LEXOLOGY®
Getting The Deal Through

Shareholder Activism & Engagement

in Ireland

Table of contents

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Ireland

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GENERAL

Primary sources

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 Euronext Dublin (formerly known as the Irish Stock Exchange), 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 Euronext Dublin (formerly known as the Main Securities Market of the ISE) are subject to continuing obligations under the Euronext Dublin - Rule Book II : Listing Rules, which regulate matters such as: (i) disclosure of information, (ii) shareholder approval of significant transactions, (iii) shareholder approval of related-party transactions, and (iv) terms and conduct of capital raisings.

Companies with a primary listing on Euronext Dublin 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 Euronext Dublin 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 (MAR) applies to companies listed on Euronext Dublin and Euronext Growth (formerly known as the Enterprise Securities Market). It principally regulates insider dealing, disclosure of inside information, dealings by directors and market conduct.

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

Shareholder activism

How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Shareholder activism remains relatively underdeveloped in Ireland as compared with the United States. However, there are signs of change and there have been a growing number of domestic examples of activism in recent years. According to a report prepared by Lazard in the third quarter of 2018, although activity is highest in the United States, Europe has continued to be a focal point of activist attention. For example, Cevian Capital, Europe's biggest activist

investor, built a stake in Irish listed company CRH plc, in early 2019. Cevian owns stakes in a range of blue-chip European companies.

The chance of success of an activist campaign depends largely on the key vulnerability factors of the relevant company such as: (i) companies experiencing significant change; (ii) board composition or remuneration issues; (iii) earnings underperformance; or (iv) undervalued companies. One key factor that has impacted companies in Ireland is Brexit. Now that Brexit is imminent, market uncertainty and volatility is set to continue, at least in the short to medium term. The volatility caused by Brexit presents a number of practical challenges for companies particularly certain smaller Irish-listed companies that are heavily reliant on the UK market. This could lead to further activist campaigns.

How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

At an Irish macro and public 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 and shareholders during the past few years and there is now a greater understanding that no public company in any particular sector is completely immune or insulated from activist campaigns.

At boardroom and analyst 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 across any industry sector. There is also a growing appreciation of the constructive role that activists can play in effecting corporate change including most notably driving shareholder value.

However, one group that is worth flagging are the smaller Irish companies listed on Euronext Dublin. Given the relative smaller size of a number of companies listed on Euronext Growth, 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 but such companies also need to be familiar with Irish company law and governance requirements.

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 international investment firms or 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 international investment firms or hedge funds. 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’ .

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

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 including in particular calls to separate the roles of chairman and chief executive officers. 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, Kingspan and Independent News & Media.

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 high-profile example of an activist promoting corporate change was Orange Capital's attempt to persuade C&C Group 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 acquired Irish company, Allergan, 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 annual general meeting (AGM) of shareholders given the public interest in the banks. While socio-political 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

Strategies

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 in the Irish market 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 growing 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 and, in particular, directors changes, at the AGM or voting against resolutions.

In contrast to the United States, 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's largest shareholder, Worldview Capital Management, initiating legal proceedings against it before it went into examinership.

Processes and guidelines

What are 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 United Kingdom, 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 wants 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 (the 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. First, they will be entitled to vote on the remuneration policy and, second, 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. The Directive must be transposed into Irish law by 10 June 2019.

The vast majority of Irish companies on Euronext Dublin proposed resolutions to approve a remuneration report in 2018. Each of those companies classified the resolution as a non-binding advisory resolution only.

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 in questions 7 and 9.

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 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 7.

In respect of listed 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 fail to convene the EGM within 21 days, the persons who have requisitioned the EGM may convene the meeting themselves.

Litigation

What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

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 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 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 multi-party 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 multi-party 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, that is, 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.

SHAREHOLDERS' DUTIES

Fiduciary duties

Do shareholder activists owe fiduciary duties to the company?

In contrast with directors, whose duties are referenced in question 17, shareholder activists do not owe any fiduciary duties to the company.

Compensation

May directors accept compensation from shareholders who appoint 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.

Mandatory bids

Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

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.

Any shareholder that cooperates with other shareholders needs to consider the implications of acting in concert for mandatory bid and other Irish Takeover Rules purposes.

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.

'Acting in concert' is defined under the Irish Takeover Rules and includes a specified list of persons that are presumed to be acting in concert with a party to a bid or takeover unless the contrary is established to the satisfaction of the Irish Takeover Panel. In practice, the Irish Takeover Panel will always look at the facts of a particular situation in order to establish what actions should be treated as those of the bidder or target (as the case may be).

Two or more persons will be deemed to be 'acting in concert' as respects a takeover or other relevant transaction, including a substantial acquisition of securities if they co-operate on the basis of an agreement, either express or tacit, either oral or written, aimed at:

- either:
- either:

The Irish Takeover Rules contain a non-exhaustive list of persons who are deemed to be acting in concert (such as affiliates, directors, etc) for the purposes of both the Irish Takeover Rules and the Substantial Acquisition Rules (SARs). However, beyond that, the question is one of fact to be considered by reference to the relevant facts of each particular case.

Disclosure rules

Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Shareholders with interests in Irish public companies listed on an EU-regulated market such as Euronext Dublin 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 Euronext Dublin, 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 or she 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.

The disclosure obligations under the Irish Takeover Rules apply when a listed public limited company is in an offer period. During an offer period, any person who is interested in 1 per cent or more of any class of voting securities is required to disclose all further dealings in securities of that class. As with the SARs, a person's holding is aggregated with the holdings of persons with whom it is 'acting in concert'.

Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

Where a party is seeking to avoid triggering the Companies Act disclosure requirements, this can potentially be

achieved through the use of contracts for differences (CFDs). Entry into a derivative referenced to the shares of a company is not counted for the purposes of the Companies Act disclosure requirement unless it is coupled with the acquisition of an interest in the relevant shares to which the derivative is referenced or the party entering into the derivative acquires the ability to exercise rights in relation to those shares. Accordingly, if a party enters into a CFD without acquiring such rights, it can avoid coming under an obligation to disclose and it may therefore be possible for an activist shareholder to build a substantial stake in a company without triggering a disclosure requirement under the Companies Act.

For the purposes of determining whether or not a party has triggered the 1 per cent threshold under the Irish Takeover Rules (as referenced in question 14), derivatives giving the party a long position in the relevant shares are counted. Once the 1 per cent threshold is reached then all dealings in derivatives (long and short) must also be disclosed in the same way as dealings in the relevant shares.

Insider trading

Do insider trading rules apply to activist activity?

As set out in question 1, the MAR applies to companies listed on Euronext Dublin and Euronext Growth. TheMAR prohibits activities such as insider dealing and market manipulation, while also imposing obligations on issuers of securities or financial instruments regarding the disclosure of inside information and the maintenance of insider lists.

In terms of dealings on non-regulated markets, the provisions in Chapters 1, 2 and 4 of Part 23 of the Companies Act apply to public companies, which effectively makes public companies subject to requirements concerning prospectus, market abuse and transparency rules, most of which are derived from European legislation.

It is clear that trading on the basis of knowing inside information could constitute insider dealing.

COMPANY RESPONSE STRATEGIES

Preparation

What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

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.

While directors may be very unwilling to deal with an activist shareholder, they will ultimately need to decouple their personal opinions and ask themselves: is the proposed action in the best interests of the shareholders?

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

It is more important than ever for Irish boards to be ready to deal with shareholder activism. While activism along with issues such as Brexit, 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, companies and their boards should not respond dismissively to activist proposals.

Companies should focus carefully on regular shareholder communications and be prepared to respond to activist campaigns by assessing, on at least an annual basis, how susceptible the company is to an activist campaign, by whom and in what particular areas. Companies need to 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 better investor relations to ensure a company has support from a wide cohort of the shareholder base.

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.

Defences

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

Structural and other 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 approval), 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 United States 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 Euronext Dublin and provides that directors of relevant companies should be elected or re-elected annually.

Reports on proxy votes

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.

Private settlements

Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

It is very common for companies to engage with activist investors privately in the first instance as a means of avoiding public and more costly action at the outset. This remains the preferred course of action in Irish shareholder activist scenarios. If an activist succeeds with its regulations, it typically results in either an announcement from the company that it is considering a particular course of action such as a strategic review or a shareholder proposal being tabled at the next AGM.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Rules on communication

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 during 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 6, activists ordinarily prefer to engage on a more private, informal and amicable basis. While companies are increasingly willing to engage with shareholders, they are not usually minded to cede to requests for board seats and other corporate changes, at least in the short term.

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.

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?

As in the United Kingdom, an Irish-listed company must not ordinarily selectively disclose information to shareholders. Under the 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.

The MAR recognises that 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.

The 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.

What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its 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.

There are systems a company can put in place to facilitate communication with its shareholders. Information booths can be set up at AGMs dealing with questions from individual shareholders. However, the type of information to be shared at the booths should be considered carefully in advance. Similarly, a company may set up a Q&A section on its website where frequently asked questions are answered prior to an AGM.

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

Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? 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 enter that information in the register of interests within three days.

To the extent that a plc receives information relating to its shares on the back of issuing a disclosure notice under the Companies Act, it is also required to maintain a list of such beneficial shareholders in its statutory registers.

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 companies listed on Euronext Dublin and Euronext Growth, must gather and maintain information on individuals described as their ultimate beneficial owner.

UPDATE AND TRENDS

Recent developments

What are the current hot topics in shareholder activism and engagement?

One relatively new development has been the increased activist activity on the part of proxy advisory firms.

Institutional Shareholder Services (ISS) advises large investors on corporate governance issues. Recently, ISS recommended that the shareholders in Malin vote against the company's remuneration arrangements. Woodford Investment Management, which holds a 23 per cent stake in the company, and ISIF voted by proxy against the proposed pay and severance plans. This led to a board and management overhaul and forced the company to put a strategy in place identifying four 'core assets' in its portfolio of investments.

Another recent high-profile campaign was the acquisition by Cevian, Europe's largest activist investor, of a stake of just less than 3 per cent in Ireland's largest multinational, CRH. It is understood that Cevian sees CRH as being undervalued by the stock market, with margins trailing in comparison to competitors, having little organic revenue growth and a strategy based on making acquisitions. Some predictions speculate that Cevian will continue to build its stake in the company with the aim of taking a seat on the board and looking for some asset sales and cost efficiencies in order to improve margins. Other predictions have been that given most of CRH's earnings are coming from the United States. Cevian may press them to look at a partial listing of its North American unit in New York to unlock value. Cevian is expected to engage with management after CRH's annual results this year.

Brexit is also a key concern currently impacting market volatility that could create new opportunities for activists who can benefit from the unpredictability. 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 has a 'permissive' regulatory environment that could favour their strategies.