeting so often can be passed by a far smaller percentage of the aggregate shareholder base.

Ordinary resolutions are usually required to carry out routine, less contentious, business. This includes matters such as authorising directors to allot shares and ratifying board decisions. In contrast, special resolutions are required for more significant matters such as altering a company's constitution, disapplying pre-emption rights, varying share capital or reducing share capital.

If a shareholder wishes to make a proposal, it can requisition an extraordinary general meeting (EGM) if at least 5 per cent of the shareholders with voting rights approve such proposal. Where shareholders hold 3 per cent or more of the total voting rights, there is now also a statutory right to put forward items on the agenda for consideration and approval at general meetings. There are, however, a number of important conditions that must be satisfied in order to permit shareholders to exercise these rights. These include (i) a justification for the inclusion of the item or a draft resolution to be adopted at the general meeting, and (ii) circulation in sufficient time to ensure the relevant matter is received by the company at least 42 days before the meeting to which it relates.

Under Irish law, shareholders of a listed company currently have no 'say on pay' right to vote on the directors' remuneration report or remuneration policy unless such right is provided for in the particular company's constitution. However once the Shareholders' Rights Directive (which came into force on 9 June 2017) is transposed into Irish law, shareholders will be able to vote on director remuneration where the company is listed on an EU regulated market. Firstly, they will be entitled to vote on the remuneration policy and secondly, they will be entitled to vote on the remuneration report. The vote on the remuneration policy is likely to be binding. The vote on the remuneration report will be advisory.

A number of companies on the MSM proposed resolutions to approve a remuneration policy in 2017. Each of those companies classified the resolution as a non-binding advisory resolution only. The vast majority of Irish companies on the MSM proposed resolutions to approve a remuneration report in 2017. Each of those companies also classified the resolution as a non-binding advisory resolution only.

7 What common strategies do activist shareholders use to pursue their objectives?

No matter what form of activism is used, the final goal is to effect change, whether at a management, operational or strategic level. Activism in Ireland often takes the form of private informal intervention in the pursuit of corporate change. Often the most successful activist campaigns are fought and won in a more subtle private engagement with the board. There is certainly a view among many activists that the most successful campaigns are the ones you never read about.

There is also a clear cost:benefit to engaging in a round of meetings and telephone calls rather than a costly and protracted proxy solicitation campaign. Moreover, boardrooms are increasingly aware of the importance, both legally and optically, in listening to the views of shareholders. There is also awareness that maintaining dialogue between activists and boardrooms is key and that often compromise is the best form of defence to a particular activist. Usually it is only when the board reacts negatively to a request or a series of requests, that the situation becomes more confrontational.

Clearly an effective tool for an activist is the use of the public domain as a forum for trying to initiate change. That can take the form of PR battles, open letters or press releases but more often consists of requisitioning general meetings, proposing resolutions at the annual general meeting or voting against resolutions.

In contrast to the US, litigation is not generally regarded as a key tool for activist campaigns in the Irish market given the costly and relatively unpredictable nature of litigation proceedings. One exception to this was Petroceltic International plc's largest shareholder, Worldview Capital Management, initiating legal proceedings against it before it went into examinership. A further example related to Conroy Gold and Natural Resources plc is further discussed in Update and Trends below.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

All general meetings, other than the annual general meeting of shareholders (AGM), are deemed to be an EGM. Notice must be given of each general meeting to every shareholder, director and the secretary

of the company. The different categories of resolutions are referred to in question 6.

In respect of traded companies, shareholders holding 5 per cent or more of the company's share capital have the power to compel the directors to convene an EGM. The requisition must state the business to be transacted at the meeting. Where an EGM has been validly requisitioned, the directors must convene that EGM within 21 days to be held within two months of the requisition. Where the board of directors fails to convene the EGM within 21 days, the persons who have requisitioned the EGM may convene the meeting themselves.

Shareholders may also act by consent in writing without holding a general meeting. A unanimous resolution, signed by all the shareholders of a company, will have the same effect as an ordinary or special resolution passed at a meeting. A unanimous resolution shall be deemed to have been passed at a meeting on the date at which it was signed by the last shareholder. A majority written resolution can be used to pass either an ordinary or a special resolution where the requisite majority of shareholders are available to sign. The majority written resolution is not as attractive as the unanimous written resolution procedure as there is a delayed effect period of 7 or 21 days. However in practical terms this option is not one that can realistically be used by a listed company given the number of shareholders involved.

9 May directors accept direct compensation from shareholders who nominate them?

A director may be separately remunerated by a shareholder who nominates or designates them but it would be unusual for an Irish listed company. In a situation where directors are also employed by a shareholder they need to be particularly mindful of their director's duties and the need to avoid any conflicts of interest.

Directors of Irish listed companies are remunerated for their services by the company. Best practice for listed companies under the Code is to establish a remuneration committee to determine directors' remuneration. The Code recommends that 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 must be obtained and where these options are exercised, the non-executive director must hold the shares for at least one year after leaving the board.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders may nominate directors for election to the board by requisitioning the directors of that company to convene an EGM for that purpose or by tabling a resolution for consideration at the AGM. The procedure for doing this is set out at questions 6 and 8.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Under Irish law, duties that relate to the conduct of a company's affairs, such as director duties, are generally owed to the company itself rather than to individual shareholders. Shareholders are therefore not generally permitted to bring an action on behalf of the company as the proper plaintiff in an action in respect of an alleged wrong done to a company is the company (ie, the Irish courts apply the rule in *Foss v Harbottle*).

There are a limited number of exceptions to that principle and where such exceptions can be relied upon, shareholders may be permitted to institute a derivative action. It is important to remember that, much like the UK, a derivative action is not an action by a shareholder in its own capacity but rather on behalf of all the other shareholders.

The ability to bring a derivative action is dependent on the company itself having a claim and obtaining the leave of the Irish courts to commence the derivative action. In making a determination, the court is likely to consider whether the action should be brought by the shareholder personally and to seek the views of the other shareholders. These requirements effectively serve as defence measures to reduce the likelihood and frequency of derivative actions.

The wrongdoing will usually have to relate to (i) an act that is illegal or ultra vires, (ii) an irregularity in the passing of a resolution, (iii) an act purporting to abridge or abolish the individual shareholder's rights, or (iv) an act that constitutes fraud against the majority, and the wrongdoers are themselves in control of the company.

There is also an onus on the plaintiff shareholder to demonstrate they have a realistic prospect of success in establishing that the company was entitled to the remedy and that they fell within one of the four exceptions noted above.

There is no framework in Ireland to formally facilitate class actions. The closest procedures under Irish law to class actions or multiparty law suits are 'representative actions' or 'test cases'. A representative action is where one claimant or defendant, with the same (as opposed to similar) interest as a group of claimants or defendants in a particular action, institutes or defends proceedings on behalf of that group. Any relevant judgment or order will usually bind all claimants or defendants represented.

The more common option in Ireland for multiparty litigation is usually a test case. A test case can arise where numerous separate claims arise out of the same circumstances. For example, in 2008 the Irish Commercial Court was faced with more than 65 separate claims related to the fraudulent investment operations run by Bernie Madoff. The Irish Commercial Court decided to take forward two cases from individual shareholders and two by fund shareholders and stayed the remaining cases pending resolution of the four test cases.

There is no such action as a strike suit under Irish law but minority shareholders are afforded protection under section 212 of the Companies Act. Under this provision, a shareholder may apply to the court by petition for relief where the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner that is oppressive to the shareholder or in disregard of the shareholder's interests. If the court is of the opinion that the shareholder's action is well founded, it may make such orders as it sees fit, including (i) directing or prohibiting any act or cancelling or varying any transaction, (ii) the purchase of the shares of any shareholders by other shareholders or by the company itself, or (iii) compensation. The court may also grant interlocutory relief. The nature of conduct required for conduct to be held oppressive or in disregard of the shareholder's interests will be judged by objective standards and there is no requirement to prove bad faith. It is also possible under section 569(f) of the Companies Act for a shareholder to apply to the court for the winding up of the company for the same reasons as above (ie, where the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner that is oppressive to the shareholder or in disregard of the shareholder's interests).

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

We advise that it is more important than ever for Irish boards to be ready to deal with shareholder activism. While activism along with issues such as cybersecurity, regulatory challenges and reputation risk are occupying the minds of Irish boardrooms, the time invested by boards in considering and preparing for it varies widely.

Responding effectively to activist shareholders requires advance preparation and active investor engagement on issues of importance to investors. It is no longer sustainable for companies to 'just say no' to an activist campaign. While some activist attention can be unwanted, our advice is that companies and their boards should not automatically dismiss activist proposals.

We recommend that companies focus carefully on regular shareholder communications and are prepared to respond to activist campaigns by assessing, on an annual basis, how susceptible the company is to an activist campaign, by whom and in what particular areas. We also recommend that companies focus on communicating a consistent and clear corporate strategy and proactively deal with earnings shortfalls or other adverse developments. Shareholder engagement on an ongoing basis can help lay the vital groundwork for investor decision making.

Other advice includes monitoring the share register, adhering to corporate governance best practice, maintaining a unified board consensus and being prepared for all eventualities at the AGM.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Structural defences are not common in Ireland. A target board must ensure at all times they observe their fiduciary duties to act in the best interests of the company. The Irish Takeover Rules dictate that directors of a relevant target must act only in their capacity as directors and not have regard to their personal interests. At any time during the course of an offer, or when the board has reason to believe that an offer may be imminent, the Irish Takeover Rules (General Principle 3 and Rule 21) prohibit companies from taking any action that would or might frustrate an offer or deprive shareholders from the opportunity of considering an offer. Unless the consent of the Irish Takeover Panel is obtained (and, in some circumstances, shareholder approved), putting in place structural defences such as poison pills during the offer period is not permitted under the Irish Takeover Rules as they could be deemed to constitute frustrating actions. Frustrating actions include issuing new shares or options, disposing or acquiring material assets, or entering into non-ordinary course contractual arrangements.

A number of Irish holding companies with listings in the US have however adopted automatic shareholder rights plans that, in general terms, work by imposing a significant penalty upon any person or group that acquires 10 per cent or more of the outstanding ordinary shares of the company without the prior approval of the board of directors.

Staggered boards are not a feature of Irish companies. Directors of Irish companies can be removed by an ordinary resolution under section 146(1) of the Companies Act. As noted above, the Code also applies to companies listed on the MSM and provides that directors of relevant companies should be elected or re-elected annually.

14 May shareholders have designees appointed to boards?

Best practice in relation to the composition of the board is set out at section B of the Code as adopted by the Irish CG Annex. Fundamentally the main principle is that a board should have the appropriate balance of skills, experience, independence and knowledge to enable them to discharge their respective duties and responsibilities. The composition of the board should have an appropriate combination of independent executive and non-executive directors such that no individual or small group of individuals can dominate the board's decision making.

Regarding the appointment of new directors to the board, there should be a formal, rigorous and transparent procedure. The search for board candidates should be conducted, and appointments made, on merit. There should be a nomination committee that should lead the process for board appointments and make recommendations to the board. The nomination committee should evaluate the balance of skills, experience, independence and knowledge of the board and, in light of this evaluation, prepare a description of the role and capabilities required for a particular appointment. Where a company has directors who have been nominated by shareholders, they should include in the annual report a reasoned explanation for such appointments, including a description of the skills and expertise directors bring to the board.

In circumstances where a shareholder appoints designees to the board, the company may seek to put in place a relationship agreement between the company and a shareholder. A relationship agreement typically governs the relationship between the shareholder and the company and requires the shareholder to acknowledge the independence of the management of the company and procures compliance with corporate governance rules. They usually also include non-compete, non-solicitation and confidentiality obligations on the shareholder and confirm the shareholders' right to appoint a director.

Pursuant to the MSM Listing Rules, companies with controlling shareholders who wish to list on the MSM must be able to operate independently of those shareholders, and a relationship agreement is required to ensure that all dealings are on arm's-length terms. A 'controlling shareholder' includes any group of persons acting in concert who together control 30 per cent or more of the voting rights attached to the company's shares.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The company's constitution is publicly available in the Companies Registration Office. A constitution is a formal document that sets out the rules governing a company. It also defines the relationship between the company, shareholders and officers.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Every company is required to keep up-to-date statutory registers with details of the legal owners of the shares in the company. The shareholders have a statutory right to inspect and receive copies of the statutory registers kept by the company. As regards other persons such as creditors, employees or members of the public, the register of members is open to inspection on the payment of a fee.

Although companies do not have to recognise the beneficial holders of shares, under section 66 of the Companies Act there is nothing precluding a company from requiring a member or a transferee of shares to furnish the company with information as to the beneficial ownership of any share when such information is reasonably required by the company. The beneficial interest may also be required to be disclosed on foot of a court order.

Even though beneficial interests are not being recorded in the register of members, a company may not ignore beneficial interests of which it has actual notice. These interests must be disclosed and recorded in a register, known as a 'register of interests'. Under section 261 of the Companies Act, directors and secretaries must notify the company in writing of their interests in shares or debentures of the company. When a company receives information from a director or secretary, it must within three days enter that information in the register of interests.

Separately, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into effect on 15 November 2016 meaning that Irish companies, except listed companies on the MSM and ESM, must gather and maintain information on individuals described as their ultimate beneficial owner.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Similar to the UK, an Irish-listed company must not ordinarily selectively disclose information to shareholders. Under the Market Abuse Regulation (MAR), an Irish-listed company is expected to disclose 'Inside information' to the market as soon as possible. Inside information includes specific or precise unpublished information relating to a particular issuer or particular securities that, if made public, would have a significant effect on the price of any securities.

MAR recognises that inside information can be legitimately disclosed to a shareholder or a potential shareholder for market sounding purposes in order to measure interest in a potential transaction, its size or pricing. However, there are onerous requirements, including the need to obtain the shareholder's consent and the need for the company to keep detailed records of the market soundings.

MAR provides that companies may legitimately delay disclosure of inside information to the public provided all of the following conditions are met: (i) immediate disclosure is likely to prejudice the company's legitimate interests, (ii) delay of disclosure is not likely to mislead the public, and (iii) the issuer is able to ensure the confidentiality of the information. Selective disclosure is also permitted to a shareholder if the shareholder owes the company a duty of confidentiality and requires the information to perform their functions.

There is in any event an obligation on companies to maintain insider lists for deal-specific or event-specific matters.

Update and trends

One relatively new development has been the increased activist activity on the part of proxy advisory firms. ISS and Glass Lewis have both recently been actively engaged with Kingspan plc. Glass Lewis, which has its European headquarters in Ireland, opposed the appointment of two new directors citing concerns in relation to their independence. They instead advocated the appointment of 'independent-on-appointment non-executive directors'. Glass-Lewis published a report expressing this view prior to Kingspan's most recent AGM.

Similarly, ISS opposed Kingspan's proposed management share bonus scheme. It released a report stating the scheme was excessive and made it too easy for management to get shares in the company. Interestingly, Glass Lewis opposed this view and endorsed the scheme. This demonstrates an interesting example of two separate proxy advisory firms pursuing differing, opposing goals in relation to the same company.

Another development this year has been the use of the Irish courts as a means of activist investors advancing their interests. This was evident in the dispute between the board of Conroy Gold and Natural Resources plc and a 28 per cent shareholder, Patrick O'Sullivan. Mr O'Sullivan held a 28 per cent stake in Conroy Gold and had concerns regarding the size and remuneration of the board. He also claimed the company was not developing the company's resource discoveries quickly enough. Acting on speculation that the company was planning to allot new shares, Mr O'Sullivan called for an EGM, moving to replace three directors with his own nominees. The replacements were blocked by the chairman on the grounds that in making his nominations, Mr O'Sullivan did not follow correct procedures as prescribed in the company's constitution. On this point, Mr O'Sullivan unsuccessfully took the company to court claiming that the chairman had abused his power.

There has been some commentary that Brexit could create new opportunities for activists, and Steven Balet, head of corporate governance and activist engagement at FTI Consulting's strategic communications arm, has said some activist firms were currently eyeing Ireland, which had a 'permissive' regulatory environment that could favour their strategies.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

The registrars of Irish companies have the ability to provide daily proxy update reports to the company ahead of any general meeting. As a large number of proxy votes tend to be made in the week leading up to the general meeting, daily updates reports are more common during this period.

Prior to proxy votes being cast, companies may engage with shareholders, and in particular institutional shareholders or investor protection committees, to seek them to vote in favour of resolutions.

Proxy votes are typically granted in favour of the company chairman and are confidential in the lead-up to the general meeting.

19 Must shareholders disclose significant shareholdings?

Shareholders with interests in Irish public companies listed on an EU regulated market such as the MSM and the main market of the LSE are required to comply with the Transparency Regulations. Under the Transparency Regulations, a person is obliged to notify a listed company where the percentage of voting rights that it holds reaches, exceeds or falls below 3 per cent and each 1 per cent threshold thereafter. The notification to the company must be made as soon as possible, and within two trading days for an Irish company.

Shareholders with interests in Irish public companies, not listed on an EU regulated market, such as the ESM, AIM, NYSE and NASDAQ, must comply with the disclosure requirements under the Companies Act. The statutory disclosure regime requires notification of interests in, and changes to interests in, 3 per cent or more of the 'relevant share capital' or of any class of 'relevant share capital'. The obligation arises where a person knowingly acquires an interest, or knowingly ceases to be interested, in shares or becomes aware that he has acquired an interest, or ceased to be interested, in shares. The notification must be made in writing to the company, in a prescribed form, within five days.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Under the Irish Takeover Rules, a shareholder is required to make a mandatory offer (under Rule 9) in the following circumstances: (i) the shareholder, or any persons deemed to be acting in concert with it, acquires 30 per cent or more of the voting rights in the company, or (ii) the shareholder's holding, or any persons deemed to be acting in concert with it, is 30 per cent or more of the voting rights in the company, but less than 50 per cent of the voting rights, and increases by more than 0.05 per cent of the aggregate percentage voting rights in that company in any 12-month period.

The Irish Takeover Rules do state that the action of shareholders voting together on particular resolutions may not of itself lead to a mandatory offer obligation but the Irish Takeover Panel may, in certain circumstances, hold that such joint action indicates that there is a group acting in concert with the result that purchases by any member of the group could give rise to such an obligation. The Irish Takeover Rules do not however elaborate, in the same manner as the UK Takeover Code, on whether shareholders who propose a 'board control-seeking' resolution will be presumed to be acting in concert.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Selective communications by a company to a discreet number of shareholders often fall within the meaning of 'inside information'. Shareholders are prohibited from dealing on the basis of such information under the MAR. Larger institutional shareholders usually have appropriate wall-crossing procedures in place to ensure that inside information can be received by a small number of relevant people within the organisation without restricting the dealing teams. Companies also need to be aware that where there is media speculation or market rumour regarding a company, they are required to assess whether a disclosure or announcement obligation arises.

Companies are increasingly turning to proxy solicitation and investor relations specialists to provide shareholder analysis reports, monitor trading movements and competitor analysis.

The use of social media platforms by activists in Ireland is still not common.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Organised shareholder engagement has increased over the past few years, but does tend to vary quite considerably from company to company.

As referenced in question 23, ongoing dialogue with shareholders is a core principle of the Code. The UK Stewardship Code also promotes effective engagement from institutional shareholders in dealing with companies.

As noted at question 7, activists ordinarily prefer to engage on a more private and informal amicable basis. While companies are increasingly willing to engage with shareholders, they are not usually minded to yield to requests for board seats and other corporate changes.

23 Are directors commonly involved in shareholder engagement efforts?

Ongoing dialogue by the board with shareholders is a core component of the Code. The main principle of this is that shareholder dialogue should be based on the mutual understanding of objectives. The Code sets out that 'the board should keep in touch with shareholder opinion in whatever ways are most practical and efficient'.

Very often most shareholder engagement takes place via the chairman, CEO or CFO. In order to ensure the board is sufficiently engaged, the board must state in the annual report the steps taken to ensure that the directors, especially the non-executive directors, have engaged with shareholders. The Code, in particular, promotes engagement by the chairman and non-executive directors with shareholders. For example, the chairman is expected to discuss governance and strategy issues with major shareholders.

As noted at question 3, the Code encourages active board engagement with shareholders, and the UK Stewardship Code promotes active engagement by institutional shareholders with the board.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not required to consider an activist proposal in a different manner to other board decisions.

The Companies Act sets out the fiduciary duties that directors owe to the company. These duties include a duty to act in good faith and in the interest of the company, to act honestly and responsibly, and to avoid conflicts of interest. These duties are owed to the company and the company alone. Directors appointed by shareholders may in the performance of their duties have regard to the interests of the shareholder but this will be subject always to the overriding fiduciary duties owed to the company. In contrast with directors' duties, shareholder activists do not owe any fiduciary duties to the company.

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