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IN IRELAND

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Thérèse Walsh
Department of Business, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01

07th February 2018

Re: Public consultation on the Transposition of Directive (EU) 2017/828 of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement

Dear Ms Walsh,

The Institute of Directors in Ireland (IoD) welcomes the opportunity to take part in the Department of Business, Enterprise and Innovation's public consultation on the transposition of the Shareholders' Rights Directive (EU) 2017/828 of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. It is our intention to focus our comments on the area of shareholders' rights, particularly in relation to director remuneration, as detailed in Articles 9A and 9B.

About The Institute of Directors in Ireland

The Institute of Directors in Ireland is the representative body for over 2,700 directors and senior executives within the private and public sectors. As the leading voice in the debate on improving corporate governance standards, IoD Ireland is dedicated to developing and improving the effectiveness and performance of directors and boards throughout Ireland.

Initial remarks

The IoD broadly welcomes the amended Shareholders' Rights Directive, which we believe will encourage transparent and active engagement by shareholders of listed companies. We agree with the rationale for the Directive to bring about more long-term focus in corporate governance and address shortcomings.

Specifically, we welcome the measures included in Articles 9A and 9B, which state that the remuneration policy of listed companies must be determined in an appropriate manner and that shareholders must have the opportunity to express their views regarding the remuneration of the company's directors.

Part of the IoD International Network
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A company limited by guarantee, registered in Ireland number 197643

Over recent years, the remuneration of directors has come under intense scrutiny, with companies, shareholders, government and public opinion increasing the focus on executive pay. This scrutiny is understandable in view of the economic crisis and governance failings in some companies.

The findings of a recent survey published by the Irish Congress of Trade Unions on the matter also considered the matter. The survey examined the remuneration of chief executives in 20 of the largest companies listed on the Irish Stock Exchange, along with CEO pay at the 12 largest commercial state companies. The report reveals pay increases for some chief executives of up to 100 per cent between 2015 and 2016, along with a near doubling of cash bonuses for some. It also reveals immense disparity between senior executive pay and average earnings.¹

It is vital for any governance procedures, including remuneration policies, to be set in the context of the long-term goals of a company rather than on the basis of short-term goals, which may ultimately lead to cases of insufficient linkage between director pay and performance.

The amended Directive now obliges EU members to implement two mechanisms for shareholder participation; a remuneration policy and a remuneration report. Implementing a clearly considered remuneration policy with a subsequent report should contribute to supporting the business strategy, long-term interests and sustainability of the company. It also provides a means to monitor the effectiveness of the policy and to report on same in a transparent manner.

Response to consultation

Section A.2 - Remuneration of directors

Section A.2 states: “Companies will be required to establish a remuneration policy. To ensure that shareholders have an effective say, shareholders will have the right to vote on remuneration policy as regards their directors at the general meeting of the company.”

In respect of the above paragraph, the IoD would recommend that greater clarity is provided as to which category of directors is proposed to be covered by such a policy. The above does not distinguish clearly between non-executive directors and executive directors therein. It would therefore be important that there is absolute clarity as to the scope of such remuneration policy which would usually only pertain to executive director remuneration.

Article 9A - Right to vote on the remuneration policy

Article 9A. Paragraph 1.

“Member States shall ensure that companies establish a remuneration policy as regards directors and that shareholders have the right to vote on the remuneration policy at the general meeting.”

The IoD agrees that companies should establish a remuneration policy, subject to clarity regarding which directors are covered by such a policy.

¹ Because We're Worth It: The truth about CEO pay in Ireland (January 2018):
https://www.ictu.ie/download/pdf/because_were_worth_it_ceo_pay_survey.pdf

We also support the proposal that “*companies submit the remuneration policy to a vote at the general meeting at every material change and in any case at least every four years.*” (Article 9(a) 5).

We welcome the proposal (Article 9(a) 6) that “*the remuneration policy shall contribute to the company’s business strategy and long-term interests and sustainability and shall explain how it does so. It shall be clear and understandable and describe the different components of fixed and variable remuneration, including all bonuses and other benefits in whatever form, which can be awarded to directors and indicate their relative proportion*”.

We support this proposal because remuneration policies which do not appropriately link executive pay to company strategy and performance can have a significant impact through diminished shareholder returns, weakened corporate governance structures and reduced confidence in the sector.

However, as the remuneration policy will be formalised it is necessary to highlight that best practice should be observed as companies establish their policy.

- The process of setting policy should be formal and transparent.
- The policy should reflect that remuneration levels should be sufficient to attract and retain directors to lead the company successfully without paying more than necessary, and be set and in line with current market levels.
- No director should be involved in setting his/her own remuneration.
- Many of Europe’s listed companies have operations in a number of different countries, where the cost of living may differ from country to country, with varying average wage levels and comparable pay levels and these structures should be considered.

The IoD also welcomes new measures included in Article 9(a) 1 that “*...shareholders have the right to vote on the remuneration policy at the general meeting.*”

We believe that shareholders’ views on director remuneration can contribute to the process and policy to ensure a stronger link between pay and performance, which in turn promotes longer-term and more sustainable growth in an organisation.

Enhanced voting rights should be seen as a reasonable additional safeguard for shareholders who recognise that, currently, the owners of a company have little influence on how company directors’ remuneration is determined.

It should be noted that regarding shareholders’ voting rights, in some historical instances, marked difficulties have occurred in circumstances where:

- no formal remuneration policy exists;
- little effort has been made by the company to consider, consult on and explain why no remuneration policy exists and/or;
- in respect of accountability, an existing remuneration policy does not include provisions and mechanisms to ensure that directors’ poor performance is met with remuneration consequences.

Certainly, in respect of stakeholder engagement, the amended Directive is in accordance with the proposed changes, which are subject to consultation, to the Financial Reporting Council’s UK

Corporate Governance Code (December 2017), with new Principle C stating, "*In order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties*". Engagement with a range of stakeholders is now a key theme running throughout the revised Code.

It is important, however, that appropriate balance and separation is maintained between shareholders and the role and responsibilities of the board, as it is ultimately the role of the board and the remuneration committee to set, agree and monitor performance against targets in respect of directors' remuneration.

The board and remuneration committee need to be permitted sufficient flexibility and discretion to set pay, whilst allowing shareholders to voice their views and concerns.

Article 9A. Paragraphs 2 and 3.

"Member States shall ensure that the vote by the shareholders at the general meeting on the remuneration policy is binding. Companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been approved by the general meeting. Where no remuneration policy has been approved and the general meeting does not approve the proposed policy, the company may continue to pay remuneration to its directors in accordance with its existing practices and shall submit a revised policy for approval at the following general meeting.

Where an approved remuneration policy exists and the general meeting does not approve the proposed new policy, the company shall continue to pay remuneration to its directors in accordance with the existing approved policy and shall submit a revised policy for approval at the following general meeting."

The IoD does not agree with the proposal that Member States shall ensure that the vote by the shareholders at the general meeting on the remuneration policy is binding so that companies are obliged to award their directors remuneration in accordance with approved policy. We believe that this a blunt instrument and could be misused by dissident shareholders.

Article 9A. Paragraph 3.

"Member States may provide for the vote at the general meeting on the remuneration policy to be advisory. In that case, companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such a vote at the general meeting. Where the general meeting rejects the proposed remuneration policy, the company shall submit a revised policy to a vote at the following general meeting."

We support this approach; it is a nuanced proposal and recognises and affirms the need for proper shareholder consultation on remuneration policy.

Article 9A. Paragraph 4.

“Member States may allow companies, in exceptional circumstances, to temporarily derogate from the remuneration policy, provided that the policy includes the procedural conditions under which the derogation can be applied and specifies the elements of the policy from which a derogation is possible.

Exceptional circumstances as referred to in the first subparagraph shall cover only situations in which the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability.”

In light of the current unpredictable nature of business, we agree with the proposal that companies are allowed, in exceptional circumstances, to temporarily derogate from the remuneration policy if this *“is necessary to serve the long-term interests and sustainability of the company as a whole or to ensure its viability”*.

We suggest that the regularity of this temporary derogation is monitored by the board as a whole, so that it only occurs in exceptional and defined circumstances.

Article 9B - Information to be provided in and right to vote on the remuneration report

The IoD welcomes the requirement for Europe’s listed companies to produce a remuneration report annually, which is subject to a non-binding vote by shareholders.

Article 9B. Paragraph 1(b)

“The annual change of remuneration, of the performance of the company, and of average remuneration on a full-time equivalent basis of employees of the company other than directors over at least the five most recent financial years, presented together in a manner which permits comparison.”

Article 9B. Paragraph 3

“Companies shall process the personal data of directors included in the remuneration report pursuant to this Article for the purpose of increasing corporate transparency as regards directors’ remuneration with the view to enhancing directors’ accountability and shareholder oversight over directors’ remuneration.”

Article 9B. Paragraph 5 (within the Directive)

“...after the general meeting the companies shall make the remuneration report publicly available on their website, free of charge, for a period of 10 years.”

The requirement outlined in point 1.(b), that the remuneration report will detail the average remuneration of full time employees of the company, other than directors will not be practical for many of Europe’s listed companies with global operations, as previously outlined, due to varying average wage rates. It is also overly prescriptive, in our view.

Additionally, the proposal that the remuneration report should include a description of the evolution of the average remuneration on a full-time equivalent basis of employees of the company other than

directors will require a lot of extra work for the vast majority of domestic companies, even more in multinational companies. The information required to be included (and now publicly disclosed) in a report may be expected to attract a lot of attention from a larger number of stakeholders.

Accordingly, companies should consider carefully how they will present the information and align their existing pay structure before the 10th June 2019, when the amended Directive must be fully implemented.

However, the overarching remit of the Directive - to collect, report and publically disclose information to enhance the shareholders' engagement, to control directors' remuneration and to minimise damage - may create problems regarding privacy. The public availability of remuneration figures, if taken out of context, could create a reputational risk, which may ultimately damage the standing of an organisation and potentially impact upon its shareholders.

While increasing the transparency of operations of Europe's listed companies is undeniably a positive step, it is vital that the integrity and reputation of such companies are not put at risk with requirements that may ultimately be counterproductive for shareholders. Thus, it is important to take into observe clause 52 of the Directive: *"This Directive should be applied in compliance with European Union data protection law and the protection of privacy as enshrined in the Charter of Fundamental Rights of the European Union."*

In particular, all directors' personal data should be kept accurate and up to date, the data subject should be appropriately informed about the processing of personal data in accordance with this Directive and should have the right to resolve incomplete or inaccurate data as well as right to erasure of personal data.

Furthermore, the IoD believes that remuneration disclosures should be clear, concise, transparent, and informative for investors and shareholders, but should avoid the disclosure of sensitive data that could undermine the competitive position of a firm against its peers.

We would suggest that the development of guidelines in respect of remuneration reports would meet investor demand for simplicity and comparability. This would also contribute to assisting the somewhat burdensome reporting process by companies themselves.

Article 9B. Paragraph 1.

"...the company draws up a clear and understandable remuneration report, providing a comprehensive overview of the remuneration, including all benefits in whatever form, awarded or due during the most recent financial year to individual directors, including to newly recruited and to former directors."

We acknowledge that this proposal is seeking to address the current complex nature of directors' remuneration packages. The complexity of directors' remuneration in some instances makes this difficult. We are supportive of disclosure with regard directors' remuneration and suggest that some degree of standardisation needs to take place on the reporting requirements to ensure that comparative analysis is possible.

In recent times, we have seen a marked interest in monitoring directors' pay. For example, in the proposed revisions to the Financial Reporting Council's UK Corporate Governance Code (December 2017), a new Provision 41 sets out in some detail the matters to be included in the company's annual report when describing the work of the remuneration committee. These include what engagement has taken place with shareholders and the workforce and how executive remuneration aligns with wider company policy.

Article 9B. Paragraph 4

“For small and medium-sized companies as defined, respectively, in Article 3(2) and (3) of Directive 2013/34/EU, Member States may provide, as an alternative to a vote, for the remuneration report of the most recent financial year to be submitted for discussion in the annual general meeting as a separate item of the agenda. The company shall explain in the following remuneration report how the discussion in the general meeting has been taken into account.”

The IoD recognises the significant impact that this Directive has on all institutions, particularly on small and medium-sized enterprises.

We agree with allowing SMEs to make remuneration one item on the agenda of the general assembly without a formal vote.


Other comments:

We acknowledge that establishing a suitable remuneration policy that aligns remuneration and performance with the medium and long-term interests of the company, is a positive step. Enhancing shareholders' right to vote on this policy and the policy's report is in accordance with the central focus of Articles 9A and 9B, which is *“to increase corporate transparency as regards directors' remuneration with the view to enhancing directors' accountability and shareholder oversight over directors' remuneration.”*

Clear frameworks should also be put in place for the implementation of the Directive, given the significance of the changes proposed and the varying scale and complexity of such companies. Implementation measures should also give due consideration and guidance to companies on dealing with the contractual arrangements for existing directors, whether grandfathered status will be afforded to these contracts, or whether existing contractual arrangements will need to be amended with immediate effect.

Thank you for the opportunity to contribute to this consultation and we would be delighted to provide further input or assistance with regard to the points outlined. If you have any queries please do not hesitate to contact me.

Yours Sincerely



Maura Quinn
Chief Executive
Institute of Directors in Ireland

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