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The International Comparative Legal Guide to:

Corporate Governance 2018

11th Edition

A practical cross-border insight into corporate governance

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Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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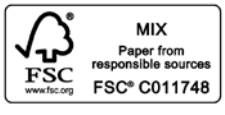

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Corporate Governance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Corporate Governance, Investor Stewardship and Engagement, particularly from a US perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 38 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Sabastian V. Niles of Wachtell, Lipton, Rosen & Katz for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Corporate Governance, Investor Stewardship and Engagement

Wachtell, Lipton, Rosen & Katz

Sabastian V. Niles

Corporate governance is increasingly conceived as a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value and resist short-termism. The below is an outline of synthesised principles intended to promote the common goal of facilitating sustainable long-term value creation through the governance roles of the board of directors and senior management, the role of investors in impacting corporate strategy and governance decisions within a framework of stewardship, and engagement between companies and investors to forge relationships built on transparency, trust and credibility. Companies and investors would tailor the application of these principles to their specific facts and circumstances.

Guiding Principles

Governance:

1. *Strategy, Management and Oversight*. The board of directors and senior management should jointly oversee long-term strategy and communication of that strategy, ensuring that the company pursues sustainable long-term value creation. The board of directors is responsible for monitoring company performance and for senior management succession.
2. *Quality and Composition of Board of Directors*. Directors should have integrity, competence and collegiality, devote the significant time and attention necessary to fulfil their duties, and represent the interests of all shareholders and other stakeholders. The board of directors as a whole should feature backgrounds, experiences and expertise that are relevant to the company's needs.
3. *Compensation*. Executive and director compensation should be designed to align with the long-term strategy of the company and incentivise the generation of long-term value, while dis-incentivising the pursuit of short-term results at the expense of long-term results.
4. *Corporate Citizenship*. Consideration should be given to shareholders and the company's broader group of stakeholders, including employees, customers, suppliers, creditors, and the community in which the company does business, in a manner that contributes in a direct and meaningful way to long-term value creation.

Stewardship:

1. *Beneficial Owners*. Institutional investors are accountable to the ultimate beneficial owners whose money they invest. As shareholders gain additional empowerment, they should use that power for the goal of long-term value creation for all shareholders.
2. *Voting*. Investors should actively vote on an informed basis consistent with the interests of their clients in the long-term success of the companies in which they invest.
3. *Investor Citizenship*. Investors should consider value-relevant sustainability, citizenship and ESG/CSR factors when developing investment strategies.

Engagement:

1. *By the Company*. The board of directors and senior management should engage with major investors on issues and concerns that affect the company's long-term value and be responsive to those issues and concerns.
2. *By Investors*. Investors should be proactive in engaging in dialogue with a company as part of a long-term relationship and should communicate their preferences and expectations.
3. *Shareholder Proposals and Votes*. Boards of directors should consider shareholder proposals and key shareholder concerns but investors should seek to engage privately before submitting a shareholder proposal.
4. *Interaction and Access*. Companies and investors should each provide the access necessary to cultivate engagement and long-term relationships.

Governance

Strategy, Management and Oversight. **The board of directors and senior management should jointly oversee long-term strategy and communication of that strategy, ensuring that the company pursues sustainable long-term value creation. The board of directors is responsible for monitoring company performance and for senior management succession.**

- The board of directors should oversee the company's management and business strategies to achieve long-term value creation, including having meaningful input over the company's capital allocation process and strategy. The board of directors should ensure that it understands the strategic assumptions, uncertainties, judgments and alternatives that underpin the company's long-term strategy.
- The board of directors sets the "tone at the top" to cultivate an ethical culture and demonstrate the company's commitment to integrity and legal compliance. Companies should have in place mechanisms for employees to seek guidance and alert management and the board of directors about potential or actual misconduct without fear of retribution.
- The board of directors should periodically review the company's bylaws, governance guidelines and committee charters and tailor them to promote effective board functioning. The board

of directors should be aware of the governance expectations of its major shareholders and take those expectations into account in periodic reviews of the company's governance principles. Boards of directors of companies that currently have dual or multiple class share structures should review these structures on a regular basis and establish mechanisms to end or phase out controlling structures at the appropriate time.

- The board of directors has two key roles with respect to management: oversight of management; and partnership with management. The board of directors should work to foster open, ongoing dialogue between members of the board and management. This dialogue requires directors to have access to senior management outside of board meetings. Management has an obligation to provide information to directors, and directors should seek clarification and amplification where necessary.
- The board of directors and senior management should jointly determine the company's reasonable risk appetite, oversee implementation of standards for managing risk and foster a culture of risk-aware decision-making. The board of directors should consider significant risks, including cybersecurity and reputational risks, to the company, but should not be reflexively risk averse; the board should seek proper calibration of risk to benefit the long-term interests of the company and its shareholders.
- Even with effective risk management, crises will emerge and test the board of directors, with potential situations ranging from unexpected departures of the CEO to risk management failures and major disasters. Each crisis is different, but in most instances when a crisis arises, directors are best advised to manage through it as a collegial body working in unison with the CEO and management team. Once a crisis starts to unfold, the board of directors needs to be proactive and provide careful guidance and leadership in steering the company through the crisis. If there is credible evidence of a violation of law or corporate policy, the allegation should be investigated and appropriate responsive actions should be taken. The board of directors, however, should be mindful not to overreact, including by reflexively displacing management or ceding control to outside lawyers, accountants and other outside consultants.
- The board of directors and senior management should maintain a close relationship with the CEO and monitor the performance of the CEO and key members of management.
- The board of directors and senior management should maintain a succession plan for the CEO and other key members of management. The board of directors should address succession planning on a regular rather than reactive basis. Direct exposure to employees is critical to the evaluation of the company's "bench strength".
- Companies should frame required quarterly reporting in the broader context of their articulated strategy and use quarterly financial results to show progress toward long-term plans. Companies should not feel obligated to provide earnings guidance.
- The board of directors should carefully consider extraordinary transactions and receive the information and time necessary to make an informed and reasoned decision. The board of directors should take centre stage in a transaction that creates a real or perceived conflict of interest between shareholders and management, including activist situations.

***Quality and Composition of Board of Directors*. Directors should have integrity, competence and collegiality, devote the significant time and attention necessary to fulfil their duties and represent the interests of all shareholders and other stakeholders. The board of directors as a whole should feature backgrounds, experiences and expertise that are relevant to the company's needs.**

- Every director should have integrity, strong character, sound judgment, an objective mind, collegiality, competence and the ability to represent the interests of all shareholders and other stakeholders.
- The composition of a board should reflect a complementary diversity of thought, background, skills, experiences, and tenures. The board of directors should develop a system for identifying diverse candidates, including women and minority candidates.
- A substantial majority of the board of directors should be independent. The board of directors should consider all relevant facts and circumstances when evaluating independence. Long-standing board service should not, by itself, disqualify a director from being considered independent.
- The board of directors should decide, based on the circumstances, whether to have separate or combined chairman and CEO roles. The board of directors should explain its decision to shareholders, and, if the roles are combined, should appoint a strong lead independent director. The lead independent director should serve as a liaison between the chairman of the board and the independent directors, preside over executive sessions, call meetings of the independent directors, guide the board's self-assessment or evaluation process, and guide consideration of CEO compensation and succession.
- The size of the board of directors will depend on the nature, size and complexity of the company and its state of development. In general, the board of directors should be large enough for a variety of perspectives and as small as practicable to promote open dialogue.
- Companies should consider limitations on the number of other boards of directors on which a director sits to ensure a director's ability to dedicate sufficient time to the increasingly complex and time-consuming matters that the board of directors and committees are expected to oversee.
- The composition of a board of directors should reflect a range of tenures. The board of directors should consider whether policies such as mandatory retirement ages or term limits are appropriate, but board refreshment should be tempered with the understanding that age and experience bring wisdom, judgment and knowledge. Substantive director evaluation and re-nomination decisions will serve better than arbitrary policies.
- Directors must spend the time needed and meet as frequently as necessary to discharge their responsibilities and should endeavour to attend all board and committee meetings, as well as the annual meeting of shareholders. The full board of directors should have input into the board agenda.
- Time for an executive session without the CEO or other members of management should be on the agenda for each regular board meeting.
- The board of directors should have a well-developed committee structure with clearly understood responsibilities. Decisions about committee membership should be made by the full board based on recommendations from the nominating and governance committee, and committees should meet all applicable independence and other requirements. Committees should keep the full board of directors and management apprised of significant actions.
- Companies should conduct a robust orientation for new directors and all directors should be continually educated on the company and its industry. Companies may find it useful to have an annual two- to three-day board retreat with senior executives to conduct a full review of strategy and long-range plans.
- The board of directors should evaluate the performance of individual directors, the full board of directors, and board committees on a continuing basis. Evaluations should be substantive exercises that inform board roles, succession planning, and refreshment objectives. Evaluations should be

led by the non-executive chair, lead independent directors, or appropriate committee chair, and externally facilitated evaluations may be appropriate from time to time.

***Compensation*. Executive and director compensation should be designed to align with the long-term strategy of the company and incentivise the generation of long-term value, while dis-incentivising the pursuit of short-term results at the expense of long-term results.**

- The board of directors should develop management compensation structures that are aligned with the long-term strategy and risk compliance policies of the company. A change in the company's long-term strategy or risk compliance policies should merit a re-evaluation of management compensation structures.
- Executive compensation should have a current component and a long-term component. A substantial portion should be in the form of stock or other equity, with a vesting schedule designed to ensure economic alignment with shareholders. In general, executives should be required to hold a meaningful amount of company stock during their tenure and beyond.
- The board of directors or its compensation committee should understand the costs of compensation packages and the maximum amount payable in different scenarios. In setting executive compensation, the compensation committee should take into account the position of the company relative to other companies, but use such comparison with caution, in view of the risk of an upward ratchet in compensation with no corresponding improvement in performance.
- Companies should be sensitive to the pay and employment conditions elsewhere in the company and take into account the pay ratios within the company. The board of directors should also consider the views of shareholders, including as expressed in "say-on-pay" votes, but should not abdicate its role in deciding what is best for the company.
- Companies should monitor, restrict or prohibit executives' ability to hedge the company's stock and oversee the adoption of policies to mitigate risks, such as compensation recoupment or clawbacks.
- Directors should receive compensation that fairly reflects the time commitment of public company board service, with appropriate benchmarking against peer companies. Independent directors should be equally compensated, although lead independent directors and committee chairs may receive additional compensation and committee fees may vary.
- Director compensation should be a mix of cash and equity, with appropriate stockholding requirements to promote continued alignment between directors and shareholders.
- If directors receive additional compensation not related to service as a director, such compensation should be disclosed and explained to shareholders.

***Corporate Citizenship*. Consideration should be given to shareholders and the company's broader group of stakeholders, including employees, customers, suppliers, creditors, and the community in which the company does business, in a manner that contributes to long-term value creation.**

- Companies should strive to be good citizens of the communities in which they do business and consider relevant sustainability issues in operating their businesses.
- The board of directors and senior management should integrate relevant ESG and CSR matters into strategic and operational planning.
- Companies have an important perspective to contribute to public policy dialogue. If a company engages in political activities, the board of directors should oversee such activities and consider whether to adopt a policy of disclosure of the activities.

Stewardship

***Beneficial Owners*. Investors are accountable to the beneficial owners whose money they invest. As shareholders gain additional empowerment, they should use that power for the goal of long-term value creation for all shareholders.**

- Investors should provide steadfast support for the pursuit of reasonable strategies for long-term growth and speak out against conflicting short-term demands.
- Investors should establish a firm-wide culture of long-term thinking and patient capital, including through the design of employee compensation to discourage the sacrifice of long-term value for short-term gains.
- Investors should adopt and disclose guidelines and practices that help them oversee the corporate governance practices of investee companies. Disclosure should include investors' long-term investment policies, evaluation metrics, governance procedures, views on quarterly reports and earnings guidance, and guidelines for relations with short-term activists.
- Investors should evaluate the performance of boards of directors, including director knowledge of governance and interest in understanding key shareholder concerns, as well as the board of directors' focus on a thoughtful long-term strategic plan.

***Voting*. Investors should actively vote on an informed basis consistent with the interests of their clients in the long-term success of the companies in which they invest.**

- Investors should devote sufficient time and resources to the evaluation of matters for shareholder vote in the context of long-term value creation.
- Investor votes should be based on the independent application of internal policies and guidelines. Investors may rely on a variety of information sources to support their evaluation. Third-party analyses and recommendations, including proxy advisory firms, should not substitute for individualised decision-making that considers the facts and circumstances of each company.
- Investors should disclose their proxy voting and engagement guidelines and report periodically on stewardship and voting activities.
- Investors should have clear procedures that help identify and manage potential conflicts of interest in their proxy voting and engagement and disclose such procedures.

***Investor Citizenship*. Investors should consider value-relevant sustainability, citizenship and ESG/CSR factors when developing investment strategies.**

- Investors should integrate material ESG factors into investment analysis and investment decisions.
- Investors should disclose their positions on ESG and CSR matters.

Engagement

***By the Company*. The board of directors and senior management should engage with major investors on issues and concerns that affect the company's long-term value and be responsive to those issues and concerns.**

- The board of directors and senior management should establish communication channels with investors and be open to dialogue on a "clear day". Boards should be responsive to shareholders and be proactive in order to understand their perspectives.

- Companies should clearly articulate for investors the company vision and strategy, including key drivers of performance, risk and evolution of business model.
- Companies should make adequate disclosures on a variety of topics, including: how compensation practices encourage and reward long-term growth; the director recruitment and refreshment process; succession planning; consideration of relevant sustainability, citizenship, and ESG/CSR matters; climate risks; political risks; corporate governance and board practices; anti-takeover measures; material mergers and acquisitions; and major capital commitments. Companies should explain the bases for their recommendations on the matters that are submitted to a shareholder vote.
- Companies should disclose their approach to human capital management: employee development, diversity and a commitment to equal employment opportunity; health and safety; labour relations; and supply chain labour standards; amongst other things.

***By Investors*. Investors should be proactive in engaging in dialogue with a company as part of a long-term relationship and should communicate their preferences and expectations.**

- Investors should actively listen to companies, participate in meetings or other bilateral communications and communicate their preferences, expectations and policies with respect to engaging with and evaluating companies. Investors should address and attempt to resolve differences with companies in a constructive and pragmatic manner that is intended to build trust and a common understanding and should give due consideration to the company's rationale.
- Investors should assume some accountability for the long-term interest of the company and its shareholders as a whole, provide companies with candid and direct feedback and give companies prompt notice of any concerns.
- Investors should invite companies to privately engage and work collaboratively with boards of directors and management teams to correct subpar strategies and operations. If an investor discloses a negative opinion about the company, it should state whether the investor first provided an opportunity for the company to engage privately.
- Investors should disclose their preferred procedures and contacts for engagement and establish clear guidelines regarding, and disclose, what further actions they may take in the event they are dissatisfied with the outcome of their engagement efforts.

***Shareholder Proposals and Votes*. Boards of directors should consider shareholder proposals and key shareholder concerns but investors should seek to engage privately before submitting a shareholder proposal.**

- Boards of directors should respond to shareholder proposals that receive significant support by implementing the proposed change if the board of directors believes it will improve governance, or providing an explanation as to why the change is not in the best long-term interest of the company if the board of directors believes it will not be constructive.
- Investors should raise critical issues to companies as early as possible in a constructive and proactive way, and seek to engage in a dialogue before submitting a shareholder proposal. Public battles and proxy contests have real costs and should be viewed as a last resort where constructive engagement has failed.
- Long-term shareholders should recommend potential directors if they know the individuals well and believe they would be additive to the board.
- Shareholders have the right to elect representatives and receive information material to investment and voting decisions. It is reasonable for shareholders to oppose re-election of directors who have persistently failed to respond to shareholder feedback.
- Boards of directors should communicate drivers of management incentive awards and demonstrate the link to long-term strategy and sustainable economic value creation. If the company clearly explains its rationale regarding compensation plans, shareholders should consider giving the company latitude in connection with individual compensation decisions. The board of directors should nevertheless take into account "say-on-pay" votes.

***Interaction and Access*. Companies and investors should each provide the access necessary to cultivate engagement and long-term relationships.**

- Engagement through disclosure is often the most practical means of engagement, though in other cases, in-person meetings or interactive communications may be more effective.
- Independent directors should be available to engage in dialogue with shareholders in appropriate circumstances without undermining the effectiveness of management to speak for and on behalf of the company.
- Investors' ultimate decision-makers should have access to the company, its management, and in some cases, its board of directors, and likewise the company should have access to investors' ultimate decision-makers.
- Boards of directors and senior management should consider cultivating relationships with the government, the community and other stakeholders.

Sabastian V. Niles

Wachtell, Lipton, Rosen & Katz
51 W 52nd Street NY
NY 10019
USA

Tel: +1 212 403 1000
Fax: +1 212 403 2000
Email: svniles@wlrk.com
URL: www.wlrk.com

Sabastian V. Niles is a Partner at Wachtell, Lipton, Rosen & Katz where he focuses on rapid response shareholder activism, engagement and preparedness, takeover defense and corporate governance; risk oversight, including as to cybersecurity and crisis situations; U.S. and cross-border mergers, acquisitions, buyouts, investments, divestitures, and strategic partnerships; and other corporate and securities law matters and special situations.

Sabastian advises worldwide and across industries, including technology, financial institutions, media, energy and natural resources, healthcare and pharmaceuticals, construction and manufacturing, real estate/REITs and consumer goods and retail.

In addition to serving as Consulting Editor for the New York Stock Exchange's Corporate Governance Guide, Sabastian writes frequently on corporate law matters and has been a featured speaker at corporate strategy and investor forums. His speaking engagements have addressed topics such as Shareholder Activism; The New Paradigm of Corporate Governance; Hostile Takeovers; Strategic Transactions and Governance; M&A Trends; Board-Shareholder Engagement; Confidentiality Agreements in M&A Transactions; Negotiating Strategic Alliances with U.S. Companies; Current Issues in Technology M&A; Corporate Governance: Ethics, Transparency and Accountability; and Developments in Cross-Border Deals.

Wachtell, Lipton, Rosen & Katz

Wachtell, Lipton, Rosen & Katz is one of the most prominent business law firms in the United States. The firm's preeminence in the fields of mergers and acquisitions, takeovers and takeover defence, shareholder activism, strategic investments, corporate and securities law, and corporate governance means that it regularly handles some of the largest, most complex and demanding transactions in the United States and around the world. It features consistently in the top rank of legal advisers. The firm also focuses on sensitive investigation and litigation matters and corporate restructurings, and in counselling boards of directors and senior management in the most sensitive situations. Its attorneys are also recognised thought leaders, frequently teaching, speaking and writing in their areas of expertise.

Albania

Anisa Rrumbullaku

Tea Take

CR Partners

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Corporate governance applies to all commercial companies, including Joint Stock Companies (JSC), Limited Liability Companies (LLC) and Collective or Limited Partnership Companies. This chapter will mainly focus on JSCs and LLCs since they are the most common form of companies adopted in Albania.

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

Corporate governance in Albania is mainly governed by the Law no. 9901 (the "**Company Law**"), the "Law on Statutory Audit and Organization of Registered Chartered Auditors and Approved Accountant" and the "Securities Law". The "Law on Banks" also provides some corporate governance rules that are specific to bank and non-bank financial institutions. Also, Law no. 10236 "On Takeovers" contains certain corporate governance rules regarding publicly listed companies. Company Law no. 9901, however, is the principal act regulating corporate governance in Albania which provides the minimum standards of corporate governance for Albanian companies, primarily for JSCs, which can choose between a one tier governance system or a two-tier system.

On 2 December 2011, a Corporate Governance Code (the "**Code**") was adopted by the Ministry of Economy, Trade and Energy. However, this Code is voluntary and only provides a set of recommendations for LLCs and JSCs.

Furthermore, upon incorporation, companies must adopt their Articles of Association, which set forth the main regulations regarding the relations between commercial companies and shareholders. However, companies are free to draft their Articles of Association to the extent of mandatory rules provided by the laws.

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

The general corporate governance legal framework in Albania is almost complete. However, the enforcement of corporate governance rules remains rather poor. The major reason why corporate governance rules remain unsophisticated is the lack of a capital market and listed companies. The country lacks a functioning stock exchange (i.e. there is only one private stock exchange licensed just recently) and a "higher authority" to act as promoter and monitor/surveillant of corporate governance issues.

Overall the Albanian corporate governance framework leaves space for further improvement, especially in ensuring that provisions of the law are well understood and implemented. The banking sector on the other hand is well developed and banks promote a good corporate governance due to the fact that Law on Banks established clear governance requirements for Banks which are supervised by the Bank of Albania.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

More advocacy efforts on corporate governance rules are generally necessary to promote sustainable value creation in the long-term which goes in parallel with better enforcement of corporate governance rules by Albanian courts.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Even though the management of a company is reserved for the Management Body, shareholders have extensive decision-making powers with respect to the election of board members, approval of the company's financial statements or any other such important decision, through an ordinary or extraordinary shareholder 'assembly meeting. They have the right to approve the business policies, amend the Articles of Association of the company, to monitor and supervise the implementation of business policies by the Managing Directors, to elect or dismiss members of the Supervisory Board and even Managing Directors in the two-tier governance system, to appoint auditors, to approve the company's audited annual report, dividends and distribution thereof in proportion to their shareholding, etc.

Albanian JSCs can operate under a one or two-tier governance system where the first one consists of a Board of Directors exercising both supervisory and management functions, whereas the second system is comprised of a Supervisory Board with supervisory functions only and Managing Directors with management functions. Members of the board of managing directors in the two-tier system can be appointed either from the general shareholders' meeting or, from the supervisory board, whereas members of the supervisory

board/board of administrators in all cases are appointed by the shareholders' general meeting. Powers of both organs are laid down in the Company Law.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Corporate governance principles, as provided in the Code, state that the shareholders of companies should establish an appropriate constitutional and governance framework for the company. Every company should strive to establish effective board which is collectively responsible for the long-term success of the company, including the definition of the company strategy.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The shareholders exercise their rights regarding company matters in the General Meeting of the shareholders. In a single member company, the rights and duties of the General Meeting are performed by the single member. The General Meeting is convened by the Managing Directors, by the Board of Directors, the Supervisory Board or by the shareholders who have at least 5% of the voting rights of the company. The General Meeting must be also convened on the following occasions:

- if the annual or interim accounts show, or if it is clear based on those accounts, that losses amount to 50% of the basic capital, or if there is a danger that the company's assets will not cover its liabilities within the next three months;
- if there is a proposal to sell or otherwise dispose of assets amounting to more than 5% of the company's annual turnover in the last accounting year; and
- when the company, within the first two years after registration, proposes to purchase assets which belong to a shareholder and which amount to 5% of the company's turnover in the last accounting years.

The General Meeting is convened by written notice or, if so provided by the Articles of Association, by electronic mail. The letter or e-mail and the agenda for the meeting, must be delivered to all members no later than 21 days before the scheduled date of the meeting in the case of JSCs or seven days in the case of LLCs. Such legal requirements are obligatory in order for decisions to be considered valid, except those cases in which the meeting being absent compliance with formalities provided in the law, is attended by all the shareholders, and none of them has raised any objection to the meeting being held.

The Company Law provides the right for minority shareholders representing at least 5% of the registered capital, or a lower threshold established by the Articles of Association, to request a General Meeting to be held. Should the meeting not be held, any of the requesting minority shareholders may ask the Court to issue a decision declaring that the Managing Directors are considered in breach of their fiduciary duties if they fail to convene a meeting within 15 days, or they may even request the company to purchase their shares.

Each shareholder is entitled to participate in the General Meeting and exercise his voting rights, based on the principle that each share equals one vote. Shareholders may attend the meeting in person or may choose to authorise another person to represent them in one meeting. The authorised person may not be a Managing Director or a member of the Board of Directors or of the Supervisory Board.

Each decision of the General Meeting must be recorded in the minutes of the meeting, a copy of which is kept in the seat of the company and published on the company's website (if available), by the Managing Director.

Regarding quorum and majority requirements, in case of matters requiring ordinary majorities, the General Meeting may only make valid decisions by shareholders holding more than 30% of the voting shares; while in case of matters requiring qualified majority, the General Meeting may only make valid decisions if the shareholders having more than half of the total number of votes participate in the voting. Decisions of the General Meeting are normally made by simple majority of the votes of the participating shareholders. Important decisions such as amendment of the Articles of Association, increase and reduction of capital, profit distribution dissolution, mergers, divisions etc., require the three-quarter majority of votes.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As a general rule, shareholders cannot be liable for acts or omissions of the corporate bodies because according to the law, Managing Directors are generally responsible with respect to governance activities. Article 16 of the Company Law, however, as an exception, provides the principle based on which company members and shareholders, Managing Directors and members of the Board of Directors are personally liable in cases when they fraudulently treat the assets of the company in a manner as if they were their own and most importantly when they fail to ensure that the company has sufficient capital at a time when they know or ought to have known that the company would not be able to meet its obligations toward third parties.

Furthermore, the shareholders of an Albanian company, based on the Company Law must perform their duties established by law or the company's Articles of Association in good faith and in the best interest of the company as whole, exercise their powers granted to them by law only for the purpose laid down in the law or company's Articles. They must give adequate consideration to the matters to be decided, prevent and avoid actual and potential conflicts between personal interests and those of the company and exercise due diligence and care in the performance of their functions. In this context, shareholders are also under the obligation to non-compete the company by virtue of management duties in other companies, unless such restriction is lifted by the Articles of Association of the company. If they fail to comply, the company may request from the court a cease and desist decision and also potential damages.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders are entitled to seek enforcement against the members of the management body through derivative action i.e. through the company's General Meeting, for failure to comply with their duties and responsibilities as provided in the law and in the Articles of Association of the company. They can demand compensation of the company for any damage caused by the Managing Directors due to violation of their duties.

The General Meeting may even file a petition with the competent court to annul a decision of a Managing Director which it considers to be seriously in breach of the law or the Articles of Association.

Members representing at least 5 percent of the total votes of the company or a smaller percentage as envisaged by the Articles of Association may file a petition to the court within 30 days after the General Meeting's refusal to initiate court proceedings.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There is no limitation in relation to securities that shareholders may own in a company.

If a person acquires or sells shares of a JSC, and if, as a consequence, its proportion of votes in the General Meeting exceeds or falls below the following thresholds: 3%; 5%; 10%; 15%; 20%; 25%; 30%; 50%; or 75%, that person shall notify the National Business Centre in writing of that acquisition or sale within 15 days.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Please refer to question 2.4 above.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The managing duties in LLCs rest with the Managing Directors of the company who manage the company's business by implementing the business policies defined by the shareholders meeting. They represent the company towards third parties and ensure the accurate and regular maintenance of accounting books and documents of the company. The General Meeting can nominate one or more natural persons as Managing Directors and, in such case, they co-manage and co-represent the company unless otherwise provided in the Articles of Association.

As for JSCs, the Company Law offers two different sets of rules for the organisation of JSC: the one tier; and the two-tier structure. In one-tier system JSC, the central administrative organ is the Board of Directors. The Board typically combines managing and supervisory functions, although the Managing Directors should not necessarily be members of the Board of Directors. The Board will normally be composed of executive and non-executive members.

As concerns the participation of the Board of Directors in the company's management, the law authorises the Board of Directors to give directives to the Manging Directors with respect to implementation of business policies. Apart from its involvement in aspects of managerial decision-making, the main task of the Board of Directors is the supervision of the Managing Directors conduct in running the company's business. However, it is the Managing Director's main task to represent the company as well as to manage its business.

The administrative functions of a two-tier JSC are distributed between two different organs, the Managing Directors and the Supervisory Board. According to the law, the Managing Directors lead the company and decide on the manner of implementation of the business policy, while the Supervisory Board assesses the policy implementation and monitors its compliance with the Law and the Articles of Association. The Supervisory Board, as a rule, does not have the authority to give legally binding instructions to the Managing Directors but is limited in the monitoring and supervision of the implementation of business policies set by the General Meeting, hence the decisions taken by the Managing Directors do not normally require the approval of the Supervisory Board unless otherwise provided in the Articles of Association of the company.

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

In a LLC, the Managing Directors are appointed and removed by simple majority of the General Meeting of Shareholders. In a JSC, in the one tier system, the members of the Board of Directors i.e. at least three, are elected and removed by the General Meeting of shareholders through simple majority. The Managing Directors on the other hand are appointed and removed by the Board of Directors with a simple majority.

Within the two-tier structure, the law provides for two different ways by which the Managing Directors are appointed, i.e. the Managing Directors may be elected either by the Supervisory Board or the General Meeting. The choice between the two systems has to be made in the company's Statute. Even in this model, the Managing Directors can be dismissed at any time. The right to dismiss Managing Directors by simple majority cannot be waived by contract or the Articles of Association of the company.

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

The competent body to appoint and dismiss the Managing Directors is also entitled to determine their remuneration. The salary of Managing Directors may be supplemented by other benefits which should be established by ordinary decision of the General Meeting [or the Board of Directors, as applicable]. The remuneration must be adequate and in accordance with the duties of the Managing Director. The remuneration can be adequately reduced in case the company's financial standing is seriously deteriorating.

The legal relationship of the Managing Directors with the company can be determined based on an employment agreement under the Albanian Labour Code or other type of service agreement based on the Albanian Civil Code.

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

Article 13 of the Company Law contains special rules about transactions between the company and persons related to the company. In this context, a Managing Director or members of the Board of Directors/Supervisory Board cannot enter into agreements or other relationships with the company if such is not authorised by a higher decision-making body. In such case, they must disclose the terms of the transaction and the nature and scope of the interests of the person and the transactions should be approved by:

- all the shareholders in case of a LLC;
- the Board of Directors or the Supervisory Board in case of Managing Directors of a JSC; or
- the Board of Directors or Supervisory Board in case of members of the Board of Directors or Supervisory Board in JSCs.

The approval is also required for any legal agreement on behalf of the company with persons who have a personal or financial relationship with the representative or supervisor or engage in activities that could reasonably be expected to affect the representative's or

supervisor's judgment contrary to the interests of the company. At the next General Meeting, shareholders should be notified of any approval, including the terms of the transaction and the nature and scope of the interests of the person involved.

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

The Albanian Company Law does not provide specific procedures on how the member of the management body meet; such rules be specified in the Articles of Association of the company [or can be adopted by a unanimous decision of the Board of Directors/ Supervisory Board in the case of a JSC]. However, there are some rules concerning the decision-making process. Hence, the Board of Directors may make decisions if more than half of its members are present. In general, decisions are taken if voted by the majority of the attending members, unless otherwise provided in the Articles of Association. The board elects its chairman, who cannot be a Managing Director. Each meeting shall be recorded in the minutes of the meeting, signed by the chairman.

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

Fiduciary duties

Article 14 of the Company Law states that a Managing Director is obliged to exercise his/her powers for the benefit of the company and not for his/her own benefit. This means that where there is a conflict of interest between a director's personal interests and those of the company, those of the company must prevail and a director must not use any corporate opportunity for his/her own personal advantage. Managing Directors are personally liable in some cases set out in article 16 of the Law, and, *inter alia*, in cases when he treats the assets of the company in a manner as if they were their own and most significantly when they fail to ensure that the company has sufficient capital at a time when they know or ought to have known that the company would not be able to meet its obligations towards third parties.

Duty of care and skill

Managing Directors must exercise reasonable care and skill in the performance of his/her functions in the company.

Non-compete obligation

The non-compete obligation, forbids a Managing Director from working in another company of the same profile during the term of his/her employment with that company. This restriction can be lifted only by the shareholders of the company. Breach of this obligation without the proper waiver entitles the company to request from the court the cease of the illegal activity of the director and compensation for damages.

Non-disclosure obligation

This obligation applies for business secrets that are known to Managing Directors because of their role and duties in the company that are strictly forbidden from being disclosed.

Creditor protection

A Managing Director is not only responsible towards to the company and its members and/or shareholders, but he/she shall also take part of the responsibility to protect the creditors of the company. The Company Law requires the issuance of a solvency certificate before distribution of profit to the members/shareholders of the company. This certificate shall certify that the company's assets will fully cover its liabilities, and that the company will have sufficient liquid assets to cover such liabilities as they fall due in the subsequent 12 months. Managing Directors can be held personally liable to the company in case they fail to comply with the duties imposed on them, unless pursuant to their inquiry and evaluation of the relevant information, the act or omission has been committed in good faith. In case the violation has been committed by several members of the Board of Directors, they shall be jointly liable for compensating the company for any damages resulting from such violation.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The members of the management body have the following rights and obligations in respect of the company:

- manage the company's business by implementing the policies defined by the shareholders' meeting;
- represent the company;
- ensure the accurate and regular maintenance of accounting books and documents of the company;
- create an early warning system with respect to developments threatening the existence of the company;
- provide for and sign the annual statement of accounts and consolidated accounts and the performance report and present it to the General Annual Meeting of the shareholder/s for approval along with the proposals for the distribution of profits;
- convene the shareholders' meeting; and
- submit filings and registrations of the company that ought to be made with the National Business Centre.

Avoiding conflict of interest situations especially in family-owned companies or single member companies appears to be the main challenge of the Managing Directors/managing body in Albanian companies.

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

There are no specific regulations with regards to this.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The approval of business policies is a right of the General Meeting. In a JSC, the Board of Directors is expressly authorised based on the law, to give directives to the Managing Directors with respect to the implementation of business policies.

Under the Code, every company should strive to establish effective board which is collectively responsible for the long-term success of the company, including the definition of the corporate strategy. The responsibilities of the board include setting company's strategy, providing leadership to put it into effect, supervising the management of the business, and reporting to shareholders on the stewardship of the company. The board should set the company's strategic objectives and ensure that the company meets its objectives.

4 Other Stakeholders

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

Employees of a company having more than 50 employees, can set up an Employee Council for a maximum term of five years. In a company which has more than 20, but less than 50 employees, the functions of the employee council are covered by one employee representative for each 10 elected by the assembly of company employees through secret ballot. Additional council members can be elected for each additional number of 20 employees up to a maximum of 30 council members. The council may establish its by-laws for the organisation of its procedures.

The Employee Council can monitor the enforcement of laws, collective agreements and Articles of Association and represent the interest of company employees. It can be active in the decision making for the utilisations of funds or assets of the company in compliance with collective agreements and the articles of association of the company. It can also participate in the decision making for the distribution of profits which belong to the employees by the decision of the General Meeting.

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

Stakeholders such as creditors, employees and suppliers enjoy protection through various laws such as the Company Law, the Civil Code and Bankruptcy Law.

With respect to creditors, same as with minority shareholders of a company, they have the right to demand from competent court personal liability of the shareholders and/or Managing Directors of the company based on Article 16 of the Company Law (see question 2.4). Further, they are entitled to request from the General Meeting of shareholders or the court special investigations or abrogation of certain management decisions.

Any company creditor may request the General Meeting nominates a special independent auditor on the grounds that there is a serious suspicion of breach of law or of the Articles of Association. If the General Meeting refuses to nominate the special independent auditor, the mentioned members or creditors may ask the court within 30 days after the refusal to provide for the nomination. In addition, company creditors may file a request to the court within 30 days after the General Meeting's refusal to initiate court proceedings for the annulment of a decision of a Managing Director which he/she considers to be seriously in breach of the Law or the Articles of Association.

Lastly, under the Insolvency Law, creditors have the right to be involved in the decision-making process of the company in the context of insolvency proceedings through the creditors' committee that is created for that purpose, so that they can resolve whether the debtor company should be given an opportunity to survive bankruptcy through reorganisation and good administration.

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

At present, there are few mandatory obligations for Albanian companies to integrate CSR in their activities mainly limited to environmental protection. However, as Albanian companies and multinationals present in Albania compete in globalised markets, their commitment to integrate CSR into the company's strategy is increasing. Generally, companies carrying out activity in Albania through agreements with the government (oil exploration, gas infrastructure, PPPs, etc.) will have CSR obligations laid down in the contract terms.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Managing Directors of the company are obliged to perform mandatory disclosures required by law. The right to information is laid down as a principle in the Company Law. This right guarantees that the person responsible for the Managing Directors of the company must not only keep shareholders informed on the progress of the company's activity, but also are obliged to provide shareholders upon request with the annual accounts, consolidated accounts, the company's progress report, management and audit report, as well as any other documents except for commercially sensitive information. Failure to do so, entitles shareholders to the right to request a court order to comply with these requests.

Under the Law on Securities, not only public but also private companies, are required to provide information to the Financial Supervisory Authority upon the occurrence of certain events, such as the issuance of new shares.

In addition, the Company Law requires companies to provide to the National Business Centre any information concerning amendments of Articles of Association, audited financial statements of the company, names of directors and supervisory board members, etc. Furthermore, according to the Company Law, the Board of Directors in one-tier system companies, must ensure that the annual financial statements, progress reports and other mandatory reporting and disclosure obligations, under the law or the Articles of Association, are executed by the Managing Directors.

5.2 What corporate governance-related disclosures are required?

Albanian companies must disclose with the National Business Centre the Articles of Association and incorporation act, the acts of appointing the bodies of the company, as well as other acts requested by the legislation in force regarding shareholders' structure, capital increases/decreases, Managing Directors and restrictions on their representative powers, their mandate, etc. The companies are obliged to register every change of published data in such register.

In addition, companies must also file the annual balance sheet, financial statement and the auditors' report, as well as other documentation on the nomination and dismissal of liquidators and auditors.

JSCs must include in their progress reports and financial statements, a coherent and descriptive statement covering the key elements of the corporate governance rules and of the practices they apply with reference to the Company Law. The statement shall also contain a profile of Managing Directors and Board members and explain why individual directors or supervisors are qualified to serve in the light of this profile.

For JSCs with public offer, additional information must be disclosed to the Financial Supervision Authority.

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

The auditors must audit annual financial statements, balance sheets, and provide an auditor's report; all subject to filing with the National Business Centre.

5.4 What corporate governance-related information should be published on websites?

Companies are not obliged to have a website. Should they have one, it must provide information on:

- the unique identification number of the company;
- its legal form;
- the location of its registered seat and head office;
- an ongoing liquation process;
- the registered capital and the "paid-in capital" of the company;
- the shares' registry;
- notices regarding the calling of the General Meeting;
- the minutes of the general meeting (no later than 15 days following the date in which the meeting is held); and
- a statement covering the key elements of corporate governance rules and of the practices they apply with reference to the Company Law. The statement also contains a profile of Managing Directors and Board members; and other data reported to the National Business Centre.

Anisa Rrumbullaku
CR Partners
Ibrahim Rrugova Street
Sky Tower Floor 5, Suite 2
Tirana
Albania

Tel: +355 4222 8181
Email: a.rrumbullaku@crpartners.al
URL: www.crpartners.al

Anisa Rrumbullaku is an experienced lawyer of over 12 years.

She is the partner in charge of the corporate and commercial practice of the firm, where she has provided domestic and international clients with legal advice across all sectors on: M&As (share purchases in particular) both for buyers and sellers; restructurings of commercial companies; shareholders' agreements corporate governance matters; due diligences; and drafting legal reports for clients. She has also worked as team leader in various PPP and energy projects advising contracting authorities, investors and concessionaires.

She graduated with honours from the Tirana Law Faculty (2004) and holds an LL.M. (*cum laude*) in Business and Trade Law from Erasmus University of Rotterdam (2007). She has been ranked by *Chambers & Partners* as a leading corporate/commercial and intellectual property lawyer in the last few years.

Tea Take
CR Partners
Ibrahim Rrugova Street
Sky Tower Floor 5, Suite 2
Tirana
Albania

Tel: +355 4222 8181
Email: t.take@crpartners.al
URL: www.crpartners.al

Tea Take serves as an Associate in the Corporate Department of the firm.

She practises most aspects of corporate issues, including, but not limited to, drafting of contracts, company establishment, business restructuring, preparing legal opinions, memos and due diligences, etc. She also assists on competition matters and provides legal advice to companies for the above-mentioned areas.

She graduated with honours in Law from Tirana Faculty of Law, University of Tirana and holds an LL.M. degree in Civil Law from the same University.

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In the past few years, members of the firm have received consistent recognition and have been awarded legal awards in several areas of practice, i.e. Corporate, Real Estate, Litigation and Projects in *The Legal 500*, *Chambers and Partners Europe*, *International Financial Law Review*, etc.

Andorra

Maïtena Manciet Fouchier

Liliana Ranaldi González

Montel&Manciet Advocats

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities that will be discussed in this chapter are the *societat anònima* (SA) and the *societat de responsabilitat limitada* (SL), without taking into account the specificities contemplated in the sectorial laws mentioned below. Please bear in mind that in Andorra there is no stock exchange market.

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

Both the *societat anònima* and the *societat de responsabilitat limitada* are regulated by the Law 20/2007 of October 18th, 2007, which has been amended in several occasions and recently through Law 14/2017 of June 22nd.

It is mandatory for both types of companies to have articles of association containing the primary regulations for the company's operations and organisation.

There are also sectorial laws which include regulations regarding corporate governance, among others:

- *Decret legislatiu del 21-03-2018 de publicació del text refós de la Llei 37/2014, de l'11 de desembre, de regulació dels jocs d'atzar.*
- *Decret legislatiu del 12-02-2014 de publicació del text refós de la Llei 8/2013, del 9 de maig, sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercats i els acords de garantia financera.*
- *Decret legislatiu del 12-02-2014 pel que s'aprova el text refós de la Llei de regulació del règim disciplinari del sistema financer.*
- *Llei 7/2013, del 9 de maig, sobre el règim jurídic de les entitats operatives del sistema financer andorrà i altres disposicions que regulen l'exercici de les activitats financeres al Principat d'Andorra.*
- *Llei 24/2008, del 30 d'octubre, sobre el règim jurídic de les entitats financeres – no bancàries – de crèdit especialitzat.*
- *Llei 12/2017, del 22 de juny, d'ordenació i supervisió d'assegurances i reassegurances del Principat d'Andorra.*

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

The Principality of Andorra is in the process of modernising its corporate sector, which was recently opened up to foreign investment. There is an undergoing effort to implement stronger regulation regarding transparency. With respect to the sectorial regulation of the corporate governance of financial institutions and insurance companies, among others, there has been a significant legislative effort to harmonise Andorran policy with the requirements of the neighbouring countries.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

There are no significant developments to consider in this regard.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The ownership of one or more shares confers the status of shareholder to its holder, and all the rights and obligations inherent to the share and, in particular, the right to participate in the distribution of corporate earnings and in the net assets resulting from the company's liquidation, the right of first opportunity to purchase, the pre-emptive right to subscribe to the issuance of new shares established at the articles of association, the right to vote at the general meetings and the right to receive information.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The ownership of one or more shares implies the submission of its holder to the articles of association, and to all the decisions of the general meetings, without prejudice to the rights and actions granted to them by the law.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The shareholders' meetings are called General Meetings, which may be ordinary or extraordinary.

An Ordinary General Meeting must be called once a year in the first six (6) months following the end of the financial year. An Ordinary General Meeting has the power to make decisions on the following matters:

a. Approving the annual accounts.

b. Adopting resolutions on the allocation of results.

c. Censorship of the social management.

An Extraordinary General Meeting can be called during the year as many times as it is necessary for the company's interest and must always be called when requested in writing by shareholders who represent at least ten (10) per cent of the share capital.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

In general term, shareholders have a duty of loyalty, and of acting in good faith and with transparency with regard to the entity. As long as the company is not extinguished, the shareholders are liable with respect to the company and its creditors up to the value of their contributions to the company's share capital.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

A shareholder can seek the enforcement of actions against members of the management body for acts or omissions which violate the law or the articles of association, providing that the interests of the shareholder are directly harmed by such acts or omissions.

The social action for liability against members of the management body is exercised by the company, with the prior consent of the General Meeting, which can be adopted even if not stated on the agenda of the day.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There is no specific limitation on interests in securities held by shareholders in a corporate entity/entities.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

In general terms, there are no specific provisions in this regard.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The company shall be governed, managed and represented by a governing body that can adopt one of the following structures: a single administrator; joint administrators; several administrators; or a board of directors.

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

The administrators or the members of the board of directors are appointed and removed by a resolution of the General Meeting.

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

The administrators or members of the board of directors can be remunerated. The articles of association must establish the remuneration system and the General Meeting is the body in charge of applying the remuneration system for each fiscal year. The remuneration of the CEO must be established by the board of directors without the involvement of the director affected by the decision.

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

Even if there is no specific provision on this type of disclosure, we understand that taking into account the duty of loyalty towards the company's interest established by Andorran law, administrators or members of the board of directors are obliged to disclose any interest that they might have in the company.

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

The board of directors is normally called to a meeting by the chairman within the term established by the articles of association. Meetings of the board can be validly held, without a prior announcement, when all of the members of the board are present in person or by proxy.

Resolutions shall be adopted by the majority of the directors present in person or by proxy. However, a resolution of the Board of Directors regarding the delegation of its powers must be adopted by two-thirds (2/3) of the members of the board.

Provided no director is opposed thereto, the board may also act in writing and without a meeting. In this latter case, the directors may cast their votes and make such comments as they wish to have recorded in the minutes by e-mail or by any other distance means of communication, on the condition that the accreditation of the directors' identity and the outcome of the vote are ensured.

All resolutions adopted by the board of directors shall be recorded in minutes drafted by the secretary or the vice-secretary. The minutes of each session must be authorised by way of the signature of the chairman and the secretary at the latest at the beginning of the following meeting.

Board of directors' resolutions shall be evidenced by means of a certificate issued by the secretary of the board or by the vice-secretary, as the case may be, with the approval of the chairman or the vice-chairman, as applicable.

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

Administrators or members of the board of directors have to exercise their position with loyalty to the interests of the company and with the allegiance of a good representative.

The duty of diligence obliges members of the management body to apply, in the area of administration, the time, effort and knowledge that can be expected from a businessman that occupies a similar position, and, in particular, to be adequately informed about the company's evolution, to participate actively in its administration and to investigate any irregularities in the company's management.

The duty of allegiance obliges the administrator or the member of the board of directors to act in the honest manner expected of a representative who manages external resources, and in particular, to refrain from: (i) competing with the company; (ii) taking advantage of the company's business opportunities; and (iii) using the company's assets for personal purpose.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Administrators and members of the board of directors have wide powers to manage the company and to represent it, in and out of court, including with respect to any transfer related to the company's assets (with the exception of those matters exclusively within the purview of the General Meeting).

Furthermore, administrators or members of the board of directors have the following specific attributions:

a. To establish the dates of the General Meetings, and their agendas.

b. To call an Ordinary General Meeting in order for it to meet within the six (6) months following the closing of the financial year.

c. To draft and present for the approval of the General Meeting the annual accounts (that comprise the balance sheet, the profit and loss statement, the annual report to the accounts, the statement of changes in the equity, the statement of cash flow and the management report), the proposed allocation of profits or losses, and a proposal related to the budget for the next year, within six months of the end of each financial year.

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

There are specific insurances that cover the eventual liability of the administrators or of the members of the board of directors.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

There is no specific legal provision in this sense. It depends on the configuration of the corporate entity and of the attributions allocated to the management body.

4 Other Stakeholders

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

There are no specific legal provisions regarding the role of employees in corporate governance. Notwithstanding the foregoing, employees' representatives have the right to be informed about the general evolution of the company's economic sector and matters regarding production, sales and recruitment.

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

Besides the creditor's right to be informed about any eventual capital reduction or about the liquidation of the company, there are no specific legal provisions regarding the role of stakeholders in corporate governance.

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

There is no specific regulation on corporate social responsibility. However, anyone applying for foreign investment authorisation for the incorporation of an Andorran company must define in the application the corporate social responsibility model that the company to be incorporated would apply.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

There are no specific legal provisions on this matter.

5.2 What corporate governance-related disclosures are required?

There are no specific legal provisions on this matter.

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

In certain cases auditors must verify the annual accounts of a company in order to ensure that the accounts are a fair reflection of the company's equity, of its financial situation and of its operating results. Auditors must verify that the information provided in the annual accounts is true and that it provides an accurate picture of the company.

5.4 What corporate governance-related information should be published on websites?

There are no specific legal provisions on this matter.

Maïtena Manciet Fouchier
Montel&Manciet Advocats
Carrer Ciutat Consuegra, núm. 16
Edifici L'Illa. Bloc A. 3r. 1a.
AD500, Andorra la Vella
Andorra

Tel: *+376 809 809*
Fax: *+376 863 698*
Email: *mmanciet@mmadv.ad*
URL: *www.mmadv.ad*

Maïtena Manciet began her professional career as a lawyer in 1986, after working in the academic sector at the Université des Sciences Sociales de Nice. Her practice focuses on corporate and public law matters. She holds a Ph.D. in Private Law and a Master's Degree in Law and Economy from the Université de Droit et de Sciences Economiques (Nice, France). She speaks fluent English, Catalan, French and Spanish.

Liliana Ranaldi González
Montel&Manciet Advocats
Carrer Ciutat Consuegra, núm. 16
Edifici L'Illa. Bloc A. 3r. 1a.
AD500, Andorra la Vella
Andorra

Tel: *+376 809 809*
Fax: *+376 863 698*
Email: *lranaldi@mmadv.ad*
URL: *www.mmadv.ad*

Liliana Ranaldi González has been an associate of Montel&Manciet Advocats since 2010. Her practice focuses on corporate matters. She graduated from the Universidad Católica Andrés Bello (Caracas, Venezuela) and holds a Master's Degree in the Banking Sector and of Financial Agent (Madrid, Spain) and a Master's Degree in Business Legal Practice from the I.E. Business School (Madrid, Spain). She is member of the Bar Associations of both Andorra and Madrid. She speaks fluent English, Catalan and Spanish.

Montel&Manciet Advocats

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Australia

Jonathan Wenig

Jeremy Lanzer

Arnold Bloch Leibler

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The corporate entities to which this chapter will refer are public companies admitted to the Official List of ASX Limited ("**ASX**"), which is Australia's principal public securities market.

There are other forms of corporate entity that may be publicly owned, including "managed investment schemes". This is a generic term under Australia's corporate law that covers a range of corporate and other structures, which may involve public ownership. Examples of managed investment schemes include cash management trusts, property trusts and agricultural schemes. Many of the corporate governance rules and principles applicable to companies apply similarly to managed investment schemes, although the focus of this chapter is on public, listed companies.

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

The *Corporations Act 2001* (Cth) ("**Corporations Act**" or the "**Act**") is the principal legislation regulating companies in Australia. It is a legislative Act of the Parliament of the Commonwealth of Australia that sets out the laws dealing with business entities in Australia. The constitutional history of Australia's corporate law is somewhat complex and tortuous. In summary, however, publicly-listed companies are now federally regulated under the Corporations Act.

The Australian Securities and Investments Commission ("**ASIC**") is the principal corporate regulatory agency. ASIC is an independent Commonwealth government body. Its functions include: registering companies; receiving, processing and making information about companies available to the public; investigating suspected contraventions of, and enforcing compliance with, the Act; and exercising discretion to relieve from compliance with regard to particular provisions of the Act. To this end, ASIC publishes regulatory guides that explain and articulate its policies in undertaking its role and exercising the discretion and responsibilities granted to it under the Act.

The Takeovers Panel ("**Panel**") is the primary forum for resolving disputes regarding a takeover bid and other control transactions. The Panel is a peer review body, with part-time members drawn predominantly from Australia's takeovers and business communities.

ASX was created when the Australian Stock Exchange and the Sydney Futures Exchange merged in July 2006. As at 24 April 2018, there were 2,253 companies listed on ASX, with a domestic market capitalisation of approximately $1.5 trillion.

For publicly-listed companies, ASX is a co-regulator with ASIC in that it prescribes standards for companies admitted to its Official List and reserves power to police those standards. The standards are set out in the ASX Listing Rules.

In addition to the ASX Listing Rules, the ASX Corporate Governance Council ("**Council**") has produced a guide entitled *"Corporate Governance Principles and Recommendations"* ("**Principles**"). The Principles are guidelines and are not prescriptive; however, the ASX Listing Rules require that companies disclose in their annual report the extent to which they have followed these Principles. Where companies have not followed these Principles, reasons must be provided for not having followed them.

Other Australian government regulators include the Competition and Consumer Commission ("**ACCC**") and the Foreign Investment Review Board ("**FIRB**"). The ACCC's primary responsibility is to ensure that individuals and businesses comply with Commonwealth competition, fair trading and consumer protection laws. While the ACCC is not a corporate regulator *per se*, it would be remiss to describe the Australian regulatory landscape without a reference to the ACCC. FIRB's primary responsibility is to review foreign investment proposals to ensure Australia's national interest is protected. It does this on a case-by-case basis and if, ultimately, it is decided that a proposal is contrary to the national interest it will not be approved or conditions will be imposed to safeguard Australia's national interest.

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

Recent developments in corporate governance and changes to the law in the past 12 months have brought several new issues to the surface. These include a shift in thinking regarding the composition of boards of directors, the introduction of a "safe harbour" for directors from personal civil liability for insolvent trading, and greater discussion of shareholder activism.

One shift in thinking relates to the value of the independence of a company's board of directors. Traditionally the concept of independence of the board has been extended beyond management independence to include investor independence. However, the value of directors who hold a direct stake in the company has been increasingly emphasised. Having "skin in the game" creates an alignment in interests between directors and other shareholders. This synergy between directors and shareholders means that the board makes decisions about the company informed from the position of a shareholder.

A recent development in Australian law is the safe harbour provisions that were introduced in September 2017. These provisions provide a "safe harbour" for directors of companies that are nearing insolvency. Directors will be afforded protection from civil liability where they develop a course of action that is reasonably likely to lead to a better outcome for a company than administration or liquidation.

Australia's favourable conditions for shareholder activism has attracted significant attention in recent months. Shareholders turn to activism to drive change in a company. Unlike other jurisdictions, Australian boards are generally more constrained in what they can do to defend themselves against an activist approach. For example, directors are severely limited in using company funds to defend themselves from activists. In contrast, the activists are almost completely unrestricted from broadcasting emotive messages that target directors and management.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

One current perspective in Australia points to a correlation between the increase in shareholder activism and short termism. Shareholder activists agitate for change at a boardroom level and that agitation is often focused on persuading companies to release excess cash, or undertake liquidity transactions, to generate high short term returns. The detractors warn that activists just focus on short-term gains rather than sustainable value creation over the long-term. However, the counter-argument is that activists are necessary to shake up underperforming companies, hold boards to account and unlock shareholder value.

Another relevant Australian market perspective on this matter stems from the equity market prevalence of large superannuation funds. Australia has, for some time, had a system of compulsory superannuation. These superannuation funds are the fourth largest in the world and hold approximately $2 trillion of Australia's wealth. These superannuation funds have the voting power to exert influence on board decisions and tend to have something of a longer term bias.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders have a number of rights under the Act. Key shareholder rights include: the right to regular corporate and financial information; the right to vote at general meetings; the right to requisition and call general meetings and to propose resolutions; and the right to appoint and remove company officers.

Beyond this, the Act requires that certain matters be decided by the general meeting of members, including: altering the corporate constitution; consolidating or subdividing the company's shares; reducing the company's issued share capital; altering rights attached to shares; altering the company's status; selective buy-backs or a buy-back exceeding certain limits; and conditions prescribed by the Act.

Certain "Related Party Transactions" require shareholder approval under the Act, the ASX Listing Rules, or both.

The ASX Listing Rules also require that particular transactions be sanctioned by shareholders at a general meeting. For example, ASX may require shareholder approval if a listed company proposes to make a significant change to the nature or scale of its activities. Further, shareholder approval is required if the significant change involves the company disposing of its main undertaking.

In addition, shareholders have statutory minority shareholder remedies under the Act, including: remedies for unfairly prejudicial conduct and oppression; derivative actions; class rights; and the remedy of inspection of books.

Shareholders are the final claimants after creditors and employees have been paid. Ordinary shareholders are the ultimate remaining claimants after preference shareholders have received their due.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders do not *per se* have any responsibilities in regards to the corporate governance of the corporate entities in which they invest. Companies are managed by a board of directors and that board of directors, informed by management, is responsible for the overall governance and strategic direction of the company, as set out in answer to question 3.1.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The calling and conducting of shareholders' meetings is governed by the Act as well as by the individual company's constitution (if any) and any applicable replaceable rules. The ASX Listing Rules impose additional requirements on companies with regard to shareholders' meetings.

While companies are required to hold an annual general meeting, it may also hold other general meetings of shareholders throughout the year. Such meetings are often referred to as "extraordinary general meetings".

There are two types of resolutions that may be passed at a shareholders' meeting:

(a) an ordinary resolution; and

(b) a special resolution.

An ordinary resolution is passed by a simple majority vote of the shareholders.

The Act requires certain types of decisions to be passed by a special resolution. A special resolution must be passed by at least 75 percent of the votes cast by shareholders entitled to vote on that resolution. Depending on the nature of the resolution, certain voting exclusions may apply under the Act or the Listing Rules.

The Act allows for a general meeting to be called at the request of shareholders:

(a) where the members hold at least five percent of the votes that may be cast at the general meeting; or

(b) where it is requested by at least 100 members who are entitled to vote at the general meeting.

Members may also give notice to the company of a resolution that they propose to move at a general meeting. The members proposing the resolution must hold at least five percent of the votes that may be cast on the resolution or the notice of the resolution must be given by at least 100 members who are entitled to vote at a general meeting.

The rights of indirect shareholders will depend on the terms of the nominee/trustee arrangement. As the registered holder of the shares, the trustee or nominee will have the power to exercise the right to vote and to dispose of the shares (notwithstanding that the trustee may be subject to the beneficiary's directions with respect to the exercise of those powers). There are, however, numerous contexts in which the law looks beyond the nominee arrangement to consider the position of the underlying beneficial holder.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Most companies are limited by shares. This means that the liability of shareholders (other than shareholders who are otherwise involved in the conduct of the company, e.g. as a director or employees) is limited to the amount paid for their shares (and any unpaid amount owning on those shares). Members whose conduct amounts to a tort on their part will ordinarily be liable without limit, regardless of whether at the time of the conduct they were engaged in activity on behalf of the company. However, if the conduct was an honest attempt at performing a contract that the company made with the victim, they will not be liable if the victim agreed to look only to the company for redress for conduct amounting to a breach of the contract. Members will always be liable for fraudulent conduct.

Directors occupy a fiduciary position in relation to the company and courts will prevent directors from using their powers for improper purposes. In contrast, shareholders holding majority control do not stand in a fiduciary position to the company or to the minority shareholders, and they do not exercise any of their powers in a fiduciary capacity.

There is, however, a line of authority that imposes certain limitations on the rights of majority shareholders to exercise freely the voting power attached to their shares. These limitations are enshrined in the statutory oppression prohibitions in the Corporations Act which provides a remedy for oppression.

Australia's High Court has articulated two principles that restrict the voting power of majority shareholders relating to their voting power in the context of altering the company's constitution. The principles highlighted in the decision were that power must be exercised for a proper purpose, and that exercise must not operate oppressively in relation to minority shareholders.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The Act provides shareholders with broad rights to claim "oppression", which is conduct that is commercially unfair and which is undertaken by the company or those who manage the company. The test under the Act is whether the offensive conduct is either contrary to the interests of the members as a whole, or is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity".

Company law confers rights on members to protect them from abuse at the hands of the controllers of the company. In this context, "controllers" include both directors, who are subject to fiduciary duties, and (in certain circumstances) the controlling shareholders, who do not occupy a fiduciary position.

Shareholder class actions against companies and their directors continue to increase in frequency and prominence in Australia.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

The takeovers provisions of the Act prohibit acquisitions of relevant interests in voting shares in publicly listed companies where the acquisition would cause someone's voting power to increase above 20 percent, or, where the acquisition would cause someone's voting power to increase from a position above 20 percent. There are certain exceptions to this prohibition including: shareholder approval; an ability to 'creep' (small and limited increases spread over a period of time); and acquisitions that result from a takeover offer made available to all shareholders. Voting power is broadly defined and captures 'power' held through associates and parties acting in concert.

Substantial shareholdings in publicly listed companies must be disclosed to the company(ies) in which they are held and to the market. A substantial shareholding is defined as five percent or more, and the definition captures holdings of associates. Each change of one percent thereafter must also be disclosed in a similar manner. When the shareholding falls below five percent, that change must also be disclosed.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no disclosure requirements with respect to the intentions, plans, or proposals of shareholders who do not propose to make a takeover bid for a company. However, under the takeovers provisions of the Corporations Act a person who publicly proposes to make a takeover bid in a company must make that bid within two months after the proposal. A person who announces such an offer who does not make it contravenes the Act. A person who recklessly makes such an offer also contravenes the Act.

The Corporations Act prohibits a person, including a shareholder, from giving a "takeover document" if there is a misleading or deceptive statement in that document. A "takeover document" includes a bidder's statement, target's statement and an offer document. A contravention of this section may give rise to both civil and criminal liability.

The general prohibition on misleading and deceptive conduct also applies to any statement made by a market participant outside of a "takeover document". This includes market announcements, media releases, press conferences, media interviews or in comments to a journalist or analyst. It also includes "last and final" statements and a bidder cannot depart from a last and final statement unless it has expressly reserved the right to do so. A bidder cannot, for example, make a last and final offer and then later extend the period of its offer or increase the value of its offer. A contravention of this general prohibition may give rise to civil liability.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A Company is managed by a single board of directors ("**Board**"). The Board is comprised of directors, both executive and non-executive. The duties of directors are the same, whether they are executive or non-executive. The duties will be applied strictly and will be determined on the facts of the case by asking what a reasonable person with the same responsibilities would do in the same situation.

Within the Board, there are a number of other company officer roles, including the company secretary, Chief Executive Officer ("**CEO**") and chairperson. Public companies must have at least three directors and one secretary. The Principles recommend that a majority of the Board should be independent.

The Board may appoint various committees to manage particular issues if its company constitution allows it. The Principles recommend the establishment of committees such as a nomination committee and an audit committee. For companies in the top 300 of the ASX All Ordinaries Index, the ASX Listing Rules require that they comply with the Principles in relation to composition, operation and responsibility of the audit committee. Notably, the Principles require that the audit committee be comprised of a majority of independent directors, and that the chair of the audit committee be an independent director.

There are also a number of provisions that ASX requires companies to include in their constitutions, including:

(a) ensuring consistency with ASX Listing Rules;

(b) information about meetings to be provided to ASX; and

(c) payments to directors and increases in fees subject to member approval.

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

At incorporation, members appoint directors to the Board. Subsequent appointments may occur at Board level (if the individual company constitution allows), but members must approve the appointment at the next general meeting of members. The Board may not remove a director of a public company. At general meetings, members may vote to appoint and remove directors and other company officers.

The ASX Listing Rules require that directors be re-elected at least every three years; however, this Rule does not apply to the election of a managing director.

Only natural persons (not companies) of 18 years or over, who have not been disqualified from holding office, may serve as directors. Public companies must ensure that at least two of their directors ordinarily reside in Australia, as must a company secretary.

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

The Act allows for the Board to decide on remuneration packages for directors. The Act (and the accompanying Accounting Standards) requires the annual directors' report prepared for members to include details of the nature and amount of remuneration given to key executives. Reporting requirements also necessitate that the remuneration amounts be publicly available. Non-executive directors' fees are also decided by the Board; however, the cumulative amount of non-executive directors fees paid must be approved at a general meeting of members.

The board is responsible for appointing senior executives to management positions. The board has the discretion to determine the remuneration of such executives. However, public listed companies have certain disclosure obligations under the ASX Listing Rules to provide summaries of key executive contracts (including remuneration and other incentive arrangements) such as that of the CEO.

The Act also regulates the termination of payments relating to directors and key management personnel. Payment's exceeding one year's base salary must be approved by shareholders.

In addition, in accordance with the ASX Listing Rules shareholder approval is required to issue securities to directors and may in some circumstances be required to issue securities to employees, for example under an employee share plan.

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

There are no limitations on interests in securities held by directors. Directors may hold securities in the company of which they manage and no limitation exists on the quantity of securities they may hold. Very strict disclosure obligations exist, however, for all public company directors. Directors must disclose any and all interests they hold in such securities. Any changes in directors' interests must be announced to the market within five business days of that change having taken place. If, however, the director is a substantial shareholder, they must lodge a substantial shareholder notice to ASX within two business days of the change having taken place. Directors must also be aware of their obligations not to undertake insider trading, therefore many companies impose restrictions on directors dealing in securities other than during certain trading windows when the market is fully informed.

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

Board meetings are called as and when needed, with no specification at law as to the number of meetings required to be held in a calendar year. The directors' report in the company's annual report must, however, indicate how many meetings were held and how many meetings each director attended. There is no requirement as to what business is to be conducted at Board meetings.

Unless individual constitutions specify otherwise, any director may call a Board meeting at any time. A period of reasonable notice must be given so that each director has the opportunity to attend.

The quorum for a Board meeting is usually two directors who must be present at all times during that meeting. However, if a director has a material interest in a particular matter, and so is unable to vote on a particular resolution, the Board must ensure that two directors are still present in order for that meeting to be valid.

Unless a constitution otherwise indicates, voting at Board meetings is conducted by a simple majority, with each director entitled to one vote.

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

Directors' duties are owed to the company and its members. Directors' duties are derived from three sources: common law; statute law; and particular company duties specified in company constitutions or other contracts.

Common Law Fiduciary Duties include the:

(a) duty to act in good faith and in the best interests of the company;

(b) duty to avoid actual and potential conflicts of interest;

(c) duty not to fetter discretions; and

(d) duty to exercise powers and discharge duties for a proper purpose.

Statutory Duties include the:

(e) duty to exercise powers and discharge duties with a degree of care and diligence;

(f) duty to act in good faith in the best interests of the company and for a proper purpose;

(g) duty not to improperly use their position to gain an advantage or cause detriment to the company;

(h) duty not to improperly use information to gain an advantage or cause detriment to the company;

(i) duty to disclose all material personal interests in matters that relate to the affairs of the company (exceptions apply); and

(j) duty to prevent the company from trading when insolvent.

A breach of directors' duties may result in a number of civil and/or criminal penalties. Some of these sanctions may include ASIC imposing fines or disqualifying that director from being a company officer for a period of time. Affected parties (members, ASIC, the Board) may seek injunctions from the court to stop a director acting in breach of his duties. A director may also be ordered to pay damages. Criminal sanctions may include fines and/or imprisonment.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Directors are responsible for the management of the company. Executive directors are responsible for the day-to-day management of the entity, whereas duties of non-executive directors include review, oversight and strategic direction. The secretary has responsibility for ensuring compliance with corporate governance and accounting requirements. The CEO manages the everyday operations of the company. The Chairman is traditionally independent (recommended in the Principles) and is responsible for strategic leadership of the Board. The Principles recommend that the roles of CEO and Chairman should not be exercised by the same person. The Principles also recommend that a code of conduct for key executives be established.

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

Yes, directors may be indemnified by the company (approved by members) in respect of dealings with third parties. Directors may not, however, be indemnified for breaches of their duties as Directors. Directors may take out directors' insurance. The Company may take out such insurance on behalf of Directors, though the insurance may not provide protection in those instances where an indemnity from the Company would not be allowed.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board of directors, informed by management, is responsible for the overall governance and strategic direction of the company. In many instances, there is some overlap between directors serving on the board and senior management personnel. For example, the CEO is often appointed as a director of the company. While the board is primarily responsible for the strategic direction of the company, the CEO and senior management will often drive strategic change within the organisation. Each company is different in this respect so the balance of power between the board and management also differs from company to company.

4 Other Stakeholders

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

The board of directors is the central organ of corporate governance, charged with the functions of leading and controlling the company. However, in Australia there has long been interest in the potential of institutionalised employee representation on boards. There is an increasing trend of Australian unions exercising a voice at shareholder level on behalf of the employees that they represent.

It is also noteworthy that Australian industry superannuation funds with significant employee representation play a significant role in corporate Australia. For instance, superannuation funds have a prominent role and voice on the share registers of Australian companies on behalf of Australia's workforce.

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

As discussed in answer to question 3.2, the board of a company is elected by shareholders and other stakeholders are not, as a matter of law, entitled to board seats or formally involved in the corporate governance of the company.

That said, as set out in more detail in answer to question 4.3, increasingly stakeholders do occupy a significant role in corporate governance. This role is informal and usually takes the form of advocacy especially in relation to employees, creditors, suppliers, consumers, the environment and the community at large.

While directors do not have a legal duty to consider stakeholders other than shareholders (other than in an insolvency context), some commentators have suggested that the duty of directors to act in good faith is broad enough to allow directors to consider interests other than the company. The prevailing view in Australia is that the failure to act ethically and responsibly will destroy value for the company over the long-term.

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

Australia's corporate law defines corporate responsibility in terms of a company's best interests, namely the interests of its shareholders, and in some circumstances and contexts the interests of the company's creditors and possibly employees. The core sections of the Act do not make explicit reference to notions of corporate social responsibility.

However, there are various ways in which corporate social responsibility has registered on the legal road map for Australian companies.

Shareholders are able to use the general meeting to seek to have the company adopt various environmental or social policy goals. For instance, they may propose resolutions to include a "social responsibility" charter in the company's constitution, requiring the board to take into account various social factors.

The ASX Corporate Governance Council has stated that company directors have the power to take broader community factors into account in decision making.

Companies are subject to a range of Commonwealth, State and Territory laws of general application that are designed to protect various interest groups or public values. Directors cannot ignore or subordinate these public obligations because of any notion that interests of shareholders are paramount to compliance with these laws.

While companies are subject to a range of reporting requirements, there is no provision in the Act, or under the ASX Listing Rules that specifically refers to reporting on the social and environmental impact of corporate activities. However, companies may, and many do, choose to report voluntarily on these matters in their various public and shareholder reports.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

It is the collective and individual responsibility of all directors to ensure that the company is meeting its disclosure and transparency obligations as required by law and by ASX. In practice, particular officers (such as a company secretary or general counsel) may have roles as compliance officers in a company's disclosure protocol. Legal responsibility, however, rests with the directors.

5.2 What corporate governance-related disclosures are required?

All public companies must release annual and half-yearly financial reports. Some public companies are also required to release quarterly reports to the market. There are Australian Accounting Standards Board ("**AASB**") requirements regarding the content that should be included in such reports. The ASX Listing Rules also require that listed public companies immediately disclose to the market any information that would be reasonably likely to have a material effect on the price or value of the company's securities.

As noted earlier, companies are required to report regarding their compliance with the Principles in their annual reports.

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

All public companies must have their annual financial reports audited, as well as having their half-yearly reports either reviewed or audited. Companies must also obtain an auditor's report, which is attached to the Company's reports. Individual companies appoint their auditors at a general meeting of members.

Auditors must be independent so as to avoid any actual or potential conflicts of interest with their role as the company's auditor. Despite recommendations that auditors rotate after a period of time has elapsed, no such requirement currently exists.

The auditor's report to members must indicate whether the auditor believes the company has complied with all relevant laws and accounting standards, as well as whether, in the auditor's opinion, the financial reports prepared by the Board give a "true and fair" view of the company's finances.

5.4 What corporate governance-related information should be published on websites?

Each ASX listed company is required, under the Listing Rules, to include in its annual report either a corporate governance statement that meets the requirements of that rule, or the URL of the page on its website where such a statement is located.

The corporate governance statement must disclose the extent to which the entity has followed the recommendations set by the Council during the reporting period. For example, the principles recommend disclosure in relation to the structure of the board, ethical and responsible practices, and management and risk.

By requiring listed entities to compare their corporate governance practices with the Council's recommendations and, where they do not conform, to disclose that fact and the reasons why, the Listing Rules act to encourage listed entities to adopt the governance practices suggested in the Council's recommendations but does not force them to do so.

If companies make their disclosures online, they should be clearly presented and centrally located on, or accessible from, a "corporate governance" landing page on its website. There should be an intuitive and easily located link to this landing page in the navigation menu for the entity's website.

Jonathan Wenig
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne VIC 3000
Australia

Tel: +61 3 9229 9999
Email: jwenig@abl.com.au
URL: www.abl.com.au

Jonathan Wenig's practice and expertise spans the breadth of commercial and corporate law, including mergers and acquisitions, corporate work, technology and financing. He is a trusted advisor to numerous active and innovative public companies – bringing his intellect and experience to bear not only in their corporate matters and acquisition activities, but across their legal affairs and strategic challenges and opportunities.

Jeremy Lanzer
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne VIC 3000
Australia

Tel: +61 3 9229 9780
Email: jlanzer@abl.com.au
URL: www.abl.com.au

Jeremy Lanzer practises in commercial and corporate law, with a particular focus on mergers and acquisitions, listed public companies, equity capital raisings and shareholder activism. Jeremy acts for a range of public and private clients in Australia and overseas across various industry sectors, including technology and internet, retail, cybersecurity, property development, and pharmaceuticals and biotechnology.

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Austria

Dr. Christoph Nauer

Dr. Daniel Reiter

bpv Hügel Rechtsanwälte GmbH

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Stock corporations (*Aktiengesellschaft, "*AG*"*) and SEs (*Societas Europaea*) are Austrian entities which can be listed on a stock exchange. The vast majority of listed Austrian companies are stock corporations.

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

The legal sources dealing with corporate governance can be divided into the following three categories:

Main Regulatory Sources for all companies

i) The Austrian Stock Corporate Act (*Aktiengesetz*) is the main framework with respect to AGs dealing in particular with:
- the foundation on an AG;
- the scope of function, responsibilities and relation between the three mandatory bodies of an AG: shareholders' meeting (*Hauptversammlung*); the management board (*Vorstand*); and the supervisory board (*Aufsichtsrat*); and
- reorganisation matters and liquidation.

ii) Austrian Commercial Code (*Unternehmensgesetzbuch*). The Commercial Code contains provisions on accounting and annual financial statements of Companies and group Companies. Special provisions related to accounting apply for capital market-oriented corporations (in particular to listed companies).

iii) The SE EU Council Regulation (EC) No. 2157/2001 of 8 October 2001 and the Austrian SE Act (*SE-Gesetz*) provide provisions for the foundation and the scope of function, responsibilities and relation between the two mandatory bodies of an SE: shareholders' meeting (*Hauptversammlung*) and management body (*Verwaltungsrat*).

Regulatory Sources with special focus on capital markets

(i) The Austrian Stock Exchange Act (*Börsegesetz*) was renewed and entered into force in January 2018. It provides provisions with respect to stock exchanges and general commodity exchanges, MTFs and OTFs, the supervision by the Austrian Financial Market Authority *(Finanzmarktaufsicht*), the admission of financial instruments, sanctions in case of violations including prosecution measures. The Stock Exchange Act also provides for criminal sanctions on market abuse as set out in the Market Abuse Regulation based on the Market Abuse Directive 2014/57/EU (*Marktmissbrauchsrichtlinie*).

ii) Market Abuse Regulation, EU No. 596/2014 (*Marktmissbrauchsverordnung*) is a framework on insider trading, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets.

iii) The Austrian Takeover Act (*Übernahmegesetz*) governs mandatory and voluntary public tender offers with respect to the acquisition of securities of listed companies. In particular, the Takeover Act provides for minimum prices regarding mandatory takeover bids and – since 2018 – for offers in connection with a voluntary delisting of the securities of a company. Monitoring of public takeover bids is carried out by the takeover commission (*Übernahmekommission*).

iv) The Securities Supervision Act (*Wertpapieraufsichtsgesetz*) contains rules of conduct for investment firms and implements the Markets in Financial Instruments Directive (2014/65/EU).

The Financial Market Authority (FMA) monitors the Austrian financial market and ensures compliance with regulatory requirements.

Non-Regulatory Sources

(i) Austrian Corporate Governance Code (*Österreichischer Corporate Governance Kodex*, "ÖCGK"). The ÖCGK is a legal framework that is not legally binding. It consists of "comply-or-explain rules" and "legal rules". Corporations listed on the Prime Market of the Vienna Stock Exchange have to comply with the ÖCGK due to a contractual obligation towards the Vienna Stock Exchange.

ii) Articles of Association (*Satzung*) govern all relations between shareholders, the management board and the supervisory board in addition to the Stock Corporation Act and in greater detail.

iii) Rules of Procedure (*Geschäftsordnung*) for the management board and the supervisory board may be implemented. According to the ÖCGK, supervisory boards of capital market-oriented corporations shall have Rules of Procedure ("comply-or-explain rule"). The Rules of Procedure determine the formalities of the meetings of the members of these bodies such as invitations, absences, proxies, adoption of resolutions, allocation of specific responsibilities, voting rights, etc. In particular, the Rules of Procedure may provide the allocation of duties (*Ressortverteilung*) among the individual board members.

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

The European Member States have to bring into force the laws, regulations and administrative provisions necessary to comply with the amended Shareholder's Directive (2014/57/EU) by 10 June 2019. The regulation establishes specific requirements in order to encourage shareholder engagement, in particular in the long-term. Those specific requirements apply in relation to identification of shareholders, transmission of information, facilitation of exercise of shareholders rights, transparency of institutional investors, asset managers and proxy advisors, remuneration of directors and related party transactions. Some of the requirements of the directive are highly controversial, such as the "say on pay", which means that the shareholders have the right to vote on the remuneration of executives or the influence on related party transactions.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

(i) Maxims of the management: The management board is obliged, under the Stock Corporation Act, to manage the company in the best interest of the company considering the interests of the shareholders, the employees and the public. The best interests of the company must prioritise the long-term perspective.

(ii) Principles of the remuneration of the management board according to the ÖCGK: The supervisory board has to take measures in the remuneration system (and also the pension system) for the management board to create incentives to promote behaviour supportive of the long-term development of the company. In particular, the variable remuneration components shall be linked to sustainable, long-term and multi-year performance criteria and shall also include non-financial criteria. Stock option programmes shall be linked to measurable, long-term and sustainable criteria and management board members shall hold an appropriate volume of shares in their own company.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The shareholders do not have direct influence on the management of a company. The Austrian Stock Corporation Act provides for mandatory competence of the shareholders' meeting. Resolutions of the shareholders are passed with simple majority of the capital and voting rights unless the law or the Articles of Association require higher majorities. In particular, the following items require shareholders' resolutions:

- discharge of the members of the management board and supervisory board;
- appointment and removal of supervisory board members;
- compensation of the supervisory board members;
- appointment of the company auditor;
- amendment of the Articles of Association (75% majority);
- capital measures including authorisations to the management to increase the share capital (75% majority);
- management matters brought to the shareholders' meeting by the management board or supervisory board (the latter as far as subject to supervisory board approval);
- decisions of major importance for the company such as major divestments, drop-downs acquisitions (based on adopted German case law known as the "*Holzmüller*/Gelatine-doctrine");
- mergers, demergers and certain other corporate restructuring measures (75% majority);
- squeeze-out (90% held by one shareholder);
- vote of no-confidence in respect of members of the management board;
- special audit and appointment of a special auditor;
- delegation or lease of the operation of the company's commercial activities or the acceptance of such delegation or lease in respect of another company (75% majority);
- transfer of the entire assets of the company (75% majority);
- dissolution of the company and continuation of a dissolved company (75% majority);
- appointment and removal of liquidators;
- discharge of the liquidators; and
- change of the purpose of the company (75% majority).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders may exercise their rights provided for under to statutory law and the Articles of Association. The statutory law does not provide for specific obligations, e.g. specific fiduciary duties, of the shareholders. However, as a general principle under Austrian law the shareholders have to take general fiduciary duties regarding the company as well as regarding the other shareholders into account when exercising their rights.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

(a) AGM

The Annual General shareholders' Meeting (AGM) is to be held within the first eight months of each year. The AGM has to be provided with the annual financial statements including the management report, the corporate governance report (if required), the consolidated financial statements (if any) including the group management report, the proposal for the appropriation of the balance sheet profit and the report of the supervisory board. At the AGM the shareholders have to resolve upon the following issues:

- use of the balance sheet profit;
- discharge of the members of the management board and the supervisory board; and
- the election of the company's auditors.

(b) EGM

Any shareholders' meeting besides the AGM is deemed to be an Extraordinary General Meeting (EGM). The formalities for an EGM are similar to an AGM. The invitation to an AGM has to be published at least 28 days prior to the AGM, with respect to an EGM the publication is to be made at least 21 days prior. In an EGM there are no mandatory items to be included in the agenda.

(c) Information to be provided

Companies generally have to publish resolution proposals by the managing and supervisory board regarding every item in the agenda

as well as documents, which are the subject of any resolution such as the annual accounts or contracts, on their website at least 21 days before the General Meeting (AGM and EGM). Every report or other document, which has to be presented to the general meeting has to be published as well. Listed companies furthermore have to publish the invitation to the general meeting and forms for PoAs as well as postal or tele-voting on their website.

The company's management board as well as the supervisory board must issue resolution proposals regarding each item of the agenda. With respect to (i) elections of supervisory board members and (ii) auditors only the supervisory board must issue an election proposal. Such proposals are part of the company proxy materials.

(d) Shareholders' rights (besides the voting rights in AGMs and EGMs)

- Any shareholder is free to ask questions related to items on the agenda. Questions may also be submitted and consequently answered upfront. If many shareholders wish to speak in front of the meeting the available time may be limited by the person chairing the meeting (in most cases the chairman of the supervisory board). If the shareholders' participation rights are used excessively or are abused they may be limited after a verbal warning or individual shareholders may be excluded from the meeting.
- Any shareholder is entitled to propose motions in connection with items of the agenda in the shareholders' meeting.
- Any shareholder may raise an objection to any resolution and request that it may be put on record by the notary who takes the minutes of the general meeting. This is required for a potential challenge of the respective shareholders' resolution before the court.
- If the company is a listed company, shareholders representing 1% of the company's share capital may also submit resolution proposals regarding scheduled agenda items, together with a justification, up to one week prior to the meeting and request that the proposals together with the justification, the names of the shareholders together with a statement of the company's management board (if such statement is issued) shall be published on the company's website registered with the commercial register. Resolution proposals may not be considered by the company if they lack a justification, would be unlawful, if a similar proposal is already published on the website or if the proposal would be defamatory or offensive from a criminal law perspective. The company's management board is liable for damages occurring to the shareholders if the resolution proposals are not published on the website. Such denial and the resolution passed on the respective item may be contested by the minority shareholders.
- Shareholders who have been shareholders for at least three months and represent in total 5% of the company's share capital may request in written form that items are added to the agenda. The holding period of three months may be evidenced by a deposit conformation or in the case of registered shares by an entry in the share register. The request has to be received by the company 21 days prior to an AGM or 19 days prior to an EGM. The amended agenda then has to be published in the same form as the original agenda. If the shareholder meeting was not conveyed by individual contact with the shareholders then the amended agenda has to be published in the Federal Gazette at least 14 days prior to the shareholder meeting and, in case of a listed company, also via media that is available in the whole of the European Union (e.g. Bloomberg, Reuters or Newswire) and on the website of the company.
- A minority of shareholders representing 10% of the company's share capital may reschedule an AGM if they disagree with certain sections of the annual accounts.
- Shareholders' voting rights may in general be exercised by proxy. Postal or tele-voting as well as simultaneous meeting in different places may be held if the company's Articles of Association allow such measures.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The Austrian statutory law does not contain any provisions with respect to shareholder's duties *vis-à-vis* the company and/or other shareholders.

Based on case law, a kind of general "fiduciary duty" of shareholders was developed. The scope and extent of such duty are not clearly defined due to the fact that only a few court decisions on a case-by-case basis are applicable. In general, shareholders have to refrain from actions which may harm the company and consider the interests of the company and/or its shareholders. The fiduciary duty of shareholders especially applies for the exercise of the shareholders' rights and may also require the shareholders to actively exercise certain rights.

Shareholders are not liable towards any creditors of the company or other third parties. Shareholders may, however, be liable if they have received prohibited payments from the company in bad faith or caused a board member of the company to harm the company or its shareholders. Also an abuse of the legal form of the company, thin capitalisation, commingling of the personal sphere and the sphere of the company, *de facto* management of the company or economically destructive actions (*Existenzvernichtungshaftung*) may lead to the personal liability of a shareholder.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The shareholders have no right to bring enforcement actions against the management board. The members of the management board are not directly liable to the shareholders. Only the company itself – represented by the supervisory board (or a specific representative) – may raise damage claims against members of the management board.

The shareholders meeting may resolve upon the initiation of actions against members of the management board and may also appoint a special representative of the company in such proceedings. Also a minority of 10% may request that proceedings with respect to damage claims are initiated, provided that such claims are not considered to be manifestly unfounded. In the latter case the competent court may appoint a special representative of the company.

Detached from (minority) shareholders' rights under corporate law, shareholders may raise claims against members of the management board or supervisory board, in particular in case of criminal actions under Austrian law.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

(a) General

Besides merger control requirements the acquisition of companies or shares of companies may be limited for the purposes of public order

and public safety in accordance with the Austrian Law on Foreign Trade and Payments (*Außenwirtschaftsgesetz*). If a person, alone or together with other persons, who is not an EU or EFTA national, wishes to acquire a controlling interest in or more than 25% of the shares of a company, which is operating in an area deemed to be of interest for the public order and public safety, this acquisition can be prohibited by the Minister of Economy.

Acquisitions, however, may result in a reporting duty concerning the beneficial owners of the company. The beneficial owners, who are individuals holding more than 25% of the shares or are able to exercise control over the company, have to be registered within a specific register. This register is not publically accessible.

In case of an Alternative Investment Fund (AIF as defined in directive 2011/61/EU) acquires, disposes of or holds shares of a non-listed company, the Austrian Financial Market Authority (FMA) has to be notified of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

(b) Listed companies

Shareholders of Austrian listed companies must disclose their directly or indirectly held share of the voting rights if it exceeds or falls below 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75% or 90% within two trading days to the Austrian Financial Market Authority (FMA), the Stock Exchange and the listed company. Listed companies may provide for an additional reporting obligation regarding a share of the voting rights of 3%. Also subject to the disclosure requirement are derivatives or other financial instruments, which facilitate the possible exercise of voting rights.

A violation of a disclosure obligation leads to a suspension of the voting rights to the extent of the difference between the new percentage of voting rights and the last percentage of voting rights reported for six months after fulfilment of the required notification obligation.

If a threshold of 30% of the voting rights is reached, the obligation to launch a mandatory public takeover offer to acquire all shares is triggered. This threshold may be reduced in the Articles of Association. A violation of the obligation to launch a mandatory takeover offer leads to a suspension of the voting rights.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

In general, there is no requirement for shareholders to disclose their intentions when purchasing or while holding shares *vis-à-vis* the company and/or other shareholders.

In case of a mandatory or voluntary public takeover offers under the Austrian Takeover Act, the bidder has to explain his intentions and strategic planning with respect to:

- the business activities of the target company (and his own business activities, if influenced);
- the retention of the target's employees and management; and
- changes of the conditions of employment.

If an AIF acquires, individually or jointly, control of a non-listed company the AIF is obliged to disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to the non-listed company and the known shareholders of the non-listed company.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Austrian Stock Corporation Law follows mandatorily a dual board system: The company is managed by the Management board and controlled by the Supervisory board.

It is the responsibility of the Management Board as body to manage the company. It must report to the Supervisory Board constantly. Furthermore, the Management Board prepares the annual financial statements and the annual report and convenes the Annual General Meeting.

The Management Board consists of one more persons. Usually functions are divided between the board members. The Management Board as body remains responsible and liable for any acts of its members.

Members of the Management Board may not be members of the Supervisory Board.

The members of the Supervisory Board are elected by the shareholders' meeting for a maximum period of four years (not including the financial year of the election). For every two members of the Supervisory Board elected, one employee representative is to be delegated. From 2018 onwards, the Supervisory Boards of listed companies and companies with more than 1,000 employees have to meet the gender quota of at least 30% women and 30% men.

In principle, the supervisory board has no executive power. However, the approval of the Supervisory Board must be obtained by the Management Board in certain cases which are mandatory by law. In addition, the company's Articles of Association may require further cases in which the approval of the Supervisory Board is required.

In an SE under Austrian law the shareholders can choose between either a dualistic system comparable to stock corporation and a monistic system (*Verwaltungsrat*) existing of executive and non-executive directors.

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

The Supervisory Board appoints the members of the Management Board for a period of up to five years. Early termination of this period of members of the management board is only entitled for cause (breach of duty, obvious incompetence). Another cause would be a vote of no-confidence by the shareholders' meeting.

The shareholders' meeting appoints and removes the members of the Supervisory Board. The employee representatives are delegated by the workers council. If a shareholder has been granted a right to appoint a member in the Articles of Association, he or she assigns the member to the Supervisory Board. The respective shareholder may also recall this member at any time.

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

The remuneration of the Management Board is determined by the Supervisory Board. Under current law, shareholders have no co-determination rights in the amount and structure of compensation for the Management Board (except the resolution on stock options).

According to the general rules for the remuneration of the Management Board stated in the Austrian Stock Corporation

Act the total remuneration must be proportionate to the duties of each member of the management board and to the situation of the company.

The Austrian Corporate Governance Code provides detailed provisions; in particular, that the remuneration contains fixed and variable components that shall be linked to sustainable, long-term and multi-year performance criteria, shall also include non-financial criteria and shall not entice persons to take unreasonable risks. Further provisions are stated with respect to stock option plans.

The annual financial statement of the company must list and publish the individual remuneration of the members of the Management Board.

The remuneration of the members of the Supervisory Board shall be recorded in the Articles of Association and will be resolved upon at the Annual General Meeting.

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

Austrian Law does not provide any limitation on the amount of shares which may be held by members of the Management or Supervisory Board.

During closed periods under the regime of the MAR management board and supervisory board members are not allowed to make transactions in financial instruments of the company.

The listed stock corporation has special disclosure requirements: Transactions in financial instruments of the company by members of the management board or the supervisory board must be reported to the Financial Market Authority – FMA and the company within five working days if the transactions exceed a volume of EUR 5,000 per calendar year (Directors' Dealings). The Directors' Dealings notifications are also published on the company's website.

Voting rights attached to shares held by members of the management board/supervisory board may not be exercised in the shareholders' meeting, in particular on the agenda item to discharge of the members of the management board/supervisory board.

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

The Austrian Stock Corporation Act does not provide any regulations for the meeting of members of the Management Board. Usually, the rules of procedures govern rules for the frequency and the procedure of Board Meetings. The regulations are therefore different in the individual stock companies.

Meetings of the Supervisory Board have to take place at least four times a year. The rules of procedure usually govern additional rules concerning the procedure and the convenience in case of reasonable request.

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

The Management Board is responsible for the management and the representation of the company externally. It is always in charge when the law does not give power to any other body. By fulfilling their obligation members of the Management Body have to apply the diligence of a proper and diligent manager.

The members of the Management Board are responsible for the company. The company may assert claims for damages if the Management Board breaches the duties. These claims are limited by the Business Judgment Rule. In the event of an entrepreneurial decision, the Board has not acted diligently if it acted in the best interests of the company, has obtained sufficient information for the decision and has not been exposed to any conflict of interest.

The Austrian Stock Corporation Act also provides for a direct action of creditors against the Management Board if creditors cannot obtain satisfaction of their claims from the company itself.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The management board is responsible for the introduction, implementation and supervision of a risk management system within the company in order to make sure that any material adverse changes to the economic and financial positions of the company are identified at an early stage so that appropriate measures to avoid or mitigate the consequences of such material adverse changes can be adopted as quickly as possible.

According to our view, the risk of liability for board members has increased in recent years due to increasing requirements to prepare business judgment decisions and also a consequence of more intense shareholder activism, which may result in special audits regarding management conduct (*Sonderprüfungen*), and the establishment of special external shareholder representatives who may have investigative powers and may, on behalf of the company and/or shareholders, prepare damage claims against managers.

The 30% gender quota ("women's quota") for supervisory boards is mandatory for listed stock companies and companies with more than 1,000 employees. The Equal Treatment Act of Women and Men in Supervisory Boards is applicable for supervisory board elections as of 2018. Existing supervisory board mandates are not affected.

The gender quota is not applicable for "single gender companies". Only in case the entire work force of a company comprises at least 20% of one gender, this gender must be represented in the supervisory board by the 30% quota. The gender quota is only applicable for supervisory boards consisting of six or more members (shareholder representatives).

The sanctions in case of breaches of the quota are serious: the election of the candidate to the supervisory board is void. A supervisory board member elected in breach of the quota is not legally appointed as board member and has no voting rights.

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

If the company has a claim for compensation against the management board, it can only waive it after five years from the date of the breach of duties. The shareholder meeting must decide to waive the claim, if 20% of the minority shareholders do not object.

Usually the company takes out D&O insurance policies in favour of the member of the Management (and Supervisory) Board. It is not specified that the individual member has to pay a deductible. This is very uncommon in Austria.

If a creditor claims for compensation against the Management Board, the company cannot simply indemnify them. Rather, the indemnity must be in the interests of the company.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The strategy of the company is one of the central management tasks of the Management Board. The Management Board – together with the Supervisory Board (Section 95 para. 5 no. 8 Austrian Stock Corporation Act) – must substantiate the long-term corporate goals within the stipulations of the Articles of Association and thus specify which business areas are relevant and which investments are necessary and appropriate. The Management Board thus decides on the long-term strategic orientation of the company. The Supervisory Board must be involved in defining the strategic framework, but not *per se* in all individual steps that serve to implement the strategy and planning.

4 Other Stakeholders

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

Employees have a substantial role in corporate governance. The interests and rights of the employees are represented and can be exercised in the supervisory board (and its committees) and at the operational level in the form of works councils (*Betriebsrat*).

a) Supervisory board:

The employees' representatives are entitled to delegate one member from among their ranks to the supervisory board of a company (e.g. stock corporations or limited liability companies) for every two shareholders' representatives to be elected or appointed in accordance with applicable law and the Articles of Association (statutory one-third parity rule). In case the number of supervisory board members to be elected or appointed in accordance with the applicable law and the Articles of Association is an odd number, one more employee representative is to be delegated. Employees' representatives shall exercise their functions on an honorary basis and their appointment may be terminated at any time only by the works council. The rights and obligations of employees' representatives shall be the same as those of shareholders' representatives. The employee representatives are generally entitled to have at least one seat and vote in all committees of the supervisory board.

For listed companies and companies with constantly more than 1,000 employees, a quota regulation applies: among the employee representatives, each sex has to be represented for at least 30%, if: (i) a minimum of three employee representatives is to be delegated; and (ii) the staff consists of at least 20% female or male employees.

Resolutions in a co-determined supervisory board are adopted by simple majority of the votes cast.

b) Works council

The works council oversees the compliance with general provisions on employee protection, health, safety, working conditions etc. with respect to employees as well as compliance with applicable collective agreements (*Kollektivverträge*) and shop agreements (*Betriebsvereinbarungen*). The works council has co-determination and information rights on various issues regarding the company's workforce, its working conditions and any activities of the company's management that might lead to mass dismissals.

The members of the works council are elected by the employees.

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

According to the Stock Corporation Act, the Management Board of a Corporation has to manage the company in the best interests of the company considering the interests of the shareholders and the employees as well as the interests of the public. The provision reflects a "moderate stakeholder approach".

In its Preamble, the ÖCGK emphasises the importance of the stakeholder theory for corporate governance, outlining that the code is designed to increase transparency for all stakeholders. According to the Stakeholder theory, a company owes a responsibility to a wider group of stakeholders, other than just shareholders. A stakeholder is usually defined as any person/group which can affect/be affected by the actions of the business. It includes employees, customers, suppliers, creditors and even the wider community and competitors or society in general and the state.

Stakeholder management can also be seen as an important element of Corporate Social Responsibility, a concept which recognises the responsibilities for the cooperation's effects on environmental and social wellbeing. In the implementation of Directive 2014/95/EU, listed companies have to publish a non-financial report in order to meet the interest of the stakeholders of the company.

Pursuant to a stakeholder-theory, a company shall have a stakeholder-management in order to identify the relevant stakeholders and to minimise risks. It is necessary for the company to stay in regular contact with (core) shareholders to know their strategy regarding their investment in the company and to analyse their expectations. However, the Management Board has to consider the interests of all stakeholders.

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

Companies and organisations are more and more assessed based on their performance for the society and on the environmental impacts of their activities. These circumstances affect the reputation and competitiveness and have a strong influence on estimates by capital investors, the customer relationships and staff productivity.

In 2017, the act on improvement of sustainability and diversity (*Nachhaltigkeits- und Diversitätsverbesserungsgesetz*) entered into force. Entities of public interest (companies with more than 500 employees and a balance sheet total exceeding EUR 20m or a turnover exceeding EUR 40m, which are focused on capital markets or act as financial service providers) have to issue a non-financial declaration within their management report (*Lagebericht*) or in a separate non-financial report.

The report shall comprise details on non-financial issues, in particular environmental protection, personnel and social issues, human rights, anti-corruption and diversity. The companies have to disclose their concepts and strategies, non-financial risks and performance indicators as well as intended measures based on existing guidelines (e.g. GRI, UNGC or ISO 26000).

The non-financial declaration has to be reviewed by the supervisory board. The auditor verifies the submission of the non-financial declaration; the content is not subject to the auditor's review.

Furthermore, companies align with national and international activities that are dedicated to corporate responsibility and sustainability.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Management Board is responsible for all disclosure and transparency requirements and has to fulfil this duty due and timely.

The Management Board also has to ensure the existence of an accounting and internal control system that meets the needs of the company and is responsible for the internal information management and information flow, in order to fulfil its disclosure requirements.

5.2 What corporate governance-related disclosures are required?

Stock Corporations and SE's are required to publish their annual financial statements together with the report of the Management Board (*Lagebericht*) as well as the corporate governance report; if required the group financial statements and the group management report (*Konzernlagebericht)*. The Supervisory Board has to review the financial statements and the management report and shall report to the Shareholder's Meeting thereon (*Bericht des Aufsichtsrats*).

According to the Austrian Stock Exchange Act, all listed companies further have to publish at least half-yearly reports and have to ensure that the reports are publicly available not less than 10 years. Further obligations for listed companies to publish quarterly reports take precedence.

If applicable (for Large Companies and/or public-interest entities as defined in the UGB and in the Directive 2013/34/EU), in addition the separate non-financial report (see question 4.3), the corporate governance report and the report on payments to governmental institutions (*Bericht über Zahlungen an staatliche Stellen*) have to be published additionally.

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

The annual report contains the certificate of the auditors (*Bestätigungsvermerk des Abschlussprüfers*). Auditors are appointed by the shareholders' meeting. The details and conditions of their instruction are dealt with by the supervisory board (usually the audit committee). Thus, the supervisory board is the contractual partner of the auditors with respect to their engagement.

The Austrian Commercial Code provides provisions with respect to the independence of the auditors. An audit cannot be carried out by auditors who, during the business year to be audited or until submission of the auditors certificate:

- hold shares in the company or its affiliates or in a company holding at least 20% of the company or have significant influence on the acquisition, management or sale of shares in the company;
- are (or were in the last 24 months prior to the business year to be audited) statutory representatives or members of the supervisory board or employees of the company or its affiliates or a company holding at least 20% in the company; or
- have no registration in accordance with applicable law (*Abschlussprüfer-Aufsichtsgesetz*);
- have assisted the company in its accounting or preparation of the annual financial statements to be audited, responsibly carried out internal control measures within the company, provided management functions or were included in the selection of statutory representatives or accounting officers, provided financial services assistance or actuarial or valuation services which have substantial effect on the annual financial statements to be audited;
- were related to an auditor (as legal representative, supervisory board member, employee or shareholder) who is excluded from auditing the company; and
- engage a person not entitled to audit.

Auditors are also barred if at least 30% of their professional revenue during the last five years was generated from the company, its affiliates or companies in which the company holds more than 20% of the shares, if this percentage is expected in the relevant business year.

Further restrictions apply to listed Companies.

The auditors must comment in their auditor's report on the way in which the accounts have been prepared and state whether the accounting, the financial statement, the management report (*Lagebericht*), the group financial statements and the group management report (*Konzernlagebericht*) have been prepared in line with the applicable rules and regulations, and whether the annual accounts give a "true and fair" view of the state of affairs of the company. In particular, adverse changes of the assets, finances and income of the company and losses with significant influence on the annual results have to be explained.

5.4 What corporate governance-related information should be published on websites?

The mandatory corporate governance-related disclosures of listed company's include in particular (i) *ad hoc* disclosures, (ii) directors' dealings announcements, (iii) a corporate action timetable, (iv) current version of the Articles of Association, (v) invitation, motions and other documents with respect to shareholders' meetings, and (vi) the declaration of the management board and supervisory board regarding the compliance with the recommendations of the ÖCGK. Further, most listed companies publish information material regarding events, roadshows with analysts and investors, press releases and other information with respect to the company or its financial instruments on a voluntary basis on the website.

Dr. Christoph Nauer
bpv Hügel Rechtsanwälte GmbH
Donau-City-Straße 11
1220 Vienna
Austria

Tel: *+43 2236 893 377*
Email: *christoph.nauer@bpv-huegel.com*
URL: *www.bpv-huegel.com*

Dr. Christoph Nauer advises clients on all corporate law issues, capital market transactions, with a focus on equity and equity-linked products, M&A transactions, in particular of listed companies as well as mergers, spin-offs and takeover situations. Christoph Nauer has been with bpv Hügel since 2009, having previously worked at Cheyne Capital, London (one of Europe's leading alternative investment fund managers). He is recommended in lawyers rankings *JUVE* ("frequently recommended"), *IFLR* ("highly regarded"), *The Legal 500* ("very competent") for capital markets and corporate/M&A. His work highlights include advice to IMMOFINANZ on the acquisition of a 29% stake in S Immo, advice to RZB on its merger with listed RBI (highest profile transaction in the banking sector in Austria in 2017), advice to IMMOFINANZ on a settlement in shares upon the exchange ratio of the merger with Immoeast, BAWAG P.S.K on its acquisition of start:bausparkasse and IMMO-BANK, Frauenthal as takeover target company and its delisting attempt, takeover defence for IMMOFINANZ against the hostile CAI/O1 offer and BUWOG spin-off.

Dr. Daniel Reiter
bpv Hügel Rechtsanwälte GmbH
Donau-City-Straße 11
1220 Vienna
Austria

Tel: *+43 2236 893 377*
Email: *daniel.reiter@bpv-huegel.com*
URL: *www.bpv-huegel.com*

Dr. Daniel Reiter advises on corporate and capital market law and has a special focus on stock-market compliance work. Work highlights include advice to IMMOFINANZ as target company in a partial takeover offer, advice to Joint Bookrunners on BUWOG share capital increase, IMMOFINANZ on a settlement in shares upon the exchange ratio of the merger with Immoeast, Frauenthal Holding as target company in a mandatory public takeover offer together with its delisting attempt, Autobank on its Tier 2 mandatory convertible loan and share capital increases, BUWOG spin-off. He regularly works for listed companies on compliance matters and shareholders' meetings. Daniel Reiter has been with bpv Hügel since 2009; and since 2015 as Attorney at Law (Senior Associate).

bpv HÜGEL

bpv Hügel is one of the leading Austrian law firms, advising national and international corporate clients in all fields of commercial law. The firm operates from offices in Austria and Brussels and the focus of its work extends to Austria and the CEE region. bpv Hügel operates as a full-service firm and is in particular known for its high-level corporate/M&A, capital market, competition and tax advice.

The firm is one of the first addresses for listed companies on transactions, national and cross border mergers, reorganisations and spin-offs. The practice is also renowned for advice on high-profile takeover transactions also involving hostile takeover defence. bpv Hügel does not strive to be the largest law firm by number of offices or lawyers. The aim of is to be the firm of choice for clients with respect to their challenging legal issues, significant business transactions and critical disputes. Many of Austria's largest listed companies and blue chip companies rely on the firm's advice. In the past five years more than 40% of the issuers in the ATX of the Vienna Stock Exchange relied upon bpv Hügel's corporate law advice.

Belgium

Astrea

Steven De Schrijver

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Corporate governance relates, in principle, to all types of corporate entities. However, most corporate governance laws and regulations apply specifically to listed companies. Therefore, our discussion will be limited to the public limited liability company ("*naamloze vennootschap*"/"*société anonyme*"), as this is the main type of legal entity whose shares are admitted to trading on the Belgian stock exchange (Euronext Brussels).

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

The main legislative, regulatory and other corporate governance sources are the following:

- the Belgian Companies Code (the "BCC"), which contains the main set of rules relating to corporate governance of legal entities (including, but not limited to, the appointment and removal of directors and members of executive and board committees, directors' liability, powers of the board and the general meeting of shareholders, etc.). The BCC entered into force on 6 February 2001 and was amended several times by corporate governance-related acts, including the Act of 2 August 2002 (the "Corporate Governance Act"), the Act of 17 December 2008 regarding the creation of an audit committee in listed companies, the Act of 6 April 2010 enhancing corporate governance in listed companies (the "Corporate Governance and Executive Remuneration Act"), the Act of 20 December 2010 on the exercise of certain rights of shareholders in listed companies (the "Shareholders' Rights Act"), the Act of 7 November 2011 on the remuneration in shares of non-executive directors of listed companies and the Act of 28 July 2011 on the representation of women on the boards of directors of autonomous state enterprises, listed companies and the National Lottery. A complete reform of the Companies Code is envisaged for 2018;
- the Act of 2 August 2002 regarding the supervision of the financial sector and financial services (the "Act on the Supervision of the Financial Sector"); this Act contains provisions relating to insider trading and market manipulation, and imposes specific occasional and periodical disclosure obligations;
- the Royal Decree of 3 March 2011 on the evolution of the supervision architecture for the financial sector, which reformed the prudential supervision of the financial institutions and the financial markets. Since the Decree's entry into force on 1 April 2011, most financial institutions are supervised by the Belgian National Bank, whereas the supervision of the financial markets is in the hands of the Financial Services and Markets Authority (the "FSMA");
- the Belgian Corporate Governance Code, which was first published by the Belgian Corporate Governance Committee in 2004 and subsequently replaced by a new and revised version, published in March 2009 (the "CG Code"). The CG Code is applicable to listed companies and constitutes "soft law" as it is based on the principle of "comply or explain". Listed companies must either comply with the CG Code's regulations or explain the reasons why they chose not to do so in the corporate governance chapter of their annual report. Pursuant to the Royal Decree of 6 June 2010, the CG Code has been imposed by law as the reference code for Belgian-listed companies. In addition to the CG Code, the Corporate Governance Committee has several guidelines on remuneration reporting and internal control and risk management. On 18 December 2014, the Committee published new guidelines aimed at improving the co-operation between the audit committee and the internal and external auditors of listed companies; and
- each company has articles of association which contain rules relating to the rights of the company's shareholders, the organisation of shareholders' and directors' meetings, and the appointment, removal and powers of the directors.

In addition to the sources mentioned above, there are several other Acts and Royal Decrees which contain provisions that are relevant in the context of corporate governance of legal entities, including rules relating to the disclosure of major shareholdings or acquisitions, market abuse and public takeover bids.

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

The last major topical issue is the envisaged introduction of a new BCC, which would include (i) a revision of the basic principles of company law, (ii) a fundamental change of the conflict of laws framework with respect to company law, (iii) a limitation of the company forms to four basic forms (i.e., a partnership ("*maatschap/société simple*"), a private limited liability company ("*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*"), a public limited liability company ("*naamloze vennootschap/société anonyme*") and a limited liability cooperative partnership ("*coöperatieve vennootschap met beperkte aansprakelijkheid/société coopérative à responsabilité limitée*")) and allowing more flexibility, (iv) the incorporation of the associations law into the BCC, and (v) changes with regard to the

executive body of the company, such as allowing for a single director in a public limited liability company and capping director liability. Another priority is the simplification of the filing and publication system for companies and associations, as well as a relaxation of the applicable language legislation for company documents.

This legislative process is expected to be finalised in 2018, and to enter into force at the end of the year. Transitional measures will be provided.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Correct corporate governance plays an important role with regard to the creation of long-term value creation, as it creates a necessary balance between entrepreneurship and supervision. For this reason, both transparency and accountability are important. Both in the Companies Code and the Corporate Governance Code, many provisions have been built in in order to ascertain this balance, making sure for instance that the Board of Directors has enough flexibility to function as required, yet including strict provisions with regards to transparency of their actions, reporting requirements and final accountability to the general shareholders' meeting. The revised Companies Code will continue to try and address to these issues, by for instance amending the requirements for the mandatory holding of the general shareholders' meeting, director liability and dispute resolution, but removing the criminal sanctions with respect hereto.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Pursuant to the BCC, the board of directors has the power to take all actions and measures in view of accomplishing the corporate purpose, with the exception of those actions that are reserved by law or in the articles of association to the shareholders' meeting. As such, the operational management of the company is the exclusive power of the board. However, the shareholders still have important powers, including the appointment and removal of directors and the statutory auditor, the approval of the annual accounts, the distribution of profits, the increase or decrease of the company's share capital, restructuring operations (including mergers and (partial) de-mergers) and amendments to the articles of association. The shareholders' meeting also has the power to decide on specific remuneration issues (such as the approval of the remuneration report of the board of directors and the approval of golden parachutes and certain types of variable remuneration).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Corporate governance is mainly the responsibility of the board of directors (and, in particular, of the committees appointed within the board, such as the audit committee and the remuneration committee). Although the shareholders have decision powers with respect to certain remuneration issues (see question 2.1) and can exercise some influence by appointing the members of the board of directors, their responsibility in relation to corporate governance is currently quite limited. However, the reform of the Companies' Code foresees a slight increase of the influence of shareholders, for instance by means of a reduction of the required capital to force the board of directors to hold a mandatory general shareholders' meeting from 20% to 10%, and a clarification in the procedure to be followed in order to nullify certain decisions by the board of directors.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are three types of shareholders' meetings: annual; special; and extraordinary. The annual meeting is held once a year on the date mentioned in the company's articles of association, and focuses on approving the annual accounts of the company, deciding on the distribution of profits and granting discharge to the directors and the statutory auditor. Usually, the shareholders also take the opportunity to renew the mandate of, or replace, the statutory auditor, if such is required. Other decisions, such as the appointment or dismissal of directors, may also be taken. The annual meeting must be held within six months following the end of the last financial year.

Shareholders' meetings that are not annual meetings and that do not decide upon the amendment of the company's articles of association (but, for instance, on the dismissal or appointment of directors) are called special shareholders' meetings.

Finally, shareholders' meetings that focus on amending the articles of association (such as a change of the corporate purpose, capital increase or decrease, amendment of any other provisions) are called extraordinary shareholders' meetings. As the articles of association are laid down in a notary deed, extraordinary meetings of shareholders must be held before a notary (as opposed to annual or special meetings).

Decisions at shareholders' meetings are usually taken by simple majority of the votes cast (whereby a quorum of 50% of the voting rights is required). The articles of association may, however, provide for specific majority and quorum requirements in relation to certain decisions. In addition, amendments of the articles of association require a 75% majority of the votes cast (with the same quorum), except for changes to the corporate purpose or to the rights attached to shares or for the dissolution of the company, which require an 80% majority.

As of the time of writing, each share in each company possesses equal voting rights. However, with the upcoming reform of the Belgian Companies' Code, it is expected that companies will be able to deviate from this rule in their Articles of Association.

Shareholders' meetings must always be convened by the company's board of directors or by the statutory auditor. Upon request of one or more of the shareholders representing at least 20% of the share capital (to be reduced to 10%), the board is required to convene a special or extraordinary meeting with the agenda determined by said shareholders.

With respect to listed companies, the Shareholders' Rights Act of 20 December 2010 provides that shareholders representing at least 3% of the share capital have the right to add items to the agenda or submit any proposals of resolution in relation to a point already on the agenda. The Shareholders' Rights Act has also introduced the possibility for minority shareholders to address questions in writing to the board or the auditor, and to provide for mechanisms in the articles of association to allow remote participation in the meeting and electronic voting in advance.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The main duty of the shareholder *vis-à-vis* corporate entity is his capital contribution. The basic principle with respect to liability of shareholders for acts or omissions of the public limited liability company is that shareholders are only liable for the company's debts up to the amount of the share capital contributed by each of them. There are, however, a number of exceptions to this principle. In exceptional circumstances, courts can decide to pierce the corporate veil and hold shareholders liable beyond their capital contribution. Also, if a limited liability company has only one shareholder for more than one year, such shareholders lose the benefit of limited liability for the company's debts until there is a second shareholder. This is expected to change as a result of the upcoming reform of the Companies Code. Finally, in the case of bankruptcy, shareholders – often in their capacity as founders of the company – may be held liable beyond their capital contribution if certain conditions are met. It should be noted that exceptions to the principle of limited liability also apply in most cases to private limited liability companies ("*besloten vennootschap met beperkte aansprakelijkheid*"/"*société privée à responsabilité limitée*").

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes, they can. Directors are liable to the company for any damages arising from:

- mismanagement;
- a breach of the provisions of the BCC or the company's articles of association;
- tort; and
- criminal offences.

The shareholders' meeting, deciding by simple majority, can decide to sue directors on the basis of the breaches mentioned above, unless it has already granted the directors in question a discharge following the approval of the annual accounts (subject to some exceptions, particularly in the event of damages arising from criminal offences or fraud).

The director's liability will be amended in the upcoming reform of the BCC. It will be capped to a maximal amount, based on the size of the company, in order to make obtaining liability insurance easier. Furthermore, special director's liability is foreseen for, amongst others, wrongful trading and serious misconduct that has led to bankruptcy.

Pursuant to Article 562 BCC, minority shareholders representing at least 1% of the total outstanding votes, or owing shares representing EUR 1,250,000 of the outstanding capital, can lodge a minority claim against directors. Such a claim is only possible, however, if the minority shareholders in question voted against the discharge at the annual shareholders' meeting, or if such discharge turns out to be null and void.

Of course, directors are also always accountable to the shareholders as they can be fired at any time in a special general shareholders' meeting, which must be convened upon request of shareholders representing 20% of the share capital (to be lowered to 10%).

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There are no limitations as to the number of securities that can be held by a shareholder of a public limited liability company, except that such a company must have at least two shareholders (or, to be more specific, if a limited liability company has only one shareholder, due to the acquisition of all shares by one person or entity, a second shareholder must enter the company within a year. If not, the single shareholder will lose the benefit of limited liability). This is bound to change with the BCC reform, in which it will be possible to have a single shareholder.

Regarding the disclosure of shareholdings, the Act of 2 May 2007 regarding the disclosure of major shareholdings in listed companies (the "Transparency Act") provides that a shareholder of a listed company must notify the company and the FSMA of its voting rights held (either directly or indirectly) in such a company if certain thresholds are met, particularly if its voting rights meet, exceed or fall below the threshold of 5% (or a multiple thereof) of the total outstanding voting rights in the company. The articles of association of the company may provide for lower thresholds (with a maximum of 3%) to trigger this notification obligation. In addition, the law provides for specific notification requirements in relation to events that give rise to a change in the breakdown of voting rights and agreements between shareholders to act in concert. Such notifications are required within four trading days from the date of the event triggering the notification obligation.

The anti-money laundering legislation has also introduced a notification obligation for all persons or entities who acquire a participation of 25% or more in non-listed companies (Article 515*bis* BCC).

The Anti-Money Laundering Act of 18 September 2018 further requires companies to submit information regarding their own Ultimate Beneficial Owners ("UBO") to a central UBO-register. While the UBO can be determined in many ways, often (but not necessarily) this will be the shareholders controlling the company.

Finally, it should be noted that if a shareholder exceeds the threshold of 30% of the voting rights in a listed company, such shareholders will be required by law to launch a public takeover bid.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

See question 2.6.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A public limited liability company is managed by the board of directors, which has the power to take all actions and measures in view of accomplishing the corporate purpose, with the exception of the powers that are reserved by law or in the articles of association to the shareholders' meeting (see also question 2.1). The board of directors must consist of three members, unless the company only has two shareholders; in which case, the number of directors may be limited to two. The reform of the BCC will make it possible for public limited liability companies to have a single director.

However, in case the company is listed, this director itself must be a public limited liability company with multiple directors. Decisions are taken by a simple majority of the votes cast, unless the articles of association provide for qualified majorities.

With regard to the composition of the board in listed companies, the CG Code provides that at least half of the directors must be non-executive directors. Three of those non-executive directors should be independent directors in the sense of Article 526*ter* of the BCC.

In addition thereto, the Act of 28 July 2011 on the representation of women on the boards of directors of autonomous state enterprises, listed companies and the National Lottery imposes specific obligations upon listed companies regarding the gender representation within the board of directors. The Act provides that a minimum of one-third of the board's members should be of the opposite gender to the other members. This obligation has entered into effect at the beginning of the sixth financial year starting after 14 September 2011 (or the eighth financial year, if the listed company either has a free float of shares of less than 50% or falls below certain thresholds relating to the number of employees, the company's turnover and/or its total balance sheet), i.e. the financial year starting after 14 September 2017 (which is, for most companies, the financial year starting on 1 January 2018).

If the minimum number of directors is not achieved at the date of entry into effect, the general shareholders' meeting will need to appoint a board in compliance with the legal provisions. Until such is the case, all benefits granted to the directors, whether financial or otherwise, will be suspended. Also, in the case of non-compliance at the set date, the first member appointed by the general meeting must be of the gender that is not sufficiently represented. All other appointments will be considered as null.

As from the first financial year starting after 14 September 2011 (for most listed companies, this was the financial year starting on 1 January 2012), listed companies have been required to describe in their annual report all efforts that were made in order to achieve the one-third representation of the opposite gender on the board. It is worth noting that on average, approximately 25% of the board members of Belgian listed companies were women in 2016 (while this was only 6% in 2004). Hence, given the fourfold increase, progress has in any case been made over the past years. However, Belgian listed companies will have to keep making efforts in order to reach the legal threshold of having one third (i.e., approximately 33%) of female board members.

The articles of association usually provide that powers of daily management of the company can be granted to a managing director (or CEO). The person in charge of daily management can be appointed among the directors, but sometimes the articles of association provide that such a person need not be a member of the board.

Article 524*bis* BCC provides that the board of directors can delegate some of its powers to an executive committee, consisting of persons who may or may not be members of the board. The delegation of powers cannot relate to the definition of the general management of the company or to specific powers that are by law reserved for the board of directors (such as establishing the annual accounts, preparing the management report or appointing a managing director). The current regulation regarding the executive committee will be abolished after the reform of the BCC, and replaced by a possibility for companies to have a proper dual board of directors, with a supervisory board and a management board, with separate competences. Each of these boards would have at least three directors, and directors can only be part of one of the two boards.

In addition, Article 522 BCC provides for the possibility for the board of directors to set up advisory committees within the board. The latter can freely determine the composition and tasks of such committees. For listed companies, however, the creation of two advisory committees is mandatory:

- Pursuant to Article 526*bis* BCC, most listed companies are required to create an audit committee. Such an audit committee must be entirely composed of non-executive directors, of which at least one must: (i) qualify as an independent director in accordance with the criteria for independence set out in Article 526*ter* BCC; and (ii) have the required expertise in the field of accounting and auditing. Without prejudice to the board's overall responsibilities, the audit committee is entrusted with a number of monitoring tasks that are listed in Article 526*bis* BCC (monitoring the financial reporting, the effectiveness of internal control and risk management systems, the legal control of the annual accounts, the independence of the statutory auditor, etc.).
- Pursuant to Article 526*quater* BCC, most listed companies are required to set up a remuneration committee. This committee must be entirely composed of non-executive directors, of which at least one must qualify as an independent director in accordance with the criteria for independence set out in Article 526*ter* BCC. Without prejudice to the board's overall responsibilities, the remuneration committee is entrusted with at least the tasks listed in Article 526*quater* BCC (e.g. making proposals to the board as to the overall remuneration policy, as well as the individual (both fixed and variable) remuneration of directors, certain members of management and persons in charge of daily management, preparing the remuneration report, etc.).

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

Directors are appointed by the general shareholders' meeting, with a simple majority (unless the articles of association provide for a qualified majority). The law provides for a maximum term in office of six years, but such a term is renewable. The articles of association may provide for a shorter term in office. In this respect, the CG Code suggests a term of four years for directors of listed companies.

Directors can be dismissed at any time by a simple decision of the shareholders' meeting. Likewise, they can resign at any time before their term of office has expired, provided that such resignation does not unduly jeopardise the company's interests.

If the position of a director becomes vacant, following the dismissal or resignation, the remaining directors may provide for an interim replacement, unless the articles of association oppose thereto. The mandate of the interim director will run until the next annual meeting, at which the shareholders must decide on the official appointment of the director.

Members of the management committee are appointed and removed by the board of directors.

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

The contracts and remuneration of members of the management body are mainly governed by the Corporate Governance and Executive Remuneration Act of 6 April 2010. This Act contains the following provisions:

- Restriction of "golden parachutes": any contractual provisions relating to severance payment awarded to an executive director, a member of the management committee or a person in charge of daily management of the company, which exceeds 12 months of salary (or 18 months, upon recommendation

of the remuneration committee), requires the prior approval of the annual shareholders' meeting. In the absence of such approval, the provision is considered as null and void. The same approval requirement applies to variable remuneration awarded to independent or non-executive directors. In addition, the aforementioned provisions need to be communicated to the works council, which can make recommendations to the shareholders' meeting as to their approval (or not).

- Restrictions on variable remuneration: if a contract with a member of the executive management contains provisions relating to variable remuneration, the criteria for awarding and calculating such remuneration should be clearly defined in the contract. In the case of non-compliance, the variable remuneration will not be taken into account for the purpose of determining the severance payment. In addition, at least 25% of the variable remuneration awarded must be based on performance criteria relating to a period of at least two years and another 25% on performance criteria relating to a period of at least three years. The performance criteria must be identified in advance and be objectively measurable.
- Restrictions regarding share-based remunerations: unless the articles of association provide otherwise or the shareholders' meeting approves an exception, shares cannot vest and stock options cannot be exercised by a director or any other member of the executive management within a period of three years following their award.

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

Directors are entitled to acquire, hold or sell shares, subject to a number of restrictions and disclosure requirements:

- regulations regarding insider dealing and market manipulation;
- the requirements for directors and members of executive management to notify the FSMA of any dealing in shares of the company for their own account. Such disclosures are made public on the FSMA website on a daily basis after the closing of the stock exchange;
- specific disclosure obligations applying to directors of companies involved in a public takeover bid; and
- the BCC provides that no person owning more than 10% of the shares of a listed company can act as independent director in the sense of Article 526*ter* BCC.

The BCC provides that the remuneration report should include information on the number and the key features of the shares and the stock options, as well as any other right to acquire shares that were awarded, exercised or that lapsed to the company's members of the executive management during the reported financial year. Such information must be included on an individual basis.

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

The board of directors is convened in accordance with the rules set out in the articles of association. Usually, this is done by sending a convening notice (either by letter or email) to the directors a couple of days or weeks in advance. The board must be convened whenever the interest of the company requires. Although Belgian company law does not impose a minimum number of meetings per year, the CG Code provides that sufficient meetings must be held to allow the directors to exercise their duties effectively. In addition, the Code provides that the number of meetings held in the preceding financial year should be disclosed in the corporate governance chapter of the annual report.

Board meetings can be held at any location (as indicated in the convening notice), unless the articles of association provide otherwise. Participation in board meetings by telephone or video conference is only possible if the articles of association explicitly provide for such possibility.

Unanimous written resolutions can only be adopted if (i) the urgency of the matter(s) to be decided on requires it, and (ii) the articles of association provide for such a possibility.

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

A director in a company limited by shares is an agent ("*lasthebber*"/"*Mandataire*") of the company.

The general legal duties of directors can be summarised as follows:

- Duty of care: directors are expected to manage the company with the care and skill a reasonably prudent professional would exercise running the same type of business, under the same circumstances.
- Duty to act in the company's interests: directors must act in the best interests of the company as a whole and not only for its shareholders. They must make and implement their decisions in the "corporate interest" of the company.
- Duty of confidentiality: directors must keep confidential all information which they obtain in the performance of their duties. They cannot use such information for purposes other than the exercise of their official duties.
- Duty of integrity and commitment: all directors (both executive and non-executive) must demonstrate independence of judgment in their decisions. They should ensure that they have detailed, accurate information and study this information carefully in order to acquire and maintain a clear understanding of the key issues relevant to the company's business. Directors should seek clarification whenever they deem it necessary and should arrange their personal and business affairs so as to avoid direct and indirect conflicts of interest with the company.
- Duty to regularly attend board meetings: this is mandatory. The board should meet sufficiently frequently in order to effectively perform its duties.
- Duty to be, and stay, informed: directors must obtain the information necessary to allow them to make decisions and share with other board members all appropriate information.
- Duty of supervision: the board of directors should review the executive management's performance and the implementation of corporate strategy, approve internal controls and risk management procedures, supervise the auditor's performance and the internal audit function, and describe the key features of the company's internal control and risk management systems, in the corporate governance statement of the management report.

As far as the directors' liability is concerned, please see question 2.5.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The CG Code imposes a number of specific corporate governance duties upon the board of directors. These include:

- pursuing the long-term success of the company by providing entrepreneurial leadership and enabling risks to be assessed and managed;
- reviewing executive management performance and the realisation of the company's strategy;

- monitoring and reviewing the effectiveness of the board's committees;
- taking all necessary measures to ensure the integrity and timely disclosure of the company's financial statements;
- disclosing other material financial and non-financial information to the shareholders and potential shareholders;
- supervising the performance of the statutory auditor and supervising the internal audit function, taking into account the review made by the audit committee; and
- fostering – through appropriate measures – an effective dialogue with the shareholders and potential shareholders based on a mutual understanding of objectives and concerns.

One of the key challenges for the boards of directors of many listed companies lies in sound risk assessment and management. This requires that the members of the board have a thorough knowledge of the business but also sufficient risk expertise. Risk management should also be made part of the corporate culture of the company, and not just treated as a box-ticking exercise.

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

Such indemnities or insurance are permitted in relation to directors or other members of executive management, provided that the indemnification or insurance does not relate to the liability of the director towards the company itself (as such would be considered a total exoneration of liability, which is not permitted by law) or to liability resulting from the director's intentional misconduct. By capping the director's maximum liability in proportion with the company's size, the upcoming reform of the BCC intends to make such insurance schemes more accessible to directors.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

While accountable to the general shareholders' meeting, the board of directors is *de facto* the main body in charge of the corporate entity's strategy. Their only limitation is the corporate purpose of the company, which can only be amended by the general shareholders' meeting by notarial deed. However, within the corporate purpose of the company, the board of directors is free to, but also has the duty to set and amend the strategy of the corporate entities that is required to fulfil the company's corporate purpose.

4 Other Stakeholders

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

Under Belgian law, employees do not have a specific role in relation to corporate governance. There is no obligation to appoint any employees or employees representatives as members of the board of directors or management (with the exception of certain pension funds).

Employees of larger companies do, however, have an impact on the operation and management of the company through their representation in the works council. The works council must be informed and/or consulted about certain decisions which the board of directors wishes to take. The main areas in which the works council is involved are:

- creation and modification of a company's work regulations;
- examination of corporate, financial, commercial, personnel information and other data which the company is legally obliged to disclose to the works council at regular intervals of three months or more, depending on the type of information involved;
- prior consultation before implementation of any decision to carry out mass hiring, lay-offs, reorganisation or plant closure;
- prior consultation before implementation of a decision concerning organisation of work (working hours, part-time work, organisational changes, etc.), training, the introduction of structural changes to the undertaking (merger, takeover bid, etc.);
- prior information on the appointment or re-appointment of independent directors;
- disclosure of the remuneration report prepared by the remuneration committee and possibility to make recommendations on the adoption of certain golden parachute and variable remuneration provisions;
- deciding the criteria to be used in selecting employees to be made redundant or re-employed for economic or technical reasons; and
- the right to veto the appointment of the company's statutory auditor.

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

Under Belgian law, and pursuant to the CG Code, other stakeholders do not have a specific role in relation to corporate governance. However, given the increased regulations with respect to corporate social responsibility, and the emphasis on transparency, integrity, dialogue, and thus responsibility, more attention is given to the right of information of stakeholders.

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

Pursuant to Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, listed, as well as non-listed companies with more than 500 employees, will need to include a corporate social responsibility ("CSR") section in their annual report. The aforementioned Directive had to be transposed into national law in Belgium by 6 December 2016, but was only transposed by the Act of 3 September 2017 concerning the disclosure of non-financial and diversity information by certain large undertakings and groups.

The CSR statement in the annual report should in any case include information relating to (i) environmental matters (i.e., the current and foreseeable impact of the undertaking's operations on the environment), (ii) social and employee matters (i.e., actions taken with respect to gender equality, working conditions, respect for trade union rights, health and safety at work, etc.), and (iii) respect for human rights, anti-corruption and bribery matters (i.e., information on the prevention of human rights abuses and on measures in place to combat corruption and bribery).

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Transparency is mainly achieved through publication of information in a company's annual accounts, on its website (see questions below) and in the Belgian Official Journal. This is essentially the responsibility of the board of directors.

As far as disclosures are concerned, the responsibility lies with the person who is legally required to disclose certain information (e.g. disclosure by directors or persons in charge of executive management of dealings in the company's shares for their own account or disclosure by shareholders when they meet certain thresholds of ownership).

5.2 What corporate governance-related disclosures are required?

In addition to the mandatory disclosures discussed under questions 2.6, 3.4 and 4.3, the Royal Decree of 14 November 2007 on the obligations of issuers of financial instruments admitted to trading on a regulated market provides that listed companies are required to publish annual accounts, half-yearly and quarterly financial reports (or, in the absence of the latter, interim management reports on the major events and transactions and their possible impact on the financial situation of the company).

Listed companies are also required to immediately communicate any inside information that directly or indirectly concerns them, unless a specific exemption applies; in which case, the disclosure of the information may be delayed.

In the context of public takeover bids, target companies are required by law to inform the FSMA and the bidder of any decision to issue securities carrying voting rights or giving access to such voting rights, or of any decision which may result in the failure of the takeover bid.

In addition, general transparency provisions in the BCC require the publication of basic company details in the Belgian Official Journal, such as the company's registered office and any change thereof, the publication of the appointment of persons authorised to represent the company such as directors and those in charge of daily management, the appointment of the statutory auditor, and the articles of association and any amendment thereof. Upon publication, such decisions are enforceable against all third parties.

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

If certain thresholds are met, public limited liability companies are required by law to appoint a statutory auditor. Such auditors are in charge of monitoring the financial situation and the annual accounts of the company. Each year, auditors must issue a report on the annual accounts (prior to their approval), in which they confirm the conformity of the annual accounts with the provisions of the BCC and the company's articles of association and indicate whether the accounts give a true and fair view of the company's financial situation.

In addition, statutory auditors are required to issue special reports in relation to specific transactions, such as contributions in-kind, mergers or the distribution of interim dividends.

Finally, Article 138 BCC provides that when auditors discover important facts that could jeopardise the continuity of the company, they should notify the board of directors thereof in writing. The board is subsequently required to convene in order to discuss any measures that should be taken in order to preserve the company's continuity within a reasonable term. The auditors must be notified of the deliberations that have taken place and the measures that have been adopted within a month from their initial notification to the board. In the absence of such a notification, or if the auditors are of the opinion that the proposed measures will not be sufficient to redress the situation within a reasonable term, the auditors may (but are not obliged) to communicate their findings to the president of the commercial court.

5.4 What corporate governance-related information should be published on websites?

Listed companies must publish certain financial information on their website, including the annual accounts, the half-yearly and quarterly financial reports and the interim management reports.

In addition, Article 533*bis* BCC provides that specific information should be made available on the company's website in the period between the issuance of the convening notice for a general shareholders' meeting and the date of such a meeting. This information includes: (i) the convening notice, which should contain information on the date, place and agenda of the meeting and the exercise of voting rights; (ii) the number of shares and voting rights (as the case may be, per category of shares); (iii) the documents submitted to the shareholders; (iv) for each point on the agenda, a draft proposal of decision or comments from the board of directors; and (v) the forms to be used for voting by proxy or by letter.

Finally, the CG Code requires that listed companies make certain information permanently available on their website, in particular:

- the company's articles of association and the corporate governance charter;
- all relevant information and documentation regarding the shareholders' right to participate and vote at the general shareholders' meetings;
- a timetable on periodic information and shareholders' meetings; and
- the results of the votes and the minutes of the shareholders' meetings, as soon as possible after the meetings.

Steven De Schrijver
Astrea
Avenue Louise 235
Louizalaan
B-1050 Brussels
Belgium

Tel: *+32 2 215 97 58*
Fax: *+32 2 216 50 91*
Email: *sds@astrealaw.be*
URL: *www.astrealaw.be*

Steven De Schrijver is a partner in Astrea's corporate and M&A department. Steven has 25 years' experience in advising Belgian and foreign companies on mergers and acquisitions, with a strong focus and unique experience in technology-related transactions. He offers maximum availability and responsiveness while maintaining a personalised and business-oriented approach. He serves a principally international clientele with an outstanding price proposition and the added value of a personalised service and round-the-clock availability. Whatever the issue is, Steven's priority is to provide his clients with pragmatic solutions which enable them to achieve their strategic business goals. His goal is always to provide legible, to-the-point and practical advice.

astrea

Astrea is one of the leading independent law firms in Belgium, with offices in both Brussels and Antwerp, the two largest economic and financial centres in the country. It currently has 13 partners and 40 fee-earners in total, and an impressive international and domestic client base. The lawyers at Astrea have a very business-oriented, pragmatic and flexible no-nonsense approach, and are known for offering good value.

Our experience includes all types of private equity and venture capital transactions, private M&A and capital market transactions, often with cross-border elements. Our transactional team can benefit from state-of-the-art assistance in all areas of law, including competition law, real estate law, environmental law, employment law, IP and IT law, privacy and regulatory law (e.g., gaming and gambling, life sciences).

Bermuda

Taylors in association with Walkers

Natalie Neto

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities in Bermuda are private companies limited by shares. There are two types of private companies limited by shares:

- exempted companies ("exempted companies"): which are companies that are owned by non-Bermudians and which carry on business outside Bermuda from a principal place of business in Bermuda; and
- local companies ("local companies"): which are companies that: (i) are controlled by Bermudians, where at least 60% of the total voting rights in the company are exercisable by Bermudians and the percentage of directors and of beneficial ownership in the company's shares is not less than 60% (known as the "60/40 Rule"); or (ii) have a licence from the Minister of Finance of Bermuda to carry on business notwithstanding that the criteria in (i) is not met.

The 60/40 Rule does not apply to companies whose shares are listed on a designated stock exchange (or the subsidiary of such a company) nor to companies within certain prescribed industries, including insurance, telecommunications, energy, hotel operations, banking or international transportation services (by ship or aircraft).

Exempted companies may conduct business from within Bermuda with entities outside Bermuda or with other exempted undertakings in Bermuda. Exempted companies are prohibited from carrying on business in Bermuda except in certain circumstances, which include dealing in securities and acting as manager or agent for, or consultant or advisor to, affiliated exempted companies or permit companies to the exempted company, or to an exempted partnership in which the exempted company is a partner, or carrying on reinsurance business or, in the case of mutual funds, selling or distributing their shares in Bermuda.

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

Legislation and Common Law

The legal system in Bermuda is based on statute and common law. Decisions of the English courts are highly persuasive in Bermuda. The Bermuda court system is comprised of the Magistrate's Court, the Supreme Court (the "Supreme Court") and a Court of Appeal, with certain cases being subject to a final right of appeal to the Privy Council of the United Kingdom.

All Bermuda companies are subject to the provisions of the Companies Act, 1981 (as amended) (the "Companies Act"). The Companies Act, together with applicable common law rules, is the primary source of corporate governance regulation of Bermuda companies.

For companies which are listed on the Bermuda Stock Exchange (the "BSX") corporate governance is also promulgated through the BSX Listing Regulations (the "Listing Regulations"). There are 10 sections to the Listing Regulations. Section I – Listing Regulations is generic and applicable to all issuers and the remaining nine sections are applicable to specific types of products or securities. The Listing Regulations are available on the BSX website at www.bsx.com.

Constitutional Documents

In addition, corporate governance is regulated by the constitutional documents of a company. Such documents include the memorandum of association (the "memorandum") and bye-laws ("bye-laws"). The memorandum will state whether the objects of a company are restricted (for example in the case of a special purpose vehicle) or unrestricted. A Bermuda company has the capacity, rights, powers and privileges of a natural person, subject to any specific provisions in the memorandum. The bye-laws govern the relationship between the company and its shareholders and detail the rights and duties of each. The bye-laws will contain provisions relating to the convening and conducting of meetings of the board and shareholders (among other things).

Corporate governance matters may also be dealt with in a shareholders', joint venture or investment agreement relating to the relevant company, whose provisions may override those set out in the bye-laws, subject always to the Companies Act.

Regulatory Bodies

The Bermuda Monetary Authority (the "BMA") regulates Bermuda's financial services sector. The BMA develops risk-based financial regulations that it applies to the supervision of Bermuda's banks, trust companies, investment businesses, investment funds, fund administrators, money service businesses, corporate service providers and insurance companies. The responsibilities of the BMA also include issuing Bermuda's national currency (the Bermuda Dollar, which is pegged to the United States Dollar), managing exchange control transactions, assisting other authorities with the detection and prevention of financial crime and advising the Bermuda Government on banking and other financial and monetary matters. Further information concerning the BMA can be found on its website www.bma.bm.

The BSX is today the world's preeminent fully electronic securities market offering a full range of listing and trading opportunities for international and domestic issuers of equity, debt, depositary receipts, insurance-linked securities and derivative warrants. The BSX is supervised and regulated by the BMA and, as noted above, promotes

corporate governance standards through the Listing Regulations. As a full member of the World Federation of Exchanges, the BSX has been acknowledged as meeting the highest regulatory and operational standards. The BSX is not bound by the European Union Listings Directive or the United States Securities Exchange Commission regulations and has a light but effective regulatory environment.

Corporate Governance Codes

Bermuda has not adopted a formal overarching corporate governance code but there are several industry-specific corporate governance codes ("Industry Codes") issued by the BMA in its capacity as the regulator for such industries:

Insurance:

- The Insurance Code of Conduct (Revised July 2015): establishes duties, requirements and minimum standards to be complied with by every (re)insurer that is registered under section 4 of the Insurance Act 1978 (as amended), including the procedures and sound principles to be observed by such persons. Failure to comply with the provisions set out in the Code will be a factor taken into account by the BMA when determining whether a (re)insurer is meeting its obligation to carry out its business in a sound and prudent manner. This Code requires every registered (re)insurer to establish and maintain a sound corporate governance framework, which provides for appropriate oversight of the (re)insurer's business and adequately recognises and protects the interests of policyholders. The framework should have regard for international best practice on effective corporate governance. Corporate governance includes principles on corporate discipline, accountability, responsibility, compliance and oversight.
- The Insurance Manager Code of Conduct 2016 (Issued August 2016): requires insurance managers to implement a documented corporate governance framework which includes policies and processes, and controls which the BMA considers appropriate given the nature, scale, complexity and risk profile of the insurance manager. The Code also includes requirements and recommendations with respect to the composition of the board of an insurance manager and management of conflicts of interests. Insurance managers are expected to comply with both the letter and spirit of this Code.

Trusts, Investment Business and Fund Administrators:

- The Corporate Governance Policy for Trusts (Regulation of Business Act 2011), Investment Business Act 2003 and Investment Funds Act 2006 (Issued January 2014) (together the "Regulatory Acts") (the "Regulatory Acts Policy"): applies to entities that are licensed under the Regulatory Acts and sets out nine principles and related guidance which reinforce key elements of corporate governance. All licensed entities are required, as a statutory minimum licensing criterion, to implement corporate governance policies and procedures. The BMA takes into consideration compliance with the Regulatory Acts Policy when assessing whether a licensee meets the criterion. The Regulatory Acts Policy consists of principles and underlying guidance. The principles are the core of the policy and the BMA expects licensed entities to comply with them. In assessing compliance, the BMA will adopt a proportional approach that reflects the size, complexity, structure and risk profile of the relevant entity's business and recognises that approaches to corporate governance among different institutions may vary notwithstanding the application of the general principle of proportionality.

Banking:

- The Corporate Governance Policy for Banks and Deposit Companies Act 1999 (Issued January 2012): this Code applies to deposit-taking companies licensed under the Banks and Deposit Companies Act 1999 and sets out 13 principles and related guidance which reinforce key elements of corporate governance applicable to such companies.

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

Bermuda companies, like many others, are facing difficult challenges with respect to corporate governance issues, particularly how to ensure effective monitoring, implementation and oversight of global risks such as money laundering and terrorist financing. Current hot topics include:

- increasing the number of independent directors on boards (in line with the industry codes);
- board diversity;
- risk management and oversight;
- succession planning and avoiding entrenchment at board level.

Shareholder involvement/engagement is of increasing importance, as well as dealing with the impact of technology, data protection and cyber-security and putting in place effective policies and procedures to manage any associated risk.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Bermuda's government, regulators, companies and stakeholders, are generally focused on the promotion of long-term investment, strategy and performance, led by the significant (re)insurance sector. The current focus on corporate governance and risk management across all sectors is indicative.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The directors manage the business, including the strategic direction, operation and management of Bermuda companies, subject to any rights reserved to the shareholders under the Companies Act, the bye-laws and any shareholders' agreement.

A Bermuda court will generally refuse to interfere with the management of a company at the insistence of a minority of its shareholders who are dissatisfied with the conduct of the company's affairs by the majority or by the board of directors (who are normally elected by the majority). The fundamental proposition of law (under the rule in *Foss v Harbottle* (1843) 67 ER 189) is that a minority shareholder cannot sue for a wrong done to the company or bring proceedings to rectify an internal irregularity in circumstances where the majority can lawfully ratify the same. Generally, the exceptions to this would include:

- where the act complained of is *ultra vires* or illegal and not capable of ratification by the majority;
- where the act complained constitutes a fraud on a minority where the wrongdoers control the company;
- where the act complained constitutes an infringement of individual rights of shareholders, such as the right to vote; and
- where the company has not complied with provisions requiring the act be approved by a special or extraordinary majority of the shareholders.

Rights of all shareholders:

- Personal actions: Any shareholder may complain in their own name and on their own behalf of a wrong done to them as shareholders by other shareholders or by the company, including, under the exceptions to the rule for *ultra vires* acts, breaches of the company's memorandum or bye-laws or an infringement of their personal rights.
- Derivative actions: A derivative action (where the shareholder sues in the company's name rather than its own) may be brought where the act complained of is *ultra vires* the company. A derivative action may also be brought against the directors and promoters who have been guilty of a breach of their fiduciary duties.
- Acts which are prejudicial to the interests of a shareholder: Pursuant to section 111(1) of the Companies Act, any shareholder may make an application to the Supreme Court for a petition for an order if the affairs of the company are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the shareholders, and seek either a winding-up order or an alternative remedy if a winding-up order would be unfairly prejudicial to them.

Matters requiring shareholder approval under the Companies Act

The bye-laws of the company will typically specify the relevant majorities for approval by the shareholders on specific matters. The Companies Act provides that certain matters require authority by a company in the general meeting (as well as, in some cases, express authority in the bye-laws). If a higher majority is not specified in the bye-laws, this would mean a simple majority of votes cast at the meeting. Such matters include:

- converting preference shares into redeemable preference shares;
- increasing or reducing the company's share capital;
- altering a company's share capital;
- electing the directors of the company;
- continuances and discontinuances;
- loans to directors;
- waiving the convening of annual general meetings or the presentation of accounts to shareholders and/or the appointment or removal of an auditor; and
- winding-up the company on a voluntary solvent basis.

Subject to any contrary provision in the company's bye-laws, shareholders holding at least 75% of the company's issued share capital have certain rights under the Companies Act including:

- to provide written consent to alter or abrogate all or any special rights attaching to shares or classes of shares (where the memorandum or bye-laws do not preclude such variation);
- to agree to any compromise or arrangement at a meeting of shareholders (shareholders in this case must represent 75% in value of those present and voting at the meeting); and
- to approve an amalgamation or merger.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders are rarely responsible for the corporate governance of Bermuda entities. There are no institutional investor or shareholder groups in Bermuda that have particular significance in corporate governance.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

All meetings of shareholders are known as general meetings. An annual general meeting ("AGM") must be held once in each calendar year, unless the company has elected to dispense with the holding of the relevant AGM. The following are typically dealt with at an AGM:

- establishing the minimum and/or maximum number of directors;
- electing the directors and determining their remuneration;
- considering the financial statements and auditor's report (unless the laying of such financial statements and/or appointment of an auditor has been waived by the directors and shareholders); and
- reappointing the auditors (unless the appointment has been waived).

The directors may also convene general meetings other than AGMs. Such meetings are called special general meetings ("SGM"). There must be at least five days' prior notice of general meetings (or such longer period of notice as is specified in the bye-laws). Such notice should specify the place, date and time and the general nature of the business to be transacted. All shareholders entitled to attend and vote at a general meeting are entitled to receive notice.

Any holder of shares representing 10% or more of the company's issued share capital is entitled to requisition the convening of an SGM pursuant to section 74(1) of the Companies Act. If the directors do not convene an SGM within 21 days from the date of the deposit of the requisition, the requisitionists, or any of them representing more than 50% of the total voting rights of all of them, may themselves convene a meeting (within three months of the date of the requisition).

Section 77A of the Companies Act permits written resolutions of shareholders *in lieu* of holding a physical shareholders' meeting, unless the bye-laws otherwise provide. Notice of the resolutions must be given to all shareholders. Written resolutions are passed when signed by those shareholders who would be entitled to pass a resolution at a general meeting of the company or by all of the shareholders.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The liability of a shareholder in a Bermuda company limited by shares is limited to the unpaid amounts (if any) in respect of their shares. This is the corollary to the principle of separate corporate personality established in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

As a consequence, a company is responsible for its own actions. A company's liability is also its own and does not pass through to its shareholders. The circumstances in which the court will ignore the principle of a company's separate liability and will hold the shareholders accountable for the company's actions (known as '*piercing the corporate veil*') are therefore very exceptional. Such cases would generally involve the legal personality of the company being used for the purpose of wrongdoing where no other remedy is available.

Under section 246 of the Companies Act, if during the course of the winding-up of a company it appears that any business of the company has been carried on with the intention to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, any person who was knowingly a party to the carrying on of the business in such manner may be held personally liable without any limitation of liability, for all or any of the debts or other liabilities of the company. Further, the officers of a company may be held liable to imprisonment for offences committed under section 243 of the Companies Act during the course of a winding-up of the company and for this purpose '*officer*' means '*any person in accordance with whose directions or instructions the directors of a company have been accustomed to act*' (which may include the shareholders in certain circumstances).

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Please refer to the response to question 2.1 above.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

All issues and transfers of Bermuda registered securities require the prior consent of the BMA, unless a general or specific permission has been granted in respect of such issues or transfers. The BMA has issued a public notice containing the current general permissions available which include where shares of a company are listed on a recognised stock exchange. It is also possible for a company to obtain specific 'blanket' permission to the issue or transfer of shares, for example, pursuant to an employee share incentive scheme.

Notification to the BMA is required by a shareholder or a prospective shareholder of new or increased control in a (re)insurance company that is registered under the Insurance Act 1978, where the new or increased control is at a level of 10%, 20%, 33% and 50%. The new or increased control can be obtained through either a transfer or new issue of shares and can take place at the direct, intermediate or ultimate level of shareholding. In the case of private companies, no person may become a new or increased shareholder unless the BMA has confirmed there is no objection (or failed to confirm within the required 45-day period).

For BSX listed companies, the directors or executive officers must deliver written notice and details to the BSX if they become aware of any shareholders who (i) acquire a beneficial interest, control or direction of 5% or more of the company's securities (or convertible securities) or any change in the identity of such holder, or (ii) has a beneficial interest in or exercises control or direction over 5% or more of the company's securities (or convertible securities) and the shareholder acquires an additional 3% or more of the company's securities.

As a result of recent enhancements to Bermuda's beneficial ownership disclosure regime, Bermuda companies are required to keep and maintain minimum required information concerning the persons who ultimately own or control 25% or more of the shares, voting rights or interests in the company, through direct or indirect ownership thereof or who control a company by other means. Companies are required to file information concerning such persons and any changes to such persons with the BMA.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Information concerning the intentions of the shareholders of Bermuda companies which are seeking a licence to do business in Bermuda may need to be provided with respect to such applications but otherwise there are generally no such disclosure requirements.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Management of a company is typically the responsibility of its board of directors. Subject to the bye-laws, the directors may exercise all of the powers of a company except those powers that are required by the Companies Act to be exercised by the shareholders of the company. The directors may delegate day-to-day management to committees and to executive officers.

Directors can be either individuals or corporate entities and sole directors are permitted.

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

The board of directors is usually appointed by the shareholders and the method of appointment is typically set out in the bye-laws, although other documents such as a shareholders' or investment agreement may contain provisions relating to the appointment and removal of directors. Absent any specific provisions in either the bye-laws or such agreements, the first board of directors is elected by the shareholders at the first statutory general meeting of the company and thereafter by the shareholders typically at each AGM, unless the company has dispensed with the requirement to hold them. Directors are usually appointed to serve until the next AGM or, if earlier, until their successor is appointed or elected. However, the bye-laws may provide for longer terms of service and for retirement by rotation.

The bye-laws usually expressly specify the circumstances in which a director must vacate office (for example, if he becomes bankrupt or of unsound mind). Subject to contrary provisions in the bye-laws, the shareholders may also remove a director at an SGM convened for the purpose and appoint another person in his place. At least 14 days' notice of the SGM must be given to the relevant director(s), who would be entitled to attend and be heard at the SGM.

The shareholders may also authorise the remaining directors to fill any vacancies arising on the board.

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

The bye-laws often provide that the amount of the directors' fees shall be determined by the company in the general meeting. Subject to any restrictions in the bye-laws, the board is typically empowered to determine the remuneration of the directors and there is generally no obligation to disclose the remuneration of each director.

However, a prospectus issued by a company applying for listing on the BSX must contain details of the aggregate remuneration and benefits in kind given to directors in the last financial year.

Some of the Industry Codes make recommendations with respect to the remuneration of the board and management.

Directors do not have to be employees of the company. There is no right for shareholders to inspect directors' service contracts.

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

There is no requirement for a director to hold shares in a Bermuda company.

For listed companies, an internal code of dealing is required which must, as a minimum, prohibit them from dealing in a company's shares for a period from when they become aware of the interim and full year's results of the company until those results are announced.

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

The method for convening and conducting board meetings will usually be set out in the bye-laws, which typically give the board considerable discretion to regulate their own affairs. The bye-laws will typically provide that the length of notice for calling a board meeting must be reasonable in the circumstances. Matters are usually decided by simple majority vote but the bye-laws may prescribe higher majorities or the consent of independent directors, for example. The chairman may also have a casting vote.

A quorum must be in attendance throughout the meeting. The bye-laws will also usually contain provisions requiring declaration of material interests which may prevent a director from being able to vote and count in the quorum (particularly for listed companies). The Companies Act provides that a director who discloses his material interest either in writing or at the first available opportunity may vote and be counted in the quorum, subject to the bye-laws.

Unless the bye-laws provide otherwise, board meetings may be held telephonically or by video conference. The bye-laws usually permit written resolutions of the directors *in lieu* of meetings and such written resolutions typically require unanimous consent, although some companies provide for written resolutions to be valid once signed by a specified majority of the directors.

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

Common Law Duties:

At common law, a director owes a fiduciary duty and a duty of skill and care to the company. Bermuda law follows the English common law principle that such duties are owed to the company and not individual shareholders. Where a company is solvent, a director's duty to act in the best interests of the company includes having regard to the interests of shareholders. But when a company is insolvent, the board must also have regard to creditors' interests.

The fiduciary duty has four aspects:

- a duty to act in good faith;
- a duty to exercise powers for a proper purpose;
- a duty to avoid conflicts of interests with the company; and
- a duty not to take a personal profit from opportunities resulting from his directorship.

The duty of skill and care:

- requires a degree of skill (although the test is subjective);
- requires diligent attention to the business; and
- entitles a director to rely on others (co-directors or company officers) but not to the extent of absolving a director from his responsibility by delegation to others.

Statutory Obligations:

In addition, the following statutory provisions, many of which arise in the context of insolvency, are applicable to directors and give rise to obligations and potential liability:

- Section 97 of the Companies Act (Duty of Care): requires a director in the exercise of his powers and the discharge of his duties, to act honestly and in good faith with a view to the best interest of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A director will be presumed not to act in good faith if he fails to disclose an interest in a material contract or person party thereto.
- Section 237 of the Companies Act (Fraudulent Preference): applies to transfers or dispositions (including mortgages, conveyances and delivery of goods) made within six months of the winding-up of a company, that are carried out with the dominant intention of preferring one creditor over another at a time when the company was unable to satisfy all creditors' claims in full.
- Section 246 of the Companies Act (Fraudulent Trading): enables a court (on the application of a liquidator or any creditor or shareholder of the company) to make an order imposing personal liability on directors for any or all of the company's debts if he is knowingly a party to fraudulent trading, which occurs when a company carries on business with intent to defraud creditors, or any other person's creditors or for any fraudulent purpose. Bermuda courts are guided by the standard borrowed from the UK's 'wrongful trading' provisions.
- Section 36C of the Conveyancing Act 1983 (Transactions at an Undervalue): a creditor may seek to set aside a disposition of the company's property at an undervalue.

Civil and Criminal Liability:

A director can be criminally liable under the general laws of theft and fraud. If a company commits an offence under the Proceeds of Crime Act, 1997, and it is shown to have been committed with the consent and connivance of an officer of the company or can be attributable to any neglect on his part, the officer and the company are liable under that Act.

Further, the Bribery Act 2016 provides for indictable offences of bribing and being bribed, including bribery of foreign public officials.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Please see our answer to questions 1.3 and section 3 above.

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

A company may, either by contract or pursuant to its bye-laws, indemnify its officers against or exempt them from any liability in respect of any loss arising or liability for which the officer may be guilty in relation to the company other than in respect of fraud or dishonesty. A company may purchase and maintain insurance for the benefit of its officers.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board of directors is responsible for the strategic direction of the company.

4 Other Stakeholders

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

Employees do not generally have a significant role in corporate governance.

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

There are no institutional investors or other shareholder groups or other stakeholders that have particular significance in corporate governance in Bermuda.

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

Bermuda companies are not currently legally required to, and currently do not generally report on, social, environment and ethical issues.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The board is responsible for ensuring that any rules regarding disclosure and transparency are adhered to.

5.2 What corporate governance-related disclosures are required?

Bermuda companies are required to file lists of directors, and any changes to such list, with the Bermuda Registrar of Companies ("RoC") which is published on the Government website. Pursuant to recent changes to the Companies Act, companies will also be required to file certain provisions of their bye-laws with the RoC which will not be publicly available. Listed companies must also comply with the disclosure requirements under the Listing Regulations.

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

This is not applicable.

5.4 What corporate governance-related information should be published on websites?

Although there is no legal requirement, larger and/or listed companies, we would recommend that copies of all constitutional documents, board committee charters and any corporate governance policies or procedures (or a summary of them) are published on the website.

Natalie Neto
Taylors in association with Walkers
Park Place
55 Par La Ville Road, Third Floor
Hamilton HM11
Bermuda

Tel: *+441 242 1533*
Email: *Natalie.Neto@walkersglobal.com*
URL: *www.walkersglobal.com/index.php/bermuda*

Natalie advises on a wide range of local and international corporate, commercial and regulatory matters, with particular focus on all aspects of M&A transactions for both public and private companies, including takeovers, tender offers and squeeze outs, amalgamations, mergers, and schemes of arrangement. She also advises on private equity investments, debt and equity capital markets transactions, banking and finance transactions.

Natalie has significant experience advising global corporate groups in complex restructuring projects involving Bermuda companies, LLCs and partnerships including redomiciliations. Natalie also advises companies and directors in respect of corporate governance and regulatory matters, including directors' fiduciary duties and responsibilities.

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Bolivia

Jorge Inchauste

José Bernal

Guevara & Gutiérrez S.C.

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities to which corporate governance regulations apply in Bolivia, are Corporations (*Sociedades Anónimas* or *"***S.A.***"*) and, to a lesser degree, Limited Liability Partnerships (*Sociedades de Responsabilidad Limitada* or "**SRL**").

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

Corporate governance in Bolivia is mainly regulated by Book 1 Title 3 of the Bolivian Commercial Code and by the articles of incorporation of each corporation. In addition, the Bolivian Comptroller of Corporations (*Autoridad de Fiscalización de Empresas* or "AEMP"), a regulator for enterprises in Bolivia, issued its Guidelines of Corporate Governance in 2011. Adopting and complying with these guidelines is not mandatory for any corporation in Bolivia, and in practice they are not usually referenced and considered in corporate incorporation documents or by-laws.

Certain specific industries are under the supervision of regulatory entities that may determine and affect the corporate governance system in companies operating in such industries. This is the case for financial institutions and banks, which are under the supervision of the Bolivian Financial System Authority (*Autoridad de Supervisión del Sistema Financiero* or "**ASFI**"), which monitors and enforces compliance with financial regulations, and even with regulations regarding the creation and composition of corporations engaged in financial services practices. ASFI issued Rules on Corporate Governance on December 2012 (amended on September 2015), which came into force a year later, for all entities under its tuition. Compliance with these rules, contrary to the Guidelines of Corporate Governance issued by AEMP for all other industries and entities, is mandatory for all financial institutions in Bolivia.

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

One of the notable aspects of corporate governance in Bolivia is that the law does not specifically deal with regulations regarding fiduciary duties of directors and executive officers. A possible reason for this lack of interest on the part of the legislator is the fact that the structure of most public corporations in Bolivia involves a major shareholder who owns a majority of the corporation's stock (unlike other countries in the world, where dispersed ownership is common). For the purposes of this analysis, we are going to refer to the Bolivian corporation structure as a 'concentrated ownership' structure. In this structure, the dominant shareholder usually owns a sufficient amount of shares to allow him to appoint all directors of the board, or at least a majority of them. As a result, the possibilities for 'entrenchment' by directors who reject, for example, a friendly acquisition offer, are minimal, while in other countries, the more active M&A markets have been the main propeller of jurisprudential and regulatory development on corporate governance and the duties of directors.

Given the predominantly concentrated ownership of Bolivian companies, the challenges that the country faces are not related to agency problems between owners and administrators of companies, but rather related to protection of minority shareholders' interests. Conflicts of interests are commonly not vertical (between shareholders and directors), but rather horizontal (between majority shareholders and minority shareholders, if any).

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The risks of short-termism are not particularly relevant in Bolivia, and are not on the radar of the legislators. This might be due to the concentrated ownership structure that prevails in Bolivian corporations. The risks of short-termism are commonly enhanced by the existence of a tangible separation between ownership and management, where there may exist potential conflicts of interests between investor shareholders and management of the corporate entity.

Because of the concentrated ownership structure of Bolivian companies, there is minimum conflict of interests between the majority shareholders, and the management of the company, therefore, short-term objectives or long-term value creation depend, mainly, on the policies of the majority shareholder.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Decisions taken by shareholders' meetings are the most important governing actions in the functioning of corporations, as shareholders have the ultimate power to take decisions regarding key aspects of

the corporate governance of corporations, such as electing directors and defining their responsibilities. Under Articles 285 and 286 of the Commercial Code, these corporate decisions are strictly reserved to the vote of shareholders and cannot be taken by the board of directors.

Ordinary meetings have exclusive competence to approve the balance sheet and accounting books of the corporation, the payment of dividends to the shareholders, and the appointment or removal of directors. Extraordinary meetings have exclusive competence to determine the amendment of the by-laws, the issuing of stock, bonds and debentures, or the dissolution of the corporation. Extraordinary meetings can also be held in order to address any other business related issue, concerning the corporate entity.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Bolivian norms do not provide for any specific responsibilities that shareholders may have as regards to the corporate governance of the corporate entities in which they are invested.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two kinds of meetings that may be held by the shareholders. The first is the ordinary meeting, commonly referred to as the annual meeting, because it must be held at least once a year to comply with the requirements of the Registry of Commerce (but can be held more frequently). The ordinary meeting has exclusive competence to approve the balance sheet and accounting books of the corporation, the payment of dividends to the shareholders, and the appointment of directors.

The second kind of meeting that can be held by shareholders is an extraordinary meeting, which has exclusive competence to determine the amendment of the by-laws, the issuing of stock, bonds and debentures, or the dissolution of the corporation. Extraordinary meetings are not mandatory, and may take place as many times in a year as necessary.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders do not owe duties to the corporate entity, or to other shareholders in the corporate entity, except for law mandated rights of the minority shareholders, which must be respected by majority shareholders.

Shareholders cannot be held liable for acts or omissions of the corporate entity, on the base of their ownership of shares in the corporation. If shareholders also act as directors or managers of the corporate entity, then of course they will have a fiduciary duty to act in the best interest of the corporate entity and may be held personally responsible for any losses incurred by shareholders.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders may seek enforcement actions against the corporate entity and/or the members of its management body through an administrative claim to the Company Regulator AEMP if the requisite annual ordinary shareholder meeting was not duly convened or if convened it did not deal with certain statutory requirements. In addition, the Company Regulator may impose fines to the corporate entity and to the management body if it finds that the regulations of the Commercial Code and the company by-laws were not adequately complied with. Shareholders may also seek enforcement actions through claims against the corporate entity/entities and/or members of the management body. Such claims are generally referred to arbitration by the company by-laws.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Bolivian laws do not impose limitations on, or disclosure requirements, in relation to the interests in securities held by shareholders in corporate entities.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no disclosures required regarding intentions, plans or proposals of shareholders with respect to the corporate entities in which they are invested.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

S.A.s are managed by a board of directors. Boards of directors must be composed of no less than three and no more than 12 directors, and its members are appointed by decision of the shareholders during the shareholders' ordinary meeting. By-laws of the company may provide for specific restrictions applicable to boards of directors (for example, staggered boards).

The representation of the company is vested in the chairperson of the board of directors who, pursuant to Article 314 of the Commercial Code, is the official representative of the company, but the representation of the board may also be delegated to other directors and executive managers, if the by-laws of the corporation contemplate the possibility.

The management faculties are commonly delegated to a general manager or CEO of the corporation, by means of a general power of attorney for administration purposes, granted by the totality of the board in representation of the corporation, which can enable the company to have a shared representation (by the board and by the CEO). In practice, the representation of the corporation is usually delegated to a CEO in medium-sized and large corporations, but it remains with the chairperson of the board of directors in the case of smaller businesses in which, frequently, the shareholders of the corporation also play the role of directors of the board.

Although managers and executives may represent the corporation (by means of powers of attorney) in the executive and administrative duties of the corporation, the delegation of power to them does not undercut the responsibilities and overseeing duties of the board of directors.

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

Under the Commercial Code, boards of directors must be composed of no less than three and no more than 12 directors. The members of the board are appointed by decision of the shareholders during the shareholders' ordinary meeting, which must be held at least once a year. The shareholders can remove directors and can also re-elect directors for indefinite periods, unless the articles of incorporation of the particular corporation establish limitations. In general terms, the Bolivian Commercial Code allows for many of the internal rules governing corporations to be simply decided by shareholders or specified in the by-laws of the corporation.

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

Article 320 of the Bolivian Commercial Code states that the remuneration of the board needs to be contemplated in the by-laws of the corporation. This article has two important implications: (1) remuneration not being mentioned in the by-laws implies that the service of the board is unremunerated (this provision is particularly designed bearing in mind the cases of small corporations where sometimes all the shareholders act as both shareholders and directors of the corporation); and (2), remuneration of directors is established by the shareholders in the by-laws and can thus only be modified by amending the by-laws.

In the case of medium-sized and large corporations, it would be unusual for directors not to be paid for their services. Normally, by-laws do not establish an exact amount, but instead provide a mechanism that determines the remuneration of directors in connection to a measurable factor, such as the annual earnings of the corporation. For such cases, Article 320 of the Bolivian Commercial Code provides that the maximum amount of remuneration that the board of directors may receive is 20 per cent of the net profit of the corporation in any particular year. If the company suffers losses during the year, the shareholders' meeting needs to expressly authorise the amount of remuneration that will be paid.

On the other hand, remuneration of senior management is mandatory under the Commercial Code, but there are no specific regulations determining limits or minimum amounts that may be paid for the services of the CEO. In the case of financial institutions, remuneration of directors and the management team cannot exceed 20 per cent of the administrative expenses of the entity, under the Rules on Corporate Governance issued by ASFI.

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

There are no limitations or disclosure provisions, on interests in securities held by members of the management body. Article 310 sets forth a list of characteristics that impede the appointment of a person as director of a corporation, including the existence of a conflict of interests between the person and the corporation. This broad provision encompasses possible interests in securities held by members of the managing body, in other corporate entities, which may create conflicts of interests.

The above-mentioned article of the Bolivian Commercial Code applies the criteria of 'conflicts of interest' in a broad manner and there is no specific case law that discusses or analyses the actions or situations that may create 'conflicts of interest'. The wording is very peculiar because it establishes that 'conflicts of interest, judicial claims or debts with the corporation' are elements that impede persons from serving as directors, meaning that a 'conflict of interest' is not defined as having a judicial claim or a debt with the corporation, but instead that having a 'conflict of interest' may encompass other things as well. However, it is not common, in practice, for appointments of directors to be challenged on any of these bases, and when there are, conflicts of interest are mostly linked to economic ties (creditor-debtor relationship) or family ties.

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

Article 315 of the Commercial Code, states that the by-laws of the corporation must determine, among other things, the frequency of the meetings of boards of directors, and how they will be communicated to the members of the board. Commonly, there are minimum formalities required for summoning a board meeting.

Minutes of the meeting must be held and copied into a notarised book, containing a basic description of the points raised during the meeting.

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

Bolivian legislation sets out the responsibilities of the board of directors in a very broad way, stating that the board of directors is responsible for the administration of the company and its representation, and that the by-laws of the corporate entity may describe in further detail the specific duties of the management body.

Regarding legal duties, article 164 of the Commercial Code imposes on the management body the duties of 'diligence, prudence and loyalty'. Directors may be held accountable and jointly liable for their actions if they break their duties of diligence, prudence and loyalty towards the corporation. However, the definition and scope of the obligations of 'diligence, prudence and loyalty' have not been developed by specific regulation or by a clear jurisprudential line. Thus, it is generally hard to argue that there has been a breach of the duties of the directors, particularly if their diligence and prudence is being questioned. Breach of loyalty duties, on the other hand, is often linked to undisclosed conflicts of interest, and is thus easier to demonstrate in court.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The principal corporate governance responsibilities of members of the board of directors are in relation to the convening and celebration of the annual ordinary shareholder meetings. At such meeting the board must present the audited financial statements and the company memoir that described the corporate entities endeavours during the last year and the earnings or losses thereof. Failure to timely convene the annual ordinary shareholder's meeting or failure to adequately present the audited financial statements or company memoir may lead to personal responsibility of the board members.

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

Members of the board of directors, management executives, and the comptroller of the company may enter into indemnity agreements

with the company. There are no restrictions in the law regarding this point, and in fact indemnities are a recommended practice, due to the fact that legal representatives of the corporate entity may, in extreme circumstances, be personally exposed to claims by governmental entities, such as the tax and labour authorities.

These situations are, as said, extraordinary, but there are precedents of cases where personal claims have been filled against legal representatives of corporate entities, for alleged non-compliance of obligations pertaining to the corporate entity.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board of directors has broad discretion in the management of the corporate entity, and may set and change the strategy of the corporate entity. The only restriction to the changes that can be implemented by the board of directors, is set by the 'object' or 'purpose' clause, set forth in the articles of incorporation. This clause states the main purpose of the company, and unlike other jurisdictions, the clause cannot be broad and all-encompassing (e.g. "all commercial activities"). It must expressly state the areas and industries where the corporate entity will operate. Therefore, boards of directors cannot redirect the strategy of the company, to activities not covered by the "object" clause of the articles of incorporation. The clauses in the articles of incorporation may be amended and expanded, but shareholders' approval is required.

In practice, and due to the concentrated ownership structure of most Bolivian companies, the strategy of the corporate entities is decided by the majority shareholder, and implemented through the board members appointed by the majority shareholder.

4 Other Stakeholders

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

Employees do not have any specific roles in the corporate governance of the company. Bolivian legislation is considered to be 'employee friendly', because it prohibits, for example, the at-will termination of employment agreements without a cause. In addition, the freedom of employees to create workers unions to represent workers' rights is strongly protected by labour laws.

Despite the fact that labour law in the country provides many advantages for employees over employers, there are no specific regulations protecting the interests of stakeholders inside the decision-taking bodies of corporations, or allowing, for example, the participation of workers unions in the decisions of the board of directors. Even though labour law and corporate governance norms do not complement each other, labour unions in Bolivian companies are important players in decisions regarding compensation bonuses, salary increases, and other labour law related decisions that may be taken by the company.

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

The law does not provide for the participation of other stakeholders in the corporate governance of corporate entities in Bolivia.

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

The 2009 Bolivian Constitution requires that any project or development in relation to the use or exploitation of natural resources must have a 'social licence'. Although there are no general regulations in this regard, specific regulated sectors such as mining, oil and gas and electricity have included specific requirements for companies operating in these sectors. As a result, companies must obtain, in addition to an environmental licence, an agreement with the local community that will be affected by or impacted by any new project. This agreement typically involves commitments from the company to hire a percentage of local workers and to perform certain works for the local community.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Commercial Code imposes basic disclosure obligations to all corporate entities in Bolivia. The Registry of Commerce is in charge of issuing an annual certificate of good standing to the corporations that comply with the basic requirements and obligations imposed by the Commercial Code, such as having one annual shareholder's meeting, registering an annual report on the activities of the company, and so forth.

In order to renew the annual certificate of good standing, corporate entities must file their financial statements before the tax authority in Bolivia, and then file them before the registry of commerce. Financial statements must be prepared by certified accountants, and become public information when registered before the registry of commerce. The management body of the corporate entity is responsible for complying with these requirements each year.

5.2 What corporate governance-related disclosures are required?

The Commercial Code does not impose specific corporate governance-related disclosures on corporate entities. However, S.A.s must file annual reports of their activities, and the annual reports must contain all information deemed to be relevant for the shareholders of the company. In practice, annual reports generally contain basic information on the structure of the corporate governance of the company.

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

As stated above, corporations must present to the ordinary shareholders meeting the annual audited financial statements. Auditors must include in such financial statements their comments on the adequacy of the financial statements presented and the general corporate situation of the company. This may result in observations from the auditors or 'notes' to the financial statements that must be presented to the shareholders. Auditors, as a result, will typically discuss the form and content of these notes with the managing body before publishing them.

5.4 What corporate governance-related information should be published on websites?

Bolivian laws do not mandate the publication of any corporate-governance related information on websites. Recently, however, a new law was enacted to accelerate publication requirements for several corporate-related amendments (for example, increases of capital, amendments to the corporate charter, merger of two corporations, and so forth). The Commercial Code states that corporate amendments required publication in a national newspaper, for specific amounts of times, depending on the case. The new law accelerates the process, because now such amendments are published online in a website administered by the Bolivian Registry of Commerce.

Jorge Inchauste
Guevara & Gutierrez
C. 15 Calacoto, Torre Ketal, of. 402
La Paz
Bolivia

Tel: +591 2277 0808
Email: jinchauste@gg-lex.com
URL: www.gg-lex.com

Jorge Inchauste is a partner at Guevara & Gutiérrez in La Paz since 2002. He is co-head of the corporate/commercial department of the firm, and has been in charge of structuring the development and finance of projects in various matters concerning natural resources in the country. He regularly advises companies on the functioning of their corporate governance mechanisms, and has ample experience in M&A operations.

He holds an LL.M. in International Legal Studies from Georgetown University Law Center, and is admitted to practice law in Bolivia and in the State of New York. During 2001 and 2002, he worked as a foreign associate at Piper Rudnick LLP, in New York, in its corporate and project finance practice group.

Mr. Inchauste is the author of several articles and publications, on merger control, corporate governance, and corporate law in general.

José Bernal
Guevara & Gutierrez
C. 15 Calacoto, Torre Ketal, of. 402
La Paz
Bolivia

Tel: +591 2277 0808
Email: jbernal@gg-lex.com
URL: www.gg-lex.com

José Bernal is a senior associate at Guevara & Gutierrez in La Paz. He has ample experience in negotiation and execution of complex commercial contracts, in project finance operations, in M&A transactions, and in corporate governance. Within the arbitration department, he assisted clients in arbitration proceedings at national and international levels, including investment arbitration cases involving the State of Bolivia.

Mr. Bernal holds an LL.M. in corporate law and governance from Harvard Law School (2014), and is authorised to practice law in Bolivia, and in the State of New York. During 2016, he worked as a foreign associate in the financial law department of the firm Uría Menéndez, in Madrid, Spain.

Mr. Bernal is also an adjunct professor of law at the Private University of Bolivia (Universidad Privada Boliviana), for the courses on contracts and commercial law.

Brazil

Novotny Advogados

Paulo Eduardo Penna

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

In Brazil, there are two main types of corporate entities: limited liability companies (*sociedades limitadas*); and corporations (*sociedades anônimas*). Limited liability companies have a simpler structure and are generally used in small and medium-sized ventures, family businesses and as subsidiaries. Corporations which have a more complex structure are subject to a more encompassing regulation and are geared towards medium and large-sized ventures. As a general rule, corporations are the only entities that can be listed and have securities admitted for public trading.

Although corporate governance is relevant to all types of companies, the answers below cover corporations, focusing on listed corporations.

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

The main sources of corporate governance requirements are corporate legislation, the corporation's organisational documents, securities legislation and stock exchange rules. Shareholder advocacy groups are also increasingly influential through the issuance of guidelines and best practices rules.

Corporate legislation

The primary source for corporate regulation and corporate governance is Federal Law 6,404/1976 ("Corporation Law"), which governs all corporations in Brazil, whether listed or not. In Brazil, only the Federal Congress has the authority to issue laws with regard to corporate matters and the securities market.

The Corporation Law regulates all matters concerning the incorporation, organisation, existence and winding up of corporations, including the issuance of shares and other securities, shareholder meetings, shareholders' rights, operation and management of the corporation, directors' and officers' duties and profit distribution.

In Brazil, important listed corporations are government-controlled. In view of an increase in conflicts between minority shareholders and the controlling shareholder (the government) of such corporations due to accusations of corruption and the use of such corporations as vehicles to implement governmental policies that undermine shareholder value, in the end of 2016 the Brazilian Congress enacted a law (Federal Law 13,303/2016) establishing rules and corporate governance standards that must be followed by government-controlled or owned companies. Except where expressly indicated otherwise, we do not cover in this article the corporate governance rules applicable to government-controlled or government-owned companies.

A corporation's organisational documents

All corporations in Brazil are governed by bylaws (*estatuto social*), which, in addition to defining the corporation's name, its purpose, the location of its head office, the value of its capital stock and the number of issued shares, among other elements, may also establish rules on shareholder meetings, board composition and authority, officers' authority, organisation of other committees of the board, shareholders' rights and many other aspects of corporate governance, to the extent that such matters are not regulated or imposed by the Corporation Law. In the case of a conflict, the Corporation Law will generally prevail over the bylaws. The bylaws can be amended by the shareholder meeting.

Listed corporations are also required to issue a policy for disclosure and use of information. Such a policy will establish standards of disclosure of acts and facts involving the entity and procedures to maintain confidentiality of sensitive information not yet disclosed to the public. Listed corporations are also encouraged to issue a policy for trading of securities by related parties, setting forth standards to be upheld by the corporation, its controlling shareholders, directors, officers and members of the overseeing committees and other committees of the board when trading securities issued by the corporation.

Corporations, especially listed ones, may also adopt additional governing documents, such as codes of ethical business conduct, dividends policies and charters of the board of directors and other committees. Government-controlled corporations and certain listed companies are obliged to adopt a code of business conduct.

Securities legislation

Listed corporations are also subject to Federal Law 6,385/1976, which regulates the securities market and the *Comissão de Valores Mobiliários* (the Brazilian securities and exchange commission, referred to as the "CVM"). They must adhere to the various rules, regulations and guidance opinions issued by the CVM, among which:

- Ordinance 358/2002, which addresses the disclosure requirements and use of relevant information of the corporation.
- Ordinance 361/2002, which regulates tender offers of Brazilian listed corporations, including delisting offers, hostile offers and sale of control offers.

- Ordinance 400/2003, which regulates the public offer for the distribution of securities, including the disclosure and control of inside information before the offer period.
- Ordinance 480/2009, which contains the requirements for a corporation to obtain registration with the CVM and thus be listed. It also establishes annual, quarterly and periodic financial reporting and other continuing obligations, and imposes additional obligations on directors, officers and controlling shareholders.
- Ordinance 481/2009, which regulates proxy solicitations and information that must be disclosed to shareholders on matters to be voted in shareholder meetings.

Stock exchange rules

Corporations listed on the São Paulo Stock Exchange, now called *B3 – Brasil, Bolsa, Balcão* Stock Exchange ("B3") must comply with its listing rules and regulations. There are four listing segments in the B3 Stock Exchange's main market: the traditional segment; Level 1; Level 2; and *Novo Mercado*. The latter three segments subject corporations to additional corporate governance practices in comparison to those set forth by law; the *Novo Mercado* having the highest standards and Level 2 having the second highest standards. The great majority of recent IPOs have been made on the *Novo Mercado*. The following practices, among others, must be followed by corporations listed on the *Novo Mercado* segment: capital composed of a sole class of voting shares; tag-along to all shareholders in the sale of the corporation's control; additional disclosures of financial information; and a minimum number of independent members in the board of directors.

The B3 Stock Exchange also manages an over-the-counter market – the *Bovespa Mais* – similar to the London Stock Exchange AIM, focusing on smaller companies and with more flexible listing rules.

Other sources

Advocacy groups such as IBGC (the Brazilian Corporate Governance Association) have issued best practice guidelines and manuals. Although not mandatory, such guidelines and manuals have had a growing influence on corporate governance practices of Brazilian corporations.

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

Due to 'Operation Car Wash', the enactment in 2013 of an anti-corruption law (Federal Law 12,846/2013) and other factors, compliance has become a very important issue for Brazilian corporations. Brazilian corporations are taking active measures to adopt compliance programmes and institute compliance committees.

Important advocacy groups in the Brazilian capital market, including ABRASCA (the Brazilian Listed Corporations Association), AMEC (the Brazilian Capital Market Investors Association) and IBGC jointly approved in the end of 2016 a new corporate governance code with recommended corporate governance practices. Although the code is not mandatory, according to new regulation issued by the CVM on July 2017, listed companies are required to inform if they adopt each of the recommended practices or to otherwise inform why they have chosen not to, under a "comply or explain" approach.

Additionally, at the end of 2017, the B3 Stock Exchange set forth a new regulation applicable to corporations listed on the Novo Mercado. The new regulation simplifies some of the requirements to be listed on the Novo Mercado, increases transparency and also imposes new obligations (creation of audit committees, adoption of a business code of conduct, etc.).

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The promotion of sustainable value over the long-term is gaining importance in Brazil. The corporate governance code referred to in question 1.3 above, which was approved at the end of 2016, concerned with short-termism, emphasises the need to promote value creation over the long-term. The code recommends management bodies to set forth the corporation's business strategies with a view to promote long-term growth. The code also underlines the need for the compensation package of the members of the management body to be aligned with long-term value creation.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The operation and management of corporations is entrusted to the members of the management bodies (directors and officers). Shareholders will shape the corporation's operation and management by electing, removing or refusing to re-elect management body members. Shareholders may also choose to install an overseeing committee (*conselho fiscal*), which will be responsible for overseeing the actions taken by the members of the management bodies and the fulfilment of their duties.

Additionally, under the Corporation Law, the following matters require shareholders' approval: amendments to the bylaws (such as share capital increases and decreases, changes to the rights of share classes, modification of the composition of the board, corporate name change); the laying and receiving of accounts from the management bodies; approval of financial statements; issuance of debentures; suspension of shareholders' rights; evaluation of assets to be conveyed by a shareholder in exchange for shares of the corporation; issuance of participation notes (*partes beneficiárias*); transformation of the corporation into another type of entity; corporate reorganisation (merger, spin-off or amalgamation); dissolution, winding up and appointment of the liquidator; and filing for bankruptcy or court-ordered restructuring. The authority of the shareholder meeting, though, is not limited to those matters. The shareholder meeting is the supreme authority within the corporation and has the power to decide on any corporate matter, including those delegated by law to management bodies.

The bylaws can also establish that specific transactions, such as the sale of relevant assets or the execution of contracts with values exceeding certain thresholds, require shareholders' approval. This type of provision is more common in smaller unlisted corporations, notably those that do not have a board of directors.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Corporate governance responsibilities are generally owed to the shareholders by those in command of the corporation. In Brazil, in spite of the emergence of some listed corporations with dispersed share ownership, most of them continue to have a concentrated

capital structure, in which the controlling shareholder exercises a vast influence over the corporations' activities. The Corporation Law provides that the controlling shareholder must use its controlling authority to cause the corporation to fulfil its corporate purpose and social function. It also sets forth the controlling shareholders' fiduciary duties towards other shareholders, the corporation's employees and the communities affected by the business activities. The controlling shareholder will be liable for damages caused by the abusive use of its controlling authority.

The Corporation Law further provides that all shareholders must exercise their voting rights in the corporation's best interest. A shareholder's vote will be considered abusive when exercised to cause damage to the corporation or other shareholders or to obtain undue advantages. A shareholder will be liable for damages caused by its abusive vote, even if it is not the winning vote.

In addition, and as discussed in question 2.6 below, certain shareholders have disclosure obligations with regard to securities owned by them.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Annual shareholder meetings are required by law and must be held within four months after the corporation's fiscal year-end. Annual meetings will resolve upon the following matters: the laying and receiving of accounts from the management bodies; approval of financial statements; profit allocation and dividend distribution; and appointment of directors (or officers) and members of the overseeing committee.

Special shareholder meetings can be called at any time to resolve upon any corporate matter, including amendments to the bylaws, corporate reorganisations (mergers, spin-offs and amalgamations) and removal of members of management bodies. As mentioned in question 2.1, shareholder meetings have the power to decide on any corporate matter, including those under the board's authority.

Shareholder meetings are generally convened by the board of directors or, if the entity is unlisted and does not have a board, by the officers. The call notice must contain an agenda of the meeting. Generally, only matters listed in the agenda may be voted. If the members of the management bodies fail to call a shareholder meeting required by law or the bylaws (for instance, the annual meeting), any shareholder may convene the meeting. In certain situations, meetings may also be called by the overseeing committee.

In addition, shareholders representing at least 5% of the corporation's capital stock may require the management bodies to call a shareholder meeting and indicate the specific resolutions to be voted upon. If the management bodies fail to do so, these shareholders may call the meeting themselves.

Shareholders holding at least 5% of the voting shares or 5% of the non-voting shares may also compel the management bodies to call a shareholder meeting for the installation of the overseeing committee. In listed corporations, these percentages will be reduced to up to 2% of the voting shares or 1% of the non-voting shares, depending on the value of the capital stock (the higher the value, the lower the required percentages). Again, if the management fails to comply, the meeting may be called directly by these shareholders.

Shareholders have the right to attend the meetings, speak, request clarifications from the management bodies and, if they have voting shares, vote.

Voting rights may be exercised by a proxy provided to another shareholder, a member of a management body or lawyer, and, in listed corporations, also by a financial institution. In listed corporations, both management and shareholders may make proxy solicitations. Shareholders representing at least 0.5% of the capital stock may require the inclusion of candidates for the position of director or member of the overseeing committee in the management body's proxy solicitation.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As discussed in question 2.2 above, shareholders must exercise their voting rights in the corporation's best interest. Such duty, however, is only required if the shareholder chooses to vote.

Generally shareholders cannot be liable for acts or omissions of the corporate entity. The basic premise under Brazilian law is that the shareholders are only responsible for the payment of the shares subscribed by them. The corporation is an autonomous legal entity, distinct from the shareholders. The corporation's liabilities shall be paid with the corporation's own assets.

There are, however, some restricted circumstances in which a shareholder may be held liable for an act or omission of the corporation. Courts may apply the "piercing of the corporate veil" theory and hold a shareholder liable where the corporation is used for purposes other than those for which it was organised, where the corporation's assets are commingled with the shareholder's personal assets, where the corporation is employed to carry out a fraud or in other specific and exceptional cases (generally in smaller, unlisted companies). A shareholder that belongs to the same economic group of the corporation may also be held accountable for labour credits of the corporation's employees. Moreover, the controlling shareholder may be held liable for damages caused by the abusive use of the controlling power (for instance, where the controlling shareholder causes the corporation to benefit another company to the detriment of the minority shareholders or the corporate assets).

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes. Shareholders can seek enforcement action against the corporation for any violation of rights brought about by the corporation. Shareholders can also file lawsuits to annul resolutions approved in shareholders meetings that were irregularly convened or installed, that violated the law or that involved fraud or other problems.

Shareholders can also seek enforcement against directors and officers through a derivative or direct claim. It is generally incumbent upon the corporation, previously authorised by the shareholder meeting, to bring an enforcement action against members of management bodies for losses caused by them to the corporations. If the shareholder meeting decides to pursue such action but the corporation fails to do so, any shareholder may bring a derivative claim against members of management bodies on the corporation's behalf. However, even if the shareholder meeting decides not to pursue such action, shareholders jointly holding 5% of the corporation's shares may initiate a derivative claim. Any proceeds of a successful derivative claim are awarded to the corporation, which must reimburse the shareholders that initiated the action for litigation expenses.

A shareholder may bring a direct claim against directors or officers when directly affected by their action or negligence (i.e. when the damage is not a result of the loss of value of the investment made in the corporation).

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There is generally no limitation on the number of shares a shareholder can own. In some specific industry sectors (such as broadcast and newspaper media), there are laws prohibiting the acquisition by foreign shareholders of shares above a certain threshold. Although not common, unlisted corporations may issue a special class of shares that can only be held by Brazilians.

Bylaws can also limit the number of votes per shareholder. In corporations listed on the *Novo Mercado* or Level 2 segments, the number of votes of a shareholder or group of shareholders cannot be limited to a percentage lower than 5% of the capital stock. Plural votes cannot be attributed to any class of shares.

The controlling shareholder, the shareholder (or group of shareholders) that has elected a member of the board of directors and any shareholder (or group representing the same interest) holding at least 5% of the corporation's shares must inform the CVM and the stock exchange of the purpose of her/his equity interest, all of the securities of the corporation directly or indirectly owned by her or him and existing shareholders' agreements. This disclosure must be repeated each time there is a 5% increase or decrease in the shareholder's participation in the corporation. In addition, the controlling shareholders must submit a monthly report to the CVM and B3 informing the number of shares held by them.

The controlling shareholders and the corporation itself are prohibited from trading with securities of the corporation before the disclosure of any material fact or pending merger, acquisition or other corporate restructuring transactions. Controlling shareholders and the corporation must also refrain from purchasing or selling securities during a 15-day period before the publication of financial reports. This prohibition does not apply in corporations that adopt a fixed calendar for the issuance of those reports. If the controlling shareholder acquires more than ⅓ of the corporation's outstanding shares not belonging to the controlling group by any means other than a tender offer, she or he is obligated to launch a tender offer to acquire all of the shares held by the minority shareholders.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Generally, it is incumbent upon the management bodies – and not the shareholders – to comment on the plans or proposals with respect to the corporate entity. In listed corporations, the CVM requires the management bodies to provide, previously to each shareholders meeting, their comments on each of the proposed resolutions to be considered at the meeting. When voting, shareholders are not required to justify their vote, but, as noted in question 2.2 above, the vote must be cast in the corporation's best interests. If a third party acquires the controlling interest of a listed corporation from its controlling shareholder, such third party must disclose the purpose of the acquisition and the expected results that the acquisition will have on the corporation's business.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Corporations are managed by executive managing officers (*diretores*) and, when established by the bylaws, also by a board of directors (*conselho de administração*). Listed corporations and government-controlled corporations (*sociedades de economia mista*) must have a board of directors.

The board of directors will supervise, direct and oversee the business and activities of the corporation. The board will establish the corporation's general policies and business strategies, appoint and remove officers (more details in question 3.2 below), oversee and evaluate the officers' performance, call shareholder meetings and approve certain material or sensitive transactions such as the sale of fixed assets and material loans. The bylaws may assign additional tasks and authority to the board.

Officers will be responsible for the day-to-day management and representation of the corporation. The bylaws can assign different activities and authorities to each officer. They will usually perform their tasks individually. However, the bylaws can provide that specific decisions and actions will be submitted to a board of officers (*diretoria*), which will decide by vote.

The board of directors will be composed of at least three members. If the corporation is listed on the *Novo Mercado* segment, at least two members of the board or 20% of the board members, whichever results in a higher number, must be independent. Directors can reside in Brazil or abroad.

Corporations must have at least two officers. All of them must reside in Brazil. A corporation will typically have at least a Chief Executive Officer and a Chief Financial Officer, larger corporations tending to have more officers.

Composition of the two management bodies can be partially overlapping: up to one-third of the directors may concomitantly be officers. However, under the *Novo Mercado* rules, the CEO cannot act as chairperson of the board of directors.

Corporations may also have an overseeing committee (*conselho fiscal*), even though strictly speaking it is not a management body. This committee's main purpose is to oversee the activities of the corporation, providing a written opinion on its financial statements. The overseeing committee is usually not a permanent body and will be established to operate for a specific fiscal year upon the request of shareholders. It will be composed of three to five members. All of them must reside in Brazil and have a university degree or at least three years of professional experience. Employees, officers and directors, as well as their relatives, cannot be members of the overseeing committee.

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

The board of directors is elected by the shareholders, usually at the annual shareholder meeting and by majority vote. Board members are, in principle, elected all at the same time. They can be removed at any time by the shareholders, by a resolution of the shareholder meeting, with or without cause.

The Corporation Law provides two main mechanisms to facilitate the election of directors by minority shareholders: separate voting; and cumulative voting. Holders of at least 15% of the voting shares or non-

voting shares (or restricted voting shares) amounting to 10% of the capital stock may require separate voting, which takes place in a sort of parallel meeting within the shareholder meeting. This parallel meeting is entitled to appoint and remove one director (and one alternate director) by a majority vote in which only minority shareholders can participate. Moreover, holders of at least 10% of the voting shares may require the adoption of cumulative voting for the appointment of board members (with the exception of the director elected through the separate vote, if any). In this case, each shareholder has as many votes as the number of shares respectively held, multiplied by the number of vacant positions on the board (for instance, if there are five vacant positions, the holder of 10 voting shares will have 50 votes). The votes can be freely distributed among all candidates of the board, allowing minority shareholders to concentrate all of their votes on few candidates (or even a single candidate) and ensure their election.

The adoption of both separate and cumulative voting mechanisms may prevent the controlling shareholder holding the majority of shares from appointing the majority of members of the board. If this occurs, such controlling shareholder will be entitled to appoint a sufficient number of additional directors to reach this majority, even if this means adding more members to the board.

In government-controlled corporations, minority shareholders are entitled to appoint one director even if they are unable to reach the shareholding thresholds for the separate and multiple voting mechanisms.

Officers are generally appointed by majority resolutions taken by the board of directors. Subject to the bylaws' provisions, the board of directors is also entitled to establish the specific role and authority of each officer. If the corporation does not have a board of directors, officers will be appointed by the shareholder meeting.

The maximum term in office for both directors and officers is three years. There are no limitations on the number of times an individual can be re-elected.

As previously mentioned, members of the overseeing committee are elected by the shareholder meeting. Holders of non-voting shares, on the one side, and minority shareholders with at least 10% of voting shares, on the other side, are each entitled to appoint one member by means of separate votes. If both such groups have exercised their right to elect members of the overseeing committee, the controlling shareholder will be entitled to appoint a total of three members, securing the majority of seats.

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

While the Corporation Law sets forth the general methods for approval of management compensation and the main limits and restrictions on bonuses and stock options, the CVM regulations focus on disclosure of information on remuneration – even though the scope of its rules has been limited by court decisions.

Under the Corporation Law, the annual shareholder meeting must approve the compensation payable to officers and directors. The meeting usually approves only the general maximum threshold of remuneration, without specifying the amounts payable to each management body or member. In this case, the board of directors will decide the individual remuneration of each management body member.

Management profit-sharing schemes can be adopted by corporations whose bylaws establish a minimum mandatory profit distribution corresponding to at least 25% of accrued net profits. Total profits shared with members of management bodies cannot exceed the lesser of 10% of accrued profits or the aggregate annual compensation of the management bodies approved by the shareholder meeting. Members of management bodies will only be entitled to profit-sharing in fiscal years in which mandatory minimum dividends have been distributed to shareholders.

A corporation can also grant stock options to directors and officers within the limits of its authorised capital.

The shareholder meeting will also establish the remuneration of the members of the overseeing committee. The compensation paid to each member cannot be lower than 10% of the average annual remuneration paid to officers.

The CVM regulations provide for mandatory disclosure on compensation policies. Listed corporations are required to disclose several details on the remuneration of directors and officers, as well of members of other committees. However, court orders have so far exempted some corporations from disclosing the maximum and minimum compensation payable within each management body on the grounds of individual privacy and lack of authority of the CVM to regulate this issue.

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

As a general principle derived from the duty of loyalty, management body members of listed corporations are not allowed to seek personal advantages based on privileged information. This includes any form of trading with shares or securities of the corporation based on confidential data.

All management body members are required, upon request of a group of shareholders holding more than 5% of the total number of shares, to disclose to the annual shareholder meeting details on any equity interest she or he may have in the corporation and affiliated companies, including stock options. Members of the management bodies are also required to inform the corporation about any equity interest held by themselves or their spouses in the entity itself and affiliated listed companies. The corporation must subsequently transmit such information to the stock exchange and the CVM.

The CVM regulations set forth certain restrictions on the trading of shares. Similar to the prohibition applicable to controlling shareholders, officers, directors and members of the overseeing committee are not allowed to trade with securities of the corporation before the disclosure of any material fact or pending merger, acquisition or other corporate restructuring transactions. Unless the corporation has adopted a fixed calendar for the disclosure of its interim financial statements and periodic information, officers, directors and members of the overseeing committee must also refrain from purchasing or selling securities during a 15-day period before the publication of the relevant reports. Listed corporations may establish a policy for trading of securities by related parties.

Additionally, officers and directors of corporations listed on *Novo Mercado* are not allowed to sell their shares within six months from the initial public offering.

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

Officers will only meet in a formally structured manner, organising themselves as a board, if and to the extent that their activities are subject to collective resolutions. Otherwise, officers will carry out their duties individually, reporting back to the board of directors.

As a result, the process for meetings of board of officers may vary significantly from corporation to corporation.

There is also great flexibility with respect to the process for board of directors' meetings. However, in contrast to officers, directors must always take resolutions collectively, by means of majority votes, and it is mandatory to establish in the bylaws the rules for the appointment of its chairperson and calling of its meetings. Bylaws can establish that the chairperson of the board will be appointed by the directors themselves or by the shareholder meeting.

The chairperson of a directors' or officers' meeting has a relevant role in Brazilian corporations. This significance, to a great extent, results from the effectiveness of shareholders' agreements under Brazilian law: agreements duly filed with the corporation are expressly binding on management. The chairperson of a meeting will be required to disregard any votes cast in breach of a shareholders' agreement. She or he may also allow a party (or its representatives) damaged by the absence or abstention of other members of the board to vote on their behalf, if the approval or rejection of a given resolution is backed by the shareholders' agreement.

Boards can have decision-making criteria based on qualified majorities or unanimous approval. The criteria must be indicated in the bylaws and apply to specific matters.

Several corporations have adopted rules for holding board meetings through telephone or video conference.

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

Under the Corporation Law, the main general duties of members of management bodies are:

- to act with diligence and care;
- to act within their powers, observing the purposes of the entity;
- to be loyal towards the corporation;
- to avoid conflicts of interest; and
- to inform.

The duty of diligence and care requires officers and directors to exercise the same diligence, care and skills that a sound businessperson would exercise in dealing with her or his own personal assets in comparable circumstances.

To fulfil the duty to act within their powers and purposes of the corporation, officers and directors must consider the interests of the corporation and of shareholders as a whole in their actions and decisions, without privileging the shareholders responsible for their appointment, and while observing the corporation's social function.

The duty of loyalty translates mainly into the obligation to preserve confidentiality and not to use privileged or sensitive information relating to the corporation for personal benefit or the benefit of third parties.

With respect to the duty to avoid conflicts of interest, members of management bodies may not take part in transactions or resolutions in which they have a personal conflicting interest. They must also inform the other officers or directors about the nature and relevance of their personal interest.

The duty to inform requires officers and directors of listed corporations to disclose details about equity interests held in the corporation and affiliates, and remuneration and fringe benefits to which they are entitled. They must also disclose material acts or events related to the entity.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Officers will carry out the actions required in the ordinary course of business and represent the corporation before third parties, signing documents on its behalf. In listed corporations, they are responsible for disclosing material facts and publishing financial reports.

The main responsibility of the board of directors is to supervise, direct and oversee the business and activities of the corporation. While overseeing the officers' performance, they should assess if the applicable corporate governance practices are being observed by the corporation. The board will approve the corporation's code of conduct, disclosure policy and policy for trading of securities. Further functions of the board of directors are mentioned in other questions in this chapter. A key challenge for directors is properly documenting individual measures that could exclude or mitigate their personal liability in relation to corporate wrongdoing, such as requests for additional information from officers, abstaining from voting due to conflicts of interest and casting dissenting votes.

The overseeing committee has an important role in overseeing the activities of officers and directors and assessing the compliance by them of applicable duties under the law and bylaws. The committee is required to review the corporation's financial statements and express its opinion on them. It will also give an opinion on proposals to be submitted by officers or directors to the shareholder meeting on certain corporate restructuring transactions and investments. The overseeing committee must also inform officers and directors of any detected fraud or error in the activities of the corporation. If officers and directors do not react properly and in a timely fashion, the overseeing committee is required to inform the fraud or error to the shareholder meeting. The committee will also call the annual shareholder meeting if the management bodies fail to do so for more than a month or, in cases of urgency, call special shareholder meetings.

An important current challenge for members of all management bodies in Brazil is the adjustment of corporate practice and culture to the Brazilian Federal Anti-Corruption Law of late 2013. This law sets forth, among other provisions, the strict liability of corporations for corrupt acts carried out on their behalf, or to their benefit, and is prompting many corporations to adopt or review anti-corruption compliance policies. For listed corporations on the *Novo Mercado*, a recent challenge is to adapt the corporation's bylaws and practices to the new regulation set forth by B3.

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

Yes, indemnities and professional liability insurance are generally permitted in relation to members of the management bodies, but not for losses arising from wilful misconduct, tort or fraud. D&O coverage has been growing steadily in Brazil.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Under the Corporation Law, the board of directors has the authority to establish – and also change – the corporation's general policies and business strategies. Such policies and strategies must be aligned

with the corporate purpose of the corporation and other limitations set forth in its bylaws and also with the resolutions taken by the shareholders. Officers are responsible for carrying out the actions to implement the corporation's strategies set forth by the board. Note that only the shareholders, by a resolution taken in a shareholders' meeting, can change the corporation's corporate purpose and other clauses of the bylaws.

4 Other Stakeholders

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

In general, employees have a very limited role in the corporate governance of Brazilian corporations. Even though the Corporation Law permits that a position in the board of directors be allocated to a representative of the employees, this allocation is not mandatory and is not exercised by the vast majority of corporations.

Federal government-owned or controlled companies with more than 200 employees are required to have at least one representative of the employees on the board of directors. Such a representative – who is not authorised to take part in discussions on labour matters, due to potential conflicts of interest – will be appointed by a majority vote in a direct election held among all employees. The election must be organised by the corporation jointly with the relevant union representatives.

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

Other stakeholders also have a limited role in the corporate governance of Brazilian corporations. The Corporation Law grants to creditors certain rights, which may impact the corporation's governance. According to this law, creditors may oppose the reduction of the corporation's capital stock and may judicially request the annulment of mergers that negatively affect her/his credit. Mergers and spin-offs of the corporation will also require the prior approval of debenture holders, unless they are authorised to redeem their debentures within a six-month period. If the corporation has debentures convertible into shares, the following actions will also require the prior approval of the debenture holders: (i) change of the corporation's corporate purpose; and (ii) creation of preferred shares or the modification of the rights of existing preferred shares that may negatively impact the shares into which the debentures may be converted. In addition to the rights set forth by law, it is not unusual for certain creditors, especially in more significant financings, to require the inclusion of covenants in the financing agreements establishing that certain actions to be taken by the corporation (for instance, sale of relevant assets) will require the creditor's prior approval. Finally, although the Corporation Law does not grant any specific approval or similar right to other stakeholders, it sets forth as a general principle that the controlling shareholder has duties and responsibilities towards the employees of the corporation and the community in which the corporation operates, and must respect the rights and interests of such stakeholders.

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

Brazil has extensive and complex legislation on issues such as environmental protection, labour safety, consumer rights and gender equality, which must be observed by corporations. As mentioned in question 2.2, the Corporation Law also sets forth the principle that the controlling shareholder must exercise the controlling powers within the corporation taking into account the interests not only of minority shareholders, but also of employees and the community.

Although not mandatory, some corporations issue social responsibility reports, describing their social responsibility practices and actions throughout the year. Certain advocacy groups, such as Institute Ethos and IBRACON, have enacted non-binding rules and standards for Brazilian corporations to prepare and publish corporate social responsibility reports.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

All members of management bodies are responsible for disclosure of information regarding events falling under their scopes of activity or authority or their respective personal relations with the corporation and affiliated entities.

In addition, listed corporations are required to appoint an investor relations officer (*diretor de relações com investidores*), who will be responsible for liaising with shareholders and market authorities and disclosing material facts. The investor relations officer can be entrusted concomitantly with other functions or activities within the corporation. Her or his appointment does not exclude personal liability of other officers and directors for any failure to comply with disclosure requirements.

5.2 What corporate governance-related disclosures are required?

Unlisted corporations are essentially required to publish their yearly management reports and financial statements, notices and minutes of shareholder meetings, and minutes of management meetings affecting third parties. They are also required to respond to specific information requests from shareholders, either made in writing or during annual meetings. The minutes of meetings held by management bodies must be registered with the Commercial Registry – and thus be subject to public scrutiny – if they are expected to affect third parties.

Listed corporations, on the other hand, are required to disclose all of the information above plus significant additional data, which are typically divided into periodic standardised information and event-based disclosures. The main applicable periodic reports are: yearly financial statements (including statements in the standard form required by the CVM); quarterly financial statements; and the yearly Reference Form. The Reference Form will include, among other information, a report on the business activities, a description of the risks that could affect the corporation, a summary of existing lawsuits and a description of the economic group to which the corporation belongs. The Reference Form should also inform the mechanisms for evaluating the performance of the management body members and present information on each of them, including her or his professional experience and relationship with the controlling shareholder. The most important form of non-periodic information is the disclosure of material facts which refer to any event that could have a significant impact on the market value of the securities issued by the corporation.

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

Listed corporations, as well as other entities with aggregate assets exceeding R$240 million or annual turnover exceeding R$300

million, must have their yearly financial statements audited by independent external auditors (including both individual professionals or auditing firms) duly registered with the CVM.

External auditors will assess the compliance of the corporation's financial statements with applicable accounting standards and indicate the effects and impact of any possible discrepancies. They will provide detailed reports to internal auditors, officers and directors, highlighting alleged deficiencies in accounting practices.

Note that the CVM regulations impose mandatory rotation of external auditors after each period of five years. To limit possible conflicts of interest, there are also restrictions on the provision of consultancy services by auditing firms to the audited corporation.

5.4 What corporate governance-related information should be published on websites?

Listed corporations are required to upload the following information to the CVM's website, among other things: notices of shareholder and debenture holder meetings; requirements to attend those meetings and vote; summaries of decisions taken in those meetings; minutes of shareholder meetings and of certain board of directors' and overseeing committee's meetings; opinions, reports and assessments on the financial status of the corporation, its value and specific corporate transactions (e.g. mergers and spin-offs); shareholders' agreements; communications on material facts; disclosure policy; reinstated bylaws; any materials used in roadshows and presentations; rating agencies' reports and assessments; instruments of securitisation and debenture issuance deeds; and debt restructuring plans and bankruptcy requests including related court decisions, internal policies and compliance with the corporate governance code. In addition, listed corporations authorised to trade shares (rather than just other securities) must publish all such information on their own website.

Unlisted corporations are not required to maintain a website or provide information on the CVM's website.

Paulo Eduardo Penna
Novotny, Ney, Saldanha, Penna, Ponte, Vianna & Corrêa Advogados
Avenida Rio Branco, 110, 24th floor
Zip Code 20040-001
Rio de Janeiro
Brazil

Tel: +55 21 3993 3601
Email: paulo.penna@novotny.com.br
URL: www.novotny.com.br

Paulo Penna is one of the founding partners of Novotny Advogados. His practice focuses on general corporate matters, corporate governance, M&A, joint ventures and private equity deals. He regularly counsels multinational groups and funds investing in Brazil. Paulo has extensive experience in representing both international and national clients of different industry sectors in major cross-border transactions.

Paulo is a member of the Business Law Committee of the Rio de Janeiro Bar Association and was previously a member of the Regulatory Committee of the Brazilian Private Equity and Venture Capital Association. Paulo is a lecturer on business law at the Law School of Pontifícia Universidade Católica do Rio de Janeiro and has written a number of legal publications, including a book on mandatory tender offers. He holds a Master's degree in Commercial Law from Pontifícia Universidade Católica de São Paulo (2010) and a postgraduate degree in Finance from Ibmec Business School (2002). He is fluent in Portuguese, English and Spanish.

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Bulgaria

Georgi Georgiev

Georgiev, Todorov & Co.

Monika Markova

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities discussed in this overview are Private Joint-Stock Companies and Public (Stock-Exchange Listed) Joint-Stock Companies.

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

The sources of corporate governance in Bulgaria can be classified into two categories:

I. Regulatory Sources:

1. The Commercial Act

The Commercial Act applies to any Bulgarian company, whether privately held or listed on the stock exchange. This act regulates all general issues regarding the company, *e.g.*, the relations of shareholders *vis-à-vis* the company, the company *vis-à-vis* the board and the shareholders *vis-à-vis* the board. It also governs the power of the General Meeting and the boards, and the management system specifics – one- or two-tier systems of governance, procedures regarding the convention of the annual and extraordinary General Meeting, etc.

Particularly the following chapters apply:

- Chapter 10 containing general rules applicable for all types of company, among them the most important related to some aspects of the incorporation of a company.
- Chapter 14 named "Stock Company" which contains detailed regulations regarding the Private Joint-Stock Company, partially applicable for the Public Joint-Stock Company too, unless there are mandatory provisions in the Public Offering of Securities Act.

2. The Public Offering of Securities Act

This Act provides specific rules for incorporation, management and corporate governance of the Public Joint-Stock Company.

3. The National Code for Corporate Governance

The Code is, by its nature, a standard for good practice. It provides companies with a framework for corporate management and control. The Code applies to Bulgarian public joint-stock companies according to the "comply or explain" principle. This principle is espoused by all corporate governance codes adopted by EU Member States. It means that companies should comply with the Code, and if they do not, the company or its corporate board must explain and disclose the reasons for non-compliance. Following the principles of the Code is one of the requirements for admission to trading on the official market of securities. The requirement is set as a criterion for the level of the corporate governance and culture of the companies that are admitted to trading to the highest tiers of the Bulgarian Stock Exchange-Sofia.

Moreover, unlisted companies are also advised to comply with the Code.

II. Non-regulatory Sources:

1. By-laws of the company (Statute)

These contain provisions regarding: the scope of business activity of the company; the amount of capital; the types of shares and specific rights for particular class of shares, if any; the system of corporate governance, etc. It is published in the Company Register.

2. Rules and Procedures /Charter of the Board of the company

This act is not compulsory but if adopted, it regulates the special requirements regarding convention of the Management Board, Board of Directors and the Supervisory Board, such as invitations, absences, restriction of the power of the board for particular transactions above a certain value, etc.

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

As far as the implementation of the EU Law has been successfully completed recently, there are no pressing tasks for the development of the legislation. In practice, attempts for the application of the National Code for Corporate Governance by Private Joint-Stock Companies are implemented.

It should be pointed out that, as a result of the financial crises and the increase of the number of insolvency proceedings, the duties of the board members for filing of applications in a timely manner have been analysed by the Supreme Court of Cassation (SCC). In its recent judgment, held on the procedure for interpretation of the law in case of contradictions in the case law of the SCC, which is mandatory for all courts, the SCC analysed the criminal liability imposed on the board members who didn't abide by the Criminal Code, i.e. s.227 "b" which stipulates that the individuals who manage and represent the company, have to file an application to the court for opening of insolvency proceedings within 30 days as of the day of the insolvency (cash-flow insolvency). The breach of this duty, which is governed also in the Commercial Act, constitutes a crime under the Criminal Code and is punishable with imprisonment of up to three years or with a fine of EUR 2,500. There were disputes whether the board members could be held liable if a resolution of

the general meeting of the shareholders or the sole proprietor of the shares was not passed. In the Judgment for interpretation of the Law №5 dated December 22, 2014 the Penalty Division of the SCC held that there was no need for such resolution of the general meeting and the board member/manager of the company is obliged to file the application for the opening of insolvency proceedings notwithstanding whether the general meeting of the shareholders passed resolution in this regards.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Concentration on short-term goals has been prevalent, with public companies being pressured to deliver short-term results to their shareholders. In terms of legal developments that promote long-term value there have not been any in Bulgaria.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The main characteristic of the Joint-Stock Company is the limited power of the General Meeting concerning the management of the company. Apart from that principle, there are such categories of decision and actions which are of vital importance to the company and could be taken by the management only after special resolution of the General Meeting, usually with majority of more than 50% (art. 221 of the Commercial Act). This constitutes specific shareholder rights, which are classified as non-pecuniary rights. The non-pecuniary rights consist of several groups of rights, divided by the legal doctrine as follows:

Management rights

Each shareholder has the following rights:

- to participate at the General Meeting, to express his opinion and to demand answers to his questions by the members of the boards;
- to vote at the General Meeting. The principle is that each share has one vote, unless otherwise agreed in the Statute. In particular cases when conflict of interest arises, this right is restricted (art. 229 of the Commercial Act); and
- to vote and to be elected as a member of the boards.

Control rights

They concern mainly the right of information about the status and the activity of the company. This category consists of, but is not limited to, the shareholders' rights described below:

- to be provided with access to or to receive at least 30 days before the date of the General Meeting the materials subject to discussions, according to the agenda (art. 224 of the Commercial Act);
- to receive a copy of the minutes of the General Meeting (art. 232, par. 5 of the Commercial Act); and
- to ask questions at a General Meeting of shareholders (not necessarily related to the agenda) to the Board members regarding the economic and financial situation of the company and its commercial activity, the members being obliged to answer correctly, and exhaustively unless for issues considered inside information (art. 115, par. 11 of the Public Offering of Securities Act).

Minority Shareholders' Rights

These rights belong to a shareholder/group of shareholders who own at least 5% of the capital of the company since a date not later than three months before the date of the General Meeting:

- to convene a General Meeting (art. 223, par. 2 of the Commercial Act);
- to enlist questions to the agenda of the General Meeting (art. 223a of the Commercial Act);
- right of a shareholder/group of shareholders who own at least 10% of the capital of the company (5% for a Public Joint-Stock Company) to bring an action against member/s of the board for damage caused to the company by them ("action *pro socio*" or "derivative suit") – art. 240a of the Commercial Act; art. 118, par. 2, item 1 of the Public Offering of Securities Act; and
- right of a shareholder/group of shareholders who own at least 10% of the capital of the company (5% for a Public Joint-Stock Company) to ask the boards or the court to appoint an auditor for revision of the Annual Financial Report of the company (art. 251a of the Commercial Act and art. 118, par. 2, point 1 of the Public Offering of Securities Act).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

There are no responsibilities of the shareholders to participate in corporate governance. See question 2.4 below.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two types of General Meetings – annual General Meeting and special (extraordinary) General Meeting. The annual General Meeting must be held during the first six months of the calendar year at the headquarters of the company, according to art. 222 of the Commercial Act and art.115 of the Public Offering of Securities Act (unless otherwise agreed for Private Joint-Stock Companies but on the territory of Republic of Bulgaria, pursuant to art. 222 of the Commercial Act).

The special (extraordinary) General Meeting takes place when special circumstances occur (e.g. art. 222, par. 3 of the Commercial Act) or when it is convened by authorised persons at their own discretion (art. 223 of the Commercial Act).

The rights of the shareholders are described in question 2.1 above.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As a matter of statutory law they do not owe any duties, but the issue can be regulated in the constitutional documents of the company or an SHA.

Generally, shareholders cannot be liable for acts or omissions of the company. The "Piercing the Corporate Veil" doctrine is not adopted by Bulgarian legislation.

However, as regards a Public Joint-Stock Company, in art. 118a of the Public Offering of Securities Act it is provided that liability for damage caused to the company by person/s or company/ies who control the Public Joint-Stock Company, or every other entity which by its influence on the Public company caused an act or omission

by the members of the board, if this decision/act/omission is not in the interest of the company. In this case, the person or entity is jointly liable with the member of the board who took the action or failed to do so. Consequently we could state that there is an explicit obligation of shareholders to refrain from interfering in the management of the company directly or indirectly by influencing the management to act not in the interest of the company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes, the "derivative suit" is provided for such purpose, both for shareholders in Private and in Public Joint-Stock companies. This issue is governed by the provisions of art. 240a of the Commercial Act (for Private Joint-Stock Companies) and of art. 118, par. 2, point 1 of the Law for Public Offering of Securities (for Public Joint-Stock Companies).

The main peculiarity of this suit is that by bringing the action, shareholders act not on their own behalf, but on behalf of the company and the aim of the claim is all damages to be paid to the company.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Regarding shareholders in Private Joint-Stock Companies there is an obligation for shareholders with registered shares to be registered in the company book (art. 179 of the Commercial Act). No limitations concerning acquisition of shares are established.

As regards a Public Joint-Stock Company – provisions of the Public Offering of Securities Act apply (art. 145) and anticipate disclosure of circumstances such as:

- Acquisition or disposal of shares by shareholders when the total amount of these shares represents 5% of the voting rights at the General Meeting, either more than 5%, or the amount is divisible by five. In this hypothesis the shareholder is obliged to inform both the company and the Financial Supervision Commission.
- Transactions with interested or related parties at a value less than 2% of the company's assets are subject to preliminary authorisation by the board of the company, according to art. 114, par. 2 of the Public Offering of Securities Act.
- Transactions with interested or related parties at a value more than 2% of the company's assets are subject to preliminary authorisation by the General Meeting pursuant to art. 114, par. 1, letter "b" of the Public Offering of Securities Act, the respective shareholder being disenfranchised.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Please see question 2.6.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

There are two systems of corporate management and the incorporators of the company could choose one of the following in the Statute:

- **One-tier system** (Board of Directors)

Where the company is represented and managed entirely by the Board of Directors.

- **Two-tier system** (Management Board and Supervisory Board)

Where the company is represented and managed by the Management Board but the actions and resolutions of the Management Board are controlled by the Supervisory Board.

At least one-third of the members of the Board of Directors/ Management Board of Public joint-stock company should be independent members (art. 116a, par. 2 of the Law for Public Offering of Securities provides a definition of the term "independent member"). In addition, a director for communication with the investors should be appointed.

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

Meeting. They elect among them a chairman, a vice-chairman, and one or more executive members.

The members of Management Board (three to nine members) are appointed and removed by the Supervisory Board whose members (three to seven) are appointed and removed by the General Meeting. The legal relations between the members of the Management Board and the company are governed by management contract and signed by the chairman of the Supervisory Board on behalf of the company. The rights and obligations of the members of the Supervisory Board are settled in contract.

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

The Obligations and Contracts Act is the main source of provisions regarding the contracts executed between the company and the members of the boards.

There are also certain relevant rules in the Commercial Act and the Public Offering of Securities Act.

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

Disclosures:

The members of the boards of both the Private and the Public Joint-Stock Companies are required to declare before their appointment the ownership of more than 25% of the capital of other companies. When shares above this limit are acquired during the tenure of the member, an immediate written notification to the company is required.

The members of the boards of the Public Joint-Stock Company are obliged, in addition to the described above, to declare in front of the company and the Financial Supervision Commission circumstances described in art. 114b of the Public Offering of Securities Act such as current or forthcoming transactions in which they could be interested parties (art. 114b, point 3). Other obligations of the members are required in the subordinate legislation acted by the Financial Supervision Commission.

Limitations:

As regards Public Joint-Stock Company, the limitations described in question 2.5 apply when the members of the boards are shareholders.

The general rule, set forth in art. 238, par. 4 of the Commercial Act and applicable for Private and Public Joint-Stock Companies, provides that the members of the board are obliged to notify the chairman of the board in written form not later than the beginning of the board meeting regarding the fact that they or a third party related to them is interested in the resolution subject to discussion in the agenda. Such members do not participate in the decision-making process in question.

The members of the board are also obliged to notify in written form the boards when they or a third party related to them form a contract with the company and its subject-matter is beyond the scope of the ordinary business activity of the company (art. 240b of the Commercial Act). These contracts are formed following a resolution of the Board of Directors or the Management Board. This transaction is binding and valid even if a special resolution was not taken, but the board member who knew or ought to have concluded about it is liable for damage caused to the company.

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

The process for board meetings is governed by the Commercial Act (art. 238 and 239) and by the Statute of the company and its Rules and Procedures. The requirement for quorum in the provision of art. 238 provides that at least half of the board members should attend or should be represented by another member of the board. The resolutions are taken with "ordinary majority" (more than half of the members) unless otherwise agreed in the company's statute. A decision *in absentia* may be taken unanimously in writing.

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

The members of the Management Board and the Supervisory Board are obliged to conduct any and all business activities of the company. They have to apply due diligence of a proper and diligent manager in this capacity as board members. The board members are jointly and severally liable for damage caused to the company. Furthermore, specific duties of the members of the boards are set forth in art. 116b of the Public Offering of Securities Act and in the Commercial Act such as:

- to notify the board regarding particular circumstances (art. 237, par. 3 CA);
- to restrain from exercising competition activity unless otherwise agreed in the Statute (art. 237, par. 4 CA);
- for non-disclosure of inside information regarding the company (art. 237, par. 5 CA; art. 116b, par. 1, item 2, letter "c"); and
- to be loyal to the company (art. 116b, par. 1, item 2 of the Public Offering of Securities Act).

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The corporate governance responsibilities of the members of the board are divided into three categories:

- **Organisation matters**

Which include preparation of the annual and the special (extraordinary) General Meeting, incorporation of all committees and bodies of the company, appointment and dismissal of employees, business transactions, accountability, etc.

- **Management issues**

Concerning all activities for planning and enforcement of the company's strategy and course of business.

- **Control issues**

Where mechanisms for internal control are provided in order to supervise the company's activity and its compliance with the strategy of the company.

The Board of Directors and the Management Board are entitled to act on behalf of the company and these actions must be taken collectively by all of the board members or by executive members, according to the rules of the company's statute.

The key current challenges for the management body are mainly related to the application of the due care in the ordinary course of business, thus the elaboration of case law on the business judgment rule is necessary for the Bulgarian legal order. Apart from the typical situations such as conflict of interests and related-party transactions, the running of the day-to-day business requires the taking of risks and launching of new products and services upon which failure the liability of the managers could be triggered. It is vital the case law and doctrine to set up the criteria to be applied will take into consideration both the interest of the company and of the managers.

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

The members of the boards are obliged to secure guarantee for their governance in an amount determined by the General Meeting but not less than three times the amount of their monthly remuneration (art. 240 of the Commercial Act; art. 116c of the Public Offering of Securities Act).

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The management body is responsible for the overall strategy of the company and its execution. Shareholders have limited powers in this respect, for example bonds can be issued only if sanctioned by a resolution of the GMS.

4 Other Stakeholders

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

Pursuant to art. 220, par. 3 of the Commercial Act, if the number of employees of the company is higher than 50, then one employee can attend the General Meeting as their agent. He/she has right to information access (as in art. 224), but has no voting right (he has "consultative vote").

The system of "co-determination" elaborated in German Corporate Law is not implemented in the Bulgarian legislation.

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

There is no explicit regulation of the authorities and the status of other stakeholders as participants in the corporate governance process.

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

Corporate social responsibility is not governed by the Bulgarian legislation. It is developed by the companies as an element of their PR and marketing strategies.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The board members are responsible for disclosure and obliged to declare relevant circumstances, acts and important issues related to the Company's activity. They should announce the respective fact in the Company Register and notify the Financial Supervision Commission as well as the regulated market (where its shares and other securities are listed) if it concerns a Public Joint-Stock Company.

5.2 What corporate governance-related disclosures are required?

The names of all board members and agents of the Company should be published in the Company Register, their specimen, declaration for compliance, the deadline of their tenure if any, and limitations of the agency powers.

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

The auditors' report on the Annual Financial Report examines whether the provisions of the Accountancy Act and the Statute of the Company are implemented. The statement of the auditors regarding the Annual Financial Report (AFR) is required in order the AFR to be presented to the General Meeting and approved by the shareholders. The board members are liable for omissions or discrepancy regarding the AFR.

5.4 What corporate governance-related information should be published on websites?

Pursuant to art. 13 of the Commercial Act, the website of the company should contain information regarding the name of the company, its headquarters and registered office, the unified identification number and bank account of the Private Joint-Stock Company. In the Commercial Act there are no particular obligations for disclosure of corporate governance information. However, in the Company Register all information about the company described above is published and updated.

The Public Joint-Stock Companies should publish on their websites information regarding forthcoming General Meetings, their agenda and supporting materials, and also the Minutes of the General Meeting within three days after the date when it was held (art. 117 of the Law for Public Offering of Securities).

Art. 115b par. 4 of the Public Offering of Securities Act allows the Statute of a Public Joint-Stock Company to provide the necessary technical facilities for distant voting including via e-mail and/or via website.

Georgi Georgiev
Georgiev, Todorov & Co.
27 Parchevich str.
Sofia
Bulgaria

Tel: *+359 2 937 65 42*
Email: *ggeorgiev@georg-tod.com*
URL: *www.georg-tod.com*

Georgi Georgiev graduated Sofia University Faculty of Law in 2010. In 2011–2012 he obtained a Master's degree in International Business Law at one of the top world universities – King's College London.

He took part in courses on Contract Law and English Legal Methods at the University of Cambridge, English Company Law and Corporate governance at the London School of Economics and Political Science, as well as training programs in arbitration and ADR at the Court of Arbitration with the Bulgarian Chamber of Commerce and Industry.

In 2012 Georgi was appointed as a country researcher for Bulgaria and a member of the research team in a project of the London School of Economics and Political Science, funded by the European Commission for a survey on the legislation and case-law of the Member States regarding corporate governance. Between 2013 and 2016 he was a part-time assistant professor at the Law School in the University of National and World Economy in Sofia and since 2016 he has been a full-time assistant professor in Commercial law and Civil law at the School of Law of Sofia University.

Monika Markova
Georgiev, Todorov & Co.
27 Parchevich str.
Sofia
Bulgaria

Tel: *+359 2 937 65 41*
Email: *mmarkova@georg-tod.com*
URL: *www.georg-tod.com*

Monika Markova, Associate at Georgiev, Todorov & Co., has obtained a dual-qualification in law. She graduated from the University of Manchester, UK and the University of Sofia.

As part of the compliance team of Georgiev, Todorov & Co. Monika specialises in administrative law and proceedings, as well as regulatory compliance and enforcement. In her work, Monika draws on her experience in English and Bulgarian law to take a multi-faceted approach to regulatory and compliance matters and to address the need and concerns of our international clients. She has advised Roche Bulgaria in relation to medicinal products regulation. Further, she advises Piraeus Bank and the Bulgarian telecommunication company (the national telecommunications operator) on different aspects of their activity.

Monika has a leading role in the team of Georgiev, Todorov & Co. on GDPR compliance and data protection issues. She helps our corporate clients deal with the new legal, technical and organisational challenges and obligations for ensuring the required level of protection of personal data.

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LAW OFFICES

Georgiev, Todorov & Co. was founded in 1991 as one of the first Bulgarian law firms. Currently we are one of the largest business law firms in the country consisting of seven partners and 52 lawyers who have always been proud of rendering excellent legal service.

The firm provides corporate law services with a particular emphasis on the financial sector, M&A, restructuring, insolvency, venture capital and secured lending for both a large number of domestic clients and a range of foreign investors.

The firm's powerful network of domestic and international contacts and its experienced lawyers, who are also foreign-educated with an excellent command of Bulgarian, English, French, German, Italian, Russian, Spanish, and Armenian, are strong prerequisites for success of our clients.

The tremendous results accomplished by our highly qualified and competent team are what allow Georgiev, Todorov & Co. to be one of the leading law firms in Bulgaria. We guarantee the most accurate services to our clients especially in the areas of large business transactions, Litigation and Dispute Resolution.

China

Tian Yuan Law Firm

Raymond Shi (石磊)

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

There are two types of companies in China (the People's Republic of China, or "**PRC**"), namely limited liability company and joint stock company. A limited liability company must remain non-public, while a joint stock company can either be non-public, or be able to offer shares publicly and list on domestic exchanges or designated venues and certain overseas stock exchanges. There are, among others, two sub-types of limited liability companies, i.e., equity joint venture (or "**EJV**") companies and cooperative joint venture (or "**CJV**") companies, both joint venture companies between foreign and domestic investors, which the PRC laws have some special provisions in respect of corporate governance that are different from other limited liability companies.

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

The primary legislation that applies to all companies in China is the Company Law of the PRC and the judicial interpretations of that law made by the Supreme Court of the PRC (together, the "**Company Law**"). In particular, the Law of Sino-foreign Equity Joint Venture of the PRC, the Law of Sino-foreign Cooperative Joint Venture of the PRC, the Law of Wholly Foreign-owned Enterprise (or "**WFOE**") of the PRC, and their respective implementation rules promulgated by the State Council govern EJV and CJV companies and WFOEs respectively.

The corporate governance of public companies (including companies that have made public offering of shares and get listed on stock exchanges, or "**listed companies**", and companies that have offered shares publicly but are not listed on stock exchanges, while their shares can still be traded on designated trading venues) must also adhere to a number of PRC laws concerning listed companies specifically. As the general law within this respect, the Securities Law of the PRC (or "**Securities Law**") provide certain requirements for companies, shareholders, board of directors and management in respect of information disclosure and corporate governance procedures. Specifically, the China Securities Regulatory Commission, the two stock exchanges and other designated trading venues within the PRC provide detailed provisions regarding public companies' information disclosure and corporate governance procedures.

In addition to observing the Company Law, each company must also have a principal constitutional document, known as its articles of association (the "**Articles**"). The Articles prescribe regulations and rules for the company and reflect the contract and relationship among shareholders. The Articles contain important details regarding governance issues which supplement what is provided by legislation.

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

Significant developments have taken place, or are taking place in various aspects in recent years; for example, the reform of state-owned enterprises promoting mixed ownership structure and encouraging foreign shareholdings, the preference share pilot programme launched at the end of 2013 giving the green light to a new class of securities in the share capital of a company, the overall climate of cracking down on corruption and bribery and, with respect to foreign-invested enterprise ("**FIE**"), the upcoming PRC Foreign Investment Law is expected to have a revolutionary impact on the overall foreign investment legal regime by abolishing the existing rules governing FIEs and integrating FIEs under the legal framework of the Company Law.

Given the relative immaturity of the PRC corporate governance regime, as well as that of PRC capital markets generally, there is an ongoing interest and strengthened effort in exploring the best corporate governance practices and methods of implementation by the PRC government, as demonstrated by various pilot programmes, guidance opinions and enforcement practices. With respect to public companies, the current discussion focuses, in particular, on the protection of minority shareholders, the regulation of controlling shareholders or actual controllers, and the transparency and disclosure obligations, etc. Various measures have been taken recently in this regard, including: (i) the launch of the pilot scheme of the Minority Shareholder Service Centre, which is composed of professionals and is entitled to hold up to 100 A shares of public companies in the pilot regions and exercise the rights as ordinary shareholders on behalf of minority shareholders, with a view to generating certain demonstrative effects and encouraging more minority shareholders to protect their rights; (ii) the State Council's opinion urging listed companies to disclose their dividends distribution policies and fulfil their related commitments; (iii) the joint enforcement by 22 PRC authorities against any breaches of good faith and unlawful conducts by listed companies and its responsible persons; and (iv) the strengthened enforcement by the CSRC with respect to the compliance by public companies with their disclosure obligations, etc. Concerns have also been extended to employees in light of the

continuous initiative to launch the employee share scheme pilot to allow the employees to legally hold the shares of listed companies in the long run.

Going forward, the focus would still remain on improving corporate governance for public companies in the areas of transparency, protection of minority shareholders and regulation of controlling shareholders or actual controllers. More particularly, echoing the "new normal" of China's economy, there is a strong desire from regulators to improve the self-discipline regime of listed companies and, in particular, to address: (i) the imbalance between controlling shareholders and minority shareholders; (ii) the transparency and disclosure obligations; (iii) the operation of the board of directors; and (iv) the promotion and management of employee share schemes.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Over a long period since China's economic normalisation from the late 1970s, the tension between short-termism and long-termism in corporate governance has never drawn too much attention from academia, legislature and judiciary practices. This particularity has multiple reasons, but among them the most important three are: legal principle; the very common concentration of ownership; and the embedded political nature of state-owned companies' governance. Starting with legal principle, PRC laws keep a near-paranoid commitment to shareholder protectionism (bar the CJV and EJV companies which are to be discussed in question 2.1), by law shareholders enjoy the absolutely supreme authority in corporate governance, to the extent that shareholders have the absolute power to decide any important issues in a company's existence and operation, while the board (or sole executive director if no board) and management team are only executive bodies deputised by shareholders; in theory, even if the board has made a decision, shareholders can still overturn it and decide otherwise, and shareholders can remove or change directors, even without cause, almost at their own discretion; accordingly, even if a conflict between shareholders and management arises, theoretically it can be simply solved by shareholders voting down the management. As for the concentration of ownership, due to cultural and historical factors, non-state-owned companies, public or private, in China are commonly owned or majority-owned by insiders in very close communities, mostly characterised by family, kinship or other close personal relationship, therefore owners and managers are often the same group of people. Even if there is a clash in corporate governance, it is much more likely to be one between majority shareholders and minority shareholders, which does not necessarily concern the question of short-termism and long-termism, rather than one between owners and managers. Lastly, for state-owned companies that control the strategically important sectors of Chinese economy and contribute nearly half of the economic output, although owners and managers do not overlap, in terms of corporate governance, aside from the aforesaid absolute power of shareholders over managers, it is much less a solely legal or commercial issue than it is a political one. That said, even if tension between government and managers in state-owned companies' governance inevitably exist, it is never like or solved like the western-styled agency problems.

This norm is hard to change. Although, some recent spotlight cases concerning listed companies' governance do significantly expose the primitiveness and weakness of the legal framework in this regard. The so-called "take-over war" for Vanke (ticker number: 00002.SZ) between new shareholders and management starting from 2015 and still apparent, and the clash between small shareholders and management of Gree (ticker number: 000651.SZ), while often headlined as a clash between management's short-termism and shareholders and companies' long-term value, are actually rather legally unsophisticated because there are so many loopholes and grey areas in corporate governance that even the presumably straightforward and procedural question such as quorum of a board meeting and effectiveness of certain board member's abstention can be interpreted and characterised in starkly opposite ways. These cases have sparked serious debates among various parties, if not just treated as single cases, may raise a flag to the academic, legal and business societies of the significance of the risks of short-termism and the importance of promoting sustainable value creation over the long-term, and may hopefully prompt further legislative reaction and judicial solutions, however slowly it may be.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Other than EJV and CJV companies whose supreme authority belongs to the board of directors, in general, the shareholders' meeting is the highest decision-making authority of a company. Shareholders entrust and delegate day-to-day operation and management of companies to the board through the Articles, and a separate supervisory board is set up to supervise the performance of the board and senior management reporting to the board. The Company Law reserves certain important matters to the shareholders' meeting. Such matters include: review and approval of the company's business strategy and investment plans; appointment and dismissal of directors and supervisors; review and approval of annual budget and final accounts; review and approval of the Articles; increasing or decreasing registered capital; and merger, division, liquidation or change of corporate form.

In the case of public companies, additional matters must also be decided by the shareholders' meeting; for example, acquisition or sale of material assets above a certain threshold and provision by the company of security for its shareholders or actual controllers. The Listing Rules provide further examples of specific transactions subject to the shareholders' approval, including material transactions, as well as material related party transactions.

Whilst shareholders have the right to reserve any other matters for their decision by stating so in the Articles or through a shareholders' resolution, public companies in the PRC, as a matter of practice, typically only reserve matters that are required by law to be decided by the shareholders.

Although PRC laws recently allowed offering of preferred shares by joint stock companies, preference shareholders are generally not entitled to attend the shareholders' general meeting, unless the matters to be resolved relate to the material interests of the preference shareholders (such as an amendment to the Articles which relates to the preference shares, a single or cumulative reduction of the registered capital of the company exceeding 10%, merger, division, liquidation or change of corporate form, and issuance of new preference shares), in which case, the preference shareholders will be entitled to vote at a separate class meeting with respect to these matters. There are also circumstances where preference shareholders will be entitled to vote at shareholders' general meetings together with ordinary shareholders, such as failure by the company to pay dividends to preference shareholders, as agreed, for three financial years in aggregate or two consecutive financial years, until the full amount of the relevant due dividends has been paid.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders are under a general requirement to comply with laws, regulations and the Articles. Other than that, most shareholder responsibility in respect of corporate governance rests with the controlling shareholders. The general principle is that controlling shareholders may not abuse their position to impair the interests of the company or any other shareholders. If they do cause harm in this manner, they may be held liable for the damages caused.

The duties of controlling shareholders of a listed company extend further. Under the Governance Guidelines, controlling shareholders are obliged to support the reform of labour, personnel and distribution systems of the listed company. When nominating directors and supervisors, controlling shareholders have a duty to ensure that the nominated candidates have sufficient professional expertise and management capabilities to perform their roles.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Companies may have regular shareholders' meetings and extraordinary shareholders' meetings; in particular, it is mandatory for public companies to have an annual general meeting (i.e., listed company's shareholders' meeting). At the annual general meeting, which should be held within six months of each financial year end, shareholders typically vote on the following: review and approval of annual budget and financial reports; appointment of the company's auditors, directors and supervisors; and declaration of dividends. Extraordinary general meetings may be held as needed (for example, to approve a specific corporate action or a material transaction) and, in addition, the Company Law requires an extraordinary meeting to be held within two months of the occurrence of certain circumstances, such as when the number of directors of the company falls below two-thirds of the number prescribed by either the Company Law or the Articles.

Shareholders (including preference shareholders who are entitled to voting rights, as described in question 2.1 above) are entitled to receive notices of all shareholders' meetings. A company must formally notify its shareholders (including preference shareholders who are entitled to voting rights, as described in question 2.1 above) at least 20 days (in the case of the annual meeting) or 15 days (in the case of an extraordinary meeting) prior to the date of the meeting. Listed companies must deliver the notice of the shareholders' meetings via a public announcement.

Voting at shareholders' meetings requires either an ordinary resolution (requiring a simple majority of those voting in person or by proxy) or a special resolution (requiring a majority of no less than two-thirds of those voting in person or by proxy). Special resolutions are required for specific matters, such as amendments to articles, an increase or decrease of registered capital, the acquisition or sale of material assets and the adoption of stock incentive schemes.

Shareholders (including preference shareholders who are entitled to voting rights, as described in question 2.1 above) individually or collectively holding 3% or more of the shares of a company may require certain matters of their choosing (which are within the power of the shareholders' committee) to be included on the agenda of a shareholders' meeting.

Whilst the default position is for the board to convene, and the chairman to chair, shareholders' meetings, shareholders (including preference shareholders who are entitled to voting rights, as described in question 2.1 above) individually or collectively holding 10% or more of the shares of a company for a consecutive period of at least 90 days may convene and chair a shareholders' meeting if the board (as well as the supervisory board) fails to do so.

Shareholders may attend shareholders' meetings in person or by proxy. Listed companies are encouraged to make online voting platforms available to shareholders, and the Exchanges also prescribe a list of matters for which online voting platforms must be set up, including resolutions relating to new issues of shares, material restructuring and related party transactions. Where a shareholder intends to appoint a proxy to attend the meeting, the power of attorney must be in writing and an original must be submitted during the meeting.

Beneficial ownership of PRC listed shares is not common and is only used in limited circumstances (for example, foreign exchange traded RMB denominated shares and shares traded under the Shanghai-Hong Kong Stock Connect Pilot Scheme and the Shenzhen-Hong Kong Stock Connect Pilot Scheme). Beneficial owners have to exercise their shareholders' rights through nominees.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Since PRC laws adopt the register capital system in terms of company's capital contribution, in general, shareholders naturally owe the duty to contribute to the company the promised share of its registered capital. The failure of such duty would lead the shareholders in default to be liable for the company and other shareholders. Moreover, it is provided by the Company Law that shareholders shall not "abuse shareholder rights" to harm the interest of the company and other shareholders, and controlling shareholders shall not use their connection with the company to their own person interest. However, these provisions are as broad a declaration as it is an ambiguous prohibition, thus leave great room to judiciary to interpret and implement.

In terms of liabilities of shareholders for acts or inaction of the companies, the fundamental principle in this respect is that in a company, the liability of a shareholder is limited to the amount of capital contribution in respect of the shares for which he has subscribed or agreed to subscribe. This, combined with the principle of separate legal personality, means that, in principle, a company's "corporate veil" is not pierced and shareholders are not held liable for a company's actions. In exceptional circumstances, the corporate veil can be pierced. According to the Company Law, if a shareholder is found to have abused the limited liability status of the company and materially prejudiced the rights of the company's creditors, the shareholder may be held jointly and severally liable, along with the company, to the creditor who has been prejudiced and called for the piercing of the corporate veil. Because the statute does not specify what constitutes "abuse of limited liability status", and given the lack of case law and official interpretation from the PRC Supreme Court, courts are left with a great deal of discretion, and concerns exist regarding the possibility of inconsistent practices arising across the country. To date, no listed company has, however, been subject to a court order piercing the corporate veil.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders can only be disenfranchised in very limited circumstances. For example, shareholders who engage in insider

trading or market manipulation may be stripped of shares which they acquired as a result of such illegal behaviour, and voting rights attached to shares held by the listed company itself are suspended. A further example is that of certain related party transactions, in respect of which the relevant related party shareholder cannot vote on the relevant shareholder resolution.

In certain regulated sectors (for example, commercial banks and securities companies), shareholders' rights to dividends, appointment of management and share transfers may be restricted by the regulators if the company is in financial difficulty.

In a takeover scenario, the relevant exchanges will cancel the listing of a company where a majority shareholder, as a result of a takeover bid, holds more than 75% or 90% of the shares of the company (depending on the number of shares issued by the company). Unlike several other jurisdictions, however, PRC laws do not force minority shareholders to sell their shares to the majority shareholder. Rather, a minority shareholder has the right to sell his shares to the majority shareholder after the expiration of the takeover offer on the same terms as those proposed in the general offer, even if the minority shareholder did not accept the offer during the general offer.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Yes. The Company Law confers the right on shareholders to bring an action against directors, supervisors or senior management for breach of law or violation of the Articles in performing their duties. Such actions may be brought in the name of the shareholders but must be in the interests of the company, with any damages awarded being payable to the company. Exercise of this right is subject to certain conditions, including that the shareholders individually or collectively have held and continue to hold 1% or more of the shares in the company for 180 or more consecutive days and the management body, or the supervisory board, in the case of misconduct by directors or senior management, has failed to file a claim on behalf of the company after the shareholders have served a written notice of the claim.

Where directors or senior management infringe on a particular shareholder's rights by breaching laws or the Articles and such infringement results in a loss to that shareholder, the shareholder may seek enforcement action on its own behalf against such personnel. Further, under the Securities Law, a shareholder may request directors, supervisors and senior management to bear joint and several liability with the listed company if such shareholder suffers a loss due to false, misleading or incomplete disclosure by the listed company.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Other than in the context of take-over of listed companies' shares, there is generally no requirement for shareholders to disclose any intentions, plans or proposals to the companies which they invest in. According to the PRC laws in connection with listed companies' take over, in open market or by contractual transfer, a shareholder (including other parties acting in consent or in coordination, same below) who acquires a listed company's shares, subject to the percentage of shares he acquires, may be required to disclose a change of their investment in the listed company, in which they should include their intentions, plans or proposals against the listed company. If the shareholder acquires more than 30% of a listed company's shares thus triggers the tender offer, except if the tender offer obligation is waived, the shareholder shall go through the tender offer process, in which he should disclose: his intention to take over the listed company; the plan to further acquire shares; and the proposals (if any) to restructure, reform or adjust the listed company's assets, business, management, governance structure, articles of association, etc.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Companies are managed by the board which reports to shareholders of the company and is subject to the supervision of a Supervisory Board (consisting of at least three supervisors). The board will also appoint senior management to manage the daily operation and business of the company. A director or senior manager cannot take a concurrent position as a supervisor of the company.

The Company Law does not expressly provide for a concept of executive directors and non-executive directors, nor for their respective responsibilities. It is common in PRC public companies that a majority of directors are internal or executive directors. In response to this, and to protect the interests of minority shareholders, a public company is required to introduce independent directors (i.e. external directors who are independent from the company and its major shareholders) comprising at least one-third of its Board. The main responsibilities of independent directors include: approval of material related party transactions before the same are considered by the board; proposing to appoint or dismiss accounting firms; and providing independent opinions to the board or shareholders on matters such as the appointment and remuneration of directors and senior management, and other matters which, in the view of the independent directors, may adversely affect the interests of minority shareholders.

Furthermore, public companies may (and in practice, do) establish several committees (although the board remains responsible for ultimate decisions), including a strategic committee responsible for long-term development strategies, an audit committee monitoring the internal audit system, a nomination committee leading the process of the selection of directors and managers, as well as a remuneration and appraisal committee reviewing the remuneration policy. Independent directors should comprise at least half of the positions on each of the nomination, audit and remuneration committees.

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

Except for directors or supervisors appointed by employees (see question 4.2 below), shareholders control the appointment and removal of the members of the board and Supervisory Board by a simple majority resolution. The term of office for directors and supervisors is three years, which can be extended if they are re-elected (and independent directors can have a maximum of six years in total).

To protect the rights of minority shareholders, a cumulative voting system is encouraged to be put in place, and this system is mandatory for the appointment of directors in a listed company whose controlling shareholder holds more than 30% of its shares. Under this system, the number of votes for each shareholder is multiplied by the number of directors to be appointed, after which the shareholders need to distribute their votes among the different candidates (each vote may only be assigned to one candidate). As a result, the majority shareholder no longer automatically controls all appointments, and this system leaves room for the minority to appoint some candidates as well.

Generally, preference shareholders do not have voting rights in respect of the appointment and removal of members of the management body.

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

The Company Law requires remuneration of directors and supervisors to be approved by a shareholders' meeting, and prohibits directors and senior management from engaging in business similar to the business of the company without obtaining approval at a shareholders' meeting. The Governance Guidelines require listed companies to enter into engagement letters with their directors and senior management. The Governance Guidelines further set out high-level principles on setting up a transparent performance appraisal system for the board (or its remuneration and appraisal committee) to use in reviewing the performance of directors and senior management, and for supervisors and independent directors to use for purposes of self-appraisals. Where a listed company intends to adopt a stock incentive scheme, it must observe the Administrative Measures on Stock Incentives by Listed Companies issued by the CSRC, which require any such scheme to be approved by a shareholders' meeting, as well as by the CSRC. The performance report, appraisal results and remuneration of each director and supervisor must be disclosed to shareholders and included in the company's annual report. For certain regulated sectors (such as banking, securities and insurance), industry-specific regulations by the relevant authorities in connection with the remuneration of members of the management body (e.g. delayed payment of performance related bonus) must also be complied with.

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

A director, supervisor or senior manager is allowed (but not required) to hold shares in a listed company subject to notification to the company. The Company Law imposes the following limitations on the transfer of such shares by these individuals: in any given year, he may transfer no more than 25% of his total shares held in the company; the totality of shares he held prior to the listing of the shares cannot be transferred within one year from the date of the listing; and in the event of departure from the company, he cannot transfer any shares within the first six months after departure. Further, a short swing rule applies to a director, supervisor or senior manager of a listed company, pursuant to which such individual is prohibited from selling (or purchasing) shares during a period of six months after he or she purchased (or sold) such shares.

Public companies must disclose the shares held by directors, supervisors and senior management, as well as any changes, on a yearly basis in their annual reports.

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

The board must convene Board meetings at least twice a year, with a notice being served at least 10 days in advance. Interim Board meetings should be called within 10 days if proposed by shareholders collectively holding 10% or more voting rights, or by one-third or more of the directors or by the supervisory board of the company. The listed company is required to provide the notice period for interim Board meetings in its Articles. The quorum for a Board meeting and the votes required for a resolution are both more than 50% of all directors. Directors may attend Board meetings in person or by proxy. Each director has one vote. In listed companies, directors who are related to the matters to be voted on must refrain from voting on such matters.

The supervisory board must hold meetings at least once every six months and interim meetings may be called if proposed by a certain number of supervisors, as provided in the Articles. The law does not specify the notice period for such meetings, leaving the Articles to provide the details. A resolution may be passed by the supervisory board if 50% or more of the supervisors' vote for the matter in question.

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

Under the Company Law, directors, supervisors and senior management are subject to duties of loyalty and diligence. These duties are not expressly defined, but are generally understood to require that these persons perform their responsibilities diligently and with due care, avoid conflicts of interest, and act in the best interests of, and for the benefit of, the company.

The Company Law provides examples of acts in breach of the duty of loyalty, including but not limited to: misappropriation of company funds; the use of one's position to divert commercial opportunities of the company; engaging in business similar to the business of the company for one's own benefit (or for the benefit of another) without obtaining approval at a shareholders' meeting; accepting commissions for transactions between other parties and the company; and disclosing company secrets without authorisation.

The Securities Law, the Articles Guideline and the Governance Guidelines set out further detailed duties and prohibited acts of a director, supervisor or senior manager, covering both the duty of loyalty and the duty of diligence. For example, under the Securities Law, directors and senior management must sign written confirmatory opinions in respect of periodic reports prepared by the listed company, and the supervisory board must review the reports and issue a written opinion on the same. All these members must ensure that there are no false statements, misleading representations or major omissions in information disclosed by the listed company in any accounting reports, annual reports, half-yearly reports and other disclosed information in respect of which such member has provided a confirmatory opinion. Further examples under the Governance Guidelines include that directors must devote sufficient time and energy to perform their duties, and independent directors must ensure their independence and protect the overall interests of the company, with a particular focus on the protection of the legal interests of the minority shareholders.

A director, supervisor or senior manager who has breached his duties under the law or the Articles may be dismissed, required to compensate the company or investor for any loss incurred as a result of such breach, or may be subject to confiscation of any income obtained as a result of the breach. Administrative penalties or criminal liabilities may also be imposed.

On a related note, the Company Law expressly prescribes that collective responsibility may fall upon all directors if a specific Board resolution was passed in violation of laws, administrative regulations, the Articles or a shareholders' resolution, and causes the company to incur serious loss. A director may be released from such liability, however, if he is proven to have expressed his opposition to such resolution when it was put to the vote and the opposition was recorded in the minutes of the board meeting.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The principal responsibility of the board is to oversee the business and affairs of the company. As a general matter, this responsibility consists of formulating the basic management system and establishing the internal management bodies of the company, identifying and hiring senior management, proposing and overseeing long-term corporate strategy, proposing the appointment of external auditors and approving the internal auditing controls and procedures and duties of internal auditors. The senior management operates the day-to-day business of the company under the oversight of the board.

The supervisory board's role is to supervise performance of the directors and senior management. Its responsibilities include, but are not limited to, examination of the financial status of the company, monitoring the board and senior management's performance of their duties and compliance with law, regulations and the Articles, proposing the removal of any director or senior manager and requiring directors and senior managers to correct any act that is harmful to the company's interests.

The key challenges facing the management body of a listed company include: (i) independence by the directors from the controlling shareholder in order to enable independent decision-making; and (ii) finding eligible directors, particularly independent directors, with sufficient industry experience and legal and accounting knowledge.

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

There are no statutory requirements nor prohibition in the PRC in relation to indemnities to and issuance of board members and senior management. In terms of indemnities, practically if a board member or management officer is personally harmed or financially damaged during the course of business or otherwise discharging professional duty, he can seek legal remedy in accordance with labour law or tort law, rather than company law; if it is provided by the company's constitutional documents that indemnities should be made, it is not directly against PRC laws, however, the validity of such an indemnity can be challenged if it appears to permit a director or officer to contract out of their statutory duties, particularly if the person benefiting from the indemnity has acted in bad faith or breached his duty of loyalty to the company. Furthermore, enforcing an indemnity claim in a PRC court may not be straightforward as PRC law does not expressly recognise the concept of an indemnity.

As for insurance, it is generally permitted that companies, subject to approval of a shareholders' meeting, maintain insurance for directors in respect of their potential liabilities, except where the liabilities result from the directors' breach of laws, administrative regulations or the Articles of the company. Although, in practice, directors and officers insurance is still seldom purchased by PRC companies except some, mostly, listed companies.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Save the special provisions concerning EJV and CJV companies, according to PRC laws, shareholders' meeting has the authority to decide the company's strategy, and the board has the authority to propose company strategy for shareholders to approve and is responsible for implementing the shareholders' meeting's decision. There is a non-binding guidance of listed companies' articles of association issued by the CSRC, providing that the power of general meeting shall not be deputised to the board, which means it is generally unwelcome if the authority to decide a listed company's strategy is deputised to the board. However, for unlisted companies, such deputy is not against any PRC laws.

4 Other Stakeholders

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

Employees do not play a direct role in the corporate governance of a company, but they may have some influence through representatives serving on the board or Supervisory Board, as well as consultation rights on certain matters. Under the Company Law, the board may (but is not required to) include employee representatives and at least one-third of the members of the supervisory board must comprise representatives of the company's employees. Further, a company should consult with its labour union and gather the thoughts and recommendations of the employees in its decision-making process with respect to restructuring, company operations or the formulation of important company rules and systems.

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

Generally there is no specific role for other stakeholders in corporate governance of a Chinese company.

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

The Company Law expressly requires all companies observe social morals and commercial ethics, act in good faith, accept the supervision of the public and undertake social duties. Whilst these provisions are seen more as promotional provisions rather than as imposing mandatory obligations *per se*, the principles that they articulate are reflected in other areas of PRC legislation, and are expected to lead over time to greater consciousness of social responsibility on the part of companies, government agencies and courts.

In recent years, an increasing number of companies have proactively promoted corporate social responsibility. The Exchanges have also published guidelines to emphasise the responsibility of listed companies in protecting the interests and rights of creditors and consumers, promoting the safety, health and education of employees and ensuring the quality of products and the sustainable development of the environment, economy and society.

The disclosure of social responsibility reports is not mandatory but highly encouraged. Increasingly, listed companies are including annual corporate social responsibility reports in their annual reports (or publishing them separately), covering the topics mentioned above.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Public disclosure (except for any disclosure made by the supervisory board) by public companies is prepared and issued in the name of the board as a whole. However, each director, supervisor and senior manager is responsible for the truth, accuracy and completeness of such information disclosed by the company. In particular, directors and senior management must each give a written confirmatory opinion on the periodic reports of the company, and the supervisory board is responsible for reviewing the report and issuing a written verification opinion.

5.2 What corporate governance-related disclosures are required?

The Governance Guidelines provide that at least the following corporate governance related information must be disclosed: (i) the composition of the board and the supervisory board; (ii) reports on the work of the two boards and the evaluation of their performance; (iii) reports on the work of independent directors and the evaluation of their performance; (iv) the composition and work of each Board committee; (v) general description and commentary on the corporate governance of the company and any deviation from the Governance Guidelines, if any; and (vi) the definitive plan and measures intended to improve corporate governance. Additionally, a public company must periodically disclose financial reports to the public.

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

A public company is required to engage an external accounting firm to audit its internal control system for such matters as corporate governance, capital structure and any deficiency in respect of internal controls. The internal control audit may be conducted separately or together with the audit of the financial accounts of the company and must be disclosed to the public.

5.4 What corporate governance-related information should be published on websites?

In principle, all disclosed information must be made available to investors by efficient and economical means (for example, over the internet). In practice, all information that needs to be disclosed by public companies relating to corporate governance is available on the website of the relevant Exchange and of the company itself.

Raymond Shi (石磊)
Tian Yuan Law Firm
10F, Tower B, CPIC Plaza
28 Fengsheng Lane, Xicheng District
Beijing 100032
China

Tel: *+86 10 5776 3888*
Email: *rshi@tylaw.com.cn*
URL: *www.tylaw.com.cn*

Raymond Shi is a partner in Tian Yuan's Beijing Office. He is licensed in China and the state of New York and has been practicing laws at well-established PRC and international law firms for years. Mr. Shi specialises in general corporate, capital markets, M&A, VC and PE investment, taxation, and anti-trust. He works with Chinese clients as a native speaker and can speak English proficiently.

Mr. Shi is good at handling extremely complicated transactions, which normally involve laws of multiple, and drastically different, jurisdictions, as well as multiple practice areas such as corporate, litigation and tax, all legal issues need to be carefully considered and addressed by lawyers.

During his professional career to date, he has established sound professional reputation and has won considerable recognition in the market of PRC legal services. He was awarded the "30 under 30" legal professional elite by ranking agency LEGALBAND in 2016.

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Czech Republic

Jindřich Král

Pavol Černý

Glatzová & Co.

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

In the Czech Republic there are two corporate forms whose shares might be publicly traded on a regulated market: (a) joint stock company *("akciová společnost")*; and (b) *societas europaea* (SE). In practice, the SE form is uncommon; unless otherwise explicitly stated, the regulation of joint stock companies applies to SEs as well.

The most common corporate form in the Czech Republic is the limited liability company *("společnost s ručením omezeným")*. Limited liability companies may not offer their shares publicly on a regulated market, but we mention them for the sake of completeness.

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

All discussed, companies are regulated in particular by the following acts:

- No. 89/2012 Coll., the Civil Code;
- No. 90/2012 Coll., the Business Corporations Act;
- No. 125/2008 Coll., on Transformation of Commercial Companies and Cooperatives;
- No. 563/1991 Coll., on Accounting;
- No. 93/2009 Coll., on Auditors;
- No. 262/2006 Coll., the Labour Code; and
- No. 40/2009 Coll., the Criminal Code.

Listed companies are further governed by:

- Act No. 256/2004 Coll., on Capital Market Undertakings;
- Act No. 104/2008 Coll., on Take-Over Bids; and
- Corporate Governance Codes which the company abides by (relevant only for companies listed in the prime market segment of Prague Stock Exchange).

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

Since the recodification of Czech private law in 2014, there have been a number of issues with the interpretation and implementation of the new regulations, and, in the last two years, there have been discussions about amending the Czech Business Corporations Act to deal with uncertainty regarding corporate governance and to provide for more flexible regulations. In particular, the following corporate governance topics are being discussed: (i) definition of responsibilities of management bodies in a one-tiered joint stock company; (ii) new rules concerning corporate groups; (iii) flexibility with regards to the ban on directors competing with a company; (iv) more lenient rules regarding amendments to memorandum of association or by-laws of companies; or (v) concurrence of functions of a director and an employee of a company.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In general, directors are obliged to exercise their governing powers in the interest of the company they manage. They cannot exclusively promote the interests of the shareholders, but must consider the interests of other stakeholders as well. Therefore, they cannot only maximise their profits, but must act pursuant to a long-term strategy promoting the company's sustainable growth. Should directors excessively focus on maximising profits for shareholders in the short-term at the expense of long-term interests, they would be breaching their duty of skill, care and diligence including the duty to act in the interest of the company. Directors may be liable for such breach if they do not make fully-informed decisions in the justifiable interest of the company. If directors make decisions that bring excessive short-term gains for shareholders or other stakeholders that cause the company to enter into bankruptcy, they could be obliged to personally guarantee the performance of the company's obligations.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Above all, shareholders may exercise their voting right at the general meeting. In this way, the shareholders can, *inter alia*, set and change the internal structure of the company including its legal form, the number of its corporate bodies and the number and identity of their members.

Articles of association can also allow shareholders to attend the general meeting remotely via electronic means. Further, the voting rights can be exercised in writing outside the general meeting.

Qualified shareholders (10% share on the registered capital or voting rights in the limited liability company or 1%, 3% or 5%

respectively depending on the amount of registered capital in the joint stock company) can enforce summoning the general meeting with an agenda proposed by them.

Shareholders of a limited liability company have broad information rights. Qualified shareholders in a joint stock company can request that the supervisory board review certain actions of the board of directors.

Approval of the general meeting is required to transfer the company's business or a material part thereof. Without such approval, the transaction can be invalidated.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The general meeting elects, recalls and approves the remuneration of members of the supervisory board, directors of the limited liability company and, unless such right is granted in the articles of association to the supervisory board, also members of the board of directors in a joint stock company.

The general meeting can suspend the performance of the office of the corporate body's members in the event of a conflict of interests and/or a ban on concluding agreements between the company and a member of company's corporate body.

The consent of the general meeting is required for the effectiveness of any agreement on settling damages incurred by the company due to a breach of obligations of company's directors.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The annual general meeting must take place within six months from the end of the last accounting period. It approves the financial statement of the company, decides on the distribution of profit or settlement of losses and selects the auditor of the company (where the audit is mandatory).

A quorum of at least 50% of all votes in a limited liability company and 30% of all votes in a joint stock company is required for a general meeting.

If the quorum of the general meeting of a joint stock company is not met, an additional general meeting must be summoned; such meeting can decide with no respect to the quorum.

The shareholders have the right to be properly informed about the general meeting in advance via a written invitation in the case of a limited liability company or by a written invitation (or via an alternative means set by the articles of association) and by an announcement on the company's website in the case of a joint stock company, respectively.

The general meeting decides most matters by a simple majority of votes present. Changes to articles of association, dissolution of the company, set-off of receivables against contributions and certain other matters require a ⅔ majority of all votes in the case of a limited liability company or present votes in the case of a joint stock company. Changes to the articles of association of a limited liability company that affect all shareholders require the consent of all of them. A resolution on a merger or other corporate restructuring and restriction of transferability or delisting of shares in a joint stock company requires a ¾ majority of present votes.

Each shareholder has the right to claim invalidity of a general meeting's resolution in court. Such right may be used within three months from the time the general meeting took place, but within one year from that day at the latest. A shareholder who attends the general meeting is required to file a protest at the meeting in order to retain the right to file a petition.

Shareholders of a joint stock company have limited rights to information related to items in the agenda of the general meeting and the right to file proposals or counterproposals.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders of Czech limited liability companies and joint stock companies are bound by the following statutory obligations: (i) an investment duty to pay up participation in the share capital of the company; and (ii) the duty of loyalty towards the company they participate in.

In order to acquire shares in a company, any future shareholder or a current shareholder wishing to increase their participation in the company must pay the company an investment in the amount set by the memorandum of association corresponding to participation of the share in the share capital of the company within the deadline set by the memorandum of association, but no later than within five years in the case of a limited liability company or one year in the case of a joint stock company from founding of the company or from takeover of an investment duty in the case of expanding a shareholder's participation in an existing company. Should any shareholder default on the investment duty, the company is entitled to interest at two times the statutory interest rate for late payment set by the Government Directive No. 351/2013 Coll. and may expel such shareholder based on a resolution of the general meeting.

All shareholders owe a statutory duty of loyalty to their company, meaning that a shareholder must exercise its rights in good faith and adhere to the memorandum of association and internal directives of the company. Thus, all shareholders must promote the purpose of the company set out in its memorandum of association, not act solely in their own interest to the detriment of the company's interest and avoid any conduct that may prevent achieving the company's purpose. If a shareholder breaches this duty of loyalty, it may be liable to pay damages to the company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders may take enforcement action against the management body. Provided the legal action is timely filed by the supervisory board, any shareholder of a limited liability company or any qualified shareholder of a joint stock company may claim compensation for damages on behalf of the company from the company's director(s).

Shareholders may also enforce their rights against their company before court. In particular, shareholders may file a lawsuit against the company (i) for authorisation from the court to call a general meeting if a qualified shareholder of a joint stock company (i.e. a shareholder whose share meets the minimum size requirements), (ii) to obtain information regarding the company, or (iii) to annul a shareholders' resolution taken in violation of the law, by-laws or good manners.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Please refer to question 5.2.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Shareholders of listed companies in the Czech Republic are bound by several disclosure duties, such as (i) the duty of major shareholders to announce their holdings, (ii) the duty of current and potential shareholders, who intend to undertake voluntary or mandatory takeover bids, to publish that it has made a decision to perform a takeover bid, and (iii) the duty to disclose trading in shares by persons with managerial responsibilities in the company.

Any planned merger or spin-off must be published 30 days before the general meeting that will pass the resolution approving the merger or spin-off, along with an executed version of a merger project outlining the terms and conditions of the planned merger.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Joint stock companies:

The management of these companies depends on whether they are two-tiered or one-tiered. The ultimate management body in two-tiered companies is the board of directors *("představenstvo")*. In one-tiered companies, it is the administrative board *("správní rada")* together with a statutory director *("statutární ředitel")*, who may simultaneously be the chairman of the administrative board. Only the statutory director is entitled to represent a one-tiered company.

The management bodies usually have more members who are jointly liable for their actions. It is common that the members divide individual areas of management among themselves and decide in such areas individually. It is also common to delegate the functions to subordinated managers.

In collective bodies, a chairman is usually elected. The chairman is generally responsible for convening the bodies' meetings and representing the company in dealings with courts, public authorities and employees.

As there are no restrictions as to the number of members of the management bodies, they may also consist of only one member. Exceptions apply to regulated entities such as banks.

Two-tiered companies are required to establish a supervisory board, which oversees the decisions and actions of the management bodies.

Limited liability companies:

The management of these companies is carried out by one or more directors *("jednatel")*. The establishment of a supervisory board is voluntary.

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

Joint stock companies:

In two-tiered companies, members of the board of directors and the supervisory board are appointed by the general meeting. The company's articles may divest the power to appoint members of the board of directors to the supervisory board.

In one-tiered companies, members of the administrative board are appointed by the general meeting. The statutory director is appointed by the administrative board.

The body that appoints a member is also entitled to remove it. Any member of any body may be removed without cause and at any time. Decisions on appointment and removal are carried out by a simple majority of votes at the relevant body meeting. The company's articles may increase the number of votes necessary for adopting such decision or may implement the right to appoint and remove a member to shares with special rights.

Limited liability companies:

Directors and members of the supervisory board, if established, are appointed by the general meeting. Similar rules as above apply.

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

Contracts on the performance of a member's office must include all types of remuneration that the member is entitled to. Contracts must be approved by the body that is entitled to appoint the member. Any consideration that is not included in the contract or in the company's internal regulations approved by the body that is entitled to appoint the member may be provided to the member only with the consent of that body after receiving a statement from the supervisory board, if established.

If a member obviously contributed to the company's poor financial results, the company is not required to remunerate that member. Additionally, if the company is declared bankrupt, a member that has not taken all reasonable actions necessary to prevent the bankruptcy may be required by an insolvency trustee to return all remuneration received from the company in the period up to two years before the declaration of bankruptcy.

In their annual reports, listed companies are obligated to include:

- principles for remunerating members of management and supervisory bodies, including their names and description of their responsibilities;
- information about and total amounts of any type of remuneration received by all members of management bodies and by all members of supervisory bodies from the company and from entities controlled by the company; and
- information about and total amounts of contracts between the company and members of its management bodies based on which the company is obligated to provide these members with any consideration dependent on termination of their office in connection with a take-over.

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

Generally, members of management bodies are allowed to acquire shares in the company without restrictions. This is a common practice based on stock option plans.

In their annual reports, listed companies are obligated to include:

- information about and number of shares, options and similar instruments owned by all members of management bodies in total and by all members of supervisory bodies in total; and
- information about plans based on which members of the management bodies are entitled to acquire the company's shares, options and similar instruments on more favourable terms.

Other disclosure duties concern changes to voting interests and take-overs with regard to these companies (see question 4.2 below).

If members of management or supervisory bodies of listed companies possess inside information regarding the company's shares or other similar instruments, they are obligated to keep such information confidential, may not purchase or sell such instruments or make recommendations to any party in this regard.

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

Joint stock companies:

In these companies, management bodies are collective (except for bodies with one member), meaning their members must decide on every issue as a group. The decisions should be made at formal meetings. The company's articles may also allow for meetings to take place via technical means (e.g. a telephone or a video-conference).

The results of the decision-making process should be contained in written minutes of the meetings.

The meetings are generally convened by the chairman of the management body. The company's articles or the body's internal regulations may adopt any suitable rules. The frequency of meetings depends on individual circumstances. However, the management body should meet at least once a year to approve the financial statements and present them to the general meeting.

Limited liability companies:

Unless the company's articles state otherwise, the directors do not form a collective body. Therefore, their decision-making process may be informal.

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

In general, members of management bodies are obligated to perform their function with necessary diligence, knowledge and loyalty. They must possess a necessary level of managerial, organisational and co-ordination skill and are obliged to always make all decisions based on sufficient information.

In the event of a breach of these duties, members of a management body are jointly liable to the company for damage. If the company is not compensated for such damage and the company's creditors are unable to satisfy their receivables, the members become guarantors of the company towards such creditors to the extent to which the members have not compensated the company for damages.

The members are not liable for damage if they prove that they acted in good faith, based on relevant information and reasonably assuming that they acted in the best interest of the company (business judgment rule). The burden of proof in this regard is on the members.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Members of management bodies are mainly responsible for conducting the company's business, managing its accounting and convening general meetings.

Specific duties include the obligation to report a member's conflict of interest to other members of the management body and to the supervisory board, if established. Alternatively, such conflict may be reported to the general meeting. A conflict of interest may arise in relation to the interests of the member him/herself, his/her relatives (family members) or persons affected by or controlled by him/her (other companies where the board member performs such function or is a significant shareholder). Conflicts of interest also arise in situations where the actions of the member are forced by people who influence or control the company, typically from the position of a parent company. The rules on conflict of interest do not apply in cases of an admitted group or in the case of contracts concluded in the ordinary course of business. The supervisory body and/or the general meeting have a right to suspend such member from their function or to ban conclusion of a conflict-related contract.

Some frequently discussed issues regarding the responsibilities of the management body are the liabilities of members regarding the company's bankruptcy.

Members of a management body are obligated to file a petition to declare the company bankrupt without undue delay after bankruptcy is first detected. Postponing the filing makes members liable for damage amounting to the difference between the creditor's claim approved in the insolvency proceedings and the actual amount of fulfilment of such claim.

Furthermore, if the company was declared bankrupt and members have not carried out all reasonable actions necessary to prevent the bankruptcy when it was preventable, the members may be:

- declared by court to be guarantors of the company with regards to any creditor of the company in full extent; and
- required by the insolvency trustee to return all remuneration received from the company in the period up to two years before the declaration of bankruptcy.

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

In general, the liability of members of management and supervisory bodies cannot be limited in advance. Any contracts between a company and members of its bodies on such limitation are null and void. The damage already caused may be settled between the member and the company by a contract approved by a ⅔ majority of votes of all shareholders.

In order to limit the member's liability in advance, a mother company usually concludes an indemnity contract with the member guaranteeing full compensation for any damages and costs that that member would be obligated to pay to the daughter company due to a negligent breach of duties.

Additionally, D&O insurance is commonly offered by Czech insurance companies. They now also offer individual D&O insurance where the member is a party to the insurance contract. The insurance premium is often paid by the company as a benefit.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

In a joint stock company, members of the board of directors are responsible not only for day-to-day management of the company, but also for making strategic long-term decisions. However, the by-laws may grant the general meeting the authority to set a long-term strategy of the company and to instruct directors to follow this strategy.

On the other hand, in a limited liability company, the general meeting may set a long-term strategy of the company and instruct the directors regarding thereof without explicit authorisation by the company's memorandum of association. Directors must adhere to the strategy agreed upon by the company's shareholders,

otherwise they may be liable for breach of their duty of due skill, care and diligence. However, if the general meeting has not made a timely resolution on a long-term strategy of the company, or if the memorandum of association grants this authority to the directors, then it is the directors' duty to set the company's long-term strategy promoting the best interests of the company.

4 Other Stakeholders

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

Generally, employees and work councils only have the right to be informed of the affairs of a company and, in certain cases, to be heard in this respect, but do not participate in the decision-making process of the company.

A few exceptions include, in particular:

- The consent of work councils to concluding a collective bargaining agreement or adopting or changing a work code.
- The consent of work councils to terminating an employment relationship with a member of a body of the work council.
- Employees in joint stock companies that have more than 500 employees elect ⅓ of members of the supervisory board.

As regards SE companies, unless agreed in the agreement concerning the extent of involvement of employees, employees have a right to influence the composition of the supervisory board or the administrative board (depending on whether the company structure is one- or two-tiered; please see question 3.1) generally in the same extent as they had before the establishment of the SE company. An employee council has the right to initiate joint meetings with a managing body to discuss certain employment issues.

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

Directors of limited liability companies and joint stock companies in the Czech Republic are obliged to promote the best interests of the company as a part of their duty of skill, care and diligence required of them when managing the company. Therefore, they must promote not only the interests of the shareholders, but also the interests of stakeholders. It should be noted that neither the Business Corporation Act nor the Civil Code explicitly requires directors to have regard for the interests of stakeholders; however, it is the prevailing opinion of jurisprudence that, while maximising the value of the company, directors must balance the interests of shareholders with those of stakeholders.

Creditors are entitled to initiate proceedings against directors that may result in directors being held personally liable for the company's obligations if their company entered bankruptcy and such directors knew or should have known that the company's bankruptcy is imminent and they did not take the necessary actions to prevent it.

In a joint stock company that has more than 500 employees, employees elect at least one-third of the members of the supervisory board of the company, unless by-laws entitle employees to elect more of their representatives. Employees may also recall the representatives they elected to the supervisory board.

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

While discharging their duties, directors must take into consideration the environmental and social circumstances of the company. Since directors promote the interests of the company and maximise its value, they should have regard for society's current needs and interests regarding public health and the environment.

Annual reports of joint stock companies (smaller companies that do not meet the criteria of turn-over, assets and/or number of employees have no obligation to prepare an annual report) must also describe: (a) research and development activities; and (b) activities in the field of environmental protection and labour relations.

Other activities concerning social responsibility are not required by law, nevertheless, some companies still adhere to them in order to strengthen their brand.

Corporate social responsibility is also enforced by criminal law. In the Czech Criminal Code, there are several categories of crimes against society and the environment, such as damaging the environment and nature, illegal disposal of waste or substances damaging to nature, cheating the consumers regarding the quality or quantity of goods, and tax avoidance and non-payment of social security insurance. In the Czech Republic, not only directors but also the companies themselves may be held criminally liable and may be subject to fines, a ban on their business operations or, in extreme cases, even dissolution of the company.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Generally, it is the member of the board of directors who is responsible for disclosure and transparency. If a board of directors with more members designates only one of its members to be responsible for disclosure, the other members shall still be responsible for supervising fulfilment of the disclosure obligations.

The supervisory board is responsible for reviewing the financial statements and a proposal for distribution of profits. Further, in the case of listed companies (and certain other companies such as banks, insurance companies, etc.), an audit committee is responsible for supervising the audit procedures within the company.

5.2 What corporate governance-related disclosures are required?

Generally, basic corporate governance information must be: (a) publicly accessible on the company's websites (please see question 5.4); and (b) submitted by the company to the Commercial Register where they are published. The Commercial Register contains information such as the names of the members of the board of directors and supervisory board or the way the members of the board of directors act on behalf of the company.

Further information might be discovered from the documents publicly accessible from the Collection of Deeds of the Commercial Register. The most important corporate governance documents contained in the Collection of Deeds are the annual reports (which must be prepared by listed companies as well as non-listed companies, except for smaller companies that do not meet the criteria of turn-over, assets and/or number of employees) and, if the company is part of a group of companies, report on relations between related entities (describing relations between the company and other companies controlled by the same parent company, including the means by which a subsidiary company is controlled by a parent company, etc.).

Listed companies are required to disclose more information in their annual reports, which must be published on their websites, as well

as to notify the Czech National Bank such information to. This information includes:

- description of rights and duties connected to every type of share, limitations of voting rights;
- description of decision-making processes and powers of the general meeting, special rules concerning appointing/removing members of the board of directors;
- information about corporate governance codes abided by the company or information that the company does not abide by any such code together with an explanation why;
- description of the company's diversity policy that applies to members of the board of directors and members of the supervisory board and the manner, in which it is applied, in case that the listed company is a large accounting unit, as defined in the Act on Accounting, or explanation why such company does not apply its own policy on diversity; and
- further information concerning members of the board of directors (for more details please see questions 3.3 and 3.4).

Besides annual reports, listed companies must disclose a semi-annual report and report of the board of directors describing the company's developments during the fiscal year.

Listed companies are obliged to disclose the following information to the Central Securities Depository:

- information on a pay-off of yields from investment securities;
- information on a calling of a general meeting or a meeting of holders of other investment securities; and
- information on any change to the rights arising from investment securities.

The entity that maintains the Central Securities Depository shall publish the abovementioned information on its website.

Should the number of shares held by a shareholder (including shares held by entities cooperating with the shareholder) of a listed company reach, exceed or decrease under 3% (for companies with registered capital exceeding CZK 100 million), 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50% and 75% of shares in the company, the shareholder shall notify the company and the Czech National Bank of such fact within four business days. Similarly, a shareholder with at least 30% or 90% of shares in a listed company shall announce its intention to make a take-over bid.

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

Companies (except for smaller ones that do not meet the criteria of turn-over, assets and/or number of employees) are obliged to have their financial statements verified by an auditor. If the company meets the statutory criteria for a mandatory audit, the auditor then verifies whether the company's financial statements reflect the true and fair state of its accounting, in accordance with the law and the Financial Reporting Standards. Following the audit of the financial statements, the auditor issues an auditor's report that includes a description of the areas reviewed and the reasons why the auditor focused on them, as well as the auditor's opinion of whether the financial statements give a true and fair reflection of the company's accounting.

The auditor's report shall be published together with the Financial Statements (or Annual Report) in the Collection of Documents, which is publicly accessible online.

5.4 What corporate governance-related information should be published on websites?

According to the Business Corporations Act, joint stock companies are obliged to set up websites that are freely accessible to the public. The following information must be stated on the website: business name; identification number; address of the company's registered office; and details of registration in the Commercial Register. If the website voluntarily states the amount of the registered capital of the company, only the amount of paid-up capital may be stated. If a limited liability company voluntarily sets up a website, the site must contain all the above information.

Besides the above, listed companies are required to publish more information on their websites (for more details please see question 5.2).

In specific situations, additional information must be published, e.g.:

- the fact that the company is a member of a group (if it wants to use the advantages envisaged by law);
- an invitation to the general meeting including supporting documents must be published at least 30 days before the general meeting takes place (applies only to joint stock companies); and
- if relevant, further information relating to squeeze–out (applies to joint stock companies).

More information about the companies might be further accessible through the websites of the Commercial Register and the Collection of Deeds of the Commercial Register (please see question 5.2).

Jindřich Král
Glatzová & Co.
Betlémský palác
Husova 5
110 00 – Prague 1
Czech Republic

Tel: *+420 224 401 440*
Fax: *+420 224 248 701*
Email: *jindrich.kral@glatzova.com*
URL: *www.glatzova.com*

Jindřich has been with the Glatzova & Co. team since 2002. Before he joined the firm he graduated from the Faculty of Law, Charles University, Prague, Czech Republic (1996–2002). He extended his studies during the stay at the Philipps-Universität Marburg, Germany (2000–2002). Jindřich became associate in 2007 and has been a partner since 2013. He is also a member of the Czech Bar Association. His practice contains a secondment in UBS Warburg AG, legal department, Frankfurt/Main (2001–2002). Jindřich specialises in Corporate Law, Mergers and Acquisitions, Restructuring and Automotive Law.

Jindřich has been ranked continuously as a leading Corporate and M&A Lawyer according to international rankings such as *Chambers Global*, *Chambers Europe*, *The Legal 500* and *IFLR 1000*.

Pavol Černý
Glatzová & Co.
Betlémský palác
Husova 5
110 00 – Prague 1
Czech Republic

Tel: *+420 224 401 440*
Fax: *+420 224 248 701*
Email: *pavol.cerny@glatzova.com*
URL: *www.glatzova.com*

Pavol graduated from the Law faculty of Charles University in Prague in 2015. Before he graduated he was awarded with a Certificate of Higher Education in Legal Studies after successful completion of a two-semester study programme at Cardiff University School of Law (2011–2012). Pavol has worked at Glatzova & Co. since 2017. Before he joined Glatzova & Co. he worked at SAMAK law & tax (2015–2017) and at Randl Partners (2011). Pavol is a member of the Czech Bar Association. In his practice, Pavol specialises in Mergers and Acquisition, General Corporate and Contract Law and Banking and Finance.

He regularly publishes articles in legal journals dealing namely with corporate matters, relationships between shareholders, intragroup matters or advising on decreasing and increasing the registered share capital.

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The Danish Companies Act (the "Companies Act") facilitates four types of companies in which the shareholders' liability is limited to the capital contributed as payment for the shares: (i) the public limited company (in Danish: *aktieselskab* or *A/S*); (ii) the private limited company (in Danish: *anpartsselskab* or *ApS*); (iii) the limited partnership company (in Danish: *partnerselskab* or *P/S*); and (iv) the entrepreneur company (in Danish: *iværksætterselskab* or *IVS*).

Only public limited companies, as opposed to, e.g. private limited companies, are admitted to official listing. 'Nasdaq Copenhagen A/S', which is owned by Nasdaq, Inc., is the only regulated market in Denmark. It also operates another marketplace for smaller growth companies called Nasdaq First North Denmark, which is categorised as a multilateral trading facility and is not a regulated market.

This chapter focuses on public limited companies whose securities are admitted to trading and official listing on Nasdaq Copenhagen A/S. There are certain governance-related provisions in the Danish Financial Business Act applicable only to financial institutions. These have been excluded from this chapter, unless otherwise stated.

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

The key sources of corporate governance for Danish listed companies consist of a combination of legislation (acts and executive orders), corporate documents (e.g. the articles of association of a company), stock exchange regulations, codes/recommendations of a soft law nature containing generally accepted best practices, and guidelines.

The Companies Act lays down the fundamental rules under which public and private limited companies operate in Denmark. Being a public limited company, a listed company is subject to the Companies Act. The Danish Financial Statements Act (the "Financial Statements Act") also includes certain provisions regarding corporate governance, and the Danish Act on Approved Auditors and Audit Firms specifically deals with auditors and the audit of financial accounts including corporate governance-related provisions. The Danish Business Authority operates the Danish Central Business Register and is the authority surveilling compliance with the Companies Act, the Financial Statements Act and the Auditors Act. The Danish Financial Supervisory Authority (the "Danish FSA") also carries out the supervision of accounts under the Financial Statements Act with respect to listed companies that are financial institutions.

In addition, listed companies are subject to the new Danish Capital Markets Act (which entered into force on 3 January 2018 and replaced the Securities Trading Act) and the EU Market Abuse Regulation (Regulation 596/2014) ("MAR"). The Danish FSA is the competent authority monitoring compliance with this legislation. While the new Capital Markets Act implements MiFID II into Danish law and includes provisions related to the MiFIR, the Act has not changed the substance of the rules most frequently used by practitioners, such as the rules on listing requirements, prospectus requirements, disclosure requirements, rules on takeovers, major shareholder flagging, etc. The new Act, however, increases the offering threshold for when a prospectus is required from EUR 1.0 million to EUR 5.0 million (and if admitted to trading on a regulated market).

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market entered into force on 21 July 2017 and applies to the Danish offering of securities to the public. As most of the provisions thereof will not enter into force until 21 July 2019, the Capital Markets Act will govern offerings until this date.

Under the authority of the said acts, the Danish Business Authority and the Danish FSA have adopted a number of executive orders providing a more detailed regulation on specific matters. Generally, non-compliance with the legislation is subject to fines and/or reprimands and to some extent sanctions are published revealing the identity of the listed company and/or the natural person in question. Market abuse violations are subject to imprisonment.

The primary constitutional documents are the articles of association (the "Articles") which prescribe the overarching rules governing the company. The Articles are publicly available and can be requested from the Danish Business Authority. The Articles reflect the legal relationship between the shareholders (and the company) and include rules on the company's corporate objective, its share capital and rights attached to the shares, the meetings of shareholders, the powers to bind the company, the duties of the board of directors and the management board, restrictions, if any, on share transfers, the company's financial year, and many other aspects relating to the governance.

Companies listed on Nasdaq Copenhagen A/S must adhere to the terms and conditions set out in the latest revised version of the Nasdaq Copenhagen A/S' 'Rules for issuers of shares', which were updated on 3 January 2018 due to the entry into force of and in order to be aligned with the Capital Markets Act, MiFID II and MiFIR. Nasdaq Copenhagen A/S monitors compliance with these

marketplace rules and may in the event of non-compliance give the issuer a reprimand, a fine, decide to delete the issuer's securities from admittance to trading and/or publish any such sanction and the identity of the issuer. This rulebook includes listing and disclosure requirements and adopts the "comply or explain" principle, whereby the issuer shall give a statement on how the company addresses the Danish Recommendations on Corporate Governance of May 2013 (revised as of 23 November 2017) issued by the Committee on Corporate Governance. Listed companies must either comply with those recommendations or explain why they do not comply. The Danish Recommendations on Corporate Governance as revised on 23 November 2017 apply to financial years commencing on 1 January 2018 or later. The practice developed by Nasdaq Copenhagen A/S suggests that it is not sufficient to merely explain the reason for non-compliance. The company must also specify its different approach to the recommendations. The recommendations do not have legal force but are considered "soft law"; however, the "comply or explain" concept is embedded in the Financial Statements Act, requiring issuers to present a statement in its annual report or on its website concerning any given applicable rules on corporate governance (i.e. in this context, the Danish Recommendations on Corporate Governance).

The set of Danish Recommendations on Corporate Governance as amended by the previous revision of November 2014 afforded more attention than before on value creation, the framework for active ownership and board assessment procedures.

The most recent revision of the Danish Recommendations on Corporate Governance dated 23 November 2017 includes recommendations concerning, among other things, (i) disclosure of information to the market (quarterly reports to be disclosed, disclosure of and board resolutions to be passed regarding board members carrying out management assignments, disclosures on board committee activities, adoption and presentation of a self-assessment procedure, including an assessment of the appropriate limit for other executive functions), (ii) policy to be prepared on diversity, i.e. age, gender, international experience, in terms of the board composition (changed from actual diversity target figures), (iii) repeal of the age limit applicable to board members, (iv) restrictions on dual functions (board members should not also be members of the management board and the chairman and vice chairman of the board of directors should not be the resigning CEO), (v) strengthen board independency by recommending that at least half of the members should be independent (e.g. independent of major shareholders), and (vi) increase transparency on management remuneration (the company policy on remuneration should now e.g. be approved at least every fourth year and upon any critical amendments and support long-term value creation for the company).

In November 2016, the Committee issued a new set of Danish Recommendations on Shareholder Activism (seven recommendations) applicable to Danish institutional investors such as pension funds and insurance companies making investments in Danish listed companies. These new recommendations came into force on 1 January 2017. According to these recommendations, any institutional investor shall publish its policy on active ownership addressing its methods for escalating active ownership, collaborative efforts with other shareholders, voting policies including use of proxy advisors and disclosure of how votes are cast, and policies for identification and handling of possible conflicts of interest. Furthermore, it is recommended that the investors at least annually publish a report on their activities pertaining to active ownership, including voting activity. Although considered "soft law", non-observance must be explained in accordance with the "comply or explain" principle.

The revision of the existing Shareholders' Rights Directive (2007/36/EC) was finally adopted on 3 April 2017. Member States will have until 10 June 2019 to implement it into domestic law. The aim of this new directive is to strengthen corporate governance in listed companies by increasing transparency levels and encouraging long-term shareholder engagement. The new requirements will apply to: (i) the remuneration of directors and managers; (ii) the identification of shareholders; (iii) the facilitation of exercise of shareholders' rights; (iv) information distribution; (v) the transparency regarding institutional investors, asset managers and proxy advisors; and (vi) related party transactions. The Danish implementation bill is expected to be presented for adoption to the Danish Parliament in October 2018. The Committee on Corporate Governance expects to revise the Danish Recommendations on Corporate Governance in 2020 following the implementation of the Shareholders' Rights Directive.

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

While having been in existence for some time, many aspects of the corporate governance debate in Denmark remain topical and important, focusing on: (i) diversity (in terms of qualifications, age, international experience and gender issues, etc.); (ii) independence of the board of directors; (iii) transparency in terms of individual management and board remuneration and policies related thereto; (iv) the duties of the board of directors in connection with a public takeover bid; (v) the impact of corporate social responsibility; (vi) risk-taking with particular focus on remuneration as well as the board of directors' duties in insolvency situations; (vii) nomination committees in respect of election of members of the board of directors and assessment of existing members of the board of directors; and (viii) shareholder activism, e.g. in the form of an increased number of shareholder proposals and statements at general meetings and the practical implications for the companies as a result thereof, and the need to enhance the transparency on the operation and activities of proxy advisors. The predominant proxy advisors covering Danish-listed companies are Institutional Shareholder Services Inc. and Glass, Lewis & Co.

Lately, following larger private equity driven IPOs, substantial focus and political voicing of the need for regulation has been directed towards very profitable management incentive schemes.

Since the spring of 2013, legislation has been aiming at equalising the gender composition by requiring that larger companies – including listed companies – should set specific target figures and implement a policy seeking to achieve a greater balance between men and women at board and management levels. Companies are required to include a statement in their annual reports describing the company's gender policy and reporting the target figures and current status. Alternatively, the reporting may be made on the company's website or as a supplement to the annual report if reference thereto is made. If the target figures are not met, an explanation must be provided. New guidelines issued in March 2016 by the Danish Business Authority emphasise the flexible nature of these rules by clarifying that new target figures do not necessarily have to be higher than target figures already achieved.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In general, various recommendations included in the Danish Recommendations on Corporate Governance are based on an

objective to promote long-term value creation of the listed companies, and as such short-termism is a recognised challenge that should be addressed properly (e.g. reflected in the recommendations on board and management remuneration).

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders exercise their power of decision-making at the general meeting. Besides that, being a shareholder does not entail additional rights to make decisions regarding the company or to act on behalf of the company. The rights of the shareholders are protected through the general corporate law principles, including equal treatment of all shareholders and the fiduciary duties of the board of directors and the management board.

A shareholder is entitled to attend and address the general meeting and to exercise voting rights, if any, on the shares. In a public company whose shares are admitted to trading and are officially listed on a regulated market, the shareholder's right to attend and the ability to vote shall, however, be determined based on the shareholding one week before the date of the general meeting (record date). In addition, the Articles may provide that shareholders are required to notify the company no later than three days before the date of a general meeting if they wish to attend.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The shareholders do not have an obligation to promote the interests of the company. Thus, the shareholders are not obliged to attend the general meetings of the company, and the shareholders do not have a duty to vote for or against specific proposals at such meetings. However, there is legal basis for holding shareholders liable in damages for losses caused to the company, to other shareholders or to third parties as a result of acts or omissions by a shareholder carried out with intent or gross negligence.

For instance, shareholders can be instrumental in wrongful decisions if, through their influence, ownership interest, voting rights or similar, the shareholder has participated in deciding on proposals at the general meeting which they know will cause the company to suffer a loss or give certain shareholders an unjustified benefit. It should, nevertheless, be stressed that imposing liability on shareholders is a rare phenomenon under Danish law.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Annual and extraordinary general meetings are convened and organised by the board of directors.

Any shareholder may attend a general meeting either electronically in the case of an electronic meeting, or physically in the case of a physical meeting. Furthermore, any shareholder may vote by letter, email or other written instrument or attend and vote by proxy.

The general meeting is omnipotent and may decide on any matter which is not explicitly made a prerogative of the board of directors. Matters reserved for the general meeting are amendments of the Articles, election and removal of members of the board and the company's auditor, remuneration of the members of the board and approval of the annual report.

Any shareholder is entitled to address the general meeting (*cf.* question 2.1 above), and is entitled to request and receive specific information on issues related to the annual accounts, the financial position of the company and items on the agenda, provided always that conveyance of such information is not exposing the company to a risk for substantial damage. If information is not available at the general meeting, it must be made available to the shareholders (e.g. on the company's website) no later than two weeks thereafter.

Shareholders holding 5% of the share capital or such smaller fraction of the capital provided for in the Articles can request for an extraordinary general meeting to be held to resolve specific issues. A meeting must be convened within two weeks after receipt of the request.

Resolutions at general meetings are passed by a simple majority of votes unless the proposal in question relates to an important matter which requires qualified or supermajority (or unanimity) pursuant to the Companies Act, e.g. an amendment to the Articles which as a general rule can only be passed by at least ⅔ of the votes cast and of the votes represented at the general meeting. The Articles may provide increased or additional requirements.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

No, they do not owe any duties to the corporate entity/entities or to other shareholders, unless otherwise provided for in the articles of association, or any shareholders' agreement entered into by and between the shareholders.

A public limited company is characterised by the fundamental principle that the shareholders are not personally liable for the acts and/or omissions of the company, and the liability of shareholders is limited to their investment.

While the applicability of the "piercing the corporate veil" doctrine remains to be discussed in legal theory, the only express authority for holding a shareholder liable is a provision in the Companies Act, according to which a shareholder is liable for any loss inflicted intentionally or with gross negligence on the company, the other shareholders or any third party, e.g. through the shareholder's participation by way of voting for an unlawful proposal at the general meeting.

It should be noted that EU antitrust case law establishes that a parent company may be held liable for its subsidiary's participation in cartel arrangements.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders or the company may bring an enforcement action against members of the management board and the board of directors, if these corporate bodies have breached their duties under the Companies Act or the Articles and/or if individual members, in the performance of their duties, have intentionally or negligently caused damage to the company and/or shareholders. A decision to commence legal actions against members of the management board and/or members of the board of directors is a matter to be resolved by the shareholders at a general meeting.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Certain governmental approval requirements in the Financial Business Act apply to acquisitions of qualified holdings in Danish financial business undertakings. In regard to other companies, an investor's ability to invest in shares is not subject to any limitations under the Companies Act. However, the Articles may include provisions which generally limit ownership to the effect that no shareholder is allowed to hold more than a specific predetermined percentage of the share capital and/or voting rights or provisions, to the effect that no matter how large a percentage of shares any shareholder possesses, the attached votes may only count for a certain predetermined percentage.

Disclosure requirements under the Capital Markets Act apply to shareholders in a company which has its securities admitted to trading and official listing on Nasdaq Copenhagen A/S, as they are under an obligation to notify the company and the Danish FSA of the shareholdings in the company when the holding of shares (i) reach or exceed 5% of the share capital's voting rights, or (ii) account for no less than 5% of the share capital. In addition, notification shall be made when the shareholding reaches or passes the thresholds of 10%, 15%, 20%, 25%, 50% and 90%, as well as ⅓ and ⅔ of the total outstanding share capital/voting rights on the day of trading. The notification obligations have been extended further as of 26 November 2015, in that in computing the holding, financial instruments related to already-issued shares should now be included.

According to the Companies Act, major shareholders must notify their holdings to the company and the company must record this in a public register of shareholders. The reporting thresholds are, by and large, similar to those of the major shareholder disclosure requirement under the Capital Markets Act. The statutory obligation for a company to keep a (non-public) register of shareholders is not affected by these rules.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

No, there are not; however, institutional investors are recommended to make disclosures in this respect under the Danish Recommendations on Shareholder Activism (*cf.* question 1.2 above).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

According to the Companies Act, Danish public limited companies may opt for a two-tier corporate governance structure by which a board of directors is responsible for the overall and strategic management, while appointing a management board to be responsible for the day-to-day management of the company. Alternatively, but rarely used in Denmark, a management board may be appointed by a supervisory board which shall monitor the management board. The board of directors or the supervisory board must have at least three members.

While executives may also be appointed/elected to the board of directors, the Companies Act provides that the majority of the board shall not be members of the management board. Furthermore, no member of the management board may be chairman or deputy-chairman of the board of directors.

The Companies Act offers more flexibility with regard to the governance structure for private limited companies and entrepreneurial companies.

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

Shareholders are entitled to elect the members of the board of directors at the general meeting, unless public authorities or others have been granted a right under the Articles to appoint directors. In public limited companies, the majority of board members (or the supervisory board) must be elected by the general meeting. Any shareholder may, even as late as at the general meeting, propose one or more candidates. However, amongst Danish-listed companies the general practice is that candidates are proposed by the board of directors following a search and screening process, and for larger companies it is conducted by a nomination committee, being a fraction of the board.

A board member may resign or be removed at any time. While the normal tenure is one year, the maximum term of office is four years. Re-election is possible, unless restricted by the Articles.

Employees may be entitled to employee representation on the board of directors (*cf.* question 4.1 below).

The management board must consist of at least one person and is appointed and removed by the board of directors (or the supervisory board).

Members of the management board (and the board of directors) must be registered as such with the Danish Business Authority.

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

The Companies Act provides that members of the board of directors and management board may receive remuneration, both in the form of base pay and a performance-related bonus. The amount of remuneration may not exceed what is considered ordinary given the nature and extent of the position, as well as what is considered financially reasonable and sound relative to the financial situation of the company.

The rights and obligations of the members of the management board are governed by the individual terms of employment (i.e. the service contracts). Such service contracts are generally subject to the freedom of contract and regulate the employee's functions and duties, remuneration and bonus, termination, vacation rights and pension plan, etc.

Before a listed company can enter into a specific agreement for incentive-based remuneration for a member of the board of directors and/or the management board, the shareholders must adopt general guidelines for such incentive-based remuneration at a general meeting. The Committee on Corporate Governance has prepared a guideline containing practices with respect to remuneration policies and incentive-based remuneration recommending that the board of directors does not receive warrants and stock options. The guidelines also recommend that incentive programmes to the management that are equity-based are revolving (consecutive allocation) and with vesting periods of at least three years, and that severance payments do not exceed two years' salary.

Please also refer to question 1.2 above regarding recommendations on remuneration of management as set out in the Danish Recommendations on Corporate Governance.

The Danish FSA has issued an executive order on remuneration in the financial sector. In addition to certain disclosure obligations, the executive order covers rules on how the salary of directors and managers shall be allocated between fixed and variable elements and equity-based instruments.

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

In connection with the entering into force of MAR, the Danish regulators opted for an increase in the reporting threshold from EUR 5,000 to EUR 20,000 for members of boards of directors and of the management board, and certain other high-ranking employees trading in the securities of a listed company. The reporting regime in MAR provides that the reporting threshold is determined on a 12-month basis. The rules impose upon the reporting persons and their related parties (e.g. spouses, minors and legal entities controlled by the reporting person and/or his family) an obligation to notify the Danish FSA and the company of trading in securities of the company. High-ranking employees not formally being part of the registered management board are only subject to the rules if they have access to inside or privileged information which directly or indirectly relates to the issuer, and always provided that the employee has the authority independently to make executive decisions of a superior nature regarding the company's future development.

Notifications to the Danish FSA and the company must be made promptly and no later than three days after a transaction.

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

The Companies Act requires that the board of directors has a set of rules of procedure governing its function and duties. The chairman of the board of directors shall ensure that the board of directors are convened whenever necessary and, in addition, ensure that all members receive due notice of any meeting.

Any member of the board of directors or of the management board may request that a board meeting is held. Members of the management board (or the company's auditor) who are not members of the board of directors have the right to be present and to speak at meetings, unless the board in the specific situation decides otherwise.

The board of directors forms a quorum when more than half of the members are present, unless the Articles require a larger representation. The opinion of the majority normally constitutes the decision of the board. In the event of a tie, the chairman of the board of directors shall have the casting vote if so provided in the Articles.

Meetings of the board of directors are held in person, unless the board decides that members may participate by electronic means and such participation is compatible with the members carrying out their duties. Certain defined duties may be dealt with by written procedure if the decision to do so has been made in advance. However, any member of the board of directors or of the management board may demand an oral discussion.

Depending on size, market cap, and area of industry, listed companies have a variety of committees, typically composed of fractions of the board of directors. While audit committees are required by accounting laws, other committees such as nomination, remuneration and risk committees are established on a voluntary basis and by reference to corporate governance recommendations.

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

The board of directors is entrusted with the ultimate responsibility of the company as they have both the supervisory function of the management board and the overall strategic responsibility of the company. Therefore, it is a primary function of the board of directors to determine the company's policies in relation to business strategy, organisation, accounting and finance, and the board of directors undertakes such policies to ensure the observance of: (i) book-keeping and financial reporting; (ii) risk management and internal control; (iii) reporting on the company's financial position; (iv) the management board's overall performance and duties; (v) sufficient liquidity in the company; and (vi) appointment and removal of the management board.

The management board is responsible for the day-to-day operations of the company and must observe the guidelines and recommendations issued by the board of directors. The day-to-day management does not include transactions which, considering the scope and nature of the company's activities, are of an unusual nature or magnitude. These decisions can only be made with the approval of the board of directors, unless awaiting the approval will be to the detriment of the company.

The board of directors and the management board may be held liable if the directors or managers in their performance of their duties have intentionally or negligently caused damage to the company, to the shareholders or any third party.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main corporate governance responsibilities and functions of the members of the board of directors and the management board as determined by the Danish corporate governance committee are:

(i) to strengthen the relationship with shareholders through continuous dialogue;

(ii) to ensure that the management board and board of directors have the required expertise, diversity, etc.;

(iii) to adopt a remuneration policy and incentive schemes;

(iv) to secure quality and transparency in financial reporting;

(v) to monitor internal control and risk management; and

(vi) to ensure open and transparent investor relations activities.

Some of the current key challenges in respect of corporate governance are: (a) the implementation of gender diversity policies; and (b) in the current low interest rate environment to consider whether excess cash should be allocated to investments or be distributed.

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

It is not uncommon that the shareholders at the annual general meeting decide to discharge the board of directors and/or the management board for liability with respect to actions taken in the past financial year.

Legal action may, nevertheless, be commenced by shareholders if the passed resolution on discharge was made based on information that was not essentially correct or complete. The discharge resolution does not shield against law suits from shareholders for claims for losses suffered exclusively by one or more of the shareholders (as opposed

to the company itself). Similarly, a discharge resolution is also not a shield against legal actions taken by creditors and other third parties.

Members of the board of directors will sometimes, as a condition for accepting nomination and election, require the company or its controlling shareholder(s) to indemnify the member of his/her liability related to the performance of his/her duties as a board member.

Companies are also permitted to and usually do maintain insurance coverage (i.e. D&O insurance) for directors and managers. Special coverage is normally obtained for public offerings.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Please refer to questions 3.1 and 3.6 above.

4 Other Stakeholders

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

Employees in listed companies are entitled to elect employee representatives to the board of directors if such companies had on average employed at least 35 individuals during the preceding three years. The employee representatives account for at least two and may equal up to half of the number of the members elected by the shareholders.

An employee representative has the same rights and obligations as other members of the board of directors, i.e. in relation to conflict of interests, confidentiality, remuneration, etc.

Special provisions entitle employees of a Danish parent company and its subsidiaries registered in Denmark, as well as the foreign branches of such subsidiaries situated in an EU/EEA country, to representation at group level.

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

Please refer to the description of the recommendations set out in the Danish Recommendations on Corporate Governance and the recommendations on Shareholder Activism applying to institutional investors (*cf.* question 1.2 above), as well as the rules on CSR (*cf.* question 4.3 below).

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

In recent years, the Danish Government has afforded much focus on corporate social responsibility ("CSR") for Danish businesses aiming at fostering best practice by ensuring compliance with internationally-agreed principles and guidelines and by encouraging actions from the companies that go beyond compliance, integrating socially responsible behaviour and ethical values into the core values of the organisations.

Implementing the new Directive 2013/34/EU on annual financial statements, etc., the amended Financial Statements Act introduces more stringent requirements regarding the amount of information that larger companies must provide on CSR in accordance with the International Financial Reporting Standards issued by the International Accounting Standard Board.

According to the Financial Statements Act, listed companies shall in their annual reports provide a description of their business model and address CSR matters including considerations on human rights, social matters, employees, environment and climate, anti-corruption and bribery, etc. The statutory requirement means that the companies must account for their policies on CSR or explain the lack of a CSR-policy.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

In accordance with the general principle of collective responsibility, it is the board of directors as a whole, not any one individual member that is responsible for transparency and disclosure of information. Market practice in Denmark is, nevertheless, that the chairman of the board of directors in cooperation with the CEO is delegated the responsibility of handling market disclosures and official statements, press releases, etc.

5.2 What corporate governance-related disclosures are required?

MAR sets out the main statutory disclosure requirements relating to the continuous disclosure of price-sensitive information relating to the company and publication of financial reports, etc.

Annual reports and company releases may now be published in the English language only. Listed companies are no longer legally required to disclose an interim management statement or quarterly interim reports. However, the Committee on Corporate Governance recommends that the companies publish quarterly reports and points out that periodic notifications do not fulfil this recommendation (*cf.* question 1.2 above).

According to the Nasdaq Rule Book, the annual report (submitted for shareholder approval) of a listed company must be published no later than three months after the end of the financial year. The audited annual report as approved by the shareholders must be filed with the Danish Business Authority without undue delay after approval, and must be received no later than four months after the end of the financial year. Listed companies must disclose half-year financial reports within a recently revised deadline of three months.

The Financial Statements Act requires that information on how companies apply the principles of corporate governance be included either in the management's review in the annual report, which will be audited by the auditor(s), or posted on the company's website together with a reference thereto in the management's review.

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

The annual report is prepared by the management board, adopted by the board of directors and audited by the company's auditor(s). The report, which is subject to final approval by the shareholders at the annual general meeting, must include statements from the auditor(s) regarding whether the auditor finds that the annual report gives a true and accurate view of the financial situation of the company.

According to Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, listed companies (and other large entities) must: (i) ensure periodic rotation on

auditors and audit firms; (ii) limit the volume of non-audit services assigned to the elected audit firm; (iii) increase responsibilities of the audit committee of the company; (iv) comply with certain search, election and nomination procedures by the audit committee when new audit firms are to be elected; and (v) opt for inclusion of external members of the audit committee who are not members of the board of directors.

5.4 What corporate governance-related information should be published on websites?

Listed public limited companies shall as soon as possible after the publication of inside information make all such information available to investors on the company's website.

As regards corporate governance, company announcements to Nasdaq Copenhagen A/S and approved guidelines for the company's incentive pay system must be published on the company's website together with basic information about the issuer (i.e. the company name, the address of the corporate headquarters, the company registration number, etc.).

Information disclosed on the company's website must be available for at least five years. Financial reports, however, must be available for a minimum of 10 years from the date of disclosure.

A listed company shall announce the voting results of a general meeting on its website no later than two weeks after the general meeting. Any questions raised by shareholders are deemed to have been answered by the company if the information is available on the company's website by way of a Q&A function.

The company's mandatory duty to prepare a statement on CSR (*cf.* question 4.3 above), must be included in the annual report or, alternatively, with a reference in the annual report, in another supplementary report or on the company's website.

The Danish Recommendations on Corporate Governance includes a number of disclosure recommendations regarding corporate governance-related information to be published on the company's website.

Peter Lyck
Nielsen Nørager Law Firm LLP
Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: *+45 30 10 39 15*
Email: *pl@nnlaw.dk*
URL: *www.nnlaw.dk*

Peter Lyck is partner in Nielsen Nørager Law Firm LLP in the M&A and Capital Markets practice group and has vast experience with public M&A and ECM transactions. He has assisted both listed and unlisted companies on corporate governance structures and documentation and has advised a number of blue-chip companies on a range of transactions covering public tender offers, IPOs and bond and rights issues.

Thomas Melchior Fischer
Nielsen Nørager Law Firm LLP
Frederiksberggade 16
1459 Copenhagen K
Denmark

Tel: *+45 31 18 04 34*
Email: *tf@nnlaw.dk*
URL: *www.nnlaw.dk*

Thomas Melchior Fischer is a lawyer with several years of experience specialising in M&A and in the field of general company law, corporate finance and capital markets law, including substantial cross-border IPO experience in recent years.

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Finland

Borenius Attorneys Ltd

Andreas Doepel

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities addressed in this section are the private limited liability company (private company, in Finnish an *Yksityinen Osakeyhtiö*, or commonly simply *Osakeyhtiö*, abbreviated Oy, and in Swedish a *Privat Aktiebolag*, or commonly simply an *Aktiebolag*, abbreviated Ab) and the public limited liability company (public company, in Finnish a *Julkinen Osakeyhtiö*, abbreviated Oyj, and in Swedish a *Publikt Aktiebolag*, abbreviated Abp). This overview will focus on public companies.

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

The central legislation governing limited companies in Finland are the Companies Act (statute 624/2006, as amended, the "FCA") and the Securities Markets Act (statute 746/2012, as amended, the "SMA").

According to Chapter 11, Section 28 of the SMA, a listed company must directly or indirectly belong to an independent organisation established in Finland that has issued a recommendation on the actions of the management of the target company in a takeover bid, in order to promote good securities market practice.

The Securities Market Association (http://cgfinland.fi/en/) is a cooperation organisation established in December 2006 by the Confederation of Finnish Industries EK, NASDAQ OMX Helsinki Ltd (the Exchange) and Finland Chamber of Commerce. The Securities Market Association administers the recommendation concerning public bids, the Helsinki Takeover Code.

The Finnish Corporate Governance Code of 2015 (the Helsinki CG Code), as well as The Helsinki Takeover Code, set out non-binding, but recommended regulations in relation to corporate governance (links to the Codes are available at http://cgfinland.fi/en/). The latest edition of the Helsinki CG Code was approved in October 2015 and it is currently being revised to account for the new proposed regulation implementing the changes to the Shareholders' Rights Directive.

Listed companies further have to comply with the Rules of the Stock Exchange of NASDAQ OMX Helsinki (latest edition available at: http://business.nasdaq.com/list/Rules-and-Regulations/European-rules/nasdaq-helsinki/index.html). Under the Rules of the Stock Exchange, all listed companies shall notify their compliance with the corporate governance in the jurisdiction where they are incorporated, meaning that the Helsinki CG Code is *de facto* mandatory for listed companies domiciled in Finland.

The Helsinki CG Code is based on the "Comply or Explain" principle, i.e. companies shall, as a rule, comply with all recommendations or disclose and explain any departures from the recommendations.

The Finnish Financial Supervision Authority ("FFSA") has compiled standards consisting of both legally binding rules and recommended provisions, to be applied when e.g. listing securities or placing public takeover bids or mandatory offers. Both the FFSA and the Helsinki Stock Exchange are empowered to impose certain sanctions for non-compliance with the rules or regulations.

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

A topical issue is the increasing impact of EU regulations on the Finnish corporate governance model has been a topical issue. The implementation of the Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU (the "Shareholders Rights Directive") and in particular the "say on pay" principle, which impacts the governance structure and division of duties between the board and the shareholders' meeting in Finnish limited companies.

The working group appointed by the Finnish Ministry of Finance published its proposal for legislation implementing the amendments to the Shareholders' Rights Directive in April 2018 and the new legislation is proposed to take effect as from 10 June 2019 with the rules concerning "say on pay" being applied from 1 January 2020, meaning that the first remuneration policies need to be presented to the General Meetings held in 2020 and the first remuneration reports shall, in most cases, be addressed by the General Meetings held in 2021.

The regulation concerning the requirement to identify and register beneficial owners of limited companies (as well at other registered entities and associations) will enter into force in Finland on 1 January 2019. The deadline to notify and register the beneficial owners to the public register maintained by the Finnish Trade Register will be 1 July 2020 and a number of questions concerning its practical implementation are still open.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Studies show that active owners dominate publicly held Nordic

companies (according to the book "The Nordic Corporate Governance Model", SNS förlag 2014, 62 per cent of companies in the region have at least one shareholder that holds more than 20 per cent of the votes). Thus short-termism has not been widely viewed as a pressing issue affecting publicly held companies in Finland and the current perspective and discussions can be characterised as a reaction to the EU regulatory agenda.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

According to the FCA, shareholders exercise their decision-making powers (and other powers) at the General Meeting. Shareholders have an extensive right to make proposals to the General Meeting and ask questions regarding management at the General Meeting.

Certain shareholders' rights, such as equal treatment of shareholders, are protected through the general principles of company law. In addition, the FCA includes certain provisions regarding rights of minority shareholders, representing at least 10 per cent of the shares of the company.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The primary responsibility to implement the CG Code and oversee the corporate governance of a Finnish limited company rests with the Board of Directors of the Company. As a rule, shareholders have rights, not obligations imposed on them under the CG code.

However, the FCA contains the requirement for the equal treatment of shareholders, i.e. all shares carry equal rights in a company, unless otherwise provided in the Articles of Association.

The general meeting, board of directors and managing director do not have the right to make a decision that could give undue benefit to a shareholder or another person at the expense of the company or another shareholder. The purpose of the principle of equal treatment is primarily to protect minority shareholders. The principle does not prevent the use of majority rule, but it prevents favouring majority shareholders at the expense of other shareholders.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The shareholder meetings commonly held are the Ordinary General Meeting and Extraordinary General Meeting.

The Ordinary General Meeting is compulsory and is held within six months of the end of the financial period and must, as a minimum, address the matters set out in the FCA.

An Extraordinary General Meeting shall be held if so decided by the board, required by the Articles of Association or the auditor or shareholders with a total of 1/10 of all shares, or a smaller proportion as provided in the Articles of Association, so demand in writing in order for a given matter to be dealt with.

Each individual shareholder has the right to propose a matter falling within the competence of the General Meeting to be dealt with by the General Meeting, provided the proposal is notified to the board of the company in time to be included in the summons.

Based on a separate rule in the FCA, a proposal shall be deemed to have been submitted in time if the proposal has been notified at least four weeks prior to publishing the summons to the General Meeting. The Helsinki CG Code requires companies to disclose the date by which proposals for the Annual General Meeting of shareholders have to be submitted to the company.

Every shareholder of the company has a right to participate in a General Meeting. A shareholder may also exercise the rights of a shareholder at a General Meeting by way of proxy representation. Shareholders in listed companies may also appoint several proxy representatives, representing the shareholder's shares on different book-entry accounts.

Shareholders are also entitled to have an assistant (e.g. legal counsel) accompanying the shareholder at the General Meeting.

Shareholders further have an extensive right to put forward questions to management at the General Meeting. Management may decline to provide information if this would cause essential harm to the company. If the question of a shareholder can only be answered on the basis of information not available at the meeting, the answer shall be provided in writing within two weeks.

As a general rule, resolutions of the General Meeting are made by a simple majority of votes cast. Certain resolutions may, however, require a qualified majority (typically two-thirds of the votes cast and represented at the meeting). The requirement that a qualified majority is achieved only by both two-thirds of the votes cast and represented means that abstain votes will in practice have the same effect as "no" votes.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

In general, shareholders may act in their own interest and owe limited duties to the corporate entity or other shareholders. The FCA contains rules imposing duties on shareholders in specific situations, e.g. if a company has only one shareholder, that shareholder is obliged to notify its acquisition to the company within two months.

More generally, the FCA has a general principle of equal treatment stating that, *inter alia*, the General Meeting shall not make decisions or take other measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder.

Ultimately a shareholder may be obliged, on the basis of action brought by another shareholder, to redeem the shares of the latter shareholder on the basis of abuse of influence by contributing to a decision contrary to the principle of equal treatment. The duty of redemption on the basis of abuse of influence has rarely been invoked in practise.

The general rule is that a shareholder cannot be liable for acts or omissions of the corporate entity. A company is a legal person distinct from its shareholders and the principle of setting aside this limited liability, i.e. piercing the corporate veil, could be realised only under exceptional circumstances.

A shareholder can, however, be held liable and obligated to pay damages for a possible loss that he/she has caused to either the company, another shareholder or a third party, by violating the FCA or the Articles of Association of the company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

It is possible for an individual shareholder or shareholders to pursue a claim against a director of the company, on behalf of the company and with respect to damages caused by director's negligence.

A prerequisite for allowing the shareholder to pursue claims against management is that the shareholder demonstrates that it is likely that the company itself would not bring a claim for damages. Further, the claimant(s) must own at least 1/10 of all shares and be able to demonstrate that the failure of the company to pursue the claim would be contrary to the principle of equality.

It is, in addition, possible for a single shareholder to pursue a claim against a director of the company for any direct damages caused to the shareholder through a deliberate or negligent violation of the FCA or the Articles of Association.

A shareholder is not, as a general rule, entitled to receive damages from a loss caused to the company.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Pursuant to certain provisions of the Securities Market Act, as well as the standards of The Finnish Financial Supervision Authority, a shareholder of a public company is required to give a notification in the event the shareholder's holdings reach, exceed or fall below determined levels of all shares of the company. The current levels in question are 5, 10, 15, 20, 25, 30, 50 and 90 per cent of all shares or voting rights, or ⅔ of all shares or voting rights of the company.

In the event a shareholder's holding in a public company exceeds 30 or 50 per cent of the voting rights, a shareholder is obliged to offer to purchase all the remaining shares of the company at the fair price. In the event the threshold of 90 per cent of all shares and votes is reached, the minor shareholders shall, in addition, have a right to require their shares to be redeemed at the fair price.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

The FFSA may impose a deadline on parties that have contacted the target company or its shareholders with a proposed takeover bid or publicly announced it is planning to launch a takeover bid to either publish the takeover bid or announce publicly that it will not launch a takeover bid.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The company is primarily managed by the Board of Directors. The Board of Directors shall see to the administration of the company and the appropriate organisation of its operations, as well as to be responsible for the appropriate arrangement of the control of the company accounts and finances. There shall be between one and five regular Members of the Board of Directors, unless it is otherwise provided in the Articles of Association. If there are fewer than three Members, there shall be at least one Deputy Member of the Board of Directors. If there are several Members of the Board of Directors, a Chairperson of the Board of Directors shall be elected. The Board of Directors shall elect the Chairperson, unless it has been otherwise decided when the Board is appointed or unless it is otherwise provided in the Articles of Association.

Having the Board of Directors is obligatory. A limited company may also have a Managing Director, nominated by the Board of Directors, and/or a supervisory board as well.

The Managing Director shall see to the executive management of the company in accordance with the instructions and orders given by the Board of Directors. The Managing Director shall, in addition, see to it that the accounts of the company are in compliance with the law, and, that its financial affairs have been arranged in a reliable manner.

The supervisory board supervises the administration of the company, which is the responsibility of the Board of Directors and the Managing Director.

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

The Board of Directors is appointed by the General Meeting. It may, however, be provided in the Articles of Association, that the Board of Directors shall be appointed by the supervisory board, or, that a minority of the Board of Directors is to be appointed according to some other procedure.

In a public company, the term of a member of the Board of Directors shall end with the conclusion of the Ordinary General Meeting following the appointment of the member, unless otherwise provided in the Articles of Association. In a private company, the term of a Member of the Board of Directors can be indefinite. Other provisions on the term may be included in the Articles of Association.

A member of the Board of Directors may be dismissed ahead of term by the party who appointed the member. However, a member appointed by someone other than the General Meeting may be dismissed by the General Meeting if the Articles of Association have been amended so that the special right of appointment no longer applies.

A member of the Board of Directors may as well resign before the end of his/her term.

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

The General Meeting generally determines the remunerations of the members of the Board of Directors, whereas the Board of Directors shall generally approve the Service Contract for the Managing Director, including e.g. terms regarding remuneration.

There are no specific legislative restrictions regarding remunerations; nevertheless, there are some general principles, e.g. in the Helsinki CG Code, that direct the decision making regarding the issues in question. According to the Helsinki CG Code, remuneration schemes should be drawn up in such a manner that they promote the competitiveness and long-term financial success of the company and contribute to the favourable development of shareholder value. Remuneration schemes shall be based on predetermined and measurable performance and result criteria.

The Helsinki CG Code places emphasis on transparency in relation to the remuneration schemes. The company shall disclose the remuneration and other financial benefits of each director for board and committee work, as well as other duties, if any, for the financial period.

If the chairman of the board or a director has an employment relationship or service contract with the company (executive chairman; executive director) or acts as advisor of the company, the company shall disclose the salaries and fees, as well as other financial benefits paid for this duty during the financial period.

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

The Helsinki CG Code allows for company shares to be used as a form of remuneration for board or committee work, noting that shareholdings of the directors in the company promote good corporate governance.

However, the independence requirement for the board as a whole shall be met. Hence, directors' shareholdings should not compromise their independence in relation to the company.

When holding the shares of the company, the directors have no exemptions from the disclosure requirements included in the Securities Market Act (see question 2.7).

In addition, the Marker Abuse Regulation (EU Regulation 596/2014, "MAR") obliges issuers' managers and persons closely associated with them to notify the issuer and FFSA of their transactions relating to said issuer's shares, debt instruments, derivatives or other financial instruments.

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

The Chairperson of the Board of Directors shall see to it that the board meets when necessary. In addition, a meeting shall be convened if a member of the Board of Directors or the Managing Director so requests. In the event that, despite the request, the Chairperson does not call the meeting, the meeting may be called by the Managing Director, or by a member, if at least one half of the members approve of the call.

The Board of Directors shall have a quorum when more than half of the Members of the Board of Directors are present, unless a larger proportion is required in the Articles of Association. The proportion shall be calculated on the basis of the number of members who have been appointed and no decision may be made unless all members have been reserved the chance to participate in the consideration of the matter. If a member is unavailable, the deputy member, if one has been elected, shall be provided the opportunity to take part in the meeting.

The opinion of the majority shall constitute the decision, unless a qualified majority is required in the Articles of Association. In the event of a tie, the Chairperson of the Board of Directors shall have the casting vote.

A member of the Board of Directors shall be disqualified from the consideration of a matter pertaining to a contract between the member and the company, as well as from the consideration of a matter pertaining to a contract between the company and a third party, if the member is to derive an essential benefit in the matter and that benefit may be contrary to the interests of the company.

Minutes shall be kept of the meetings. The minutes are to be signed by the person chairing the meeting and, if there are several members of the Board of Directors, at least by one member designated by the board. A member and the Managing Director shall have the right to have a dissent entered into the minutes.

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

According to FCA, the general purpose of a company is to generate profits for the shareholders. The management of the company shall act with due care and promote the interests of the company. The articles of the company may also prescribe a different general purpose for the company.

A member of the Board of Directors, a member of the supervisory board and the Managing Director shall be liable in damages for the loss that he/she, in violation of the duty of care has, in office, deliberately or negligently caused to the company. A member of the Board of Directors, a member of the supervisory board and the Managing Director shall also be liable in damages for the loss that he/she, in violation of other provisions of the FCA or the Articles of Association, has in office deliberately or negligently caused, either to the company, a shareholder or a third party. In the event a provision that is denoted as punishable has been breached, criminal liability may also occur.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The Board of Directors shall see to the administration of the company and the appropriate organisation of its operations. The Board of Directors is further responsible for the appropriate arrangement of the control of the company accounts and finances.

The Managing Director's duty is to take care of the day-to-day management of the company. The Managing Director shall see to the executive management of the company in accordance with the instructions and orders given by the Board of Directors, and, to see to it that the accounts of the company are in compliance with the law. The Managing Director shall further see that the company's financial affairs have been arranged in a reliable manner.

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

The companies may, and commonly do, purchase D&O insurance on behalf of their directors.

The discharge of the Members of the Board of Directors, the Members of the Supervisory Board and the Managing Director from liability is one of the mandatory issues to be put before the Ordinary General Meeting. By the decision, the company unilaterally waives its right to claim damages from management. It should be noted, however, that the waiver only extends to such actions or decisions that have been sufficiently disclosed to the General Meeting and hence the practical effect of the waiver is, in many cases, limited.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Setting and changing the company's strategy is a central task of the Board of Directors whereas the implementation of the set strategy is the task of the Managing Director and other operative management. The field of operations of the company enshrined in the Articles of Association set out the general scope for the strategy for the Board of Directors.

4 Other Stakeholders

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

Employees have no statutory right to be represented on the board. A company may, however, agree with its employees to arrange some employee representation in the company governance, and, in the event nothing is agreed regarding the representation, the employees may have a right to have some representatives appointed in the management groups or similar bodies of the company.

The employees should, in addition, be consulted regarding certain major issues, e.g. major changes in the company.

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

Generally, Finnish Corporate Governance addresses stakeholders by imposing disclosure and reporting obligations on the company to the stakeholders. The FCA defines the default purpose of the limited company as generating profits to the shareholders. The preparatory works of the act recognise, however, that long-term profit generation generally require the company to adhere to accepted social norms and thereby acknowledges that stakeholders may have a role to play in the fulfilling of the company purpose, in addition to shareholders.

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

The general meetings in the spring of 2018 were the first held after the rules added into the Finnish Accounting Act and requiring large public-interest companies to report on non-financial matters came into effect. The non-financial matters to be reported include information on how the entity addresses environmental, social, HR, human rights and anti-corruption matters.

Generally, the discussions concerning the challenges of the reporting requirements that preceded the reports was more active than at the general meetings. The Finnish implementing regulation defines, *inter alia*, all companies that have securities (stocks, bonds of other securities) listed on the Nasdaq Helsinki Oy stock exchange as public interest companies.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Responsibility for fulfilling the disclosure and transparency requirements lies with the company. The Helsinki CG Code, e.g. states that the "company" shall disclose information. In practice, the ultimate responsibility for complying with the requirements rests with the Board of Directors and the Managing Director of the company.

5.2 What corporate governance-related disclosures are required?

According to Finnish legislation, all financial statements are public and shall be registered with the Finnish Trade Register within two months of the adoption. Listed companies are required to publish a corporate governance statement annually in connection with their annual report and the Helsinki CG Code requires listed companies to maintain current and updated CG information on the website of the respective company.

In addition, public companies are obliged to prepare and publish their interim reports, as well as annual financial statements and reports and make them available through the company website.

All information that may have an effect on the share price shall be made public without any undue delay.

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

All financial statements are to be audited and the auditor's report to be issued. A failure to comply with the statutory duties may result in liability.

5.4 What corporate governance-related information should be published on websites?

According to the FCA, the company is obliged to publish the board proposals, financial statements, annual/interim reports and auditor's reports on the company website prior to the General Meeting. After the General Meeting the minutes shall be kept available on the website of the company.

According to Securities Market Act, the interim reports, interim board reports, financial statements and annual reports are to be kept available through the company website for at least five years.

According to the Helsinki CG Code, the company shall issue a separate Corporate Governance Statement, detailing, *inter alia*, compliance with the Code and details on internal control and risk management, as well as organisation of the management. The statement, together with a separate remuneration statement, shall, together with other information, be presented on the company's website as investor information.

The Helsinki CG Code also contains detailed recommendation on the information that shall be published on the website of listed companies, including the following information:

- Information on compliance with this Helsinki CG Code.
  - If the company has departed from an individual recommendation, information on this as well as the explanation for the departure.
- Statements.
  - Corporate Governance Statement.
  - Remuneration Statement.
- General meeting.
  - notice of the general meeting, which contains the proposal for the agenda, and information prior to the meeting;
  - proposal concerning the composition and remuneration of the board and auditor(s);
  - information concerning the procedure used to nominate board directors;
  - information concerning the board of directors and the evaluation of the independence of the directors;
  - proposals put forward by shareholders and date by which shareholder proposals to the AGM shall be submitted and instructions for submitting proposals; and
  - archive of documents relating to the General Meetings for the last five years.

- Information on the board and any committees.
- Information on the managing director and other executives.
- Information on risk management and control.
- Information relating to the auditor and audit.
- Other material information pertaining to the Company's corporate governance, such as:
  - Articles of Association and information on possible redemption clause.
  - Shares and share capital.
  - List of major shareholders.
  - Known shareholders' agreements.
  - Events calendar.

Andreas Doepel
Borenius Attorneys Ltd
Eteläesplanadi 2
FI-00130 Helsinki
Finland

Tel: *+358 20 713 33*
Email: *andreas.doepel@borenius.com*
URL: *www.borenius.com*

Partner Andreas Doepel advises clients on corporate governance matters and other matters related to corporate arrangements, mergers and acquisitions. Andreas heads the Corporate Advisory & Compliance group of Borenius Attorneys Ltd.

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France

Pascale Girard

Villey Girard Grolleaud

Léopold Cahen

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Although all French corporate entities raise corporate governance questions, corporate governance rules do focus on listed companies. The following developments will therefore mainly describe rules applicable to listed companies and more precisely to limited liability companies (*sociétés anonymes*), which is the most common form of corporate entity.

The governance of *société anonymes* can be of two types:

- *Société anonyme à conseil d'administration* (one-tier structure).
- *Société anonyme à directoire et conseil de surveillance* (two-tier structure).

Nonetheless, it should be underlined that French regulators tends to extend governance rules initially designed for listed companies to large private companies (i.e. companies crossing certain thresholds in terms of number of employees, P&L, turnover).

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

The main sources are:

- The French Codes: Commercial code and, to a certain extent, Financial and Monetary code.
- The European Union directives and regulations (such as Directive 2006/46/CE of 14 June 2006 relating to annual and consolidated accounts or Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement).
- The French financial markets regulator – the *Autorité des marchés financiers* (AMF), which publishes recommendations, instructions and positions and each year publishes, a report on corporate governance, compensation of executive officers, internal control and risk management.
- Corporate governance codes ("soft law"):
  - the Afep-Medef code, published by the two main French business federations and designed for large listed companies; and
  - the MiddleNext code, mostly dedicated to small and mid-listed companies.

    In 2013, Afep and Medef set up the High Committee for Corporate Governance to monitor the implementation of the Afep-Medef code and give recommendations on corporate governance practices.

    These codes are soft law and hence non-binding. However, pursuant the legal principle "comply or explain", companies choosing to refer to one of these codes must justify any non-compliance with their provisions.
- Euronext Rules.

Certain large listed companies with no controlling shareholders are also advised to take into account guidelines established by proxy advisors (ISS, Glass Lewis and Proxinvest), including their recommendations on corporate governance.

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

The current main issues relating to the corporate governance in France are:

- Remuneration of executive directors: in 2013, the Afep-Medef code introduced the 'Say on Pay' principle on a non-binding basis. The French lawmaker decided to make this practice binding. Since the Loi Sapin II dated 9 December 2017 and its implementing Decree dated 16 March 2017 shareholders vote both "*ex ante*" and "*ex post*". This vote is binding.
- Gender parity in boards of directors and supervisory boards: listed companies and large sized companies are now legally required to be composed of at least 40% of members of each gender.
- Employee representation in boards of directors and supervisory boards: several reforms recently increased the representation of employees on boards and a new law currently under discussions (*loi PACTE)* would continue this trend.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

European and French lawmakers are now aware of the risk of short-termism and the importance of promoting sustainable value creation over the long-term. See, for example, Directive (EU) 2017/828 of 17 May 2017 that sets out several requirements, especially transparency requirements, presented as means to favour long-term engagement.

Similarly, on 30 December 2014, French law – implementing Directive 2013/50/UE – removed the obligation for listed companies to publish quarterly accounts.

In the next few months, a new law, the *Loi PACTE*, is expected to add new obligations in terms of corporate social responsibility and stakeholders' interests. Although, no precise draft of the law has been released yet, it is contemplated to amend the definition of "company" in the French civil code to reflect these objectives.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The CEO (*directeur général*) and the board of directors or, in two-tier structures, the management board are in charge of the day-to-day management of the company.

Shareholders are not involved in the day-to-day management of the company.

Shareholders have an indirect influence on the strategic decisions since they appoint and dismiss the members of the board of directors (the CEO and deputy CEOs, if any, are appointed by the board of directors).

In a two-tier structure company, shareholders appoint the supervisory board members. The management board members are appointed by the supervisory board and dismissed by the shareholders (and, if the articles of association so provide, by the supervisory board).

Shareholders also approve related party transactions (defined as transactions entered into between companies having common executive officers, between a company and one of its executive officers or between a company and one of its shareholders who/that owns at least 10% of the voting rights).

On 15 June 2015, the AMF released a position-recommendation pursuant to which it recommends that listed companies consult their shareholders prior to dispose of major assets (i.e., when the assets represent more than 50% of the company's value).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders do not have any specific responsibilities as regards to the corporate governance of the corporate entities in which they are invested, with the exception to the elements described in question 2.4.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two different kinds of shareholder meetings:

- An ordinary general meeting is held at least once a year, in order to vote on the annual accounts and, where applicable, the consolidated accounts for the past financial year. It is called the "annual general meeting". Annual general meetings also include a resolution on the allocation of profits (or loss), resolutions on the appointment/renewal/dismissal of board members, say on pay, related party transactions, golden parachutes and resolutions on the appointment of statutory auditors. Shareholders are generally asked to authorise the board of directors/management board to put in place a share buy-back programme. In ordinary general meetings, resolutions are adopted by a simple majority of the voting rights of shareholders present or represented.
- Extraordinary general meetings are held to vote on any decision amending the company's by-laws. Shareholders are usually requested to grant the board of directors or management board the competence or authorisation to issue shares or rights giving access to shares. In extraordinary general meetings, resolutions are adopted by a two-third majority of the voting rights of shareholders present or represented.

Since 3 April 2016, any shareholder holding shares of a listed company in the registered form for at least two years is entitled to double voting rights, unless the company's by-laws provide otherwise.

Shareholders meetings are convened by the board of directors or by the management board. Shareholders meetings can also be convened by the supervisory board. Minority shareholders representing at least 5% of the share capital or associations of minority shareholders may request the judge to appoint a trustee in charge of convening the general meeting.

The agenda is decided by the entity convening the meeting. However, under certain conditions, shareholders may request the inclusion of items or draft-resolutions to this agenda.

Companies must provide certain information to the shareholders prior to the general meeting (such as accounts, reports of the statutory auditors, draft resolution, etc.).

In listed companies, shareholders must justify ownership of their shares at least two days prior to the general meeting.

Shareholders who cannot attend the meeting can vote by post or by proxy. If the articles of association so provide, shareholders can also vote by videoconference or any telecommunication.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As a general principle, French law does not impose any specific duties on shareholders to the corporate entities.

However, under French case law, shareholders can be held liable for abuse of majority or abuse of minority, as the case may be, (i) when majority shareholders vote in favour of a decision that solely serves their interests, is contrary to the interests of the minority shareholders and cannot be justified by the company's interests, and (ii) when minority shareholders oppose an important decision in terms of the company's interests, solely to preserve their interests and against the interests of the other shareholders.

The shareholders cannot be directly held liable for acts or omission of the company. In case of financial difficulties, the maximum amount they can lose is their investment in the company (except in situations such as piercing the corporate veil).

In addition, since a law dated 29 March 2017, a parent company of a group employing at least 5,000 persons in France or 10,000 persons worldwide can be held responsible for damages caused by its subsidiaries to the environment or in relation to human rights or security of persons. The parent company can be held responsible for not having set up the appropriate preventive plan to identify the risks that caused the damages and prevent the damages.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Under French law, a shareholder can seek the liability of a CEO through two actions:

- The *ut singuli* claim: this is a claim filed by a shareholder (regardless the number of shares it holds) on behalf of the company for damaged suffered by the company. If the CEO is held liable, compensation is granted to the company and not to the shareholder.
- The individual claim: this is filed by a shareholder for damages suffered personally. In this case, compensation is thus granted to the shareholder.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Limitations

Under French law, there is no limitation as to the number of securities a shareholder can hold. However, articles of association may limit the number of voting rights that a shareholder can vote at shareholders meetings.

Disclosures

Any shareholder crossing upward or downward (either acting alone or acting in concert) the thresholds of 5%, 10%, 15%, 20%, 25%, 20%, 30%, ⅓, 50%, ⅔, 90% and 95% of the share capital or voting rights of a listed company must notify the company and the AMF of the crossing before close of market on the fourth day following the crossing. In addition, the articles of association of the company may provide for additional thresholds crossings to be notified to the company.

Subject to relevant exemptions, the launch of a public tender offer is mandatory when a person (acting alone or in concert) crosses upward the threshold of 30% of the share capital or voting rights. Similarly, a shareholder holding between 30% and 50% of the share capital or voting rights of a listed company is required to launch a mandatory offer if it acquires in excess of 1% of the share capital or voting rights of the company over a 12-month period.

During an offer period (and provided that they are not prohibited), dealings in the target's securities trigger strict disclosure obligations. In particular, trades must be disclosed on a daily basis when they are carried out by the bidder or the target (or their respective directors or managers) as well as by any person holding more than 5% of the capital or voting rights of the target or by any person having acquired, since the announcement of the offer period, more than 1% of the target's securities. Relevant shareholders may, in addition, be required to disclose their intentions in respect of the target.

Shareholders are required to disclose to the AMF the short positions they hold. Reverse transactions are also to be disclosed under certain conditions.

Since the entry into force of the Loi Sapin II, all non-listed companies (including companies pertaining to a same group) are now required to identify their beneficial owner(s) and to communicate this information to the registry of commerce. A beneficial owner is any natural person or persons who either directly or indirectly hold(s) more than 25% of the capital or voting rights of the company, or, exercise, by any other means, a controlling power over the management, administration or direction bodies of the company or over the general meetings.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

- When crossing upward the thresholds of 10%, 15%, 20% or 25% of the share capital or voting rights of a listed company, a shareholder must publicly disclose its intentions with respect to the target for the next six months.
- In the context of potential public tender offers, the AMF General Rules provide that, in the event of rumours or in the event of unusual trades on the securities of the target, the AMF may require the potential bidder to anticipate the disclosure of its intention (French "put-up or shut-up" rule).
- See above the disclosure requirement applicable during the offer period.
- More generally, pursuant to the AMF General Rules, any person preparing a financial transaction likely to have a significant impact on the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management structure of the French *société anonyme* is mostly imposed by law, with two options:

- a one-tier structure: in this structure, the collegial body is the board of directors (*conseil d'administration*) composed of three to 18 directors. The board of directors (i) is responsible for the overall business strategy of the company, (ii) ensures that the strategy is implemented, and (iii) undertakes the necessary controls and verifications. The day-to-day management of the company is entrusted to a CEO (*directeur général*) (and deputies, if any), who may also be the chairman of the board (*président-directeur général*); and
- a two-tier structure: in this structure, a management board (*directoire*; one to five members in private companies or one to seven members in public companies) manages the company and a supervisory board (*conseil de surveillance*; three to 18 members) oversees the action of the management board.

Pursuant to French law and corporate governance codes, the board of directors or the supervisory board are required to set up, among their members, committees entrusted with specific duties. The most common board committees are the following:

- the audit and risk committee (which can be divided into two separate committees). An audit committee is mandatory for listed companies, unless the duties of the audit committee are entrusted to the board of directors itself;
- the remuneration and nomination committee (which can be divided into two separate committees); and
- the strategic committee.

The CEO/management board usually works with deputy CEOs and an executive board (*Comex* or *comité de direction*).

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

Members of the board of directors are appointed and dismissed by the shareholders meeting. The by-laws set out the terms of office, which cannot exceed six years. The directors are often appointed for a four-year period, as recommended by the Afep-Medef code. The Afep-Medef code recommends a staggered board in order to ensure a certain stability in the composition of the board. The shareholders' meeting may decide to dismiss a board member at any time, for any reason.

The CEO and his/her deputies are appointed by the board of directors. Removal may be decided by the board of directors at any time with a just cause, unless the CEO is also the chairman of the board of directors; in which case, he/she can be dismissed for any reason.

Members of the managing board are appointed by the supervisory board (duration of mandate between two and six years). Removal may be decided by the shareholders meeting and, if provided by the company's articles of association, the supervisory board, at any time with a just cause.

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

Remuneration of executive directors is set out by the board of directors or the supervisory board, as applicable.

Following the introduction of a binding Say on Pay regime by the Loi Sapin II in 2017, shareholders' approval is now required for listed companies as follows:

- the *ex ante* vote: the principles and criteria for the determination, breakdown and allocation of the fixed, variable and exceptional elements of the total remuneration and benefits in kind of the chairman of the board of directors, managing director, deputy managing director and members of the managing board must be approved by an ordinary resolution of the annual shareholders meeting. In case of negative vote, the company shall abide by the past policy until obtaining a positive vote on a new policy; and
- the *ex post* vote: once the remuneration policy has been approved, the compensation, including benefits of any kind, awarded or due to each director for the most recent financial year must be approved by the next general meeting. No variable remuneration or bonus can be paid unless the shareholders approve such compensation.

In addition to the Say on Pay votes, exceptional elements of remuneration, such as golden parachutes, cannot be granted and paid without complying with a specific process involving approval by the shareholders meeting and publication of press releases. Such elements of remuneration must be subject to performance conditions.

The annual report of listed companies must precisely set out the elements of remuneration granted and paid to executive directors and members of the board of directors or supervisory board of the company. The AMF and the corporate governance codes provides for disclosure rules in that respect.

Unless entered into in accordance with market practice, any agreement entered into between, directly or indirectly, an executive director or a member of the board of directors (or supervisory board) and the company must be subject to a prior approval of the board of directors or the supervisory board as the case may be. Shareholders must then approve these agreements. This is, for example, the case for employment agreements between the company and an executive director.

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

French law does not require members of the management body to hold company's shares. As recommended by the Afep-Medef code, articles of association or internal rules usually require directors to hold a minimum number of shares of the company. Pursuant to the French commercial code, executive directors and board members, and members of their family, must hold the company's shares on registered form or use a custodian.

Transactions on company's securities carried out by executive directors, members of the boards or members of their family, must be filed with the AMF and the company within three business days after the transaction if the total amount of the transactions made by such persons is higher than 20,000 euros on a given calendar year. The management report of listed companies must contain a summary statement of the transactions completed during the last financial year.

Members of the management body must also comply with closed periods (30 days prior to the publication of the annual and semi-annual results) during which they must refrain from making any transaction on the company's shares, due to the fact they are deemed to have access to inside information. The prohibition to operation on securities applies each time a member of the management body has inside information.

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

The process for meetings of the members of the management body is mostly governed by the articles of association, the internal rules of the said management body and the French commercial code.

For instance, pursuant to the Commercial code, the board of directors can only meet if at least half of its members attend the meeting. The articles of association and the internal rules may provide that members present via telephone or videoconference are deemed present at the meeting.

Majorities required to adopt decisions are freely set out by the articles of association, provided that they are at least equal to 50% of the members attending the meeting or represented.

Board of directors and supervisory boards must meet as often as required by the corporate interest. The Afep-Medef code recommends that a meeting without the executive director (in the event the managing director is a member of the board) be organised each year.

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

Under French law and pursuant to the corporate governance codes, members of the boards must comply with several principles, usually set forth in their internal rules or charters of ethics, such as:

- act in the interest of the company;
- duty of secrecy and confidentiality;
- duty of loyalty and diligence;
- duty to reveal any conflict of interests and refrain to participate to any deliberation of the board when conflicted;
- duty to respect any regulation applicable to the company, including the by-laws, the internal rules and any charter of ethics; and
- duty to remain fully informed and to attend the board meetings.

The liability of the executive directors toward shareholders and the company is described in question 2.5.

Executive directors and members of the board of directors are liable, individually or jointly, toward the company or third parties for any violation of applicable laws and regulations, the articles of association or any fault in their management.

Supervisory board members are liable for their personal faults but not for management actions. However, they can be liable for criminal offences committed by the managing board in the event they were aware of such offences but did not reveal them to the general meeting.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main corporate governance functions are set out in question 3.1.

Functions and responsibilities of the board of directors differs from those of the supervisory board. The board of directors determines the Company's business strategy and monitors its implementation, with the ability (i) to handle all matters involving the proper functioning of the company, and (ii) to carry-out any controls and verifications it deems appropriate. Hence, without trespassing the powers of the CEO, the board of directors has an active role in the management of the company. The supervisory board does not have such an active role since it only exercises permanent control over the management of the company.

As of today, one of the key challenges of the management bodies is the establishment of a real and direct dialogue with shareholders. The 2017 Annual Report of the High Committee for Corporate Governance underlines a growing pressure from institutional investors for direct dialogue to be established between the directors and the shareholders. This task could be carried-out by the chairman of the board of directors when he/she is not the managing director. However, they must take into account the risk brought by such dialogue regarding insider trading, confidentiality and equality of treatment between shareholders.

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

Many companies subscribe to insurances covering their executive directors and board members for their personal liability that shareholders or third party may be willing to seek in case of misconducts or breach of law when managing the company. These insurances do not cover wilful misconducts and consequences of criminal offences.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The management body decides the strategy of the company, but remains directly (board of directors, managing board and supervisory board) or indirectly (managing directors and deputy managing directors) under the control of the shareholders.

Therefore, in the event of a disagreement between the management body and shareholders representing the majority of the voting rights regarding the strategy of the company, the shareholders may decide at any time to change the composition of the management bodies.

4 Other Stakeholders

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

Representatives of the workers council are entitled to attend boards and general meetings.

The Workers council is periodically informed or consulted on the major events relating to the company, including events having consequences on the corporate governance.

The workers council is entitled, under certain conditions, to convene a general meeting and to request the inclusion of draft-resolutions on the agenda of the general meeting.

In companies employing, with their subsidiaries, at least 1,000 employees in France and 5,000 employees worldwide, employees are entitled to appoint one or several employees' representatives as members of the board of directors or supervisory board.

In listed companies, when employees own more than 3% of the share capital, one or more board members representing employees, as shareholders, have to be elected by the shareholders meeting.

Articles of association may also provide, on a voluntary basis, for the appointment of board members elected by employees, within the limits, for listed companies, of five members without exceeding ⅓ of the other board members.

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

The upcoming *Loi Pacte* is expecting to better take into account all stakeholders through a new definition of "company".

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

Since 2001, listed companies are required to include in their management report a description of the way they take into account the social and environmental consequences of their activities. Listed companies must also include in this report the financial risks linked to climate change and the measures they take to reduce these risks through implementing a low-carbon business strategy.

The following companies must now include in their management report a declaration of non-financial performance setting out these elements in a very comprehensive way:

- listed companies and companies from the banking and financial sectors employing more than 500 persons having a balance sheet higher than 20 million euros and a turnover higher than 40 million euros; the declaration must, *inter alia*, specifically include information relating to fight against bribery and actions taken in favour of human rights; and
- non-listed companies employing more than 500 persons having a balance sheet and a turnover higher than 100 million euros.

The MiddleNext and AFEP-MEDEF corporate governance codes both put corporate social responsibility at the heart of the concerns of the boards.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The CEO or the management board (as applicable) are responsible for disclosure and transparency. They must make available information to the public, file certain documents with the registry of commerce, communicate or make available other information to their shareholders, file information with the AMF and release information on their website (see question 5.2 for details). In that respect, the financial annual report (which can be included into a registration document) must include a statement from the person responsible for the accuracy of the information contained in such document, i.e. the CEO or, as the case may be, the chairman of the managing board.

5.2 What corporate governance-related disclosures are required?

As indicated above all information in relation to the remuneration of board members/executive officers must be disclosed to the market, together with their trading on securities of the company.

In addition, the report on corporate governance established by the board of directors or supervisory board must be made available to the shareholders prior to the annual shareholders' meeting. This report must contain all information related to corporate governance, including composition of the boards and the committees, number of independents, biographies, summary of their work during the last financial year, detailed information on the remunerations, description of certain related party transactions with subsidiaries of the company.

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

Statutory auditors mostly intervene in the establishment of the financial statements of the companies in which they are appointed. In this respect they establish reports on the company's accounts and, where applicable, on the consolidated accounts. These reports are submitted to the general meetings and, consequently made publicly available prior to such meetings.

With respect to corporate governance matters, the statutory auditors:

- provide in a report on the report on corporate governance of the board of directors or supervisory board; and
- submit to the general meeting in a special report summarising the terms and conditions of the related party transactions and on the granting of exceptional elements of remuneration described in question 3.3.

5.4 What corporate governance-related information should be published on websites?

According to French Commercial, the following must be published on companies' websites: the annual declaration of non-financial performance described in question 4.3; the granting of exceptional elements of remuneration to the executive directors or chairman of the board of directors; and the documents made available to the annual shareholders' meeting (including the board report on corporate governance and the statutory auditors reports on related party transactions).

The AMF General Rules require listed companies to publish all "regulated information" on their website, which include the following information:

- Periodic information: financial annual and half-year reports, information relating to the number of shares and voting rights in the company and press release relating to the information available prior to a shareholders' meeting.
- Permanent information: publication of inside information.
- Disclosures relating to a transaction: such as press release regarding the availability of a prospectus or information relating to a shares buy-back programme.

Pascale Girard
Villey Girard Grolleaud
15 Avenue d'Eylau
75116 Paris
France

Tel: +33 1 56 89 40 00
Email: pgirard@vggassocies.com
URL: www.vggassocies.com

Pascale acts predominantly in merger and acquisition and capital market transactions and on corporate governance matters.

She is a co-founder of Villey Girard Grolleaud. She has been a partner for four years with Darrois Villey Maillot Brochier, after having been an associate at Cleary, Gottlieb, Steen & Hamilton for six years (New York and Paris offices).

Admitted to the Paris Bar in 1998 and New York Bar in 2000, Pascale Girard holds a DESS-DJCE in business law and taxation and a DEA in international private law from the Panthéon-Assas University – Paris II. She is a graduate of the Institut d'Etudes Politiques de Paris and Harvard Law School (LL.M.).

Léopold Cahen
Villey Girard Grolleaud
15 Avenue d'Eylau
75116 Paris
France

Tel: +33 1 56 89 40 00
Email: lcahen@vggassocies.com
URL: www.vggassocies.com

Léopold is an associate specialising in mergers and acquisitions and corporate governance matters.

Admitted to the Paris Bar in 2016, Léopold Cahen has postgraduate degrees in international and European business law from the University of Lorraine and a postgraduate degree in criminal financial law from the University of Cergy-Pontoise.

Villey Girard Grolleaud
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Villey Girard Grolleaud is an independent law firm founded in 2013.

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Germany

Dr. Christoph Nolden

Dr. Michaela Balke

SZA Schilling, Zutt & Anschütz
Rechtsanwaltsgesellschaft mbH

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The vast majority of listed entities in Germany are stock corporations (*Aktiengesellschaften*), followed by SEs (*Societas Europaea*) with a dual board structure. An alternative for family- or foundation-controlled companies are partnerships limited by shares (*Kommanditgesellschaften auf Aktien, KGaA*). Foreign corporate forms like Luxembourg entities or hybrid forms like PLC & Co. KG with listing in Germany are not subject to the following discussion.

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

Basic Corporate Law and Regulation

a. **Stock Corporation Law** (*Aktiengesetz*) of 6 September 1965, last amended on 17 July 2017), (English translation available under https://www.gesetze-im-internet.de/englisch_aktg/index.html).

Key regulation for corporate governance between shareholders, Management Board (*Vorstand*) and Supervisory Board (*Aufsichtsrat*) of German stock corporations and partnerships limited by shares; provisions are binding and exclusive; articles of association may only deviate, if and to the extent expressly allowed by law; also includes provisions regarding Group Law (*Konzernrecht*), rules for the appropriation of profits and reporting obligations.

b. **SE EU Council Regulation** (EC) No. 2157/2001 of 8 October 2001 and the German SE Act (*SE-Ausführungsgesetz*), last amended on 10 May 2016.

Specific provisions regarding the corporate governance of SEs; prevailing to the basic German Stock Corporation Law; provides more flexibility than a stock corporation in respect of board structure (two-tier / one-tier board) and co-determination.

c. **Commercial Code** (*Handelsgesetzbuch*) (last amended on 18 July 2017) (English translation available under https://www.gesetze-im-internet.de/englisch_hgb/index.html).

The Commercial Code contains *i.a.* accounting rules and provisions regarding the annual financial statements as well as the reporting on corporate governance.

d. **German Corporate Governance Code** (*Deutscher Corporate Governance Kodex*), last amended on 24 April 2017 (English version available under https://dcgk.de/en/home.html).

Non-binding best practice recommendations and suggestions on corporate governance by an expert commission introduced by the German Federal Minister of Justice in September 2001. Deviations from the recommendations have to be explained and disclosed with the mandatory annual declaration of conformity (Comply or Explain).

e. **Co-Determination Laws**: Provisions regarding the size and composition of the Supervisory Board. Various laws are applicable depending on the size and business of the Company.

f. **Internal Non-Regulatory Sources**

- Articles of Association (*Satzung*): Governs the specifics of the individual corporation in addition to the basic corporate law, in particular company purpose, capitalisation, size and composition of Management Board and Supervisory Board; technicalities of Shareholders' Meetings etc.; usually available on the companies' website in German and English.
- Rules of Procedure (*Geschäftsordnung*) for the Management Board and/or the Supervisory Board: Governs procedural details of the decision making and coordination process of the Management Board and the Supervisory Board, contains in particular a catalogue of transactions requiring approval of the Supervisory Board; publication not mandatory, but usually available on the companies' website.

Capital Markets Law

a. **Market Abuse Regulation**, EU No. 596/ 2014 of 16 April 2014 (*Marktmissbrauchsverordnung*), (available in various languages under https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596).

Key regulation regarding insider trading and market manipulation rules, ad hoc-disclosures and market sounding; accompanied by various guidelines and FAQs of competent authorities (EU: ESMA; Germany: BaFin).

b. **Securities Trading Act** (*Wertpapierhandelsgesetz*), last amended on 17 August 2017.

Governs provisions regarding the trading of securities and financial instruments, voting rights publications; reporting obligations for listed companies and damage claims regarding incorrect or incomplete capital markets publications; determines BaFin's competence to oversee capital market compliance.

c. **Securities Takeover Act** (*Wertpapiererwerbs- und Übernahmegesetz*), last amended on 23 June 2017: Legal framework for all public tenders for shares in companies listed in Germany.

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

We see a vast growing influence of European Law. The Market Abuse Regulation aligned the rules on insider dealing, market abuse and *ad hoc* disclosures in Europe. It also introduced the concept of extensive FAQs and additional guidelines of the European and national supervisory authorities to supplement the Regulation.

The European Parliament amended the Directive 2007/36/EC by the new Directive (EU) 2017/828 of the European Parliament and the Council of 17 May 2017 as regards the encouragement of long-term shareholder engagement. The directive, that has to be implemented by the member states until 10 June 2019, essentially governs three areas:

Remuneration policy: The directive introduces a mandatory voting of the General Meeting on the remuneration of the Management Board and the Company's remuneration report. Member States can opt if the voting shall have a binding or an advisory effect. If the General Meeting rejects an advisory approval, the Company shall submit a revised policy to a vote at the next General Meeting. So far, German stock corporation law provides only for a voluntary and advisory remuneration approval of the General Meeting.

Transparency and approval of related party transactions: The Directive introduces a new approval requirement for related party transactions to the German corporate law. Material related party transactions, as defined by the Member States, shall be publicly announced and approved by the General Meeting or the Supervisory Board.

Finally the directive raises the transparency requirements and obligations for shareholders (>0.5% shareholding) and institutional investors, asset managers and proxy advisers.

Since 2018 listed companies shall report on various non-financial issues as part of their disclosure obligations (Corporate Social Responsibility-Reporting). Specifically, the law requires, among other things, reporting on the business model, concepts, risks and performance indicators with regard to environmental concerns, employee concerns, social issues, human rights issues and the fight against corruption and bribery.

Finally, there is an increasing trend to provide electronic means to promote the exercise of shareholder rights in preparation and during the General Meetings.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Shareholders in German listed companies have only indirect influence on the strategy of the Company. Further the common two-tier board system and the co-determination in the Supervisory Board support a long-term approach rather than short-term actions.

One of the key instruments to prevent short-termism are therefore the requirements and limitations on the remuneration of the Management Board. Such remuneration shall be geared to sustainable corporate development. In particular, the variable remuneration components should have a multi-year assessment basis and the Supervisory Board should agree on a limitation option for extraordinary developments. These restrictions are accompanied by detailed reporting obligations on the compensation of the Management Board.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders in the common German two-tier board system have only indirect influence on strategy, operation or management of the Company. In particular, shareholders have the right to elect the members of the Supervisory Board, who in turn not only controls and advises the Management Board, but also appoints and dismisses the members of the Management Board and decides on their individual remuneration. The power to influence the strategy of a company is therefore mainly dependent on the ability of a shareholder to appoint or at least influence the members of the Supervisory Board.

The General Meeting can only decide on management issues if the Management Board so requests. Shareholders' approvals are passed by a simple majority of the votes cast, unless a higher quorum is requested by law or the articles of association. On a regular basis shareholders vote in the Annual General Meeting on:

- Appropriation of the distributable profit.
- Discharge of the members of the Management Board and the Supervisory Board.
- Appointment of the auditors.
- Appointment of the Shareholders' members of the Supervisory Board.

In addition, various major actions and transactions shall require the approval of the General Meeting, *inter alia*:

- Dismissal of the Shareholders' members of the Supervisory Board (75% majority, if not provided otherwise in the Articles).
- Amendment of Articles of Association (75% majority, if not provided otherwise in the Articles).
- Change of the purpose of the Company (75% majority).
- Capital increases or decreases and issuing of convertibles or profit related bonds (75% majority, if not provided otherwise in the Articles).
- Exclusion of subscription rights of the shareholders and creation of authorised capital (75% majority).
- Authorisation to acquire own shares (75% majority, if not provided otherwise in the Articles).
- Mergers, spin-offs, split-ups or other transactions pursuant to the German Transformation Act and amalgamations (*Eingliederung*) (75% majority).
- Entering into domination or profit transfer agreements (75% majority).
- Squeeze-out (95% of the shares held by one shareholder).
- Sale of most of the Company's assets and dissolution of the Company (75% majority).

Finally, the General Meeting resolves on the compensation of the members of the Supervisory Board by a change of the Articles (75% majority, if not provided otherwise in the Articles). The General Meeting may also approve the compensation scheme of the Management Board upon request of the Management Board and the Supervisory Board and with advisory effect.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders shall refrain from influencing a member of the

Management Board or the Supervisory Board, an authorised signatory or a proxy to act to the detriment of the Company or its shareholders and shall be obliged to compensate the Company and the shareholders for any resulting damage. Also a controlling shareholder may not use its influence to cause the Company to enter into a legal transaction which is detrimental to it or to take or refrain from taking measures to its disadvantage, unless the disadvantages are compensated. Finally, in special situations, shareholders are subject to fiduciary duties *vis-à-vis* the Company and other shareholders in exercising their shareholders' rights.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The Annual General Meeting is held within the first eight months of the business year. The Annual General Meeting resolves upon the appropriation of the distributable profit, the discharge of the members of the Management Board and the Supervisory Board, the appointment of the auditors and any other action or object proposed by the company.

Extraordinary Shareholders' Meetings may be convened by the company in special situations, in particular if the Company is subject to a takeover offer. The Management Board has also to convene an Extraordinary General Meeting and give notice accordingly, if a loss in the amount of half of the share capital exists. The Company may also convene a resolutionless Shareholders' Meeting for information and discussion purposes.

Also shareholders holding together at least 5% of the registered share capital may request an Extraordinary Shareholders' Meeting stating the purpose and reasons of the meeting. Shareholders holding the same quorum or a *pro rata* amount of at least EUR 500,000 may request to add additional items to the agenda of a convened Shareholders' Meeting.

The convocation to the General Meeting, the agenda items and the proposals of the Company and shareholders are published in the German electronic federal gazette (*Bundesanzeiger*) and other EU-wide media forums as well as on the homepage of the Company. Shareholders may also file counterproposals to the agenda items or propose opposing candidates to the Supervisory Board. The Company shall publish these counterproposals if filed at least two weeks before the General Meeting.

Voting rights are frequently exercised by proxy via financial institutions, institutional proxy advisors or proxies appointed by the Company (*Stimmrechtsvertreter der Gesellschaft*). Such proxies have to be specifically instructed to vote and can therefore not react on new proposals made in during the General Meeting or procedural requests like the dismissal of the chairman of the General Meeting.

Besides exercising their voting rights shareholders have the right to speak at the General Meeting in person or by proxy and to request information on matters concerning the Company and affiliated companies to the extent that is necessary for a proper assessment of the items on the agenda. The right of speech and information of each shareholder may be limited to a reasonable speaking time. Shareholders may challenge resolutions of the General Meeting if the Company provides false or insufficient information. In case such contesting action is successful, the respective resolution is null and void.

Companies use increasingly electronic means to promote the exercise of shareholders' rights prior to and during the General Meeting, e.g. electronic registration, *ad hoc* issuing of voting instructions, streaming of the General Meeting on the Company's website or filing questions and answers via electronic tools.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders have only limited duties and responsibilities *vis-à-vis* the Company and other shareholders (see question 2.2). Shareholders may only be liable, if they use their influence on the Company to the detriment of the Company. In very exceptional cases shareholders may also be liable, if they seriously violate their fiduciary duties in specific situations, e.g. blocking structural changes or required capital measures for selfish motives.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders may challenge decisions of the General Meeting, if they violate law, regulations or the articles of association or shareholders' rights were violated in the decision making process. Other actions of the Management Board or the Supervisory Board are, in principle, not subject to shareholder claims.

Only the Company may claim damages from members of the Management Board or the Supervisory Board for breach of their duties. However, the Company may not waive or compromise a claim for damages against Management Board members without the prior consent of the Shareholders' Meeting. Shareholders may request with a simple majority of the General Meeting the appointment of special auditors to review specific actions of the Management Board or Supervisory Board. Shareholders related to the specific board members are restricted from voting in such decision. If the General Meeting rejects such audit request, shareholders holding at least 1% of the registered capital or a *pro rata* amount of at least EUR 100,000 may ask the competent court to appoint a special auditor. The court may follow the request, if facts exist which justify the suspicion that dishonesty or gross violations of the law or the Articles of Association occurred in the transaction. The special auditor has far-reaching investigation and information rights and will report the findings in a special auditor's report to be published by the Company.

In addition, the General Meeting may resolve with simple majority of the votes cast to initiate claims against members of the Management Board or Supervisory Board and appoint special representatives for the enforcements of the claims.

Notwithstanding the above, shareholders may claim individual damages against members of the management bodies by means of statutory provisions of the German Civil Code, in particular wilful immoral damage.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

In principle, the only restrictions on the interest in securities are imposed by German and European merger control provisions and the Foreign Trade Act (*Außenwirtschaftsgesetz*). According to the latter, the German Federal Ministry for Economic Affairs and Energy may oppose the acquisition of 25% or more of the voting rights of a German company by a non-EU investor if such acquisition endangers Germany's public order or security. The Foreign Trade Act and the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) was amended in 2017, to

allow for a tighter control of foreign investments in securities to protect companies that are active in security-sensitive areas and that provide critical infrastructure. While the German government was rather open to grant approvals in the past, we have seen in the last two years an increasing awareness and a more restrictive practice of the Ministry. Germany, France and Italy also started an initiative on EU level to ensure reciprocity and therefore an equal treatment for EU companies that face barriers in foreign investments in non-EU countries. In a European Council meeting of June 22/23, the European Council therefore called on the co-legislators to "*swiftly agree on modern, WTO-compatible trade defence instruments, which will reinforce the ability of the EU to effectively tackle unfair and discriminatory trade practices and market distortions*".

Further registration or approval requirements exist in specific regulated industries, i.p. when acquiring a qualifying holding (10% or more of the capital or voting rights) in a credit or financial services institution and insurance undertaking, a pensions fund or an insurance holding company (so-called "*Inhaberkontrollverfahren*").

Shareholders reaching or crossing the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights in a listed Company directly or indirectly shall notify the company as well as BaFin within four trading days at the latest. Voting rights of shareholders, who are acting in concert, are attributed to each other. The same applies to the holding of financial instruments (with the exception of the 3% threshold) that grant the holder a right to acquire shares in the Company or have a similar economic effect. BaFin may impose fees in the maximum amount of EUR 10 million, 5% of the total turnover generated by the legal person or association of persons in the financial year prior to the decision of the competent authority or twice the economic advantage gained from committing the offence. A breach of the notification requirements may also lead to the suspension of the rights attached to the shares, i.p. dividend and voting rights.

Shareholders reaching or crossing the threshold of 10% of the voting rights have to inform the Company of the objectives pursued with the acquisition (see question 2.7).

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

A shareholder who reaches or exceeds the thresholds of 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights must inform the Company of the objectives pursued with the acquisition of the voting rights and the origin of the funds used for the acquisition. He also has to inform the Company of any change in the objectives. The reporting shareholder must indicate whether:

- the investment serves the implementation of strategic goals or the achievement of trading profits;
- he intends to acquire further voting rights by acquisition or otherwise within the next 12 months;
- he seeks to influence the composition of the Company's administrative, management and supervisory bodies; and
- he strives for a significant change in the capital structure of the Company, in particular with regard to the ratio of equity and debt financing and the dividend policy.

However, the violation of these notification obligations is (so far) sanctionless.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Most German listed companies have a dual board system with a clear separation of duties between the Management Board and the Supervisory Board. Only a very limited number of SE's apply a one-board system consisting of executive and non-executive *board* members.

The Management Board is primarily responsible for managing and representing the Company. The members of the Management Board run the business and define the strategy and policies of the Company. The members of the board share a collective and joint responsibility for all management decisions, even though the allocation of functions to individual members, i.p. CEO or speaker and CFO, is common.

The Management Board is controlled and advised by the Supervisory Board, who oversees the Board of Management's actions and appoints and dismisses its members. The supervisory board may at any time request reports of the Management Board. The articles of association and/or the Supervisory Board shall specify matters of fundamental importance, e.g. actions or decisions having a material impact on the assets, financial or profit situation of the Company that may only be dealt with upon the prior consent of the supervisory board.

The Supervisory Boards consist of three to 21 members, depending on the size of the Company. Depending on the specific circumstances of the Company and the number of Supervisory Board members, the formation of committees with special expertise (personnel committee, audit committee) is common and – depending on the size of the company and the supervisory board – also mandatory.

If the Company has more than 500 employees, the Supervisory Board is subject to co-determination and, if so, comprises representatives of the shareholders and employees. In listed corporations subject to co-determination, the Supervisory Board comprises at least 30% women and at least 30% men. The Supervisory Board of listed companies shall include an appropriate number of independent members as well as at least one financial expert. The Supervisory Board shall determine concrete objectives regarding its composition, and shall prepare a profile of skills and expertise for the entire Board.

Current members of the Board of Management are prohibited from serving on the Supervisory Board of the same Company. Members of the Board of Management will have to take a two-year cooling off period before being appointed to the Supervisory Board, if such appointment is not requested earlier by Shareholders holding more than 25% of the voting rights. According to the German Corporate Governance Code no more than two former members of the Management Board shall be members of the Supervisory Board. Members of the Supervisory Board shall not be members of governing bodies of, or exercise advisory functions at, significant competitors of the Company. Every member of the Supervisory Board is bound to observe the Company's best interests.

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

The members of the Management Board are appointed and dismissed by the Supervisory Board only. The General Meeting or individual shareholders have no right to participate in the appointment or

dismissal process. The Supervisory Board determines targets for the share of female Management Board members and shall take diversity into account. The maximum permissible appointment period is five years; however, for first-time appointments the Supervisory Board shall refrain from applying the maximum term.

Members of the Management Board may be dismissed by the Supervisory Board at any time if there is a cause. Such cause may be a breach of duty or the inability to manage the Company accordingly or a no-confidence vote of the General Meeting. While such no-confidence vote may give a cause to dismiss a Management Board member, it does not force the Supervisory Board to do so.

The representatives of the shareholders in the Supervisory Board are appointed by the General Meeting for a period of up to five years. The General Meeting may also dismiss its representatives at any time without cause with a majority of 75%, if not provided otherwise in the Articles. Representatives of the employees are elected in a voting process by the employees.

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

The main sources in determining the remuneration of the members of the Management Board are the German Stock Corporation Law, the German Corporate Governance Code as well as the German Trade Law (*Handelsgesetzbuch*).

The remuneration of the members of the Management Board comprises monetary remuneration components, pension commitments, other commitments, fringe benefits of all kinds. The remuneration may also include benefits from third parties.

According to the Stock Corporation Law the remuneration must be focussed on the sustainable growth of the Company. The remuneration may also be reduced, if the situation of the Company deteriorates. Monetary remuneration shall comprise fixed and variable components. These basic conditions are detailed by the German Corporate Governance Code. Variable components shall be determined on a generally multiple-year assessment basis and take into account both positive and negative developments. The amount of remuneration shall be capped with maximum levels, both as regards variable components and in the aggregate.

The remuneration of the members of the Supervisory Board is specified by resolution of the General Meeting or in the Articles of Association. It may also include variable compensation, whereby the proportion of variable compensation is usually significantly lower than for the Management Board.

The remuneration of each member of the Management Board and the Supervisory Board is to be disclosed in a detailed Remuneration Report as part of the financial statements or management report, classified by remuneration components.

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

There are no limitations to the holdings of members of the Management Board or Supervisory Board. On the contrary, shares and share options are frequently a part of the variable remuneration of Management Board members. All transactions of Management Board or Supervisory Board Members or related parties above an annual volume of EUR 5,000 shall be disclosed to the Company, BaFin and the public. Like all shareholders, managers must refrain from trading in shares in the Company, if they are aware of any inside information. Management Board members and Supervisory Board members may not exercise their voting rights in case of a conflict of interest, e.g. discharge of the Board or the vote of no confidence.

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

The internal management of the operations of the Management Board like the process for meetings, voting requirements or the allocation of responsibilities is not subject to the law, but usually regulated in the Rules of Procedure of the Management Board.

Supervisory Board meetings are convened by the Chairman. The Supervisory Board shall meet twice a year; however, if required, the Supervisory Board Chair shall convene extraordinary Supervisory Board meetings. The Supervisory Board shall inform the General Meeting on the frequency of meetings, the meetings and the attendance of the members.

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

The Management Board assumes full responsibility for managing the Company in the best interests of the Company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation. In this capacity, the members have to exercise the care of a prudent and conscientious manager. However, there is no breach of duty if, when making an entrepreneurial decision, the Management Board member could reasonably assume that he was acting on the basis of appropriate information for the benefit of the Company (*Business Judgement Rule*). Members of the Management Board (and also of the Supervisory Board) who violate their duties are jointly and severally liable to the Company for any resulting damages.

According to the so-called ARAG/Garmenbeck-ruling of the German Federal Court of Justice (*Bundesgerichtshof*), the Supervisory Board must, in principle, pursue claims against the Management Board, if the Supervisory Board comes to the conclusion that the Company is entitled to enforceable claims for damages. The Supervisory Board may only waive this right by way of exception if there are weighty reasons for not doing so in the best interests of the Company and if these circumstances outweigh or are at least equivalent to the reasons for legal proceedings.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Management Board and Supervisory Board members must exercise the standard of care of a prudent and conscientious manager when carrying out their duties. In complying with this standard of care, members must not only take into account the interests of shareholders, as would typically be the case with a U.S. board of directors, but may also allow for the interests of other stakeholders, such as the Company's employees, and, to some extent, the public interest.

The main challenge for today's Management Boards is the organization and steady improvement of the internal compliance systems. The Management Board shall ensure that the Company is in compliance with all provisions of law and the Company's internal policies. The importance of such compliance systems has dramatically increased due to the heavily regulated environment. Recent worksites include the complex international sanctions

provisions (i.p. in respect of Iran), the fight against corruption and unfair business actions and the rise of the data protection regulation (*General Data Protection Regulation*).

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

D&O liability insurances are common practice for Management and Supervisory Board members in listed companies. If the Company takes out the insurance policy, each Management Board member has to bear a deductible of at least 10% of the loss up to at least one and a half times the fixed annual remuneration. According to the German Corporate Governance Code, the same shall be recommended with respect to Supervisory Board members.

Indemnifications by listed companies are in principle not permitted, as the Company is only allowed to waive or settle on liability claims against Management Board or Supervisory Board members after three years following their accrual. Further such waiver or settlement is subject to a General Meeting's approval with simple majority and without an objection of a shareholder minority jointly representing 10% of the registered share capital.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Management Board develops the strategy for the Company, agrees it with the Supervisory Board and ensures its implementation. It frequently coordinates the Company's strategic approach with the Supervisory Board and discusses the current state of strategy implementation with the Supervisory Board at regular intervals.

Between meetings, the Supervisory Board Chair shall be in regular contact with the Management Board in order to discuss with them issues of strategy, planning, business development, the risk situation, risk management and compliance of the Company.

4 Other Stakeholders

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

Board-level Representation: Depending on the Company's total number of employees, up to one-half of the Supervisory Board members will be elected by the Company's employees. 30% of Supervisory Board members of companies with more than 500 employees in Germany have to be employee representatives. The statutory percentage of employee representatives is 50% for companies with more than 2,000 employees in Germany. For companies with more than 2,000 employees, the Chair of the Supervisory Board, who is almost always a shareholder representative, has the casting vote in case of tied votes. Shareholder representatives and employee representatives, who to a certain degree may also be union representatives, are obliged in equal measure to act in the best interests of the Company.

Workplace Representation: Employees interests are also represented by the Works Council (*Betriebsrat*), whose members are elected by the employees. The works council is obliged to ensure that all laws, rules and health provisions are applied correctly and to the benefit of the employees. It has general information and consultation rights under the Works Constitution Act (*Betriebsverfassungsgesetz*). The employer and the works council can agree on works agreements, which are binding on all employees. In companies with more than 100 employees an economic committee (*Wirtschaftsausschuss*) must be formed as part of the works committee, which is responsible for determining and advising on economic issues.

Shareholder Participation: While the interest of employee shareholders in German listed companies is rather low, such employee shareholders have usually a strong voice in the General Meeting.

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

As a principle, German members of the Management Board and the Supervisory Board must not only take into account the interests of shareholders, as would typically be the case with a U.S. board of directors, but may also allow for the interests of other stakeholders, such as the Company's employees, and, to some extent, the public interest. We see an increasing influence of Non-Governmental Organizations (NGOs) on the companies in and outside the corporate governance. It is not unusual for NGOs – Environmental Organizations, International Union Associations or Equal Opportunity Groups – to be active in corporate governance, become shareholders and take the floor on the General Meeting.

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

Since 2018 listed companies shall report on various non-financial issues as part of their disclosure obligations (Corporate Social Responsibility Reporting). Specifically, the law requires, among other things, reporting on the business model, concepts, risks and performance indicators with regard to environmental concerns, employee concerns, social issues, human rights issues and the fight against corruption and bribery.

However, it will remain up to the companies whether, and in what way, they take measures in this regard. In addition, the audit does not review whether the content of the CSR-statements is correct; an external review of the content is optional, but not mandatory. Instead, the legislator trusts that the reporting obligations have an indirect regulatory effect. The fact that any renunciation of measures relating to corporate social responsibility issues must be disclosed and explained is intended to exert indirect pressure to encourage companies to voluntarily introduce such measures.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Management Board is primarily responsible for disclosure and transparency, but may assign certain Management Board members (usually the CEO and CFO) with this task or delegate the obligation to committees or specific departments that report to the Management Board or individual Management Board members.

5.2 What corporate governance-related disclosures are required?

The Company shall publish a corporate governance report (*Erklärung zur Unternehmensführung*) as part of its financial reporting. In the report, the Company shall state, if it is in compliance with the recommendations of the German Corporate

Governance Code and disclose and explain any deviations (comply and explain). The report also contains a description of the basic corporate governance principles, a description of the co-operation between the Management Board and the Supervisory Board including its committees, the self-defined targets for the Supervisory Board's composition and skills profile, the Company's diversity policy and a detailed report on the remuneration of the Management Board and the Supervisory Board.

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

The General Meeting appoints the auditor of the annual financial statements. The auditor is instructed by the Supervisory Board or one of the committees. The auditor is highly independent and must change periodically. The auditor must comment in the auditor's report on the way, the accounts have been prepared, if they have been prepared in line with the applicable rules and regulations and whether the annual accounts provides for a "true and fair view" of the state of the affairs of the Company. While the management report is generally subject to the audit, neither the corporate governance report nor the CSR-report are mandatorily audited for correctness. Instead the examination of such information is to be limited to whether the information was provided.

5.4 What corporate governance-related information should be published on websites?

The corporate governance report (*Erklärung zur Unternehmensführung*) and the CSR-report are published as part of the management report or separately on the Company's website and shall be available for at least 10 years.

Dr. Christoph Nolden
SZA Schilling, Zutt & Anschütz
Rechtsanwaltsgesellschaft mbH
Taunusanlage 1
60329 Frankfurt am Main
Germany

Tel: +49 69 976 9601 535
Email: christoph.nolden@sza.de
URL: www.sza.de

Dr. Christoph Nolden represents German and international clients in the areas of corporate and public take-over law as well as on questions of corporate compliance and corporate governance. Particularly, he is focused on cross-border transactions, in particular tender offers and takeovers, subsequent group integration tools, corporate restructuring and IPOs. Christoph Nolden has gained substantial expertise in preparing and managing the execution of general meetings of stock corporations and structuring and implementing transformations, recapitalisations, squeeze outs, domination agreements and other corporate actions. His expertise also comprises the representation of public companies and members of the boards in complex corporate litigation and arbitration proceedings and the settlement of contested transactions.

Dr. Michaela Balke
SZA Schilling, Zutt & Anschütz
Rechtsanwaltsgesellschaft mbH
Otto-Beck-Straße 11
68165 Mannheim
Germany

Tel: +49 621 42 57 205
Email: michaela.balke@sza.de
URL: www.sza.de

Dr. Michaela Balke (Partner) is active in the fields of corporate and group law as well as M&A. A main focus of her work is consultation and representation of companies and board members in matters concerning corporate governance, compliance and liability. In addition, she is an expert in remuneration matters – also under consideration of statutory supervisory requirements. She is the author of numerous publications concerning corporate law and a speaker at seminars concerning stock corporation law.

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Hong Kong

Ashurst Hong Kong

Joshua Cole

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter focuses on limited liability companies which are incorporated in Hong Kong and corporations which are listed on the Main Board of the Hong Kong Stock Exchange (irrespective of whether they are incorporated in Hong Kong).

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

The "new" Companies Ordinance (Cap 622) came into effect in 2014 and replaced most of the provisions of the previous Companies Ordinance (Cap 32) (often referred to as the "Old Companies Ordinance"). However, certain provisions of the Old Companies Ordinance remain and that ordinance was renamed the "Winding-up and Miscellaneous Provisions Ordinance" (Cap 32). The Securities and Futures Ordinance (Cap 571) also imposes certain disclosure obligations in respect of holdings of securities.

In addition, governance for all Hong Kong companies is subject to various Common Law rules.

Listed companies in Hong Kong are also subject to the Hong Kong Listing Rules, the Corporate Governance Code and the Takeovers Code.

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

After many years of pressure, the Hong Kong Stock Exchange and the Securities and Futures Exchange are now set to enable dual class listings in Hong Kong. Previously, a number of Chinese businesses (such as Alibaba) have listed in the US due to dual listings being available there. This change is expected to make Hong Kong a much more attractive venue for listing and it is anticipated that there will be a number Chinese tech sector businesses that will now choose Hong Kong as their primary listing venue. It is also anticipated to lead to dual listings of technology companies that are currently listed in the US as ADRs. The key feature of such listings will be that founders will hold a class of share that enables them to retain control of the listed company, notwithstanding the shareholdings of the non-founders. There continues to be concern from some areas that many companies in Hong Kong are run more as "family businesses" with directors not fully appreciating their duties and limitations as directors or their obligations to the company.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

There is some concern that the volatility of the public markets gives rise to significant short-term incentives at the cost of long-term sustainable value creation. However, whilst this is a feature in respect of some Hong Kong companies (or PRC companies which are listed in Hong Kong), it is certainly not the case in respect of all such companies.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Generally shareholders entrust and delegate the day-to-day operation and management of their companies to the Board of Directors, thereby limiting the shareholder's own day-to-day role. This is governed by the Articles of Association of the relevant company, but subject to certain key rights and powers given to shareholders under the Companies Ordinance (for Hong Kong Companies) and the Listing Rules (for companies listed on the Hong Kong Stock Exchange). For example, the Model Articles (which are frequently adopted by Hong Kong companies, or used as the basis for their modified Articles of Association) provide that a company's shareholders may direct the Board by special resolution. Even where the Articles of Association do not give the shareholders such power, under Common Law the Company will be bound by matters which are the subject of the unanimous consent or approval of the shareholders.

In addition, for companies listed on the Hong Kong Stock Exchange, under the Listing Rules shareholders must approve certain transactions before they can proceed, such as acquisitions and disposals of a certain size by reference to pre-set calculation methods and transactions with related parties including directors and their associates.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

There are no positive obligations imposed on shareholders in respect of governance matters. Instead, shareholders have powers in respect of certain matters (see question 2.1 above) and certain remedies in the event that directors are not exercising their duties and powers properly. The most common means for a shareholder to exercise power in respect of governance is by exercising its vote for the appointment (or removal) of directors to the company's Board.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Unless exempted, a company must hold its Annual General Meeting ("AGM") at least once a year. The time period in which the AGM must be held differs for private companies and public companies (which for this purpose is deemed to include subsidiaries of public companies). A private company must hold its AGM within nine months of the end of its financial year, whereas a public company must hold its AGM within six months.

Shareholders meetings for public companies must be held to approve certain transactions under the Listing Rules (such as material acquisitions and disposals or related party transactions). This occurs frequently in Hong Kong.

Shareholders representing at least 5% of voting rights may request an extraordinary general meeting. If the Board fails to call such a meeting within certain timeframes, then at least 50% of those requesting the meeting (measured by voting rights) may themselves call a general meeting.

The company must provide at least 21 days' notice of the AGM and at least 14 days' notice of other general meetings.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The only obligations of shareholders to the corporate entities in which they hold shares and other shareholders is to comply with the constituent documents of the company (i.e. the Articles of Association).

The liability of shareholders is limited to their equity commitment to the company. A court would only seek to "pierce the corporate veil in" exceptional circumstances. For example, where the relevant shareholders were, in fact, controlling the company and utilising that control for fraudulent purposes.

A shareholder may also have the same liability as a director if the shareholder is in fact a "shadow director" (which occurs where it can be shown that the directors of the company are in fact acting in accordance with, or are accustomed to be acting in accordance with, that shareholder's directions).

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The directors' duties are to the company, rather than to individual shareholders. However, in some limited circumstances a shareholder of a Hong Kong company may bring a "derivative action" under Common Law against a director where the company has failed to do so. Whether a shareholder is able to do this in respect of a non-Hong Kong company which is listed on the Hong Kong Stock Exchange is a question of the law of incorporation of that company.

Shareholders also have a statutory right to seek the leave of the court to bring a derivative action against the company.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Subject to certain exceptions (such as creeping acquisitions), under the Takeovers Code, a shareholder cannot acquire voting interests of 30% or more (including the interests of any concert party) in a public company without being required to make a Mandatory Takeover Offer.

In addition, a shareholder must disclose when it becomes interested in 5% or more of the shares in a listed company, when they cease to hold a 5% interest or when a party who holds at least a 5% interest increases or decreases their percentage interest.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Such requirements only exist in relation to public offerings of shares (where the pre-IPO shareholders may be required to make representations about their intentions) or in connection with takeover offers (where a bidder may be required to make such intentions known, once the offer is made).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Management of a company vests in the Board of Directors.

For listed companies the Corporate Governance Code requires that, in addition to any executive directors or directors with controlling equity interests, a company must have independent non-executive directors. The Listing Rules provide that independent non-executive directors comprise at least one-third of the Board.

Generally, companies are headed by a chairman who is responsible for leadership of the Board and ensuring the Board's effectiveness, together with a chief executive who is responsible for day-to-day business operations of the company. The Corporate Governance Code provides that the roles of chairman and chief executive should not be combined, other than in exceptional cases.

The Board will typically delegate certain deliberative activities to Committees of the Board (although it is the Board that remains responsible for ultimate decisions). The Corporate Governance Code requires that (for a listed company) there to be at least:

- a nomination committee, to lead the process for Board appointments;
- a remuneration committee, to make recommendations to the Chairman as to the appropriate remuneration of directors; and
- an audit committee, with wide responsibilities including monitoring the integrity of the company's financial statements, reviewing internal financial controls and broader

internal controls and risk management systems (unless this is expressly addressed by a separate risk committee), as well as the company's relationship with its auditors.

In addition to the delegation of certain deliberative activities to committees, a Board will delegate certain authority to the managers of the company (such as the Chief Executive Officer) within which they may manage the day-to-day affairs of the company. Such managers report to, and are subject to direction by, the Board.

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

Shareholders ultimately control Board appointments (through voting at the AGM).

However, for listed companies (and depending on the company's Articles of Association, certain private companies) Board appointments during the year may be made by the Board itself (upon the recommendation of the nomination committee). The Corporate Governance Code provides that shareholders of listed companies must then have the opportunity at the next AGM, by way of ordinary resolution, to vote for, or against, the election of any director newly appointed by the Board during the course of the preceding year.

Each non-executive director of a listed company must be re-elected at regular intervals (typically of no more than three years).

The Corporate Governance Code also contains general provisions designed to ensure formal, rigorous and transparent procedures for elections and re-elections of directors. These include requirements for a nomination committee, whose role it is to lead the process for Board appointments and make recommendations to the Board.

The Articles of Association commonly provide for situations when the office of director must be vacated. This may include where a director's resignation is requested by all other directors. The power to remove directors lies generally with shareholders who may, subject to giving the requisite notice, by ordinary resolution at a general meeting remove a director of a company. In practice, if enough shareholders come together expressing dissatisfaction with a director and request his removal, any company will have to consider this, and it is a distinct possibility that a Board decision will be taken to ask the director to resign, so that a formal and public shareholder vote on a resolution is avoided.

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

Remuneration of executive and non-executive directors of private companies will typically be regulated by the Articles of Association of the company.

For listed companies, the Corporate Governance Code provides that remuneration of directors should be determined by a process under which the Remuneration Committee consults with the chairman and/or chief executive of the company. The Remuneration Committee should make recommendations to the Board and review and either approve the remuneration packages of executive directors (acting under authority delegated to it by the Board) or make recommendations to the Board as to such packages.

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

Directors are required to disclose any conflicts of interest.

If expressly permitted by the Articles of Association, directors of private companies may participate in the relevant decisions once they have made such disclosure.

For listed companies, the Corporate Governance Code requires directors to comply with, and for the company to make disclosures in its annual report in accordance with, the Model Corporate Governance Report, which is set out in the Listing Rules. The Corporate Governance Code recommends that companies disclose in their annual report the number of shares held by directors and senior management. In addition, it is required to include information about its policies on securities transactions by its directors and each director's compliance with those policies. The annual report should also include certain details relating to the Chairman, Chief Executive and any non-executive directors. Information about a range of other matters must also be included.

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

Board meetings are called whenever required, by giving notice to all directors as required by the company's Articles of Association. The Articles of Association will also specify the quorum and notice requirements for meetings.

There is no statutory minimum number of Board meetings.

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

Directors of Hong Kong companies are subject to overarching fiduciary duties that they owe to the companies. These duties are the same for, and apply to both, executive and non-executive directors and derive from longstanding common law principles. Some of these duties were codified in the new Companies Ordinance, but this codification not intended to affect the nature of the duties owed by directors.

Directors are required to conduct themselves as a reasonably diligent person who has (1) the general knowledge, skill and experience reasonably expected of a person holding their position within the company, and (2) the general knowledge and skills that the particular director actually has. In addition, directors are required:

- to act in good faith for the benefit of the company as a whole;
- to use their powers for a proper purpose for the benefit of members (or shareholders) as a whole;
- not to delegate powers except with proper authorisation;
- to exercise independent judgment;
- to exercise care, skill and diligence;
- to avoid conflicts between personal interests and interests of the company;
- not to enter into transactions in which they have a conflict of interest, except in accordance with the requirements of the law;
- not to use their position as director to gain advantage;
- not to make unauthorised use of the company's property or information;
- not to accept personal benefit from third parties because of their position as director;
- to comply with the company's Articles of Association and resolutions; and
- to keep accounting records.

Directors may be liable to the company for breaches of these duties and may be exposed to personal liability for debts incurred by the company incurred when the company is unable to pay its debts.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The Board of Directors is responsible for:

- determining the long-term strategic objectives and priorities of the company;
- appointing senior management;
- monitoring the company's progress towards its objectives;
- monitoring the company's compliance with the policies set by the Board; and
- providing an account of the company's activities to shareholders.

Directors' powers and responsibilities are collective. They act as a Board, rather than as individuals. It is the Board, not individual directors, that determines what may be done in the name of the company, however in order to do this effectively the Board will delegate certain matters to committees and senior executives.

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

A company is prohibited from giving indemnities to directors in respect of claims arising from the director's negligence, default, breach of duty or breach of trust, except that it may provide an indemnity where proceedings have been commenced or are anticipated and the court is satisfied that the director acted honestly and reasonably and "ought fairly to be excused" having regard to the circumstances.

However, the company may purchase Directors and Officers Insurance for the benefit of its directors and officers (and, for listed companies, the Corporate Governance Code recommends this).

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board has responsibility for setting the strategy of the company and has the power to vary the strategy from time to time.

4 Other Stakeholders

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

Employees that are not officers of a company do not generally have any formal corporate governance responsibilities.

Under employment law principles, general duties owed by employees to the company (as their employer) will generally include compliance with the company's corporate governance policies and systems.

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

The company's Company Secretary is not usually involved in commercial decisions in respect of the company but provides administrative support to enable the decisions of the Board or of the shareholders to be carried out.

All companies are required to appoint an auditor (see question 5.3 below).

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

There is no law or regulation imposing corporate social responsibility obligations on companies in Hong Kong.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Board as a whole has collective responsibility for disclosure and transparency, although they may choose to discharge the responsibility by delegating particular tasks to specific members of the Board, committees or senior management. Some Boards have established "disclosure committees" with delegated responsibility for disclosure related matters.

5.2 What corporate governance-related disclosures are required?

All companies are required to provide the company's financial statements, annual report and auditors report at the AGM.

For public companies, in addition to the financial matters contained the annual report, directors are required to give an account of the state of affairs of the company and disclose certain information about the directors, their interests and their participation in the management of the company and their compliance with the company's securities trading policy.

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

All companies are required to appoint auditors and to have their financial statements audited by the company's auditors. The auditor is required to state whether the financial statements were prepared in compliance with the Companies Ordinance and give a true and fair view of the state of the company's affairs.

Auditors have a right to access the accounting records of the company at all times and to require explanation from the company's officers. They are also entitled to notice of, and a right to attend, all general meetings of the company. They are entitled to speak at any general meeting in relation to matters which relate to them as auditors.

5.4 What corporate governance-related information should be published on websites?

Any announcement or notice which a listed companies is required to make or publish must also be submitted in electronic form for publication on the Hong Kong Stock Exchange's website.

Joshua Cole
Ashurst Hong Kong
11/F Jardine House
1 Connaught Place
Central, Hong Kong

Tel: +852 2846 8989
Email: joshua.cole@ashurst.com
URL: www.ashurst.com

Joshua is a partner based in Hong Kong who specialises in mergers and acquisitions, joint ventures and private equity transactions throughout Asia.

Joshua has advised on a number of high-profile international acquisitions, disposals and joint ventures throughout the region and across a range of industry sectors, including financial services, telecommunications, pharmaceuticals, energy and resources and retail.

He advises both public and private companies on Hong Kong corporate governance matters and also speaks on the subject regularly at seminars and training workshops for directors.

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Hungary

Szarvas and Partners Law Firm

Julia Szarvas

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The types of business associations and other entities used for business operations are regulated in statutes and one may only choose from the regulated entities when considering investment in Hungary.

The following company forms are available:

- general partnership ("*Közkereseti Társaság*", "Kkt.");
- limited partnership ("*Betéti Társaság*", "Bt.");
- limited liability company ("*Korlátolt Felelősségű Társaság*", "Kft.");
- private company limited by shares ("*Zártkörűen működő részvénytársaság*", "Zrt."); and
- public company limited by shares ("*Nyilvánosan működő részvénytársaság*", "Nyrt.").

The members of a general partnership and the general partners of a limited partnership have unlimited liability for the liabilities of the company. The shareholders of limited liability companies and companies limited by shares may not be held liable for the obligations of the company.

Foreign companies may also establish a branch office ("*Fióktelep*") or a commercial representative office ("*Kereskedelmi Képviselet*"). Neither of these entities possesses separate legal personality, but they are considered units of the foreign company. The branch office may perform the same business activities as companies registered in Hungary, while the representative office is limited in its operations.

The most common company form for investment in Hungary is the limited liability company; however, establishment of a private company limited by shares may be advisable in case the issue of shares by the company is necessary for any reasons. Each of these types of companies may be established also by a single-shareholder. Establishing a branch office is also a favoured option for smaller operations (no minimum capital requirements exist) or when the business presence in Hungary is necessary for a limited time only (the winding-up process is relatively expeditious).

Corporate governance has a key importance and is highly regulated for public companies limited by shares; however, due to the limitations in terms of the length of this article, with a few exceptions, our answer will not cover those special rules.

In view of the above, our answers below apply mainly to limited liability companies and we will also point out the different rules applicable to private companies limited by shares.

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

The main sources of corporate governance for Hungarian companies consist of a combination of (A) statutes, (B) corporate documents and bylaws, as well as (C) stock exchange regulations (which apply to listed companies only).

(A) Statutes:

- Act V of 2013 on the Civil Code ("Civil Code") lays down the fundamental rules under which a company operates in Hungary;
- Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings ("Company Procedures Act");
- Act CXX of 2001 on Capital Market ("Capital Market Act");
- Act C of 2000 on Accounting ("Accounting Act");
- Act CLXXVI of 2013 on transformations, mergers and demergers of certain types of legal entities; and
- Act CXL of 2007 on cross-border mergers of limited liability companies, implementing Directive 2005/56/EC on cross-border mergers of limited liability companies.

(B) Corporate documents and bylaws:

- Articles (articles of association): this is the primary constitutional document, stipulating the overarching rules governing the company. Upon its mandatory filing with the Court of Registration, it becomes publicly available.
- Shareholders' Agreement: with certain limitations, it may govern the transference of shares, pre-emption rights, corporate governance issues, distribution of profits, etc.
- Coordination Agreement between a holding company and its subsidiaries in case of a recognised group of companies.
- Bylaws, internal policies.

(C) Regulations for public companies:

- Corporate Governance Recommendations of the Budapest Stock Exchange for companies listed on the stock exchange.

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

While having been in existence for some time already, the Civil Code that entered into effect in 2014 can be still mentioned as a fundamental development and challenge in terms of corporate governance in Hungary. Among other changes, this new law introduced the permissive concept of company law in Hungary, meaning that in the articles the shareholders are, with certain

restrictions, free to determine the relationship between each other. Furthermore, shareholders may, with certain limitations, determine the organisational structure and operational arrangements of the company derogating from the provisions of the Civil Code.

It should also be noted that until the end of August 2017, companies were obliged to register a so-called "company gate" which will be a safe and certified electronic delivery address for them. Company gate will ensure that companies receive and transmit their official correspondence electronically along with verifiable delivery. From January 1, 2018, this service will become obligatory for communication with government bodies, meaning challenges for actors of both the private and the public sectors.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In Hungary, the management generally exercises wide power to implement the company's business strategy which shall be defined by the shareholders (please see our answer to question 3.9).

Depending on the remuneration system of the management, the managers may be interested in achieving an economic goal within the shortest possible time, even if the importance of promoting sustainable values needs to be set aside. The law does not provide any automatic corporate governance mechanism to remedy the different interests of the parties involved. However, with the active participation of the shareholders, the management short-termism may be controlled or remedied. For instance, shareholders may appoint a supervisory board for the overview of the management activities. The shareholders can remove or limit the powers of, one or all members of the management at any time (please see our answer to question 3.2).

Furthermore, the shareholders may avoid these varying interests by providing ownership interest to the management. In practice, this corporate governance mechanism is very common, and the members of the management body frequently receive shareholding interest as an incentive. The management may also be involved in employee ownership programmes.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Under Hungarian corporate law, the rights and powers of shareholders in the operation and management of a company is relatively wide in comparison with those in other jurisdictions. The shareholder meeting is the principal body of companies, and shareholders exercise their decision-making power there. The main responsibility of the shareholder meeting is to adopt decisions on fundamental business and personnel issues, as well as the approval of the annual financial statement and distribution of profits. In Hungary, however, all issues requiring the update of the articles also require the resolution of the shareholder meeting, i.e. even such minor issues like change of registered address or scope of activities.

Approval of the shareholders is also required for any agreements to be entered into between the company and any of its shareholders, executive officers, members of the supervisory board, the auditor, or a close relative of any of the foregoing.

Note that the scope of exclusive competence of the shareholders may be extended by the shareholders at any time by amending the scope of powers of the shareholder meeting in the articles accordingly, i.e. the shareholders may that way withdraw certain powers from the management.

With certain restrictions, upon the request of a shareholder of the company, the executive officer shall provide information on the affairs of the company and allow the inspection of the books and documents of the company for the shareholder.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

In principle, corporate governance is the responsibility of the executive officers, except for matters which fall into the exclusive or extended competence of the shareholders, as described in our answer to question 2.1 above.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

One may differentiate between ordinary and extraordinary shareholder meetings. At least one shareholder meeting needs to be held annually (ordinary shareholder meeting), and for all other issues requiring the decision of shareholders, an extraordinary shareholder meeting needs to be convened. It is important to note that shareholders may decide on any matter in writing, without holding a physical meeting, and meetings may also be held via electronic means (telephone conference, videoconference or other device determined in the articles).

Shareholders are entitled to attend and propose items to the agenda and to exercise voting rights at the shareholder meeting.

All shareholders shall have the right to participate in the activities of the shareholder meeting in person or by way of a proxy. Generally, the voting right of the shareholders in the shareholder meeting is proportional to their capital contribution.

Private companies limited by shares may issue preferential shares. Shareholders holding different types of shares may have different voting rights in proportion to their shares in the company or may have no voting right at all.

Limited liability companies are prohibited to issue shares, but the shareholders hold "quotas" in the company. The quota is not a material document as a printed share, but a percentage presenting the proportional interest of the shareholder in the company's share capital and in the related owner's rights (voting, dividend, liquidation assets). In principal, the shareholders of a limited liability company exercise their owner's rights in proportion to their quotas held in the limited liability company, unless otherwise agreed in the articles. Based on this permissive rule, shareholders may attach rights and obligations to a quota which are not proportionate to the capital contribution of the owner of the quota, creating similar corporate vehicle as a preferential share.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The most important duty of the shareholders towards the company, is to provide their respective share capital contributions to the

company, in accordance with the provisions of the articles. During the operation of the company, in order to cover the losses of the company, the shareholders may be required to provide supplementary contributions, provided that the supplementary contribution is prescribed by the articles. The articles shall determine the frequency and maximum amount of the supplementary contributions that may be requested from the shareholders. Furthermore, the shareholders may oblige themselves with ancillary services by defining the ancillary services and the remuneration paid by the company to the respective shareholder, if any, in the articles. The ancillary service is a pecuniary service undertaken by a shareholder towards the company, in addition to providing its respective capital contribution. Accordingly, such service does not increase the company's capital. The ancillary service shall be provided by the respective shareholder in person.

Generally, the shareholders do not own any duties to other shareholders; however, in the articles or in a separate agreement, the shareholders are free to agree on such duties, e.g. on non-competition undertakings. The shareholders' liability is limited to the provision of their capital contribution to the company. The corporate 'veil' can only be pierced, to give creditors security, under the following circumstances:

- until the entire cash contribution of a shareholder is paid up, the shareholder shall bear the liability for the limited liability company's debts, up to the unpaid part of their cash contribution;
- if in a court procedure it is established that a shareholder abused its limited liability, resulting that outstanding creditors' claims remain unsatisfied at the time of the company's termination, the shareholder may bear unlimited liability for such debts; and
- in forced liquidation proceedings, if a creditor can successfully prove at court that a controlling shareholder has pursued a so-called "*permanently disadvantageous business policy*", the personal liability of such shareholder may also be established for the company's outstanding debts.

It is to be stressed that Hungarian courts very rarely establish shareholders' liability for the acts or omissions of the company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Besides general conflict of interest rules, under Hungarian law there are certain limited circumstances when a shareholder may face disenfranchisement.

The legal relationship between a shareholder and the company may be automatically terminated pursuant to the Civil Code, if the shareholder does not provide its capital contribution in time and after the expiry of 30 days of receiving the notice of the executive officer for that effect.

Successful exclusion process may also result in the termination of legal relationship with the relevant shareholder. The company may bring an action against a shareholder for his exclusion from the company if maintaining his shareholder relationship would seriously jeopardise the company's objective. No such action may be brought if the corporation has only two shareholders or against the shareholder holding three-quarters or more of the votes in the shareholder meeting.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Yes, shareholders are entitled to seek enforcement against the management. The company may, based on the resolution of the shareholders, bring claims against executive officers for damages caused to the company by the exercise of their management duties. In the procedure, general rules relating to recovering damages caused by the breach of a contract are applicable.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Generally, there is no disclosure required under the law with respect to the intentions, plans or proposals of the shareholders with respect to the corporate entity/entities in which they are invested. However, if a shareholder, directly or indirectly, controls at least three-quarters of the votes, the Court of Registration is to be notified thereof within 15 days from the time of acquisition of such qualifying interest, for registration and publication purposes. Within a 60-day period following such notification, any shareholder of the company may request the controlling shareholder to purchase its shares at market value.

Other disclosure requirements with respect to the intentions, plans or proposals of shareholders, with respect to the corporate entity/entities in which they are invested, may be agreed in the articles or in a separate agreement concluded among the shareholders.

Although energy, banking and finance and other regulatory issues fall outside the scope of our answers, it should be mentioned that several statutory notification and approval requirements exist for shareholders of companies acting in such industries, and also broad disclosure requirements exist under competition and anti-trust laws.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management of a company's business and affairs is carried out by one or more executive officers (either natural or legal persons). The executive officers have all powers to manage the company's business, except for those reserved for the shareholder meeting, please see our answer to question 2.1.

The statutory right of representation of the executive officers can be restricted in the articles or can be distributed among several executives (e.g. by mentioning values, specific contracts, etc.), but towards third parties such restrictions will be ineffective, i.e. the act of the executive officer will be binding to the company even if he/she acted beyond his/her power.

The right of representation and signing on behalf of the company are exclusive competences of the executive officers. The representation and signing right of an executive officer may be individual or joint with another executive. If in a legal action the company is properly represented/signed for, the action is valid towards third parties even in the case where the board of directors, if applicable, has not approved the action in line with internal rules of the company.

The following executive officers act at the different types of limited companies:

A) At limited liability companies:

- In principle, the managing directors represent the limited liability companies before the courts, authorities and other third parties. The managing director can be a Hungarian or a foreign natural person, or a legal person. If a limited liability company has more managing directors, generally they each act individually and not as a body.

- Instead of the managing directors, the shareholders may appoint a board of directors in the articles. The board exercises its rights and performs its tasks as a body, e.g. the board shall adopt decisions at board meetings.

B) At private companies limited by shares:

- In principal, shareholders shall appoint a board of directors for the management of a private company limited by shares. The board of directors comprises, at least, three board members (natural or legal persons). The board shall elect its chairman from among its members. The board exercises its rights and performs its tasks as a body, e.g. the board shall adopt decisions based on the board members' votes.
- Alternatively, shareholders may elect a single person acting as a chief executive officer. The chief executive officer is entitled to exercise the full powers of the board.

Besides the executive officers, shareholders may also appoint a company manager. The company manager can have either individual or joint right of representation, the same way as executive officers. The company manager's powers can be full or limited, validly even towards third parties as well.

In respect of management and representation of the company, there is a further possibility to indicate in the articles that employees in certain positions can represent the company within a predefined scope of powers (e.g. under certain value, in specific contracts, etc.), and their liability is limited accordingly. The appointment requires a resolution of the managing directors/board of directors, as applicable. The joint signature of two employees having the right of representation is required for the validity of the company's representation, unless otherwise prescribed in the articles.

As mentioned earlier, the shareholders may confer to the supervisory board the right to adopt or approve certain decisions that would otherwise belong to the competence of the executive officers.

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

The approval and removal of executive officers fall in the exclusive competence of the shareholders. Shareholders shall adopt a resolution at a shareholder meeting concerning the appointment of an executive officer. Executive officers can be elected either for a definite or an indefinite term. The appointment becomes effective once accepted by the appointed person. The appointment of the new executive officer shall be registered with the Court of Registration; however, once accepted, the executive may start exercising his/her duties. The court registers the appointment with retroactive effect to the date of acceptance.

Executive officers can be removed at any time by a resolution of the shareholders; no reasons need to be stated.

Unless otherwise provided in the articles, the election and removal of an executive officer require a simple majority of votes in the shareholder meeting.

An executive officer may resign at any time. However, if so required for the operation of the company, any resignation shall only take effect on the sixtieth (60th) day after the announcement thereof, unless the shareholders provide for the appointment of a new executive officer beforehand. Until the resignation takes effect, the executive officer shall participate in making any urgent decisions and taking any urgent measures.

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

Executive officers can perform management duties within the framework of either an employment agreement or a service agreement.

If acting under a service agreement, the executive officer may work free of charge or against a consideration. If acting under an employment agreement, he/she is entitled to, at least, the statutory minimum wage.

The main legislative sources impacting the relationship between the company and the management body are the Civil Code (in case of a service relation) and the Act No. I. of 2012 on the Labour Code (in case of an employment relation).

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

Generally, without the prior consent of the shareholders of a company, an executive officer of a company shall not acquire interest or become an executive officer in another company pursuing the same business activity as that of the company (save for acquiring shares in a public company limited by shares).

Under the Capital Market Act, at a public company limited by shares, any interests in securities in the company held by executive officers of that company is strictly restricted. These types of transactions are either prohibited or require reporting/approval with the regulator. Insider trading is also prohibited and executives (or their close relatives) of a public company limited by shares are not allowed to commence any transactions relating to the securities of the company in certain periods of time (e.g. before the annual financial statement is published).

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

As mentioned above, management of the limited liability company's business and affairs are carried out by one or more executives (managing director(s) or members of the board of directors, as applicable) and a board is not always formed. The executive or executives represent the limited liability companies individually or jointly before the courts, authorities and other third parties.

If the shareholders appoint a board of directors for managing the limited liability company or at private companies limited by shares, besides relevant rules included in the articles, the board of directors shall be responsible for laying down its own rules in the rules of procedure.

The board must be convened in accordance with the rules laid down in the articles of the company and in the rules of procedure of the board. Generally, the chairman is responsible for initiating and convening the board meetings. The board shall be convened whenever the interest of the company so requires or if any board member, member of supervisory board or the auditor requests a board meeting to be held. Usually, the rules of procedure specify a notice period which is required in relation to formal meetings of the directors. A resolution is passed at least by the simple majority of votes, unless the articles prescribe for a higher proportion of majority.

Board meetings can be held in any location (usually convened at the company's registered office), unless otherwise required by the articles. It is also possible to hold board meetings via electronic means (telephone conference, videoconference or other devices determined in the articles or the procedural rules). The board is usually entitled to adopt decisions in writing.

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

The management of the company's business and affairs is carried out by the executive officers. Executives are authorised to decide on all matters not belonging to the exclusive competence of the shareholders, please also see our answer to question 2.1.

Executives shall carry out the management of the company based on the priority of the interests of the company.

Executive officers are liable towards the company in accordance with the rules of the Civil Code relating to damages caused by the breach of a contract.

In the event of the forced liquidation of a company, creditors may claim damages against the executive officer(s) up to their outstanding claims based on rules of non-contractual liability, provided that it is established in a court procedure that the executive officer(s) ignored the interests of the creditors when the threat of insolvency of the company was imminent.

Executive officers are of course subject to Hungarian criminal law. In case of criminal offences (e.g. fraud in connection with a tender, payment of unlawful incentives, etc.), generally the executive officer's liability is established instead of that of the company.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main specific corporate governance responsibilities of executive officers are to:

- represent the company and manage the business;
- keep a continuous record of the resolutions adopted by the shareholders (Register of Resolutions);
- report and keep updated the company's information filed with the Court of Registration;
- prepare and send an invitation for shareholders and initiate the adoption of written resolution;
- disclose information to the shareholders; and
- deposit and disclose the company's annual report.

For public companies limited by shares, based on the relevant recommendation of the Budapest Stock Exchange, main corporate governance functions of the management include:

- careful management of the company (drafting and implementation of strategy);
- financial planning and execution of it;
- controlling of the company's internal processes;
- the issue of business ethics;
- transparent operation of the company; and
- principles and procedures regarding the disclosure and corporate social responsibilities.

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

Shareholders may give a discharge of liability to the executive officer together with approving the annual financial statement of the company, in which they acknowledge the compliance of the executive officer's activities in the previous business year. Shareholders may only provide such indemnity if it is permitted by the articles. Once such indemnity is provided by the shareholders, the company may only bring a claim against the executive officer on the grounds of breaching obligations in the year covered by the indemnity if the underlying facts and information provided to the shareholders at the time of issuing the indemnity were false or incomplete.

In addition to the above, no Hungarian legislation governs the indemnity or insurance of executive officers or others. In practice, however, it is usual that executive officers are provided with indemnification from the company under an indemnity agreement or declaration.

Taking out a D&O insurance is also common, in order to hold the executives harmless against any liability arising from their managing duties. The beneficiary of such policy can be either the executive or the company itself.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

In Hungary, the management generally exercises wide power to implement the company's strategy which shall, however, be set by the shareholders. The management shall manage the operation of the company independently, based on the importance of the company's interests. In this capacity, the management shall discharge its duties in due compliance with the relevant legislation, the articles and the resolutions of the shareholders. With the exception of sole-shareholder companies, the management may not be instructed by the shareholders and his competence may not be negated by the shareholders. As regards sole-shareholder companies, the sole shareholder may instruct the management, and the executive is required to carry out these instructions. The managers or the management body are responsible for the implementation of such strategy in the course of the day-to-day operation.

Accordingly, the management has a key role in implementing the company's strategy in the course of the day-to-day operation of the company.

4 Other Stakeholders

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

Company managers and authorised employees must be employees of the company, thus they have a key role in corporate governance.

Also, if the annual average number of full time employees at a company exceeds 200, the appointment of a supervisory board is mandatory. In this case, one-third of the supervisory board members shall be made up of employee representatives. Employee representatives have the same rights and obligations as all other members of the supervisory board. If the opinion of the employee

representatives unanimously differs from the majority standpoint of the supervisory board, the minority opinion shall be submitted to the next meeting of the shareholders. Employee representatives shall inform the company's employees concerning the activities of the supervisory board.

If there is a works council operating at the company, it is entitled to request information and initiate negotiations with the company (i.e. the management). Furthermore, the executive officer exercising the employer's right over the employees shall notify the works council every six months about, among others, any fundamental issues at the company, changes in wages and on liquidity of the company related to the payment of wages.

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

Besides the already discussed bodies of companies and stakeholders, there are a few other bodies having a role in corporate governance in Hungary:

- The appointment of a supervisory board is mandatory at a company if the annual average number of full-time employees exceeds 200, and the works council did not relinquish employee participation in the supervisory board, otherwise a supervisory board is optional. In case of a mandatory supervisory board, the supervisory board shall consist of at least three members. The supervisory board has the powers and responsibilities to prepare a written report for the shareholders regarding the annual financial statement, notify the shareholders if, according to the supervisory board, the activity of the management of the company does not comply with the law, with the articles or with the resolutions of the shareholders or otherwise is damaging the interests of the company.
- The appointment of an auditor is also required if the company's average annual net sales revenue of two consecutive business years exceeds HUF 300 million (approx. USD 12,000), or if the average number of employees exceeds 50 in two consecutive business years. Otherwise, the appointment of an auditor is optional. The auditor shall be responsible for carrying out the audit of accounting documents in accordance with the Accounting Act, and for providing an independent opinion to determine as to whether the annual financial statement of the company conforms with legal requirements and whether it provides a true and fair view of the company's assets and liabilities, financial position and profit or loss. If the auditor detects any changes in the company's assets that are likely to jeopardise its ability to settle its liabilities or learns of any circumstance which entails the liability of the executive officers or supervisory board members, the auditor shall intervene and take the necessary actions in accordance with the Civil Code.

In the articles, shareholders may establish other organs in addition to the bodies already mentioned, without prejudice to the powers and responsibilities of those bodies governed by statutes.

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

Hungary has implemented Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. If any of the requirements laid down in the Accounting Act (e.g. the company had more than 500 employees in the previous business year) is met, the company's annual financial statement shall include a corporate social responsibility section, which, among others, describes the company's business model and policies in respect of environment, social and employment matters, human rights and fight against corruption, as well as the results in those areas.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Generally, the executive officers are responsible for reporting to the Court of Registration the foundation of the company, any amendments to the articles and information required to be entered into the trade registry and any changes thereto.

The annual financial statement of the company shall also be deposited and disclosed by the executive officer of the company.

5.2 What corporate governance-related disclosures are required?

The following corporate governance-related disclosure requirements exist:

- change of corporate data needs to be reported to the Court of Registration and therefore entered into the trade registry;
- the annual financial statement of the company needs to be published at the relevant site operated by the Ministry of Justice; and
- publications need to be initiated on certain corporate actions, e.g. the capital decrease, merger or the voluntary dissolution of the company, in the official Companies' Gazette or on the company's website.

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

The auditor shall be independent from the company and is responsible for the examination and auditing of accounting documents of the company and issues its opinion about the annual financial statement. The financial statement may be published even without the opinion of the auditor or with a refusing opinion of the auditor, at the responsibility of the company. Please see question 4.2.

5.4 What corporate governance-related information should be published on websites?

Companies are not required by law to maintain a website. In the case that the company operates a website, it is, however, required to indicate the name of the competent Court of Registration and the name, registered address as well as the registration number of the company.

In the articles, the shareholders may decide to disclose statutory publications on the company's website instead of publishing those in the Companies' Gazette.

Julia Szarvas

Szarvas and Partners Law Firm
Capital Square
Váci út 76
1133 Budapest
Hungary

Tel: +36 1 883 0310
Email: julia.szarvas@szarvaslawfirm.hu
URL: www.szarvaslawfirm.hu

Julia has spent 16 years of her professional career at law firms working in association with different BIG4 firms and one of the largest accounting firms in Hungary. She has broad experience in transactions when legal, tax and accounting aspects need to be considered parallel. She understands the tax and accounting requirements and knows the legal answer.

She has advised clients in different M&A transactions and setup of joint venture structures.

Julia advises several international clients holding investment in Hungary and provides day-to-day advice for their legal compliance in corporate, commercial and HR matters.

She specialises in certain special regulated areas, including data privacy law and legal aspects of electronic signatures.

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Szarvas Julia Law Firm is a small boutique firm with international clientele. It focuses on legal support of foreign investments in Hungary and on legal compliance of clients doing business in Hungary. Expertise of the firm include corporate, commercial, financing, competition, employment and data protection laws. The firm specialises in complex advisory and transactional services, when legal support needs to be provided in consideration of tax and accounting aspects and in cooperation with professionals of such areas. It is an independent law firm, having smooth cooperation with several independent tax advisors and accounting firms, as well as with law firms in numerous European countries.

India

Kosturi Ghosh

Wiseroy Damodaran

Trilegal

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter focuses on Indian public companies listed on the Bombay Stock Exchange (**BSE**) and the National Stock Exchange (**NSE**). All references to 'companies' in this chapter are to BSE and NSE listed Indian companies. The information in this chapter is up to date as of May 2018.

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

The Companies Act 2013 (**Companies Act**) is the principal legislation governing companies in India.

In addition to the Companies Act, companies are governed by the Securities and Exchange Board of India Act, 1992 (**SEBI Act**), various regulations notified under the SEBI Act, particularly the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**). Companies are also bound by the standard listing agreement of stock exchanges like the BSE/NSE, where the shares of the company are listed.

Companies are required to comply with accounting standards issued by the Institute of Chartered Accountants of India, the national professional accounting body of India. The Companies Act requires the financial statements of a company to be prepared in accordance with the prescribed accounting standards to provide a true and fair view of its state of affairs.

Companies are also required to comply with the secretarial standards issued by the Institute of Company Secretaries of India.

The Ministry of Corporate Affairs of the Government of India has also prescribed the *Corporate Governance Voluntary Guidelines 2009* in the wake of the global financial crisis and large format corporate failures in India. These *Guidelines* are voluntary in nature and intend to develop a transparent, ethical and responsible corporate governance framework in India.

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

In the last year, India has witnessed an exponential rise in shareholder activism, where the shareholders have adopted a more active role in highlighting governance-based issues. Shareholders were seen not only being more vigilant and seeking explanations from the board of directors on their decisions, but also approaching the Securities and Exchange Board of India (**SEBI**) to conduct necessary enquiries on companies. For instance, SEBI's interference was recently sought by: (i) the shareholders of Uttam Galva Steels Limited, when the stock exchanges reclassified one of the promoters as a public shareholder; and (ii) shareholders of Infosys Limited following resignation of its chief executive officer who was granted a generous severance pay-out. SEBI's interference was also sought by a whistle blower in relation to Infosys' announcement of selling two of its recently acquired subsidiaries at a significant discount.

Related party transactions, which represent potential conflicts of interest that may compromise a management's duties to shareholders, have continued to be a concern in Indian companies. The prevalence of value-destroying related party transactions has further boosted shareholder activism in India. For instance, Raymond Limited, an Indian textile major, was questioned by its shareholders when it proposed to sell some of its prime properties to its chairman and his relatives for a price which was lower than 1/10th of the market value.

With several such issues being brought to the attention of the general public, the SEBI realised the importance of improving the standards of corporate governance. It accordingly constituted a committee under the chairmanship of Mr. Uday Kotak (**Kotak Committee**) and entrusted it with the duty to make recommendations on issues like: (i) improving safeguards and disclosures pertaining to related party transactions; (ii) improving effectiveness of board evaluation process; and (iii) addressing disclosure and transparency related issues, etc. The Kotak Committee examined a plethora of issues and made recommendations that would, *inter alia,* ensure more transparency in companies that are predominantly promoter driven and increase the accountability of directors (especially independent directors) and auditors. The SEBI in its meeting on May 2018 accepted several of these recommendations, including recommendations on: (i) enhancing the role of board committees like the audit committee; and (ii) enhancing the disclosure requirements of companies by requiring them to disclose details of utilisation of capital raised through preferential issues, details of credentials, basis of recommendation and fees payable to auditors in the notice seeking auditors' appointment.

While the steps taken by the SEBI, proxy-advisory firms and shareholders towards ensuring better corporate governance have been welcomed by the public, the increase in accountability and regulatory scrutiny has caused independent directors to resign from the boards of companies. This has further shrunk the talent pool of independent directors and made it difficult for companies to attract high calibre professionals to serve as independent directors.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In the recent past, the Indian market has shown a steady increase towards sustainable value creation. While factors such as, increased focus towards boosting company's valuation and creating wealth for short-term investors has led to a rise in short-termism, seasoned businesses have realised the perils of short-termism and have initiated steps for adopting policies and business models that promote value creation over the long-term. For instance, where on one hand companies like Educomp and Everonn failed to sustain themselves in a booming sector like education due to unsustainable business models and excessive debt, the Tata Group took a flying leap and founded a not for profit organisation to specifically focus on developing practical tools and approaches to support long term behaviours across the investment value chain.

Indian legislations also highlight the importance of long-term value creation and, *inter alia*, require the board of directors of companies to ensure that their steps do not result in over-optimism that expose companies to excessive risks. Recently, the Kotak Committee constituted by the SEBI for improving the standards of corporate governance has, *inter alia*, recommended that: (i) companies disclose long-term and medium-term strategy to the shareholders in the company's annual report; and (ii) top 500 companies mandatorily constitute a risk management committee. While such measures strive to make companies more accountable, they also tend to create pressure on companies to prioritise short-term achievements. Further, traditional and mechanical approaches adopted by creditors while dealing with distressed companies is restricting the industry from exploring resolution mechanisms that generate long-term value.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

While shareholders are not entitled directly to participate in the day-to-day operation and management of companies, they have the right to:

- participate in and be sufficiently informed of and vote on decisions concerning fundamental corporate changes (for instance, change in authorised share capital, issuance of shares on a preferential basis, approval of a scheme of arrangement, merger, demerger, etc.);
- participate in and be sufficiently informed of and vote on decisions such as, related party transactions, managerial remuneration, etc.;
- appoint and remove directors from the Board;
- attend and vote at general meetings of the company; and
- initiate a liquidation of the company.

Companies are required to obtain prior approval of the shareholders for certain matters such as appointment of directors, alteration of constitutional documents, issue of securities by the company, declaration of final dividend, etc.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Ownership of an equity stake in a company is typically not associated with statutory duties on corporate governance of a company. For instance, while ownership of shares enables their holders to vote at a shareholders' meeting, there is no obligation to exercise that right.

However, in the event that (i) a company's affairs are being conducted in a manner which is prejudicial to the interests of the company itself or any shareholder, or (ii) if there is any material change in the management or control of a company which is likely to result in the company's affairs being conducted in a manner prejudicial to any shareholder, then affected shareholders (constituting at least 100 in number or one-tenth of the total number of shareholders, whichever is less, or shareholder(s) holding at least 10% of the issued capital of the company) have the right to approach the National Company Law Tribunal (**NCLT**) for relief. This right may be seen in the context of the majority shareholders typically being in management of companies in India, and therefore having the responsibility of conducting the affairs of the company without oppression of minority shareholders or mismanagement of the affairs of the company.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Shareholder meetings in India can be classified as: (i) annual general meetings (**AGMs**); (ii) extraordinary general meetings (**EGMs**); and (iii) meetings convened by the NCLT. These shareholder meetings vary in their frequency and hold different points of discussion.

Companies are required to hold an AGM every year for conducting 'ordinary business' such as, disclosing the financial performance of the company and management initiatives or the (re-)appointment of directors. The duration between two AGMs cannot exceed 15 (fifteen) months.

A meeting of shareholders other than the AGM is designated as an EGM. EGMs are typically conducted for the consideration of urgent issues which arise prior to holding of an AGM. The Board usually convenes an EGM, although it can be initiated at the request of the shareholders holding more than 10% of the paid-up share capital of the company.

Meetings may be convened by the NCLT for the consideration of all schemes of arrangement, and the resolutions proposed in such meetings need to be approved by a majority representing three-quarters of the value held by the shareholders (either in person or through proxy voting). Such schemes also require an in-principle approval from the SEBI prior to their filing in the NCLT.

The Companies Act also provides for certain business items (such as alteration of the object clause of the company's memorandum of association) to be necessarily approved by postal ballot instead of a physical meeting, with a view to encouraging wider shareholder participation in such matters.

At meetings, shareholders have the right to do the following:

- ask questions;
- appoint a proxy, i.e. an agent to attend and vote at meetings on their behalf;
- seek appointment as a director of shareholders or elect a small shareholder director by nominating a representative;
- inspect company documents such as the register of shareholders/directors, annual returns, constitutional documents, etc.; and
- meet the stakeholders' relationship committee for resolution of grievances.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders owe certain general duties towards the company that they are invested in and the other shareholders of the company. These include:

- duty to notify the company if the shareholder is a related party of the company and the company proposes to enter into a transaction with such a shareholder;
- duty to not deal in securities of the company using manipulative, fraudulent or unfair trade practices;
- duty to not disclose unpublished price sensitive information relating to the company or its securities listed or proposed to be listed to any person, unless the same is permissible under the regulations prescribed by SEBI;
- duty to make an open offer in case a public shareholder intends to reclassify itself as a promoter of the company in accordance with the regulations prescribed by the SEBI; and
- duty to make events-based and continuous disclosures to the relevant stock exchange for the purpose of discharging obligations under the regulations prescribed by the SEBI. Some examples of the disclosures that need to be made are set out in our response to question 2.6 below.

Indian law considers a company to be a distinct legal entity from its shareholders and separates liability for the acts or omissions of a company from that of its shareholders. Shareholder liability is capped to the face value of the shares held by them in the company. There may be extraordinary instances where the 'corporate veil' is lifted by courts to impose liability on shareholders. However, such cases would typically arise in the context of fraudulent conduct by a shareholder.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The Companies Act provides for a class action mechanism, permitting a representative group of shareholders, constituting a minimum of 100 shareholders in number or one-tenth of the total number of shareholders, whichever is less or shareholders holding at least 10% of the issued capital of the company, to bring an action on behalf of all affected parties, including claims for compensation from directors for any fraudulent, unlawful or wrongful act or omission or conduct on their part before the NCLT.

As discussed above, specified shareholders also have the ability to approach the NCLT against cases of oppression or mismanagement of the company by the majority shareholders.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Shareholders of listed companies are required to make events-based and continuous disclosures to the relevant stock exchange for the purpose of discharging obligations under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (**Takeover Regulations**).

Any shareholder acquiring or holding more than 5% shares or voting rights in a company, together with any person acting in concert, is required to make a disclosure of such acquisition or change in shareholding beyond 2%. Every shareholder holding 25% or more of the shares or voting rights in a company is required to disclose shareholding on an annual basis.

As part of the SEBI (Prohibition of Insider Trading) Regulations 2015 (**Insider Trading Regulations**), promoters, directors and 'key managerial personnel' (**KMP**) of a company are required to disclose their holding of securities in the company within seven days of acquiring such a status. Such persons are also required to disclose any transactions in securities within two trading days, if the value of the securities traded in a calendar quarter is greater than INR 1 million cumulatively. This requirement is also applicable to any person who takes trading decisions for the promoters, directors or KMPs.

Additionally, a company's promoters are required to disclose any creation, invocation or release of an encumbrance of their shares to the relevant stock exchange and the company within seven working days of such activity.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

In addition to any disclosure that may be required under the charter documents of a company, shareholders of a company are required to make disclosures under the Takeover Regulations if as holders of 25% or more of the capital of such company, they intend to acquire more than 5% of the voting rights of such company or control in such a company. Such disclosures are also required if such shareholders intend to acquire control of the company through indirect means and such indirect acquisition is deemed to be a direct acquisition under the Takeover Regulations. Further, shareholders who have an intention to delist the company pursuant to making a public announcement for an open offer are required to declare their intention upfront to delist the listed entity at the time of making the detailed public announcement.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Except for those matters which require the consent and approval of the shareholders, the Board is entitled to exercise all the powers of the company, and to do all such acts and things which the company is authorised to do, in accordance with the Companies Act and the constitutional documents of the company.

Companies follow a unitary board structure and do not have the concept of a supervisory board. The Board is authorised to delegate certain specified powers to: (i) a committee constituted by the board (such as, audit committee, nomination and remuneration committee, etc.); (ii) the managing director; and (iii) the manager or key managerial personnel of the company. Companies are required to have at least one Indian resident director, one female director, and either one-half or one-third of independent directors on their Board, depending on whether the chairperson of the Board is an executive director or a non-executive director.

Companies are required to appoint the following as KMP by way of a board resolution detailing their terms of their appointment:

(i) a Chief Executive Officer, the managing director or the manager;

(ii) a company secretary; and

(iii) a Chief Financial Officer.

The KMPs, along with executive directors of a company, are generally deemed to be responsible for any defaults under the Companies Act by virtue of being classified as 'officer who is in default'.

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

Directors of a company are typically appointed through a shareholders' approval at the AGM. A company must intimate the candidature of a person applying for the office of director to the shareholders. A director is required to agree to act as a director of a company. The Board may be permitted to appoint a person as an additional director, alternate director or nominee director under the constitutional documents. However, the additional director appointed by the Board is entitled to hold office only until the ensuing AGM of the company.

The appointment of an independent director is required to be approved by the company in an AGM. The appointment should take place through a letter of appointment, indicating the terms and conditions of the appointment.

A company can remove a director (except a director, if any, that has been appointed by the NCLT) before the expiry of the period of office upon providing such a director a reasonable opportunity to be heard, followed by passing an ordinary resolution removing the director from office.

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

Companies are required to constitute a nomination and remuneration committee, for the purposes of recommending a policy to the Board concerning the remuneration of directors, KMPs and other employees. The remuneration of directors, KMPs and other employees is determined based on the restrictions under the Companies act, 2013 and general employment law.

The total managerial remuneration payable by a company to its directors including the managing director, whole-time directors and managers, in respect of any financial year must not exceed 11% of the net profits of the company for that financial year. The benefit derived from stock options granted to directors are included as salary income for the purposes of income tax laws at the time of exercise of options. Stock options, however, cannot be granted to a director who either himself or through his relatives holds more than 10% of the outstanding equity shares of the company granting the stock options.

The remuneration is approved by the Board at a meeting, which is subject to approval by a resolution at the ensuing general meeting. Approval of the central government and the shareholders is required for payment of remuneration exceeding prescribed thresholds. However, a recent amendment proposed by the government intends to do away with the requirement of obtaining the consent of the central government.

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

Directors of public listed companies must disclose their shareholding details and voting rights above a prescribed threshold, in accordance with the Insider Trading Regulations and the Takeover Regulations.

Directors are also required to disclose their concern or interest, including shareholding, in any company or companies or other forms of legal entities at the time of joining the Board and after the next Board meeting upon the occurrence of any change in such disclosure. Further, if the company proposes to enter into a contract or arrangement with a body corporate in which a director holds more than 2% shareholding, the director holding such a stake is not permitted to participate in the meeting at which the contract or arrangement is proposed to be approved.

In the event that a company provides any share-based employee benefits, the Board is required to disclose the details of such schemes in the Board report, including the beneficiaries of the schemes.

Directors are also restricted from entering into agreements, by themselves or through other persons, with any shareholder or any other third party for sharing any compensation or profit in connection with dealings in the securities of the company without obtaining the prior approval from the Board and the public shareholders of the company.

Companies are also required to make continuous and event-based disclosures to the stock exchange where the shares of the company are listed, as well as to the SEBI.

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

Companies are required to conduct a minimum of four board meetings in a year, with a gap of no more than 120 days between them. Notice of conducting a board meeting must be provided in writing to every director of the company, and an agenda must be attached along with such a notice. The quorum for a board meeting is one-third of the total number of directors or two directors (whichever is higher), provided such directors are eligible to participate at the meeting. As mentioned in the response to question 3.4 above, directors interested in a contract or arrangement are not permitted to participate in a meeting at which such contract or arrangement is proposed to be discussed.

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

The Companies Act has codified the common law duties of directors which require them to:

- act with care, skill and diligence and to exercise independent judgment;
- act in accordance with the constitutional documents of the company;
- act in good faith in order to promote the objects of the company for the benefit of its shareholders as a whole and in the best interest of the company, its employees, the community and for the protection of environment;
- not obtain any undue gain or advantage and/or to assign their office; and
- not be involved any situation which conflicts with the interests of the company.

Directors are required to make full and adequate disclosures in the event of any conflict of interest, including perceived conflicts, and to abstain from participation in discussions or voting on such matters.

A director in breach of these duties is liable for both civil and criminal sanctions, which are determined on the basis of the type of breach and the statutory provision violated by him/her.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

It is mandatory for the Board of every company to sign the financial statements and present the same to the shareholders along with its report, known as the Board's Report and the auditor's report, at every AGM. Apart from giving a complete review of the performance of the company for the year under report and material changes until the date of the report, the report needs to highlight the significance of various national and international developments which can have an impact on the business and indicate the future strategy of the company.

The Board's report is a wide-ranging document covering both financial and non-financial information, with a view to informing the stakeholders about the performance and prospects of the company, capital structure, management changes, significant policies and recommendations for the distribution of profits, etc.

The top 500 listed companies (based on market capitalisation at BSE/NSE) are also required to circulate a business responsibility report in a standardised format for companies to report the actions undertaken by them towards adoption of responsible business practices. This reporting is intended to provide basic information about the company and information related to its performance and processes.

Additionally, the Board is required to: (i) review from time to time strategies and business plans; (ii) monitor corporate performance and effectiveness of the company's governance practices; and (iii) oversee major capital expenditures, acquisitions, divestments, succession planning, etc. The Board is also required to implement a risk management policy to create and protect shareholder value by minimising threats or losses, and identifying and maximising opportunities. To build a lasting and strong culture of corporate governance and to provide a platform to stakeholders to report suspected or actual occurrence of illegal, unethical or inappropriate actions, the Board is also required to devise an effective whistle blower policy.

One of the key challenges faced by the management body is maintaining diverse expertise and skills sets on the Board. This is due to the increased accountability and liability of directors witnessed in the recent times. Management bodies also struggle to balance conflicting interests of stakeholders while formulating business strategies that are focussed at long-term growth.

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

Directors are permitted to obtain indemnities from the company in the event that they are liable but no fault can be attached to their conduct. Companies also typically obtain directors' and officers' insurance for their director and key management personnel.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The management body plays an instrumental role in preparing strategies for the corporate entities. It is entrusted with the responsibility of providing strategic guidance to the company and reviewing corporate strategies, major plans of action, risk policy, annual budgets and business plans, etc. from time to time. Except for those matters which require the consent and approval of the shareholders, all strategic decisions need to be sanctioned by the company's Board. The law empowers the Board to 'step back' to assist executive management by challenging the assumptions underlying strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the company's focus.

4 Other Stakeholders

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

Employees of a company, especially the KMPs, play an essential role in ensuring corporate governance of a company. Under the LODR, employees are restricted from entering into agreements, by themselves or through other persons, with any shareholder or any other third party for sharing any compensation or profit in connection with dealings in the securities of the company without obtaining the prior approval from the Board and the public shareholders of the company. Further, KMPs are required to make disclosures to the Board relating to all material, financial and commercial transactions, where they have personal interests that may have a potential conflict with the interest of company.

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

The SEBI requires companies to recognise the rights of its stakeholders (creditors, debenture holders, employees, etc.) and encourage cooperation between the company and the stakeholders. It ensures this by requiring companies to: (i) respect the rights of stakeholders that are established by law or through mutual agreements; (ii) devise a whistle-blower mechanism so that the stakeholders can freely communicate their concerns about illegal and unethical practices of a company; and (iii) constitute a stakeholder relationship committee to specifically look into the mechanism of redressal of grievances of debenture holders and other security holders of the company.

The Companies Act also empowers certain stakeholders to make an application to the NCLT for freezing the accounts of a company for a period not exceeding three years. Such application may be made by: (i) a creditor who has extended a debt exceeding INR 100 thousand; or (ii) any other person who has reasonable grounds to believe that the removal, transfer or disposal of funds, assets or properties of a company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or its creditors.

India has also seen a growing trend of proxy advisory firms who are hired by institutional investors to obtain research and vote recommendations on issues that are addressed at shareholder meetings. These proxy advisory firms have played an active role in highlighting corporate governance issues in companies and helping public shareholders exercise their voting right by making informed decisions. For instance, Ingovern, a reputed proxy advisory firm in India, highlighted to the shareholders of ITC that while the designation of ITC's chairman was being changed from executive to non-executive chairman, his salary remained unchanged and was far higher than the salary drawn by the new chief executive officer.

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

India has codified its corporate social responsibility (**CSR**) obligations in the Companies Act which requires specified companies (mentioned below) to spend at least 2% of the average net

profits made during the three immediately preceding financial years on prescribed CSR activities. This provision operates on a 'comply or explain' basis, and the Board must provide an explanation in the directors' report if the company does not spend the requisite amount on CSR. This requirement is applicable to companies which have:

- a net worth of at least INR 5 billion during any financial year;
- a turnover of at least INR 10 billion during any financial year; or
- a net profit of at least INR 50 million during any financial year.

Every company which fulfils any of the above threshold, must constitute a CSR committee, formulate a CSR policy and make recommendations on CSR to the Board.

There is a mandatory requirement to report the details of the CSR policy and the implementation of the CSR initiatives taken by a company during a financial year.

A company can engage in a broad category of CSR activities, including eradication of poverty, promotion of education, promotion of gender equality and environmental sustainability. The CSR activities must be performed within India and are not permitted to be for the exclusive benefit of the company's employees or their family members.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The SEBI prescribes that the Board and senior management of a company should conduct themselves in a manner that meets the expectations of operational transparency to stakeholders and imposes a general obligation of compliance on KMPs, directors, promoters or any person dealing with the company.

The Board is also required to authorise one or more KMPs for the purpose of determining materiality of an event or information and for the purpose of making disclosures to the relevant stock exchange(s). The contact details of such personnel are also required to be disclosed to the stock exchange(s) and provided on the company's website.

Every company is required to appoint a qualified company secretary as the compliance officer who is responsible for:

- ensuring conformity with the regulatory provisions applicable to the company;
- co-ordination with and reporting to the Board, recognised stock exchange(s) and depositories with respect to compliance requirements; and
- ensuring the correctness, authenticity and comprehensiveness of the information, statements and reports filed by the company.

5.2 What corporate governance-related disclosures are required?

Companies are required to ensure timely and accurate disclosure of all material matters, including the financial situation, performance, ownership, and governance aspects. Companies are required to, *inter alia*: (i) submit to the stock exchanges on which the company is listed, quarterly compliance reports on corporate governance; and (ii) disclose to the stock exchanges on which the company is listed, details such as, acquisitions, material related party transactions, issuance or forfeiture of securities, outcomes of board meetings, frauds or defaults by promoters or KMP, amendments to charter documents, etc.

The financial statement of a company must be approved by the Board for submission to the auditor for his report.

The managing director, the whole-time director in charge of finance, the Chief Financial Officer (or any other person of a company empowered by the Board) are required to prepare the books of account and other relevant books and papers and the financial statement for every financial year which provide a true and fair view of the state of the affairs of the company (including that of its branch offices, if any).

At every AGM, the Board must present the financial statements for the previous financial year. The Board must issue a board report, which must be annexed to the financial statements and presented before the company in the AGM.

The board report must also have a directors' statement of responsibility which requires directors to endorse that they have devised proper systems to ensure the company's compliance with all applicable laws, that these systems are adequate and are operating effectively, and that the applicable accounting standards have been followed in the preparation of the company's financial statements. The board report is also required to respond to qualifications made in the auditor's report of the company.

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

The auditor of a company is required to make a report for the shareholders on examination of the company's accounts. The auditor report also states whether it gives a true and fair view of the company's accounts in accordance with the Companies Act, in the opinion and to the best knowledge of the auditor.

The primary objects of an audit are to disclose:

- the company's compliance with statutory requirements;
- adequacy of information required to be provided in the financial statements;
- truth and fairness of the financial position, as reflected in the balance sheet;
- truth and fairness of the company's operations as reflected in the profit and loss account; and
- accuracy and reliability of accounts books and underlying documents from which the financial statements have been prepared.

Companies are permitted to appoint an individual as an auditor for a maximum period of five consecutive years or an audit firm as an auditor for a maximum of two terms of five consecutive years after obtaining the auditor's written consent for such an appointment. The rotation of auditors introduces a system of checks and balances and reduces the scope for any malpractice. Further, strict regulations governing the procedure for removal of an auditor ensure that the auditors are encouraged to undertake their obligations in a fair and transparent manner without fear of retribution.

5.4 What corporate governance-related information should be published on websites?

Every company is required to maintain a functional and accurate website containing its basic information. Any change in the content of a company's information is required to be updated on its website within two working days from the date of such change. The website is required to contain:

- details of the company's business;
- the company's shareholding pattern;
- criteria of making payments to non-executive directors;

- name and contact details of the KMP authorised to determine the materiality of an event or information along with the policy for determination of materiality;
- the composition of various committees of the Board;
- the terms and conditions of appointment of independent directors;
- details of the establishment of a vigil mechanism or whistle-blower policy;
- the code of conduct of the Board and senior management personnel;
- the dividend distribution policy of the company;
- policies on dealing with related party transactions and determining 'material' subsidiaries;
- details of agreements entered into with the media companies or their associates;
- details of familiarisation programmes imparted to independent directors;
- contact information for resolution of investor grievances;
- financial information including financial results and copies of the annual report including the balance sheet, profit and loss account, directors' report and corporate governance report;
- a schedule of analyst or institutional investor meetings and presentations made by the company to analysts or institutional investors;
- the new name and the former name, of the listed entity for a continuous period of one year, from the date of the last change of name; and
- all such events or information which has been disclosed to the stock exchange under the LODR.

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Adhunika Premkumar is a Senior Associate with the corporate practice group at Trilegal.

Kosturi Ghosh
Trilegal
The Residency, 7th Floor
133/1 Residency Road
Bangalore 560 025
India

Tel: +91 80 4343 4603
Email: Kosturi.Ghosh@trilegal.com
URL: www.trilegal.com

Kosturi Ghosh is a Partner and the deputy head of the corporate practice group of the firm. Her primary areas of practice are general corporate advisory, M&A, Private Equity and Real Estate. She has over 15 years of experience and specialises in advising multinational clients on mergers and acquisitions, structuring investments and exit options, conducting due diligences and drafting transaction documentation. She regularly advises on commercial, regulatory and strategic matters as well as processes and procedures to ensure compliance in India.

Recognised as a leading individual, she has been given high praise for being "an intelligent, business-minded lawyer with exceptional negotiation skills and on-point experience" – RSG India 2015. Kosturi recently won the special jury award – Women in Legal Leadership – at IDEX Legal Awards 2016 and also featured in '40 Under 40' in Asia Pacific by Asian Legal Business.

Wiseroy Damodaran
Trilegal
The Residency, 7th Floor
133/1 Residency Road
Bangalore 560 025
India

Tel: +91 80 4343 4682
Email: Wiseroy.Damodaran@trilegal.com
URL: www.trilegal.com

Wiseroy Damodaran is a Counsel in the Bangalore office of Trilegal and is part of the general corporate practice group and primarily focuses on M&A and private equity/venture capital related work. Wiseroy has been involved in several complex and large M&A deals involving restructuring of businesses and corporate structures in India, including court approved schemes of arrangement. He has been involved in setting up and structuring businesses in India, obtaining various statutory approvals and representing clients before regulatory bodies such as the erstwhile Foreign Investment Promotion Board, the Reserve Bank of India, the Ministry of Corporate Affairs and the Ministry of Home Affairs in connection with various regulatory matters and approvals.

Wiseroy regularly advises Indian companies and their promoters on investments from private equity and venture capital fund houses, strategic acquisitions, joint ventures and exits by way of share and business acquisitions.

TRILEGAL

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Our areas of expertise include: mergers and acquisitions; strategic alliances and joint ventures; private equity and venture capital; defence and aviation; energy and infrastructure; banking and finance; taxation; restructuring; capital markets; telecoms, media and technology; dispute resolution; regulatory; competition law; labour and employment; real estate; hospitality; pharmaceuticals; and manufacturing, among others.

Indonesia

Fiesta Victoria

T. Anggra Syah Reza

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The discussion will focus on a limited liability company (*perseroan terbatas* ("**PT**")) set under Law No. 40 of 2007 concerning limited liability companies, and its implementing regulations ("**Indonesian Company Law**"). PT is the corporate entity form allowed within the context of foreign direct investment in Indonesia (with some exceptions on the banking and oil and gas sectors under production sharing contracts or the construction sector in the scheme of joint operation) and can take the form of a private company or a public company (also known as PT Tbk, with a minimum of three hundred shareholders and issued and paid-up capital of a minimum of IDR 3 billion).

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

Corporate Governance of Indonesian limited liability companies is mainly governed by: (i) the Indonesian Company Law; (ii) for foreign investment companies, Law No. 25 of 2007 on investment and its implementing regulations ("**Investment Law**"); and (iii) for public companies, Law No. 8 of 1995 on Capital Market including its implementing regulations ("**Capital Market Law**"). For banks and non-bank financial companies, they are regulated under the regulations of the Financial Services Authority ("**OJK**").

Articles of Associations provide more specific corporate governance rules for each PT.

The Indonesian Company Law sets the general rules on corporate governance of PT – the duties, roles, rights, obligations and liabilities of PT and each organ of PT consisting of (i) General Meeting of Shareholders ("**GMS**"), (ii) Board of Directors ("**BOD**"), and (iii) Board of Commissioners ("**BOC**"). The rules and provisions set by the Indonesian Company Law are generally applicable to all limited liability companies.

The Investment Law works in conjunction with the Indonesian Company Law as one of the main sources of corporate governance practice for foreign investment companies. While most of the corporate governance rules are covered by the Indonesian Company Law, the Investment Law provides additional obligations/requirements such as: restrictions on nominee-share ownership arrangements and the requirement for a foreign direct investment to be conducted in the form of a limited liability company.

For the corporate governance rules of public companies, the Capital Market Law is more detailed and requires the public companies to also comply with OJK and Indonesia Stock Exchange ("**IDX**") rules. These rules require public companies to have an independent commissioner (constituting of at least 30% of the BOC members) and an independent director. Aside from the foregoing organs of PT, the Capital Market Law requires other structures consisting of: (i) a Corporate Secretary; (ii) an Audit Committee; and (iii) an Internal Audit Unit. In addition, the public companies may also establish a Nomination and Remuneration Committee.

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

There have been no changes to general corporate governance matters set by the Indonesian Company Law, since 2007. Some notable changes that have been applied by the Indonesian government for specific sectors include, among others:

(i) issuance of the new Investment Coordinating Board ("**BKPM**"), which came into force on 2 January 2018. The new regulation shows supportive changes from the government on foreign direct investment policies, among others: allowing trading/services activities to go through only one stage of licensing, compared to two stages of licensing under the previous BKPM regulation; and

(ii) issuance of specific regulations on fintech companies by OJK in 2017, followed by some supporting personal data privacy regulations.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The government is starting to recognise the importance of promoting sustainable value creation over the long-term and therefore encouraging long-term investment. While, this is not implemented comprehensively in all business sectors yet, we have seen a change in government regulation. For example, the government now extends the investment period of Venture Capital Company to a maximum of 20 years (compared to a 10-year maximum in the previous regulation).

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Operation or management duties and functions are basically the roles of the BOD (under the supervision of the BOC).

Nonetheless, Indonesian Company Law sets certain minimum limitations to the BOD's/BOC's roles, i.e., approval from the shareholders (in a GMS or BOC as the case may be) must be obtained for the matters/actions as outlined below, which, in turn, provide certain strategic power to the shareholders. In addition, shareholders may also set limitation to the roles of the BOD and/or BOC in the company's articles of association.

Matters requiring approval of the shareholders or the BOC (as the case may be) set by Indonesian Company Law, are as follows:

- subscription of shares by way of in kind participation;
- conversion of loan to equity by a shareholder and/or other creditor;
- buy-back shares of the company;
- an increase in the issued and paid-up capital within the limit of the authorised capital, or a reduction in the capital of the company;
- approval of business plans (either by the BOC approval or the GMS as provided in the articles of association of the company);
- approval of annual reports, including financial statements and report of the BOC's duties;
- appropriation of net profits including: the determination of the amount to be allocated for the reserve fund; declaration of dividends; and determination of the uncollected dividends;
- division of duties and authorities of management amongst the members of the BOD;
- amendments to the articles of association of the company including any increase in the authorised capital, reduction in authorised, issued and paid up capital;
- merger, consolidation, acquisition, spin-off, bankruptcy, extension of the company's duration, and dissolution of the company;
- appointment of other party(ies) to represent the company if all members of the BOD or the BOC have a conflict of interest with the company;
- transfer or encumber of the company's assets with a value exceeding 50% of the net assets of the company in one or more transactions, whether related or unrelated;
- appointment, replacement and dismissal of the members of the BOD and/or the BOC;
- provisions on the amount of salary and allowances of the members of the BOD (to be approved by the GMS or BOC meeting/resolution);
- provisions on the amount of salary and allowances of the members of the BOC;
- approval for the BOC to conduct managerial activities for certain circumstances and definitive period or appointment of independent Commissioners;
- approval of report submitted by liquidator; and/or
- appointment of the liquidator.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders do not have a particular corporate governance responsibility under Indonesian Company Law.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Indonesian Company Law divides shareholders meeting into two types: (i) Annual General Meeting of Shareholders ("**AGMS**"); and (ii) Extraordinary General Meeting of Shareholders ("**EGMS**").

An AGMS is intended to approve the management and supervision duties and roles by the BOD/BOC of the company of the previous year (and release and discharge the liabilities of BOD/BOC of the previous financial year, as well as allocation of net profit). An AGMS must be convened at the latest six months after the end of the company financial year.

For EGMS, there are no limitation as to agendas that may be approved in an EGMS (except for the agendas relating to annual report which is specifically required to be approved in the AGMS). An EGMS may also be convened at any time, as deemed necessary, based on the request of shareholders holding at least 1/10 voting rights in the company and/or the BOC (or based on the court's decision if the incumbent BOD and/or BOC of the company fail to convene the requested EGMS).

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

No, unless any of the following situation occurs:

- when their company loses its legal entity status;
- when a shareholder directly or indirectly abuses the company for their personal benefit;
- when a shareholder is involved in an unlawful act committed by the company;
- when the shareholder directly or indirectly uses the company's assets unlawfully resulting in the assets becoming insufficient to pay off the debts of the company;
- when the number of shareholders remain at only one member after six months; and
- when the first GMS has not been conducted to approve all legal acts committed by the shareholder before the company became a legal entity.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The Indonesian Company Law provides the following rights of enforcement to the shareholders:

(a) The right to file a claim towards the company (at a district court), if a shareholder experiences loss and deems that the GMS, BOD, and/or BOC pass an un-just and un-reasonable resolution.

(b) One or more shareholder(s), whom represent at least 1/10 of all shares, with a voting right may file a written request to a district court (where the company is domiciled) to conduct an investigation upon the company, for any alleged:

(i) tort act by the company that causes losses to the shareholder(s) or third party(ies); or

(ii) tort act by the BOD or BOC (and/or its members) that causes losses to the company, the shareholder(s), or third party(ies).

(c) The right to request the company buys back its shares if the shareholder(s) disagree with any of the following actions of the company, following an action that causes a loss to the shareholder(s) of the company:

- amend the company's articles of association;
- transfer or encumber the company's asset exceeding 50% of the company's net asset; or
- merger, consolidation, acquisition, or division of the company.

Certain additional requirements apply for a buy-back scenario and the number of buy-back shares must not exceed 10% of the issued and paid-up capital. The company must procure third party(ies) to purchase the remaining shares (if any).

The OJK regulations require for a public company to disclose information of the buy-back to the public and the OJK. This must be done within two days of the GMS approving the buy-back, consisting of:

(i) description for buy-back of shares;

(ii) name of shareholders;

(iii) share prices and pricing procedures; and

(iv) buy-back period.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Under the OJK regulation, a shareholder who owns 5% or more shares (directly or indirectly) in a public company, is required to report such ownership to the OJK at the latest 10 days (or five days if the report is submitted by an attorney) after the transaction occurs.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Generally, no, except for a public company, there is a requirement to disclose material information/facts (i.e. any important or relevant information/facts regarding events that may affect the price of securities and/or the decision of investors, prospective investors or any other party concerned over such information/facts, including any plan for holding a GMS), to the OJK and announce the material information/facts to public.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The BOD is responsible for the day-to-day management of an Indonesian limited liability company. This includes representing the company inside or outside the court. This management duty, is supervised by the BOC. For public companies, the OJK rule requires the BOD and BOC of a public company to consist of at least two persons/members.

While the Indonesian Company Law mandates that the management role must be performed by the BOD, it does provide certain exceptions and/or additional requirements which includes:

a) Any member of the BOD who (i) has an ongoing dispute with the company in a court, or (ii) has a conflict of interest with the company, may not represent the company. In this case, the Company must be represented by the BOC, other Director [it is possible for the company to be represented by more than one director] with no conflict of interest, or other party appointed by the GMS [it is possible for the company to be represented by more than one party] (in case all member of the BOD/BOC have conflict of interest with the company).

(b) For any transfer or encumbrance of company's asset exceeding 50% of the company's net asset, the BOD must first obtain approval from the GMS.

The shareholders can provide a stricter rule to those provided under the Indonesian Company Law in their company's Articles of Association.

For public companies, the OJK rule also requires a Corporate Secretary to assist the BOD and BOC with, among others, the implementation of corporate governance, as follows:

- to disclose information to the public, including on the public company's [this should refer to the website of the public company] website;
- submission of a report to the OJK on a timely basis;
- arrangement and documentation of GMS;
- arrangement and documentation of BOD and/or BOC meeting; and
- implementation of an induction programme for the BOD and/or BOC.

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

The GMS should appoint and remove members of the BOD and BOC. For certain financial service sectors, the OJK requires a fit and proper test before members of the BOD/BOC can be appointed.

Indonesian Company Law allows a BOC to temporarily suspend any members of BOD by giving the relevant BOD member a prior written notice, stating the reason of suspension (during such suspension period the relevant member of the BOD is prohibited from representing the company and performing their management duties and role as a BOD member). Within 30 days as of the effective date of suspension, the company must hold a GMS either to remove or affirm the suspension. If the resolution of the GMS affirms the suspension, such member of the BOD will be permanently discharged; however, if within the 30-day period no GMS is held, or the GMS fails to reach a resolution, the suspension will be automatically cancelled. In relation to the foregoing, the same general rules apply for public companies, but the OJK rule provides a longer period for a public company to hold the GMS, i.e. within 90 days as of the temporary suspension date. In addition, the public company must disclose the information to the public and report to the OJK.

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

Remuneration of BOD/BOC members is determined by the shareholders in the GMS (for BOD members the authority of the GMS to determine remuneration can be delegated to the BOC).

The Indonesian Company Law and Indonesian civil code specifically impact contracts with the BOD/BOC (Indonesian manpower laws and regulations do not apply for BOD/BOC members as they are not deemed as employees within the context of Indonesian manpower law).

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

The Indonesian Company Law provides no limitation for the BOD or BOC to hold shares/securities in the company or any other company. In this case, the Indonesian Company Law mandates the BOD to maintain a special shareholders register which contains detail on shares/securities that members of the BOD or BOC (as well as their family member (wife, husband, and/or children)) holds in the company or any other company.

For public companies, under the OJK regulation, members of the BOD or BOC are required to report their ownership and any change to their ownership of the public company's shares (directly or indirectly) to the OJK.

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

For non-public companies, there are no specific procedures required by the Indonesian Company Law to convene the BOD (or members of the management body) meetings and therefore the procedure can be freely determined in the company's Articles of Association. For public companies, the OJK regulations require a BOD meeting to be held at least once a year with notice sent to the members at least five days before the scheduled meeting which must be attended by at least a majority of the members. In addition, public companies are also required to hold a join BOD-BOC meeting at least once every quarter.

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

The BOD of the company is generally entitled and authorised to manage the company in good faith and full responsibility within and outside the court in all matters and in all events, to the extent there is no ongoing court case or conflict of interest between the Director and the company. In the event the BOD is guilty or in negligence for performing its duties, each member of the BOD (jointly liable in case there is more than one member of the BOD) shall be fully liable personally for the loss of the company.

Some of director(s)' duties specifically set out under Indonesian Company Law are elaborated in question 3.7 below.

Members of the BOD are jointly and severally liable for, among others, the following events:

- losses incurred by good faith shareholders arising from a buy-back which is void by law; and
- any losses incurred by the company in the event the shareholders are unable to return the interim dividends, in which the BOD, together with BOC, of the company shall be responsible for these losses.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Specific duties mandated by the Indonesian Company Law to the BOD or BOC of a company are:

a) BOD, among others:
   (i) to perform a managerial role and represent the company inside or outside the court (including representing the company as a contracting party);
   (ii) to create and maintain a shareholder register, special shareholder register, minutes of the GMS, and minutes of the BOD meeting;
   (iii) to prepare an annual business plan, annual report and other financial documents;
   (iv) subject to review by the BOC, to prepare and obtain approval from the GMS for the annual report of the preceding financial year within a period of no more than six months after the financial year ends;
   (v) to maintain all documents, minutes, and financial documents in the company's domicile;
   (vi) to disclose/report to the company, on his/her/families' share ownership in the company or other company, to be registered in a special shareholder register; and
   (vii) to convene an AGMS and EGMS based on the request of: (a) shareholder(s) having 1/10 (one-tenth) or more shares with voting rights; or (b) BOC.

b) BOC, among others:
   (i) to perform a supervisory role in the policy and management of the company and give advice to the BOD;
   (ii) to disclose/report to the company, on his/her/families' share ownership in the company or other company, to be registered in a special shareholder register;
   (iii) to maintain the minutes of the BOC meeting;
   (iv) to report the result of its supervision duty during the preceding financial year;
   (v) to review the company's annual report prepared by the BOD; and
   (vi) to represent the company, in case (a) all members of BOD have a conflict of interest with the company, and/or (b) there are currently no BOD members that are available (due to vacancy of all BOD positions or unavailability).

From the perspective of a compliance issue, the key challenges are to maintain updated internal rules in accordance to the everchanging regulations. Many non-compliance issues occur due to ignorance of the legal compliance division of a company on the issuance of new regulations instead of intentional negligence. This is especially true for companies in the financial sector which is heavily regulated.

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

There is no prohibition under Indonesian Company Law to provide insurance or indemnity to BOD and BOC members.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Indonesian Company Law sets a general and broad authority to the BOD to represent the company inside or outside a court (but

subject to limitations provided in its Articles of Association). This means that the BOD has an important role in setting the course and changing the strategy of the company.

4 Other Stakeholders

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

Indonesian Company Law does not specifically determine the role of employees in the corporate governance of a company.

Nonetheless, in practice, it is not uncommon for a company to disclose, discuss and negotiate certain management matters with their employees or the labour unions (if any), as factually employees become one of the most important elements in implementing good corporate governance in the company.

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

There are no specific roles of shareholders in corporate governance under the Indonesian Company Law. However, certain corporate actions of the Company must first be approved in the GMS as elaborated in question 2.1 above.

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

Indonesian Company Law and its specific implementing regulation (i.e. Government Regulation No. 47 of 2012 concerning Social and Environmental Responsibility of Limited Liability Companies) mandate companies that are engaged in the business field of or related to natural resources to implement Corporate Social Responsibility ("**CSR**") programmes. The implementation of such programme is conducted by the BOD of the company, based on the company's annual plan upon being approved by the BOC or GMS of the company. Both regulations state that failure to do the same shall be subject to sanctions under the laws and regulations, but without specifically mentioning the details of such sanction.

In addition, there is also a CSR obligation which is regulated under Indonesian Investment Law applied to investment companies (either domestic or foreign). Its elucidation defines CSR as "*responsibility that is attached to every investment company to maintain and create a harmonious and balanced relationship with local communities in accordance with the environment, values, norms and culture of the surrounding communities*". Failure to comply with this obligation may result in certain administrative sanctions.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The BOD with the supervision of the BOC is responsible for the disclosure and transparency of a company.

For public companies, in addition to the BOD, certain disclosure should be conducted by their Corporate Secretary (provided that they have been authorised to do so by the BOD).

5.2 What corporate governance-related disclosures are required?

The Decision of the Minister of Industry and Trade No. 121/MPP/Kep/2/2002 concerning the Provisions of Annual Financial Report of Company Submission requires an Indonesian company with the following criteria to submit the Company's Annual Financial Statement (*Laporan Keuangan Tahunan Perusahaan* – "**LKTP**") and company profile (signed by management of the company and affixed by company stamp) to the Ministry of Trade:

(a) (i) public company, (ii) a PT engaging in public fund raising – excluding Bank Perkreditan Rakyat ("**BPR**"), (iii) a PT issuing any acknowledgments of indebtedness, (iv) a PT having total assets of at least Rp 25,000,000,000, or (v) a PT which is a debtor and whose annual financial statements are audited by its bank;

(b) a PMA company; or

(c) a State-owned Limited Liability Company (*Persero*), Public Corporation (*Perum*), and Regional State-Owned Company (*Perusahaan Daerah*).

Specifically for public companies, OJK regulations require them to disclose, incidentally, any material information/facts which could affect the value of their securities and/or the investor's decision within two working days of the existence of said material information/fact. In addition, they are required to procure certain reporting and disclosure periodically, and/or for specific corporate actions, among others, as follows:

(i) annual report (i.e., accountability report by the BOD and BOC relating to the management and supervisory of the public company);

(ii) annual financial report and semi-annual financial report;

(iii) appointment and replacement of corporate secretary;

(iv) report on the performance of duties of the remuneration and nomination committee (if a remuneration and nomination committed is established);

(v) the GMS agenda and minutes of the GMS;

(vi) increase in capital with or without rights issue;

(vii) voluntary tender offer;

(viii) public company takeover;

(ix) public company merger and consolidation;

(x) buy-back shares;

(xi) Material Transactions; and

(xii) Affiliated Transactions.

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

An independent auditor will perform an audit of the Annual Financial Report in question 5.2 to be submitted to the Ministry of Trade and specifically for companies under categories # (a) and (b) in question 5.2 above. An independent auditor may also represent the company in submitting the report on behalf of the company.

For public companies, the legal auditor will perform a legal audit and issue a legal opinion.

5.4 What corporate governance-related information should be published on websites?

There are no requirements of mandatory disclosure to be published on websites by private companies.

For public companies, specific corporate governance-related information must be available on the website. These are, among others:

- The BOD and BOC working guidelines.
- Appointment and replacement of Corporate Secretary and Audit Committee.
- Company Ethics Codes.
- Audit Committee Charter.
- Committee's working guidelines.
- Management Risk Policy.
- Procedures for nomination and remuneration.

In addition, the disclosure of material information/facts by a public company must also be announced to public through the public company's website, in Indonesian or a foreign language (at least in English).

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The authors would like to acknowledge the assistance of their colleague Venny Iswanto in the preparation of this chapter. Ms. Venny Iswanto has a law degree and completed her notarial law programme from Pelita Harapan University (UPH), where she obtained *cum laude* predicate for both degrees. During her university years, she represented the University in various legal debate competitions and served as a President of the Student Senate of Faculty of Law UPH.

Fiesta Victoria
Walalangi & Partners
Pacific Century Place 19th floor
Jalan Jenderal Sudirman Kav 52–53
SCBD Lot 10, Senayan, Kebayoran Baru
Jakarta Selatan, DKI Jakarta 12190
Indonesia

Tel: +62 811 9338 170
Email: Fvictoria@wplaws.com
URL: www.wplaws.com

Ms. Fiesta Victoria is an Indonesian qualified lawyer, and expert in M&A, Corporate Restructuring, Real Property, and employment issues with more than 10 years of experience, focusing on finance companies and fintech business. She obtained her law degree from Pelita Harapan University, majoring in Business Law and received an award as "the Best Law Graduate Student of year 2007" with *cum laude* predicate.

Before joining Walalangi & Partners, she pursued her career in one of the largest corporate law firms in Indonesia.

Ms. Fiesta Victoria has been assisting various foreign companies (including Japanese trading and multi-finance companies) and one of the largest Indonesian state-owned banks on their complex investments, M&A (including assets and portfolio loans acquisitions), real property projects, and corporate restructurings. She has also represented leading global banking and financial groups on major transactions, from traditional acquisitions to complex assets and portfolio loans acquisitions as well as sophisticated fundraising projects.

T. Anggra Syah Reza
Walalangi & Partners
Pacific Century Place 19th floor
Jalan Jenderal Sudirman Kav 52–53
SCBD Lot 10, Senayan, Kebayoran Baru
Jakarta Selatan, DKI Jakarta 12190
Indonesia

Tel: +62 811 9338 165
Email: Treza@wplaws.com
URL: www.wplaws.com

Mr. T. Anggra Syah Reza has been practising law for more than seven years and has been involved in numerous M&A transactions, and Asset Acquisitions, as well as acted as advisory on matters related to Real Property, Construction, Peer to Peer Lending, Commerce, Telecommunication, and General Corporate Matters. He obtained his law degree from the University of Indonesia where he was also a member of the Student Executive Body and Asian Law Student Association. Before joining Walalangi & Partners, he was an associate in one of the largest corporate law firms in Indonesia.

Mr. T. Anggra Syah Reza has been assisting various foreign companies in their complex investments and acquisitions, real property projects in Indonesia and has been advising a number of prestigious real property companies as well as construction companies.

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Walalangi & Partners ("**W&P**") was founded by Mr. Luky I. Walalangi as a corporate law firm, which is acknowledged by its clients for its outstanding swift responsiveness, thorough analysis and clear out-of-the=box legal solutions and advice. The W&P team comprises prominent and qualified lawyers, led by Mr. Luky I. Walalangi, a highly regarded and leading lawyer in Corporate and Merger & Acquisition, as well as Banking & Finance, with more than 17 years of experience in law practices.

W&P is in association with Nishimura & Asahi ("**N&A**"), the largest law firm in Japan with more than 500 experts in various legal matters, including cross-border transactions and Asian practices. With this association and combination of talents, W&P offers extensive international resources and a highly responsive client support centre. W&P is working together with N&A to meet its clients' highest expectations and it focuses on supporting inbound investment and financing activities in a variety of sectors, with a particular focus on Japanese investment into Indonesia and domestic reputable clients.

Ireland

David Byers

McCann FitzGerald

Paul Heffernan

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter deals primarily with Irish incorporated companies with shares admitted to trading on the Main Market of Euronext Dublin (previously the Irish Stock Exchange) (the "Main Market", which is a regulated market) or listed on the Enterprise Securities Market ("ESM") of Euronext Dublin. Credit institutions and insurance undertakings are also referenced, given the focus of the Central Bank of Ireland ("CBI") in improving corporate governance standards.

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

The law is stated as of 9 May 2018. The primary corporate governance legislation is contained in the Companies Act 2014, as amended (the "Companies Act"). Irish incorporated companies with securities admitted to trading on a regulated market are subject to additional EU-based regulations, primarily the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 ("Shareholder Rights Regulations"), the Transparency (Directive 2004/109/EC) Regulations 2007 and the EU Market Abuse Regulation (596/2014) ("MAR").

MAR took effect on 3 July 2016 and extended the application of the existing market abuse and inside information regime beyond issuers with shares admitted to trading on EU-regulated markets, such as the Main Market, to include issuers of securities traded on multilateral trading facilities, including the ESM.

An Irish incorporated company is also subject to its memorandum and articles of association. The memorandum of association sets out the principal objects of the company, whilst the articles of association set out the internal regulations regarding matters such as shareholder meetings, voting rights and powers and duties of directors. Under the Companies Act, a new type of private limited company has a one-document "constitution", whereas other companies continue to have a constitution comprising a memorandum and articles of association.

Companies listed on the Official List of Euronext Dublin must adhere, on a "comply or explain" basis, to the corporate governance principles set out in the UK Corporate Governance Code as supplemented by the Irish Corporate Governance Annex published by Euronext Dublin (together, the "Corporate Governance Code").

Irish companies listed on the ESM will generally seek voluntarily to comply insofar as possible, or disclose non-compliance, with the Corporate Governance Code or the Corporate Governance Guidelines for small quoted companies (a non-mandatory Code).

Financial institutions are also required to comply with the Corporate Governance Requirements published by the CBI. In the private sector, there are a significant number of companies which are State-owned, and these must comply with the Code of Practice for the Governance of State Bodies (last updated in 2016).

Guidelines and pronouncements of shareholder representative organisations (such as the Irish Association of Investment Managers) on corporate governance practices, while not having the force of law, are usually observed.

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

The CBI has stringent corporate governance requirements for all Irish credit institutions, insurance undertakings and captive insurance/reinsurance undertakings, which were updated in 2015. Fitness and probity requirements apply in respect of the appointment of directors and senior managers. CBI approval is required prior to appointment to key roles.

The EU (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 were introduced on 21 August 2017. The obligations to provide the non-financial information and a diversity report are "comply or explain" in nature and apply to any company that is a "large company", has an average number of employees exceeding 500 and is an "ineligible entity". An "ineligible entity" includes a company traded on a regulated market or a credit institution or insurance undertaking. The Regulations require "large companies" traded on a regulated market to include in their financial statements a report on its diversity policy and apply to financial years beginning on or after 1 August 2017.

The Companies Act:

- defines a "large company" as a company fulfilling at least two of the three requirements (balance sheet total more than €20m, turnover more than €40m, average number of employees more than 250);
- requires "relevant companies" (balance sheet total more than €25m and turnover more than €50m) to have an audit committee (although many of those companies have an audit committee, in any event, under the codes referred to above or to comply with best practice); and
- requires PLCs and certain other limited companies (balance sheet total more than €12.5m and turnover more than €25m) to include a directors' compliance statement in their annual report to confirm that the company has certain arrangements

or structures in place to ensure compliance with tax law and significant company law obligations.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Companies managed for the short-term make decisions almost exclusively with short-term shareholder value in mind. Ireland generally adopts a shareholder value approach to governance and this has led, in some companies, to directors seeking to maximise short-term profits. This can cause excessive risk taking by directors at the expense of other stakeholders and at the expense of long-term projects, strategies, investment and sustainability. Such behaviour has been blamed, in part, for the financial crisis.

However, with increased emphasis on corporate governance and transparency in the Companies Act, non-financial reporting discussed at question 1.3 and larger companies attempting to apply sustainability in relation to their business models, there is now increased engagement with shareholders and with other stakeholders. By complying with the UK Stewardship Code (mentioned in question 2.2 below) companies aim to protect the long-term success of companies but in such a way that means the ultimate providers of the capital also profit.

The longer term viability statement set out in the Corporate Governance Code is also a key focus, as is the fact that remuneration policies should be designed to deliver long-term benefits to the company as opposed to short-term benefits to management.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The day-to-day operation and management of an Irish company is usually entrusted to its board of directors by shareholders under the memorandum and articles of association. The ability of shareholders to remove and appoint directors is the principal power of shareholders to influence the operation and management of the company. Company law and various requirements in the Listing Rules of Euronext Dublin (the "Listing Rules"), as well as the Corporate Governance Code, require certain rights and powers to be reserved to shareholders.

The Listing Rules impose various requirements for shareholder approval in respect of significant corporate transactions for companies on the Main Market. These requirements for shareholder approval are more relaxed in the case of the ESM.

Company law also regulates potential conflicts of interest by requiring certain transactions between a company and its directors (and connected persons) to be approved by shareholders. Shareholders also have the right to requisition the convening of shareholder meetings for the purpose of proposing resolutions which seek to direct the board to undertake certain actions. For companies listed on the Main Market, a shareholder or a group of shareholders holding at least 5% of the issued share capital may requisition the convening of such meetings. For other companies, the threshold is 10% of the issued share capital. Importantly, the ability of shareholders to direct the board to undertake certain actions is limited where that matter is already reserved for the exclusive determination of the board under the articles of association.

Shareholders may oppose management proposals (in the form of resolutions proposed at general meetings) by seeking to amend resolutions, as well as by speaking and voting against any particular resolution. Particular rules in the Companies Act, the articles of association and case law, regulate a shareholder's ability to put amendments to resolutions.

Under the Shareholder Rights Regulations, members of a company traded on an EU-regulated market, holding 3% of the voting share capital, are given a statutory right to put items on the agenda of the annual general meeting ("AGM").

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders have a key role in, but have no particular responsibility for, corporate governance. EU and domestic legislative and non-legislative initiatives have sought to encourage more active shareholder participation in corporate governance. The UK Stewardship Code for institutional investors (the "UK Stewardship Code") is also applicable to Irish-listed companies and seeks to encourage a more meaningful relationship between institutional investors and investee companies.

Various shareholder advisory services review corporate governance practices in companies prior to their AGMs. Increasingly, Irish listed companies consult on a private basis with one or more key shareholder advisory services to ensure that their corporate governance standards meet the relevant requirements.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

All Irish companies must hold an AGM within 18 months of their incorporation, and thereafter, the gap between AGMs may not exceed 15 months. Additional meetings, known as extraordinary general meetings ("EGMs"), are held as required. For companies traded on an EU-regulated market, the standard notice period for general meetings is 21 clear days, save that the company may convene a general meeting (other than an AGM or a meeting to consider a special resolution – a resolution which requires a 75% majority vote) on 14 days' clear notice if that flexibility has been granted by shareholders at a preceding general meeting.

The business of the AGM is typically the consideration of the annual report and financial statements, the declaration of dividends, the re-election of directors, the fixing of the remuneration of the auditors and of the ordinary remuneration of the directors and a review of the company's affairs.

The notice of any meeting must describe the nature of the business and must be circulated to all shareholders at least 21 clear days prior to the meeting (for an AGM or a resolution to pass a special resolution). Shareholders in companies traded on a regulated market who hold 3% or more of the issued share capital of the company have the right to put an item on the agenda of the AGM. Such a request is to be received not less than 42 days before the meeting, in order to allow notice of the resolution to be sent to all shareholders before the meeting. For other companies, shareholders will not, generally, have a right to propose resolutions at an AGM, unless allowed by the articles of association.

An EGM will also be convened by the directors where a company is undertaking a transaction which requires shareholder approval. Shareholders holding at least 5% of the issued share capital of the company, in the case of companies traded on a regulated market, or 10% of the issued share capital of the company in all other cases, can

also requisition the convening of an EGM. Under the Companies Act, unless the company's constitution states otherwise, 50% of shareholders can convene a general meeting (this right is separate to the ability to requisition the convening of such a meeting).

To be passed, resolutions at general meetings either require approval as an ordinary resolution (requiring a simple majority) or as a special resolution (requiring a majority of not less than 75%).

Voting on a show of hands is permitted with members above a threshold having the right to demand a poll.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The main duty of a shareholder is to pay the company any amount which remains outstanding in respect of the price agreed for the share in the original allotment. This sum becomes payable when a call is made, or where the terms of issue provide for the payment in instalments, on the payment date. Shareholders in a company with unlimited liability are liable without limit for the debts of the company where it is insolvent i.e. unable to pay its debts. Shareholders' agreements may be used to impose duties and obligations on shareholders and may include obligations that could not be imposed by the company's constitution or obligations which would otherwise not arise under legislation.

Where a company has a significant shareholder and that shareholder can be shown to have exercised significant influence over the board, it is possible under Irish law for the shareholder to be regarded as a 'shadow director'. In those circumstances, the shareholder could have the same duties and liability as a director on certain issues including potential personal liability. The Companies Act provides that a body corporate is not to be regarded as a shadow director of any of its subsidiaries.

Companies listed on Euronext Dublin will be limited liability companies so that shareholders will usually have no liability for the acts or omissions of the company. Shareholders who are parties or beneficiaries in matters that constitute a breach of the Companies Act (for example, fraudulent trading by a company) can be liable to make good the company.

For takeovers, there are also provisions which can result in liability for shareholders where they are shown to be acting in concert with the company or its board in undertaking an activity in breach of the Rules of the Irish Takeover Panel. Liability can also arise under MAR where a shareholder deals in the company's shares or related securities after receiving confidential price-sensitive information from the company – so-called inside information.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

No direct shareholder suits are permitted. Shareholders can seek permission to launch derivative actions, but such actions are difficult to bring, as stringent requirements for such proceedings are strictly enforced. The courts are reluctant to interfere in the internal management of a company and adhere to the principle that the proper claimant in an action in respect of a wrong done to the company is the company itself. Shareholders will more likely bring a claim for minority oppression (that is, where the affairs of the company are being conducted in a manner oppressive to members, or in disregard of their interests).

The Director of Corporate Enforcement ("DCE") has significant powers under the Companies Act to enforce compliance with company law by the directors of a company. Shareholders may make complaints to the DCE if they believe that the board is not complying with its statutory obligations. The DCE will decide whether to investigate the matter.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

In respect of a company traded on a regulated market, shareholders or other persons are required by regulations implementing the EU Transparency Directive to make a public disclosure where they acquire, directly or indirectly, control of voting rights equal to 3% or more of the total voting rights. Additional disclosures are required if the holder increases or reduces his/her interests in the voting rights by a further 1%. The Companies Act contains a separate statutory regime for disclosure of interests in companies listed on non-regulated markets or unlisted public limited companies. The disclosure threshold under this regime is also 3% (and each 1% thereafter), but the category of interests that are required to be disclosed is wider.

Irish company law and the articles of association of a company may require shareholders to disclose details of beneficial interests held in its shares. The EU (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 require most Irish companies to gather and maintain information on individuals described as their ultimate beneficial owners. Further regulations are expected mid-2018 to create publicly accessible national beneficial ownership registers.

Under the Rules of the Irish Takeover Panel, there are detailed restrictions and disclosure requirements regarding the acquisition of shares and interests in shares in a company while an offer for the company is underway or in contemplation.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

The UK Stewardship Code (mentioned in question 2.2 above) sets out good practice for institutional investors on engaging with the companies in which they invest. This includes reporting periodically on their stewardship and voting activities, disclosure of their policies on how they will discharge their stewardship activities such as engaging with companies, and the principle that they should be willing to act collectively with other investors where appropriate.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

All Irish companies are managed by a board of directors (two-tier boards do not exist in Ireland). Typically, articles of association state that the business of the company shall be managed by the directors who may exercise all powers of the company which are not by the Companies Act or the articles required to be exercised by the company in general meeting. Most types of companies must have at least two directors (who must be individuals of at least 18 years of age) but there is no limit on the number of directors that may be appointed unless this is specified in the articles of association. The

Companies Act allows a new type of private limited company to have one director (provided that a separate secretary is appointed).

Irish law provides that companies traded on a regulated market, or perhaps their parent, must have an audit committee, comprising at least one independent director with competence in auditing or accounting (as mentioned above, the Companies Act requires certain relevant companies to have such a committee). The Corporate Governance Code provides that such companies have an audit committee composed solely of persons who are regarded by the Code as independent non-executive directors and one of whom must have recent financial experience. Otherwise, there is no legal requirement for a board to be composed of persons with any particular background or skills. In practice, most listed companies will seek to have a majority of independent non-executive directors. These persons will in turn constitute the directors who are then appointed to the audit, remuneration and nomination committees of the board. The Irish Corporate Governance Annex published by Euronext Dublin places additional emphasis on the requirement for a board and its committees to have an appropriate balance of skills, experience, independence and knowledge of the company to enable the directors to discharge their respective duties and responsibilities effectively. Similar requirements apply to the boards of banks and insurance institutions subject to the CBI's requirements. The latter requirement goes further by limiting the number of directorships a director of such an entity may have.

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

The first directors will be appointed by the incorporators of the company and thereafter appointments are, generally, made by shareholders. Most boards will have a nomination committee which will have responsibility for identifying and recommending to the board suitable candidates for appointment to fill any vacancies on the board. A board will usually have the power to fill vacancies; however, any director appointed by a board is required, under conventional articles of association, to retire at the next AGM and, if willing, offer himself/herself for re-election. Shareholders can appoint directors to fill a vacancy by way of an ordinary resolution though this is, typically, subject to prescribed notice requirements in the articles of association (unless the person proposed for appointment has been recommended by the board). The Companies Act allows shareholders to remove any director by way of an ordinary resolution.

Increasingly, companies listed on the Main Market are adopting the practice of offering their entire boards for re-election at each AGM (by separate resolution for each director). For companies listed on other markets, their articles of association will normally provide that one-third of the board will retire by rotation at each AGM and will be eligible for re-election. Under the Corporate Governance Code, boards are expected to evaluate the performance of their directors on an annual basis and to confirm this to shareholders in their annual report.

It is also common for the articles of association to provide that an individual director may be required to resign by the unanimous decision of all of the other directors.

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

The Companies Act provides, for all companies, that any director's service contract with a fixed term of over five years must be approved by shareholders. In practice, most companies tend to follow the recommendation in the Corporate Governance Code which suggests that notice periods be set at one year or less. While the Companies Act requires companies to disclose the aggregate remuneration and benefits payable to all directors, companies tend to go further and disclose, and the Listing Rules require disclosure by Main Market listed companies of, remuneration and benefits on an individual basis in respect of each director. A company's annual report will also frequently contain a report from the remuneration committee which will provide information on a historic basis in respect of the company's policy on directors' remuneration including performance-related conditions and compensation received in the form of share options, share incentive schemes and pensions. It is now becoming common for Irish companies to ask shareholders to vote on an advisory non-binding 'say-on-pay' resolution, although there is no legal obligation to do so pending the entry into force, for companies with securities admitted to trading on an EU-regulated market, of the Amended Shareholder Rights Directive in 2019.

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

Directors are permitted to own shares in their companies and frequently do so in the case of listed companies. Subject to obtaining prior shareholder approval for the relevant option or incentive scheme, directors can be granted options or other forms of equity based incentive awards. Under the Companies Act, directors are obliged to disclose to the company any "interest" (a term widely defined) which he/she or certain connected persons hold in shares or debentures in the company and relevant group companies. Disclosure is not required where the aggregate interest held is less than 1%.

Companies listed on the Main Market or ESM will adopt a share dealing code which is in accordance with the requirements of MAR. Such share dealing codes impose restrictions on, as well as consent requirements for, share dealings which directors may wish to undertake in their company shares.

MAR expressly prohibits trading by directors and other "persons discharging managerial responsibilities" (which includes directors and their connected persons and senior management, "PDMRs") in "closed periods", save in limited and specified circumstances. PDMRs may not conduct transactions on their own account or for the account of a third party during a closed period of 30 calendar days before the announcement of an interim financial report or end-of-year report which the issuer is obliged to make public according to the rules of the trading venue on which the issuer's shares are admitted to trading or national law.

Under MAR, PDMRs of companies traded on a regulated market or ESM listed companies are required within three business days of any share dealing to notify the company of the dealing. The company must notify the market by way of a regulated announcement as soon as possible and no later than the end of the business day following receipt of the information. If a director has a large shareholding which is equal to or exceeds 3% of the issued share capital of the company, this must be notified to the company as well as any 1% change in such interest. The company must in turn notify this to the market.

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

The articles of association of a company invariably provide that a board meeting can be convened by reasonable notice by any director.

An agenda and relevant board papers are circulated (increasingly, by secure electronic means). In practice, boards will agree at the start of each year the schedule for board meetings throughout the rest of the year, and additional board meetings may be convened by the chairman where particular issues arise which need to be dealt with at short notice. Listed companies will usually set out in their annual report the number of board meetings held during the year (and committee meetings) and indicate the attendance levels of each director. Participation by phone and other electronic means is usually permitted for board meetings.

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

There are a large number of statutory requirements which must be complied with by directors. These include obligations under health and safety legislation, employment legislation, insolvency law and the Companies Act. Under the Companies Act, the principal duties of the directors include the obligation to maintain proper books and records that accurately record the affairs of the company, as well as the duty not to knowingly carry on the business of the company in a reckless manner in order that loss could be caused to creditors of the company. The Companies Act has codified certain duties of a director (which were previously common law fiduciary duties), namely the duties:

- to act in good faith;
- to exercise powers in the interest of the company for a proper purpose;
- to avoid conflicts of interests;
- not to misuse company property;
- to exercise reasonable care, skill and diligence; and
- not to restrict the director's power to exercise an independent judgment.

The Companies Act also codified the duty for a director to act honestly and responsibly in the conduct of the company's affairs and a duty to have regard to the interests of employees.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

A company's accounting records must correctly record its transactions and enable the financial position of the company to be determined at any time with reasonable accuracy. This is the primary statutory corporate governance duty of all directors and a director who deliberately or negligently fails to ensure compliance with this requirement can be guilty of an offence. The DCE (mentioned in question 2.5 above) will investigate claims that proper accounting records have not been maintained. For companies traded on a regulated market, directors are also under a statutory obligation to describe in their annual report the internal control and risk management systems which operate in the company, and they confirm that the effectiveness of these controls and systems has been reviewed.

Directors have a duty to ensure that the auditors have all information relevant for the audit. PLCs and other companies of a certain size have an obligation to put in place arrangements designed to ensure compliance with company and tax law (see question 1.3 above).

The Corporate Governance Code, and equivalent codes applicable to such companies, expects all directors to be collectively responsible for the success of the company by providing entrepreneurial leadership within a framework of prudent and effective control. The Corporate Governance Code requires the directors to maintain dialogue with shareholders based on the mutual understanding of objectives.

Government, regulators and investors all seek to ensure that Irish companies are well-governed by competent, professional and ethical boards in order that trust and confidence in the Irish business community is maintained. Issues of cyber-security, data protection and the identification and monitoring by companies of risk (not least implications of Brexit) are topical challenges for many Irish entities.

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

Companies are permitted to maintain insurance for directors and officers in respect of liability which they may incur as a consequence of being a director. The cover usually applies on a "claims made" basis. This insurance can cover defence costs but may not cover any criminal fines or regulatory penalties which may be imposed on a director. The Companies Act prohibits indemnities to directors where they seek to cover breach of duty or default. Articles of association of Irish companies invariably provide an indemnity for directors of the company; however, this indemnity (provided that it forms part of the appointment terms for the director) may only be called upon where a judgment has been given in favour of a director which either exonerates or relieves the director from any liability in respect of his or her actions. Therefore, the indemnity does not, as a general principle, allow the company to pay defence costs while the director might still have potential liability.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Corporate Governance Requirements published by the CBI (mentioned in question 1.2) require that in credit institutions, insurance undertakings, captive and non-captive insurance undertakings, the role of the board should include the setting and overseeing of business strategy. The role should also include, in credit institutions and insurance undertakings, setting the strategy for the on-going management of material risks. Generally, strategy formulation and its implementation through policy making is a key component of the board's task in directing the company. In formulating and updating strategy, the board considers the future of the company and its risk appetite and looks to both the company's internal business and the business, legal and regulatory environment in which the company operates.

4 Other Stakeholders

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

With the exception of some companies which are or have been owned by the Irish Government, there is no requirement to have employee representatives on the boards of Irish companies. Senior executives and members of the internal audit have a key role to play in the corporate governance of all Irish companies.

Whistle-blowing legislation was enacted during 2014 and facilitates an employee making a (good faith) disclosure where he/she has certain concerns (such as concerns that a company is breaching the law). In the financial services sector, certain individuals (such

as a director of a regulated company) have a mandatory reporting requirement to the Central Bank if he/she believes that their company is breaching financial services law.

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

The role of employees is dealt with at question 4.1, investor advisory groups at question 2.2. The role of Government as owner of state entities is reflected in the relevant legislation and the Code for State entities mentioned at question 1.2. Earlier parts of this Chapter considered the role of various regulators (for example, the CBI and DCE). The influence of other stakeholders is less direct in that companies with strong corporate governance enjoy a better reputation (and trading opportunities) with customers and creditors.

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

This is not a legal requirement; however, many Irish companies voluntarily report to their shareholders on an annual basis on CSR issues.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The board has a statutory obligation to ensure that the company complies with its transparency and disclosure obligations set out in the Companies Act, MAR and the Transparency Regulations. These obligations are less onerous for companies which are not traded on a regulated market. Both the annual report and the half-yearly report to shareholders will contain a responsibility statement on behalf of all of the directors, confirming the company's compliance with its obligations under the Transparency Regulations.

5.2 What corporate governance-related disclosures are required?

All companies must prepare and publish annual financial statements in the Companies Registration Office in Dublin in accordance with the Companies Act. The annual report will also contain a detailed narrative which describes the business of the company and its subsidiaries during the financial year.

The directors' report must contain a fair review of the development and performance of the company's business and of its position during the financial year, together with a description of the principal risks and uncertainties that the company faces. As described at question 1.3 above, the non-financial statement in the directors' report must include information necessary to understand the development, performance, position and impact of the company's activity on "required matters", which include environmental matters and social and employee matters. The diversity report on the company's diversity policy must be included in the corporate governance statement in the directors' report.

As described in question 3.7 above, companies traded on a regulated market must publish in their annual report a corporate governance statement including disclosures regarding the main features of the company's internal control and risk management systems.

Companies traded on a regulated market are required to state in their annual report what governance code has been adopted by the company and how they have complied with the code. Most companies comply with this obligation by setting out a lengthy corporate governance report in their annual report. This report will deal with the structure and role of the board and the division of responsibilities between the board and its committees. Certain companies of a particular size are required to publish details of a directors' compliance statement (see question 1.3 above).

The Companies Act requires "large companies", large groups and public-interest companies involved in logging, exploration, mining or quarrying industries to prepare and file each year an "entity payment report" setting out details of payments of €100,000 or more made to governments.

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

Companies traded on a regulated market must ensure that their auditors state in the annual audit report whether, in their opinion, the description in the corporate governance statement of the main features of the internal control and risk management systems of the company is consistent with the process for preparing the company's consolidated financial statements. The Regulations referred to in question 1.3 above extend this obligation, on the statutory auditors, to the diversity report.

Generally, an auditor is required by law to report to the audit committee (where relevant) on key matters arising from the statutory audit, and, in particular, on material weaknesses in internal control in relation to the financial reporting process.

The Corporate Governance Code also requires the company to ensure that the auditors review a number of issues before the annual report is published. This review includes the statement by the directors that the business is a going concern, as well as the board's corporate governance report insofar as it relates to the duty of directors to explain in the annual report their responsibility for preparing the financial statements.

Auditors have specific duties under the Companies Act to check that directors comply with disclosure obligations concerning interests in shares and other matters. Where an auditor has reason to believe that a specified offence (under the Companies Act or a serious market abuse offence, a prospectus offence or a serious transparency offence) may have been committed, the auditor is obliged to report the matter to the DCE; failure to do so can lead to prosecution of the auditor.

EU Statutory Audit Regulations, applicable to certain public-interest entities, which first came into force and applied from 2010, came into effect in 2016 as did the more widely applicable provisions of the EU Statutory Audits Directive.

5.4 What corporate governance-related information should be published on websites?

Under the Shareholder Rights Regulations, companies listed on a regulated market are required to provide a summary of the rights of shareholders in respect of voting and attending shareholder meetings, as well as their rights to propose resolutions and ask questions at the meeting. Companies must also maintain on their website, for a period of five years, regulated disclosures which they may make from time to time.

As required by the Corporate Governance Code, relevant companies also publish on their website the terms of reference of their nomination, remuneration and audit committees.

After any shareholder meeting, it is a legal requirement for a company traded on a regulated market to publish on its website the results of any voting conducted at the meeting. Most listed companies will voluntarily provide other information such as a copy of the articles of association of the company, as well as notices issued in respect of shareholder meetings on other websites.

Non-listed companies tend to include some corporate-related information on their websites, but typically not information that is not otherwise publicly available or which is trade-sensitive.

David Byers
McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Dublin 2
D02 X576
Ireland

Tel: *+353 1 607 1365*
Fax: *+353 1 829 0010*
Email: *david.byers@mccannfitzgerald.com*
URL: *www.mccannfitzgerald.com*

David is a corporate lawyer, specialising in mergers and acquisitions, public company takeovers, IPOs and equity issues by public companies, demergers and restructurings. David advises financial institutions and other market participants on regulatory issues, including market abuse, corporate governance and compliance matters.

David is a frequent contributor on matters of securities and corporate law to a number of industry and legal journals, as well as mainstream media published in Ireland and internationally.

He has been a member of the expert groups established by the Irish Stock Exchange which advised on the implementation in Ireland of the EU Prospectus, Market Abuse and Transparency Directives. David is a member of the Irish Stock Exchange's equity listing committee.

Paul Heffernan
McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Dublin 2
D02 X576
Ireland

Tel: *+353 1 607 1326*
Fax: *+353 1 829 0010*
Email: *paul.heffernan@mccannfitzgerald.com*
URL: *www.mccannfitzgerald.com*

Paul's work spans a broad range of corporate activity including mergers and acquisitions, corporate reorganisations and corporate matters relating to insurance undertakings. He advises a range of State and public sector entities. He is experienced in advising on all aspects of corporate governance.

Paul is a member of the Institute of Directors in Ireland and is on the Institute's legal panel for members. He speaks regularly within the firm and at external events on a range of company law and corporate governance topics.

McCann FitzGerald

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Italy

Dario Trevisan

Paolo Preda

Trevisan & Associati

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

In principle, corporate governance is relevant to any type of company.

Nevertheless, since the joint stock companies (*Società per Azioni* – "SpA") is the most common form for listed companies in Italy, this chapter will mainly focus on such corporate type.

Certain references will also be made to limited liability companies (*Società a responsabilità limitata* – "Srl") since, even though such kind of company may not be listed, it represents the most common company type adopted in Italy.

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

The Italian civil code ("ICC") is the main corporate governance source for any type of Italian company. Additionally, upon incorporation any company must adopt its by-laws, which set forth the main rules regarding, *inter alia*, the management body, its composition, its role and its functioning.

Listed companies are subject also to the following rules: Legislative Decree no. 58/1998 (*Testo Unico della Finanza* – "TUF"), regulatory provisions issued by *Commissione Nazionale per le Società e la Borsa* – "Consob" (the Italian authority which is responsible for the supervision of the Italian securities market) or by *Borsa Italiana S.p.A.* (the company managing the Italian stock exchange), and related secondary regulations.

Moreover, listed companies may voluntarily adopt a self-regulation Corporate Governance Code (the "Code"), issued by the Corporate Governance Committee of *Borsa Italiana S.p.A.* The Code is based upon the "comply or explain" principle: companies are free to decide whether to follow the recommendations or not; in case of any deviation, they are required to give an explanation for the benefit of shareholders, investors and the market.

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

Several issues of corporate governance which have already been of essence in the last years continue to remain topical and material. Gender diversity and remuneration of executive directors and management (in particular in case of the state-owned public companies), are still of relevance. Also the necessity to create value for the shareholders over a medium-long term period is a topical issue (see question 1.4).

Moreover, the recent reformation of the insolvency law (still to be implemented) provides for a central role of the management in each and any phase of the crisis, from the very beginning: only in case the crisis is revealed at a very early stage, the business value and the going concern might be properly safeguarded. In order to do so, the management must implement an appropriate corporate governance system.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

After the economic crisis of the recent years, one of the major challenge in corporate governance in Italy is to place priority on creating value for the shareholders over a medium-long-term period. The Code expressly provides that, among its duties, the board of directors shall define the risk profile – as to both nature and level of risks – consistently with the issuer's strategic objectives, taking into account any risk that may affect the sustainability of the business in a medium-long-term perspective.

Guaranteeing that the business continues to be a going concern, in order to safeguard its value, is strategic also under the perspective of the insolvency law. This law has been widely reformed in the last year, by approving a number of general principles, to be implemented by the adoption of new specific rules currently under discussion. According to the spirit of the reformation, the management must act with a long-term perspective, in order to guarantee that the business can maintain its value, avoiding any short-termism attitude, which might create a damage to the stakeholders (shareholders, employees, creditors, etc.) and to the company itself.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Even though the management of the company is reserved to the management body, shareholders have certain rights, which can

influence and impact the operation and management of the corporate entities, such as: approval of the yearly financial statements; allocation of profits; any extraordinary transactions (merger, de-merger, winding-up, reorganisation and dissolution of the company); and increase or decrease of the corporate capital.

Furthermore, in SpA, shareholders have the right to inspect corporate books and make copies of them (art. 2422 ICC) and to challenge the resolutions of the management body that infringe and cause damage to the shareholders' rights (art. 2388, section 4, ICC).

As to Srl, quotaholders who do not manage the company are entitled to receive information on the company's business and consult corporate books and documents relating to the management (art. 2476, section 2, ICC). Moreover, by-laws can empower specific quotaholders with management powers (art. 2468, section 3, ICC). Finally, directors can request that the quotaholders resolve on specific issues that are usually reserved to the management body (art. 2479 ICC).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

No specific responsibility is provided for on the shareholders regarding corporate governance; consequently, they cannot be held responsible in this respect.

In any case, as to the listed companies, the Code recommends the management body takes initiatives aimed at promoting the broadest participation possible from the shareholders in the shareholders' meetings and makes the exercise of their rights easier to help develop a continuing dialogue with the shareholders.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

In SpA, shareholders' meeting may be ordinary or extraordinary.

Meetings are called by the directors; shareholders representing 10% of the capital (5% for listed companies) have the right to request the directors to call a meeting or add specific items to the agenda.

Ordinary shareholders' meetings

Ordinary meetings must be held at least once a year, no later than 120 days after the end of the previous fiscal year. In case of specific needs (based on the structure or the activity of the company), by-laws may extend such term to 180 days.

Among others, the following resolutions are reserved to the ordinary meeting:

- approving the yearly financial statements and distribution of profits;
- appointing and revoking directors and auditors and, if appointed, the external auditors; and
- determining directors' and auditors' remuneration.

Ordinary meetings are duly constituted with the presence of as many shareholders as representing at least ½ of the corporate capital; resolutions are taken with as many votes as those representing the absolute majority of those in attendance (unless otherwise indicated in the by-laws).

Extraordinary shareholders' meetings

Among others, the following resolutions are reserved to the extraordinary meeting:

- amending the by-laws;
- appointing, replacing and defining the powers of the liquidators;
- issuing debentures convertible into shares; and
- carrying out merger, de-merger, winding-up and reorganisation.

Extraordinary meetings are duly constituted and lawfully adopt resolutions with the presence and the favourable vote of as many shareholders representing more than ½ of the corporate capital. In case of listed companies, resolutions are taken with as many votes as those representing ⅔ of the corporate capital present at the meeting.

Both ordinary and extraordinary meetings in second calls require lower *quorum*.

In Srl, among others, the following resolutions are reserved to the shareholders:

- approving the annual financial statements and distribution of profits;
- appointing directors;
- appointing auditors, if any;
- amending the by-laws; and
- entering into transactions which cause a substantial change to the corporate object or to the rights of the quotaholders.

Resolutions are taken with the favourable vote of as many quotaholders representing more than ½ of the corporate capital (unless otherwise indicated in the by-laws).

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

In principle, in SpAs and Srls, the only duty of the shareholders to the company is to carry out the contribution as specified in the constitutional deed (payment of money, contribution in kind, etc.).

As a general rule, the liability of the shareholders is limited to the amount of their capital contribution. Hence, shareholders cannot be liable for acts or omissions of the company: only directors have general and specific duties and responsibilities with respect to the corporate governance activities. As a partial derogation as to Srl, quotaholders may be kept liable jointly with directors, should they have intentionally voted or approved activities which damaged other quotaholders, third parties or the company itself.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The ICC provides specific enforcement actions against members of the management body; such actions can also be started by the shareholders (see the answer to question 3.6).

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

There is no limitation in relation to securities that shareholders may own in a company.

In case of listed companies, shareholders that hold, either indirectly, more than 3% of the capital (5% in case of a small-medium sized company) shall notify the company and the Consob (art. 120 TUF). A notification shall also be made when the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.6% and 90% are reached, and when the investment falls below such thresholds.

In case of cross-participations exceeding the above thresholds, the company that has exceeded the limit successively cannot exercise its right to vote related to the surplus shares and it must dispose of them within 12 months of the date on which it exceeded the limit. In the event of failure to make the disposal within such time limit, the suspension of voting rights shall apply to the entire shareholding (art. 121 TUF).

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

When acquiring a participation above the thresholds of 10%, 20% and 25%, in the notification as per question 2.6, the shareholders shall also have to specify the objectives it intends to pursue in the following six months, including whether it intends to (i) stop or continue its purchases, (ii) have an influence on the management of the company and, in such cases, the strategy it intends to adopt and the transactions to be carried out, and (iii) propose the integration or revocation of management body. Furthermore, the shareholders shall clarify as well its intentions as to any agreements and shareholders' agreements to which it is party (art. 120 TUF).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Italian companies are managed by the management body, which may have a number of different structures.

The management body of a listed company is comprised of several directors, which may operate in different ways:

i) Traditional system

The company is managed by a board of directors, while the control is carried out by the board of statutory auditors.

ii) Dual board system

The company is managed by the management board, which is controlled by the supervisory board.

iii) Monistic board system

The company is managed by a board of directors (executive directors), within which a supervisory committee is appointed (non-executive directors).

Among the listed companies, the traditional system is largely prevalent.

Non-listed SpAs, in addition to the systems described above, may also opt for a sole director.

Srls may be managed by a board of directors or by a sole director.

The system to be adopted is decided by the shareholders' meeting.

There is no limit on the number of directors that may be appointed, unless this is specified in the by-laws. If the by-laws do not specify the number of directors, but only provide for a maximum and minimum number, then the shareholders' meeting shall determine such number (art. 2380-*bis* ICC).

Either an individual (of at least 18 years of age) or a company can be appointed as a member of the management body.

The board may delegate part of its management and representation powers to one or more directors (managing directors) and/or to executive committees.

In general, there is no legal requirement for a board to be composed of persons with any particular background or skills. In case of specific business sectors (e.g. banks and insurance institutions), and in case of listed companies, additional emphasis is placed on the requirement for a board and its committees to have an appropriate balance of skills, experience, independence and knowledge to enable the directors to discharge their respective duties and responsibilities effectively.

The Chairman is entrusted with duties of organisation of the board's works and of liaison between executive and non-executive directors.

Even though there are no mandatory rules as to the separation of the functions of the Chairman and CEO, due to their different roles, best practice tends to separate them.

With regard to listed companies, the Code expressly recommends avoiding the concentration of corporate offices in one single individual. In the event that the Chairman is also the CEO, the Code suggests that the board designates an independent lead director, who coordinates the requests and contributions of non-executive directors and, in particular, of those who are independent.

For listed companies, the board must be comprised of executive and non-executive directors. Among the non-executive directors, an adequate number (in any case, not less than two) must be independent, *i.e.* they must not maintain, nor have recently maintained, directly or indirectly, any business relationships with the company, or persons linked to it, of such a significance as to influence their autonomous judgment.

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

Appointment:

i) Traditional system

The shareholders' meeting appoints the board of directors.

ii) Dual board system

The shareholders' meeting appoints the supervisory board, which must be comprised of at least three members.

The supervisory board in turn appoints the management board, which must be comprised of at least two members. At least one of the members of the supervisory board must be an auditor (*revisore legale dei conti*); by-laws may subordinate the appointment to further requirements of honourableness, professionalism and independence.

The members of the one board may not be members of the other.

iii) Monistic board system

The board of directors is appointed by the shareholders' meeting. At least ⅓ of the members must be independent.

The board appoints within its members the supervisory committee which, in case of listed companies, must be comprised of at least three members. Members of the committee must be independent and must meet the requirements of honourableness and professionalism as provided for by the by-laws; furthermore, they may not have any delegation of authorities, nor in general can they carry out any management activity of the company.

At least one of the member of the committee must be an auditor (*revisore legale dei conti*).

The appointment will be effective only upon acceptance by the relevant director.

In case of Srl, directors are appointed by the shareholders' meeting.

The term of the office in SpA shall not exceed three fiscal years. In Srl there is not any limit for the term of the office; the appointment may be also for an indefinite term.

In case of listed companies, by-laws must provide that directors are appointed on the basis of the list of candidates and define the minimum participation share required for their presentation (which must not be higher than 1/40 of the share capital). At least one of the directors shall be chosen among the minority list.

Furthermore, at least one of the directors must satisfy the independence requirements.

The board, at least on a yearly basis, shall perform an evaluation of its performance, as well as its size and composition, taking into account the professional competence, experience (including managerial experience) gender of its members and number of years as director. Based on this evaluation, it shall report its view to shareholders on the managerial and professional profiles, deemed appropriate for the composition of the board, prior to its nomination.

Additionally, the board shall appoint a nomination committee whose majority will be represented by independent directors. Said committee will perform a consultative and advisory role in the identification of the best composition of the board, indicating the professional figures whose presence may favour its correct and effective functioning.

In listed companies, by-laws must provide for mechanisms which assure that the less-represented gender obtains at least ⅓ of the appointed directors.

Co-optation:

i) Traditional system

Should during a fiscal year one or more directors cease their office, the others provide for their replacement by resolution approved by the board of statutory auditors, provided that the majority is always represented by directors appointed by the shareholders' meeting (art. 2386 ICC). The directors so appointed remain in office until the next shareholders' meeting. Should the majority of the directors cease their office, those who remain in office shall call a meeting to appoint the new directors.

By-laws may provide that in case of cessation of certain directors the entire board ceases to operate (so-called *simul stabunt simul cadent*).

ii) Dual board system

Should during a fiscal year one or more members of the supervisory board cease their office, the shareholders' meeting shall immediately provide for their replacement; should one or more members of the management board cease their office, the supervisory board shall immediately provide for their replacement.

iii) Monistic board system

Should during a fiscal year one or more members of the supervisory committee cease their office, the board shall immediately provide for their replacement by choosing any of the directors; should this not be possible, the same rules as for the traditional system shall apply.

Removal:

The members of the management body can be removed at any time from their office by resolution of the shareholders' meeting. Should the removal be without cause, the directors shall be entitled to receive an indemnification in principle equal to the remuneration that he/she would have received until the term of his/her office.

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

The remuneration of the directors is established by the shareholders' meeting upon their appointment. In case of a dualistic board system, the remuneration of members of the management board is established by the supervisory board.

Generally, a fixed amount or a variable remuneration with general indicators or benchmarks is provided for. Remuneration may be represented in whole or in part by profit sharing or by the attribution of the rights to subscribe shares to be issued at a predetermined price.

The remuneration of directors having special authorities (in particular, the CEO) is determined by the board of directors, having heard the opinion of the board of statutory auditors. Such opinion is non-binding; should the board want to deviate from it, it must justify such deviation.

If provided for by the by-laws, the shareholders' meeting can determine an aggregate remuneration for all directors, including the ones which have special authorities.

As to listed companies, the Code provides that the remuneration of directors and key management personnel shall be of sufficient amount to attract, retain and motivate people with the professional skills necessary to successfully manage the company.

Additionally, a material part of the remuneration of directors with managerial powers should be linked to the achievement of specific performance objectives; the remuneration of non-executive directors shall be proportional to the commitment required from each of them, also taking into account their participation in any committees.

The board of directors shall prepare on a yearly basis a report on remuneration, which must contain at least:

1. the policy on the remuneration of directors and key management personnel with reference to at least the following year and the procedures used to adopt and implement this policy; and
2. with reference to any directors and key management persons, a suitable representation of each of the items comprising his/her remuneration, illustrating any amount received, in any form, by the company and by subsidiaries or affiliated companies.

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

Directors are permitted to own shares in the companies they manage; there is no limitation of shares that may be owned by them.

Directors of a listed company (as well as any other persons performing management and supervisory functions) must inform Consob and the public of transactions involving the company's shares carried out by them, also indirectly, or by certain connected persons.

The shareholders' meeting may approve compensation plans based on financial instruments in favour of directors (and other managers), provided that the company makes available to the public a report specifying, *inter alia*, the procedures and clauses for the implementation of the plan and the restrictions on the availability of the shares or options allocated.

The use of insider information for any such transactions is strictly prohibited and constitutes a criminal offence.

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

A board's meeting is called by means of a notice of call to be sent to all the members of the management and control bodies. By-laws may provide that a meeting is also validly held without a formal notice, provided that all the members are in attendance or a majority is in attendance and those absent have been previously informed of the meeting.

In general, ICC requires at least one board meeting per year, for the annual approval of draft financial statements. Nevertheless, since the managing director(s) must report on the management (*i.e.* business) of the company to the board and to the auditors at least on a bi-annual basis, at least two meetings will be held.

In listed companies, meetings must be held at least on a quarterly basis. In any case, according to common practice, their frequency is significantly higher (approx. 8–10 meetings per year).

In any case, the chairman has the faculty to call a meeting whenever he/she deems it to be necessary. Furthermore, the chairman must call a meeting upon request of any director which specifies the issues to be dealt with. Additionally, in case of urgency any director is entitled to call a meeting of the board.

The chairman shall determine the agenda of the meeting and shall cause the relevant board papers to be circulated before the meeting.

In order to hold a valid meeting, at least the majority of the directors (or the higher percentage as provided for by the by-laws) must be in attendance. For passing resolutions, the favourable vote of the majority of directors in attendance (or the higher majority as provided for by the by-laws) is required.

By-laws may allow directors to participate in the meetings by phone or by other tele- or video-communication means.

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

The management body is responsible for the business activities of the company. In this capacity, directors must apply the due diligence of a proper and diligent businessman and must act in the best interests of the company and in compliance with the corporate purpose and with the duties provided by the law or by-laws.

In addition to the general duty of care, the ICC provides certain specific duties such as the: duty to be informed about the running of the business and, in turn, duty of the managing director(s) to inform other directors; duty to keep the corporate books in a correct way; duty not to compete with the company, unless in case of express authorisation from the shareholders' meeting; and duty to notify any conflict of interests. In addition, directors are required to ensure the company complies with obligations under health and safety legislation, employment legislation and insolvency law.

Directors are personally liable for breaches of duty. Even though, in principle, any director shall be liable only for his/her acts or omissions, Italian practice (in particular in case of insolvency procedures) try to extend a liability to the whole board.

The business judgment rule shall apply: directors shall not be held liable for the bad results of the management, provided that they act on the basis of adequate and accurate information.

A claim against the directors may be brought upon a resolution of the shareholders' meeting, within five years from the termination of their office. In order to safeguard the minorities, the claim may be exercised also by shareholders representing at least 1/5 of the capital (1/40 in the case of listed companies).

In the case of a dual board system, a claim may be brought either by the shareholders or by the supervisory board.

As a consequence of the corporate liability action, directors will be removed from their offices.

The company may waive this action and settle the claim against the directors, provided that the relevant resolution is not opposed by more than 1/5 of the capital (1/20 in case of listed companies).

Creditors may also bring an action against the directors, should they prove that the company's assets are insufficient for the satisfaction of their claims. Also in such a case the indemnification, if any, shall be paid to the company (and not to the creditors).

Finally, individual shareholders and third parties are entitled to be indemnified of damages directly caused to them by the directors (e.g.: an investor which subscribes a capital increase based upon financial statements which afterwards turn out to be false).

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The management body is empowered with any ordinary and extraordinary management powers.

A number of specific corporate governance duties are imposed upon it, including:

- setting the strategic aims, values and standards of the company;
- preparing the financial statements of the company;
- monitoring and reviewing the effectiveness of the board's committees;
- providing strategic guidance and evaluation on the overall adequacy of the internal control and risk management system;
- instigating initiatives aimed at promoting the broadest participation of the shareholders in the shareholders' meetings and make easier the exercise of the shareholders' rights; and
- developing an effective dialogue with the shareholders based on the understanding of their reciprocal roles.

As to the challenges, a particular focus is put upon risk management: the recent reformation of the insolvency law (still to be implemented) tend to provide for mechanisms aimed at identifying any material adverse changes to the economic and financial positions of the company at an early stage. To this end, a major role will be reserved for the management body.

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

Whilst a prior, general undertaking to indemnify the directors would not be valid since it would be undetermined and undefined, it is common that in cases where transactions involve a change of control, the company undertakes to waive any actions against the directors (which usually involve dismissal) and to keep them harmless and indemnified against any actions which any third parties might start against them in connection with their offices.

It is common practice in Italy that companies maintain insurance policies (so-called "D&O") for directors and officers in respect of civil liabilities, which they may incur in relation to the performance of their duties in office. Usually the company pays the insurance premium, which is considered to be a fringe benefit.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The management of the company is reserved to the management body, which shall set and change the general strategy of the company.

4 Other Stakeholders

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

Under Italian law, unlike other European laws and regulations, there are no rules or provisions providing for employee representation in corporate governance.

For SpAs, by-laws can provide the allocation of specific shares or financial instruments to employees (art. 2349 ICC), but they do not automatically include any role for employees in corporate governance.

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

There are no rules or provisions providing a role, even minor, for other stakeholders in corporate governance.

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

EU Directive on non-financial information and diversity information by large companies and groups (2014/95/EU) has been implemented in Italy by the Legislative decree 254/2016. Large companies (and, in particular: listed companies; banks; and insurance companies) are required to make disclosures on non-financial matters such as environmental, social and employee-related matters, anti-corruption and bribery issues, respect for human rights and diversity.

In any case, in recent years many Italian companies have been actively engaged in corporate social responsibility, in particular in the fields of environment, energy consumption, sustainable development and social and employee-related matters.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Italian companies are subject to disclosure and transparency duties, and they are obliged to report certain information (see the answer to question 5.2) to the companies' register. Such information may be accessed by the public. Listed companies must also disclose information to Consob and to Borsa Italiana S.p.A.

Directors are responsible for the fulfilment of such obligations of disclosure.

Listed companies must also appoint a manager in charge of preparing the financial reports, which will certify that the disclosed information complies with the applicable laws and regulations.

5.2 What corporate governance-related disclosures are required?

The following information, related to the corporate governance, must be disclosed:

- financial statements and minutes of any related shareholders' meetings, management reports and statutory auditors reports;
- shareholders' agreements;
- direct and indirect holdings;
- securities and restrictions on the transfer of holdings (including those held by directors);
- details of the company's capital structure;
- details of the composition and duties of the management and control bodies;
- details of management delegated powers;
- details of the adoption of a corporate governance code of conduct;
- agreements between the company and directors, internal or external auditors that envisage indemnities in the event of resignation or dismissal without just cause or termination of their agreements upon a takeover bid;
- any agreement resulting in a change of control or the termination of a change of control situation;
- details of the holders of securities with special control rights;
- compensation agreements detailing financial instruments in favour of directors, managers, employees or external collaborators linked to the company, parent company or subsidiaries; and
- shareholdings exceeding the thresholds fixed by Consob (see the answer to question 2.6).

Furthermore, Italian companies are required to prepare a management report, attached to the yearly financial statements, whereby the directors describe the situation of the company and the trend of the operations. No specific information is required as to the management body practices. Additionally, listed companies are required to insert in such management report a section named: "Report on corporate governance and ownership structures", which shall provide, *inter alia*, detailed information on:

- the board's composition, indicating for each member their qualification (executive, non-executive, independent), their relevant role and their main professional characteristics, as well as the duration of his/her office since their appointment;
- the percentage of each director's attendance at board meetings;
- agreements between the company and directors, members of the control body or supervisory board, which envisage indemnities in the event of resignation or dismissal without just cause, or if their employment should be terminated as the result of a takeover bid;
- rules applying to the appointment and replacement of directors and members of the control body or supervisory board;
- the adoption of a corporate governance code of conduct issued by a regulated stock exchange, together with the corporate governance practices actually applied by the company;
- the composition and duties of the management and control bodies and their committees; and
- a description of the diversity policies applied regarding the structure of the management and auditing bodies in relation to aspects such as age, gender and training/professional courses taken, with a description of the objectives, implementation methods and results of said policies.

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

Whilst in an SpA a board of statutory auditors must be appointed (comprised of at least three effective members and two substitutes), in Srls the appointment shall be mandatory only when certain requirements are met (in terms of assets, turnover and number of employees). Furthermore, in Srl-type, the control body shall be represented by a sole statutory auditor, unless by-laws expressly opt for a board.

Auditors must act with autonomy and independence also *vis-à-vis* the shareholders that appointed them. Furthermore, they must devote the necessary time to the diligent performance of their duties.

The role of the auditors is that of ensuring that the management body complies with law, by-laws and standards of good management. In order to do that, auditors are entitled to request information to the directors or call general meetings on specific resolutions regarding management activities.

With reference to disclosure duties, auditors must examine and verify the accuracy of the financial statements, and draft a report assessing, amongst others, their reliability.

5.4 What corporate governance-related information should be published on websites?

Non-listed companies are not obliged to maintain a website. Should they have one, it must provide information on (art. 2250 ICC):

- the company's registered office;
- the companies' register and number of registration;
- the existence of a sole shareholder;
- the company's VAT number and certified e-mail address;
- corporate capital paid-in;
- the status of liquidation (should this be the case); and
- the status of being subject to the management and coordination of another company (should this be the case).

A listed company must maintain a website in order to disclose relevant information and comply with the shareholders' right to information. In addition to the information above, with reference to any shareholders' meetings, the company must publish on its website a notice regarding the calling of the meeting, a report on each of the items on the agenda, and the relevant minutes.

Dario Trevisan
Trevisan & Associati
Viale Luigi Majno 45
Milan
Italy

Tel: *+39 02 805 1133*
Email: *trevisan@trevisanlaw.it*
URL: *www.trevisanlaw.it*

Dario Trevisan is the founder and managing partner of Trevisan & Associati.

His practice areas include Corporate Law, Financial Markets Law, Corporate Governance and Litigation.

He is a member and co-founder of the International Corporate Governance Network, a global membership organisation of over 500 leaders in corporate governance based in 50 countries, with a mission to raise standards of corporate governance worldwide.

He represents institutional investors in the annual general meetings of several listed companies; furthermore, he also acts as Saving Shareholders' Corporate Representative.

Mr. Trevisan is the author of several contributions and papers in the sector of the corporate governance and proxy voting, and he regularly takes part, as moderator and speaker, to conferences and meetings regarding these issues.

Paolo Preda
Trevisan & Associati
Viale Luigi Majno 45
Milan
Italy

Tel: *+39 02 805 1133*
Email: *preda@trevisanlaw.it*
URL: *www.trevisanlaw.it*

Paolo Preda works mainly in the fields of commercial and corporate law, mergers, acquisitions and private equity, business transactions and contract law, both domestic and international.

TREVISAN & ASSOCIATI
STUDIO LEGALE

Trevisan & Associati is a boutique of financial, corporate and trade law and is an important reality in the Italian legal market. The Firm provides complete and targeted assistance, both in and out of court, not only in Italy but also abroad, where it has established a large network of relationships with foreign law firms with which it cooperates regularly. The Firm, in particular, works in advising and legal consulting in the following areas: Corporate and Commercial Law; Law of Financial Markets; International Law; Banking Law; Bankruptcy Law; Litigation; and Arbitration. The Firm is the leader, in Italy, in the field of Proxy Voting and Corporate Governance consulting, in regard to listed and not listed Issuing Companies, having a wide experience in legal advising to Investors, Brokers, Banks, Leasing and Insurance Companies, and also for small–medium sized Companies and related contracts, activity of Mergers and Acquisitions, Joint Ventures and in the field of operations of corporate and/or financial reorganisation.

Japan

Nobuya Matsunami

Kaoru Tatsumi

Nishimura & Asahi

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The corporate entities discussed in this chapter are stock companies (*kabushiki-gaisha*) listed on the Tokyo Stock Exchange (the "TSE"). Stock companies are the most common form of corporate entity used for business enterprises in Japan. Generally, only securities issued by stock companies can be listed on a securities exchange in Japan.

The TSE is one of the largest equity markets in the world, listing approximately 3,602 companies (as of March 13, 2018), including major Japanese companies. The TSE imposes corporate governance requirements on its listed companies.

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

In Japan, the main sources of corporate governance rules are as follows:

Regulatory sources

(a) Companies Act (Act No. 86 of 2005) (the "Companies Act"). The Companies Act, along with its subordinate regulations, sets forth the basic principles that a company needs to abide by regarding the rights and obligations of management members, organs, the disclosure of information, etc. This Act also requires "Large Companies" (companies with capital of JPY500 million or more or with total debts of JPY20 billion or more) with a board of directors to establish a basic policy regarding its internal control system. The Companies Act applies whether or not such companies are listed.

(b) Financial Instruments and Exchange Act (Act No. 25 of 1948) (the "FIEA"). This Act, along with its subordinate regulations, requires that listed companies disclose issues relating to corporate governance by way of filing annual securities reports or quarterly reports, disclosing material information in a timely manner by way of extraordinary reports, and submitting internal control reports to the authorities, etc.

(c) The securities listing regulations published by the TSE (the "TSE Regulations"). The main corporate governance requirements for listed companies that these regulations set forth are as follows: (i) to submit corporate governance reports; and (ii) to elect and disclose the name of at least one "Independent Officer", who is defined as an outside director or outside statutory auditor who does not (even potentially) have a conflict of interest with shareholders, and to submit a written notice regarding the Independent Officer.

Non-regulatory sources

(a) Articles of incorporation and other internal regulations of each company. All stock companies are required under the Companies Act to establish articles of incorporation that regulate their corporate governance, including organs and the number of directors. In addition, many listed companies have other internal regulations regarding board meetings or other material meetings.

(b) Japan's Corporate Governance Code. Japan's Corporate Governance Code, published by the Council of Experts Concerning the Corporate Governance Code established by the TSE and the Financial Services Agency ("FSA"), offers fundamental principles for effective corporate governance of listed companies in Japan. A brief overview is provided in question 1.3.

(c) Proxy voting criteria provided by investor groups. Some investor groups, including the Pension Fund Association, under the influence of the Principles for Responsible Institutional Investors ("Japan's Stewardship Code"), provide criteria for proxy voting that influence the corporate governance of listed companies. Recently, it has become more common for such investor groups to disclose the results of the exercise of voting rights. (See question 2.2.)

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

Amendments to the Companies Act

Amendments to the Companies Act (the "Amendments") were promulgated in 2014, and became effective on May 1, 2015. The push towards reform arose primarily from domestic and foreign investors' concerns over the quality of Japanese corporate governance. A brief overview of the Amendments is provided below:

- **A new internal governance model – Companies with an Audit and Supervisory Committee**

Companies may opt into a new corporate governance model that coexists with the traditional Japanese models. The new model is a "Company with an Audit and Supervisory Committee" within the board of directors. This new model is the intermediate model between the traditional "Company with Statutory Auditor(s)" and "Company with Three Committees" models. Unlike a "Company with Statutory Auditor(s)" model in which the statutory auditors are not directors, members of the Audit and Supervisory Committee in a "Company with an Audit and Supervisory Committee" are directors. Further, unlike a "Company with Three Committees" model, there is no obligation in a "Company with an Audit and Supervisory Committee" to establish a nominating committee or a compensation committee, or to appoint executive officers (*shikkoyaku*).

■ **Amendment to the qualification of outside officers**

Eligibility requirements for outside directors and statutory auditors have been amended. Directors, executive officers and employees of a parent company, executive directors, executive officers and employees of a sister company, and close relatives of directors and executives of the company would no longer be eligible.

The Amendments do not mandate that listed companies have at least one outside director; instead, any listed company that is required to submit an annual securities report and that has no outside directors on its board must disclose why appointing an outside director would be inappropriate (the so-called "comply or explain" approach).

Japan's Corporate Governance Code

The Council of Experts Concerning the Corporate Governance Code, established by the TSE and FSA, released Japan's Corporate Governance Code on March 5, 2015, which became effective from June 1, 2015. This Code adopts a principles-based approach in order to achieve effective corporate governance in each company's particular situation. The general principles that the Code offers are those regarding (i) protecting the rights and ensuring the equal treatment of shareholders, (ii) appropriate cooperation with stakeholders other than shareholders, (iii) ensuring appropriate information disclosure and transparency, (iv) responsibilities of the board, and (v) dialogue with shareholders for the purpose of achieving effective corporate governance. For example, regarding responsibilities of boards of directors, the Code provides that listed companies should appoint two or more independent directors.

The Code also adopts a "comply or explain" (either comply with a principle or, if not, explain why not) approach for implementation. Therefore, if in its circumstances a company finds a certain principle inappropriate, the company does not need to comply with the principle, provided that the company fully explains the reason why it does not comply.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In Japan, the risks of short-termism, such as the possibility of bringing about under-investment in tangible and intangible assets including R&D that may produce long-term value, have recently been widely recognised. Based on such recognition, various efforts to create corporate value over the mid-term and long-term have been promoted in order to maximise the profits of Japanese companies for sustainable economic development in Japan. Introduction of both Japan's Corporate Governance Code (see question 1.3) and the Principles for Responsible Institutional Investors (Japan's Stewardship Code) (see question 2.2) may be positioned as part of such efforts.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

In listed companies, the operation and management of the company is the responsibility of directors (in the case of Companies with Three Committees and executive officers, see question 3.1) and only material issues, including the items set forth below, must be approved by a shareholders' meeting under the Companies Act. Most items can be resolved by a majority of the voting rights of shareholders present at the meeting; however, some material issues must be resolved by a greater proportion of voting rights, such as no less than two-thirds of the voting rights of shareholders present at the meeting (e.g. amendments to the articles of incorporation, mergers, etc.).

The rights and powers of the shareholders' meeting include the following items:

(a) amendments to the articles of incorporation;

(b) appointment and dismissal of directors, statutory auditors, or accounting auditors (see question 3.2);

(c) approval of financial statements (except for companies which satisfy certain requirements);

(d) approval of mergers, demergers, share exchanges/transfers, or business transfers (with *de minimis* exceptions);

(e) payment of dividends (unless otherwise provided for in the articles of incorporation);

(f) issuance of shares or stock options at especially favourable prices; and

(g) determination of directors' remuneration (see question 3.3) and discharging of directors' liabilities (see question 3.8).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Since the responsibility of shareholders is limited to the amount of their invested capital, general shareholders do not have any responsibilities as regards corporate governance. Regarding institutional investors, the Principles for Responsible Institutional Investors (Japan's Stewardship Code) published by the Council of Experts Concerning the Japanese Version of the Stewardship Code established by the FSA offers the principles to be followed for a wide range of institutional investors to appropriately discharge their stewardship responsibilities, with the aim of promoting sustainable growth of investee companies. These principles include that institutional investors should have a clear policy on how they fulfil their stewardship responsibilities, and should publicly disclose such a policy.

On May 29, 2017, the Principles for Responsible Institutional Investors (Japan's Stewardship Code) were revised after the discussion at the Council of Experts on the Stewardship Code. Although the revision extends throughout the Code, one major change of the revision is that the revised Code has adopted the principle that institutional investors should disclose voting records for each investee company on an individual agenda item basis.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

In Japan, companies commonly hold an annual shareholders' meeting within three months after the end of each fiscal year. In this meeting, shareholders vote on items such as the appointment of directors/statutory auditors and the distribution of dividends (see question 2.1). Companies also hold extraordinary shareholders' meetings in order to obtain shareholder approval of other corporate actions, such as mergers.

Shareholders who have met certain requirements (level of shareholding or holding period) have the right to demand that directors convene a shareholders' meeting. If directors do not convene within a specific period despite such demands, the shareholder may convene a meeting after obtaining court permission. A shareholder who meets certain requirements may also require that the company include specific proposals as agenda items for a shareholders'

meeting by a request made eight weeks or more prior to the date of the shareholders' meeting. Shareholders are entitled to ask questions relating to the agenda items at the shareholders' meeting.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Generally, shareholders do not owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities, and are not liable for acts or omissions of corporate entities because the liability of shareholders is limited to the amount of their capital invested in the shares for which they have subscribed. Although shareholders can be theoretically liable for the company's acts or omissions under the doctrine of "piercing the corporate veil", the likelihood of a successful application of such a doctrine to the shareholders of a listed company is very low.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders may seek enforcement action against the members of the management body (i.e. directors, statutory auditors, and executive officers) mainly by two methods. One method is to initiate a lawsuit on behalf of the company (i.e. a derivative claim). The other method is to pursue board members directly as individuals (i.e. a direct claim).

Before filing a derivative claim, the shareholders need to request that the company sue such members of the management body, and if the company does not sue the management members within 60 days of such a request, the shareholders may sue the members on behalf of the company. These claims are usually brought on the basis of a breach of fiduciary duty by the directors, statutory auditors or executive officers.

If a shareholder suffers damages due to the wilful misconduct or gross negligence of the directors, statutory auditors or executive officers in the performance of their duties, the shareholder may directly claim damages against such members.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

The main disclosure requirements are provided for in the Companies Act, the FIEA, and the TSE Regulations. The Companies Act provides that a company must state in its business report the names, number, and shareholding ratio of its top 10 shareholders as of the end of each fiscal year. The FIEA provides that a shareholder in a listed company must file a report with the authorities concerning its shareholding ratio, the purpose of the holding, and other related matters if the holding ratio exceeds 5%, and to file a report if the holding ratio increases or decreases by 1% or more. In addition, the FIEA and the TSE Regulations provide that a listed company must report or disclose in a timely manner when a main shareholder (i.e. a shareholder who holds 10% or more of the voting rights of the company) changes.

The acquisition of securities by a shareholder is not limited unless otherwise provided for in relevant laws. Parties that intend to acquire one-third or more of the voting rights of a listed company outside the market should be aware of the tender offer regulations under the FIEA, which limit the method, timing and speed with which shareholders may purchase shares in listed companies. Some Japanese companies have adopted anti-takeover devices which are triggered when a bidder acquires a certain pre-determined shareholding ratio (in many cases, 20% of the voting rights of the company). The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade imposes a 30-day pre-notification requirement if (i) a purchaser's voting rights exceed 20% or 50% of all voting rights after the contemplated transaction, and (ii) the aggregate amount of domestic sales of the parties' group companies exceed certain thresholds. Foreign investors should be aware of FDI restrictions under the Foreign Exchange and Foreign Trade Act; if a foreign investor's holding rate of a listed company that engages in weapons manufacturing, the airline industry, nuclear industry, oil industry, or other specified industries relating to the national interest of Japan will be 10% or more, the investor must file a report with the relevant authorities 30 days prior to the closing of the transaction, which could be subject to investigation by the relevant authorities. Furthermore, there are other special limitations on holding rates of foreign investors in specified industries. For example, a company in the air transportation industry may, when foreign investors request to be registered in the shareholders' list, refuse to do so, and, if the company registers them to the effect that more than one-third of its shares are owned by foreign investors, it is not allowed to engage in the air transportation business.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

The FIEA requires any shareholder who holds more than 5% of the total number of issued shares of the relevant listed company to file a large shareholding report. In such large shareholding report, a large shareholder has to disclose its intention or purpose for holding the shares as concretely as possible.

Other than this large shareholding report system, there are no mandatory disclosure requirement of the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested. However, under the Principles for Responsible Institutional Investors (Japan's Stewardship Code), institutional investors should publicly disclose a clear policy on how they fulfil their stewardship responsibilities and voting records for each investee company on an individual agenda item basis. (See question 2.2.)

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management body of a company can be classified into three types: a "Company with Statutory Auditor(s)"; a "Company with an Audit and Supervisory Committee"; and a "Company with Three Committees". While a Company with Statutory Auditor(s) is the most commonly used corporate structure for Japanese listed companies, the number of Companies with an Audit and Supervisory Committee, the corporate structure for which was introduced by the Amendments (see question 1.3), is gradually growing. As of March 13, 2018, over 831 listed companies on the TSE had adopted this new structure.

- **Company with Statutory Auditor(s)**

Shareholders elect both directors and statutory auditors, and the directors constitute a board of directors. The board of directors

appoints representative director(s) among the directors, who can bind the company and take general responsibility for the management and operation of the company on a daily basis. Directors must monitor the performance of duties of other directors, and statutory auditors must audit the management of the company by the directors. Important decisions of the company provided by law or the articles of incorporation must be resolved at a board meeting. Most listed companies fall under the category of a "Large Company" (see question 1.2), and the statutory auditors of a Large Company must form a board of statutory auditors.

■ **Company with an Audit and Supervisory Committee**

Shareholders elect directors who are members of the Audit and Supervisory Committee and other directors separately, and the directors constitute the board of directors. The majority of Audit and Supervisory Committee members must be outside directors. The board of directors appoint one or more representative directors from among the directors, who are given the authority to bind the company and take general responsibility for the management and operation of the company on a daily basis. The Audit and Supervisory Committee is empowered with broader audit authority than the statutory auditors in the traditional model.

As with a Company with Statutory Auditor(s), important decisions of the company as provided by law or the articles of incorporation must be resolved at a board meeting. However, if a majority of directors are outside directors or the articles of incorporation so provide, the board may delegate to a certain director (typically a representative director) the authority to make important decisions, including the issuance of shares to a third party, important disposals of company property, etc.

■ **Company with Three Committees**

Shareholders only elect the directors, and the directors form a board of directors and elect the members of three committees from among these directors. No statutory auditor is appointed. The three committees are (i) the audit committee, which mainly audits the directors and executive officers, (ii) the nominating committee, which determines proposals to be submitted at the shareholders' meeting regarding the appointment and dismissal of directors, and (iii) the compensation committee, which determines compensation for each director and executive officer. Each committee must have three or more members who concurrently serve as directors, and a majority of the members must be outside directors. The board of directors appoints executive officers who manage and operate the company on a daily basis, and directors and the board of directors supervise the executive officers. If two or more executive officers are elected, the board of directors must select representative executive officer(s). Directors who are not outside directors may concurrently serve as executive officers.

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

In a Company with Statutory Auditor(s), directors are appointed and removed by a shareholders' resolution passed by a majority of the voting rights of shareholders present at a shareholders' meeting. The period of tenure of a director is two years, unless such a term is reduced by the articles of incorporation or a resolution at a shareholders' meeting. The representative director is appointed and removed among directors by the board of directors. Statutory auditors are appointed and removed by a shareholders' resolution passed by a majority (in the case of removal, two-thirds or more) of the voting rights of shareholders present at a shareholders' meeting. The period of tenure of a statutory auditor is four years, and such a term cannot be reduced by the articles of incorporation or a resolution at a shareholders' meeting.

In a Company with an Audit and Supervisory Committee, directors are appointed and removed by a shareholders' resolution passed by a majority (in the case of removal of members of the Audit and Supervisory Committee, two-thirds or more) of the voting rights of shareholders present at a shareholders' meeting, and directors who are members of the Audit and Supervisory Committee are appointed separately from other directors. The period of tenure of directors who are members of the Audit and Supervisory Committee is two years, which cannot be reduced by the articles of incorporation or a resolution at a shareholders' meeting. On the other hand, the period of tenure of other directors is one year, unless reduced by the articles of incorporation or a resolution at a shareholders' meeting. Representative directors are appointed and removed from among directors who are not members of the Audit and Supervisory Committee by the board of directors.

In a Company with Three Committees, directors are appointed and removed by a shareholders' resolution. Members of the audit committee, the nominating committee, and the compensation committee are appointed and removed by the board of directors. Executive officers, including representative executive officer(s), are elected and removed by the board of directors. The tenure of a director or executive officer is one year, unless the term is reduced by the articles of incorporation. The board of directors may always remove executive officers.

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

The Companies Act provides that, for a Company with Statutory Auditor(s), the remuneration of directors must be approved at a shareholders' meeting. Most companies approve a maximum aggregate amount of remuneration for all directors and delegate the board of directors to determine the amount for individual directors. For a Company with an Audit and Supervisory Committee, the remuneration of directors who are members of the Audit and Supervisory Committee must be approved separately from that of other directors. In the case of a Company with Three Committees, the compensation committee determines the remuneration of each director and executive officer. The Companies Act provides that a company's business report must state the aggregate amount of compensation (including severance allowance) for directors (in a Company with an Audit and Supervisory Committee, (i) directors who are members of the Audit and Supervisory Committee, and (ii) other directors), statutory auditors, and executive officers, respectively. In the case of a Company with Three Committees, information regarding how the company determines the directors' and executive officers' remuneration, and an outline of the company's compensation policy must be included in the company's business report.

In addition, the FIEA requires that companies disclose in the securities report the type of compensation (cash, stock options, bonuses), the total amounts of compensation for directors, statutory auditors, and executive officers, respectively, and the number of members of each group, and the amount of compensation for each individual director, statutory auditor, or executive officer whose total compensation is JPY100 million or more.

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

In addition to the disclosure requirement described in question 2.6, directors, executive officers and statutory auditors are required to

report sales and purchases of securities in order to ensure that they do not violate insider trading regulations; if a director, executive officer or a statutory auditor of a listed company buys and sells shares in his/her company within a six-month period and realises profits, the company may require the director, executive officer or statutory auditor, as the case may be, to disgorge the profits to the company. Furthermore, under the FIEA, the number of shares held by directors, executive officers and statutory auditors must be disclosed in the company's securities reports. Under the Companies Act, the number of stock options held by directors, executive officers or statutory auditors must be stated in the company's business report, and the number of shares held by the nominees of directors or statutory auditors must be stated in the reference materials provided at shareholders' meetings.

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

Directors specified in the articles of incorporation of the company can convene a board meeting by giving one week's prior notice (unless a shorter period is provided in the articles of incorporation) to all directors (and statutory auditors in the case of a Company with Statutory Auditor(s)), and other directors may require that the board meeting be held whenever necessary. Resolutions are passed with a simple majority of directors present at the meeting, and a quorum is represented by a majority of all directors with voting rights (unless otherwise provided in the articles of incorporation). A director who has a special interest in a resolution may not participate in the vote for such a resolution. A resolution may be passed by obtaining the written or electronic consent of all directors if so provided in the articles of incorporation.

The representative directors and the executive officers are required to report to the board at least once every three months regarding the status of the execution of his/her duties, and these reports cannot be made by way of notice. Therefore, a company must hold a board meeting at least once every three months.

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

The principal duties of directors include the following: (i) duty of care (directors must manage the business with the care of a good manager); (ii) duty of loyalty (directors must perform their duties for the company in a loyal manner); (iii) duty to monitor (directors must monitor the performance of other directors, including representative director(s)); and (iv) duty to establish a risk management system (directors must establish internal control systems to manage risks associated with the business; see question 3.7).

If directors or executive officers neglect their duties, they will be liable to the company for damages arising as a result thereof. In addition, they are liable to third parties, such as creditors, for damages incurred by such third parties arising as a result of wilful misconduct or gross negligence in the performance of their duties.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The Companies Act requires Large Companies, Companies with an Audit and Supervisory Committee and Companies with Three Committees to have internal control systems to ensure that (i) directors, executive officers and other employees perform their duties in an efficient manner, (ii) the company properly manages the risks associated with its operations, (iii) directors, executive officers, and other employees perform their duties in compliance with relevant laws, regulations, and articles of incorporation, and (iv) the performance of duties by directors, executive officers, and other employees are properly audited and monitored by statutory auditors, an Audit and Supervisory Committee or the audit committee, respectively. The systems which must be determined by the board of directors include a system to ensure that the business of the company group, consisting of the company, the parent company, and the subsidiaries, is conducted properly.

Many listed companies in Japan have already introduced outside directors. However, for the listed companies which have not already done so, one of the key challenges currently facing the management bodies of such companies is the strong demand of introducing outside directors to enhance corporate governance. As stated in question 1.3, any listed company that is required to submit an annual securities report which has no outside directors on its board must disclose why appointing an outside director would be inappropriate (the so-called "comply or explain" rule). In addition, Japan's Corporate Governance Code includes the principle that listed companies should have two or more independent outside directors. It is expected that some listed companies which are not able to find appropriate persons as outside directors will change their structure to a Company with an Audit and Supervisory Committee by appointing previous outside auditors as directors who are members of the Audit and Supervisory Committee.

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

If the articles of incorporation of a company so provide, some of the directors' liabilities to the company may be discharged to a limited extent by board resolution. Further, some of the directors' liabilities may be discharged by a shareholder resolution without the authorisation of the articles of incorporation, though approval of all shareholders is required to discharge the directors' liability in full. Further, a company may also, if allowed by the articles of incorporation, enter into contracts with its directors who are not executive directors or employees, and statutory auditors, limiting their liabilities to the company under the Amendments.

Directors, statutory auditors, and executive officers are permitted to take out liability insurance. The tax authority in Japan has announced and clarified that insurance premiums paid by a company covering the liability of a director shall be treated as insurance rather than as part of the compensation paid to such a director, if: (i) the insurance premiums have been approved by a board of directors' meeting; and (ii) there is approval of either (a) a voluntary committee, the majority of which is outside directors, or (b) all of the outside directors.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

It is understood that setting and changing the strategy of the corporate entity/entities should be done primarily by the management body (i.e. the board of directors) itself, or by the relevant corporate department (such as corporate development department) under the supervision and ultimate responsibility of the management body of the company.

4 Other Stakeholders

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

No laws provide a specific role for employees in corporate governance. In practice, however, some listed companies negotiate with employees or labour unions with regard to management matters, such as company reorganisation. In addition, the misconduct of several companies has been brought to light by employee whistleblowers. In this regard, the Whistleblower Protection Act prohibits a company from treating employees unfavourably for blowing the whistle on illicit behaviours within the company.

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

There are no legal or regulatory duties or voluntary codes providing a specific role for other stakeholders in corporate governance. Many listed companies, however, consider that customers, suppliers, local community or other stakeholders are important for them to increase their corporate value in a sustainable manner.

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

No laws regulate corporate social responsibility ("CSR"). In practice, however, many listed companies consider CSR important and have tried to highlight their efforts by disclosing CSR reports.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The representative director (or the representative executive officer in the case of a Company with Three Committees) is in charge of the operation and management of the company and, therefore, is primarily responsible for disclosure and transparency.

5.2 What corporate governance-related disclosures are required?

The FIEA requires listed companies to disclose (i) their corporate governance policies (e.g. an outline of their policies and the reasons for adopting such policies, etc.), and (ii) information regarding the compensation of directors, statutory auditors and executive officers (see question 3.3). In addition to these disclosures through securities reports and disclosure through business reports, the FIEA requires listed companies to submit an internal control report once every fiscal year to the relevant local finance bureau, setting forth an assessment of their internal procedures designed for ensuring the credibility of their financial statements and information that might materially influence financial statements.

Furthermore, TSE Regulations require listed companies to submit a corporate governance report setting forth matters including an outline of the corporate governance system, basic policy regarding internal control system, and the relationship of the directors, statutory auditors, and executive officers with the company.

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

Statutory auditors (in the case of a Company with an Audit and Supervisory Committee or a Company with Three Committees, the Audit and Supervisory Committee or the audit committee assumes the same role respectively) audit the business operations of a company managed by directors including internal control systems (see question 3.7 for further details), as well as an annual business report to ensure proper disclosure. The board of statutory auditors presents an auditor report to shareholders, which states (i) whether or not the business report describes the company's situation properly, and (ii) any unlawful act or material fact that violates laws, regulations or the articles of incorporation in connection with the performance of duties by directors and executive officers, if any. In addition, the accounting auditor, who must be a licensed accountant or accounting firm, audits the financial statements of the company.

5.4 What corporate governance-related information should be published on websites?

Companies are not required to post corporate governance information on their websites, unless they elect to do so under the Companies Act. Annual securities reports, quarterly reports, extraordinary reports, and other reports of listed companies are publicly disclosed by the Ministry of Finance through the Electronic Disclosure for Investors' Network ("EDINET"). Further, certain information relating to corporate governance of listed companies, such as corporate governance reports, is publicly disclosed by TSE through the Timely Disclosure Network.

Nobuya Matsunami
Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku
Tokyo, 100-8124
Japan

Tel: *+81 3 6250 6200*
Email: *n_matsunami@jurists.co.jp*
URL: *www.jurists.co.jp*

Nobuya Matsunami is a Partner with Nishimura & Asahi and a member of the corporate department. He has broad experience in international and domestic M&A transactions, as well as general corporate matters. Mr. Matsunami engages in various kinds of transactions, including stock and asset acquisitions, tender offers, joint ventures and de-listings of publicly held companies. Mr. Matsunami is admitted to practise law in both Japan and New York.

Kaoru Tatsumi
Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku
Tokyo, 100-8124
Japan

Tel: *+81 3 6250 6200*
Email: *k_tatsumi@jurists.co.jp*
Firm: *www.jurists.co.jp*

Kaoru Tatsumi is a Counsel with Nishimura & Asahi. His practice focuses on domestic and cross-border acquisitions, ongoing private transactions, restructurings and spin-offs, joint ventures, and numerous other kinds of M&A. Mr. Tatsumi has recent experience working at the Japanese Ministry of Justice, mainly on the amendment of the Companies Act, and using such experience, he provides a wide range of legal services in the areas of corporate law and corporate governance. Mr. Tatsumi is admitted to practise law in both Japan and New York.

NISHIMURA & ASAHI

Nishimura & Asahi is one of Japan's premier full-service law firms, covering all aspects of domestic and international business and corporate activity. The firm currently has more than 500 Japanese and foreign lawyers and employs over 700 support staff, including tax accountants, and one of the largest teams of paralegals in Japan.

Through the enhancement of professional and organisational synergies resulting from the firm's expansion, an unprecedented level of client service is made possible in highly specialised and complex areas of commercial law. Nishimura & Asahi understands its clients' growing needs, and its fully integrated team of lawyers and professional staff is proud to share the same fundamental philosophy: an uncompromising commitment to excellence.

Kazakhstan

Bolat Miyatov

Igor Lukin

GRATA International

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate form to be discussed is the joint-stock company (the "**JSC**"). In Kazakhstan, the JSC is traditionally perceived as a corporate form of a large business. Consequently, the JSC is designated (at least on paper) to be a corporate form for a widely held large business corporations – a traditional subject of the corporate governance research. In addition, the JSC has been a focus of corporate governance reform in Kazakhstan during the last two decades. According to the Integrated Securities Registrar (www.tisr.kz), the number of JSCs in Kazakhstan is 1,006, as of 1 March 2018.

Kazakh law does not require JSCs to be officially listed and/or offer shares to public. In general, an undeveloped local stock market is one of the main reasons why the overwhelming majority of JSCs are controlled by a dominating shareholder. An extremely high concentration of corporate ownership is the main feature of the corporate governance system of Kazakhstan. In particular, many JSCs are owned by only one shareholder. It is notable that, according the Register of State Assets (www.gosreestr.kz), the number of JSCs owned (50% of voting shares and more) by the state is 316. Thus, another determinant of Kazakh corporate governance is the high percentage of state ownership.

It is fair to mention that the most popular corporate form in Kazakhstan is the limited liability partnership. As well as the JSC, the limited liability partnership is often used for running significant businesses. However, due to its closed nature, the limited liability partnership is not adjusted good fit for serving as a corporate form for widely held corporations. For this reason, limited liability partnerships are not discussed herein.

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

The main legislative source of corporate governance practices is the Law "On Joint Stock Companies" (the "**JSC Law**"). The main regulatory source is the Listing Rules of the Kazakhstan Stock Exchange (the "**KASE**"), which apply to listing companies. Certain corporate governance provisions are also contained in other industry specific laws, e.g. the Law "On Banks and Banking Activity in Kazakhstan", the Law "On State Property".

In 2005, the Kazakh Corporate Governance Code was adopted by the Council of Issuers and the Council of the Association of Financiers (non-governmental associations). The provisions of the Code are voluntary and are not enforced somehow. In general, the Code seems to be very outdated and does not play any significant role in the corporate governance system of Kazakhstan.

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

In Kazakhstan, corporate governance is not a central aspect of political and academic debate, which is strange in the light of classical corporate governance problems heavily experiencing by Kazakh JSCs. We believe that the main reason for this is that the real value of corporate governance is still not widely recognised in Kazakhstan.

However, some corporate governance initiatives are sporadically taken. For example, during the last two decades Kazakh law has been supplemented with a number of "best practices", e.g. independent directors, board committees, prohibition of CEO duality, D&O fiduciary duties and liabilities, derivative action, etc. (although the quality of such implementation seems to be rather low). As mentioned, in 2005, Kazakh Corporate Governance Code was presented. During 2013–2015, a EBRD-sponsored project aimed at the reform of corporate governance framework in Kazakhstan was being implemented. Within the project, a concept of the draft Law «On Amendments to Some Legislative Acts of the Republic of Kazakhstan on Issues of Corporate Governance» was prepared and it was anticipated that the draft Law itself would be submitted to the Parliament. Unfortunately, for some reason the project was curtailed. In 2015, a major sovereign holding Samruk-Kazyna JSC that controls a significant part of Kazak economy adopted a new corporate governance code drafted with the assistance of the OECD and claimed to meet the "best international standards". This code applies to Samruk-Kazyna JSC and all its subsidiaries. In 2016, the National Forum "Corporate Governance: New Insight into Investment Potential of Kazakhstan" took place. Although it was a large-scale event, most important challenges and issues of Kazakhstan corporate governance were not discussed.

One of the main Kazakhstan challenges in corporate governance is to reduce the severity of a shareholder-manager agency problem in state-owned JSCs. The relevance of this problem is clear in the wake of recent corporate scandals that involved fraudulent behaviour of senior executives of the largest state-owned enterprises and, in most cases, led to imprisonment. Another challenge is to curb the controlling shareholder's opportunism in those privately held JSCs having minority shareholders. Although there has been no substantial research on the subject, there is evidence of expropriation of minority shareholders. The latter comes as no surprise provided the highly concentrated ownership and practically low legal protection of shareholders.

One of the main problems arises from the box ticking approach to the corporate governance. Policymakers in pursuit of "best practices" have transplanted certain popular concepts. However, in most cases, such concepts are simply copied and not adjusted to the local context. Moreover, the policymakers often do not even clearly understand the true purpose of these concepts. Consequently, many implemented rules have been distorted. A striking example is the board committees (including audit, nomination and remuneration) which are mandatory to all JSCs (even those owned by one shareholder), charged with the "preparation of recommendations to the board", and whose member can be the CEO or some "external experts", i.e. not board of directors. The are many other problematic issues, for example, weakness of external and internal mechanisms of control, near-complete absence of the corporate governance case law, lack of professional directors and managers, and possibly, corrupt ties between controlling shareholders and politicians.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The risks of short-termism and the importance of promoting sustainable value creation over the long-term are not officially recognised in the legislation or widely promoted. Nor are they hotly debated in the press or academia. Some companies declare their adherence to sustainable value creation. However, it is not clear whether this principle is implemented in practice.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Kazakh law gives significant powers to shareholders in the strategic direction of JSCs. A general meeting of shareholders of the JSC (the "**General Meeting**") is entitled to resolve on numerous fundamental matters as, for example, amendments to the charter, election of the board of directors, liquidation and reorganisation, sale or other alienation of the JSC's assets amounting to 50% of the total book value of the company, appointment of the independent auditor, etc. Moreover, the General Meeting can overrule resolutions of any other bodies of the JSC relating to "internal affairs of the JSC". In addition, the charter of the JSC can grant almost all other powers to shareholders. Given the high concentration of ownership, controlling shareholders often interfere not only in the work of the board of directors but even in the day-to-day operations of management. It is notable that board of directors of almost all JSCs listed on KASE are chaired either by the controlling shareholder himself or by his representative.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

No specific corporate governance responsibilities are imposed on shareholders.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two types of General Meetings: Annual; and Extraordinary. An Annual General Meeting must be held no later than in five months after the end of each financial year. Extraordinary General Meetings are convened at a request of a board of directors or a major shareholder (10% and more of voting stock) and their number is unlimited.

Each shareholder holding voting shares has the right to participate and vote at the General Meeting, be notified of the General Meeting, request and receive information and materials relating to agenda, challenge decisions of the General Meeting in the court, etc. A major shareholder (or a group of shareholders holding 10% and more of voting stock) has the right to convene the extraordinary General Meeting.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Under the JSC Law shareholders must not disclose the JSC's confidential information, including business secrets. In addition, major shareholders must disclose to the board of directors their affiliates or their interest in transactions to be entered in by the JSC. The JSC Shareholders also have other duties that are irrelevant to the corporate governance (e.g. obligation to pay shares).

Neither the concept of a *"shadow director"* nor the concept of a *"de facto director"* is explicitly recognised under Kazakh law and the corporate veil can be probably pierced only in certain cases of the insolvency. In case of an intended of false bankruptcy of a JSC, any person who is found to be responsible for intended or false bankruptcy (e.g. a shareholder) bears secondary liability towards the JSC's creditors should the JSC be unable to satisfy their claims. In addition, a parent company bears secondary liability for the performance by the subsidiary of transactions concluded at the instruction of the parent company. Arguably (the law is unclear), a major shareholder may be held liable for losses of the JSC incurred as a result of entry by the JSC into a "major" or related party transactions, if the large shareholder was interested in such transaction and the prescribed approval procedure has been broken.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

For the purposes of this chapter, an "**official**" shall mean a board director or a member of the executive body of the JSC and an "**officer**" shall mean a member of the executive body of the JSC.

A shareholder (or a group of shareholders) holding at least 5% of voting stock is entitled on his/her (their) own behalf but in the interest of the JSC to file a complaint against:

- official(s) – claiming for the compensation of the JSC's losses incurred as a result of the official(s) actions or omissions; and/or
- official(s) and/or their affiliates – claiming for the return to the JSC of the profit earned as a result of entry of the JSC into a "major" and/or related party transaction if such transaction has caused losses to the JSC and has been approved (or offered for approval) by such official(s); and/or
- official(s) and/or third party – claiming for the compensation of the JSC's losses incurred as a result of entry of the JSC into a certain transaction with the third party provided that the official(s) acted under the relevant agreement with the third party and has violated law, charter and internal documents of JSC or employment agreement of such official(s).

Officials may raise certain defences to avoid the above liability, as for example, business judgment rule, vote against, and non-participation in the voting for good reasons.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

In general, there are no limitations in relation to the interests in securities held by shareholders in a JSC. However, there are some specific areas of business (e.g. banks, subsoil use, communications, mass media, etc.) where stakes can be purchased by foreign investors at governmental permissions and/or are legally limited to certain amounts. In addition, as a general duty, major shareholders must disclose his/her affiliates, including 10% and more owned companies, to the JSC.

Each JSC must disclose its shareholders holding 10% and more of voting stock by posting information on the specialised governmental website (www.dfo.kz). In addition, each listed JSC must disclose any shareholders holding 5% and more to KASE.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

With respect to intentions, the only obligation of a shareholder is to notify the JSC and the National Bank of Kazakhstan of his intention to purchase (by himself or together with its affiliates) shares in the JSC that will rise his shareholding (including shareholdings of his affiliates) to 30% or more.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Apart from the General Meeting, each JSC must have the board of directors and the executive body.

The board of directors is in charge of the "general management of the JSC's activity". The structure and powers of the board of directors are determined by the JSC Law. Competence of the board covers broad strategic powers as, for example, approval of the primary areas of the JSC's development, acquisition of subsidiaries, and appointment of the executive body. The JSC Law perceives this authority as a collective strategic manager rather than a control device. Only individuals can be board directors. The number of the board members cannot be less than three. Independent directors in any JSC must make up at least 30% of the board.

The executive body is responsible for the JSC's "day-to-day operations". In fact, the competence of the executive body is formed according to the residual principle, i.e. all corporate power that are not explicitly vested into other corporate bodies by legislation or internal regulations of the JSC, lies with the executive body. In addition, the executive body possesses some exclusive competences as, for example, the right to represent the JSC or issue PoAs on behalf of JSC. Only individuals can be members of the executive body. The executive body may consist of only one (CEO) or several members (collegial body). Only the CEO (or a head of the collegial executive body) may also be a board member but not a chairman of the board.

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

Board directors are elected by the General Meeting by the cumulative voting. For the removal of a board director a simple majority of votes of the General Meeting is enough (if the charter does not set out a higher threshold). In case of a sole shareholder, board directors are appointed and removed by the resolution of the former.

The executive body is appointed by the board of directors by simple majority of votes. Arguably, this threshold may be changed in the JSC's charter.

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

The regulation of the contracts and remuneration of officials of a JSC is scanty. The law says nothing about the nature and terms of contracts of board directors. As to the officers, their contracts are governed by the Labor Code of Kazakhstan. A labour agreement with a head of the executive body is signed by the board chair or another person authorised by the General Meeting. Labour agreements with other officers are signed by the head of the executive body.

The General Meeting approves remuneration of board directors and remuneration of officers is determined by the board of directors. Each JSC has to disclose the aggregate annual remuneration of officers on the specialised governmental website (www.dfo.kz). In addition, each listed company is obliged to disclose to KASE the aggregate annual remuneration, bonuses, and funds accumulated for future pension schemes of the board directors and officers.

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

There are no applicable limitations. Each listed JSC must disclose the shareholding of its officials in the JSC and its subsidiaries. In addition, each official must disclose his affiliates, including 10% and more owned companies, to the JSC.

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

Kazakh law does not regulate meetings of the board of directors or executive body in much details.

Quorum of the board meeting is determined by the charter but cannot be less than 50% of the board directors. Each board director, including the chair, has only one vote. The charter may provide that the chair has a casting vote. The board meeting may be opened or closed, in presentia or absentia. The resolution of the board meeting should be signed by the chair and the secretary of the meeting.

With respect to the meeting of the collegial executive body the JSC Law provides only that the minutes of the meeting must be signed by each member of the executive body and contain the agenda and voting results detailing votes of each member.

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

The JSC Law provides for a relatively long list of duties of the

officials. Many of them can be regarded as examples of "best practices". However, almost all concepts in use are not elaborated in the statutory or case law and, therefore, it is unclear how to implement or enforce the relevant principles on practice. For instance, we are aware only of one court case when the officer of the JSC has been brought to liability for the breach of one of the below duties. Bad wording of some duties and absence of clear structure exacerbate an issue.

The JSC Law explicitly and implicitly imposes the following duties of directors and officers of the JSC (duties 1–5 below apply only to board directors, all other duties are common for board directors and officers):

1) duty to act in compliance with laws, the JSC's carter and internal documentation, on an informed basis, transparently, and in the interests of the JSC and its shareholders (Article 62.2.1 of the JSC Law);
2) duty to treat all shareholders equally (Article 62.2.2 of the JSC Law);
3) duty to exercise objective independent judgment in respect of corporate matters (Article 62.2.2 of the JSC Law);
4) duty to monitor and prevent potential conflicts of interest of officials and shareholders, including illegal use of the JSC's property and abuse of power while executing related party transactions (Article 53.6.1 of the JSC Law);
5) duty to monitor effectiveness of the corporate governance practices of the JSC (Article 53.6.2 of the JSC Law);
6) duty to perform duties in good faith and act in the best interests of the JSC and its shareholders (Article 62.1.1 of the JSC Law);
7) duty not to use or allow the use of the JSC's property contrary to the JSC's charter, or resolutions of the General Meeting, or for personal gain (Article 62.1.2 of the JSC Law);
8) duty to ensure the integrity of the JSC's accounting and financial reporting systems, including the independent audit (Article 62.1.3 of the JSC Law);
9) duty to oversee the disclosure process and the accuracy of information disclosed (Article 62.1.4 of the JSC Law);
10) duty to keep confidentiality in respect of the JSC's business during the term of their office and three years after resignation (unless otherwise is provided by internal documents of the JSC) (Article 62.1.5 of the JSC Law);
11) duty to disclose information about affiliates (Article 67 of the JSC Law);
12) duty to disclose interest in transactions to be entered by the JSC (Article 72 of the JSC Law);
13) duty to provide the General Meeting with information and documents sufficient for the purposes of adoption a reasonable decision in case of the General Meeting is considering a related party transaction to be entered in by the JSC (Article 73.3 of the JSC Law);
14) duty not to cause damage to the JSC (Articles 63.1.1, 63.1.2 of the JSC Law);
15) duty not to provide misleading or false information or violate the prescribed procedure for provision of information (Articles 63.1.1 of the JSC Law);
16) duty not to unfaithfully propose (to the JSC/shareholders) or decide to enter into "major" or related party transactions which are aimed at personal gain or gain of affiliated of directors/officers (Article 63.1.3 of the JSC Law);
17) duty to follow the prescribed procedure for entry by the JSC into "major" or related party transactions (Article 74.2 of the JSC Law); and
18) duty not to approve misleading financial reports (Article 63.5 of the JSC Law).

Despite the JSC Law explicitly defines duties 1–13 above, it does not establish direct liability for the breach of such duties *per se* (although breach of duties 6–10 constitute an element of unfaithfulness for the purpose of duty 16). Thus, it is fair to say that these duties are not formally enforced. Duties 14–18 above are not explicitly provided by the JSC Law but are implied by establishing corresponding financial liabilities. For example, a director (officer) can be obliged to compensate the JSC's losses if he has not followed the prescribed procedure for entry by the JSC into "major" or related party transactions (duty 17 above).

Officials may bear financial liability for the JSC's losses incurred as a result of their actions or inactions. Under Kazakh law, such type of liability is called "civil liability". As a general rule, Kazakh law provides that losses caused by illegal actions or omission must be recovered in full by an entity at fault. Thus, the ground for civil liability of officials is loss incurred by the JSC as a result of director's (manager's) illegal actions or omission. The JSC Law elaborates on some specific cases of such actions/omission committed by officials of a JSC (duties 14–18 above).

Another block of civil liabilities of officials is set forth by the Law "On Rehabilitation and Bankruptcy" (the "**Bankruptcy Law**"). For example, in case of an "intended" or "false" bankruptcy of a JSC, any person who is found to be responsible for such intended bankruptcy (e.g. a director or officer) bears secondary liability towards the JSC's creditors should the JSC be unable to satisfy their claims; in addition, directors (officers) who are found to be liable for the intended bankruptcy are obliged to compensate the amount of loss caused to participant. The "intended" and "false" bankruptcy can also imply a criminal liability (please see below). There are other civil liabilities that can be imposed on the officials of an insolvent JSC.

A number of liabilities of officials are imposed by the Criminal Code of Kazakhstan. In certain instances, criminal liability would be applicable specifically to officials acting in their respective capacity. Some general crimes (where officials are not specifically named as subjects of an offence) may also be applicable depending on particular circumstances. The most relevant crimes are: abusing corporate powers; disregarding duties; misappropriating and embezzling company's property; fraud; corporate bribery; tax avoidance; and intended or false bankruptcy if this caused material damage, etc.

A director or officer who is found guilty of committing crime against property, related to economic activity or against the commercial and other entities, or who are relieved from criminal liability for such crimes on non-rehabilitation grounds are disqualified from performing functions of the company's directors or officers for five years from the moment of clearing from criminal record or relief from criminal liability.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Specific corporate governance duties of the officials are listed in the previous paragraph. Many of them are taken out of context or ill-conceived. In addition, they have never been tested in the court and there is no official guidance explaining such duties. As a result, behind of the abundance of duties, an entire purpose of the board of directors assumed by Kazakh law can hardly be understood. It was mentioned that board of directors is rather legally designated as a higher level of management dealing with strategic matters rather than the mechanism of mitigation of agency problems. It is not

clear what specific corporate governance responsibilities/functions are carried out by the JSC officials (especially board of directors) in practice. One may reasonably expect that the central corporate governance mechanism dealing with the "shareholder-manager" agency problem in most JSCs is a controlling shareholder and the board of director and officers are just rubberstamps. One of the main challenges for officials of privately held JSCs is a powerful influence of dominating shareholders that excludes independence. The problem of some state owned JSCs is likely to be fraudulent and non-professional management.

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

Though indemnity and insurance of officials are not legally prohibited, however, they are not developed in practice in Kazakhstan. Kazakh law does not recognise the concept of indemnity generally and it is not clear how relevant rights and obligations of the parties will be enforced in Kazakhstan.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

According to the JSC Law, a board of directors is entitled to determine the strategy of a JSC. However, in practice it is not clear what is the board of directors' or executive body's role in setting and changing the corporate strategy. We assume that in most cases the real power to determine the strategy of a JSC lies with the controlling shareholders.

4 Other Stakeholders

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

Kazakh law does not provide for a specific role of employees in corporate governance. We assume that in practice employees do any significant role in corporate governance.

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

The Kazakh corporate governance system can hardly be named stakeholder oriented. The only constituencies explicitly recognised as stakeholders are shareholders and the JSC itself. As noted above, officials are obliged to act in the best interests of the JSC and its shareholders. However, other entities may play role in corporate governance from time to time. For example, creditors recover their losses from directors/officers through the court in certain cases of the JSC's insolvency. Or, appointment of officials of any bank must be preapproved by the National Bank of the Republic of Kazakhstan, etc.

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

Kazakh law does not specifically recognise the concept of corporate social responsibility. We assume that relevant corporate practices are not developed. Although the concept is in its infancy, there are some elements of it in place. For example, a JSC and/or its officials may be held administratively/criminally liable for large number of offences against ecology, labour, or taxation.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Under the JSC Law, all officials of the JSC are responsible for disclosure. Thus, it is not absolutely clear who is actually responsible.

5.2 What corporate governance-related disclosures are required?

Each JSC must disclose the following corporate governance-related information on the specialised governmental website (www.dfo.kz):

1) most important corporate events as listed in the law (e.g. Minutes of the General Meeting, entry into a "major" or related party transaction, holding the JSC or its officials liable, etc.);
2) changes in the JSC's business affecting interests of shareholder as listed in the law;
3) information on aggregate annual remuneration of officers;
4) affiliates of the JSC; and
5) audited consolidated annual report of the JSC.

The JSCs listed on KASE are subject to some additional disclosure requirements.

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

Each JSC must have its annual report independently audited.

5.4 What corporate governance-related information should be published on websites?

Each listed JSC must publish on its website information about large shareholders, details of the board directors that hold senior position in another company with specification of their respective responsibilities. The **public company** must publish on its website information about certain corporate events. Please note that there are no JSCs in Kazakhstan that fall under the legal definition of a "public company".

Bolat Miyatov
GRATA International
104 Ospanov Street
Almaty, 050020
Kazakhstan

Tel: *+7 727 244 5777*
Email: *bolat.miyatov@gratanet.com*
URL: *www.gratanet.com*

Bolat Miyatov is a Partner and Head of GRATA International's Corporate and M&A practice. He is regularly involved in advising on the local Kazakh legal aspects of the numerous high-profile transactions in various industries, including the local oil & gas sector.

Bolat is a regular contributor to the World Bank *Doing Business* Survey and an author of numerous articles on corporate issues of Kazakh law, including director's and officer's liability. During his work at GRATA, Bolat's team turned into one of the most prominent M&A and corporate legal practices in Kazakhstan.

Bolat seamlessly combines his vast experience in the corporate field with in-depth knowledge of Kazakh competition law which enables the clients to get comprehensive advice on all legal implications and ensure the successful outcome of transactions. He handled numerous merger filings for cross-border takeovers and counselled on potential or ongoing anti-trust, anti-subsidy and anti-dumping investigation against local entities.

Igor Lukin
GRATA International
104 Ospanov Street
Almaty, 050020
Kazakhstan

Tel: *+7 727 244 5777*
Email: *ilukin@gratanet.com*
URL: *www.gratanet.com*

Igor Lukin is a senior lawyer in GRATA International's Corporate Law Department. He specialises in corporate law and governance. Igor has solid experience in advising on arranging and closing M&A transactions, creating business ventures, corporate governance issues, and due diligence investigations.

Igor is a final year PhD candidate conducting his research in the field of corporate law. In 2015, he worked for Max Planck Institute for Comparative and International Private Law in Hamburg as a visiting researcher.

Igor provided legal support, consultations, due-diligence reports, and conducted assessments for companies like the Joint Stock Company Sovereign Wealth Fund Samruk-Kazyna, the Royal Bank of Scotland, European Bank for Reconstruction and Development, International Finance Corporation and others.

GRATA INTERNATIONAL

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GRATA International's Corporate Law Department covers M&A, anti-monopoly regulations, general corporate law practice and labour law issues. Our lawyers have extensive experiences in this area and excellent track record of successful projects. Their expertise and knowledge of the latest changes in corporate regulations and international standards, allow them to provide appropriate solutions to their clients.

Korea

Sungmin Kim

Lee & Ko

Jang Hyuk Yeo

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

There are five types of companies under the Korean Commercial Code ("KCC"), namely, a *chusik hoesa* (a joint stock company), a *yuhan hoesa* (a closely held limited liability company), a *yuhan chaekim hoesa* (similar to a limited liability company), a *hapmyung hoesa* (similar to an unlimited partnership), and a *hapja hoesa* (similar to a limited partnership).

Liability of each shareholder of a *chusik hoesa* is limited to the amount that the shareholder has invested by subscribing to the shares of the company. Unless otherwise provided in the Articles of Incorporation ("AOI"), stockholders are free to transfer their shares and realise their investment at any time. The business of a *chusik hoesa* is carried out by a board of directors, who may or may not be stockholders of the company, whereby, in principle, ownership and management of the company are separate.

In contrast, a *hapmyung hoesa* is a legal entity similar to a partnership and a member of the company assumes unlimited liability for the liabilities of the company. A member of the company must obtain the approval of all the other members before transferring his/her equity interest in a *hapmyung hoesa*.

In a *hapja hoesa*, there are two classes of members: members assuming unlimited liability; and members assuming limited liability. To transfer equity, a member with unlimited liability must obtain the approval of all other members.

A *yuhan hoesa* is a closely-held limited liability company that has been principally designed for small businesses. A *yuhan hoesa* consists of members with limited liabilities who are responsible only to the extent of their capital investment. Although the units of the corporation may be transferable, *yuhan hoesa* may not issue bonds or different classes of units.

A *yuhan chaekim hoesa* is very similar to a U.S. limited liability company. It is intended to provide the advantages of a *yuhan hoesa* and a *chushik hoesa*. The liability of members is limited, no capitalisation requirements are imposed and no director or auditor requirements are imposed. However, *yuhan chaekim hoesa* has rarely been used in practice, as it was only introduced by the revision of the KCC in 2012.

A *chusik hoesa* is the most dominant form of company in Korea. A *yuhan hoesa* and a *chusik hoesa* are very similar in substance, but the most prevalent form of corporate entity in Korea is the *chusik hoesa*, which, unlike a *hapmyung hoesa* and *hapja hoesa*, allows the stockholders to have limited liability. Due to sufficient corporate precedents, a *chusik heosa* has more stability in its operations, and more easily attracts investment due to the requirement for companies undergoing IPOs to be a *chusik hoesa*, etc. Unless otherwise noted, our responses below were prepared assuming cases of a *chusik hoesa*.

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

The main statute that sets forth the fundamental guiding principles for governance of a company is the KCC. The AOI sets forth more specific principles for corporate governance and operation. Specifically, the AOI provides for the name, objectives, total number of issued shares, location of the head office and other basic matters about the company, as well as matters regarding operation of the company including the number of directors, matters for resolution by the shareholders' meeting, matters relation to new shares and dividends.

The Financial Investment Services and Capital Markets Act ("Capital Markets Act") provides for various rules governing listed companies, including public disclosure, insider trading, prohibition of unfair trade practices such as market price manipulation, audit committee and outside directors, and rights of minority shareholders. The purpose of these rules, administered by the Ministry of Strategy and Finance, Financial Supervisory Service and the Korea Exchange, is to ensure transparency in listed companies and healthy operation of the securities markets. Subordinate statutes under the Capital Markets Act include the Rules on Issuance of Securities and Disclosure promulgated by the Financial Supervisory Service, and the KOSPI Market Listing Rules, KOSDAQ Market Listing Rules, KOSPI Market Disclosure Rules and KOSDAQ Market Disclosure Rules, which are promulgated by the Korea Exchange.

A *chusik hoesa* meeting certain thresholds, regardless of whether it is listed, must undergo an accounting audit by an independent outside auditor, pursuant to the Law on External Audit of Chusik Hoesa. Pursuant to a recent amendment to the Law on External Audit of Chusik Hoesa, beginning from the first fiscal year after 01.11.2018, the same requirements are applicable for a *yuhan hoesa*.

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

A comprehensive restructuring of the regulatory scheme is currently in progress for improvement in corporate governance and the securities market. As part of that effort, a substantial revision of the KCC is currently being reviewed by the National Assembly. Major issues being considered as part of the revision bill include: (i)

mandatory cumulative voting for listed companies above a certain amount of assets; (ii) introduction of 'multiple derivative actions' which allow shareholders holding 1% or more of a parent company to pursue claims against subsidiary directors; (iii) mandatory nomination by the outside director nomination committee of one outside director from each of the employee stock ownership association and shareholders who hold at least 1% of the issued voting shares; and (iv) introduction of mandatory electronic voting system for listed companies with more than a certain number of shareholders to allow shareholders to vote via the electronic system without having to physically attend shareholder meetings. It is not clear if the revision bill will be passed by the National Assembly and if so, when and in what form. If some of the above-mentioned proposals are implemented and enacted into law, the corporate governance structure of Korean companies will be greatly affected.

In addition, shadow voting, formerly permitted under the Capital Markets Act (Korea Securities Depository exercising the voting rights of shares deposited in its name in proportion to the affirmative and negative votes of shareholders who actually participate in the shareholders' meeting), was abolished as of 01.01.2018, to minimise potential misuse by controlling shareholders. Under the KCC, an ordinary resolution can be adopted by an affirmative vote of ¼ or more of the issued shares (and a majority of the voting shares), and thus, for a listed company with a high degree of shareholder dispersion, such shadow voting helped secure the required number of votes for approval of a resolution. With the abolition of shadow voting, we can expect companies to more actively promote the usage of the electronic and written voting system which was available under the KCC but not actively used, and we also expect usage of proxy voting to increase.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Short-termism can be largely divided into short termism of the management level and the shareholder level. With respect to management, there is an incentive to pursue short termism as incentive plans, compensation, etc. are often times linked to the company's short term performance. Shareholders are also increasingly seeking to withdraw funds over a short period by share buybacks and dividend payout. Recently, shareholder short termism is increasingly becoming the norm as private equity funds seeking short-term investments with high returns are becoming the main players in the M&A market.

However, the KCC does not directly restrict short-termism of management or shareholders. Of course, if the act of pursuing short-termism by management (registered director) violates the law or AOI or causes damage to the company, it may be grounds for dismissal, civil liability, or criminal liability for breach of fiduciary duty. If shareholders are responsible for conspiring with management, or instructing management, shareholders may also be liable for the same civil or criminal liability. Otherwise, however, there are no particular restrictions to short-termism specified under the laws.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

A shareholder may not directly participate in the management of the company, but may only participate indirectly through a shareholders' resolution. Further, the shareholders' meeting has authority over matters specified by legislation or in the AOI, rather than the overall management of the company. The important matters that are within the authority of the shareholders' meeting are as follows:

(i) Election and removal of directors and statutory auditors, and decision of their remuneration.

(ii) Revision of the AOI.

(iii) Approval of financial statements and dividends.

(iv) Transfer of all or part of the company's business and purchase of all of the business of another company.

(v) Merger, spin-off, comprehensive exchanges and transfers of shares.

(vi) Capital reduction.

(vii) Grant of stock option (provided, in case of a listed company with KRW 300 billion or more in paid-in capital, up to 1% of the issued shares; for a listed company with less than KRW 300 billion in paid-in capital, up to 3% of the issued shares, by a resolution of the board of directors).

There are certain other rights of shareholders that may be exercised to influence management of the company, including: (i) the right to demand the convening of the shareholder's meeting; (ii) the right to demand a director to cease improper activity; (iii) the right to demand review and duplication of accounting books; and (iv) the right to demand removal of a director or statutory auditor.

The requirements for exercise of such rights vary depending on the specific right and the type of company at issue. For instance, the right to demand a derivative action against a director (in case where the company refuses to comply with the shareholder's demand to impose sanctions on such director) can be exercised by a shareholder with a 1% share, in case of a private company. In case of a listed company, on the other hand, such right can be exercise by a 0.01% shareholder, if he has held the shares for six months or longer. Also the right to demand the removal of a director or statutory auditor can be exercise by a shareholder with a 3% share, in case of a private company, while, in case of a listed company, it can be exercised by a 0.5% shareholder (0.25% in case of a listed company with KRW 100 billion or more in paid-in capital) if he has held the shares for six months or longer.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

As further elaborated in the answer to question 2.4 below, in principle, shareholders do not owe any duties to the company, and, if the directors nominated by shareholders are liable for any wrongful act, such liability is personal to that particular director. The nominating shareholders do not bear any responsibility.

However, (i) a person who instructs a director to conduct business by using his/her influence over the company, (ii) a person who conducts business in person under the name of a director, or (iii) a person other than a director who conducts the business of the company by using a title which may give the impression that he/she is authorised to conduct the business of the company, such as honorary chairman, chairman, president, vice-president, executive director, managing director, director, or others (collectively, a "person who instructs another person to conduct business, etc.") shall be jointly and severally liable for damage incurred to the company or a third party as a result of such instructed or conducted acts, together with the directors.

Although most of the times the controlling shareholders are liable for such acts, such liability of a person who instructs another person to conduct business, etc. is not necessarily limited to shareholders, and is applicable to any third party that influences a director in his/her performance of business.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

A company must hold an annual shareholders' meeting on a specified date each year, and may hold extraordinary shareholders' meetings as necessary. An annual shareholders' meeting must, in principle, be held within three months following the last day of the preceding fiscal year. The usual matters resolved at an annual shareholders' meeting are election of directors and statutory auditor, determination of their remunerations, and approval of financial statements. Other matters may also be resolved as necessary, such as a business transfer or amendment of the AOI.

Unless otherwise provided for in the AOI, a shareholders' resolution may be (i) an ordinary resolution requiring ½ of shares represented at the meeting and ¼ of all outstanding shares, or (ii) a special resolution requiring ⅔ of shares represented at the meeting and ⅓ of all outstanding shares. Other than as to matters requiring special resolution or unanimous consent of shareholders as specified by law or under the AOI, an ordinary resolution is sufficient.

In principle, a shareholders' meeting must be called by a board resolution. However, a shareholder with 3% or more of the total outstanding shares may demand the convening of an extraordinary shareholders' meeting, by a written request to the board stating the agenda for the meeting. In case of a listed company, a shareholder who has held 1.5% or more of the voting shares for six months or longer has the same right.

Also, a shareholder with 3% or more of the voting shares may propose an agendum for a shareholders' meeting, in writing to the board submitted at least six weeks prior to the meeting date. In case of a listed company, a shareholder who has held 1% or more of the voting shares (0.5% in case of a listed company with KRW 100 billion or more in paid-in capital) for six months or longer has the same right.

See question 2.1 above for the important matters that are within the authority of the shareholders' meeting.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders nominate directors, who owe a fiduciary duty and duty of loyalty to the company, but, in principle, shareholders do not owe any duties to the company or to other shareholders.

There is an academic viewpoint that the duty of loyalty and duty of faithfulness of shareholders should be recognised; however, the majority view remains that, unless the controlling shareholder simultaneously holds a director position, such duties cannot be recognised as a duty of a shareholder.

Other than liability for damages under the Korean Civil Law, or liability of person who instructs another person to conduct business, etc. pursuant to Article 401-2 of the KCC, a shareholder's exposure to liability with respect to obligations of the company is limited to losing his/her equity in the company. Therefore, shareholders are not liable for acts or omissions of the company, unless deemed a person who instructs another person to conduct business, etc. as seen in question 2.2 above, or in the case of piercing the corporate veil. As a rare exception, there are cases where a shareholder was held liable for the company's obligations in full, under the theory of piercing the corporate veil. According to such precedents, this theory is applicable where the company is apparently in the form of a legal entity, but that is no more than a mere disguise, and in fact the company belongs entirely to an individual or is recklessly used by such individual as a means of evading application of law.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

See question 2.1 above for a discussion on derivative actions.

A shareholder with a 1% share or more of the shares may demand a director to cease engaging in an act which violates a law or the AOI, if such act may cause irreparable harm to the company. In case of a listed company, a shareholder who has held 0.05% or more of the voting shares (0.025% in case of a company with KRW 100 billion or more in paid-in capital) for six months or longer has the same right.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

In general, there is no legal limit on shareholding ratio or share acquisition. However, there are certain shareholding restrictions under specific statutes. A holding company, for instance, must hold at least 40% of the shares in its subsidiary (20% if the subsidiary is a listed company), and may not hold more than 5% of the shares in a company other than its subsidiary. Further, foreigners' shareholding in companies involved in certain industries is restricted or prohibited altogether (e.g., up to 49% shareholding is permitted in a company engaged in the telecom business).

In case of a listed company, if a share acquisition results in the acquirer's shares (together with its specially-related persons) being 5% or more of the total outstanding shares of the company, such acquisition must be publicly disclosed within five business days thereafter. The same applies to every change in shareholding thereafter by 1% or more.

In case of a listed company, if a share acquisition results in the acquirers' shares (together with its specially-related persons) being 10% or more of the total outstanding shares of the company, and if the acquirer is a major shareholder or officer of the company, then such acquisition must be publicly disclosed within five business days thereafter. The same applies to every change in shareholding thereafter by one share.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

In principle, disclosure of the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested is not required by law.

However, in case of a listed company, there are certain disclose requirements pursuant to the KOSPI Market Disclosure Rules and KOSDAQ Market Disclosure Rules, which are promulgated by the Korea Exchange.

For example, (i) if a certain intention, plans or proposals of shareholders with respect to the company results in a binding obligation on the company (e.g., execution of a binding MOU, etc.), disclosure thereof may be required, (ii) the Korea Exchange may request for an inquired disclosure in relation to certain rumours in the market that relate to a major management decision of a listed

company; upon receiving such inquired disclosure, the company must provide a response. However, it is unlikely that the intentions, plans or proposals of shareholders will be disclosed due to inquiry disclosure requirements, as it is common to provide brief abstracts or a general response to such requests.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Other than certain important matters required to be authorised by the shareholders' meeting under the KCC or the AOI, such as merger or business transfer, matters relating to company management are generally decided by the board of directors. The authority to execute the affairs of the company in general, including implementation of the board's decisions, lies with the representative director. The representative director is usually elected by the board, but may also be elected by the shareholders' meeting if such is permitted under the AOI. In turn, the board oversees the representative director's activities, and the statutory auditor or audit committee audits the affairs of the board and the representative director.

In principle, the board must consist of three directors (there is no ceiling), but a company with less than KRW 1 billion in paid-in capital may have only one or two directors. Meanwhile, election of outside directors is not required in case of private companies, but at least ¼ of all directors in a listed company must be outside directors. In case of a listed company with total assets of KRW 2 trillion or more, there must be at least three outside directors who must represent a majority of the board members. To ensure independence of an outside director, the KCC prohibits persons having certain relationships with the company or a major shareholder from becoming an outside director.

The company may have a committee consisting of two or more directors, in accordance with the AOI, and the board may delegate its authority to such committee, except with respect to certain matters on which delegation is prohibited by law. In case of a listed company with total assets of KRW 2 trillion or more, an audit committee and an outside director nomination committee are mandatory.

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

Directors are elected by the shareholders' meeting, and their term of office is determined by the AOI or shareholders' resolution, provided that it may not exceed three years. Unless the AOI provides to the contrary, directors must be elected by cumulative voting upon request of a shareholder with 3% or more shares (in most companies, the AOI specifically excludes cumulative voting). Cumulative voting is a system of voting where, in case of electing two or more directors, each shareholders has voting rights equal to the number of his/her shares multiplied by the number of directors to be elected, and may concentrate those votes on one or more candidate(s).

A director may be removed at any time with or without cause, by a special resolution of the shareholders' meeting. However, the removed director may claim damages (loss of earnings for the remainder of his term) if the removal was without justifiable cause. The statutory auditor is elected by the shareholders' meeting and may be removed at any time with or without cause, by a special resolution of the shareholders' meeting. The term of office of a statutory auditor is until conclusion of the ordinary shareholders' meeting for the last fiscal year falling within three years following the date of election. A shareholder with more than 3% voting shares may not vote the shares in excess of 3% in the election of a statutory auditor.

In case of a listed company, if the largest shareholder (together with specially-related persons) holds more than 3% of the voting shares, the largest shareholder may not vote shares in excess of 3% in the election or removal of a statutory auditor or an audit committee member who is not an outside director (provided, in case of a listed company with KRW 2 trillion or more in total asset, the largest shareholder holding more than 3% of the voting shares is also prohibited from voting shares in excess of 3% in the election of an audit committee member who is an outside director).

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

The KCC provides that the remuneration of a director is to be determined by a shareholders' resolution if it is not specified in the AOI. In practice, the shareholders' meeting approves the total amount of remuneration for directors, and the board of directors then decides the remuneration amount for each individual director, the total amount of which shall be within the ceiling amount approved at the shareholders' meeting.

Grant of stock option is a means of remuneration, and thus requires shareholders' approval (in the case of a listed company, up to a certain limit, by a resolution of the board of directors; see response to question 2.1 above for further details). Meanwhile, the KCC prohibits grant of stock option to a shareholder with 10% or more shares, and specially-related persons of such shareholder. Therefore, a director falling in that category may not receive a stock option.

Meanwhile, the Capital Markets Act requires disclosure of directors' remunerations. In particular, directors and statutory auditors with annual remuneration of KRW 500 million or more must disclose the individual directors' and statutory auditor's remuneration together with the specific calculation criteria for such remuneration.

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

A director may hold shares and there is no restriction in this regard. A director of a listed company must disclose any shareholding in the relevant company on his account, within five business days following his appointment as director, and any change in such shareholding thereafter must be disclosed within five business days from the occurrence of such change. See response to question 2.6 above for more details.

Insider trading is prohibited under the Capital Markets Act. The Capital Markets Act also contains provisions on "short swing" profits, whereby a director who gains profits by sale and purchase (or purchase and sale) of shares within six months must transfer such profit to the company.

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

In principle, each director has a right to convene a board meeting, but such right may be given exclusively to a designated director through the AOI or by a board resolution. Even if such person is designated, however, such person must comply with a director's request to convene a board meeting.

A board meeting may be held at any time, and a notice must be sent to each director and statutory auditor at least one week before the meeting date. This notice period may be shortened through the

AOI, and also, the meeting may be held at any time without notice by consent of all directors and statutory auditors.

The directors must be physically present at a board meeting in principle, but may also participate in the resolution by means of a mode of communication whereby video or audio signals are simultaneously transmitted (i.e., by video conference or conference call), if such is permitted under the AOI.

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

A director has the duty to faithfully execute his duties for the company in compliance with laws and the AOI. This fiduciary duty owed towards the company applies to all directors, whether or not the company is listed, and whether the director is standing or non-standing, inside or outside.

In relation to the fiduciary duty of a director, the courts have adopted the so-called "business judgment rule", and have held that a director cannot be deemed to have breached his fiduciary duty if he has made a decision in the interest of the company, following collection of information to a reasonable degree and an appropriate review process. One such decision is quoted below.

"If a director of a financial institution has made a decision to grant a loan, and such loan ultimately proved to be difficult or impossible to recover, such fact alone does not lead to a conclusion that the director who made that decision has breached his fiduciary duty. Rather, if the director has made the business judgment relating to the loan as a reasonable officer of a financial institution, based on proper information under the circumstances and through appropriate procedures, and in good faith for the best interest of the company, then absent a manifest impropriety in the review and decision process, such business judgment of the director should be deemed to be within the scope of discretion permitted to him, and in full discharge of his fiduciary duty toward the company."

Whether or not a director of a financial institution has breached his fiduciary duty should be determined on the basis of whether there was a fault in the loan decision that should not have been overlooked by a reasonable loan officer, by comprehensively taking into account all relevant circumstances including the terms and conditions of the loan, amount of loan, repayment plan, existence and substance of collateral, and the assets, business circumstances and growth potential of the borrower.

If a director is found to have breached his fiduciary duty, he is liable for damages incurred by the company as a result of such breach. If the company fails to claim such damages against the director, then the shareholders may do so through a derivative action (see response to question 2.1 above).

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main responsibility of a director is to make decisions on company management through the board meetings, and in that process, the director bears a fiduciary duty as discussed in question 3.6. Each director additionally has a duty to observe the other directors' execution of their duties, and to maintain confidentiality on company secrets. Decisions made by the board are executed by the representative director.

While the board and individual directors have a right and duty to supervise company management, it is the statutory auditor or the audit committee which has the ultimate supervisory function over company affairs. Such function is served based on the right to participate in and make statements at board meetings, right to demand a report from directors, and the right to inspect the affairs and assets of the company. Although the statutory auditor or audit committee is an organ of the company, it is independent to a certain extent in overseeing the management and accounting of the company.

Key, current challenges for the management body would be the civil or criminal (breach of fiduciary duty) liability of management in the event a management decision later causes damage to the company. As seen under question 3.6, the court's adoption of the business judgment rule does provide some flexibility to avoid legal liability for management's business decisions. However, mainstream court precedents have been quite liberal in finding civil/criminal liability of directors. It has been pointed out that this affects management, by inducing passive management by the directors and causing delays of management decisions, ultimately hindering competitiveness in the international market. In response to such concerns, and to minimise exposure of potential civil/criminal liability of directors, codifying the business judgment rule in the KCC is currently being considered by the National Assembly.

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

It is permissible for the company to indemnify a director for damages incurred in the course of performing duties as director, or to obtain insurance coverage (i.e., D&O insurance coverage) for such indemnity.

If a director has intentionally or negligently acted in violation of any law or the AOI or has neglected his/her duties, he/she shall be jointly and severally liable for damages incurred by the company. In order to exempt the director from such liability, the KCC provides (i) complete exemption by unanimous consent of the shareholders, and (ii) partial exemption as permitted under the AOI.

First, with unanimous consent of the shareholders, a director may be completely exempted from liability for damages incurred to the company, provided, excluding liability for damages to third parties unless with the consent of such third party.

Second, a company may, in accordance with its AOI, limit director liability to the company to six times (three times in case of outside directors) his/her total remuneration (that of the immediately preceding year of the date of the act or misconduct of the director, including bonuses and the profit from exercise of stock option). The six/three times requirement can be increased under the AOI, but not reduced. Additionally, director liability due to intentional wrongdoing or gross negligence, violation of non-compete restrictions, holding concurrent office, usurpation of corporate opportunity and self-dealing are excluded from such exemption.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board is the corporate organisation where decisions of the company are made other than those expressly reserved for the shareholders meeting pursuant to the AOI or the KCC. As the board generally establishes a business plan after obtaining adequate and reliable information, setting and changing the strategy of the corporate entity/entities is mainly a role of the board. Once the board approves of the strategy of the corporate entity/entities, such are implemented by the representative director. The board is obliged to oversee the overall execution by the representative director.

4 Other Stakeholders

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

In principle, employees do not have a right of participation in management.

Depending on the company, however, there could be provisions in the collective bargaining agreement between management and the labour union, requiring prior consultation with the union or other form of employee participation in respect of certain matters that may directly affect employees' interests.

Additionally, as mentioned under question 1.3 above, the KCC amendment to mandate the appointment of one outside director nominated by the employee stock ownership association is pending in the National Assembly, although it is unclear whether it will be adopted.

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

Other stakeholders of the company, excluding shareholders, management and employees, can be the government, civil organisations and creditors.

The Ministry of Justice, which oversees the KCC, plays a role in managing and supervising KCC violations of directors in order to establish sound corporate governance, by way of imposing administrative penalties, etc. Civil organisations and creditors do not play a direct role in corporate governance, but indirectly participate in corporate governance by reviewing information obtained from the company (creditors are allowed visits to the company during business hours to review the AOI, minutes of the shareholder meetings, bond registry, and financial statements/auditor reports approved by the general meeting of shareholders) or public information, and raising issues or reporting to relevant authority when there is a belief of breach of fiduciary duty or other corporate governance issue.

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

While there is growing recognition and discussion about corporate social responsibility, there is not yet a legislative framework that serves as a general guideline thereof. In 2007, the Social Enterprise Fostering Act came into effect, providing the basis for granting tax benefits and other support for companies designated as a "social enterprise". However, the requirements for such designated companies are quite stringent, e.g., at least 50% of the company's employees must be in the underprivileged class, or at least 50% of the services provided by the company must be targeted toward the underprivileged class. For this reason, it seems that only a small number of companies would be able to benefit from this law.

Through the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion Act, the Equal Employment Opportunity and Work-Family Balance Assistance Act, and the Act on the Employment Promotion and Vocational Rehabilitation of Persons with Disabilities, the government prohibits companies from discrimination against the elderly, women and handicapped persons in employment, and encourages companies to protect such persons. These statutes ensure that companies discharge their social responsibility at certain threshold levels.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Ultimate responsibility for transparency in company management and disclosure lies with the board, and specifically the directors. Further, the statutory auditor or audit committee oversees activities of the board and individual directors.

In case of financial institutions such as banks and securities companies, the law requires a set of procedures and standards to be put in place for compliance by officers and employees in performing their duties (internal control standards), and further, the company must have an officer who verifies such compliance and reports any violation to the audit committee (compliance officer).

5.2 What corporate governance-related disclosures are required?

A company must prepare a business report, audit report and financial statements each year and place them at its head offices and branch offices, following approval by the shareholders' meeting.

A listed company is required to submit to the Financial Supervisory Service and to disclose, not only the annual report but also the semi-annual and quarterly reports. These reports contain comprehensive information about the overall company operation, including changes in capital, status of shares and voting rights, financial matters, matters on operation of the board, matters on statutory auditor, dealings with the largest shareholder and other specially-related persons, and matters relating to officers and employees, thus providing a bird's eye view of the overall operation of the company.

Also, in case of listed companies, disclosure is required upon occurrence of important events in company affairs, including board resolutions on certain matters pursuant to the KOSPI Market Disclosure Rules and KOSDAQ Market Disclosure Rules.

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

The statutory auditor or audit committee audits the company affairs and accounting, and oversees directors' performance of their duties. The statutory auditor or audit committee receives the financial statements and business report from the representative director, and conducts a review as to the accuracy of information in these documents, and as to whether there has been any impropriety in directors' activities. Since the statutory auditor or audit committee is an internal organ of the company and therefore not sufficient in itself to fully carry out the auditing function, the Law on External Audit of Chusik Hoesa requires companies with over KRW 12 billion in assets etc. to appoint an accounting firm as external auditor to audit the financial statements. Also, listed companies are required under the Law on External Audit of Chusik Hoesa to appoint an external auditor upon approval of an external auditor appointment committee with proven expertise and independence, and to appoint the same person (accounting firm) as external auditor for three consecutive years in principle so as to ensure independence of the external auditor.

5.4 What corporate governance-related information should be published on websites?

In general, there is no legal requirement to publish governance information on websites. However, listed companies and certain

private companies must make public disclosures on various matters relating to management and governance, through the electronic disclosure system operated by the Financial Supervisory Service (DART: Data Analysis, Retrieval and Transfer System – http://dart.fss.or.kr) DART is designed to enable companies to submit reports to the relevant authorities in electronic format through the internet, and to disclose the contents of such reports to the public on a real-time basis, thus fostering speedy disclosure and transparency in company operation. Thus, in case of a listed company, almost all disclosures are published instantly on the internet, and not only shareholders but the general public can view the disclosure materials without restriction. To a limited extent, the disclosure materials are also provided in English (http://englishdart.fss.or.kr).

Sungmin Kim
Lee & Ko
Hanjin Building 63
Namdaemun-ro, Jung-gu
Seoul 04532
Korea

Tel: +82 2 772 4979
Email: sungmin.kim@leeko.com
URL: www.leeko.com

Sungmin Kim is a partner in the Corporate and M&A Practice Group and the head of the Start-up Team at Lee & Ko. His primary practice focuses on mergers & acquisitions, corporate governance, joint ventures, cross-border investment and general corporate counselling. Since joining Lee & Ko in 2010, he has handled a broad range of transactional matters, including mergers, spin-offs, stock and asset acquisitions, joint-ventures, purchase & assumptions, etc. In particular, he has solid experience in M&A of financial institutions and IT companies.

He also has expertise in the areas of Fin tech, Startups, Technology, Media & Telecommunications and Capital Market Regulation & Compliance, where he represents various domestic and foreign companies.

Prior to joining Lee & Ko, Mr. Kim served as a military prosecutor for the Korean Army and legislative officer at the Legislative Task Force Team on Improvement of Defense Procurement System for the Ministry of Defense, where he managed amendment process of the Defense Acquisition Program Act and other defence-related laws and regulations.

Mr. Kim received his LL.M. degree from UCLA School of Law in 2015 and worked at Mayer Brown LLP (Chicago office) as a Foreign Attorney (2015–2016). He is a member of the Korean Bar and the California State Bar.

Jang Hyuk Yeo
Lee & Ko
Hanjin Building 63
Namdaemun-ro, Jung-gu
Seoul 04532
Korea

Tel: +82 2 2191 3258
Email: janghyuk.yeo@leeko.com
URL: www.leeko.com

Jang Hyuk Yeo specialises in the areas of mergers and acquisitions, joint ventures, foreign investments, private equity transactions and other general corporate matters.

Mr. Yeo has worked on numerous high-profile cross-border transactions such as Carlyle Group's acquisition of ADT Caps, Daesung Group Partners and Goldman Sachs's sale of Daesung Industrial Gases to MBK and LS Mtron/ LS Automotive's transfer of automotive parts business and copper foil/ thin film business to Kohlberg Kravis Roberts & Co. Mr. Yeo has established a solid reputation for advising both domestic and foreign clients in complex cross-border transactions involving Korea or Korean companies.

Prior to joining Lee & Ko, Mr. Yeo worked at the Hong Kong office of Cleary Gottlieb Steen & Hamilton, where he has gained substantial experience in capital markets and mergers and acquisitions.

Founded in 1977, Lee & Ko consistently ranks among the largest and most highly respected law firms in Korea. Lee & Ko's Corporate / M&A Team has ranked first place in Thomson Reuters' South Korean M&A League Table in 2011, 2012 and 2016 and also in deal numbers in 2013, 2014 and 2016. Lee & Ko's M&A team ranked top tier by international legal service surveyors: top tier 1 in *The IFLR 1000* ratings since 2008; band 1 recognition from *Chambers Asia* since 2013; and tier 1 in *The Legal 500* since 2007.

Lee & Ko's Corporate / M&A Team represented domestic and international clients in many of the largest merger and acquisition transactions to date involving Korea or Korean companies, and is widely recognised for being able to handle complex transactions with efficiency, reliability and dedication. The team provides advice on corporate governance, transactional and regulatory compliance matters for most leading Korean companies and many major foreign companies across all industries.

Lee & Ko has over 620 professionals (440 Korean lawyers, 100 foreign lawyers, 80 patent agents, accountants, customs officials, tax agents, and legal advisors). Lee & Ko consists of five groups: Corporate Legal and International Transactions (170 experts); Finance (over 100 experts); Intellectual Property Rights (around 90 experts); Crime and Arbitration (around 170 experts); and Tax (around 90 experts). Our expert teams consist of approximately 30 specialised teams: anti-corruption & regulatory compliance; antitrust and competition; aviation; banking; bankruptcy; insolvency and corporate restructuring; capital markets and securities; class action and consumer claims; construction; corporate and M&A; corporate governance; derivatives; dispute resolution; energy; entertainment; environment; finance (acquisition finance, asset finance, project finance, structured finance); foreign direct investment; healthcare; insurance; intellectual property; international practice (Chinese, European, Japanese practice); international trade; labour and employment; maritime and shipping; overseas investment; private equity and venture capital; privatisation; product liability; real estate; tax and customs (tax consulting, audit, dispute resolution, transfer pricing); technology; media and telecommunications; and white-collar crime. Lee & Ko continues to work with its clients around the world with dedication and expertise, successfully handling complex cases in many important transactions and cases.

Malta

James Scicluna

WH Partners

Gabriella Zammit

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Maltese law provides for several forms of corporate entities, but the most frequent form of business entity is by far the limited liability company, which may have the status of a public or private company. A limited liability company is a company in which the shareholders' liability is limited to the amount unpaid on their share capital. It is the most popular vehicle to carry out business and/or hold investments due to the security it offers to the shareholders in cases of bankruptcy.

A private company is one that, in its constitutive document, restricts the rights to transfer shares, limits the number of its members to 50 and prohibits any invitation to the public to subscribe for any shares or debentures of the company. A private company can further be established as a private exempt company or a single member private exempt company. By exclusion, a public company is defined as a company that is not a private company as defined. Limited liability companies may also be registered as investment companies with variable share capital (SICAV) or investment companies with fixed share capital (INVCO). Limited liability companies carrying out the business of insurance may also be registered as/or converted into a protected cell company (PCC).

Listed Companies are entities whose shares are listed on a regulated market for public trading. There are currently three regulated markets authorised under Chapter 345 of the Laws of Malta – The 'Financial Markets Act' which are the 'Malta Stock Exchange', the 'European Wholesales Securities Market' and the 'Institutional Financial Securities Market'. The Malta Financial Services Authority ('MFSA') solely regulates the financial services in Malta and it also acts as the Listing Authority in Malta.

Public Interest Companies are defined under the 'Corporate Governance Guidelines for Public Interest Companies' issued by the Malta Financial Services Authority as companies whose operations impact a substantial sector of society. A public interest company is any one of the following:

a) A regulated company meaning a company authorised to provide a financial or a utility service and which is either a large private company or a public company but excluding collective investment schemes, companies which do not hold or control clients' money and companies which already have an obligation to segregate clients' funds in separate accounts.

   A 'large private company' is a private company as defined under the Companies Act and which exceeds a certain minimum balance sheet and turnover thresholds.

b) A company that has issued debt securities to the public and whose securities are not admitted to listing on a recognised investment exchange.

c) A government-owned entity established as a limited liability company.

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

The principal Maltese legislation regulating corporate governance practices is the Companies Act 1995. The Maltese Companies Act defines the types of corporate entities or commercial partnerships that may be established and regulates the manner in which their affairs are to be conducted. It is the main source for the division of authority between the board of directors and the general meeting of shareholders. It also regulates the duties and accountability of the directors together with shareholder redress mechanisms and disclosure and transparency requirements.

Another important source of corporate governance for a company registered under Maltese Law is the memorandum and its articles of association. The articles of association define the internal relationship of a company with its members and sets out a company's powers, obligations and procedures. The memorandum and articles of association are the company's source of its own governance and bestow legitimacy on its own actions. The Companies Act provides specimen articles of association that apply by default unless an express exclusion is inserted in the constituting document of the company being established.

There is no major distinction in terms of corporate governance practices between public and private companies. Public companies listed on a regulated market are required to comply with the Listing Rules issued by the MFSA. Listed companies should also comply with the Code of Principles of Good Corporate Governance forming part of the Listing Rules. The Code is a fundamental set of guidelines to establish the corporate governance framework for listed companies. This is a non-binding Code designed to strengthen the legal, institutional and regulatory framework for good governance under the Maltese corporate sector. Although implementation of the Code is on a 'comply or explain' basis, a company that chooses not to comply with one or more of the Code provisions must clearly explain their rationale to its shareholders.

Similar guidelines were issued by the MFSA in 2006, this time targeting Public Interest Companies ('Corporate Governance Guidelines') having an impact on the public in general. These guidelines are similarly non-binding but public interest companies should highlight their adherence to such guidelines in their annual reports.

In September 2014, the MFSA also issued a Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes ('Corporate Governance Manual') with the aim of guiding directors of an investment company or of a collective investment scheme on how to implement good corporate governance practice.

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

With the ever-increasing emphasis on corporate governance, boards of public companies, public interest companies and regulated entities are experiencing more awareness and greater pressure to become active and involved with their fiduciary responsibilities. Boards must adopt new frameworks, best practices and new attitudes about their decision-making roles and exhibit a sound governance culture.

There are increased pressures on the board members to make such a push for increased internal governance. Consequent EU Directives have pushed for increased governance around internal process. Apart from the Regulator, expectations of investors and other stakeholders on governance, especially on listed entities, are increasing. Stakeholders are more than ever holding the board accountable for the effectiveness of their overall governance process. This shift is significant and is likely to amount to an expectation of greater board involvement in the means by which governance is organised and effected.

These expectations sometimes go down to a product level. This is especially true with new Regulation drafted following the 2008 financial crisis. Both the Markets in Financial Instruments Directive II (MiFID II) and the Insurance Distribution Directive (IDD) have product governance requirements which factor in Board involvement.

Solvency II and Basel III have specific requirements for a 'fit and proper' board which conducts proper oversight throughout all the functions of the respective bank or insurance company. The expectation now is for the board is to ensure that a proper governance framework is in place.

One of the current challenges is how the EU's most sweeping law regarding data privacy, the General Data Protection Regulation (GDPR), will change the governance landscape. Nearly half of the articles in the regulation are related to business procedures associated with policies, controls, record-keeping, and the accountability of different roles and entities. Running a successful digital business requires governance excellence just as much as it requires information excellence. This requires a robust, consistent and holistic approach with defined policies and processes. Malta-based corporate entities will need to revisit their governance practices in line with the GDPR.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Companies are promoting sustainable value creation over the long-term more and more by investing time in building a more robust governance framework. Whilst direct board involvement may be realistic in smaller organisations, larger banks and insurance companies may find these requirements challenging. Such boards have generally responded by strengthening internal policies and establishing board-level committees with clear mandates. Roles such as the chief risk officers (CROs) are now common and head well-resourced units which can assist the board in their monitoring work.

It is now not uncommon, especially in larger organisation, to find individuals with a risk-related function such as enterprise risk management specialists, compliance officers, internal control specialists, and fraud investigators amongst others. Each would be looking at specific risk areas with the aim of helping the board to manage the different risks which the organisation may face.

Yet, the challenge for boards is how to transform the various risk management functions from simply being a corporate function to a discipline which is embedded across the enterprise and viewed as a strategic asset. With this, there also needs to be a shift from bolted-on, point-specific compliance 'solutions' that add costs and headcount to responses that integrate financial, operating, risk, and regulatory requirements. Only through such a transformation, can the full benefit of risk management be obtained and governance frameworks strengthened.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Under Maltese Law, the general principle is that the board of directors can exercise all the powers of the company saving those powers which are exclusively reserved for the shareholders by the law or by the memorandum and articles of the company. Therefore, in order to distinguish between the rights and powers of directors and those of shareholders, a good review of the company's memorandum and articles of association should be done in addition to an assessment of the provisions of the Companies Act.

There are, however, significant powers which are exclusively reserved for the general meeting of shareholders. These powers include:

- removal of directors;
- altering the memorandum and articles of association; and
- dissolving the company.

Other important powers reserved for shareholders are the power to: increase or reduce share capital; approve annual financial statements; convert the company into another form of commercial partnership; divide the company; and appoint or remove auditors.

The powers of the shareholders are exercised at a general meeting where they are asked to vote on matters requiring their consent. On the other hand, shareholders of a private company may exercise such powers by means of a unanimous written resolution without the need for a meeting provided that the decision does not relate to the removal of a director or auditor.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Whilst the Companies Act reserves certain powers to the general meeting of shareholders as explained above, it does not impose any obligations on them with regard to the exercise of such powers and any responsibilities connected therewith.

The only responsibilities emerge from the Corporate Governance Guidelines and the Listing rules. The former provides that shareholders are required to appreciate the significance of participation in the general meetings of the company and particularly in the election of directors. They should continue to hold Directors to account for their actions, their stewardship of the company's

assets and the performance of the company. The latter requires shareholders to make good use of their votes and to take an active role in achieving their voting objectives. They are also required to consider board composition and other governance arrangements carefully.

However, as previously mentioned, these guidelines are non-binding in nature but simply encourage shareholders to comply with them. Therefore, as a general rule, there are no obligations relating to shareholders under the main legislative act which is the Companies Act.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two kinds of shareholder meetings that are commonly held. These are the: 1) Annual General Meeting; and 2) Extraordinary General Meeting. The Annual General Meeting must be held no later than 15 months from the previous meeting. The Companies Act does not list any business that must be transacted at the Annual General Meeting; however, the following are generally covered:

- approval of annual financial statements;
- declaration of dividend;
- (re)appointment of the members of the board of directors; and
- (re)appointment of the auditors.

Whatever is not discussed at the Annual General Meeting, may be discussed at an Extraordinary General Meeting.

The Companies Act gives several rights to shareholders regarding general meetings. These rights include in particular: the right to receive at least 14 days' written notice of the general meeting; the right to vote at such meetings; the right to appoint a proxy to attend and vote on their behalf; the right to move an ordinary resolution where the notice gives an indication of the business to which it relates; and the right to demand a poll.

Moreover, a member or members of a company which holds no less than 10 per cent of the issued paid-up share capital of the company, has the right to order an Extraordinary General Meeting. If the board of directors fail to conduct such meeting within 21 days from the order, then the requesting members shall have the right to conduct the meeting themselves within three months from the deposit of the request.

At the general meetings, shareholders take their decisions by means of an ordinary or extraordinary resolution. The nature of these resolutions is tied to voting thresholds which can be found under the Companies Act. These thresholds can be increased under the company's articles of association.

Certain corporate actions by shareholders are subject to specific voting majorities:

- Altering the company's constitution – a company can alter its memorandum and articles of association by extraordinary resolution. The votes required for an extraordinary resolution to pass vary from private and public companies.
- Appointing and removing directors – a director of a company other than the first directors must be appointed by ordinary resolution of the company in the general meeting. A company can remove a director before their time has expired by ordinary resolution.
- Increasing share capital – provided that not all authorised share capital has been issued, a company can increase its issued share capital by ordinary resolution adopted by the shareholders. An ordinary resolution is passed if it enjoys the consent of an aggregate of more than 50% of those members with the right to attend and vote at the meeting. If a company wishes to decrease its share capital or increase its authorised share capital, this requires an extraordinary resolution.

In terms of Article 132 of the Companies Act, the shareholders have the power to apply to courts to hold a meeting of the company. This power can be considered to be the last resort of the shareholders if the company is unable to hold a meeting.

On the other hand, there are increasing rules for Listed Companies under the Listing Rules. When it comes to the calling of a general meeting, there are further requirements including the contents of notice, the minimum notice period and the publication of information prior to the meeting. In addition, a shareholder or shareholders of a listed company holding no less than five per cent of the voting issued share capital, may request items to be included on the agenda of the general meeting provided that certain conditions are met.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Whilst the Companies Act provides for several duties of directors, it does not mention any obligations of shareholders towards the entity or to other shareholders. Article 4 of the Companies Act provides for the principle of separate legal personality. This states that a company 'has a legal personality distinct from that of its member or members'. This means that a shareholder is not responsible for the actions or omission of the company, and thus the shareholder is only liable to the extent of any unpaid amount on his shares.

However, there may be situations where a member or members may be held liable for the actions of the company. This is because the law allows for the 'lifting of the corporate veil' in instances where: 1) there is a reduction in the number of members below the minimum statutory requirement of two members for more than six months; 2) the business of the company is carried on with the intent to defraud creditors of the company or of any other person or for any fraudulent purpose; or 3) a prospectus contains untrue statements and a person who relied on the same for subscribing to the shares of a company sustains damages.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

As a rule, under Maltese law, directors owe their obligations to the company itself and not to the individual shareholders. However, the Maltese courts have broadly recognised an exception to the proper plaintiff principle in the form of derivative action. This means an action brought by a shareholder in respect of a wrong done to the company where the directors or the majority of the shareholders, who control the composition of the board, fail to take the necessary action to initiate legal proceedings against the wrong done to the company. It is good to note that the benefit of the action would not accrue to the benefit of the shareholder initiating the action but rather to the company itself.

The introduction of the unfair prejudice remedy available to shareholders (whether majority shareholder or otherwise) under the Companies Act diminished the use of the derivative action. This newly introduced action allows a shareholder who complains that the affairs of the company have been, are being, or are likely to be conducted in a manner that is oppressive, unfairly discriminatory against, or unfairly prejudicial, in relation to a shareholder(s) or in a manner that is contrary to the interests of the members as a whole to apply to court to make an order as the court thinks fit. A point duly

settled by the Maltese Courts is that in order for this action to be successful, the conduct complained of must be deemed by the Court to be oppressive, unfairly discriminatory and unfairly prejudicial, but not necessarily to the plaintiff. It is sufficient that the acts or omissions complained of are oppressive, discriminatory or unfairly prejudicial with respect to another member of the company, or to the interests of the shareholders. The Court has noted that it is not sufficient to simply complain that the conduct in question was contrary to the interests of the members as whole.

Furthermore, in relation to determining whether conduct as described above has occurred, the Court declared that one must first look at whether the affairs of the company were being conducted according to the statute of the company. However, in the application of this provision, which is inspired from principles of equity rather than rights which are strictly legal, the Court should take legitimate expectations into consideration.

In addition to this action, the Maltese Courts have also recognised the possibility for shareholders to enforce 'personal rights'. This provides that if a shareholder is able to show the existence of a right relating to him personally rather than the company, then he may sue in order to have the right enforced. This can be done either through the remedy of specific performance or that of an injunction.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Under the Companies Act, there is no limitation on the number of securities held by members.

However, under the Listing Rules published by the MFSA (Rule 5.176), any shareholder who acquires or disposes shares to which voting rights are attached is obliged to notify the Issuer and the Listing Authority of the proportion of voting rights which are held by such Shareholder as a result of the acquisition or disposal where the proportion reaches, exceeds or falls below certain thresholds.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no formal requirements under the Companies Act for shareholders to disclose their intentions or plans in the entity that they are invested in. The objects clause in the memorandum of association reflects the intention of the company to pursue a certain trading activity. The shareholders signify their approval for the board members/the company to pursue defined trading activities by signing the memorandum of association and therefore agreeing to the terms set out in the constitutive document of the company.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A company is managed by two major organs: the General Meeting of Shareholders and the board of directors. The board of directors has very wide powers as it can exercise all the powers except for those which are strictly required to be exercised by the shareholders under law or under the memorandum and articles of association of the company. The memorandum and articles of association do not generally assign powers beyond those under the Companies Act granting the directors very wide powers.

A private company must have a minimum of one director at all times. Directors manage all the business of the company save for business that falls within the competence of general meetings. A public company must have at least two directors. Therefore, the powers of the directors shall be exercised by the directors acting collectively. Very often, the board can be empowered by the articles of association of a company to delegate its powers to committees of directors, or to individual directors or even to persons who are not members of the board such as CEOs, CFOs and other members of the senior management team. Moreover, a director can also be allowed to appoint a substitute director in his absence, to perform all the functions on his behalf.

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

Directors are appointed during a general meeting for a period of time determined by the shareholders in accordance with the articles of the companies. The memorandum or articles of association may reserve this right to the board itself or to a particular person such as the managing director. However, in practice this rarely takes place as shareholders will want to exercise such a fundamental right. Individuals who are appointed as directors of a public company must accept the appointment in writing.

Under the Companies Act, the removal of a director is a power vested in the shareholders. The Act lays down a mandatory rule that a director may be removed from office 'before the expiration by a resolution taken at a general meeting of the company' and it must be passed by a member or members holding a simple majority of votes. However, the director in question must be informed of the intention of such resolution and must be given the opportunity to attend and be heard at the general meeting.

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

The Model Regulations under the First Schedule of the Companies Act provide that the remuneration of the directors shall from time to time be determined by the company in a general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

Directors' remuneration must be disclosed during the general meeting. The directors' remuneration is determined by the company in the general meeting by ordinary resolution passed by the shareholders.

In the Code of Good Corporate Governance, the boards of directors of listed companies should establish a Remuneration Committee composed of non-executive directors with no personal financial interest other than as shareholders in the company, one of whom shall be independent and shall chair the Committee. A remuneration policy for directors and senior executives should also be established providing formal and transparent procedures for developing such policy and for establishing the remuneration packages of individual directors.

Transparency in relation to executive pay is also achieved via disclosure requirements under the Listing Rules, in terms of which listed companies are required to disclose the terms of service contracts between themselves and directors.

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

There is no restriction or limitation on the number of shares a director may hold in a company in which he is a member of the management body. A director can buy and sell shares and other securities in the company without restriction. However, this is only permissible if carried out transparently without any inside information.

Directors of a company whose financial instruments are admitted to a regulated market must comply with the restrictions and obligations under the Prevention of Financial Markets Abuse Act 2005 (Chapter 476 of the Laws of Malta) when dealing in instruments issued by the company.

Under the Listing rules published by the MFSA, with regards to transactions carried out by directors and Office of Issuers, a director shall not deal directly or indirectly in any of the Securities of the Issuer at any time:

i. when he is in possession of unpublished price-sensitive information in relation to those Securities;

ii. when prior to the Announcement of matters of an exceptional nature involving unpublished price-sensitive information in relation to the market price of the Securities of the Issuer;

iii. on considerations of a short-term nature;

iv. without giving advance written notice to the Chairman, or one or more other directors designated for this purpose. In his own case, the Chairman, or such other designated director, shall not deal without giving advance notice to the board of directors of such company or any other designated director as appropriate; and

v. during such other period as may be established by the Listing Authority from time to time.

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

The procedure calling meetings of the board of directors is set out in articles of association which will provide that a director may at any time summon a meeting of the directors, include a notice period for the calling of meetings and the form of notice required, stipulate a quorum for board meetings and stipulate voting majorities for the adoption of resolutions. The articles will also include a provision which will allow the board to resolve on matters by virtue of a unanimous written resolution instead of at a meeting of the directors. Although the Companies Act does not specifically set out any statutory requirements with regards to the number of meetings that must be held, the Model Regulations under Schedule I of this Act provide that the directors may, whenever they deem fit, meet together for the despatch of business, and adjourn and otherwise regulate their meetings. There are no mandatory requirements regarding frequency or notice requirements.

The Listing Rules require that board meetings of listed companies should be held regularly to ensure that the management body carries out its duties effectively. The Listing Rules further require that the board sets out procedures to determine the frequency, purpose, conduct and duration of meetings and meet regularly, this depending upon the nature and demands of the company's business. In addition to this, notice of the dates of the forthcoming meetings together with the supporting material should be circulated well in advance to the directors so that they have ample opportunity to appropriately consider the information prior to the next scheduled board meeting. After each board meeting and before the next meeting, minutes that faithfully record attendance and decisions should be prepared and should be circulated to all directors as soon as practicable after the meeting.

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

Directors are bound to their companies by fiduciary duties. These duties may be broadly classified into two categories: duties of loyalty; and duties of care and skill. Directors must promote the well-being of the company and are responsible for the general governance and proper administration, management and general supervision of the company and its affairs.

The duty of loyalty covers the duties to act honestly and in good faith in the best interests of the company, not to make secret or personal profits, to exercise powers for the proper purposes and refrain from abusing of them and, to ensure that the personal interests of the directors do not conflict with the interests of the company. The directors must not use any company property, information or opportunity for their own or anyone else's benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with consent from the company in a general meeting or as permitted by the company's memorandum or articles of association. The directors must exercise the powers they have for the purposes for which they were conferred and not misuse them. The duties of care and skill establish both an objective and subjective test against which the competence of a director is measured. The Listing Rules, the Corporate Governance Manual and the Corporate Governance Guidelines all include provisions which mirror the statutory duties of directors.

The personal liability of the directors in damages for any breach of their duties is joint and several except in cases where directors breach a duty which was entrusted particularly to them. The actions of co-director/s shall not affect the rest of the co-director/s provided that the latter can prove either lack of knowledge or dissent in writing as to the breach of duty and that all reasonable steps were carried out to prevent it. Directors are also liable for any act which by law must be performed by a company.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

In terms of the Companies Act, the board is the organ of the company which is responsible for exercising all powers vested in the company as a separate juridical entity which are not reserved to the general meeting of shareholders.

The Code of Corporate Governance provides that the board has the first-level responsibility of executing four basic roles of corporate governance namely: accountability; monitoring; strategy formulation; and policy development.

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

Members of the management body and others shall not be exempted from or indemnified in respect of negligence, default or breach of duty or otherwise of which he may be guilty in relation to the company. Any provision, whether contained in the memorandum or articles of a company or in any contract with a company, or otherwise for exempting any officer of the company from, or indemnifying

him against, any liability which by virtue of any rule of law would in the absence thereof have been attached to him, shall be void.

However, this prohibition shall not extend to instances where such officer obtains a judgment in his/her favour or in which he is acquitted. In these cases, a company may indemnify such officer against liability incurred in defending such proceedings. The Companies Act also clarifies that nothing shall prevent companies or any officer of the company from purchasing directors' and officers' insurance to cover liabilities as aforesaid, and in practice it is very common for companies to do so (such D&O insurance would not, however, cover wilful or dishonest actions of the directors). The Corporate Governance Manual recommends that fund directors should be covered by D&O insurance.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Companies Act does not define what role the members of the board should take when setting the strategy; however, the directors have a duty towards the company and its shareholders to ensure that the company's strategy is in line with its objects of the company. Together with the company's senior executives, the management body is responsible for setting the vision and strategy of the company. The board of directors should discuss strategic matters at the board of directors meeting and promote an effective dialogue to address issues and implement best corporate governance practices.

4 Other Stakeholders

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

Following an Anglo-Saxon corporate governance model, Maltese legislation does not cater for two-tier board structures under which employees are given a forum to exercise control over the management of the company, nor are employees given a right to representation on the unitary board.

As stated above, companies covered under the Listing Rules and the Corporate Governance Guidelines are expected to give due consideration to employees. In doing so, the board is expected to work closely with all groups of its stakeholders, including, suppliers, customers and the wider community in which the company operates, and work closely with such stakeholders.

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

The stakeholders, including the employees, suppliers, customers and the wider community do not have a defined role in corporate governance. As provided in the Listing Rules, the board of directors should recognise that a company's success depends upon the relationship with all groups of its stakeholders. The board should maintain an effective dialogue with such groups in the best interests of the company.

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

The Companies Act provides that certain large undertakings (over 500 employees) must include in the director's report a non-financial statement containing information necessary to understand the undertaking's development, performance, position and the impact of its activity which relates to:

- Environmental, social and employee matters.
- Respect for human rights.
- Anti-corruption and bribery.

In accordance with the Companies Act, the directors' report which is to accompany the annual financial statements should, to the extent necessary for an understanding of the undertaking's development, performance or position, include an analysis of both financial and non-financial key performance indicators relevant to the particular business, including information relating to environmental matters.

Under the Code of Principles of Good Corporate Governance, directors of listed companies should seek to adhere to accepted principles of corporate social responsibility in their day to day management practices of their company. Listed companies should behave ethically and contribute to economic development while improving the quality of life of the work force and their families as well as of the local community and society at large; take up initiatives aimed at augmenting investment in human capital, health and safety issues and managing change, while adopting environmentally responsible practices related mainly to the management of natural resources used in the production process; act as corporate citizens and review material relating to the theme of corporate social responsibility and keep abreast with initiatives being taken both locally and internationally.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

On the principle of joint and several liability of directors under the Companies Act, the board of directors as a whole is collectively responsible for complying with disclosure and transparency requirements. In fact, the board of directors have collective responsibility for ensuring that the annual accounts of a company, directors' report and, where provided, the corporate governance statements are drawn up. They are also responsible for ensuring the annual accounts are audited and tabled at a general meeting for approval together with a directors' report. The board is collectively responsible for ensuring that minutes of board meetings are properly kept in minute books and available for inspection by shareholders.

5.2 What corporate governance-related disclosures are required?

A company must prepare and publish annual financial statements in compliance with the requirements of the Companies Act. The accounts shall be accompanied by a directors' report and an auditors' report and must be approved by the shareholders.

The Listing Rule require the directors of listed companies to include in its annual financial report, a directors' report on the company's extent of compliance with the Code of Principles for Good Corporate Governance. It is also required to make certain additional disclosers such as an interim directors' report, half-yearly directors' reports and company announcements relating to specific matters.

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

The annual financial statements of a company must be audited by a qualified auditor. Every company not qualifying as 'very small'

must appoint an auditor and prepare audited financial statements for every financial year. A private company is considered to be a small company if it does not exceed the limits of two of the following criteria:

- Balance sheet total: EUR 46,600.
- Turnover: EUR 93,000.
- Average number of employees during the accounting period: two.

The duty of the auditor is to examine and verify the original accounting records of the company, to discover any inaccuracies or omissions therein, to examine the company's annual balance sheet and profit and loss account so as to ensure that they agree with the company's original accounting records, and to subsequently report to the members of the company on the original accounting records and on the company's annual accounts. This latter function serves as a shareholders' safeguard against inaccurate, misleading or incomplete annual accounts being presented to them by the directors.

Under the Listing Rules the listed company's auditors are to include a report in the annual financial report to shareholders on the corporate governance statement issued by directors relating to the extent of compliance with the Code of Good Corporate Governance.

The Listing Rules also require listed companies to establish an audit committee consisting of a majority of non-executive directors. The members of the committee should meet at least four times a year and have several responsibilities including the monitoring of the financial reporting process, monitoring of the effectiveness of the company's internal control and risk management systems, and monitoring of the audit of the annual and consolidated accounts.

5.4 What corporate governance-related information should be published on websites?

A company is not required to publish any particular information on its website. However, under Article 6 of the Companies Act, a company shall mention in 'legible characters its name, kind of commercial partnership, registered office and registration number' in all its business letters and order form, whether they are in paper form or in any other medium, as well as on its internet website (if any). The Listing Rules allow listed companies to publish certain other information on their websites such as company announcements and general meeting notices.

James Scicluna
WH Partners
Level 5 Quantum House
75 Abate Rigord Street
Ta' Xbiex XBX 1120
Malta

Tel: *+356 209 251 00*
Email: *james.scicluna@whpartners.eu*
URL: *www.whpartners.eu*

James Scicluna is a Malta Advocate and a Solicitor of the Senior Court of England and Wales. He has practised law in the UK and Malta, both in private practice and as in-house counsel.

James provides advice mainly to the Gaming, Financial Services, Real Estate and Hospitality industries. He is ranked as one of the top 50 Gaming and Gambling lawyers globally by *Chambers and Partners*. He is also listed by *Who's Who Legal* in the Sports & Entertainment category and is recommended by *The Legal 500* as a top Corporate and M&A lawyer, as well as a top Intellectual Property lawyer. The *International Financial Law Review* also lists James as a leading lawyer in the M&A and Risk & Insurance categories.

Gabriella Zammit
WH Partners
Level 5 Quantum House
75 Abate Rigord Street
Ta' Xbiex XBX 1120
Malta

Tel: *+356 209 251 00*
Email: *gaby.zammit@whpartners.eu*
URL: *www.whpartners.eu*

Gabriella Zammit is a Senior Associate at WH Partners. Gabriella is a corporate and financial services lawyer and is predominantly involved in the structuring and licensing of investment services, collective investment schemes, credit institutions and financial institutions in Malta. Prior to joining WH Partners in November 2017, she worked as a Senior Manager within the Risk Consulting Advisory Services team at one of the big four audit firms. She formed part of a multi-disciplinary team managing a number of advisory engagements concurrently with a focus on regulatory work.

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Mexico

Luis Dantón Martínez Corres

Ritch, Mueller, Heather y Nicolau, S.C.

Alejandra Lankenau Ramírez

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

I. Business Corporation (*Sociedad Anónima*; "SA");

II. Limited Liability Company (*Sociedad de Responsabilidad Limitada*; "SRL");

III. Investment Promotion Corporation (*Sociedad Anónima Promotora de Inversión*; "SAPI");

IV. Stock Market Investment Promotion Corporation (*Sociedad Anónima Promotora de Inversión Bursátil*; "SAPIB"); and

V. Stock Market Company (*Sociedad Anónima Bursátil*; "SAB").

This Chapter aims primarily to describe the corporate governance practices of SAPIB and SAB, companies whose equity securities are registered with the Mexican National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*; "CNBV"), given that they represent a greater interest from a corporate governance perspective.

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

I. General Corporations Law (*Ley General de Sociedades Mercantiles*; "LGSM");

II. Securities Market Law (*Ley del Mercado de Valores*; "LMV");

III. Code of Best Corporate Practices (*Código de Mejores Prácticas Corporativas*; "Code of Best Corporate Practices") of the Mexican Stock Exchange (*Bolsa Mexicana de Valores, S.A.B. de C.V.*; "BMV"); and

IV. General Rules Applicable to Issuers of Securities and other Securities Market Participants (*Disposiciones de Carácter General aplicables a las Emisoras de Valores y a otros Participantes del Mercado de Valores*; "CNBV Rules").

The LGSM governs non-public corporations (i.e. SAs and SRLs) and the LMV provides for comprehensive corporate governance requirements for SAPIs and public companies (i.e. SAPIBs and SABs).

The Code of Best Corporate Practices was adapted from the OECD Principles of Corporate Governance and since then it has constituted a source of non-binding corporate governance practices followed by listed companies in the BMV. The LMV subsequently incorporated many of the concepts pioneered by the Code of Best Corporate Practices.

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

I. General Corporations Law: The Mexican law of corporations is federal. All corporate charters are granted pursuant to federal law and there are practically no state laws that directly affect corporations. Since the laws that regulate securities and the stock market are also federal, many of the policies that affect corporations are set by Congress and by the federal agencies that administer these laws, such as the CNBV.

II. Family Controlled Companies: Despite several decades of market-oriented reforms and transformation of the economy, Mexico continues to have a large number of family-owned corporations. Even public companies, with some notable exceptions, are controlled by individual family networks and Mexican law provides a significant amount of power to such controlling shareholders, however curtailed by corporate governance practices discussed in this Chapter, but this topic still remains an area of opportunity.

III. Legislative and Regulatory Developments: It was not until 2005 when the current LMV was enacted that the legal framework of Mexican corporate governance was strengthened and stronger statutory rights of minority shareholders, obligations of shareholders, and limitations on the right to vote were introduced, together with a more robust regulation of privileged information. The corporate governance aspects involving the Board of Directors also evolved with the adoption of the LMV, such as the requirement to have independent directors, code of conduct, loyalty and diligence duties, conflict of interest and equal treatment of shareholders. Finally, guidelines related to minority rights, transfer of shares, separation and removal of shareholders, liability of Directors and other similar improvements were adopted.

IV. New Stock Exchange: In addition to the BMV, a new stock exchange, the Bolsa Institutional de Valores ("BIVA"), was recently authorised and will begin operation this year. This is expected to increase competition and create greater incentives for Mexican companies to become public.

V. Private Equity Funds: The significant development of a private equity market has been one of the key factors that has contributed to the development of corporate governance in Mexico. Private equity has inherently a longer term horizon and, in that sense, corporate governance becomes a key requirement to increase profitability, accountability and transparency of their equity investments.

From 2004 to 2018, the private equity market grew from U.S. $800 million dollars to U.S. $52 billion dollars, considering only the private equity funds which are members of the Mexican Association of Private Capital (*Asociación*

Mexicana de Capital Privado; known as "AMEXCAP"). Today Mexico's private equity industry has 177 active fund managers.

VI. Role of Institutional Investors: Another key development has been the rise to prominence of pension funds ("AFORES"), which have gained considerable power in the market with an aggregate investment capacity of over U.S. $175 billion dollars. AFORES have increased incentives for the market to adopt best practices and improve corporate governance in Mexico. Also, AFORES have been seeking to extend investment horizons and diversification and have greatly contributed to developing the market, one example is the buoyant market of investment instruments, such as capital development certificates known as CKDs (used in the implementation of infrastructure and private equity funds) and real estate trust certificates issued by FIBRAs.

VII. Gender Equality: Gender equality has recently risen to prominence among the corporate governance topics that are currently being addressed for improvement. A low number of women are Directors of public companies. The Ministry of Finance and Public Credit in the past years has led the discussion with the BMV to increase the number of women Directors to at least one independent Director per listed company.

VIII. Criminal Liability for Corporations and New Anticorruption System: With the adoption of criminal liability for corporations and its officers, as well as the creation of a new National Anticorruption System, the need for companies to have effective Compliance Programs and Anti-Corruption Policies has risen to the forefront as key issue given the strict criminal, economic and commercial law penalties attached to corporations that incur in acts of corruption. These reforms, together with global greater awareness of the issue of corruption, as well as the adoption of anticorruption laws by many countries and increased international cooperation in investigations will likely reshape the level to which Boards are committed to doing business in compliance with laws and regulations, including in the matters of economic competition and environmental matters.

IX. Improvements in Corporate Governance: Notwithstanding shortcomings, public Mexican corporations continue to professionalise and develop, with greater diligence being exercised by independent directors, audit and corporate practices committees. The complexity and liabilities inherent to our new regulations, including environmental, economic competition, tax, among others, has created the need for Boards to step up their expertise in these areas to be able to effectively deal with the associated risks.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

A wider look at companies and markets worldwide confirms that focus on short-term results is a management practice globally. Mexico is not an exception and the authority that regulates AFORES has analysed proposals to align incentives for fund managers with long-term performance. However, AFORES have contributed to lengthening significantly investment horizons.

Private equity funds have also been actively promoting sustainable value creation over the long-term, given that the investment horizons range from 5–10 years.

The average fund life in Mexico is 7.5 years *vis-à-vis* five years for a comparable fund in the U.S.

A driver of short-termism in Mexico has been the increased volatility that the market has experienced as a result of the tapering of the quantitative easing since 2015, the strengthening of the US dollar *vis-à-vis* emerging markets currencies, and the negative results associated with threats with respect to the U.S. pulling out of NAFTA, protectionism and now the prospect of a trade war with China.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders of a SA and partners of a SRL have the following primary rights:

I. Preemptive Rights. In case of an increase of the capital stock of a company, the shareholders/partners have a preferential right to subscribe shares or equity interests, as applicable, resulting from the increase in proportion to their participation in the company.

II. Transfer Rights. Pursuant to the LGSM, partners of a SRL must approve any transfer or assignment of the equity interest in a partner´s meeting. On the other hand, the LGSM is silent about transfer restrictions in a SA.

III. Voting Rights. The shareholders of a SA generally have the right to have one vote per each share and the partners in a SRL have one vote per each peso contributed in the capital of the company.

IV. Dividend Rights. The shareholders of a SA and the partners of a SRL have the right to receive payment of dividends in proportion to their participation in the company.

V. Statutory Auditor. Pursuant to the LGSM, shareholders of a SA have the right to appoint a Statutory Auditor for the company. On the other hand, partners of a SRL are not required to appoint a Statutory Auditor, but may appoint a surveillance board.

VI. Annual Reports. Shareholders/partners have the right to review the annual reports of management and of the Statutory Auditor, as well as the balances and financial statements prior to the annual ordinary shareholders' meeting.

VII. Withdrawal Rights. In a SA, any shareholder voting against the modification of the nationality, object or type of the company or against the spin-off of the company, may withdraw from the company and the shareholder is entitled to receive the book value of its shares. SRLs do not have this right.

Any shareholder of a SA or partner of a SRL may withdraw their contribution from the variable portion of the company's capital.

VIII. Dissolution. In the event of a cause for dissolution provided for in the LGSM, (i.e. expiration of the company's term, impossibility to pursue its corporate purpose, less than two shareholders/partners or if the company loses ⅔ of its capital) shareholders/partners may petition a court to dissolve the SA or SRL.

IX. Liquidation. In the event of the liquidation of a SA or SRL, shareholders/partners have the right to receive a proportional part of the capital equity of the company.

The above rights of a SA are also applicable to SAPIs, SAPIBs and SABs; however, the LMV provides for the following additional primary rights to the shareholders of such companies:

I. Restricted Transactions. Under the LMV, the shareholders of the company would have to approve transactions that in a yearly period involve an amount that is equal to or exceeds 20% of the consolidated assets of the company.

II. Deferral of Voting at Shareholders' Meeting. Shareholders representing 10% of the capital of a company may request the deferral of voting at a shareholders' meeting of the company.

III. Opposition to Shareholder Resolutions. Shareholders representing 20% or more of the capital of the company may judicially challenge shareholder resolutions that contravene the company's by-laws or applicable law.

IV. Board of Directors. Shareholders representing 10% of the voting capital of the company may appoint one Director to the Board of Directors.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The shareholder's/partner's responsibilities are limited to the creation of control, management and surveillance bodies and to the appointment of the members of such corporate bodies.

In a SA, the shareholders appoint one or more Statutory Auditors whose responsibility is, among others, to oversee the performance of the Board of Directors, provide a report on the fulfilment of their activities and an opinion on the reports rendered by management to the shareholders' meeting.

In a SAPIB or SAB, the responsibility to oversee the performance of the board of Directors is carried out through the audit and corporate practices committees and the external auditors.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

I. General Ordinary Shareholder Meetings. SAs must hold general ordinary shareholders' meetings at least once a year to discuss and approve the information presented by Directors on the financial, accounting and commercial affairs of the corporation, the appointment, removal or ratification of Directors and Statutory Auditors and Directors' and Statutory Auditors' remuneration.

II. General Extraordinary Shareholder Meetings. SAs must hold extraordinary shareholders' meetings to discuss, among other matters, extensions to the company's term, dissolution of the company, capital increase of reduction, change or corporate purpose, change or nationality of the company, company transformation, merger, issuance of preferential stock, redemption of shares and issuance of shares, amendment to the incorporation deed and bond issuance.

III. SRL Annual Meetings. The LGSM does not regulate SRLs shareholder meetings by type of meeting; however, annual meetings must be held to discuss and approve the balance sheet of the corresponding fiscal year, measures to be carried out, profit sharing, appointment and removal of Managers, appointment of the surveillance board, partnership interest division and redemption, supplementary contributions and accessory benefits, the filing of actions for damages and losses against corporate bodies or against the partners and amendments to the incorporation deed.

IV. Calling a General Meeting. Meetings shall be called by the Board of Directors or the Statutory Auditors and shareholders that hold 33% of the capital stock of the company may request the call for a meeting to the Board of Directors or to the Statutory Auditors.

If a SA has not held a shareholders' meetings or the corresponding shareholders meetings have not approved the financial statements or members of the administration during a period of two years, any shareholder may request that a shareholders meeting be convened. SRLs do not afford this right.

In a SAPI, SAPIB and SAB shareholders representing 10% of the capital stock of the company may request that a shareholders' meeting be held.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The liability of a shareholder/partner is generally limited to the amount of such shareholder's/partner's contribution to the company.

I. Duty of Care. The LGSM provides that the shareholders of a SA must refrain from deliberating and voting on matters in which the shareholders have a conflict of interest with the company. Such shareholders will be liable for the damages and losses caused to the company.

This duty is also applicable to shareholders of public companies. However, the LMV further provides that the controlling shareholder of a publicly held company shall be presumed to have a conflict of interest in respect of any matter that is submitted to the shareholders meeting on which such controlling shareholder votes and that results in benefits to such controlling shareholder that are not equally available to minority shareholders, the public company or any entity controlled by the company.

II. Controlling Shareholder Duties. The LMV provides that controlling shareholders of a public company have certain duties to the company and are liable to the company for losses and damages resulting from the breach of such duties. Under such provisions, controlling shareholders of a company must abstain from (i) using the company's or its subsidiaries' assets for their own benefit, (ii) unduly using non-public relevant information, and (iii) taking advantage of business opportunities that were available to the company without a waiver issued by the Board of Directors.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Pursuant to the LGSM, shareholders of a SA representing at least 25% of the capital stock of a company may directly file civil liability action against their Directors and any partner of a SRL may directly file civil liability action against its Managers.

Pursuant to the LMV, shareholders of a SAPI representing 15% or more of the voting capital of a company and shareholders of a SAB representing 5% or more of the voting capital of the company may exercise civil liability action against their Directors.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Some of the more relevant Mexican disclosure requirements applicable to shareholders of public companies are the following:

I. 10% Rule. Under the LMV, every purchaser (whether one person or a group of persons) that acquires beneficial ownership of, or the power to exercise control over, or securities convertible into, or ordinary participation certificates having as underlying securities, or derivatives to be settled in, voting or other equity securities of any class of a public company that, together with that purchaser's holdings of securities of that class, would represent 10% or more and less than 30% of the outstanding securities of a public company must disclose the transaction with the BMV (for disclosure to the public) and with the CNBV.

II. 5% Rule. Related persons of public companies that increase or reduce their participation in the capital stock of a public

company in 5% must give notice of such transaction to the public (through the BMV) and to the CNBV.

III. Ongoing Reporting. Persons or group of persons holding 10% or more of the stock of a public company, directors and relevant executives of such public company, must give notice to the CNBV, of any purchase or sale of equity securities, if the aggregate amount of the transactions equals or exceeds amount that currently approximates U.S. $385,000.00.

IV. Short Swing Rule. Under the LMV, insiders may not sell securities issued by the public company with which they are related, within a three-month period counted from the date of the purchase. Alternatively, any insider that sells equity or debt securities issued by a public company may not purchase securities issued by such company, within a three-month period counted from the date of the sale.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Not additional to the ones specified in the answer to the immediately preceding question. Please note that transactions of a certain size are required to obtain the prior written approval of the Mexican Federal Economic Competition Commission under the Mexico's Federal Anti-Trust Law (*Ley Federal de Competencia Económica*).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Day-to-day operation of a corporate entity is the responsibility of a CEO and its management team, whilst the task of defining the strategic vision, overseeing management and approving its results is the responsibility of the Board of Directors. Boards of publicly-traded companies must not exceed 21 Directors, of which 25% must be independent. In these tasks, all members of the Board of Directors share responsibility either individually or as a group. Mexican law provides the possibility of corporate entities having a sole administrator but we will focus on corporate entities managed by Boards of Directors.

The Code of Best Corporate Practices considers that in order to better meet its objective the Board of Directors members must not be involved in day to day operations of the corporate entities, so that they can bring external and independent judgement. Also to facilitate their work the Board of Directors can have intermediary committees, which can analyse information and propose actions in specific topics of importance.

Mexico has a single-tier board structure. Audit and corporate practices committees are mandatory for public companies. The committees must be formed by independent directors, and exceptionally by a majority of independent directors. The role of the Statutory Auditor has been eliminated for publicly traded companies and been taken over by the Board of Directors through the audit committee, the new corporate practices committee, or an external auditor.

The Board of Directors is generally entrusted with setting forth the general strategies for and supervising the operations of the company and its subsidiaries. The LMV provides that the Board of Directors is required to approve certain specific transactions, including related party transactions, significant unusual or non-recurring transactions, the appointment of the CEO and external auditors of the company, the company's internal control, auditing and accounting procedures, the financial statements of the company and its disclosure policies and procedures, among others.

The LMV sets forth a list of matters entrusted to the CEO of the company and the standards of liability applicable to the CEO and other significant officers. Under such standards, such officers will be liable in respect of the damages and losses suffered by the company as a result of a breach by such officers of their obligations under the LMV (including obligations similar to those applicable to Directors under their duty of loyalty standard).

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

Directors are appointed and removed by the general shareholders meeting. The LMV has provided minority investors with a number of improved protections under the law.

Directors can also be removed pursuant to a firm resolution by a governmental authority, such as a judicial authority, or by regulators such as the CNBV in the case of financial groups and banks.

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

The general shareholders meeting can establish Board Directors contracts and remunerations. There are no limitations set by legislative, regulatory authority or otherwise. Remuneration for Directors is generally approved on an annual basis by the general shareholders' meeting.

Publicly traded companies also have the obligation to inform the general shareholders meeting about employee's compensation, generally in the form of a Compensation Committee report.

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

There is no prohibition for Directors to own shares in the corporate entity; however, ownership of shares can affect its independent status if a Director has influence or decision power in the SAB or affiliate of the SAB, or is a shareholder forming part of the shareholders control group. Disclosure is necessary to ensure transparency and to prevent conflicts of interest.

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

According to the LMV, the Board of Directors of a publicly traded company can meet at least four times per year. The Chairman of the Board, the audit or corporate practices committees, or 25% of the Directors can call a Board meeting and include in its Agenda the items for discussion that they deem necessary.

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

Directors must carry on their duties to create value in benefit of the company, without favouring a specific shareholder or group of shareholders. They must act diligently, adopting reasoned decisions and fulfilling all duties that the LMV mandates or those established by the by-laws.

The main legal duties of members of the Board are duty of loyalty and duty of care. The LMV states that failure to fulfil the duty of care includes unjustified nonattendance to board meetings and failure to provide information relevant to decision making. Failure to comply with the duty of loyalty is penalised with jail time of three to 12 years if Directors knowingly benefit one shareholder to the detriment of others, vote in conflict of interest, or misuse confidential or relevant information.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main responsibilities of the Board of Directors are:

I. Approving the company's strategy, plans, budgets, and monitoring its performance.

II. Approving major capital expenditures and the disposal or acquisition of major businesses.

III. Approving capital structure, dividend policy, and the accuracy and transparency of financial statements.

IV. Ensuring that major risks to the company are identified and managed.

V. Appointing and evaluating the CEO, and ensuring that succession is planned.

VI. Approving senior executive compensation.

VII. Ensuring compliance with legal and regulatory requirements, and establishing ethical standards for the company.

Current challenges impose greater diligence to be exercised by Directors, audit and corporate practices committees. The complexity and liabilities inherent to new regulations, including environmental, economic competition, tax, bankruptcy, compliance and anticorruption, among others underscore the need of Boards to step up their expertise in these areas to be able to effectively deal with the associated risks.

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

D&O insurance is a standard practice for publicly traded companies in Mexico and is valid for liabilities incurred in good faith. Indemnities are valid if provided for in the by-laws of the company of by resolution of the general shareholders meeting, provided the breach is not a result of fraud, bad faith or illegal activity. In the case a breach in the duty of loyalty the Director is personally liable and no insurance by the company will be available.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

As mentioned above, the Board of Directors is responsible for approving the company's strategy, plans, budgets, and monitoring its performance against them. It is the responsibility of the CEO and his team to work with the Board in developing and presenting the strategy for approval and adjustments.

4 Other Stakeholders

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

Employees are bound by their individual labour agreements and shall follow the corporate governance internal policies indicated by their employers.

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

Boards, especially those of publicly held companies, accept responsibility to other stakeholders, such as suppliers, customers, clients and the community and understand that overall corporate health is likely to support the company and grant shareholder's value, understanding that in the long-term shareholders will be rewarded if customers, employees and other stakeholders are satisfied.

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

Although there are no mandatory corporate social responsibility requirements in Mexico, it is common for companies to establish corporate social responsibility policies. The Mexican Philanthropy Centre (*Centro Mexicano para la Filantropía*) grants the Socially Responsible Enterprise distinction to Mexican companies that comply with certain requirements. To be a Socially Responsible Enterprise, a company must promote a culture of responsible competitiveness that enables the success of the business while contributing to the welfare of its community, reject corruption, be governed by a code of ethics, contribute to the conservation of the environment and work towards the social needs of its community.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

In the case of publicly traded companies, senior management and boards are responsible for disclosure and transparency. The CEO with the support of senior management, within the scope of their respective function, have clear responsibility in the preparation of periodical disclosures and also of extraordinary event disclosures under board oversight.

5.2 What corporate governance-related disclosures are required?

I. Annual Meeting Minutes. In accordance with the LGSM, SAs, SRLs, SAPIs, SAPIBs and SABs must annually submit to their shareholders/partners a report on the status of the company, including the respective examiner or surveillance board report.

II. Corporate Books. Under the LGSM, SAs, SRLs, SAPIs, SAPIBs and SABs must create and keep updated a Shareholders'/Partners' Meeting Minutes Registry Book, Share/Equity Interest Registry Book, Capital Stock Variations Registry Book and a Board of Directors'/Managers' Meeting Minutes Registry Book.

III. LMV Reporting Obligations. Under the LMV and the CNBV Rules, the company or its shareholders are required to report to the CNBV, the BMV and to publicly disclose, if applicable, the following information:

1. Financial Information. Quarterly unaudited and annual audited financial statements including disclosure relating to changes in the company's internal control, auditing or accounting practices.
2. Annual Report. An annual report containing business, financial and operative information relating to the company and its subsidiaries.
3. Legal Information. Corporate information relating to shareholder meetings, updated by-laws and notices to shareholders (dividends, exchanges, etc.), among others.
4. Corporate Restructurings. Detailed information (including *pro-forma* financial statements) in respect of corporate restructurings.
5. Material Events. Information relating to events that have affected or could affect the price of the company's securities.
6. Share Transfers. Notices in respect of significant purchases or sales of company stock by its shareholders and related parties.

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

Committees created pursuant to the LMV such as the audit and corporate practices committees are dedicated to accounting and internal controls, and are responsible for the upkeep of good corporate governance practices. Such committees report to the Board.

Under the Mexican Federal Tax Code, an entity is required to obtain an audit opinion regarding the financial statements when the entity: (i) generates revenue subject to income tax exceeding MXN $109,990,000.00 (approximately U.S. $6,099,373.00); (ii) owns assets worth MXN $86,892,100.00 (approximately U.S. $4,819,306.00) or more; or (iii) has more than 300 employees.

5.4 What corporate governance-related information should be published on websites?

There is no mandatory obligation in Mexico to publish corporate governance-related information on websites; however, publicly traded companies tend to publish information, such as their code of conduct and ethics.

Luis Dantón Martínez Corres
Ritch, Mueller, Heather y Nicolau, S.C.
Torre Virreyes
Av. Pedregal No. 24 floor 10
Molino del Rey, 11040
Mexico

Tel: *+52 55 9178 7004*
Email: *ldanton@ritch.com.mx*
URL: *www.ritch.com.mx*

Luis Dantón Martínez Corres joined the firm in 2018 as partner and is the head of our Corporate Governance & Compliance practice group. Mr. Martinez Corres previously worked in the legal departments of Citibank Mexico, Banco Nacional de Mexico, Citigroup in New York City, Walmart Mexico and Central America, and the Mexican Ministry of Finance and Public Credit. Immediately prior to his incorporation as a partner of Ritch Mueller, he served as Head of Legal and Trustee Services of Nacional Financiera, S.N.C., a leading Mexican development bank.

The diverse and significant professional experience of Mr. Martínez Corres has enabled him to participate and specialise in a broad range of banking and financial transactions, mergers and acquisitions, and regulatory matters, which have resulted in significant exposure and deep understanding of corporate governance, compliance, FCPA, anti-money laundering and investigations.

Mr. Martínez Corres participated in the development and implementation of the 2013 Mexican Financial Reform and coordinated the publishing of the book, "The Financial Reform Explained", which was then published by Nacional Financiera. He has also written several articles on financial topics and on the reforms of the Mexican banking system.

Alejandra Lankenau Ramírez
Ritch, Mueller, Heather y Nicolau, S.C.
Torre Virreyes
Av. Pedregal No. 24 floor 10
Molino del Rey, 11040
Mexico

Tel: *+52 55 9178 7091*
Email: *alankenau@ritch.com.mx*
URL: *www.ritch.com.mx*

Alejandra Lankenau Ramírez joined the firm in 2014 as an associate. Alejandra helps clients with a variety of corporate matters including corporate governance, mergers and acquisitions and banking regulation.

She also has experience in project and infrastructure finance and has participated in a number of transactions involving the acquisition, financing, and development of companies in the renewable power, mining, banking, and gas transport businesses.

RITCH
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We represent and provide sophisticated high value added and specialised legal and tax advice to domestic and international clients in respect of their business transactions in Mexico. We work hand in hand with our clients in structuring and implementing solutions that meet each of their needs. Our measure of success is our clients' satisfaction and ability to achieve their objectives. Building prosperous and longstanding relationships with the best interests of our clients in mind is at the heart of what we do.

Our legal and tax team combines seasoned and young legal practitioners and professionals creating one of the most talented teams of legal professionals in Mexico. We privilege teamwork and efficiency and guide our practice based on the ethics passed down from the firm's founder, the late James E. Ritch. We constantly seek to add new talented and dedicated professionals to our staff so as to allow us to serve a market that continues to evolve, both in dimension and complexity. The result is a partnership with unique diversity and experience, and a history of proven innovation.

Morocco

UGGC Law Firm

Ali Bougrine

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities to be discussed are:

- Limited Company with a Board of Directors (*société anonyme*, "**SA**").
- Limited Company with an Executive Board and Supervisory Board (*société anonyme à directoire et conseil de surveillance*, "**SA dualiste**").
- Simplified Joint Stock Company (*société par actions simplifiées*, "**SAS**").
- Limited Liability Company (*société à responsabilité limitée*, "**SARL**").
- Limited Liability Company with a sole shareholder (*société à responsabilité à associé unique*, "**SARLAU**").

Please note that this chapter relates to the aforementioned companies' legal form, with the exception of Listed Companies.

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

The main sources are:

- Law no. 17-95 relating to Limited Companies dated 30 August 1996 as amended and completed by the Dahir n°1-08-18 dated 23 May 2008 and the Law no. 78-12 dated 28 August 2015.
- Law no. 5-96 relating to the General Partnership Company, Limited Partnership Company, Private Company Limited by Shared, Limited Liability Company and Joint Venture dated 1 May 1997 as amended and completed by Law no. 24-10.
- The Dahir on Obligations and Contracts ("**DOC**").
- The Articles of Association of the company (the "**AoA**").

Also, as the case may be, the shareholders' agreement.

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

In corporate governance, the main challenges nowadays in Morocco are to ensure:

- transparency, especially *vis-à-vis* shareholders, who shall be entitled to have access to clear and accurate information with respect to the company;
- the distribution of powers among the different corporate players; and
- the accountability of the management body *vis-à-vis* shareholders.

In this respect, the reform of the law related to Limited Companies is part of this current trend, as this reform has amended the provisions related to the regulated agreements, enhanced the shareholders' rights, and improved the transparency in the event of a merger or de-merger.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The Kingdom of Morocco is willing to promote foreign investments from a long-term perspective and, over the last decade, has implemented a more and more flexible and liberal regime for foreign investors, such as:

- foreign exchange rules with respect to foreign investment that insure the repatriation of the investment, the dividend performed, as well as to import of services are more and more liberal;
- several bilateral tax conventions concluded in order to avoid double taxation;
- the process related to the creation of Moroccan entity is being facilitated and tends to be more fluid;
- implementation of favourable tax regimes in order to attract foreign investors:
  - specific tax regimes related to certain geographical areas: sectorial export processing zones (automotive industry in Tangier and Kenitra, aeronautic and aerospace industries in Nouaceur, etc. and defined areas designated to specific offshore activities; and
  - Casablanca Finance City, which is a status conceived to make Casablanca a hub towards Africa;
- exemption of corporate income for five years for new companies (subject to the meeting of certain conditions); and
- the budget law for 2018 provides for incentive provisions to promote investment such as progressive scale of the corporate income, exemption of registration fees on the operations of incorporation of SA, SAS and SARL, capital increase of SA, SAS and SARl, and shares transfers.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The main shareholders' rights are:

- the right to participate in collective decisions and subsequent voting rights proportional to the capital they represent;
- the right to information;
- the right to the company's profits (and especially the right to dividends of shares);
- the right to reimbursement of the contribution and to the *boni* of liquidation;
- the right to alienate their own shares; and
- the preferential right of subscription.

The main shareholders' powers include:

- the power to amend the AoA;
- the power to participate in any transaction affecting the share capital;
- the power to decide upon a merger, de-merger, dissolution or liquidation;
- the power to approve the annual accounts;
- the power to appoint the statutory auditors, as the case may be;
- the power to appoint, as the case may be, the President (for the SAS), the Manager (for the SARL and SARLAU), Directors (for the SA) or Members of the Supervisory Board (for the SA dualiste); and
- general powers of supervision of the governing and management bodies (e.g. revocation, right to discharge certain management bodies from any liabilities with respect to the performance of his duties, etc.).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

The main responsibilities of the shareholders with respect to corporate governance are:

- the appointment of the governing and management bodies; and
- the appointment of the statutory auditors.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

With respect to the main shareholders' meetings

Two main kinds of meetings are commonly held: ordinary; and extraordinary general meetings.

Extraordinary general meeting (the "EGM"): The EGM is, in principle, responsible for all decisions involving amendments to the AoA including, but not limited to, change of the corporate name, legal form, transfer of the registered office, and capital change, mergers, dissolution, etc. The EGM is competent to approve the creation of preferred shares: shares with a double voting right ("*actions à droit de vote double*"); and preferred dividend shares without a voting right ("*actions à dividende prioritaire sans droit de vote*"). The EGM is also competent to approve the creation of bonds which can be converted into shares ("*obligations convertibles en actions*").

Ordinary general meeting ("OGM"): The decisions taken in the OGM cover all matters not involving a change of the AoA. An OGM must be convened at least once a year – within six (6) months of the end of the financial year – for the approval of the annual accounts.

With respect to the main rights of the shareholders regarding general meetings

From the convening of shareholders' meeting and at least within the fifteen (15) days prior to the said meeting, the shareholders have a right to information with regards to, notably, the agenda, the draft resolutions that will be submitted to the vote of the shareholders, the list of regulated agreements, the management report, the statutory auditor's reports, the proposed allocation, inventory, and financial statements, etc. The shareholders have access to this information at the company's registered office.

During the shareholders' meeting, shareholders have the right to participate in collective decisions and subsequent voting rights proportional to the capital which they represent or, as the case may be, in accordance with the stipulations of the AoA.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

With respect to the duties owed by shareholders to the corporate entity/entities or to other shareholders in the corporate entity/entities:

This answer is applicable to the SA/SARL and SAS:

- **Obligation to make a contribution**:

Each shareholder must make a contribution to the Company, it being specified that there is no need for the shareholders' contribution to be equal to or of the same kind.

- **Obligation to contribute to losses**:

As counterpart to the shareholders' entitlement to benefits made by the Company, the shareholders owe a duty to contribute to the Company's losses which is proportionate to their contribution and strictly limited to their contribution amount. In this respect, shareholders' commitments cannot be increased without their own consent.

- **Obligation to comply with the AoA's provisions**:

The shareholders have to comply with the obligations and provisions provided in the AoA.

- **Duty of loyalty and non-competition obligation:**

The Law does not provide for such a duty and/obligation bound by the shareholders. However, the Company's AoA and/or the shareholders' agreement may provide for such duty and/or obligation.

Thus, in the absence of such duty and/or obligations provided for in the AoA and/or in the shareholders' agreement, the breach of this duty/obligation by a shareholder might only be indirectly sanctioned on the grounds of the contractual good faith, *intuitu personae* and the common interest of the shareholders provided for by the DOC.

With respect to the shareholders' liability for acts or omissions of the corporate entity/entities?

This answer is applicable to the SA/SARL and SAS, unless otherwise provided in the AoA.

- the founding shareholders may be liable (severally with the first governing bodies) for damages incurred by the lack of a mandatory mention in the AoA, or due to a specific omission or improper performance of a legal formality related to the company's incorporation;

- the shareholders responsible for nullity of the company may be severally liable for the damage arising from this nullity in the event of misconduct or fault of the governing bodies; and
- the shareholder who has not paid the promised contribution is liable for damages toward the Company if the Company has suffered a loss as a result of the lack of payment,

it is specified that all the aforementioned actions may be incurred by the person who manages *de facto* the company.

It is specified that the liability of the shareholders is limited to the amount of their contribution.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Misconduct in the management of the company

The Members of the management body's liability *vis-à-vis* shareholders shall mainly be incurred for misconduct in the company's management. Moroccan law does not provide for general principles relating to the duty of care and diligence that Members of the management body must take to the management of the company. Members of the Supervisory Board are not liable for their management and results. Members of the Supervisory Board are liable for personal misconduct committed in the performance of their mandate. They may be civilly liable for offences committed by the members of the Executive Board, if they have become aware of these offences and they do not report them to the shareholders' meeting.

Therefore, it is up to the Commercial Court, on a case-by-case basis, to define the components of the misconduct in the company's management. Enforcement actions against directors, the General Manager, the Deputy Managing Director(s) and members of the Executive Board have a five-(5) year time limit.

Breach of legal and regulatory provisions and stipulations of the AoA

The Members of the management body are liable for breach of legal and regulatory provisions, as well as breach of the stipulations of the AoA.

Individual liability of the Member of the management body

Any shareholder is entitled to claim for compensation due to the damage which he has personally suffered as a result of a Member of the management body.

Action in the company's interest

Shareholders are entitled, individually or together, to bring an action in the company's interest against, as the case may be, the President, Directors, General Manager, Deputy Managing Director, Members of the Executive Board, or Manager(s), in order to obtain compensation for the entire damage suffered by the company.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

With respect to potential limitations on interests in securities held by shareholders

SARL/SARLAU: Transfer of shares to third parties is subject to the prior approval of the shareholders representing a three-quarters (¾) majority vote. Such a limitation is not provided by the law for SAS and SA, unless otherwise provided by the AoA.

In addition, shareholders, through the company's AoA and/or the shareholders' agreement, can provide for limitations such as an inalienability clause, preferential right in favour of another shareholder or a third party, pre-emptive right, and the possibility to issue non-voting priority dividend shares.

Please note that if shareholders are entitled to limit the rights attached to the shares, they are not allowed in any circumstances to limit the right to information.

With respect to disclosures required in relation to interests in securities held by shareholders

SARL/SARLAU: The AoA must mention, under the penalty of nullity of the company, the contribution of each shareholder as well as the distribution of the shares.

SAS: Such a disclosure may be mentioned in the AoA, but there is no legal provision which requires this.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Disclosure requirements bound by shareholders *vis-à-vis* the Company with respect to the shareholders' intentions, plans or proposals do not exist.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management depends upon the company's legal form.

SA with a Board of Directors: This is managed by a Board of Directors (composed of at least three (3) and no more than twelve (12) Members who can be either natural or legal persons) which is appointed by the shareholders.

The Board of Directors shall appoint, from among its Members, a President who shall be a natural person.

The general management of the company shall fall within the responsibility of either the President of the Board of Directors designated as the Chief Officer Executive ("**PDG**"), or another individual appointed by the Board of Directors, i.e. the General Manager.

The legal representative of the company *vis-à-vis* third parties is the Chief Executive Officer ("**PDG**"), General Manager and Deputy Managing Directors ("**DGD**") if any, it being specified that any limitations of legal powers shall be valid only in the company, in order that they shall not be demurrable to third parties.

SA with an Executive Board and Supervisory Board: This is managed by an Executive Board composed of a number of Members, as set forth in the AoA, which cannot exceed five (5). The Members of the Executive Board must be natural persons and shall be appointed by the Supervisory Board. A Member of the Executive Board can be an employee of the company or a non-shareholder person.

The Supervisory Board is composed of at least three (3) Members and no more than twelve (12) Members who can be either natural or legal persons and shall be appointed by the shareholders.

The Members of a Supervisory Board must appoint a President and may appoint a Vice President.

The Executive Board is entrusted with the power to represent the company *vis-à-vis* third parties and shall carry out its functions under the control of the Supervisory Board.

The Supervisory Board shall exercise permanent control of the management of the company by the Executive Board.

SAS: As per Moroccan law, the company must be managed by a President appointed by the shareholders. The President can be a legal person. In such a case, the legal entity is required to appoint a permanent representative who is subject to the same conditions and duties and is both civilly and criminally liable as if the latter was President of the SAS on his/her own.

However, the AoA may provide for any other management body pursuant to the shareholders' wishes. In such a case, it is specified that the AoA must set forth *a minima* the operating modalities and the powers to be entrusted to this *ad hoc* management body.

SARL/SARLAU: This is managed by one or several manager(s) who shall be a natural person (shareholder or not). All the administrative and management functions and related powers are vested in the Manager or Co-managers if any, who can act in the name of the company.

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

SA with a Board of Directors: Directors are appointed by shareholders. The Board of Directors shall appoint, from among its Members, a President who shall be an individual. Also, upon the proposal of the President, the Board of Directors shall appoint a General Manager as well as Deputy Managing Directors.

The discharge of the General Manager may be decided by the Board of Directors at any time.

The discharge of the Deputy Managing Directors may be decided by the Board of Directors based upon a proposal of the General Manager. The discharge without just cause may give rise to claims for damages, except where the General Manager is also the President of the Board of Directors.

The discharge of the President of the Board of Directors may be decided by the Board of Directors at any time. The Directors may be discharged by the general shareholders' meeting.

SA with an Executive Board and Supervisory Board: Members and the President of the Executive Board shall be appointed by the Supervisory Board. If the Executive is only composed of one single individual, its title shall be "Sole General Manager".

The Executive Board Members or the Sole General Manager may be discharged by the shareholders, or if provided so in the AoA, by the Supervisory Board. The discharge without just cause may give rise to claims for damages.

Members of the Supervisory Board shall be appointed by the shareholders and may be discharged by the general shareholders' meeting.

The Members of Supervisory Board must appoint a President and may appoint a Vice President.

SARL/SARLAU: Manager(s) is/are appointed by the shareholders. The discharge shall result from a shareholders' decision representing at least three-quarters (¾) of the share capital. The discharge without just cause may give rise to claims for damages.

SAS: A President must be initially appointed by the shareholders in the AoA and afterwards as per the stipulations of the AoA. The President may be discharged in accordance with the stipulations of the AoA. Any other *ad hoc* management body may be established if the AoA has provided so.

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

The main sources are:

- Law no. 17-95 relating to Limited Companies dated 30 August 1996 as amended and completed by the Dahir n°1-08-18 dated 23 May 2008 and the Law no. 78-12 dated 28 August 2015.
- Law no. 5-96 relating to the general partnership company, limited partnership company, private company limited by shares, limited liability company and joint venture dated 1 May 1997 as amended and completed by Law no. 24-10.
- The AoA of the company.

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

SA: Members of the Board of Directors and Members of the Supervisory Board must hold a number of shares as provided in the AoA. These shares are inalienable.

SARL/SARLAU: Managers are not required to be the owner of a number of shares.

No public disclosure in relation to the said shares is required.

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

SA with a Board of Directors: The course of the company's business must be determined, and its implementation must be supervised.

The Board of Directors is convened by the President as often as is required for the proper conduct of business. In the absence of any AoA provisions, the convening may be made by any means.

The Board's meeting may be held physically or by way of video conference or any similar means which allow Directors to be identified. Video conferencing cannot be used in the following cases:

- board meetings which decide the appointment, the discharge or the remuneration of the President, the Managing Director or DGD; and
- board meetings which decide to convene the shareholders' general meeting and the setting of the agenda, as well as the setting of the resolutions and the Board reports submitted to the said shareholders' general meeting.

The Board of Directors can only validly deliberate if half of the Directors are present. Unless otherwise provided by the AoA, decisions are adopted by a majority vote of the Directors present or represented.

SA with an Executive Board and Supervisory Board: The law refers to the company's AoA to provide for the modalities of deliberation of the Executive Board.

The modalities and delay of convening related to the meeting of the Supervisory Board shall be provided in the AoA. The Supervisory Board can only validly deliberate if half of its Members are present. Decisions are adopted by a majority of votes of the Members present or represented, but the AoA may provide for a larger majority of vote.

SAS: As the case may be, the process for the meeting of the *ad hoc* management body shall be set forth by the AoA of the company.

SARL: This is only applicable in the case of a "Board of Managers" ("*Conseil de la gérance*"); in such a case, the process for meeting shall be governed by the AoA of the company.

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

The main general duties of the Members of the management body

Members of the management body are subject to a duty of loyalty *vis-à-vis* the company and shareholders:

- they shall perform all acts of management in the company's interest;
- they are subject to a non-competition obligation *vis-à-vis* the company; and
- they are subject to an obligation of information and transparency.

The main liabilities of the Members of the management body

(i) **Civil Liability *vis-à-vis* the company, shareholders or third parties**, especially in the case of misconduct in the management of the company and breach of the legal provisions or AoA's stipulations. The civil liability may be individual or several in the event of a common misconduct.

(ii) **Criminal Liability**. Members of the management body may incur criminal liability for various infringements with respect to the course of the company's history, such as infringements related to the provisions regarding the incorporation of the company, the shareholders' meeting, the amendments of the AoA, the supervision and control, securities, winding up, and legal formalities, as well as in the event of misuse of the corporate asset, etc. The criminal penalties provided in Law no. 17-95 and Law no. 5-96 are doubled in case of a repeated offence.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

See questions 3.1 and 3.2.

Challenges for a management body include acting, in all circumstances, in the best interests of the company in compliance with the laws in force in Morocco in a changing legal environment and whilst ensuring transparency *vis-à-vis* shareholders.

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

There is no legal provision under Moroccan law that would prevent members of the management body from taking out a liability insurance policy.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Subject to any limitations of powers provided in the Company's AoA, especially with respect to some important decisions that may be subject to the shareholders' first approval and/or, as the case may be, to an administrative body's approval, such as the board of directors, executive board, committees, etc., the general manager ("**SA**"), the manager ("**SARL**") and the president ("**SAS**") are entrusted with the most extensive powers with respect to the management of the Company to act on the behalf of the Company and have in that respect a major role with respect to setting and changing the strategy of the Company.

In an SARL as well as in an SAS (unless provided otherwise in the AoA), the manager and the president have a significant role with respect to setting and changing the strategy of the Company, in as much as they are in charge of determining the orientations of the Company's activities and ensuring their implementations.

In an SA, the role of the manager, with respect to changing the strategy of the Company, is slightly less significant; as such, the role is also entrusted to the Board of Directors or Executive Board, who is in charge of determining the orientations of the Company's activity and ensuring their implementation. It deals with any question concerning the proper functioning of the company and by its deliberations regulate the affairs related thereto.

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

Employees, through the employees' representative bodies, have a very limited role in corporate governance matters; for instance, there is no prior consultation of an employee representative body in the case of a company's restructuring (merger, de-merger, relocation, and transfer of the company, etc.).

In the event of redundancy for economic reasons, the employee representative bodies must be informed prior to the redundancy, and the employer is required to engage in consultations and negotiations with the employees' representative bodies in order to consider ways of preventing the redundancies or limiting the effects of the considered redundancies.

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

Law no. 17-95 relating to Limited Companies allows the directors of limited companies to establish technical committees. In this respect, it is up to the board of directors to choose and appoint the members of such committees, who can be directors or shareholders but can also be third parties.

The board of directors sets forth the functions of the designated committees. As per article 51 of Law no. 17-95 relating to Limited Companies, the functions are limited to the examination of specific issues and questions that the directors or the president shall submit for opinion only.

The technical committees have a predominantly advisory role in the management of the company but can lead indirectly to the reduction of the powers granted to the Chief Executive Officer ("**PDG**"), General Manager or Deputy Managing Directors ("**DGD**").

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

Concerning corporate social responsibility, the following is applicable:

- Law no. 17-95 relating to limited companies dated 30 August 1996, as amended and completed by Law no. 78-12 dated 28 August 2015;
- Law no. 5-96 relating to general partnership companies, limited partnership companies, private companies limited by shares, limited liability companies and joint ventures dated 1 May 1997 as amended and completed by Law no. 24-10;

- the AoA of the company; and
- the shareholders' agreement.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The legal representative of the company is responsible for disclosure and transparency, i.e. Managers in an SARL/SARLAU, the General Manager in an SA moniste, the President of the Executive Board in an SA dualiste and the President in an SAS.

5.2 What corporate governance-related disclosures are required?

The following disclosures are required:

- **Disclosure to the shareholders**: Shareholders have a right to information related to the company's business, in addition to a right to information prior to the general meeting (see question 2.3 above); shareholders have a right to permanent access to certain documents such as AoA and legal documentation related to the last three fiscal years.
- **Disclosure to the statutory auditors**: For the performance of their duty, statutory auditors have a right to information; in particular, they are to be provided with all documents/information necessary for the performance of their mission, such as all the contracts, books, account documents, registers of minutes, etc. The statutory auditor's powers of investigation may be validly performed within the company as well as within the parent company and/or the company's subsidiaries. The statutory auditors can be assisted or represented under their responsibility by any experts or collaborators of their choice, who shall have the same powers of investigation as those granted to the statutory auditors. For the performance of their duty, statutory auditors are entitled to be provided with any necessary information or documents from third parties.
- **Disclosure to the management body**: The statutory auditor must inform the management body about any control and checks they carried out, the amendments to be made to the financial statement, the inaccuracies and irregularities identified, their conclusion related to the observations and amendments made, and any facts they may consider as criminal behaviour.
- Disclosure to third parties: Disclosure to third parties occurs through the submission to the relevant Trade Register of a form, with a named statement of amendment in the event of changes to be indicated on the certificate of registration, such as change of the legal representative or change in the Member of the management body, or in the event of the adoption of any extraordinary decisions.

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

The statutory auditor must verify all the account documents of the company in order to control the compliance of the company's accounting with the rules in force, to verify the compliance of the annual accounts and the fairness of the provided information in the management report drawn up by the relevant management body and in any documents provided to the shareholders regarding the financial situation and the accounts of the company.

During the audit, the statutory auditor is required to ensure that the principle of equality between shareholders has been observed.

Statutory auditors are required to ensure compliance with the legal provisions related to the shares owned by certain management body (i.e. Board of Directors, Supervisory Board).

Statutory auditors have an important role regarding preventing businesses getting into difficulties. Should the management body fail to take the appropriate measures to correct the facts likely to compromise the operation of the company, the statutory auditor shall warn the management body by registered letter about the identified facts which are likely to compromise the business's continuity.

They must certify that the annual accounts are proper and sincere, and they must give a faithful representation of the company's assets.

5.4 What corporate governance-related information should be published on websites?

No specific provision related to corporate governance information to be published on websites is provided by Moroccan law.

However, in principle, deeds and documents originating from the company and intended for third parties, such as letters, invoices, announcements and publications, must indicate the corporate name, preceded or followed by the mention of the legal form, the share capital and the registered office, as well as the registration number according to the Trade Register.

Ali Bougrine
UGGC Law Firm
97 Boulevard Massira Al Khadra
Casablanca
Morocco

Tel: +212 522 99 76 00
Email: a.bougrine@uggc.com
URL: www.uggc.com

Managing Partner of the Casablanca Office

- 15 years' experience as a practising lawyer within UGGC Avocats.
- French and Moroccan nationality.
- Member of the International Association of Lawyers ("**UIA**").
- Member of the Moroccan Business Lawyers Association ("**AJAM**").
- Member of the Moroccan Association of Capital Investors ("**AMIC**").
- Member of the International Chamber of Commerce ("**ICC**").
- Morocco Representative of the Interlaw worldwide network.
- Morocco Representative of BNP Trade International.

Professional experience

- Partner, UGGC Law Firm (since 2011), Casablanca – Paris.
- Of Counsel, UGGC Law Firm (2006–2010), Casablanca – Paris.
- Lecturer of training sessions for LexisNexis Maroc (since 2014 – Morocco).
- Lecturer for the International Union of Lawyers (since 2015 – Morocco).

Professional references

- Cousel of international groups (especially Essilor, Axa, Colas, Bongrain, DTZ, Roca, Peri, Arcelor Mittal, Bodino, GCF) for external growth deals (mergers and acquisitions) and complex issues about corporate law in France and/or Africa.
- Counsel of Moroccan and international banks for structured finance deals (especially CIC International, BNP Trade, Crédit du Maroc, BMCE).
- Counsel of national and international investment funds within private equity deals (John Laing Investment, Entrepreur Venture, MTIC).

Languages

French (fluent), English (fluent), and Arabic (fluent).

Created over 20 years ago, UGGC Law Firm is one of the foremost independent law firms in France which comprises over 100 lawyers, including 27 partners.

UGGC Law Firm is organised into structured departments (each comprising partners and associates who are experts in their discipline) covering all areas of business law: mergers and acquisitions; private equity; banking law; labour law; tax law; public law; real estate law; environment law; competition law; intellectual property law; health law; insolvency law; and private clients and litigation.

The quality of the firm's services has been acknowledged by the highly reputable guides and directories on the market (*The Legal 500*, *Chambers & Partners*, *PLC Which Lawyer?*, and *IFLR*).

Thanks to the trust of its clients and the stability of its teams, UGGC Law Firm has enjoyed significant and steady growth in terms of turnover and staff for over 20 years, without any cycle effect. This growth results from the firm's determination to cover all areas of the law and to be able to draw on the expertise of structured teams in each specialised domain. In this way, the client benefits from the permanence of the firm's teams and the high quality of services which they provide.

The Casablanca office of UGGC Law Firm was created in December 2002. UGGC Law Firm was one of the very first French law firms to become durably established in Morocco. The Casablanca office has become one of the most important French law firms in Morocco.

Netherlands

Alexander J. Kaarls

Duco Poppema

Houthoff

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Under Dutch law, there are various types of corporate entities. The best-known Dutch corporate entities are: (i) the private limited liability company (*besloten vennootschap met beperkte aansprekelijkheid* or "BV"); (ii) the public limited liability company (*naamloze vennootschap* or "NV"); and (iii) the cooperative (*coöperatie* or "Coop"). BVs and NVs are limited liability companies. The following three different liability arrangements may be chosen for a Coop: (i) statutory liability (*wettelijke aansprakelijkheid* or "W.A."); (ii) excluded liability (*uitgesloten aansprakelijkheid* or "U.A."); or (iii) limited liability (*beperkte aansprakelijkheid* or "B.A."). The selected liability arrangement should be mentioned in each specific Coop's statutory name. In deviation of a BV and an NV, a Coop does not have shareholders and shares, but has members and memberships.

A business that does not seek to make profit distributions can also be organised in the form of a foundation (*stichting*). A foundation is not allowed to have any shares or memberships. In addition, a foundation is in most cases not allowed to make a profit distribution. A publicly traded company, itself most often an NV, may use a foundation in relation to the implementation of an anti-takeover measure. Smaller family controlled non-publicly traded, companies may use a foundation for participation plans for family members or other investors in an effort to limit the loss of family control.

Under Dutch law, there are also several types of legal trading forms without legal personality. Most well-known is the general partnership (*vennootschap onder firma* or "VOF") which is commonly used for joint ventures. The joint venture partners will exercise control and they will be jointly and severally liable for debts of the VOF.

This chapter will predominantly focus on the BV and the NV, unless stipulated otherwise.

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

Dutch corporate law is primarily found in the Dutch Civil Code ("DCC"). Topics covered in the DCC for the BV and the NV are: (i) the shares; (ii) the capital of the company; (iii) the general meeting of shareholders; (iv) the management board and supervision on the management board; (v) the so-called "large company regime" (*structuurregime*, as described in question 3.1 below); and (vi) the balanced allocation of seats among men and women for boards of certain BVs and NVs. The majority of these topics are incorporated by reference for the Coop. The law applicable to legal trading forms without legal personality are addressed in the Dutch commercial code (*Wetboek van Koophandel*). European legal entities (e.g., the *societas Europaea* or "SE") are not addressed in this chapter, albeit that if an SE is domiciled in the Netherlands, the rules applicable to NVs will largely apply *mutatis mutandis* to such an SE.

In addition, the DCC contains legislation for all legal entities regarding the company's annual accounts. Pursuant to these provisions, publicly traded companies in the Netherlands must disclose compliance with a code of conduct in its annual accounts on a comply-or-explain basis. This so-called Corporate Governance Code ("Code") comprises of principles and best practice standards. The provisions laid down in the Code are not legally binding. In case a company deviates from the Code, it should say so and explain why a provision is not applied.

The articles of association (the "Articles") of a company may be another source of corporate governance rules applicable to the specific company. The Articles may contain clauses that deviate from the DCC if the DCC allows doing so. Generally, the Articles may state that a supermajority is required for corporate resolutions identified therein.

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

In 2016, a revised Code was published. Publicly traded Dutch companies are to follow this new Code on a comply-or-explain basis in their 2017 annual accounts (i.e., as of 2018). The revised Code has given a central role to long-term value creation, and the introduction of "culture" as a component of effective corporate governance.

Another trend is the increase in more active shareholder engagement in the Netherlands. Recent examples include (i) shareholder engagement on an unsolicited public bid on AkzoNobel (by PPG), (ii) discussions that led to a bid price increase with respect to Qualcomm's bid for NXP Semiconductors, and (iii) shareholder involvement on discussions regarding Ahold Delhaize (i.e., the continued validity of Ahold Delhaize's anti-takeover device). These developments have caused debates in the Dutch parliament. In October 2017, the Dutch coalition government proposed to take measures aimed to shift influence from shareholders for boards to focus on long-term sustainable value creation. To this end, the coalition government proposed to implement a statutory response time of 250 days for Dutch listed companies that are confronted with general meeting ("GM") agenda requests that may result in a fundamental change in the company's strategy.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Dutch corporate law states that the executive management board ("Management Board") members must act in the best interest of the company, including its business and its stakeholders as a whole, including the company's shareholders and its employees, suppliers and customers, among others.

The Dutch corporate governance principles are primarily based on a stakeholders model. This means predominantly that sustainable value creation for all stakeholders is promoted in the Netherlands. According to the Code, the Management Board must develop, with adequate involvement of the supervisory board (if any), a vision aimed at long-term value creation and formulate an appropriate strategy. In addition, Dutch publicly traded companies must disclose in their management reports the relevant company's values and the manner in which these are implemented at the company and the effectiveness of, and compliance with, the company's code of conduct. A recent burst of action by activist shareholders in the Netherlands appears to have shown both the resilience of the Dutch stakeholder model and the limits thereof as imposed by the Dutch courts and (*de facto*) international institutional shareholders.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Neither the Board, nor the GM may exceed the boundaries of its powers under the law and the Articles. The determination of the company's strategy is the sole discretion of the Management Board under the supervision of the supervisory board, if any. Also, shareholders are, in principle, not allowed to request precatory votes such as an advisory voting item or a poll. The Management Board, however, is accountable to the GM with respect to the company's strategy.

In principle, shareholders do have the right to dismiss Management Board members. In addition, if shareholders do not agree with the company's strategic direction, shareholders may request the Enterprise Chamber at the Amsterdam Court of Appeals to start an enquiry procedure as further described in question 2.5 below.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

In principle, shareholders are obliged to fully pay up the issued capital on the shares they own (which is typically done immediately upon issuance). It may be agreed that the nominal value, or part of it, must first be deposited after a certain period of time or after the company has called its capital. As of 2012, a BV may have shares that do not have a nominal value. In that case, shares do not need to be fully paid-up and shareholders are not necessarily required to pay a minimal amount.

A BV's Articles may impose additional obligations on shareholders of a BV. Such obligations may include (in the case of a BV) obligations of a contractual nature such as an obligation to finance the company if certain conditions are met, or the obligation to accept or supply certain goods or services under pre-set conditions.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

After the end of a company's fiscal year, the company should have its annual GM. In this GM, shareholders will resolve on the adoption of the company's annual accounts. Shareholders may also decide to extend the deadline for adoption. Typically, boards will propose to shareholders a release of liability of the board towards the company with respect to the performance of its duties over the past fiscal year, to be adopted immediately following adoption of the annual report. Any such release will be solely based on, and be limited to the information disclosed in, the annual report. If the company's Articles provide for annual director elections, these will typically be done during the annual GM. On an annual basis many companies will also obtain from shareholders a delegation to buy back shares as well as a limited delegation to issue new shares. In addition, an extraordinary GM may be held to resolve on various matters belonging to shareholders.

Dutch law also allows for GMs of holders of a certain class of shares if such GM of holders of a certain class of shares is provided for in the Articles. Special rights may be awarded to the GM of holders of a certain class of shares, such as (for instance) the preparation of binding nominations for the appointment of Management Board members.

In principle, a GM is called by the Management Board, or by the supervisory board. The Articles may also grant such right to others. Holders of shares or depositary receipts issued for shares are allowed to, in person or by means of a written proxy, attend and speak during a GM and may exercise their voting rights. Shareholders of a BV that, alone or jointly, hold more than 1% of the issued capital, may request that an item be put on the agenda, provided that the request is made no later than the thirteenth day prior to the date of the meeting and that it does not conflict with a substantial interest of the company. Shareholders of an NV may do so as well, if they, alone or jointly, hold more than 3% of the issued capital. A company's Articles may provide for a lower threshold.

Shareholders that, alone or jointly, hold more than 10% of the issued capital may be authorised by the court at their request to convene a GM. Such request shall be denied if it does not appear that shareholders have written to the Management Board and supervisory board requesting a GM and stating the exact matters to be considered, and the Management Board or supervisory board has not taken the necessary steps so that the GM could be held within six weeks of the request.

Pursuant to the DCC, the Management Board must provide all information to the GM that it requires to fulfil its role. This right pertains to shareholders jointly since shareholders should, in principle, be treated equally. In this respect, the DCC states that equal rights and obligations are attached to all shares in proportion to their amount, unless provided otherwise in the Articles. However, each individual shareholder has the right to be provided with all the required information if it submits an individual request during a GM. The Management Board may refuse a request for information if there is a compelling corporate reason for not providing the information.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

In principle, shareholders are not liable for acts or omissions of the corporate entity. However, if a shareholder acts as *de facto* director

of the company, the *de facto* director may be liable. As a general rule, the involvement as a shareholder in the day-to-day management of the company and the internal decision-making process must be substantial before liability might arise.

According to Dutch case law, a shareholder may also be liable for the debts of its subsidiaries. Such liability, if any, depends on specific circumstances including the interwovenness (*vereenzelviging*) of the group companies, combined with the subsidiaries' risk management of operations that may lead to a duty of care of the parent towards the creditors of its subsidiaries. A parent may also be liable for the debts of its subsidiaries if the difference between the parent and its subsidiary is minimal and that difference can be eliminated in thought. Although this will not easily lead to liability, shareholders are to interact within the company in line with general principles of reasonableness and fairness. This may include a limitation on a major(ity) shareholder's ability to (ab)use its powers when such (ab)use might lead to disproportionate damage to minority shareholders.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

The Enterprise Chamber at the Amsterdam Court of Appeals (the "EC") is a specialised court that deals with disputes within companies. Shareholders who, alone or jointly, hold more than a certain statutory threshold may request the EC to start enquiry proceedings. Generally, the statutory thresholds that holders of shares or depositary receipts issued for shares of a BV or an NV are required to hold is at least 10% of all issued and outstanding shares up to a maximum of EUR 225,000 in nominal value. If a Dutch company is listed on a regulated market and the issued capital exceeds EUR 22.5 million, holders of shares or depositary receipts issued for shares, should solely or jointly represent at least 1% of the issued capital. The Articles of a company may set a lower threshold.

An enquiry proceeding is an investigation into potential mismanagement concerning the capital or governance of the company. If the EC judges an enquiry is justified, the EC can take a broad range of temporary actions. If, after completion of the enquiry, the EC holds that mismanagement has in fact occurred, it can take similar actions and other remedies to ensure proper management on a more permanent nature.

The right to call a GM can be enforced in the district court. Although it is possible to hold board members liable in tort, such action are relatively rare and derivative suits are not possible under Dutch law.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

According to the Dutch Financial Supervision Act ("DFSA"), a shareholder who, directly or indirectly, obtains or loses capital or voting rights in a listed company which exceeds or falls below a certain threshold, must, without delay, notify the Dutch Authority for the Financial Market ("AFM") of its holdings and the relevant change. The threshold values for the purpose of this obligation are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75%, and 95%.

Shareholders that hold 100% of the company's capital must be so registered in the Dutch trade register. In addition, proposed European Union legislation that aims to prevent money laundering may impact the identification of ultimate beneficiary owners ("UBOs") under a fourth and a proposed fifth anti-money laundering directive. According to this (proposed) legislation, UBOs may be natural persons that, amongst other things, (indirectly) hold more than 25% in the capital of a company, hold more than 25% of the voting rights in the GM, or have actual control in the company. The fourth directive should have been implemented in Dutch legislation by 26 June 2017, but the Netherlands have suspended implementation awaiting the fifth directive.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Shareholders are currently not required by Dutch law to disclose their intentions, plans or proposals with respect to the company in which they are invested. However, a new European Union shareholders rights directive is being implemented in the Netherlands. According to this directive, institutional investors and asset managers must develop and disclose shareholders engagement policies on their website on a comply-or-explain basis. Their investment strategy must be transparent, including the way in which it contributes to the medium- to long-term performance of the institutional investor's portfolio or fund.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Dutch law allows for a one-tier board governance structure, or a two-tier board governance structure. A one-tier board structure may consist of only executive directors or both executive and non-executive directors in a single corporate body. When a two-tier board structure is applied, the company's Articles will provide for a Management Board consisting of executive directors, and a supervisory board consisting of non-executive directors (also called supervisory directors) in two separate corporate bodies. In a one-tier board structure, the Articles may provide for non-executive directors sitting on the same board jointly with the company's executive directors.

The company is required to install a supervisory board, or appoint non-executive directors, if the company files a statement that it qualifies as "Large" according to the DCC for three consecutive years. Such a statement must be filed, if (i) according to the company's balance sheet, the total issued capital plus its reserves amounts to EUR 16 million, (ii) the company (or a dependent company) has established a works council pursuant to a legal obligation to do so, and (iii) the company and its dependent companies together normally employ at least one hundred employees in the Netherlands. Certain full or partial exemptions may apply if, amongst other things, the company is considered a financial holding company whereby the majority of the employees work outside the Netherlands, or the company virtually exclusively renders certain management and financing services to its group.

The Management Board manages the corporate entity subject to limitations as set out in the company's Articles. However, the Articles may stipulate that certain Management Board resolutions are subject to prior shareholder or non-executive approval. If the company qualifies as a Large company, certain board resolutions are mandatorily subject to approval of the non-executive directors.

The Management Board should consist of at least one member. Both natural persons and legal entities can be Management Board members. The Articles may provide further criteria, which a

Management Board member has to qualify for. A Management Board member of a company that is considered large for accounting purposes may not be appointed if that person is a supervisory board member or non-executive director at more than two other companies, or that person is the chairman of the supervisory board or the chairman of the board in a one-tier structure.

Separately, bigger companies tend to install an executive committee. An executive committee is not a corporate body and is only referred to in the Code. According to the Code, an executive committee is a committee that is closely involved in the decision-making of the Management Board, and that, in addition to Management Board members, may also include members of senior management.

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

Management Board members are first appointed in the deed of incorporation of the company. Afterwards, Management Board members are appointed and dismissed by a resolution of the GM. According to the DCC, a normal majority in the GM is required for appointments, suspensions or dismissals. The Articles of a company may state that a larger majority is required. However, it is not permitted that a larger majority needed for the suspension or dismissal of a member of the Management Board requires more than two-thirds of the votes cast, where two-thirds represent more than 50% of the issued and outstanding capital.

If a company is a Large company, the company must install a supervisory board, or appoint non-executives on its Management Board. Executive Management Board members in a Large company are appointed by the supervisory board or by the non-executive directors for a two-tier or one-tier board structure, respectively, which appointment may not be limited by a binding nomination.

Although it is not a constitutive requirement for the validity of the appointment or dismissal, the appointment or dismissal of a Management Board member should be registered with the Dutch trade register.

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

A Management Board member may have an employment agreement, or management agreement with the company. A company may agree with a Management Board member that he, she or it is not entitled to any compensation. Termination of board membership by a company's GM will automatically lead to termination of the employment relationship between the company and the director concerned (without prejudice to any agreed upon severance payments).

According to the DCC, the GM determines the remuneration of Management Board members of a BV, unless the Articles provide otherwise. An NV should have a remuneration policy that is set by the GM. In addition, if the NV has a works council, the works council has the right to present its views on the policy before the policy is proposed to the GM.

According to the Code, a publicly traded Dutch company should install a remuneration committee if the supervisory board consists of more than four members. The remuneration committee should draw up a clear and understandable proposal to the supervisory board as a whole concerning the remuneration policy to be pursued with regard to the Management Board. The supervisory board should present the policy to the GM for adoption. The supervisory board determines the remuneration of the individual Management Board members, within the limits of the remuneration policy adopted by the GM. The GM may award remuneration to the supervisory board members or non-executive directors.

Management Board members may be granted certain types of bonuses. Bonuses may include profit-sharing programmes, or share-option arrangements linked to certain targets. If a bonus has been paid based on incorrect information about the achievement of the targets, the company has the power to claim repayment of the bonus in whole, or in part.

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

Management Board members are, in principle, not required to disclose their interests in securities held. However, if a company is listed in the Netherlands, Management Board members and supervisory board members should disclose their shares and voting rights and changes in these share holdings and voting rights where these concern (rights to acquire) shares in their company and in affiliated issuers to the AFM. In addition, any manager of the company should disclose transactions that have been performed by them in shares or debt instruments of the company or derivatives or other financial instruments linked thereto to the AFM. The AFM keeps registers of the above filings, which are publicly available on the website of the AFM.

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

The chairman of the Management Board or any director may generally call a Management Board meeting at its own initiative. The notice shall be given in writing, or e-mail and must be delivered timely prior to the date of the meeting, in such a manner that the Management Board members are able to properly prepare for the meeting. The Articles may contain requirements with respect to the notice of or the agenda of the Management Board meeting. In principle, the meetings of the Management Board will be held at the company's head office, or at such other location as may be agreed by the Management Board. The meetings shall be conducted in a language which the Management Board decides.

At a Management Board meeting, resolutions can be adopted by a majority of votes cast at the meeting, unless the Articles prescribe a higher majority or a quorum. Resolutions of the Management Board may also be adopted outside of a meeting if the Articles provide so. As set out in this chapter, certain resolutions may be subject to prior approval of the GM or another corporate body.

The secretary of the Management Board must prepare minutes of the meeting reflecting the discussions held and decisions made during the meeting. These minutes may be prepared in English and are circulated by the secretary following the Management Board meeting.

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

The main responsibilities of the Management Board include: (i) managing the general course of affairs of the company and its business, including the company's strategy; (ii) bookkeeping and the proper administration of the company's records; (iii) preparing and filing the company's annual accounts in a timely manner; (iv) representing the company; and (v) approving dividend distributions (the latter subject to definitive approval by the GM).

Management Board members are required to have at least such level of expertise as may be expected from a diligent board member in a similar situation. Management Board members do have discretionary room in managing the company.

Article 2:9 DCC lays down rules for the liability of a Management Board member to the company if this member has performed its duties improperly. Generally, a serious reproach (*ernstig verwijt*) is required for personal liability of a Management Board member to arise. Management Board members are jointly and severally liable. A Management Board member has the opportunity to exculpate himself if he cannot be reproached for the relevant shortcoming and if he has not been negligent in acting to prevent the consequences of improper management.

In case of insolvency of the company, the bankruptcy trustee may hold a Management Board member liable for the entire deficit in bankruptcy if the Management Board has manifestly performed its duties improperly. If the company has not timely filed its annual accounts or has not properly kept the company's administration, this results in (i) a presumption of improper performance of duties by Management Board members, including *de facto* Management Board members, and (ii) a rebuttable presumption that such improper performance played a significant role in causing the bankruptcy during a three-year window.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

As described in question 1.3 above, the main corporate governance challenge for Management Boards in the Netherlands these days appears to be the more active levels of shareholder engagement in recent years.

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

The GM can discharge a Management Board member of director liability. Such discharge has a limited effect. Discharge only relates to facts and circumstances that were known to the shareholders at the time the discharge was granted.

A general exoneration of a Management Board member by the company beforehand for causing loss or damage as a result of serious mismanagement is not allowed. A company can enter into an agreement with a Management Board member for the payment of legal defence costs and to indemnify against other liabilities in case a Management Board member is otherwise held liable. It is also quite typical to lay down a general board indemnification in the company's Articles. In addition, directors' and officers' insurance contracts are typically in place.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

As described in question 2.1 above, determining the company's strategy belongs to the powers and duties of the Management Board. However, if the Management Board of an NV (i) plans to sell the business, or a substantial part thereof to a third party, (ii) the company enters into or terminates a long-term cooperation with another legal entity that has a substantial impact on the company, or (iii) the company acquires or divests an interest having a value of at least one-third of the amount of its assets, prior approval of the GM is required. In addition, if a works council has been set up by a BV or NV, the works council in some strategic cases has the right to be consulted or works council approval is required. As noted above, in performing its duties the board is ultimately subject to shareholder oversight.

4 Other Stakeholders

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

In principle, if a company continuously employs at least 50 employees, it should install a works council. The works council has a right to advice on certain topics. These topics include, amongst other things, a significant reduction, expansion or other change in the company's activities, a significant change in the company's organisation, or a significant reduction, expansion, or other change in the company's activities. In addition, approval of the works council is required for, amongst other things, any arrangement relating to working conditions, absenteeism, or the company's reintegration policy. If the company qualifies as Large, the supervisory board shall nominate and propose persons recommended by the works council for one-third (rounded down) of the number of members of the supervisory board.

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

There is no active role for other stakeholders in corporate governance. However, when determining its policy, the company should take the interests of all stakeholders into account at any time.

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

As described in question 1.3 above, culture is considered an effective component of corporate governance. In addition, certain social corporate governance aspects need to be disclosed as described in question 5.2 below.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

According to the DCC, the Management Board must prepare its annual accounts within five months after the end of the company's financial year. After preparation, the GM must adopt the annual accounts within two months. After adoption, the annual accounts need to be publicly filed with the Dutch trade register. Under special circumstances, the GM may extend the preparation period by explicit resolution thereto for up to six months. Other disclosures are predominantly the responsibility of the Management Board.

5.2 What corporate governance-related disclosures are required?

According to the DCC, if a company is considered large for accounting purposes, the company should also address non-financial indicators in its annual reporting. Disclosure should include (i) a brief description of the company's business model, (ii) a description of policies pursued

regarding environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters, (iii) principal risks related to those matters, and (iv) non-financial key performance indicators relevant to the particular business of the company.

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

The company shall give instructions for the audit of the annual accounts to a registered accountant, an accountant-administrator, or a statutory auditor. If a legal person is a public interest organisation (*oob*) such as a listed company, the appointment shall be notified to the AFM. The accountant shall examine whether the annual accounts provide the required true and fair view. There is no obligation to audit the annual accounts of smaller entities as determined in accounting legislation.

5.4 What corporate governance-related information should be published on websites?

There are generally no statutory disclosure requirements for small, not publicly traded, companies. If a Dutch company is listed on a regulated market, it should announce the calling of a GM on its website and therewith disclose, among other things, (i) the agenda, (ii) time and place of the GM, (iii) the procedure to attend the GM, and (iv) the explanatory notes. After such GM is held, the company should also disclose the voting results.

Alexander J. Kaarls
Houthoff
Gustav Mahlerplein 50
1082 MA, Amsterdam
The Netherlands

Tel: *+31 20 605 6110*
Email: *a.kaarls@houthoff.com*
URL: *www.houthoff.com*

Alexander J. Kaarls focuses on (cross-border) corporate transactions and corporate governance matters, including public and private M&A, and equity capital markets. Before joining Houthoff, Alexander practised law with Skadden, Arps, Slate, Meagher & Flom LLP from 1994 until 2004. He is recognised as a leading M&A practitioner in the Netherlands by *Chambers Global*, *Chambers Europe*, *Who's Who Legal – Merger and Acquistions*, and *IFLR1000*. Alexander studied at Leiden University (School of Law) and Sciences Po (Paris). Alexander is a member of the Bar in Amsterdam and California.

Duco Poppema
Houthoff
Gustav Mahlerplein 50
1082 MA, Amsterdam
The Netherlands

Tel: *+31 20 605 6115*
Email: *d.poppema@houthoff.com*
URL: *www.houthoff.com*

Duco Poppema is a lawyer in Houthoff's Corporate M&A practice group. He specialises in public and private M&A transactions and capital markets transactions, including initial public offerings (IPOs). He also gives advice to listed and non-listed companies on ongoing obligations and corporate governance matters. Duco graduated from Leiden University with a Master's degree in corporate law in 2016. He graduated from University College London (UCL) with a Master's degree in management with an emphasis on finance in 2017. He was admitted to the Bar in Amsterdam in 2018.

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Nigeria

Jennifer Douglas-Abubakar

Miyetti Law

Khadija Bala

1 Sources And Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entities currently existing in Nigeria are: Companies Limited by Shares (Ltd), Companies Limited by Guarantee (Ltd/Gte), Unlimited Liability Companies (Ultd) and Incorporated Trustees (IT). The above listed entities can operate as either public or private companies.

However, this chapter deals with corporate governance with a focus on Public and Private Companies Limited by Shares.

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

The laws and regulations governing corporate governance in Nigeria are generally as follows:

a. The Companies and Allied Matters Act, 1990 (CAMA) establishes the Corporate Affairs Commission (CAC) which is responsible for the supervision, formation, and winding up of companies.

b. Banks and Other Financial Institutions Act, 1991 governs financial institutions in Nigeria. It equally charges the Central Bank of Nigeria (CBN) with the regulation and supervision of these institutions.

c. The Investment and Securities Act, 2007 provides for the establishment of the Securities and Exchange Commission (SEC), which is the leading regulatory body on the capital market, securities investments and Mergers & Acquisition.

d. The Financial Reporting Council Nigeria Act 2011 (FRCN) establishes the Financial Reporting Council. The Council has powers to establish a directorate of Corporate Governance which has the responsibility to develop both principles and practices of corporate governance.

The Codes and Rules which also regulate corporate governance in Nigeria include:

a. Code of Corporate Governance for Public Companies, 2011 (SEC Code) which applies to all public companies and quoted private companies on the capital market in Nigeria.

b. Code of Corporate Governance for Banks and Discount Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry 2014, (CBN Code) which applies to banks and discount houses in Nigeria.

c. Securities and Exchange Commission Rules 2013.

d. Code of Business Ethics and Principles on Corporate Governance for the Insurance Industry 2009 (NAICOM Code).

e. Code of Corporate governance for Licensed Pension Operators, 2008 (PENCOM Code).

f. Listing Rules of the Stock Exchange.

Other Sources:

The Memorandum and Articles of Association of all companies in Nigeria also regulate companies' internal administration and the manner in which the business of the company may be conducted.

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

The Nigerian banking financial crisis in 2004 and the global financial meltdown of 2008–2009 have precipitated many Laws and enactments such as the SEC Code. These laws and codes on corporate governance extensively reviewed practices on board composition, appointment, removal, remuneration, disclosure and reporting. The codes also restated the role, duties and skill of managers/directors of corporations, gender parity, piercing the glass ceiling by women directors and mandatory Corporate Social Responsibility (CSR).

Developments/Trends

To create an effective corporate governance framework and to safeguard stakeholders' interests and assets of public entities, the FRCN issued the National Code of Corporate Governance (NCCG) in 2016. The Code was, however, fraught with overlapping, conflicting and inconsistent provisions which are currently undergoing review.

In February 2017, the CBN released an Exposure Draft of the Code of Corporate Governance for Other financial institutions (OFIs). The Code has introduced novel provisions on appointment and maximum tenure of directors, their remuneration and establishment and functions of committees, etc.

Also, the Nigerian Stock Exchange (NSE) and the Convention on Business Integrity (CBI) introduced the Corporate Governance Rating System (CGRS) for companies listed on the NSE. The Rating System for public-listed companies is based on the companies' corporate governance and anti-corruption culture.

Challenges

The trend of regulating public companies faces a gamut of challenges such as the high rate of corruption and weak regulatory framework. Interdependence of the regulated public regulators in the private sector allows the use of private companies for corrupt practices. Other challenges to effective corporate governance

include conflicting and overlapping regulatory rules, anachronistic laws, slow judicial enforcement and intervention process, unstable micro-economic indices, frequent changes in government policies and weak local currency which affect corporate performance.

Despite these challenges Nigeria has been ranked among the top five countries in Africa for compliance with the Organisation for Economic Co-operation and Development Principles of Corporate Governance. The ranking followed a study jointly published by the Association of Chartered Certified Accountants and KPMG titled 'Balancing Rules and Flexibility for Growth'.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Worldwide, the role of corporations in economic development is not in contention as many corporations are far richer than national governments. Society demands that profit maximisation can no longer be the sole objective of companies. Nevertheless, many shareholders in Nigeria prefer profit maximisation and quick returns rather than longer-term investments in sustainable capital appreciation. Short-termist approaches tend to entrench managements who seek shareholders' interests rather than broader interests of expansions, research or product development, investments in corporate customers satisfaction, etc.

Characteristically, short-termism engenders breaches of business ethics, relegation of wider common good considerations, and undermines core values which weaken the company's capacity to achieve non-financial goals. Most organisations that rely on short-termism often maintain a system of poor accountability, weak internal control systems, concentration of power in MD/CEO and management entrenchment.

The main factors responsible for short-termism in Nigeria include the high cost of borrowing, huge cost of doing business, over-regulation of the economy, incompetent directors, non-pursuant of value-added and research programmes, and general misconceptions of the application of codes of corporate governance only to large organisations. To curb short-termism in corporate governance, general reengineering of the macro and micro economic environment is needed, e.g. political stability, policy reforms, prosecution of alleged corrupt offenders, change of attitude of directors, improvement of infrastructure, power, water and security to reduce the cost of doing business in Nigeria.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they invested?

Shareholders are given concurrent and supervising powers to oversee some management functions through participation in strategy committees etc. to direct the Board on certain investments and projects.

In private companies, there is usually no clear dichotomy between the shareholders and the directors. The shareholders are usually the directors of their business. Some rights of shareholders include:

1. The right to receive notice of meeting (S. 219); the right to attend any general meeting (S. 227).
2. The right to speak and vote on any resolution.
3. The right to convene an extraordinary general meeting where the shareholder holds at least 10% of the total voting rights (S. 215(2)).
4. The right to present a winding-up petition (S. 410 CAMA).
5. The right to apply to the CAC to direct the calling of the AGM where there is default in holding the AGM (S. 213(2)).
6. The right to seek redress, and enforce their rights (S. 303).
7. The power to appoint and replace directors and auditors of the company (Ss. 214, 262, 357).
8. To petition the court for relief from unfairly prejudicial actions (S. 310 & 311).
9. The right to appoint representatives to Audit Committees (S. 359).

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders have the responsibility to appoint and replace director(s), especially non-performing directors. Shareholders can also call for the annual general meeting of the company where the directors of the company fail to do so. Shareholders are expected to proactively attend general meetings of the company, pass resolutions at such meetings, and settle outstanding amounts on calls.

2.3 What kinds of shareholders meetings are commonly held and what rights do shareholders have as regards such meetings?

CAMA mandates companies to hold General Meetings of shareholders. These meetings are the annual general meeting (AGM), and extraordinary general meeting (EGM).

Shareholders have the right to attend the meetings of the company. They can apply to the Corporate Affairs Commission to direct the calling of the AGM where there is default in holding the AGM within the stipulated period, or where there is deadlock in the Board's exercise of its powers.

Shareholders holding not less than one-tenth of the paid-up capital of the corporation can requisition an EGM which the members of the management body are bound to convene (S. 215(2)).

Also, by the provisions of CAMA, public companies are expected to hold a statutory meeting within a period of six months from the date of incorporation (S. 211). There are other meetings provided by law such as the meetings of classes of shareholders (S. 243), and Audit Committees, which involve shareholders (S. 359(4)).

2.4 Do Shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders have the right but not the duty to attend the company's general meetings and to pass resolutions at such meetings. Shareholders may appoint a proxy to vote in their capacity as shareholders. In law, especially in public companies with dispersed shareholding, shareholders do not exercise control over the company management. Their duties are mainly to pay up on shares allotted when due. Their right to appoint and remove directors is their major exercise of corporate power.

Also, shareholders may be liable for the acts or omissions of the company where the shareholders control the companies. In such cases, the veil of incorporation is lifted. In an unlimited company, the shareholders' liability is unlimited for the acts or omissions of the company. Additionally, parent companies who are controlling

shareholders in subsidiaries may be responsible for negligent breaches on the environment, non-compliance with employee protection and safety rules.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders can seek enforcement action against the company or members of the management body by bringing either a members' direct action or a representative action.

As protection against oppressive conduct in the company, a shareholder can bring a member direct action (derivative action) where the act or omission of the company affects the shareholders. Enforcement actions arise where there is fraud in the minority as in the undervalue sale of company assets or securities (1985), fraudulent trading, misfeasance, illegal activities such as money laundering, and *ultra vires* actions. The shareholders may seek relief through injunction, nullification of questionable transactions or damages, etc.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

The articles of a company may impose some restrictions upon the highest number of shares that may be held by each shareholder. In the absence of such, there is no legal provision that places a limit on the number of shares that a shareholder may acquire in a company. However, as CAMA requires at least two shareholders before incorporation, one shareholder cannot hold 100% of the shares. BOFIA also limits a person's maximum shareholding in any bank.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Section 94 of CAMA empowers a public company to require disclosure, by notice in writing, by any member of the capacity in which he holds any shares in the company. If he holds shares as beneficial owner, the member should state the particulars of the identity of persons interested in the shares and whether such parties so interested are also parties to any agreements or arrangements relating to the exercise of any rights conferred by the holding of the shares.

Under S. 275, every company must keep a register showing each director shares (number, description, amount) in the company or debentures of the company or in any other company subsidiary or holding company held in trust for him or otherwise.

3 Management body and management

3.1 Who manages the corporate entity/entities and how?

Section 63(3) of CAMA provides that directors of a company are appointed to direct and manage the affairs of the company. Collectively, the directors are referred to as the Board of Directors. Subject to the company's articles, it is the board's responsibility to ensure that the company is properly managed.

A company is required by CAMA to have a minimum number of two directors. However, the SEC code requires a public company to have a minimum of five directors, which consist of executive directors, non-executive directors and at least one independent director. The non-executive directors are to be in the majority.

The board derives its power from the members of the company, and may in turn delegate their powers to other officers of the company or to a few directors to carry out specific assignments.

The board may equally constitute some of its members or officers into committees to undertake tasks like risks and loan management (in banks), compliance issues, remuneration and disciplinary matters, etc. (S. 64).

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

There are three ways through which a director of a company may be appointed by the provisions of CAMA:

a. The first directors of a company are appointed by the subscribers to the memorandum and articles of association of the company at the incorporation of the company.

b. The members, in a general meeting, appoint subsequent directors of the company by resolutions. Also, a person, not being a member of the company, who is empowered by the articles of the company may appoint a person as a director e.g. institutional or regulatory bodies, CBN, NDIC, government Agencies.

c. In the unlikely event that all the shareholders and directors die, CAMA empowers their personal representatives to apply to the court to convene a general meeting of all the personal representatives of the shareholders to appoint directors. If the personal representatives fail to convene such meeting, the creditors are empowered to do so.

A director can be removed in any of the following ways:

a. By the provision of section 262 of CAMA a company may by the members in general meeting by ordinary resolution remove a director at any time, notwithstanding the provisions of its articles or any agreement between the company and the director.

b. Certain regulatory laws empower the regulatory body to remove a director e.g. section 35 of the Bank and other Financial Institutions Act empowers the Governor of the Central Bank of Nigeria to remove the directors of a bank or financial institution.

c. Under certain circumstances, the terms of a director's service contract may stipulate the mode of the director's removal. Where such stipulation covers the director's dual status as a servant and director of the company, the director's removal in line with such terms is valid.

d. Where the Articles of Association provide a clearly defined procedure for the removal of any director, a director removed in line with the procedure stands removed.

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

1. Section 267 of CAMA states that the remuneration of the directors shall, from time to time, be determined by the general meeting. Directors are also allowed sitting allowances and other costs incurred in carrying out their duties. The executive directors are equally employees of the company and as such their service contracts make provisions for their remuneration. Non-executive directors are not paid salaries but only remuneration for specific tasks and sitting allowances.
2. The SEC Code requires companies to develop a comprehensive policy on remuneration for directors and senior management.

The Code also states that the remuneration of each director should be considered individually with particular attention paid to the relevance of the skill and experience to the company. Only non-executive directors should be involved in determining the remuneration of executive directors. As such, most companies have Remuneration Committees.

3. The CBN Code specifically provides that banks shall align executive and board remuneration with the long-term interests of the bank and its shareholders. The remuneration shall be sufficient to attract and motivate the directors and also must be balanced against the bank's interest so as not to pay excessive remuneration. Where the remuneration is linked to performance, the remuneration shall be designed so as not to encourage excessive risk-taking, etc.
4. Some articles of association of companies, especially private companies, do prescribe the quantum of remuneration payable to directors.

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

By CAMA, where the articles of association provide for directors' share qualifications, a director who fails for a period of two months after his appointment to obtain his qualification shall vacate his office. The company is also mandated to keep a register, at its registered or head office, showing the number, description and amount of shares or debentures each member of the management body owns.

The SEC Code states that companies should disclose in their annual report, the details of the shares of the company held by directors. Also, persons who are to be appointed directors in a company, shall disclose their shareholding in the company prior to the appointment.

The CBN Code provides a limitation in that where stock options are offered to directors as an option of remuneration, such shall not be exercisable until after one year after the expiration of the tenure of the director.

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

By CAMA, the directors are to be given fourteen (14) days' notice of meeting in writing, failing which the meeting is invalid.

The directors may elect a chairman for their meetings and determine his/her tenure. If, however, he/she is not present at any meeting after five minutes, the directors may appoint anyone from their number to be chairman of the meeting.

Any question arising at any meeting shall be decided by the majority of votes and where there is an equality of votes, the Chairman shall have the casting vote or second vote. Unless otherwise stated in the articles of association of the corporation, the quorum needed for the transaction of the business of the Board is two (2) where the members of the directors are not more than six (6). Where the members of the Board are more than six (6), the quorum is ⅓ of the number.

By the provisions of the SEC Code, the directors are to meet at least once every quarter to effectively perform their managerial functions and monitor corporate performance. The Code also makes it mandatory for the directors to attend a minimum of ⅔ of all meetings in a year, otherwise they may be removed or not be re-elected.

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

The directors of a company have certain duties that are expected of them to perform and there are certain liabilities upon failure to perform effectively. The principal legal duties of directors are categorised into three:

1. Fiduciary duties.
2. Duties of care and skill.
3. Ancillary duties.

Section 279 of CAMA lists some of the main duties of directors and states that the directors stand in fiduciary relationship towards the company, and are expected to act in utmost good faith towards the company in any transaction with or on behalf of the company. Under section 283 thereof, the Directors are trustees of the assets and powers given to them. Accordingly, the directors have the following duties:

- to act at all times in what he/she believes to be the best interest of the company;
- not to fetter their discretion to vote in a particular way;
- to exercise their powers for the purpose for which they are specified, and not for a collateral purpose;
- not to allow their personal interest to conflict with the interest of the corporation;
- not to abdicate from their responsibility even if they delegate; and
- to consider the interest of employees, etc. (S. 279(4)).

The Act further provides that the directors of a company are expected to exercise their powers and discharge their duties honestly, and to exercise the degree of care, diligence and skill which a reasonable prudent member of the management would exercise in similar situations. It is imperative to note that failure of any of the directors to discharge these duties may render them personally liable either in tort, contract or crime.

Ancillary duties of directors include, under section 276, the duty to notify the company of any loan or a guarantee by any third party based on security provided by the company. This applies to directors, officers and any such officers who had been in that position for the preceding five years.

Under section 277, any director who is directly or indirectly interested in a contract or proposed contract with the company, shall declare the nature of his interest at the board meeting at which the contract is being considered.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The SEC Code provides for the specific corporate governance responsibilities of directors as follows:

(a) formulation of policies and overseeing the management and conduct of the business;
(b) formulation and management of risk management framework;
(c) succession planning and the appointment, training, remuneration and replacement of board members and senior management;
(d) overseeing the effectiveness and adequacy of internal control systems;
(e) performance appraisal and compensation of board members and senior executives;

(f) ensuring effective communication with shareholders;

(g) ensuring the integrity of financial reports;

(h) ensuring that ethical standards are maintained; and

(i) ensuring compliance with the laws of Nigeria.

In carrying out their duties, some of the challenges experienced by management are:

a. general inadequate professional know-how, ethical lapses and compliance failures;

b. inadequate digitalisation and innovation of the general business environment;

c. increased levels of operational risks, and poor fidelity standards of employees;

d. corruption and inadequate infrastructure which increase operational costs;

e. multiplicity of regulatory bodies and rules; and

f. general poverty, illiteracy and obsolescence of machines and skills.

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

Under CAMA, the company is responsible for any liabilities incurred by the directors while working for the company. This is because the director is seen as an agent of the company.

Also, the directors are personally liable for any loss incurred by the company from breach of any of his duties to the company and no provision, whether contained in the articles or resolutions of a company, or in any contract, shall relieve the director from such liability imposed by law. These liabilities may be insured by the company as directors' liability and fidelity insurance.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Being the apex decision-making body of the company, the board is saddled with the responsibility of designing and implementing policies that would ensure the long-term growth and profitability of the company. Specifically, the SEC Code states that the board should define the company's strategic goals and ensure that its human and financial resources are effectively deployed towards attaining those goals.

4 Other stakeholders

4.1 What, if any, is the role of employees in Corporate Governance?

The role of employees in corporate governance in Nigeria is increasing as the employees make the hierarchical proposals which enable the boards to take decisions. However, unless employees acquire membership rights through shareholding, they cannot be represented on the boards.

To increase employees' participation in corporate governance, employees are given access to vital records of the company for better enlightenment during consultations, salary reviews, negotiation, and collective bargaining. Some enactments of the Employee Protection Act and Safety Laws confer a certain degree of protection of rights and interests on employees, especially in respect of workers exposed to occupational hazards. Many organisations resort to holding routine consultations with representatives of employee unions before taking key decisions that concern their welfare, redundancy schemes and work processes.

Also, CAMA recognises the strategic role of employees in corporate governance by protecting their rights to profit sharing if under their contract of service such right is given as an incentive. Their profits must be paid whether or not dividends have been declared.

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

Other stakeholders in corporate governance include regulatory bodies such as the CBN, NDIC, AMCON, SEC, CAC, debenture holders, creditors contributories, receiver/managers, liquidators, suppliers, and local communities.

The regulatory bodies oversee the performance and operations of banks and other financial institutions and ensure that economic and social policies are implemented. In times of deep crises, AMCON, NDIC, and CBN may exercise governance functions.

Under trust deeds, debenture holders could exercise powers of management over assets of the company and may appoint receivers/managers and liquidators to coordinate company governance, especially in times of corporate financial upheavals.

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

Like many legal jurisdictions, Nigeria has no compulsory provisions on CSR especially as a concise scope of the concept is not universal. However, it is no longer theoretical that companies must address sustainable development issues to maintain profitability within a global sustainable safe environment, and enhanced economic development of especially poor countries. To this end, an attempt was made in 2008 to enact a law with a bill titled: A Bill for an Act to provide the Establishment of the Corporate Social Responsibility Commission.

5 Transparency and reporting

5.1 Who is responsible for disclosure and transparency?

A company's board of directors has the responsibility of disclosure, integrity and transparency in preparing, signing and distributing the company's financial statement.

The SEC code provides that the chief executive officer and the head of finance should certify in a written statement that the financial statements presented represent the true and fair view of the company's affairs. Also, the board of every public company must ensure that there is sufficient disclosure on accounting and risk management issues. The Chairman of the board of directors also has a specific obligation to give a summary of the company's performance for the period under review.

Under the NSE Listing rules, the board is mandated to disclose in its annual report a list of the codes of corporate governance to which it is subject, and where the company has not fully complied with the codes it must provide a detailed statement of the non-compliance.

5.2 What corporate governance-related disclosures are required?

As regards corporate governance disclosures, CAMA mandates that every company must disclose the following:

a. Financial position of the company at any given period.
b. Shareholders with substantial interest in a public company.
c. Shares of company directors.
d. Directors' interests in company contracts.
e. Accounting policies amongst others.

The SEC Code enjoins all public companies to make the following disclosures in its annual report:

a. Company's governance structures, policies, and the company's compliance with the code.
b. Composition of board, responsibilities and names of all directors.
c. Disclosure on code of business conduct and ethics for directors and employees.
d. Disclosure on accounting policies and risk management issues.
e. Company's performance for the period under review.
f. Directors' interests in contracts whether directly or indirectly.
g. Disclosures on property transactions relating to director's current accounts or loans.

The CBN code mandates financial institutions to make the following disclosures:

a. Annual report including remuneration of board and executives.
b. Details of directors and shareholders who own 5% and above of the bank's shares.
c. Board of Director's performance evaluation.
d. The bank's corporate governance structure and composition of board committees.

The NAICOM code calls for the following corporate governance-related disclosures:

a. A shareholder who owns a minimum of 5% of shares in the company and controls the company when acting in concert.
b. Show compliance with corporate governance code applicable to the company.
c. Disclose board meeting and attendance records.
d. Disclose any major deviation from applicable accounting, auditing and corporate governance standards.

Corporate governance related disclosures by the PENCOM code include:

a. Reports on directors' remuneration.
b. Corporate governance practices.
c. Members of the board, meetings and composition of committee members.

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

By section 357 CAMA, every company must appoint an auditor to audit its financial statements. In addition, the auditors of public companies are required to make a report to the audit committee of the company. The audit committee is a key structure charged with overseeing financial reporting and disclosure.

The audit report is presented to the company in the general meeting which must expressly attest that in the auditors' opinion, and after diligent investigation, the report is in agreement with the accounts, books and returns and that the audit report represents a fair view of the company's balance sheet and profit and loss for the year. The auditors must also examine the directors' report for the year and state whether they are consistent with the company's accounts.

5.4 What corporate governance-related information should be published on websites?

The SEC code encourages public companies to have websites and investor-relations portals so that shareholders, stakeholders and the public have access to the communication policy, annual reports and other relevant information.

The CBN code requires all banks to establish and maintain a website which should provide information on the bank's risk management practices, executive compensation, board and top management appointments amongst others.

The PENCOM Code on corporate governance requires pension fund administrators to publish on their websites their level of compliance with the Code.

Jennifer Douglas-Abubakar
Miyetti Law
1 Nwaora Close Off Gana Street
Abuja 900271
Nigeria

Tel: +234 80 9020 5901
Email: jdouglas@miyettilaw.com
URL: www.miyettilaw.com

Jennifer Douglas-Abubakar is the Managing Partner at Miyetti Law in Nigeria. Her practice focuses on Corporate financing transactions and transnational asset recovery. Jennifer provides strategic counsel and general advisory to governments, domestic and international corporations navigating the regulatory environment in Nigeria. Jennifer is also the Editor-in-Chief of the *Miyetti Quarterly Law Review*.

Khadija Bala
Miyetti Law
1 Nwaora Close Off Gana Street
Abuja 900271
Nigeria

Tel: +234 80 9020 5905
Email: khadija.bala@miyettilaw.com
URL: www.miyettilaw.com

Khadija Bala is a member of the Miyetti Law Corporate Practice Group. Her practice focuses on Corporate Restructuring, Islamic Banking & Finance and, Oil & Gas Transactions. She is also an Editor for the *Miyetti Quarterly Law Review*.

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Poland

Łukasz Bobeł

Krzysztof Weremczuk

WBW Weremczuk Bobeł & Partners
Attorneys at Law

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter focuses on corporate governance ("**CG**") issues regarding Polish joint stock companies ("**JSC**") whose shares may be admitted to trading on the WSE (Warsaw Stock Exchange) Main Market (regulated market) and NewConnect (alternative trading system).

The JSC is a legal entity with the capital divided into (as a rule, freely) tradeable shares. It may be established for any purpose allowed by law, by at least one shareholder (who cannot be, however, a single shareholder limited liability company). What is important is that the JSC provides protection for the personal assets of shareholders against the company's creditors. Namely, according to the general rule, shareholders are not liable for the debts of the JSC. Moreover, statutory provisions relating to JSCs do not include the counterpart of article 299 of the Code of Commercial Partnerships and Companies ("**CCPC**") which applies to limited liability companies ("**LLC**") and provides that if enforcement against the LLC proves to be ineffective, the members of the management board ("**MB**") who (at their fault) failed to file a petition for bankruptcy of the company at the correct time shall be jointly and severally liable for its obligations.

JSCs constitute companies whose shares are traded on a public market.

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

The laws mentioned below are up to date as of 1 May 2018.

The provisions concerning corporate governance of JSCs are included mainly in the following Acts:

- **the Code of Commercial Partnerships and Companies** ("**CCPC**") dated 15 September 2000, which is the main legislative corporate governance source that regulates the incorporation, organisation, functioning, dissolution, merger, division and transformation of commercial partnerships and companies (including JSCs);
- **the National Court Register Act** dated 20 August 1997, which provides for certain disclosure and transparency requirements relating to commercial partnerships and companies, as well as some other entities. Kept by district courts, the National Court Register ("**NCR**") is a public register where all the above entities are entered into and obliged to disclose their specific data; an entry into the NCR is necessary to complete the JSC's formation process;
- **the Accountancy Act** dated 29 September 1994, setting out the principles of accountancy, audit and (to some extent) transparency which shall apply to commercial partnerships and companies (and some other entities);
- **the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies** ("**Act on Public Offering**") dated 29 July 2005, which provides, *inter alia*, for some disclosure requirements and CG rules relating to public (listed) JSCs; and
- **the Act on Trading in Financial Instruments** ("**TFI**") dated 29 July 2005, which also introduces certain disclosure and transparency requirements, as well as CG rules relating to listed JSCs and their shareholders.

The statutory provisions on CG are supplemented by the memorandum of association of the JSC ("**MoA**"), as well as the regulations adopted by the corporate bodies of the JSC, i.e. resolutions of the general assembly of shareholders ("**GA**"), and regulations (by-laws) of the management board ("**MB**") or supervisory board ("**SB**").

For JSCs listed on the WSE Main Market and on NewConnect, there are also, in particular, two specific non-statutory CG sources:

- "**The Code of Best Practice for WSE Listed Companies 2016**" ("**The Code of Best Practice**"), which entered into force on 1 January 2016; and
- "**Good Practice of NewConnect Listed Companies**".

Each of the mentioned Acts (together hereinafter referred to as the "**Codes of Practice**") constitutes a set of CG rules and standards, adopted by the WSE, which govern relations between listed companies and their market environment. Although application of those rules is voluntary, it is basically (except for the so-called "recommendations") subject to the 'comply or explain' principle (if the listed company decides not to comply with any of the mentioned rules, it is required to provide the market with direct information regarding this, as well as the reasons for such a decision; failure to fulfil the "explain" duty may result in financial penalties imposed by the WSE).

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

On 30 April 2018 a long awaited new Regulation of Ministry of Finance on current and periodical reports entered into force. The Regulation mentioned above adjusted the disclosure obligations of listed companies from the Main Market to EU Market Abuse Regulation which entered into force in July 2016. The further important change which entered into force in March 2018 relates to filling the accounts of the companies with the NCR. Since 15 March

2018 the accounts may not be filled in a traditional way but only electronically. In general the legislative change in this respect shall be regarded as a positive one but at the same time its implementation creates some problems for the companies with foreigners in the Management Board (filing the accounts may not be performed by the attorney and requires that the member of the Management Board holds a specific Polish statistical number and specific electronic signatures which makes it cumbersome for the foreigners to follow the obligation). The Polish government is also currently working on a legislation which is about to remove the traditional bearer shares (in a paper form) of private JSCs from the legal system. This legislation if passed will significantly change the operation of the private JSCs.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

There are some specific rules which support promoting the long-term value creation and minimise the risks of short-termism. First, there are some tax incentives supporting longer investments in corporations (e.g. so-called "participation exemption") or supporting the research and development expenses (such expenses create long-term value of the company). Secondly, the Code of Best Practice supports some instruments which promote the long-term value creation. This mainly include the rule that the employee stock option plans shall take into account the long-term financial situation of the company when determining the benefits of the management.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders participate in the operation and management of JSCs by adopting resolutions in the most important company matters listed in the CCPC or in the MoA.

A resolution of shareholders ("**GA**") is required under the CCPC particularly in the following matters:

- consideration and approval of the MB report on the operations of the company and the annual financial report;
- approval of the performance of duties by members of the company's governing bodies;
- disposal of, or tenancy of, the enterprise or its organised part and the creation of a limited right *in rem* over them;
- acquisition and disposal of real estate, the right of perpetual usufruct, or a share in real estate (unless the MoA provides otherwise);
- conclusion of a credit agreement, a loan agreement, a surety agreement or other similar agreement with a member of the MB, SB, a commercial proxy or a liquidator (or for the benefit of any such person), unless the law provides otherwise;
- amendments to the MoA;
- merger, division or transformation of the company; and
- dissolution of the company.

Resolutions are binding only internally (i.e. they apply to the JSC's bodies, the shareholders and the company itself). However, legal acts executed without the resolution of shareholders that is required by an act of law are invalid; those executed without the resolution required by the MoA are valid, but may result in the liability of members of the MB for a breach of the memorandum.

Unless the MoA provides otherwise, shareholders have the right to appoint and remove – by a resolution – members of the SB, as well as remove, at any time, any member of the MB.

The MoA may also grant some personal rights in the area of CG to particular shareholders, such as the right to solely appoint or dismiss certain members of the MB or SB.

Moreover, every shareholder has the right to request from the MB (during the GA or at the time when the GA is not held) certain information concerning the company, and the MB is generally obliged to provide such information on conditions prescribed by law.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

There are no significant CCPC provisions imposing on shareholders of the JSCs any responsibilities as regards the CG of their company. There is, however, an unwritten rule that all corporate rights (described briefly in question 2.1) are associated with the correlative duties. For instance, the right to vote on GAs is associated with the respective duty to exercise it at least in those cases when a resolution of shareholders is required by law and necessary (so that the MB could manage the JSC effectively). The examples of such cases are listed in question 2.1 above (e.g. conclusion of a loan agreement with a member of the MB, SB or a commercial proxy, acquisition and disposal of real estate).

Naturally, the shareholders who are members of the MB or SB have additional CG related responsibilities which result from their membership in the corporate bodies of the JSC.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The GA may be convened as an ordinary or extraordinary assembly.

According to the general principle, the ordinary GA is required to be held within six months of the end of each financial year. The agenda of the ordinary GA includes at least:

- consideration and approval of the MB report and the financial statement for the previous financial year;
- adoption of a resolution on division of profits or financing of losses; and
- approval of the performance of duties by members of the MB and SB.

On the other hand, the extraordinary GA can be convened to adopt any other resolutions – if required by law or the MoA, as well as in all cases when governing bodies or persons authorised to convene the GA consider it desirable.

It should be noted that shareholders representing at least half of the share capital or of the total number of votes in the company have the right to convene the extraordinary GA. Moreover, a shareholder or shareholders representing at least one-twentieth of the share capital (or less, if the MoA provides so) may request that the extraordinary GA be convened, as well as that certain matters be placed on the agenda of that GA. If the extraordinary GA is not convened within the statutory time limit, the registry court may authorise the shareholders to convene the extraordinary GA on their own. Subject to relative provisions of the CCPC and the MoA, a shareholder or shareholders representing at least one-twentieth of the share capital may also request that certain matters be placed on the agenda of the next GA as well as – in the case of public companies – submit to the company drafts of the resolutions to be adopted at the GA.

Furthermore, during the GA, each of the shareholders may submit drafts of resolutions concerning the matters placed on the agenda.

Apart from the powers mentioned above, shareholders have, *inter alia*, the following rights as regards the GA:

- crucially, the right to participate in the GA and vote on it (also by proxy);
- the right to request a secret vote; and
- the right to bring an action for annulment of a resolution or declaration of its invalidity.

According to the New Code of Best Practice, JSCs listed on the WSE Main Market shall enable their shareholders to participate in a GA and exercise the voting right using electronic communication means if this is justified by the structure of the shareholding or expectations of the shareholders notified to the JSC.

In a single-shareholder JSC, all rights of the GA are exercised by the single shareholder.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

According to CCPC, the main duty of a shareholder is to make a full contribution towards shares. Moreover, the MoA may provide that certain shares shall carry the duty to provide certain recurring non-pecuniary performances. Such duty may be imposed only upon the consent of a shareholder and only with regard to the registered shares. In such a case a shareholder may not dispose of shares without the consent of a company which is entitled to refuse only for an important reason. There is no general duty of loyalty of a shareholder towards other shareholders of the company which would result from CCPC but sometimes such a loyalty obligation is recognised by the jurisprudence. According to the general principle, shareholders are not liable for obligations of the JSC. However, this rule is not without exception.

Firstly, a shareholder is jointly and severally liable with the company and persons who acted in the name of the JSC after signing the MoA but before its registration in the NCR ("**JSC in organisation**") for the obligations of that JSC in organisation (up to the value of the unpaid contribution to finance the subscribed shares).

Secondly, shareholders may be liable (with all their assets) for tax arrears and social security contributions of the JSC in organisation if the enforcement against the mentioned company proves to be fully or partially ineffective and it has no MB or even an attorney acting on its behalf.

For liability of a shareholder who is also a member of the MB, see question 2.5.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Principally, there are two ways for shareholders to seek enforcement actions against members of the MB.

Firstly, as a member of the MB, under the CCPC, is liable to the JSC, *inter alia*, for damage caused by acts or omissions in breach of law or provisions of the MoA (unless he or she is not at fault), each of the shareholders may bring against him or her – on behalf of the JSC – an action for compensation. The condition is that the JSC has not brought such an action itself within one year of the date on which the act causing the damage was discovered.

Secondly, shareholders are entitled to seek compensation of damage on their own behalf according to the general principles of liability for damages included in the Civil Code (if they suffer damage due to acts or omissions of the member of the MB and are able to prove it).

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

First of all, if the JSC is a single-shareholder company, details of the sole shareholder have to be reported to the registry court and accordingly entered into the register of entrepreneurs maintained for the company.

Moreover, for registered shares of the JSC, the MB is obliged to keep a share register, into which, *inter alia*, information on the shareholders holding such shares and on the transfer of the shares in question should be entered.

There are also some disclosure requirements connected to the relation of dominance and dependence between companies (for example, both a shareholder and a member of the MB/SB of a company ("**X**") may demand that a company/partnership being a shareholder in X provides information as to whether it remains in a position of dominance/dependence with respect to a particular company/partnership being a shareholder in X too; the entitled person may also demand disclosure of the number of shares or votes that the requested company holds in X).

Furthermore, pursuant to the Act on Public Offering, a shareholder who acquires or disposes of a qualifying holding in a public JSC (specified in the mentioned Act) shall report such a transaction both to the Polish Financial Supervision Authority ("***KNF***") and the company. Information received from the shareholder should subsequently be published on the company's website as well as submitted by the company to *KNF* and WSE. As for the JSCs listed on the WSE Main Market, the Act on Public Offering introduces also some limitations regarding acquisition of a certain number of shares in such companies i.e. the special procedure in which the acquisition in question may only be carried out.

For some specific limitations on (plus disclosure requirements in relation to) interests in securities held by members of the MB, see question 3.4.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Currently there are no disclosures required in such cases. The Act on Public Offering imposes on the shareholders disclosure obligations to be executed only *post factum*. Such obligations concern acquiring or disposing of shares that impact on the number of votes in JSC and is also described in question 2.6. It is worth noting though that before 04 June 2016 such an obligation to notify the *KNF* and the company about the planned intentions during the following 12 months existed.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The right to manage the affairs and to represent the JSC is vested in the MB. Pursuant to the CCPC, the MB may consist of one or more members (individuals only, shareholders, and/or non-shareholders).

If the MB comprises more than one member, the way of executing both of the mentioned powers can be (discretionally) determined by the MoA. Unless the MoA provides otherwise, representations in the name of the JSC may be made by two members of the MB acting jointly or by one member acting together with a commercial proxy. On the other hand, unless the MoA includes any different rules, all members of the MB may manage the affairs of the JSC acting jointly. Unless the MoA provides otherwise, the resolution of the MB shall be adopted by an absolute majority of votes.

Moreover, as stated in question 2.1, some matters require a resolution of shareholders. The MoA may also provide that prior to carrying out actions specified therein, the MB shall obtain the consent of the SB.

Most important of all, the CCPC provides that the GA and the SB do not have the right to give the MB any binding instructions with respect to the management of the affairs of the JSC.

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

According to the CCPC, members of the MB are appointed and removed by the SB. However, the MoA may provide otherwise, e.g. grant the right to appoint and/or dismiss the members to the GA, one or some of the shareholders or even to third parties.

Notwithstanding the above, the CCPC provides that a member of the MB may be removed at any time by a resolution of the GA (regardless of any provisions of the MoA).

The mandate of a member of the MB also expires upon death, resignation or (in most cases) as a result of the end of tenure.

The maximum tenure is five years.

The MoA may provide for a partial renewal of the MB in such a way that a certain number of the members step down in an order determined by a draw of lots, or by seniority of appointment or in another order.

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

Contracts of members of the MB are subject to acts of law (e.g. the CCPC, the Civil Code, the Labour Code), the MoA and (unless the memorandum provides otherwise) the resolutions of the shareholders (in practice, the competence to set the MB remuneration is often vested in the SB).

According to the New Code of Best Practice, JSCs listed on the WSE Main Market should have a remuneration policy for MBs. Further, the motivational plans for MBs shall be prepared in a way as to make the level of the remuneration dependent upon the real, long-term financial situation of the company, long-term increase in value to the shareholders as well as the stability of the company.

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

Firstly, according to the CCPC, a member of the MB may not, without the consent of the JSC, engage in a competitive business or participate in a competitive company (as a member of its governing body), partnership or civil law partnership (as a partner), or any other competitive legal person (as a member of its governing body). The same prohibition refers to participation in a competitive company where the member of the MB holds at least 10% of shares or has the right to appoint at least one member of the MB. Unless the MoA provides otherwise, the consent should be given by the governing body which is entitled to appoint the MB.

Secondly, pursuant to the TFI, during the restricted period defined therein (i.e. for instance, the period between the time when a member of the MB gains certain inside information concerning the company or its shares, and the time when such information is made public), members of the MB of the public JSC may not generally acquire or dispose of (for their own account or for the account of a third party), any of the company's shares, derivative rights attached thereto or other financial instruments related to such shares.

Moreover, members of the MB of the public JSC shall notify *KNF* and the company of any transactions executed by them or by persons related to them and for their own account, whereby they acquire or dispose of any shares in the company (as well as derivative rights and other financial instruments related to the company's securities), admitted or sought to be admitted to trading on a regulated market.

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

The CCPC does not include any detailed provisions governing the process for meetings of members of the MB. It only states that: 1) all members shall be properly notified of the meeting; 2) unless the MoA provides otherwise, resolutions of the MB shall be adopted by an absolute majority of votes; 3) the resolutions of the MB shall be included in minutes signed by the members of the MB present at the meeting; and 4) in some cases, a member of the MB is obliged to withhold from deciding on the matters.

The MoA (or internal regulations of the MB adopted by an authorised company's body) may introduce some further requirements regarding the meetings, as well as regulate the process in detail. The MoA may, for example, stipulate that if the number of votes is equal, the president of the MB has the casting vote. They may also confer certain powers in managing the operations of the MB upon the president.

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

The main duty of the members of the MB is to manage the affairs and represent the JSC. However, in the case of a conflict between the interests of the JSC and the interests of a member of the MB, his or her spouse, relatives and in-laws up to the second degree or persons with whom he or she has personal relations, the member is obliged to withhold from deciding on the matters.

Pursuant to the CCPC, when performing their duties, members of the MB are required to 'exercise diligence characteristic of the professional nature of their activity'. If they fail to meet that requirement, they may find themselves liable for obligations of the company or the damage caused to it.

For instance, members of the MB who have provided false data in representations on contributions towards the share capital (required for registration of the JSC in the NCR or registration of the increase of the share capital of the JSC) are jointly and severally liable with the JSC to its creditors, for three years from the date of the mentioned registration.

Moreover, members of the MB can be jointly and severally liable for tax arrears and social security contributions of the JSC, particularly if the enforcement against the company proves to be ineffective and they do not demonstrate that, in appropriate time, a petition for bankruptcy of the company was filed.

For liability for damage caused to the company, see question 2.4.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

There are basically no further principal statutory CG responsibilities/functions of members of the MB of the private JSC other than those mentioned above. On the other hand, when it comes to public JSCs, the provisions of particular acts of law and the New Code of Best Practice provide for some additional CG related rules applicable to those companies.

For instance, members of the MB of the JSC listed on the WSE Main Market are obliged, *inter alia*, to:

- request – before the company executes a significant agreement with its related entity or a shareholder holding more than 5% of shares – from the SB the approval of the agreement in question;
- provide to other members of the MB notification of any conflicts of interest which have arisen or may arise, and refrain from taking part in the discussion and from voting on the adoption of a resolution on the issue which gives rise to such a conflict of interest;
- delegate to participate in the GA those of them who can answer questions which may be submitted at the GA (e.g. by shareholders); and
- seek the consent of the SB for holding positions in governing bodies of companies outside of the capital group.

In light of the current situation in the financial market, the key challenges for the MB of public JSCs seem to be the following: 1) enhancing transparency; 2) improving quality of communication between the company and investors; and 3) strengthening protection of shareholders' rights, including those not regulated by legislation, as the mentioned factors appear to have a direct positive impact on the market valuation of the company, reducing the cost of capital.

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

Members of the management body may be indemnified pursuant to the provisions of the agreement executed with the company or upon its GA resolution. Liability insurance for members of the MB and other corporate bodies of JSCs (i.e. D&O insurance) is permitted under Polish law. D&O insurance is usually purchased by the JSC itself, even if it is for the sole benefit of the mentioned persons (its purpose is to ensure that some strategic decisions of the executives of a company can be made without fear of personal financial loss).

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

In general, members of MB manage the company. Managing the company includes also setting the strategy of the company. MoA of the company may, however, vest the right to set or change the strategy with other corporate bodies, mainly SB or to a lesser extent GA. Further, certain important activities which may be a part of the implementation of the strategy set by MB may require the prior consent of SB or GA.

4 Other Stakeholders

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

The general rule is that employees of the JSC have no powers in corporate governance (unless they are shareholders or members of the corporate bodies at the same time). Nevertheless, under the Act on Informing and Consulting Employees, dated 7 April 2006, they are entitled to be informed of some of the aspects of the JSC's activity (e.g. economic situation, current and future undertakings), as well as to be consulted with regard to those matters.

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

Apart from the company's bodies and to a limited extent employees of the company there are also other stakeholders in corporate governance in Poland. They include organisations which group companies from a specific sector (e.g. banks, insurance companies). The role of such organisations is to lay down expected market standards of corporate governance rules applicable to companies belonging to a given sector. Such standards are basically not mandatory but very often followed by the companies. Further, in respect of the listed companies, as mentioned above, the major role in respect of corporate governance is played by WSE, which lays down Code of Best Practice for listed companies. As already mentioned above such Code is based on 'comply or explain' principle. Finally, specific corporate governance rules apply to state-owned companies where a major role is played by the Ministry which supervises the given state-owned company and very often adopts internal regulations concerning the operation of the controlled companies.

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

There are no significant statutory provisions concerning corporate social responsibility in Polish law. However, companies – including JSCs – are becoming more aware of the underlying ideas and more often take them into consideration when determining the policies and business strategy.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Responsibility for disclosure and transparency in the JSC generally rests with the MB.

For disclosure requirements, see questions 5.2 and 5.4.

5.2 What corporate governance-related disclosures are required?

There is a general rule that both data and corporate documents of JSCs should be reported to the registry court so that they can be registered in the register of entrepreneurs of the NCR or at least disclosed in the registration files kept for the company.

The above requirement refers, in particular, to any amendments to the MoA, the appointment and dismissal of members of the MB and SB, the approval of the annual financial statement, and many other events concerning the activity and legal status of the JSC.

The register of entrepreneurs of the NCR is public (anyone may request written excerpts from it, inspect the company's registration file, as well as access all registration details of all registered entities currently disclosed in the register by visiting the following website: https://ems.ms.gov.pl). Moreover, almost all entries into the NCR (and some other corporate information, for instance concerning in-kind contributions made by shareholders) must be published in the Official Court and Business Gazette (*Monitor Sądowy i Gospodarczy*), and also available on the Internet.

For disclosure requirements applying to JSCs listed on the WSE Main Market or on NewConnect, which have to be met by publishing certain (also CG-related) information on companies' websites, see question 5.4. Please note that in addition to publishing the above information on corporate websites, public companies are also obliged to submit it to the *KNF*.

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

The Accountancy Act generally requires all JSCs to subject their annual financial reports to audit. The purpose of an audit is for the auditor to issue an opinion on whether a given financial report is prepared in compliance with the accepted accounting principles and whether it gives a true and fair view of the property, financial standing and the financial results of the audited JSC.

The opinion of an auditor is generally also required to confirm what is a fair value of the in-kind contributions made by shareholders (stipulated in the respective report of the promoters/MB), and whether it corresponds to at least the nominal value of the shares subscribed for such contributions or the higher issue price.

The role of audit and auditors is therefore to ensure reliability of the disclosures made by JSCs.

5.4 What corporate governance-related information should be published on websites?

According to the CCPC, all public companies are required to have a website and publish in particular the following information there: the business name of the company, its seat and address; the name of the registry court where the documents of the JSC are filed; the number under which the JSC is entered into the NCR; the tax identification number ("***NIP***"); the amount of the share capital and the amount of contributions made to cover the share capital (importantly, if a private JSC decides to have a website, it is also obliged to publish all of the above information on it); and information regarding the GA including, *inter alia*, the date, time, venue, detailed agenda, drafts of the resolutions to be adopted, and the adopted resolutions and results of the voting.

Moreover, pursuant to the Act on Public Offering, the JSCs listed on the WSE Main Market have to publish on their websites in particular:

- confidential information as defined in article 154.1 of the TFI and EU Market Abuse Regulation (i.e. simplifying the issue, information which has not been made public and which, if made public, would be likely to have a significant effect on the prices of shares);
- current reports regarding events relating to the JSC or its subsidiary, listed in the Regulation of the Minister of Finance dated 28 March 2018 (e.g. changes to the share capital, redemption of the shares, appointment, dismissal or resignation of a member of the MB or SB, acquisition or disposal by the JSC of its own shares, certain major transactions of the company, etc.), as well as other information required to be published under statutory provisions (e.g. acquisition or disposal of a qualifying holding in the company or share sale/purchase transactions, regarding shares in the company, concluded by members of its governing bodies); and
- periodical reports (quarterly, semi-annual and annual reports).

Similar (but in narrower scope) disclosure requirements relate to the JSCs listed on NewConnect. Namely, the companies in question are obliged to publish on their websites in particular:

- confidential information as defined EU Market Abuse Regulation;
- current reports regarding events (also in the area of CG) relating to the JSC, set forth mainly in the Appendix 3 to the Alternative Trading System Rules (list of events is similar to those applicable to JSCs listed on WSE Main Market); and
- quarterly and annual reports.

There are some further disclosure requirements for public JSCs from the applicable Codes of Best Practice.

Łukasz Bobeł
WBW Weremczuk Bobeł & Partners
Attorneys at Law
ul. Domaniewska 37
02-672 Warszawa
Poland

Tel: *+48 22 211 12 79*
Email: *lukasz.bobel@wbwlegal.pl*
URL: *www.wbwlegal.pl*

Łukasz Bobeł is the managing partner of WBW Weremczuk Bobeł & Partners and is responsible for M&A and corporate practice within the firm. He graduated from the Law Faculty of Adam Mickiewicz University in Poznań in 2002 (*magna cum laude*). In 2002, he also completed a Cambridge University course on British and European Union Law. He is the member of the Regional Chamber of Legal Advisors in Poznań. Łukasz Bobeł specialises mainly in M&A transactions and in the capital markets. He advised a number of international clients in complicated cross-border M&A transactions and on IPOs and SPOs on the Warsaw Stock Exchange. Łukasz Bobeł is a member of supervisory boards of a number of companies. He also authors a number of publications on civil, commercial and administrative law.

Krzysztof Weremczuk
WBW Weremczuk Bobeł & Partners
Attorneys at Law
ul. Illakowiczowny 8/2
60-789 Poznan
Poland

Tel: *+48 61 8 510 700*
Email: *krzysztof.weremczuk@wbwlegal.pl*
URL: *www.wbwlegal.pl*

Krzysztof Weremczuk is a partner with WBW Weremczuk Bobeł & Partners. He graduated from the Law Faculty of Adam Mickiewicz University in Poznań in 2000 and since then has remained a member of the Regional Chamber of Legal Advisors. Krzysztof Weremczuk's area of expertise covers corporate matters as well as banking and financial issues. Krzysztof Weremczuk also advises clients on real estate projects (purchase and development), provides day-to-day legal support in general commercial matters and represents clients in court disputes. He works for both domestic and international clients.

WBW Weremczuk Bobeł & Partners Attorneys at Law

WBW Weremczuk Bobeł & Partners is one of the most reputable national law firms in Poland, specialising mainly in M&A transactions, Corporate law and Banking & Finance. The firm was established by partners formerly working in one of the biggest international law firms who have vast experience in advising on complicated cross-border transactions, as well as in providing legal assistance to international clients. The firm has been cooperating on a number of cross-border transactions with major international law firms. The firm provides legal services to both Polish and foreign entrepreneurs (those already operating on the Polish market or willing to enter it). The firm's M&A practice has been steadily recognised by *The Legal 500* and *IFLR1000*. The firm was also awarded, for a number of times, the prize of 'M&A Law Firm of the Year' in Poland by a number of international magazines, including *Finance Monthly*, *ACQ Finance Magazine*, and *Lawyer's Monthly*.

Puerto Rico

Fernando J. Rovira-Rullán

Yarot Lafontaine-Torres

Ferraiuoli LLC

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter will focus on privately held corporations ("Corporations") and limited liability companies ("LLC(s)"). The majority of Puerto Rican businesses are incorporated as Corporations; however, in recent years, LLCs have gained popularity among business owners and their counsel given the particular advantages that LLCs offer such as: (i) the freedom to structure management (i.e. member managed, manager managed, or centralised management structure such as board managed); (ii) they are not required to file financial statements with the Puerto Rico Department of State; (iii) streamlined corporate formalities; and (iv) the option to be taxed as a partnership or as a regular Corporation.

Please note that although there are publicly traded companies organised under the laws of Puerto Rico that trade in national stock markets (i.e. NYSE and AMEX) and over the counter markets (i.e. NASDAQ), we will not cover corporate governance requirements applicable to publicly traded companies under United States federal securities laws and regulations, and applicable securities exchanges rules and regulations.

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

1. Legislative Sources: Puerto Rico Corporations and LLCs are subject to the requirements of the Puerto Rico General Corporations Act of 2009, as amended (the "Corporations Act") and case law from the Puerto Rico Supreme Court. It is important to note that the Corporations Act is modelled on the Delaware General Corporations Act (the "Delaware Corporations Act") and that the Puerto Rico Supreme Court has stated that judicial decisions from Delaware courts in connection with the interpretation of the Delaware Corporations Act shall be highly persuasive and illustrative before Puerto Rico courts. This principle of interpretation has not been expressly extended by the Puerto Rico Supreme Court to Delaware court decisions interpreting the Delaware Limited Liability Company Act (the "Delaware LLC Act"); however, it seems highly probable that the same principle would apply.

   Please note that Puerto Rican publicly traded companies registered with the Securities and Exchange Commission are subject to regulations promulgated under the Securities Act of 1933 and the Securities Exchange Act of 1934 and such other rules and other corporate governance requirements imposed by the exchanges in which their securities are traded. As previously indicated, we will not cover such rules and regulations in this chapter.

2. Organisational Documents: A Corporation's or LLC's organisational documents are an important source of corporate governance requirements. A Corporation's articles of incorporation, its by-laws and its shareholders' agreement may include particular provisions regarding voting requirements, meetings and shareholder rights, among others. Please note that although a shareholders' agreement is an important source of corporate governance for Corporations, the Corporations Act does not impose on a Corporation or its shareholders the obligation to adopt such document.

   Although the Corporations Act has default provisions applicable to LLCs, an LLC operating agreement is the principal source of corporate governance requirements. This is due to the fact that one of the LLC's principal benefits is the freedom provided to the members in determining the governance structure of the company, the formalities, if any, that shall be required, and ultimately how the company is managed. However, under Puerto Rico law, and contrary to Delaware law, the Corporations Act does not impose on the members of an LLC the obligation to adopt an operating agreement. If no operating agreement is adopted, the LLC will be subject to the default provisions contained in the Corporations Act. For the purpose of this Corporate Governance Guide, we will treat LLCs as if an operating agreement has been adopted.

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

The most recent development in corporate governance is the amendment of the Corporations Act in December 2015 to allow for the organisation, merger, and/or conversion of Public Benefit Corporations ("Benefit Corporations") in Puerto Rico. Benefit Corporations that are organised under the Corporations Act are required to file annual reports and social benefit reports, setting forth the public benefit provided by the Corporation. One of the advantages of organising a Benefit Corporation is that its directors, in making their determinations, are allowed to consider factors other than the best interests of its shareholders. For example, they are allowed to take into consideration, among others things, the general public benefit pursued, the best interests of its employees and the community at large. In addition, directors of Benefit Corporations shall not be liable for any damages caused due to decisions made in good faith and in pursuit of the general public benefit set forth in the Certificate of Incorporation.

A major challenge in Puerto Rico is that the majority of private companies in Puerto Rico are closely-held family businesses that generally do not have the sophistication of larger businesses with regards to matters of corporate governance. Thus, given the nature of these companies, corporate governance formalities are not always strictly followed or enforced, and this may raise difficulties or problems when attempting to execute certain types of transactions, such as obtaining commercial financing or a merger and acquisition of an ongoing concern.

Another significant challenge for most closely-held family businesses is the adoption and successful implementation of an orderly plan of succession that will smoothly transfer the management of the business from one generation to the next. Often, these companies are founded and managed by one individual who may not take the time to nurture or identify another person or persons to succeed him after his retirement or death. The lack of a generation transition plan has resulted in the termination of many successful businesses in Puerto Rico.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In view of the economic situation in Puerto Rico, the government does not only view long-term sustainable value as positive, it is heavily promoting and stimulating long term economic development. Such stimuli include the Act to Promote the Exportation of Services, Act 20-2012 and the Act to Promote the Relocation of Individual Investors, Act 22-2012.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

One of the basics tenets of corporate law under the Corporations Act is that the business of a Corporation shall be managed by or under the direction of a board of directors. Thus, shareholders are generally not involved in the management of the Corporation. The principal exception to the foregoing occurs in the context of close corporations in which the shareholders are primarily responsible for the operation and management of the entities. Nonetheless, shareholders have the right and the power to elect the board of directors and they also have the right to vote on and approve extraordinary transactions such as: (i) any amendment to the certificate of incorporation or the by-laws; (ii) a merger or consolidation; (iii) the sale of all or a substantial amount of the assets of the Corporation; or (iv) a dissolution.

Contrary to Corporations, LLCs are regularly managed in a decentralised fashion by their members (similar to a partnership) and members actively participate in the operation and management of the LLC. The Corporations Act provides that unless otherwise established in the operating agreement, the LLC will be managed by the members owning more than fifty per cent (50%) of the equity interests in the LLC. Notwithstanding the foregoing, the members may choose to implement a centralised management structure, similar to that of a Corporation, including the election of a board of managers and the appointment of officers. If this were to be the case, the members need to specify in the LLC's operating agreement the particular requirements regarding the management structure, including what rights they wish to retain for themselves and not delegate to the LLC's board of managers and officers.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Generally, except for certain extraordinary matters such as a merger or consolidation, the sale of all or substantially all of the assets or dissolution for which shareholder approval is required, shareholders do not have corporate governance responsibilities in Corporations. Notwithstanding the foregoing, in situations where a majority shareholder has a conflict of interest with respect to a corporate matter, the Corporations Act imposes upon the controlling shareholder(s) a duty of loyalty. In the case of LLCs, the Corporations Act establishes that members are bound by the same duty of loyalty to the LLC and to the other members of the same.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

The Corporations Act requires that Corporations hold an annual meeting of shareholders and allows the board of directors to convene special meetings of shareholders to discuss and take action on particular matters. The Corporations Act further provides that the notification period for annual or special meetings shall be no less than ten (10) days or more than sixty (60) days prior to such meeting. If the notification is for a special meeting, the purpose of said meeting must also be disclosed in the notification. In addition, the by-laws of the Corporation may establish additional rules regarding who may convene special shareholder meetings. For example, they could provide that the shareholders holding a majority of the voting rights may convene a special meeting. In annual and special meetings the shareholders have the right to vote (either in person or via proxy) on the matters brought before them.

Contrary to Corporations, LLCs are not statutorily required to hold annual or special member meetings, thus, the establishment of such meetings and the rules governing the same are subject to the discretion of its members or as otherwise stated in the operating agreement.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As discussed in question 2.2, the Corporations Act imposes upon the majority or controlling shareholder(s) a duty of loyalty to the Corporation and to the other minority shareholders regarding corporate matters. Additional duties may be voluntarily agreed upon pursuant to the Shareholders' Agreement.

A basic tenant of corporate law and a principal advantage of organising a business as a Corporation or as an LLC is the concept of limitation of liability. This concept dictates that the liability of shareholders or members for the debts or other liabilities of the company is limited to those amounts invested in said Corporation or LLC by such shareholder or member. Notwithstanding the foregoing, a shareholder or member may be found responsible for the acts or omissions of the company pursuant to the doctrine of "piercing the corporate veil".

Puerto Rico courts have stated that the corporate veil shall be upheld unless such entity and the limited liability benefits afforded by it are used to: (i) defeat public policy; (ii) justify an inequality; (iii) commit fraud; or (iv) defend crime. Although a judicial action to pierce the corporate veil is very fact specific, the main factors considered by the Puerto Rico courts are: (i) when fraud is present and the corporate

entity is used as a conduit to "legalise" illegal acts; and (ii) when the corporation is a mere instrument or alter-ego of the shareholders. Please note that the alter-ego factor is not, by itself, sufficient to pierce the corporate veil.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes. A shareholder may present a direct action against the Corporation and its management alleging that he or she has suffered damages as an individual shareholder.

As well, shareholders (and in certain situations creditors) may pursue derivative actions against management. In a derivate action, a shareholder or group of shareholders pursue a claim on behalf of the Corporation in the event that the directors or officers of the Corporation fail to do so or violate one or more of their fiduciary duties. This inaction in the part of management typically takes place if the directors or officers of the Corporation are responsible for the damages alleged under the derivative action. It is important to note that under a derivative action any relief or award granted by the courts shall be for the sole benefit of the Corporation and not of the shareholder(s) who initiated the action. In the case of an LLC, the Corporations Act expressly states that only a current member of the LLC may file a derivative suit.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

The Corporations Act does not impose any limitations or require disclosure in relation to the ownership interest held by shareholders or members. Notwithstanding the foregoing, in the banking and insurance industry when a shareholder attains a certain level of ownership, disclosure to the appropriate regulators is required. Furthermore, it is common for local financial institutions or government agencies to request such information and disclosures pertaining to the ownership structure of an entity requesting financing from a financial institution, requesting that a licence be issued by a government agency, or entering into a contract with a government agency.

It is important to note that a Corporation may not take away voting rights once they have been granted to shareholders. Notwithstanding the foregoing, there are certain situations in which shareholders may become "disfranchised". For example, disenfranchisement occurs in the context of "squeeze-out" mergers whereby, pursuant to the vote of a majority shareholder, the minority shareholders are required to tender their shares in exchange for a cash payment and do not become shareholders of the surviving Corporation. Furthermore, in certain circumstances, shareholder rights may be diluted by the issuance of additional shares or new classes of securities.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Absent a Shareholders' Agreement that requires particular disclosure no disclosure requirement exists under the Corporations Act for shareholders with respect to a corporate entity in which they are invested. With the exception that if they act as directors or officers, they will be bound by the fiduciary duties of such positions.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

As a general rule, Corporations are managed by or under the direction of a board of directors. Notwithstanding the foregoing, the certificate of incorporation could establish a different management structure, in which case the person or group of persons designated in the certificate of incorporation would assume all of the powers and responsibilities traditionally granted to the board of directors. Furthermore, the certificate of incorporation may grant to the board of directors the power to execute management agreements, provided, however, that the terms of such management agreement may not exceed three (3) years. It is important to note that the board of directors of a Corporation, generally, does not engage in or manage the daily operations of the Corporation; instead such responsibilities are delegated by the board of directors to the officers that it appoints.

Contrary to a Corporation, an LLC's default rule for management is member managed, however, the operating agreement may provide for a centralised management structure similar to that of a Corporation (i.e. a board of managers and officers). As the name implies, in a member-managed LLC the members are responsible for the day to day operations of the company. In certain instances, the members may decide to appoint a manager, who does not have to be a member, to oversee the day to day operations of the company. As mentioned in question 1.2, Delaware case law is highly persuasive in Puerto Rico. Although the Puerto Rico Supreme Court has yet to express itself on the following matter, it is important to note that the Delaware Chancery Court recently stated in *Obied v. Hogan*, WL 3356851 (2016) that the choice of management structure chosen by the members shall have consequences when drawing case law as an analogy in order to solve a controversy. For example, if the members adopted a board of managers structure, then corporate law may be applied by a court of law or if the members adopted a member managed structure, the general partnership law may be applied by analogy in deciding the particular controversy.

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

The members of the board of directors of a Corporation are elected annually by a majority vote of the shareholders present at the annual meeting of shareholders, in person or via proxy, who have the right to vote at such meeting. It is important to note that the certificate of incorporation may provide for the creation of a staggered board with two or three groups of directors who may serve for a period of one to three years. In a staggered board only one group of directors will be elected at each annual meeting of shareholders.

In a non-staggered board of directors, any one director or the whole board of directors may be removed with or without cause by the holders of a majority of the shares entitled to vote for the election of directors. In a staggered board of directors, shareholders may only remove a director for just cause, unless otherwise provided in the certificate of incorporation. Furthermore, if the certificate of incorporation authorises cumulative voting, no director may be removed if the cumulative votes against his or her removal are sufficient to elect such director as a member of the board of directors.

In the event of a vacancy as a result of the removal, resignation or death of a director, the remaining members of the board of directors may designate a director without seeking the approval of the shareholders. A director designated to the board of directors in such a fashion shall serve for the remainder of the former director's term.

Unless otherwise specified in the certificate of incorporation or by-laws, the officers of a Corporation are appointed by the board of directors without the need to seek the consent of the shareholders. The board of directors has the exclusive power to appoint and remove corporate officers as they deem in the best interests of the Corporation.

The members of an LLC may choose to appoint a manager or a group of managers who will have the rights and responsibilities provided in the operating agreement. We note that the Corporations Act does not directly address the removal of the manager of an LLC but a manager may be removed by the members holding a majority interest in the LLC.

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

The Corporations Act does not impose any limitation on the compensation of directors. Unless otherwise specified in the certificate of incorporation or the by-laws, the board of directors has the authority to determine the compensation to be paid to the officers and directors of the Corporation. The Corporations Act does not specifically address this matter in connection with LLCs.

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

The Corporations Act does not impose any requirement regarding share ownership disclosures and/or limitations. Unless otherwise provided in the company's organisational documents, the directors and officers of Corporations and the managers of LLCs are not required to be shareholders/members in order to hold their respective offices.

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

The Corporations Act does not impose a statutory requirement to hold a minimum number of board of director meetings nor does it provide or establish specific guidelines as to how to conduct the order of business in a board meeting. The Corporations Act simply requires, unless otherwise stated in the certificate of incorporation or the bylaws, that the board of directors meeting may be held in person or by electronic means of communication (such as telephone or video conferences) provided that all members of the board of directors assisting such meeting are able to listen to each other simultaneously.

Furthermore, unless prohibited by the Corporation's bylaws, any action required or permitted to be taken at any meeting of the board of directors may be taken without a meeting, if all members of the board of directors consent thereto in writing, and such consents are filed with the minutes of the proceedings of the board of directors. Thus, any rules governing the meetings of the board of directors, such as minimum notification periods, frequency of meetings and quorum are most commonly specified in the Corporation's by-laws.

The Corporations Act does, however, expressly provide that meetings of the board of directors may be held in person or by means of electronic communication (such as telephone or video conferences) provided that all members of the board of directors assisting the meeting are able listen to each other simultaneously.

Furthermore, unless prohibited by the Corporation's by-laws, any action required or permitted to be taken at any meeting of the board of directors may be taken without a meeting, if all the members of the board of directors consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the board of directors.

The Corporations Act does not govern the meetings of the members of an LLC nor does it provide or establish rules governing the structure or process for the meetings of the members or any governing body. Given the fact that the Corporations Act does not require that a meeting of the management body of an LLC be held, such requirements are generally established in the company's operating agreement.

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

The directors and officers of a Corporation are bound by three (3) principal legal obligations: (i) to act pursuant to the objectives and purposes of the Corporation; (ii) to perform their duties with the care and attention that a reasonable and competent person would exercise under similar circumstances ("duty of care"); and (iii) to act in a just manner and exercise their powers with the utmost loyalty and in the best interest of the Corporation and its shareholders ("duty of loyalty").

The duty of care includes responsibilities such as: (i) the duty to monitor; and (ii) the duty to make enquiries. The duty of loyalty imposes upon directors and officers the obligation to act in the best interest of the Corporation and its shareholders, setting aside their own personal interests. In order to comply with this duty of loyalty, the directors and officers must avoid transactions that may result in a conflict of interest with the Corporation. The directors and officers of a Corporation should not engage in or become involved with businesses that compete with the Corporation. Nor should the directors and officers use material non-public information for their personal gain.

The Corporations Act expressly extends the duties set forth above to the members and managers of LLCs.

A director will be found to have violated his duty of care in the event that a plaintiff is able to prove that the actions of the director were grossly negligent. In order to establish that the director was grossly negligent the plaintiff must first overcome the presumption provided by the Business Judgment Rule. The Business Judgment Rule provides a presumption that in making a decision the director was informed and acted in good faith and in what he believed were the best interests of the Corporation. Furthermore, the Business Judgment Rule provides that the plaintiff must prove that a reasonable commercial basis for the director's decision did not exist. The underlying purpose of the Business Judgment Rule is to allow directors and officers to make reasonable business decisions without holding them responsible for the success or failure of each venture. In the event that the presumption established by the Business Judgment Rule is overcome, the implicated directors are subject to the Entire Fairness judicial standard of review. Under the Entire Fairness standard of review, a director must show that the decision was taken with the utmost good faith and that it was inherently fair to the shareholders.

Notwithstanding the forgoing, a Corporations Certificate of Incorporation may include a provision limiting or eliminating the personal responsibility of a director or officer for breaching his/her fiduciary duties, with the exception of the duty of loyalty and acts or omissions done in bad faith.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

As mentioned in question 3.1 above, the Corporations Act states that the business of the Corporation will be managed by or under the supervision of a board of directors. The board of directors will be responsible for instituting the corporate strategy to be followed by the Corporation and they are also responsible for the appointment and supervision of the officers of the Corporation.

The corporate governance responsibilities of an LLC fall on the members of the LLC, unless the operating agreement appoints a manager to run the business, in which case the corporate governance structure will more closely resemble that of a Corporation.

Currently, the main challenges for management are related to the fact that the majority of private companies in Puerto Rico are closely-held family enterprises that may not have sophisticated corporate governance procedures, which in turn may present difficulties in the execution of certain transactions (such as a sale of the business or obtaining financing). In addition, another relevant challenge in the current environment is that the same closely-held family enterprises may face a generational change in ownership, and often these companies (which typically relied on the original founder(s)) do not have an ownership or management transition plan in place for the continuous operation of the business. The lack of a generation transition plan has resulted in the termination of many successful businesses in Puerto Rico.

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

Yes. The Corporations Act allows that Corporations and LLCs indemnify a person due to the fact that such person was a director, an officer, a manager, an employee or a member of the Corporation or LLC. Such indemnification may include attorneys' fees, and any other fines or amounts paid as a result of a judgment or settlement. The indemnification will not proceed if the person is found liable to the company in connection with the cause of action for which such person is requesting the indemnification.

A Corporation or an LLC may also buy insurance on behalf of its directors, officers, managers or employees.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Corporation Act states, except as otherwise provided in the certificate of incorporation, that the business and affairs of the company shall be governed by a board of directors, which includes setting and changing corporate strategy.

In the case of an LLC, the role of the management body will be determined in the Operating Agreement. If no agreement exists, the Corporation Act states that the management of an LLC shall be vested in its members in proportion to their percentages or other interest of members in the profits of the LLC owned by all of the members. The decisions will be made by the members owning more than fifty percent (50%) of the said proportion or other interest in the profits.

4 Other Stakeholders

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

Under the Corporations Act, there is no statutory provision regarding the involvement of employees in corporate governance. Nonetheless, a company may designate an officer to be in charge of corporate governance procedures and compliance.

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

Under the Corporations Act, there is no statutory provision regarding the involvement of other stakeholders such as creditors, labour unions and employees in corporate governance.

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

Currently, there are no laws or regulations that specifically address corporate social responsibility. However, as previously mentioned in question 1.3, in December 2015, the Puerto Rico government enacted Act 233-2015 which amended the Corporations Act to allow the creation of Public Benefit Corporations. Public Benefit Corporations are required, among other things, to file annual reports and social benefit reports regarding: environmental matters (product cycle management, reduction of waste and residues, use of clean technologies, reduction of a negative environmental footprint, and responsible use of natural resources); corporate operations (information transparency, economic impact in the communities where the Corporation operates, and health and safety initiatives); and human capital (policies and practices against discrimination, elimination of work violence, and development of human capital). In addition, the reports must set out the public benefits that the entity brings to the community in which it operates.

In addition, a significant number of companies practise various levels of corporate social responsibility. Generally, Puerto Rico companies and business leaders are actively involved in an array of non-profit entities that provide a wide variety of services and benefits to local communities.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The directors and officers of a Corporation are the parties responsible for disclosure and transparency. Under the Corporations Act, if an officer or director knowingly publishes false information regarding material aspects related to the Corporation's situation or business, such officer or director shall be responsible for any loss or damage resulting from the false information. Please note that the aforementioned provision applies to LLCs.

5.2 What corporate governance-related disclosures are required?

Besides making the company's organisational documents, such as the certificate of incorporation and by-laws, in addition to the shareholders' agreement, if adopted, in the case of Corporations and the certificate of organisation and the operating agreement in the case of LLCs, available to the shareholders and members of the Corporation or LLC, there is no statutory requirement for private companies regarding corporate governance disclosures to private parties. However, the Corporations Act requires that all Corporations file an annual report to the Puerto Rico Department of State which, among other things, details the identity of at least two officers and/or directors of the Corporation. The Corporations Act does not require such disclosure for LLCs with the Puerto Rico Department of State.

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

Under the Corporations Act, Corporations with an annual business volume in excess of $3 million are required to file with the Puerto Rico Department of State an audited balance sheet together with their annual report. LLCs are not required to file financial reports with the Puerto Rico Department of State.

5.4 What corporate governance-related information should be published on websites?

Currently, there is no statutory requirement for private companies to publish any corporate governance information on their websites.

Fernando J. Rovira-Rullán
Ferraiuoli LLC
221 Ponce de León Avenue, 5th Floor
San Juan, 00917
Puerto Rico

Tel: *+1 787 766 7000*
Email: *frovira@ferraiuoli.com*
URL: *www.ferraiuoli.com*

Mr. Rovira-Rullán is a Capital Member of Ferraiuoli LLC and Chair of its Corporate and Real Estate Department. He joined Ferraiuoli LLC in 2004 after serving as Senior Vice President and Deputy General Counsel of a publicly traded financial institution. Before that, Mr. Rovira-Rullán worked as an Associate in the Corporate Department of another leading Puerto Rico law firm from 1998 until 2002.

Mr. Rovira-Rullán is admitted to practise in Puerto Rico and New York. His principal areas of practice include mergers and acquisitions (local and cross-border experience), commercial lending, real estate, general corporate law, corporate governance and fiduciary duties, intellectual property, and tourism and hospitality.

Since 2010, Mr. Rovira-Rullán has been rated by *Chambers & Partners* in its *Global* and *Latin America* editions as a Leader in Corporate and Commercial areas of practice. He serves as an adjunct professor at the University Of Puerto Rico School Of Law, where for 17 years he has offered advanced corporate law courses such as Business Organisation and Mergers and Acquisitions.

Yarot Lafontaine-Torres
Ferraiuoli LLC
221 Ponce de León Avenue, 5th Floor
San Juan, 00917
Puerto Rico

Tel: *+1 787 766 7000*
Email: *ylafontaine@ferraiuoli.com*
URL: *www.ferraiuoli.com*

Mr. Lafontaine-Torres was a Senior Associate in the Corporate Department of Ferraiuoli LLC. His main practice areas include mergers and acquisitions, private equity; alternative investment funds; securities regulation (including private placement offerings), banking and financial institution regulations; corporate governance; and general corporate law.

Prior to joining Ferraiuoli LLC, Mr. Lafontaine-Torres was a financial analyst in a leading Puerto Rico distressed asset management firm. In addition, during the summer of 2008, Mr. Lafontaine-Torres was an analyst at the investment bank Lehman Brothers, Inc.

Mr. Lafontaine-Torres obtained his J.D. degree from the University Of Puerto Rico School Of Law. During his legal studies, Mr. Lafontaine-Torres was the Editor-in-Chief of the Third Volume of the University of Puerto Rico *Business Law Journal*.

Singapore

Benjamin Choo

Genesis Law Corporation

Bernice Man

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter focuses on public companies limited by shares, which are listed either on the Main Board or the junior board, Catalist, of the Singapore Exchange Securities Trading Limited ("**SGX**"). Where this chapter refers to companies, or shareholders or directors of listed companies, it refers to companies listed on either the Main Board or Catalist of SGX. Corporate governance is also relevant to other entities listed on SGX, including real estate investment trusts ("**REITs**") and business trusts ("**BTs**"), as well as private companies limited by shares. However, these will not be discussed in this chapter.

As at March 2018, there are 745 public companies with their shares listed on either the Main Board or Catalist of SGX, with a total market capitalisation of approximately S$1 trillion. There are also 41 REITs and BTs listed on SGX. This information was obtained from SGX's website.

The information in this chapter is up to date as of 9 May 2018, and only provides a general overview of the corporate governance framework in Singapore.

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

The Singapore corporate governance framework comprises a balance of mandatory rules, captured mainly under the Companies Act (Chapter 50) (the "**CA**"), the Securities and Futures Act (Chapter 289) (the "**SFA**"), the listing rules of SGX for listed companies ("**Listing Rules**"), and best practice recommendations in the form of the Code of Corporate Governance (the "**Code**"), issued by the Monetary Authority of Singapore ("**MAS**"). Under a "comply or explain" regime, listed companies are required to comply with the Code or provide an appropriate explanation for any deviations from the guidelines of the Code. Failure to do so would amount to a breach of the Listing Rules.

The CA and the SFA, which are the principal legislative sources, are administered by the Accounting and Corporate Regulatory Authority ("**ACRA**") and MAS respectively. There is also relevant subsidiary legislation which supplements both the CA and the SFA.

SGX, both a listed securities exchange and a regulator, is the main body that administers, regulates and monitors compliance with the requirements of the Listing Rules. As a regulator, SGX can impose penalties on companies for breaches of the Listing Rules, ranging from public censure and reprimands to delisting. Where a reference to Listing Rules is made in this Chapter, it refers to the Listing Rules of the Main Board.

In addition, the Singapore Code on Take-overs and Mergers (the "**TO Code**") issued by the MAS, is also relevant to the corporate governance of listed companies in situations of take-overs and mergers. The TO Code is administered and enforced by the Securities Industry Council ("**SIC**"). While the TO Code is non-statutory in nature, the SIC has powers under law to investigate any dealings in securities that are connected to a take-over or merger. In the event of breach, the SIC has recourse to private reprimand or public censure, or in flagrant cases, to further action as it deems fit.

The constitution of the company (the "**Constitution**"), which primarily governs the relationship between shareholders and the company *inter se*, would also prescribe the overarching rules for the company including, for example, procedures for board and shareholders' meetings, the powers of directors and other aspects relating to governance.

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

Some notable developments in Singapore corporate governance include:

Review of the Code of Corporate Governance

In early 2018, the Corporate Governance Council ("**CGC**") released a consultation paper on its recommendations to revise the Code. Some of the CGC's recommendations include strengthening the board quality of companies by encouraging board renewal and enhancing director independence, increased disclosure on remuneration practices and enhancing board diversity. The CGC also considered how the "comply-or-explain" regime under the Code can be made more effective and explored ways to improve the quality of a company's disclosure of their corporate governance practices and explanations of any deviations from the Code. Further, the CGC also took this opportunity to streamline the Code to ensure companies focus on the key tenets of good corporate governance. The public consultation of the review of the Code ended on 15 March 2018 and at present, CGC and SGX are considering the feedback received and have not yet released a revised Code.

Proposed Listing Framework for Dual-Class Share Structure

After almost a year of public consultation, on 19 January 2018, SGX announced that it will permit the listing of companies with a dual-class share ("**DCS**") structure in Singapore. The DCS structure refers to a share structure that gives certain shareholders voting

rights disproportionate to their shareholding. However, the DCS structure is commonly associated with certain corporate governance risks. These include entrenchment of the controlling shareholder and expropriation, where the controlling shareholder can further his own interest at the expense of other shareholders. In view of such risks, SGX has proposed safeguards such as allowing multiple vote ("**MV**") shares to carry a maximum of 10 votes and event-based sunset clauses which require the MV-shareholder to convert their shares to one-vote shares upon their occurrence of certain specified events. Nevertheless, we note that SGX is still considering and has not finalised the proposed safeguards.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In 2016, the Listing Rules were amended to require all listed companies issue an annual sustainability report describing the company's sustainability practices with reference to the five primary components (as discussed below) on a "comply or explain" basis. The introduction of sustainability reporting is deemed necessary, as it provides a more comprehensive picture of the listed company and allows added transparency in the assessment of the company's financial prospects and quality of management. At the same time, this reporting framework also encourages companies to integrate sustainability as a part of their business model.

The five primary components of the sustainability report are (a) identifying material environmental, social and governance ("**ESG**") factors, (b) describing policies, practices and performance in relation to the identified material ESG factors, (c) setting out targets, (d) selecting a sustainability reporting framework to report and disclose the identified material ESG factors, and (e) a board statement stating that the board has considered sustainability issues as part of its strategic formulation and overseen the sustainability reporting process. It bears mentioning that companies should identify all material ESG factors that will act as barriers or enablers to achieve business goals in the short, medium and long-term.

However, in practice smaller companies have voiced concerns with the mandatory sustainability reporting framework such as limited resources and manpower available to identify their ESG factors. Further, it has been criticised that the increased cost of compliance may deter small companies from issuing an annual sustainable report.

Nevertheless, the requirement for companies to issue an annual sustainable report is a clear indication that SGX recognises the importance of promoting sustainable value creation and demonstrates SGX's effort to meet the growing interest from investors who seek sustainable investments. It should, however, be noted that the requirement for companies to issue an annual sustainability report is still relatively new and the effectiveness of the mandatory sustainability reporting framework in Singapore remains to be determined.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

While directors are responsible for the overall management of the company, there are certain matters under the CA, the Listing Rules and the Constitution, which the company cannot undertake without the requisite shareholders' approval. Some examples under the CA are: (i) granting directors the power to issue new shares; (ii) alteration of the Constitution; and (iii) disposal of the whole or substantially the whole of the company's undertaking or property.

Under the Listing Rules, matters which require shareholders' approval include, subject to certain thresholds and exceptions: (i) the entry by the company, its unlisted subsidiary or associated company that it controls, into a transaction with an interested person (which includes a director, chief executive officer ("**CEO**") and controlling shareholders) ("**IPT**"); and (ii) an acquisition or disposal of the company's assets.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders do not have positive obligations with respect to corporate governance of the company. In a statement on the role of shareholders (which is annexed to, but does not form part of the Code), it is noted that shareholders' input on governance matters is useful to strengthen the overall environment for good governance policies and practices, and convey shareholders' expectations to the board of directors (the "**Board**"). Crucially, shareholders should exercise their right to attend general meetings and vote responsibly. If they do not agree with any proposal tabled at a general meeting, shareholders are encouraged to communicate the reasons for the disagreement.

In recent years, the Securities Investors Association (Singapore) ("**SIAS**"), which represents minority retail investors, also helps organise pre-annual general meeting ("**AGM**") meetings with listed companies, at their members' requests, to address critical issues ahead of AGMs.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Companies must hold their AGM once every calendar year, and not more than 15 months from the last preceding meeting, in accordance with the CA. Under the Listing Rules, the time between the end of an issuer's financial year and the date of its AGM must not exceed four months.

Routine business that is commonly dealt with at AGMs includes receiving and adopting directors' statements and financial statements, re-election of directors, approval of directors' fees and re-appointment of auditors. In addition, companies may call shareholder meetings, also known as extraordinary general meeting ("**EGM**"), to consider specific business matters from time to time (including matters discussed in question 2.1). The Board must convene an EGM if requisitioned by shareholders holding 10% of the total number of paid-up shares in the company.

Unless otherwise stated in the Constitution, EGMs are generally called by: (i) giving members not less than 14 days' notice in writing; or (ii) if there are matters which need to be passed by special resolutions, giving not less than 21 days' notice in writing.

The Listing Rules provides that all general meetings must be held in Singapore, unless prohibited by the laws of the jurisdiction of incorporation of the issuer. Further, all resolutions at general meetings of companies shall be voted by poll. Generally, voting at general meetings either requires an ordinary resolution (which requires a simple majority of those voting in person or by proxy), or special resolution (requiring a majority of not less than three-fourths of those voting in person or by proxy).

Shareholders who are unable to attend the general meetings are entitled to appoint up to two proxies, unless otherwise stated in the Constitution, to attend and vote on their behalf at the general meeting. With effect from 3 January 2016, the CA provides an exception for "relevant intermediaries", such as banks and capital market service licence holders that provide custodial services for securities, to appoint more than two proxies to attend and vote at such meetings.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Generally, shareholders do not owe duties to the company or to other shareholders in the company. A company has a separate legal personality and is distinct from its shareholders. The liability of shareholders in a limited liability company is limited to the amount of their capital contribution on the shares that they have subscribed or agreed to subscribe.

Although there are exceptional circumstances where the "corporate veil" may be pierced to impose liability on shareholders (for example, where a person is a knowing party to the fraudulent trading engaged in by the company), such circumstances are less likely to arise in respect of shareholders of a listed company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Generally, the duties of directors are owed to the company, and the company is the proper body to bring a claim against the directors if those duties are breached. There are, however, limited exceptions to this. Section 216A of the CA confers the right on shareholders to bring a derivative action, with the leave of court, against a defaulting director in the name of the company in certain circumstances. The application of section 216A was extended to listed companies pursuant to amendments to the CA.

Minority shareholders may be able to seek recourse under section 216 of the CA if their rights have been unfairly prejudiced in specified circumstances. This would include a situation where the powers of the directors are being exercised in a manner oppressive to the minority shareholder. If such grounds are established, the courts have wide discretion to make orders, including one to regulate the conduct of affairs of the company in the future.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

While there are no statutory limits as to how and when a shareholder may acquire shares in a company, a shareholder should be aware of the thresholds under the TO Code. Briefly, a shareholder (referred to as the "**Offeror**") incurs an obligation to make a mandatory offer for all the shares in the company when: (i) the Offeror, together with his concert parties, acquires shares amounting to 30% or more of the voting rights of the company; and (ii) the Offeror and his concert parties, hold not less than 30% but not more than 50% of the voting rights and any one of them, acquires additional shares carrying more than 1% of the voting rights in any period of six months.

A substantial shareholder (i.e. a shareholder who has an interest in shares holding not less than 5% of the total voting rights) is required to inform the company, using prescribed forms, within two business days of him becoming aware that: (i) he is a substantial shareholder; (ii) there is a change in the level of percentage of his interest; and (iii) he ceases to be a substantial shareholder. Thereafter, the company is obliged to make certain regulatory announcements of this information.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

At present, there are no disclosure requirements with respect to the intentions, plans or proposals of shareholders with companies in which they are invested.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Companies in Singapore adopt a unitary board system, as in many other Commonwealth countries. Under the CA, the business of the company is "managed by, or under the direction or supervision of" the directors.

The Constitution often provides the minimum and maximum number of directors. The CA requires at least one director who is ordinarily resident in Singapore, while the Listing Rules require the listed company to have at least two non-executive directors who are independent and free of any material business of financial connection with the listed company.

Generally, the Board comprises executive and non-executive directors. Executive directors take an active role in the management of the company, and generally work for the company on a full-time basis, while non-executive directors perform a more supervisory role with strategic oversight of the company. The CA, however, does not draw a distinction in the duties and liabilities owed by executive and non-executive directors.

The Code stresses the role of independent directors to act as a check and balance on the Board and management of the company, by requiring at least one-third, or in certain situations, half of the Board to be made up of independent directors. An "independent" director is defined as one who has no relationship with the company, its related corporations, its 10% shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment with a view to the best interests of the company.

The Code further recommends that the Chairman and CEO should be separate persons to ensure an appropriate balance of power, increased accountability and independent decision making. The CEO representing management, has general executive responsibility for the conduct of the business and affairs of the company. The Chairman, on the other hand, is charged with securing good corporate governance amongst other duties.

The Code advocates the establishment of three board committees:

- The Nominating Committee ("**NC**"), which is primarily responsible for making recommendations to the Board on board appointments and assessing the independence of directors.
- The Remuneration Committee ("**RC**"), which is principally responsible for forming formal and transparent procedures for developing policy on executive remuneration and fixing the remuneration packages of directors.

- The Audit Committee ("**AC**"), which is responsible for, *inter alia*, reviewing the financial reporting, internal audit and external audits and internal controls of the company.

The Board may, without abdicating its responsibility, delegate the authority to make decisions to any board committee, and must make disclosures in respect of such delegation.

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

The appointment and removal of directors is governed by the CA and the Constitution, and are typically approved by ordinary resolutions of the shareholders. The Constitution would usually provide that in the event the directors exercise their powers to appoint a director, such person appointed shall hold office until the next AGM and will then have to stand for re-election.

The Code recommends that all directors are required to submit themselves for re-nomination and re-appointment at least once every three years. The Constitution usually provides that one-third of the directors for the time being is subject to retirement by rotation and if the retiring director wishes to be re-appointed, they will need to stand for re-election at the AGM.

To ensure a formal and transparent process for the appointment and re-appointment of directors to the Board, the Code recommends disclosing the search process, nominating process and key information regarding directors (for example, academic and professional qualifications) in the company's annual report.

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

As stated in question 3.1, the RC reviews and recommends to the Board a general framework of remuneration for the Board and key management personnel (including the CEO). The RC covers all aspects of remuneration, including directors' fees, bonuses, and share-based incentives. The Code provides that each company should disclose its remuneration policies, level and mix of remuneration, and the procedure for setting remuneration in the company's annual report. The remuneration of directors, the CEO and at least the top five key management personnel should also be disclosed.

Procedurally, the RC's recommendations are submitted for endorsement by the entire Board. Thereafter, shareholders' approval at a general meeting is required, in accordance with the CA, before emoluments can be made to directors of the company.

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

There are no prohibitions on directors holding shares in the company. With regards to dealing with securities, directors are generally prohibited from insider trading. It is an offence under the SFA if directors, in possession of price-sensitive information, trade (either directly or through a third party) or communicate such price-sensitive information to a third party who would or be likely to trade in the company's securities. Price-sensitive information refers to information which is not generally available, and if it were generally available, might have a material effect on the price or value of the shares of the company.

The Listing Rules further prescribe that directors should not deal in the company's securities during the period commencing two weeks before the announcement of the quarterly results, and one month before the announcement of the company's half or full year financial statements. Companies also need to disclose in their annual reports a statement as to whether and how it has complied with the best practice of devising and adopting an internal compliance code, which provides guidance to its officers regarding dealing of securities by directors.

Under the SFA, directors need to make disclosures of their interests, including in shares, debentures or rights to acquire shares in the listed company or its related corporation, in the prescribed format within two business days of the director becoming aware of such change or acquiring such interest. It should also be highlighted that directors are deemed interested in securities held by a family member (i.e. spouse or children under the age of 21 years).

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

Board meetings are called by giving notice to all directors, in accordance with the Constitution. While there is no set minimum number of board meetings under the CA, the Code recommends that the Board meets regularly, and as and when deemed appropriate by the Board members. The number of meetings of the Board and Board committees held in the year should be disclosed in the company's annual report.

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

As fiduciaries of the company, directors owe duties to the company to act in good faith and in the best interest of the company, the duty to act for the proper purpose, and the duty to avoid conflicts of interest between his duty to the company and his personal interest. A director is also under the duty to exercise skill, care and diligence in discharging his responsibilities. The minimum objective standard is referenced to what is reasonably expected by a director in the same position.

Additionally, under section 157(1) of the CA, "a director shall at all times act honestly and use reasonable diligence in the discharge of his duties of his office". Under section 157(2) of the CA, an officer or agent of a company must not make improper use of his position as an officer or agent of the company or any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person to cause detriment to the company. Breaches of directors' duties under section 157 of the CA, in particular, renders a director liable both civilly and criminally. He will also be liable to account for profits made or damage suffered by the company as a result of breach.

Further, if in the course of the winding up of or proceedings against a company, it appears that a director: (i) knowingly caused the company to enter into contracts for debts with no probable or reasonable expectation that the company will be able to repay the debt; or (ii) knowingly carried on the business with intent to defraud creditors of the company, the director may be liable for offences under the CA, and may even be made personally liable for such debts.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The Board is collectively responsible for the long-term success of the company. The Code provides guidance on the Board's role, which is to: provide entrepreneurial leadership, set strategic objectives, and

ensure that the necessary financial and human resources are in place for the company to meet its objectives; establish a framework of prudent and effective controls which enable risks to be assessed and managed, including safeguarding of shareholders' interests and the company's assets; review management performance; identify the key stakeholder groups and recognise that their perceptions affect the company's reputation; set the company's values and standards (including ethical standards), and ensure that obligations to shareholders and other stakeholders are understood and met; and consider sustainability issues, as part of its strategic formulation.

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

It is common practice for listed companies to obtain D&O or management liability insurance for the directors. The CA allows the company to maintain such insurance in respect of liabilities in connection with any negligence, default, breach of duty or breach of trust in relation to the company.

Companies are also allowed to indemnify the directors for liability incurred to a person other than the company, except for certain specified liability (for example, to pay a fine in criminal proceedings). Save for the maintenance of insurance discussed above, companies cannot provide any indemnity for liability attaching to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

While the CA does require a director to act honestly and use reasonable diligence in the discharge of the duties of his office, most of the duties specified in the CA relate to governance and compliance issues. The CA does not expressly require the Board to set or change the strategy of a company. The position under the Code is similar.

In practice, the strategic direction of a company is often set by its executive directors. However, in the revised draft of the Code, it is expressly stated that: "*The Code takes as its starting point a recognition that the Board has the dual role of setting strategic direction, and of setting the company's approach to governance. The role of the Board is therefore broader than that of providing oversight. A well constituted Board fosters more complete discussions, leading to better decisions, and enhanced business performance.*"

It does appear that non-executive directors are expected to contribute more actively to the Board's role of setting the strategic direction of a company.

4 Other Stakeholders

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

While there are no formal corporate governance responsibilities for employees, whistle-blowing by employees is increasingly seen as an important component of the corporate governance framework. The Code recommends that the AC should review the policy by which employees may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. Arrangements should be in place for such concerns to be raised and independently investigated, and for follow-up action to be taken. The Code further recommends that the existence of a whistle-blowing policy be disclosed in the company's annual report, with appropriate disclosure of the procedures. At present, however, there are no overarching laws relating to the protection of whistle-blowing employees.

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

Companies listed on Catalist of SGX, operate under a sponsor regime, in which a sponsor takes on the role of supervisor to ensure the listed company's compliance with Listing Rules. Continuing sponsors are also required to advise the company on corporate governance matters or arrange for an appropriate adviser to do so.

In addition, SIAS and SID are also stakeholders in corporate governance. Both organisations are consulted for their views relating to regulatory changes which affect directors and investors. SIAS, in particular, actively promotes corporate governance, and engages listed companies on behalf of minority shareholders, in respect of the former's corporate governance practices.

Although the current Code does not explicitly address a company's engagement with stakeholders, the CGC recognises the importance of companies to maintain their relationship with stakeholders such as customers, suppliers, creditors, regulators and the broader community. As such, CGC made recommendations, in its proposed revised Code, that companies should consider and balance the needs and interest of major stakeholders which includes (i) identifying its material stakeholder groups and maintaining relationships with them, (ii) disclosing its key focus areas in relation to the management of stakeholder relationships, and (iii) maintaining a corporate website to keep material stakeholders informed of material updates. However, companies will have to wait and see if CGC's recommendation in this aspect is adopted in the revised Code.

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

Further to our discussion in question 1.4, we wish to highlight that mandatory sustainability reporting takes effect for any financial year ending on or after 31 December 2017 and companies have up to 12 months to prepare their first sustainability report.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Board is collectively responsible for managing the company's disclosures and ensuring transparency. The Board's role includes establishing a framework of prudent and effective controls which enables risks to be assessed and managed. As fiduciaries of the companies, all directors must objectively discharge their duties and responsibilities in the best interest of the company.

Nevertheless, the Code emphasises the need for a "strong and independent element on the Board, which is able to exercise objective judgment on corporate affairs independently". The independent directors should form the majority of members of the board committees, which are each tasked with making the process of appointment and remuneration of directors more transparent, as well as ensuring that an annual review of all material controls is conducted.

5.2 What corporate governance-related disclosures are required?

The listed company must announce its financial statements for the full financial year, and may, depending on its market capitalisation, be required to announce financial statements for each of the first three quarters of its financial year or on a half-yearly basis. In respect of interim financial statements, directors are required to provide a confirmation that to the best of their knowledge, nothing has come to the Board's attention that may render the interim financial statements to be false or misleading in any material aspects.

The Listing Rules also prescribe certain continuous disclosure obligations aimed at ensuring transparency and accountability to shareholders. Under Rule 703 of the Listing Rules, a listed company is required to, subject to certain limitations, promptly announce any information known to it that is necessary to avoid the establishment of a false market or would be likely to materially affect the price or value of its securities. Events which likely require immediate disclosure include joint ventures, mergers or acquisitions and purchase or sale of a significant asset. The announcement needs to be contain sufficient quantitative information to allow investors to evaluate the importance of such event relative to the activities of the listed company.

Rule 704 of the Listing Rules further requires the listed company to make immediate announcements in certain specified situations, including the appointment or resignation of directors.

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

The audited financial statements of listed companies must be made up to a period not more than four months before the AGM, and need to be laid before the shareholders at the AGM together with the auditor's report. In this regard, a listed company needs to appoint a suitable auditing firm that meets its audit obligations.

Auditors have a key role in uncovering any financial irregularities or defects. If in the course of performing his duties, the auditor is satisfied that there is a breach or non-observance under the CA and in his opinion, the circumstances are such that the matter has not or will not be adequately dealt with by the comment in the auditors' report or by bringing the matter to the directors' attention, he would need to report the matter to ACRA immediately. Given that an auditor's independence is crucial, the Listing Rules prescribes that an audit partner must not be in charge of more than five consecutive audits for a full financial year, though he may return after two years. Any change of auditors would also need to be approved by the shareholders. The notice of meeting to approve such change would include prescribed information such as specific reasons for the change of auditors, and confirmation from the company as to whether it is aware of any circumstances relating to a change of auditors which should be brought to the attention of the shareholders.

Under section 201B of the CA, besides having to appoint auditors, listed companies also need to appoint an AC. The AC carries out key functions, including reviewing significant financial reporting issues, and reviewing and reporting to the board on the adequacy of the company's internal controls. The Listing Rules further supplements that an independent audit may also be commissioned by the AC on the internal controls of the company. The Code further recommends that the AC should establish the practice of meeting with external and internal auditors, without the presence of company's management.

5.4 What corporate governance-related information should be published on websites?

All announcements that need to be made and documents to shareholders, including those discussed above, should be first released via SGX's portal SGXNET. The annual reports and sustainability reports should also be made available both on SGXNET and on the company's website. SGXNET is accessible by members of the public.

Benjamin Choo
Genesis Law Corporation
1 Coleman Street
#07-02 The Adelphi
Singapore 179803

Tel: *+65 6236 0321*
Email: *benjamin.choo@genesislawcorp.com*
URL: *www.genesislawcorp.com*

Benjamin leads a team in the Corporate and Transactional practice at Genesis Law Corporation. His area of practice includes mergers and acquisitions, joint ventures, commercial contracts and general corporate advisory issues.

Benjamin has been involved in varied complex cross-border transactions, some of which have been acknowledged in legal journals such as the *Asia Pacific Legal 500*.

He was a Member of the Inquiry Panel constituted under the Legal Professional Act from 2011 to 2014 and a Member of the Complaints and Disciplinary Panel constituted under the Accounts Act from 2010 to 2014. Since 2010, Benjamin has been an *ad hoc* referee of the Small Claims Tribunal in the State Courts of Singapore. He also sits as an independent director on a company listed on the SGX.

Benjamin graduated from the National University of Singapore in 2001 and was called to the Singapore Bar in 2002.

Bernice Man
Genesis Law Corporation
1 Coleman Street
#07-02 The Adelphi
Singapore 179803

Tel: *+65 6332 0334*
Email: *bernice.man@genesislawcorp.com*
URL: *www.genesislawcorp.com*

Bernice is an associate with the Corporate and Transactional practice at Genesis Law Corporation. Her principal area of practice includes mergers and acquisitions and general corporate work for both listed and unlisted companies.

Bernice graduated from the University of Bristol with a Bachelor of Laws (Honours) Degree and is admitted as an Advocate and Solicitor to the Supreme Court of Singapore.

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Founded in 2004, Genesis Law Corporation is a full-service law firm established on the principles of honesty, integrity and justice. Our firm provides a comprehensive range of legal services, ranging from dispute resolution, real estate to corporate advisory. Our firm consists of lawyers who have had experience serving on the bench, with the Attorney General's Chambers and recognised industry experts.

Our Corporate and Transactional team takes pride in understanding the concerns of their clients, which comprises of institutional clients and sophisticated individuals, and providing bespoke solutions. In March 2018, the Corporate and Transactional team was strengthened with the addition of Mr Benjamin Choo and Ms Bernice Man.

Slovakia

Katarína Čechová

Čechová & Partners

Ivan Kolenič

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The main corporate entity to be discussed is the regular joint-stock company (the "**Joint-Stock Company**"), and a simple joint-stock company (the "**Simple Joint-Stock Company**") newly introduced as of 1 January 2017 to support start-up companies (both companies limited by shares). The Joint-Stock Company issues shares either in documentary or book-entered form. The Simple Joint-Stock Company issues shares only in book-entered form. The shares issued by a Joint-Stock Company may be offered and traded on regulated markets (subject to the satisfaction of conditions for their acceptance). The Simple Joint-Stock company cannot offer subscription of shares publicly or become listed without prior transformation to a regular Joint-Stock Company. Both types of joint-stock companies are managed by a Management Board and supervised by a Supervisory Board. The establishment of a Supervisory Board is, however, not obligatory in a Simple Joint-Stock Company.

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

The main legislative source is Act No. 513/1991 Coll., Commercial Code, as amended (the "**Commercial Code**"). The Commercial Code contains general provisions regarding the establishment, organisation, governance, corporate financing, functioning and dissolution of Slovak companies.

The majority of the provisions of the Commercial Code regulating joint-stock companies are obligatory; however, quite extensive scope of corporate governance regulation is delegated to the Articles of Association (the "**Articles**") as the basic corporate document of every joint-stock company. The Articles are adopted by a general assembly of shareholders (the "**General Meeting**"), meanwhile a qualified majority of shareholders is required to make amendments (at least two-thirds of the present shareholders, unless the Articles specify a higher percentage).

In certain limited respects Act No. 566/2001 Coll., on Securities and Investment Services, as amended, and Act No. 429/2002 Coll., on Stock-Exchange, as amended, regulate some rights, duties and notification requirements of Management Boards and shareholders of joint stock companies.

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

Current topical issues in corporate governance in Slovakia include e.g. liability of members of Management Boards to joint stock companies, abuse of minority and majority shareholder rights, enforcement and performance of, as well as damage claims from, members of Management Boards and limitations of mergers of companies with negative net equity.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

We are not aware of any current developments and perspectives specifically concerning the risks of short-termism and the importance of promoting sustainable value creation over the long-term.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The operation and management of joint-stock companies is carried out by Management Boards. The competence of shareholders is limited to decisions on matters designated by the Commercial Code and Articles to the General Meeting (see question 2.3 below). In principal (unless expressly provided by Articles), the General Meeting may not give any binding instructions to the Management Board regarding the operation and management of the company.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Slovak law does not stipulate any responsibilities of shareholders with regards to the operation and management of corporate entities.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two main types of shareholder meetings: (i) ordinary

General Meetings; and (ii) extraordinary General Meetings. Ordinary General Meetings must be held at least once a year to approve financial statements and profit distribution/disposal of loss. A Management Board shall convene an extraordinary General Meeting upon request of the shareholders representing 5% of the registered capital, unless the Articles stipulate a lower threshold (the "**Minority Shareholders**"). Also, the Management Board in a Joint-Stock Company shall convene an extraordinary General Meeting if it found out that an accumulated loss of the company exceeded or may exceed one-third of its registered capital (in a Simple Joint-Stock company the Management Board only has the obligation to inform the shareholders). It is important to note that in the case of a Simple Joint-Stock Company, the Articles may provide for *per rollam* adoption of resolutions (in writing or using other communication means) outside of the General Meeting (i.e. it is not necessary to convene the General Meeting).

The scope of powers of the General Meeting includes, in particular, the following:

(i) amendments to the Articles;

(ii) decisions on the increase or decrease of the registered capital, an authorisation of the Management Board to increase the registered capital and issue priority bonds or convertible bonds;

(iii) the election and recall of members of the Management Board (unless the Articles provide their election and recall by the Supervisory Board);

(iv) the election and recall of members of the Supervisory Board and other company bodies if stipulated in the Articles (other than the Supervisory Board member elected and recalled by employees);

(v) approval of financial statements, resolutions on distribution of profits or coverage of losses and determining dividends;

(vi) decisions on the replacing of documentary shares with book-entered shares and *vice versa*;

(vii) decisions on the winding-up and change of legal form of the company;

(viii) decisions on terminating trading with company shares on regulated markets (stock exchanges), and decisions on the company ceasing to be a public Joint-Stock Company;

(ix) approval of the rules for remuneration of members of bodies of the company (providing that the Articles do not stipulate that such rules shall be approved by the Supervisory Board);

(x) decisions on the approval of contracts on the transfer of enterprises or a part of an enterprise; and

(xi) decisions on other matters entrusted by the Commercial Code or the Articles to the authority of the General Meeting.

Generally, voting at the General Meeting requires a simple majority of votes of shareholders voting in person or by proxy. However, a resolution concerning (i), (ii), (vii) and (viii) above requires a qualified majority of not less than two thirds of votes of the voting/present shareholders. In addition, in case of the Simple Joint-Stock Company the resolution concerning a change of the Articles in respect of the rights associated to certain types of shares and limitation of the transferability of shares requires a qualified majority of not less than two-thirds of votes of the owners of the concerned shares. The number of a shareholder's votes is determined as a proportion between the nominal value of the shares held thereby and the total amount of registered capital of the company. The voting procedure is determined by the Articles. Voting at a General Meeting shall not take into account the shares with which the shareholder cannot exercise the voting right (e.g. priority shares).

In its Articles, the company may allow voting at the General Meeting by correspondence or by electronic means. A change of the Articles in this respect requires a three fifths majority of the votes of all shareholders.

Shareholders may not directly call a General Meeting, they may only initiate convocation of such meeting by request of the Minority Shareholders. The Management Board is liable to convene the General Meeting upon such request; if the Management Board does not comply with such demand, the Minority Shareholders may request the court to authorise them for such a call.

Each shareholder may submit proposals, including proposals for resolutions, exclusively regarding the matters put to the agenda of the General Meeting. Upon request of the Minority Shareholders an agenda of the General Meeting shall be supplemented by the points proposed by them (subject to an on time request and notification of other shareholders of such supplement).

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

There are no specific duties that shareholders owe to the company/companies in respect of corporate governance. As other shareholders are concerned, the Commercial Code stipulates general restrictions, which prohibit (i) shareholders to exercise the rights of a shareholder to the detriment of the rights and legitimate interests of other shareholders, and (ii) misuse of rights, in particular a misuse a minority of votes, in a company, and any conduct which is intended to place some of the company's shareholders at a disadvantage by means of malpractice.

Shareholders cannot be liable for acts or omissions of the corporate entity/entities. Joint stock companies are fully liable for any breach of their obligations; whereas the shareholder bears no liability for obligations of the joint stock company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

No, it is the company (not shareholders) who can enforce claims against members of the Management Board. The company is represented in such enforcement proceedings by a member of the Supervisory Board. The Minority Shareholders may request the Supervisory Board to claim damages or other claims against members of the Management Board. Only if the Supervisory Board does not follow such request can the Minority Shareholders enforce such claim for and on behalf of the company; such shareholders shall bear the costs of such enforcement.

Although not specified in the law and not settled by binding interpretation as the introduction of the Simple Joint-Stock Company is recent, in the case of a Simple Joint-Stock Company without an established Supervisory Board, the Minority Shareholders may enforce claims for and on behalf of the company directly.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

A legal entity (or an individual) acquiring an interest in voting rights attached to shares traded on a regulated market equal to or exceeding 5%, 10%, 15%, 20%, 25%, 30%, 50%, or 75% of all voting rights attached to the shares of the Joint-Stock Company is required to disclose to the Joint-Stock Company his/her/its interest in voting rights attached to such shares, as well as to notify the National Bank of Slovakia.

Moreover, prior approval of the National Bank of Slovakia is required for attaining or exceeding certain thresholds of shares in specified types of joint stock companies (such as banks, insurance companies, reinsurance companies, securities dealers, asset management companies or pension management companies) notwithstanding whether the shares of such companies are admitted for trading on a regulated market or not.

As of 1 February 2017, access to funds from public resources has become subject to prior registration in the Register of Public Sector Partners. Such register mandatorily provides, among others, data on the ultimate beneficial owners/shareholders of company controlling directly or indirectly at least a 25% share or 25% of the voting rights or who is entitled to appoint or remove members of the corporate bodies or to at least 25% of the profits of the business or other activities of the company.

As a result of implementation of the 4th European Anti-Money Laundering Directive, effective from 1 November 2018, newly established companies will be obliged to register their ultimate beneficial owners in the Register of Ultimate Beneficial Owners of the respective Commercial Register (final deadline for companies existing prior to 1 November 2018 will be 31 December 2019). The obligation to register the respective information shall not apply to companies listed on a regulated market that is subject to disclosure requirements pursuant to the applicable Slovak or EU law or subject to equivalent international norms. The registered information shall, in general, not be publicly accessible. However, specific authorised persons and entities (particular public authorities and institutions) including also obliged entities under anti-money laundering legislation in specific cases shall be entitled to access them.

In the case of listed companies' members of the statutory body, a procurist and all managing employees of the company acting under a direct authority of the statutory body shall be registered as beneficial owners (this is applicable for both the Register of Public Sector Partners and the Register of Ultimate Beneficial Owners).

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no specific disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The Management Board is the statutory body of joint-stock companies fully authorised to manage its operations and act on its behalf. The Management Board makes decisions concerning any matter of the company, unless such matter is reserved for the authority of the General Meeting or the Supervisory Board (or other body in case of the Simple Joint-Stock Company) by the Commercial Code or Articles. Unless the Articles provide otherwise, any member of the Management Board is authorised to act for and on behalf of the company. The Management Board shall consist of a number of members, as stated in the Articles. The minimum is one member.

The authority of the Management Board to act on behalf of the company may be restricted by the Articles, resolutions of General Meeting or Supervisory Board; however, such restrictions are not effective *vis-à-vis* third parties.

The Supervisory Board, which is only optional in Simple Joint-Stock companies, is not a management body, it only supervises the exercise of powers by the Management Board. Members of the Supervisory Board are entitled to review any document and report any activities of concern. The Supervisory Board also inspects whether accounting books are properly kept, whether business of the company is performed in compliance with the law, the Articles and resolutions of the General Meeting. Furthermore, the Supervisory Board reviews financial statements and proposals for distribution of profits and coverage of losses, and shall submit its comments to the General Meeting. It consists of at minimum three members; in Joint-Stock Companies with more than 50 employees, one-third of members are elected by employees.

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

Under Slovak law, members of the Management Board are elected and removed by the General Meeting, unless the Articles devote the power to elect and remove members of the Management Board to the Supervisory Board.

The body which elects the members of the Management Board shall determine which member shall be the Chairman thereof. The period of office is a maximum of five years in a Joint-Stock Company. In a Simple Joint-Stock Company the Articles may stipulate an unlimited period. Repeated election is possible, unless Articles provide otherwise.

The Articles of Association may provide that election of members of the Management Board shall be made *en bloc*. A list of candidates shall be drawn out from all of the proposals and shareholders shall elect the members by specifying the number of votes, out of their aggregate votes, which they cast in favour of individual candidates while the maximum number of candidates to whom they may give their votes shall be equal to the number of members of the Management Board to be elected. The candidates who have been given most votes shall become members of the Management Board.

Members of the Supervisory Board of a Simple Joint-Stock Company may be elected exclusively by the General Meeting. Members of the Supervisory Board of a Joint-Stock Company may be elected exclusively by the General Meeting save for one-third elected by employees of the Joint-Stock Company provided there are more than 50 full-time employees in the Joint-Stock Company at the time of the election. The Articles of the Joint-Stock Company may provide a higher number of members of the Supervisory Board to be elected by the company's employees; however, such number may not be higher than the number of members to be elected by the General Meeting. The Articles of the Joint-Stock Company may also provide that even if the number of employees employed by the company is less than 50, the employees shall elect a member (several members) of the Supervisory Board.

Members of the Supervisory Board shall be elected for the term specified in the Articles; however, such term cannot be more than five years in a Joint-Stock Company. Although not specified in the law and not settled by binding interpretation as the introduction of the Simple Joint-Stock Company is very recent, there are opinions expressed in expert literature that in a Simple Joint-Stock Company the Articles may stipulate an unlimited period. Unless the Articles of Association provide otherwise, the election by the General Meeting shall be made *en bloc* (see above).

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

The relationship between the company and members of the Board (either Management or Supervisory) is regulated by provisions of the Commercial Code on a mandate contract, unless a special agreement on performance of function was executed between the company and a specific Board member. The agreement on performance of function must be approved by the General Meeting (or Supervisory Board if the Articles so stipulate). Nonetheless, during their office the members of the Management Board can be also employed under a separate employment contract with the company. This is quite common practice in Slovakia, where, e.g., the same individual is the Chairman of the Management Board (under a contract on performance of function or mandate contract) and General Manager of the company (under an employment contract).

Remuneration of members of the Boards is not regulated in the Commercial Code. It is under the competence of the General Meeting to approve an amount of remuneration directly or within the agreement on performance of function, unless the Articles delegate such competence to another body (e.g. the Supervisory Board).

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

Slovak law does not stipulate limitations on members of Management Boards owning shares. As to disclosure duties on the acquisition of shares of companies traded on the regulated market, the notification requirements already mentioned in question 2.6 apply equally.

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

The regulation of processes for meetings of members of the Board is delegated by the Commercial Code to a company's Articles. Unless the Articles provide otherwise, however, the Board may pass resolutions if their meetings are attended by a majority of their members, while any such resolution requires the approval of a majority of members present. The Articles may provide for *per rollam* adoption of resolutions (in writing or using other communication means).

Minutes compiled from Board meetings shall include details of resolutions passed thereby and shall be undersigned by the Chairman of the Board and the minutes clerk. Each member of the Board is entitled to demand that his/her opinion (if in opposition to opinions of other board members) is recorded in the minutes.

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

Members of the Management Board are obliged to perform their function with due care. Such due care involves a duty to exercise professional care and act in line with the interests of the company and all of its shareholders. In particular, members of the Management Board have to collect and take into account all available information concerning their decisions. Moreover, they may not disclose any confidential information to third parties if such disclosure could cause damage to the company or prejudice its interests or the interests of its shareholders. Also, they may not give priority to their own interests or interests of certain shareholders or interests of third parties over the interests of the company.

Unless the Articles provide for further restrictions, no member of the Management Board of a Joint-Stock Company may:

(i) enter in his/her own name, or for his/her own account, into business deals inherent to the company's business activities;

(ii) intermediate deals of the company for other parties;

(iii) participate in the business of another entity as a member with unlimited liability; or

(iv) be a member of a statutory or similar body of another legal entity which has a similar scope of business, unless the company (of whose statutory body he/she is a member) has a shareholding or other participation in the other company's business.

The above-described restrictions do not apply to the Management Board of a Simple Joint-Stock Company; however, its members have an obligation to inform the company of such information.

Members of the Management Board are responsible for: keeping accurate accounting records; publishing annual reports and financial statements; and preparing proposals for the distribution of profits or coverage of losses to present to the General Meeting for approval in accordance with the Articles.

Members of the Management Board who have breached their obligations while exercising their powers mentioned above are jointly and severally liable without limitation for the damage caused to the company by such breach. The member shall not be liable for damage if he can show that he performed his duties with due care and in good faith and that he acted in the company's interests. Members of a Management Board should not pass a resolution of the General Meeting if such resolution is in conflict with the Commercial Code or the Articles. Members of the Management Board are not relieved of liability if their conduct was approved by the Supervisory Board.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

In case of a Joint-Stock Company at least once a year the Management Board submits to the Supervisory Board a written report specifying the fundamental strategy of management for the company for the upcoming period, as well as expected developments regarding property, finance and revenues of the company. The Board also submits a written report detailing the business and any properties of the company, along with a summary of the future outlook. In addition, the Management Board must promptly inform the Supervisory Board on any fact which may have a material impact on the business or property of the company, including (but not limited to) its liquidity. The Management Board is responsible for convening an extraordinary General Meeting if it has found that accumulated loss of the company exceeded or may exceed one-third of its registered capital. In such a case it shall submit to the General Meeting a proposal of steps to be taken.

The above-described responsibilities do not apply to the Management Board in a Simple Joint-Stock Company; however, the shareholders of a Simple Joint-Stock Company without an established Supervisory Board have the right to request the Management Board at any time to provide information on matters of the company.

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

Any agreement between the company and a member of the Management Board which excludes or restricts his/her scope of liability is forbidden. In addition, it is not possible for such liability

to be restricted or excluded by the Articles. The company may waive its damage claims towards members of the Management Board or make a settlement with them, however not earlier than three years from the occurrence of the claim and provided such waiver was approved by the General Meeting and no objection against such resolution was raised by any Minority Shareholders.

Joint-Stock Companies cannot indemnify members of the Management Board in respect of liabilities towards third parties. Nonetheless, companies are permitted to maintain insurance in respect of liability of members of the Management Board.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The role of the Management Board is to manage the company, which means, among other things, that it is responsible for achieving the company's objectives and strategy. In this respect, the Management Board is obliged to submit (at least once a year) to the Supervisory Board information on the core objectives of the company's business management for the future period, as well as expected developments in the company's balance of assets, finances and revenues, and, upon the request of and within a period determined by the supervisory board, a written report on the status of the company's entrepreneurial activity and its assets in comparison with the expected development. The Management Board is also obliged to inform the Supervisory Board without undue delay of any facts that may substantially influence the development of the company's entrepreneurial activity and balance of assets, in particular its liquidity.

4 Other Stakeholders

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

Employees have a specific, although limited role in corporate governance. One third of Supervisory Board members of a Joint-Stock Company are elected and removed by employees of the company, provided there are more than 50 full-time employees at the time of election of members of the Supervisory Board.

Elections of employee nominees to the Supervisory Board are organised by the Management Board in cooperation with trade unions or employee representatives. If there are no employee representatives, the elections shall be organised by the Management Board in cooperation with employees, who are authorised to elect the members of the Supervisory Board.

Act No. 311/2001 Coll., the Labour Code, as amended (the "**Labour Code**") stipulates that employees shall have the right to the provision of information on the economic and financial situation of the employer and on the presumed development of its activities, in an intelligible manner and in an appropriate time. The employer may deny disclosure of any information, which could prejudice the employer, or may request to treat such information as confidential. Employees shall have the right to comment on such information and submit their suggestions.

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

There are no generally recognised aspects of law, regulation and practice concerning the role of other stakeholders in corporate governance.

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

There is no law which directly regulates corporate social responsibility, however several additional disclosure requirements are regulated, by, e.g., the Labour Code, regarding informing employees on corporate changes or reorganisation within companies. Several other disclosure and notification duties are imposed on companies and issuers of shares traded on regulated markets. Such duties include interim reports on important events, trades with related persons, details on the company's financial situation and economic results of the company.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

It is members of the Management Board, individually and collectively, who are responsible for disclosure and transparency.

5.2 What corporate governance-related disclosures are required?

On 1 January 2014 a public Register of Financial Statements for filing financial statements, annual reports and auditors' reports was launched. Both types of Joint-Stock Companies shall file these documents with the Register of Financial Statements within the statutory time limits.

In case of Joint-Stock Companies listed on regulated markets a special financial report (containing not only audited financial statements, but also a declaration of responsible members of the Management Board that such report provides correct and complete information on the state of assets, liabilities and financial situation of the company) and an interim semi-annual report containing information of important facts and trades, have to be published.

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

The role of an auditor is to verify data, reports, statements, the conduct of accounting procedures, accounting systems, assessment, etc., within the scope requested by a company.

5.4 What corporate governance-related information should be published on websites?

The business name, registered seat, legal form, identification number, registration number and designation of the relevant registry court of the company are mandatorily required to be published on a company's website; however, only if the company has a website. If the company also specifies on its website the amount of its registered capital, it must indicate to what extent the registered capital has been paid up.

Information on the Management Board or Supervisory Board is not required to be published on a company's website; however, such practice is common. In any event said information is publicly accessible via the website of the Slovak Commercial Registers.

Katarína Čechová
Čechová & Partners
Staromestská 3
811 03 Bratislava
Slovakia

Tel: *+421 2 544 144 41*
Email: *katarina.cechova@cechova.sk*
URL: *www.cechova.sk*

Katarína Čechová is a senior partner in Čechová & Partners. During her 34 years of practice she has worked on a wide range of transactions and has been instrumental mainly in M&A work, restructurings, corporate and project financing. Katarína graduated from the Law Faculty of Comenius University, Bratislava, Slovakia and received her Dr. Jur. in 1984. In 1990 she was the founding partner of the firm. Katarína has served as the guest professor of commercial and financial law at the Law Faculty of Comenius University in Bratislava from 1996 to 1998. She has served as the arbitrator for international disputes of the Court of Arbitration of the Slovak Trade and Industry Chamber since 1997. Katarína is a recognised expert in the area of corporate law, particularly corporate finance and governance. She has also been involved in several equity financing deals and reorganisations of local companies.

Ivan Kolenič
Čechová & Partners
Staromestská 3
811 03 Bratislava
Slovakia

Tel: *+421 2 544 144 41*
Email: *ivan.kolenic@cechova.sk*
URL: *www.cechova.sk*

Ivan Kolenič has studied law at the Charles University in Prague, and is currently studying for his University degree at the Pan-European University in Bratislava. Ivan joined Čechová & Partners in 2015 and has been involved mainly in advising clients on corporate, regulatory, employment and contractual matters. He is a Slovak national and is fluent in English and Czech.

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Sweden

Carl-Olof Bouveng

Advokatfirman Lindahl

Maria Arnoldsson

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The Swedish Companies Act (the "Companies Act") facilitates two types of companies in which the shareholders' liability is limited to the capital contributed as payment for the shares: (i) private limited liability companies; and (ii) public limited liability companies.

Only public limited liability companies can be admitted to trading. In Sweden there are two different types of marketplaces; regulated markets and Multi Trading Facilities ("MTF"). Nasdaq Stockholm and NGM Equity are regulated markets whereas First North, Nordic MTF and AktieTorget are MTFs.

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

The main legislation governing limited liability companies are the Companies Act and the Annual Accounts Act.

The Market Abuse Regulation ("MAR") applies to all listed companies and primarily regulates the companies' treatment of inside information.

The Swedish Corporate Governance Code (the "Code") applies for companies with shares listed on a regulated market, i.e. Nasdaq Stockholm and NGM Equity. The Code applies on a "comply or explain" basis for the covered companies. In addition, each of the regulated markets and MTFs have their own rule books which apply to the companies listed in each exchange. For example, Nasdaq Stockholm has the Rule Book for Issuers and the Takeover rules Nasdaq Stockholm, whereas Nasdaq First North has the Nasdaq First North Nordic – Rulebook and the Takeover rules for certain trading platforms. All listed companies also have to consider the statements by the Swedish Securities Council on what constitutes good practice on the Swedish securities market.

The Trading in Financial Instruments Act contains rules regarding offerings to the market, prospectuses etc. and applies to all public limited liability companies. Further, the Financial Instruments Act contains rules regarding notification of shareholdings applicable to shares traded on a regulated market. Additional statutes applicable to companies listed on a regulated market include the Securities Market Act and the Stock Market (Takeover Bids) Act.

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

Gender representation on the board of directors in listed companies is a current topic of Swedish corporate governance. Although the Swedish Government, in 2017, withdrew its bill on a gender quota (i.e. at least 40 per cent of the board members shall be of each gender) due to low support in parliament, there are currently discussions on EU level as regards a proposal on minimum harmonisation in that area. In addition, the Code prescribes that the nomination committee shall strive for a gender balance and that the nomination committee shall motivate its proposals with respect to this goal. Moreover, companies that are to prepare a sustainability report (see question 4.3 below) are to provide information in their corporate governance report of their diversity policy.

Another trend on the board agenda include the increase of regulations, mainly due to EU regulations; for instance, the MAR and the General Data Protection Act, which impose more responsibility on the board of directors.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

In 2016, new rules on sustainability reporting were implemented in Sweden (see question 4.3). The new legislation is based on an EU directive and is intended to increase the transparency and make it easier to compare the companies concerned. Hence, risks relating to sustainability aspects can be analysed and stakeholders' confidence in companies should increase. In regard to sustainability issues in particular, companies may have other important stakeholders in addition to its investors, such as customers, consumers and environmental organisations. Such stakeholders and their at least indirect impact on the business operations should increase as an effect of the new sustainability reporting requirements and serve as a counterweight to short-termism.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The corporate governance model in Sweden is based on a hierarchical governance structure, under which the general meeting of shareholders

is the highest decision-making body of the company. Shareholders exercise their decisive powers of the company at the general meeting, during which the shareholders participate in the supervision and control of the company. Some decisions regarding the company, such as appointment of the board of directors, amendments of the articles of association, mergers and de-mergers, and changes of the company's share capital by way of issue of new shares, convertibles or warrants, must be passed by the general meeting.

Each body of the corporate governance model can issue directives to a subordinated body and to a certain extent take over the subordinated body's decision-making authority. The general meeting can therefore issue directives to the board of directors which is a subordinated body. The shareholders therefore have indirect powers over the strategic direction, operation or management of the corporate entity through the general meeting.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders have no obligations towards the company, the board of directors or the creditors of the company. Thus, shareholders are not obliged to attend the general meetings of a company, nor are they obliged to vote for or against specific proposals or to make proposals. A shareholder may however under certain circumstances be held personally liable for the company's obligations (see question 2.4).

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Annual general meetings must be convened and held within six months from the end of each financial year. In addition, extraordinary general meetings must be convened and held if the board of directors considers there is reason to hold such extraordinary general meeting, or if an auditor of the company, or at least 10 of all shares in the company demand in writing that such meeting be convened.

A shareholder is entitled to take part in the meeting if he or she is listed in the share register as of the day of a general meeting, and may vote on all the shares owned or represented by him or her unless otherwise provided in the articles of association. However, the articles of association of a company may provide that, in order to take part in a general meeting, a shareholder must notify the company no later than the date specified in the notice of the general meeting. In companies which have their shares registered in a central securities depositary ("CSD"), the shareholder has to be listed in the share register five weekdays prior to the general meeting to be allowed to take part in and vote at the general meeting. All listed companies must have their shares registered in a CSD. Shareholders have a right to make proposals to the general meeting, and are entitled to ask questions regarding the company and its management during the general meeting. Upon request by any shareholder and where it may take place without significant harm to the company, the board of directors and CEO shall provide information regarding circumstances which may affect the assessment of a matter on the agenda or affect the assessment of the company's financial position.

A shareholder who wishes to have a matter addressed at a general meeting can do so by submitting a written request to the board of directors. Also, the board of directors have to convene an extraordinary general meeting where owners of at least one-tenth of all shares in the company demand in writing that such a meeting be convened.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

The main attribute of a limited liability company is that shareholders are free from personal liability. However, under certain circumstances a shareholder may be held personally liable for the company's obligations, such as if distribution of profits has been made in violation of the rules for dividends in the Companies Act, the receiver shall repay the amount he or she has received, including interest, if the company can show that the recipient realised or should have realised that the distribution was in violation of the rules of the Companies Act. If the distribution is not fully recovered from the recipient, persons who have participated in or executed the decision to distribute such profits (such as shareholders who have voted in favour of the decision) may be liable to cover the deficiency. Furthermore, a shareholder is liable to pay compensation for damages or loss inflicted due to wilful misconduct or gross negligence by the shareholder to the company, a shareholder or to a third party as a result of a violation of the Companies Act, applicable annual accounts legislation or the articles of association.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

A shareholder or a group of shareholders may challenge a resolution adopted by the general meeting in court if the resolution is in conflict with the Companies Act, applicable annual accounts legislation or the articles of association. If such challenge is successful the resolution may be held invalid, or be cancelled or modified.

Shareholders may also bring enforcement action against a director of the board of directors or the CEO if these corporate bodies intentionally or negligently cause damage to the company in the performance of his or her duties. The same applies where damage is caused to a shareholder or a third party due to breach of the Companies Act, applicable annual accounts legislation or the articles of association. A claim on behalf of the company may be made by the board of directors or a group of shareholders holding at least one-tenth of the shares issued.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

The Financial Instruments Trading Act prescribes that a shareholder in a listed company with shares admitted to trading on a regulated market, i.e. Nasdaq Stockholm or NGM Equity, is obligated to notify the company and the Swedish Financial Supervisory Authority (the "FSA") in writing when the change in its holding entails that the portion of all shares in the company or of the voting interest which is equivalent to the holding reaches, exceeds or falls below any of the limits of 5, 10, 15, 20, 25, 30, 50, 66 ⅔ or 90 per cent.

If a shareholder's holding in a listed company reaches at least three-tenths of the voting rights, it must immediately disclose its shareholding. The shareholder is further obligated to make an offer to purchase all the remaining shares in the company (a "mandatory tender offer"). The shareholder must launch the mandatory tender offer within four weeks after the threshold was exceeded.

The majority of all limited liability companies must register their beneficial owner(s) with the Swedish Companies Registration

Office. If an individual, directly or indirectly, controls more than 25 per cent of the votes in a company, it is assumed that such person exercises control over the company and is therefore considered a beneficial owner, who is to be registered.

As mentioned below under question 3.4, MAR also requires disclosures due to shareholdings in a listed company for persons discharging managerial responsibilities and persons closely associated with them.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no disclosure requirements for shareholders based solely on their intentions or plans regarding their shareholding.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A corporate entity is represented by its board of directors in its entirety, and in relation to the day-to-day management of the company, by its CEO. A public limited liability company is required to appoint a CEO, but the appointment of a CEO in a private limited liability company is optional.

The CEO is subordinated to the board, and the board of directors defines the authority of the CEO in written instructions and the CEO must follow the board's guidelines and instructions.

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

The directors of the board of directors are generally appointed by the general meeting with simple majority, and are normally elected for one-year periods at the annual general meeting (until the next annual general meeting). Re-election is possible unless restricted by the articles of association.

The directors of the board may resign or be removed by the general meeting. A CEO is appointed and removed by the board of directors.

Under the Code, the general meeting shall appoint members of the nomination committee or specify how they are to be appointed. The purpose of the nomination committee is to propose candidates for the board of directors as well as fees and other remuneration to the board.

As mentioned under question 4.1, the decision to elect employee representatives lies with the labour organisation when applicable.

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

The remuneration should be resolved in advance for the following year and if a member of the board of directors has accepted the position without a prior decision on the remuneration, it is implied that no remuneration was intended for it. However, he or she should be entitled to reasonable compensation for the services performed. It can also be noted that the remuneration can consist of shares and similar securities. Also, remuneration to a board member for services performed outside of their role as board members does not require a resolution from the general meeting. Such latter remuneration is to be decided by the board of directors.

The Companies Act sets forth that the general meeting shall determine the remuneration of each member of the board and CEO.

Companies listed on a regulated market shall also establish guidelines for remuneration to the executive management of the company which shall be approved by the general meeting.

The Code provides further guidelines regarding the remuneration of the board of directors and executive management on a "comply or explain" basis for companies listed on a regulated market. The process for deciding remuneration has to be formal and transparent, with a design to ensure that the company has access to the required competence. A remuneration committee should be established and any variable remuneration should be linked with measurable performance criteria.

Share-based incentive schemes for executive management should be resolved at a general meeting and the vesting period should be in excess of three years according to the Code.

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

Under MAR, all persons having managerial responsibilities in listed companies, and persons closely associated with them, have to notify the company and the FSA in respect of transactions related to shares in the company and other securities linked to the shares. The notification requirement applies to all transactions once a total amount of EUR 5,000, without netting, has been reached within a calendar year. The notification has to be made promptly and no later than three business days after the date of the transaction.

MAR also prohibits a person having managerial responsibilities in a listed company to conduct any transactions with shares and other securities linked to the shares during a period of 30 calendar days before the announcement of an interim financial report or a year-end report.

In addition, if any person receives inside information, that person is not allowed to conduct any transactions until the information has been publicly disclosed or does not constitute inside information anymore.

As mentioned above under question 2.4, a notification is also required when the shareholding reaches, exceeds or falls below certain thresholds. Also, the board of directors and CEOs shareholding in a listed company has to be disclosed on the company website.

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

Board meetings shall be held as often as required. There are, however, no statutory requirements on how many meetings that must be held. In practice, at least one inaugural meeting is held in connection with the annual general meeting. It is the chair of the board of directors that is responsible to ensure that meetings are held when necessary. The meeting of the board of directors must be convened when requested by a director, the CEO or the auditor.

A board of directors is quorate if more than half of the total number of directors, or a higher number as provided by articles of association, is present. In determining whether the board is quorate, directors with a conflict of interest are deemed to be absent.

Unless a specific qualified voting majority is prescribed in the articles of association or for certain specific cases in the Companies Act, resolutions of the board of directors are passed by a simple majority of those present. In the event of a tied vote, the chair has the casting

vote. However, if not all directors are present, those voting in favour of a resolution must constitute more than one-third of the total number of directors, unless otherwise provided by the articles of association.

Minutes must be taken at meetings of the board of directors, and an annotation must be made in the minutes of the resolutions passed by the board of directors. The minutes must be signed by the keeper of the minutes and be attested by the chair of the board of directors if the chair did not take the minutes. If the board of directors has several members, the minutes must also be attested by a member nominated by the board of directors.

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

The board of directors has extensive responsibilities in relation to the company. The board is responsible for the company's management and organisation, meaning that the board of directors is responsible for, among other things, setting the business strategy, continuously assessing the company's result and financial position as well as evaluating the day-to-day management.

The members of the board of directors and the CEO may be liable towards the company if they, while performing their duties, have intentionally or through negligence caused damage to the company.

The members of the board of directors may also be liable towards other parties (e.g., shareholders, creditors and parties to contracts, etc.) as a consequence of a violation of the Companies Act, applicable annual reports legislation (including, if applicable, the sustainability report) or the articles of association. If the company has prepared a prospectus, an offer document or other similar documents under the Financial Instruments Trading Act the board of directors may also be liable towards other parties, as regards information contained in such document as well as the format of the document.

If there is reason to assume that there is not sufficient equity to cover at least half of the share capital, the board must take immediate action, including the preparation of a balance sheet for liquidation purposes and convening of a general meeting to determine if the company should be liquidated. If the members of the board of directors do not follow the aforementioned procedure set out in the Companies Act, they can be personally liable for the company's debts.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The main specific governance responsibility of the board of directors is the organisation of the company and the management of its business. The board of directors must ensure that there is adequate control of the company's accounts, assets and business. It must continuously assess the financial position of the company and ensure that the company abides by laws and regulations. The board of directors is also under a duty to issue instructions on reporting to the board to enable the board to properly supervise the company's affairs. The board of directors is subordinated to the general meeting. The CEO has the primary responsibility for the day-to-day management which includes all measures that are not of an unusual nature or of major importance with regard to the scope and nature of the company's operations.

A key challenge in respect of corporate governance is the implementation of gender diversity policies, and gender diversity in corporate entities board compositions. In addition, the trend of the increase of regulations, especially concerning listed companies, is a challenge.

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

It is not possible under Swedish law to indemnify the board of directors or CEO in the articles of associations.

Directors' & Officers' liability insurances are permitted, and companies are commonly covered by such insurance.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The board of directors is responsible for the organisation of the company and the management of the corporate entity's affairs, which includes, among other things, setting and changing strategies of the corporate entity. However, the board of directors is subordinated to the general meeting and the objects of the business as set forth in the articles of association and the board of directors may therefore not resolve on a change in strategy that is not in accordance with the objects of the business.

4 Other Stakeholders

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

Employees in limited liability companies are entitled to elect two employee representatives to the board of directors if the company has employed on average 25 employees in Sweden during the last financial year. If the company is active in several sectors and has employed more than 1,000 employees in Sweden during the last financial year, the employees are able to elect three representatives. However, the number of employee representatives may not exceed the number of ordinary members of the board of directors.

The decision to elect representatives lies with the labour organisation. The elected representatives are considered actual members of the board of directors and are in principle equal to members of the board of directors elected at the general meeting.

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

Under the Companies Act, value transfers, i.e. dividends etc., are restricted to protect creditors and other stakeholders in limited liability companies. A value transfer may not take place if there are insufficient assets to cover the company's restricted equity after the transfer. It must also be considered whether the size of the company's equity is sufficient in relation to the nature, scope and risks associated with its operations and whether the company needs to strengthen its balance sheet, liquidity and financial position in general (see also question 3.6 above).

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

Under the Annual Reports Act, companies are obligated to prepare a sustainability report if they reach a certain size (i.e., at least two of the following three requirements: regularly have more than 250 employees, balance sheet total exceeding SEK 175 million, or net turnover exceeding SEK 350 million).

The report has to contain sufficient information to provide an understanding of the business development, financial position and results and consequences of the business. It also has to include information regarding environmental and social relationships, personnel, human rights, and anticorruption issues. The report is to include, among other things, the company's business model, the material risks related to the above-mentioned issues which are connected to the company's business, how the company manages the risks and central result indicators which are relevant to the business.

The reporting of the above should be made on a "comply or explain" basis, which means that if the company does not comply with any of the above requirements, it has to explain the reasons for the deviations.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

In accordance with the general responsibility in relation to the company, it is the board of directors as a whole that are responsible for the disclosure and transparency of information, and, as regards the day-to-day operations, the responsibility lies with the CEO.

MAR sets forth disclosure obligations of inside information for listed companies. The Code obligates the board of directors to ensure that the company's external communications are characterised by openness, and that they are accurate, reliable and relevant. It is also obligated to ensure that there is a satisfactory process for monitoring the company's compliance. Moreover, the rule books for each market place stipulate other disclosure requirements.

5.2 What corporate governance-related disclosures are required?

As mentioned under question 5.1 above, MAR obligates listed companies to disclose inside information and periodic information as soon as possible, if the information may have a significant effect on the price of the company's shares or financial instruments, i.e. if the information is to be considered as inside information.

The Annual Reports Act prescribes that limited liability companies are obligated to file the annual report with the Swedish Companies Registration Office within one month of it being adopted at the annual general meeting.

Companies listed on a regulated market are required to publish their annual reports on their website, no later than four months following the end of the financial year. In addition, companies which are subject to the requirements to prepare a sustainability report (see above under question 4.3) shall publish their report in connection with the annual report.

Companies with shares listed on a regulated market are obligated to prepare and disclose a corporate governance report in connection with the annual report. The report should include information on how the corporate governance is working and how the company is applying the Code.

Listed companies are also obligated to prepare and publish a report of annual earnings figures and interim reports within two months from the expiry of the reporting period during a financial year. A year-end report and half-yearly reports are sufficient for companies listed on MTFs, and shall be published not later than within three months from the expiry of the reporting period for reports of annual earnings figures, and within two months for half-yearly reports.

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

All public limited liability companies have to appoint an auditor. Private limited liability companies can be exempted from the audit requirement if they do not exceed more than one of the following criteria; more than three employees, balance sheet total exceeding SEK 1.5 million or net turnover exceeding SEK 3 million during the last two financial years. Interim financial reports do not have to be reviewed by an auditor, but it must be stated in the report whether the report has been audited or not for listed companies.

When a company is obligated to prepare a sustainability report, the auditor is to review whether it has been prepared in accordance with the law or not, but the auditor is not obligated to verify the quality of the report. Hence, the auditor is not required to review the content of the report.

When a company is obligated to prepare a corporate governance report, the auditor's report has to contain a statement regarding whether or not such a report has been prepared in accordance with the law. The information regarding internal control, shareholdings, voting limitations, rules regarding appointment and dismissal of members of the board of directors and authorisation to issue new shares included in the corporate governance report, has to be reviewed by the auditor to some extent. The audit report has to contain a statement on whether the information is consistent with the other parts of the annual report and compliant with applicable law regarding annual reports.

5.4 What corporate governance-related information should be published on websites?

Unlisted limited liability companies do not have to provide any information on their websites. However, all listed companies have to publish, among other things, their prospectuses, annual reports, interim financial reports, auditor's report, and the notice to attend a general meeting on their websites.

Inside information is also to be published by listed companies on their websites as soon as possible.

Companies listed on regulated markets shall publish a company calendar listing the dates on which the company expects to disclose financial statement releases, interim reports, and the date of the annual general meeting.

Under the Code, companies listed on a regulated market also have to publish the following information on their website:

- a corporate governance report;
- date and venue of the shareholders' meeting;
- names of members of the nomination committee and its statement explaining its proposals regarding the board of directors;
- information on candidates nominated for election or re-election to the board of directors;
- its current articles of association;
- information regarding members of the board of directors, the chief executive officer and the statutory auditor;
- a description of the company's system of variable remuneration to the board of directors and executive management, and of each outstanding share- and share price-related incentive scheme; and
- a sustainability report for companies which are legally required to publish such a report.

Carl-Olof Bouveng
Advokatfirman Lindahl
P.O. Box 1065
101 39 Stockholm
Sweden

Tel: +46 766 170 890
Email: carl-olof.bouveng@lindahl.se
URL: www.lindahl.se

Carl-Olof has key expertise in corporate law, mergers & acquisitions and insurance. Carl-Olof represents publicly and privately-held companies as well as private equity sponsors in a broad range of corporate transactions, including mergers and acquisitions, reorganisations and tender offers. He also advises on capital market, corporate governance and general corporate matters, as well as regulatory issues in the insurance industry. Carl-Olof also represents a number of international NGOs.

Carl-Olof is a recent Chair of the International Section of the New York State Bar Association, and also admitted to practice in New York.

Maria Arnoldsson
Advokatfirman Lindahl
P.O. Box 1065
101 39 Stockholm
Sweden

Tel: +46 766 170 998
Email: maria.arnoldsson@lindahl.se
URL: www.lindahl.se

Maria specialises in capital markets and corporate law with a main focus on capital market transactions and public M&A including IPOs, the raising of capital, public takeover bids, non-cash acquisitions, mergers and restructuring. Maria also works with corporate law, corporate governance, disclosure issues and regulatory matters on the equity capital markets.

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Switzerland

Patrick Schleiffer

Lenz & Staehelin

Andreas von Planta

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The companies covered in the answers below are organised as stock corporations.

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

The primary sources of law relating to corporate governance in Switzerland are the following:

- Swiss Federal Code of Obligations (CO), in particular Art. 620 *et seq.*, which govern stock corporations. These rules are in part mandatory and in part non-mandatory, and apply (with exceptions) to any Swiss corporation, whether privately held or listed on a stock exchange. The provisions governing stock corporations are currently being revised (see question 1.3).
- Swiss Ordinance against Excessive Compensation with respect to Listed Companies (OaEC), which implements provisions of the Swiss Federal Constitution resulting from the affirmative vote of the Swiss people on 3 March 2013 on the so-called Minder Initiative. The OaEC entered into force on 1 January 2014 and will apply until the revised provisions of the CO governing stock corporations which will incorporate the provisions of the OaEC enter into effect (see question 1.3).
- Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and its implementing ordinances which contain, *inter alia*, rules regarding the disclosure of significant shareholdings, and public takeover offers with respect to Swiss companies listed on a stock exchange in Switzerland or non-Swiss companies having their primary listing in Switzerland.
- Listing rules of the SIX Swiss Exchange (Listing Rules), the most important trading venue in Switzerland, and the implementing directives and circulars which contain, *inter alia*, periodic financial reporting and other continuing and *ad hoc* reporting rules applying to companies whose shares are listed on the SIX Swiss Exchange. The SIX Swiss Exchange holds the status of a self-regulatory trading venue under the FMIA.
- Directive on Information relating to Corporate Governance (SIX-DCG) of the SIX Swiss Exchange which requires issuers whose equity securities have their primary or main listing on the SIX Swiss Exchange to disclose in their annual reports certain information on the group and capital structure, shareholders (including their participation rights), board of directors and executive board (including their compensation as well as share and option plans), the control mechanisms and defence measures in the case of control changes, as well as auditors and information policy.
- Directive on the Disclosure of Management Transactions (SIX-DMT) of the SIX Swiss Exchange which requires issuers whose equity securities have their primary listing on the SIX Swiss Exchange to disclose transactions in the company's own shares and related instruments by members of the board of directors and the executive board.
- Swiss Code of Best Practice for Corporate Governance (SCBP) issued by *economiesuisse*, the largest umbrella organisation representing the Swiss economy in Switzerland, which sets corporate governance standards in the form of non-binding recommendations, primarily for public Swiss companies.

In addition, companies have articles of association and internal organisational regulations which, within the limits of the law, may provide for additional rules in the area of corporate governance.

Special or different rules on corporate governance exist in Switzerland for banks and insurance companies as well as for investment companies with variable capital (SICAV) or fixed capital (SICAF) within the meaning of the Swiss Federal Act on Collective Investment Schemes (CISA). Particularly noteworthy is the Circular on Corporate Governance, Risk Management and Internal Controls relating to Banks issued by the Swiss Financial Market Supervisory Authority (FINMA) that entered into force on 1 July 2017. It contains rules on corporate governance, risk management, internal control and audit in relation to banks, securities dealers, and group of such entities. These rules were previously contained in other circulars and FAQs issued by FINMA. In addition, FINMA revised its previous Circular on corporate governance, risk management and internal audit for insurance companies which entered in force on 1 January 2017. FINMA has also revised its Circular on Minimum Standards for Remuneration Schemes of Financial Institutions (the FINMA Remuneration Circular). This circular defines minimum standards with respect to the remuneration principles within banks, securities dealers, insurance companies, fund management companies, asset managers of collective investment schemes and other institutions requiring a licence from FINMA under the CISA (see question 3.3).

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

The financial crisis and the subsequent economic downturn not only fuelled public discussion on corporate governance topics like management compensation, transparency and shareholder rights,

but also increased demand on the political and regulatory level for stricter rules for banks and other financial institutions in particular, in addition to other public companies.

In March 2013, the Swiss people and cantons accepted the Minder Initiative, a popular initiative originally submitted in 2008. The initiative introduces two new paragraphs in the Swiss Federal Constitution that provide for relatively general principles on the corporate governance regime applicable to Swiss listed companies. The new constitutional provisions do not contain a detailed legislative framework and are not self-executing. Therefore, implementing legislation must be drafted. In the meantime, the Federal Council enacted the OaEC, which entered into force on 1 January 2014 and provides for transitional implementing rules that will remain in force until the Swiss Parliament has adopted the actual legislative implementation of the initiative.

The OaEC provides for, *inter alia*, the following new rules:

- Mandatory and annual election by the shareholders of the chairman and the members of the board of directors, the members of the compensation committee and the independent representative of shareholders (*independent proxy*).
- Annual binding shareholder vote on the aggregate remuneration of the members of the board of directors, executive board and advisory boards (if any).
- Prohibition of certain forms of compensation such as severance and "other" payments (*golden parachutes*), advance compensation payments and payments related to the acquisition or disposal of companies.
- Obligation of companies to fix the maximum number of permissible external mandates (in the board of directors of other companies, being listed or not) of the members of the board of directors or the executive board (in the articles of association).
- Prohibition of corporate and custodian proxies.
- Prohibition of delegation of management responsibilities to a body corporate.

According to the OaEC, the articles of association also have to include rules for members of the board of directors and the executive board on loans, retirement benefits, or incentive and participations plans. Further, the OaEC also provides for criminal prosecution in the case of a breach of the new requirements. While the new constitutional provisions and its implementing ordinance introduced a number of restrictions on remuneration practices, they do not provide for or require a cap on executive pay.

In November 2016, the Swiss Federal Council presented its revised draft of the corporate law reform along with the explanatory report and submitted it to the Swiss Parliament. The revised law is not expected to be enacted before 2020/2021. The main proposals are:

- The incorporation of the OaEC into the CO.
- A target gender quota of 30% for the board of directors and 20% for the executive committee of major publicly listed companies subject to a "comply or explain" obligation.
- An obligation for major companies in the exploitation of natural resources industry to disclose payments made to public authorities which exceed CHF 100,000 per financial year.
- Numerous changes in "traditional" corporate law, such as the permissibility of a share capital denominated in foreign currency, a "capital band" to give companies more flexibility to increase and reduce their share capital, clarification of the requirements for distributions out of the capital reserves and interim dividends, the strengthening of shareholders' rights and remedies to improve corporate governance and the enhancement of the organisation of shareholders' meetings.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Swiss corporate law does not explicitly address the question of short-termism. However, the duties of the board of directors and the management are primarily linked to the interest of the company and not to the mere financial interest of the shareholders. The rules of the SIX Swiss Exchange only provide for a duty to disclose half-year and annual results and the Swiss Code of Best Practice for Corporate Governance recommends that the board of directors be guided by sustainable corporate development. The ground rules thus imply that short-term thinking is not recommended and should not determine the leadership.

However, many companies adopted a quarterly reporting cycle and certain compensation systems are designed to favour a short-term view. Shareholder activism pushing for strategy changes with a view to realise short term gains, have further contributed. At present, the discussion on this topic is intense. Changes can be anticipated. Compensation systems may be less animated by individual quantitative targets, but pass to collective results and to qualitative expectations. In addition, companies like Nestlé and Novartis, supported by a qualified majority of their shareholders, amended their corporate purpose clause in the articles of association to link the activity to long-term value creation. Investor pressure on Corporate Responsibility and ESG targets may also have an impact and lead to a lower importance of short term targets. See also question 3.6 and 4.3.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

The operation and management of a corporation is by statutory law with the management body (board of directors and executive board), and such power may not be withdrawn by way of a shareholders' resolution (certain exceptions apply with respect to anti-takeover actions in the event of a public takeover). Accordingly, under Swiss law, shareholders have no direct rights or powers in the operation and management of a Swiss company. However, shareholders are to vote on the appointment and the removal of the members of the board of directors whenever a shareholder meeting is held and its agenda provides for the appointment or removal of the members of the board of directors. Thus, shareholders may indirectly influence the course of action taken by the board of directors by threatening or bringing removal motions. There are additional corporate actions which may have an impact on the operation of a company and for which the shareholders' approval is required, e.g. change of the company's corporate purpose, approval of mergers, declaration of dividends, and increase or decrease in the company's share capital. In addition to the above, following the entry into force of the OaEC, shareholders are entitled to vote in a binding way on the aggregate amount of compensation for the members of the board of directors and the executive board. The vote may be organised in a prospective or a retrospective way, or a combination of both.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Other than the disclosure obligations according to the CO and FMIA, shareholders have no responsibilities as regards the corporate governance of their corporate entity (see also question 2.7).

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Swiss corporations need to hold an annual shareholder meeting within six months after the close of the business year and may hold other (extraordinary) shareholder meetings as and when they need to. All shareholders are entitled to be given notice of the shareholder meeting in the form provided for by the articles of association no later than 20 days prior to the day of the meeting.

The prevailing view in Switzerland is that companies whose shares are in the form of registered shares may provide in their articles of association for the use of electronic communications to shareholders; accordingly, it should be possible to send out the relevant notice for calling a shareholder meeting to the holders of registered shares in electronic form only. However, in practice, shareholders are given notice of the shareholders' meeting by mail and publication in the Swiss official gazette of commerce.

Shareholders representing at least 10% of the share capital may request that a shareholder meeting be convened. Shareholders representing at least 10% of the share capital or an aggregate par value of at least 1 million Swiss francs may request that a specific item be put on the agenda irrespective of the board of directors' backing.

Shareholders may participate in the shareholder meeting personally or by proxy. The articles of association may limit proxy-representation to other shareholders. Pursuant to the OaEC, the board of directors had to ensure that, at the latest, in the 2015 annual general meeting, the shareholders were able to give electronic proxies and voting instructions to the independent proxy. There is, however, no duty to provide for real-time "direct" electronic voting. Further, under the OaEC, corporate and custodian proxies are no longer permissible.

Swiss corporate law does not provide for communication rights of dissident shareholders which would entitle them to require the board of directors to circulate their statements among the shareholders or to make available the name and address of the other shareholders registered in the company's share register to the dissident shareholders so that they can contact them. Thus, in practice, proxy fights are mainly fought by using the media to make the relevant positions of a dissident shareholder known to the other shareholders.

The shareholder meeting may pass resolutions and carry out elections by an absolute majority of the votes allocated to the shares represented. Certain specific resolutions, however, such as the change of a company's corporate purpose, the creation of shares with privileged voting rights, restriction of the transferability of shares, the limitation or suspension of pre-emptive rights of shareholders in a capital increase and the merger of the company by amalgamation require a qualified majority of at least two-thirds of the votes represented at the relevant shareholder meeting and an absolute majority of the nominal value of the shares represented.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

As a matter of Swiss company law, shareholders, unlike the members of the board of directors or the management of a company, do not owe fiduciary duties to the Company.

Shareholders may only be held responsible for acts and/or omissions of the company where they acted as actual or constructive founder, organ or agent of the company. In exceptional cases, the corporate veil of a company may be pierced on the grounds of abuse of rights, particularly where a sole shareholder commingles its own funds and those of the company, disregards corporate formalities, and where the company is severely undercapitalised. Also, controlling shareholders owe no fiduciary duty to the company or minority shareholders unless they act as an actual or constructive organ or agent of the company.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

In general, the members of the board of directors are liable to the shareholders for damage caused to them by any intentional or negligent violation of their duties (see question 3.6).

Resolutions of the board of directors may not be challenged in court. Exceptionally, however, resolutions of the board of directors which are so defective as to be incompatible with the basic structure or organisation of the company may be declared void by the court following a petition of shareholders.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Under Swiss corporate law, there are no statutory limitations on the number of shares a shareholder may hold or the speed with which he can build a stake in a company. To the extent provided in the articles of association, listed companies with registered shares may, however, refuse to register shareholders in the company's share register with voting rights, if (i) a shareholder, or shareholders acting in concert, exceeds a certain defined percentage of registered shares in the company, or (ii) the acquirer, on the company's request, does not state that he holds the acquired shares in its own name and for its own account. In addition, the articles of association may provide for voting restrictions so that a shareholder may only exercise its voting rights up to a certain percentage. Moreover, the articles of association may refuse the registration as a shareholder with voting rights if such registration would prevent the company from providing evidence of Swiss control as is required by certain Swiss laws. Further limitations and restrictions apply with respect to regulated industries (e.g. banks and insurance companies) and in the case of a public takeover.

As regards disclosure, under the FMIA and its implementing ordinance, whoever, directly or indirectly or acting in concert with others, acquires or sells shares in a Swiss company listed on a stock exchange in Switzerland and thereby reaches, exceeds or falls below the threshold percentages of three, five, 10, 15, 20, 25,

33⅓, 50 and 66⅔% of the voting rights must notify the company, as well as the stock exchange within four trading days. Under the new rules of the FMIA, persons who have the discretionary power to exercise voting rights (i.e. asset managers) are also subject to these disclosure obligations. The company then has to make regulatory announcements of this information by using the SIX Swiss Exchange's electronic reporting platform. The disclosure obligations are (*inter alia*) also triggered by put and call options and conversion rights. Under the FMIA, the duty to disclose significant shareholdings also applies with respect to non-Swiss companies with a main listing on a stock exchange in Switzerland. Further, Swiss company law requires listed companies to disclose in their annual report the identity of shareholders or organised groups of shareholders with an interest in shares of more than 5% (if the articles of association provide for a percentage restriction of shareholders at less than 5%, it is this lower percentage which applies to this disclosure). As to dealing in shares of the company by the members of the board of directors or the executive board, see question 3.4.

In the course of implementing the revised Financial Action Task Force (FATF) recommendations of 2012, new provisions have been incorporated into the CO, according to which any person who acquires bearer shares in a company whose shares are neither listed nor organised as intermediated securities must give notice of the acquisition to the company within one month. Additionally, any person who, alone or by agreement with third parties, acquires bearer or registered shares in a company whose shares are neither listed nor organised as intermediated securities, and as a consequence of the acquisition reaches or exceeds the threshold of 25% of the share capital or votes, must within one month give notice to the company about the beneficial owner of the acquired shares. For as long as the shareholder fails to comply with his obligations to give notice, the membership and property rights conferred by the shares in respect of which notice of acquisition must be given are suspended.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Shareholders as such are not required to disclosure mere intentions, plans or proposals to the company or the public. See also question 2.6.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

In principle, Swiss corporate law provides for a one-tier board structure. However, the board of directors is granted considerable organisational discretion. Save for non-transferable core competences, such as strategic management, appointment and removal of the members of the management, the supervision of the management and the setup of a sufficient internal controlling and reporting system, the board of directors may delegate the management to an individual or to an executive board. In listed companies, the day-to-day management is typically delegated to the chief executive officer or the executive board, resulting in a two-tier board structure. Special rules apply to banks and security dealers which must establish a two-tier structure with a functional and personal separation of operative management and supervision.

Swiss law does not require that the functions of the chairman of the board of directors and the CEO be separated (except for banks and security dealers). To the extent that the board of directors decides that a single individual should assume the functions of the chairman of the board of directors and the CEO, the SCBP recommends that the board of directors provides for adequate control mechanisms, e.g. by appointing a non-executive member of the board of directors (lead director) responsible for such control.

Under Swiss law, there is no required minimum number of non-executive or independent directors. The SCBP recommends that the majority of the board of directors be composed of non-executive directors, i.e. members who do not perform any line management function within the company. In practice, this recommendation is widely followed (and always has been) by all listed companies. Further, with respect to licensed banks and securities dealers, FINMA expects that a substantial number of the members of the board of directors – at least a third – should be independent, i.e. members who are not and have not in the previous two years been employed in some other function within such entities or as their lead auditor, have no commercial links with such entities which would lead to conflicts of interests and are not a qualified shareholder (shareholding of at least 10%) in such entities and represent no such shareholder. Further, all members of the board of directors of licensed banks and securities dealers must be non-executive directors.

Other than as set out below, neither Swiss corporate law, nor the Listing Rules or any other rules of the SIX Swiss Exchange explicitly provide for mandatory board committees (special rules apply to banks and insurance companies). The SCBP recommends that an audit, compensation and nomination committee be established. The members of the audit committee should be non-executive, preferably independent directors and the majority of the members (including the chairman) should be experienced in accounting matters. The members of the compensation committee should be independent directors. The SCBP defines "independent director" as a non-executive member of the board of directors who has not been a member of the executive management in the past three years and who has no, or only comparatively minor, business relations with the company.

With respect to listed companies, the OaEC provides for a mandatory and annual election by the shareholders of the members of the compensation committee. Further, the articles of association of a listed company must provide for principle-based rules regarding the powers and responsibilities of the compensation committee (which may also be given additional duties, such as nomination of members of the board of directors or the executive board).

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

The shareholder meeting appoints and removes the members of the board of directors (see question 2.1). Removal is possible at any time, irrespective of terms of office which may still be running.

The OaEC provides for mandatory and annual election by the shareholders of the chairman and the members of the board of directors, the members of the compensation committee and the independent representative of shareholders (*independent proxy*) (see also question 1.3).

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

With the acceptance of the Minder Initiative, the Swiss Constitution has been amended with a number of new provisions that aim to increase transparency and introduce stricter rules with respect to the remuneration of the board of directors and the executive board of listed companies. As discussed above, these new constitutional

provisions are currently being put into law as they are not directly applicable (see question 1.3). Until this legislative implementation has been approved by the Swiss Parliament, the transitional rules as set out in the OaEC apply to all Swiss listed companies. As discussed in more detail below, the new rules of the OaEC prohibit various forms of compensation and require listed companies to amend their articles of association with new compensation-related provisions. Further, the OaEC provides for detailed rules regarding the compensation report that listed companies are required to prepare for each financial year. Under these rules, listed companies are obliged to disclose the total aggregate amount of all remunerations to members of the board of directors and the executive board. In addition, compensations and loans of persons close to the members of the board of directors or the executive board have to be disclosed. Compensations and loans granted to every member of the board of directors have to be disclosed individually, comprising the name and function of the member. With respect to the members of the executive board, only the highest compensation awarded, indicating the recipient and his/her function, has to be disclosed. In addition, the SIX-DCG requires the disclosure of information on the basic principles and elements of compensation, the number of permitted activities of the members of the board of directors and the executive committee as well as any share and option plans in the annual report.

Even before the entry into force of the OaEC, the SCBP already provided for detailed recommendations pursuant to which the board of directors has to implement a compensation system for the members of the board of directors and the executive board and to prepare a compensation report for the annual shareholder meeting describing the remuneration system and its application in the business year under review. It was further recommended that the board of directors either brings the compensation report into the discussion during the agenda items "approval of the annual financial statements" or "discharge to the board" (so that the resolution to approve the annual financial statements and the resolution of discharge, respectively, are taken by the shareholders in knowledge of the content of the compensation report), or puts the compensation report to a consultative vote at the annual shareholder meeting in question. In practice, many listed companies accepted the alternative of a consultative vote. Following the implementation of the Minder Initiative, Swiss listed companies are required by law to submit the aggregate compensation of the members of the board of directors, executive board and advisory committees to a binding vote of the shareholders. The first mandatory votes on the aggregate compensation of the board of directors and the group executive board occurred on the occasion of the 2015 annual general meeting (see questions 1.3 and 2.1). With respect to such a vote, companies may choose to have the shareholders prospectively or retrospectively approve the aggregate compensation of the members of the board of directors and the executive board. They may also choose a combination of the two systems by submitting fixed compensation to a prospective and variable compensation to a retrospective vote. As for the compensation report, the OaEC does not require listed companies to submit their compensation report to a vote of the shareholders.

Under the OaEC, certain forms of compensation are prohibited. This includes severance payments, advance payments, payments related to the acquisition or disposal of businesses, loans, credit, pension benefits or performance-based remuneration not provided for in the articles of association and the allocation of shares, other equity securities and options or conversion rights not provided for in the articles of association (also see question 1.3).

The revised FINMA Remuneration Circular supplements the above rules for banks, insurance companies and other financial institutions (see question 1.2). Its provisions are only mandatorily applicable for large banks and large insurance companies. Generally speaking, the FINMA Remuneration Circular places the responsibility for the compensation system of financial institutions on the board of directors, puts the emphasis on the sustainability of remuneration practices, in particular with respect to variable remuneration and the prevention of incentive distortions, and also increases transparency with respect to the remuneration practices. Further, the FINMA Remuneration Circular defines minimum standards for the design, implementation and disclosure of remuneration schemes of banks, insurance companies, securities traders and other financial institutions supervised by FINMA, as well as their consolidated domestic and foreign subsidiaries and branches, and covers the salaries of all employees including the executive board and the board of directors (the only exceptions being the remuneration of partners with unlimited liability and persons holding an interest of at least 10% in the company).

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

Directors may own shares in their companies.

As to disclosure, the significant shareholding notification requirements of the FMIA apply equally to director shareholders (see question 2.7). Further, Swiss corporate law requires that any shares, as well as option and conversion rights of the members of the board of directors, the executive board and persons close to them be disclosed on an individual basis in the notes to the annual financial statements of the company.

As regards dealing in the company's own shares, companies with a primary listing on the SIX Swiss Exchange are, under the SIX-DMT, obliged to ensure that the members of their board of directors and their executive committee report all transactions no later than the second trading day after the reportable transaction (i.e. a transaction in the company's own shares, conversion and share acquisition rights, as well as in financial instruments, the price of which is influenced primarily by the company's own shares) has been concluded. The companies then have to report such transactions within another three trading days to the SIX Swiss Exchange. Transactions by related parties which are made under the significant influence of a person who is subject to a reporting obligation under the SIX-DMT are also to be reported to the SIX Swiss Exchange. The relevant notifications to the SIX Swiss Exchange, *inter alia*, have to include the name and function of the person subject to the reporting obligations, number and type of instruments, as well as the total value of the transaction. The SIX Swiss Exchange has to publish the content of such reports (except for the name of the person subject to the reporting obligation and the date on which such a person has reported the relevant transaction to the company) by making such information accessible on the website of SIX Exchange Regulation for a period of three years.

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

Swiss company law requires that at least one board meeting be held per year for the purpose of preparing the annual general shareholder meeting. In addition, each member of the board of directors may request that a board meeting be convened at any time. The SCBP recommends that at least four meetings of the board of directors be held annually according to the requirements of the company and that its members convene at short notice if necessary.

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

In fulfilling their responsibilities, the members of the board of directors have to comply with the duties of care and loyalty, as well as the duty to treat shareholders equally. The duty of care requires the members of the board of directors to comply in their actions with standards of care as usual in a given professional or functional context. The duty of loyalty requires a director not to pursue his interests to the disadvantage of the company's interests. Under Swiss law, the duties of care and loyalty are owed to the company rather than towards the shareholders. The duty of equal treatment requires the board of directors to treat shareholders under the same circumstances equally. Deviations from equal treatment are permitted if such deviations are in the company's interests and justified by a valid reason.

In fulfilling its responsibilities, the board of directors has to safeguard the company's interests. The company's interests as commonly defined in Switzerland encompass not only the interests of the shareholders but also the interests of other stakeholders such as the company's employees.

Upon breach of the board of directors' duties, which has the consequence of damage to the company, the company or each of the shareholders may sue the directors; creditors are only entitled to sue the directors for damages incurred by the company if the company is bankrupt. If the board of directors has delegated the management of the company in compliance with the statutory requirements, and the damage has been caused by the management, the board of directors is exempt from liability if careful selection, instruction and supervision of the management can be demonstrated.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

According to the SCBP, the board of directors is to provide leadership and control to the company. It is responsible for the strategic direction of the company and should ensure that strategy and finances are in harmony. Further, the board of directors should ensure that management and control functions are allocated appropriately.

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

The general view in Switzerland is that companies are permitted to maintain insurance in respect of directors' and officers' liability to the company and to pay for the premium.

An undertaking of the company to indemnify directors and officers for liabilities is likely to be held invalid, except for costs incurred in connection with lawsuits unsuccessfully brought against a director or officer.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Under Swiss company law, the setting and changing of the company's strategy is with the board of directors. If a change of strategy requires an amendment to the articles of association (e.g., an amendment to the purpose clause in the company's articles of association), the shareholders will have to approve such amendment.

4 Other Stakeholders

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

Although unions have contributed to some extent to the recent discussion in Switzerland of corporate governance-related issues, in particular with respect to board of directors and management remuneration, employees do not play a prominent role in corporate governance. In particular, Swiss law does not require that employees be represented on the board of a company (irrespective of whether privately held or listed on a stock exchange).

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

Other stakeholders do not play a prominent role in corporate governance (see also questions 4.1 and 4.3).

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

Neither Swiss company law, nor the Listing Rules (and its implementing directives or circulars enacted thereunder), nor the SCBP provide for specific rules with regard to corporate social responsibility. However, the board of directors, in determining the company's best interests, has to take into account not only the interests of the shareholders but also those of other stakeholders, such as the employees of the company (see question 3.6).

Since 1 July 2017, issuers with a primary listing of equity securities on the Swiss Exchange have, according to the SIX-DCG, the opportunity, by means of an opting in, to inform SIX Exchange Regulation that they issue a sustainability report in accordance with an internationally recognised standard. This fact has to be published on the website of the SIX Swiss Exchange.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

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

5.2 What corporate governance-related disclosures are required?

As regards financial reporting, companies listed according to the main standard of the SIX Swiss Exchange must publish audited annual financial statements and unaudited half-year interim financial statements in accordance with either IFRS or US GAAP and in line with the Listing Rules and the relevant directives. The Listing Rules further require the company to submit a corporate calendar containing the dates of important corporate events such as the date of shareholder meetings and the publication date of the annual financial statements or the half-year financial statements to the SIX Swiss Exchange and keep such information up-to-date.

SIX Exchange Regulation, responsible for the enforcement of the issuer and participant regulation, introduced a new regulatory standard concept in October 2014 with the aim to streamline the current structure, clearly position Swiss GAAP FER as one of the

relevant accounting standards and amend the admission criteria to meet market requirements. The new regulatory standard concept is based on a Standard for Equity Securities (broken down into a Sub-Standard for International Reporting and Sub-Standard for Swiss Reporting). IFRS or US GAAP must be used on the International Reporting Standard, whereas issuers who opt for Swiss GAAP FER are allocated to the Swiss Reporting Standard. The new regulatory standard concept entered into force as of 1 July 2015.

As regards other information, listed companies have a duty to disclose potentially price-sensitive facts (*ad hoc* information) and to disclose in a separate section of their annual report information, *inter alia*, on the group and capital structure, shareholders, the board of directors and the executive board, basic principles and elements of compensation as well as the share and option plans, changes of control and defence measures, and on information policy. With respect to such information, the principle of "comply or explain" applies, i.e. the company must give specific reasons for each instance of non-disclosure to the extent that it decides not to disclose certain information. Further, listed companies have to prepare a compensation report that discloses, *inter alia*, the amount of compensation paid to the members of the board of directors and the executive board and the shares in the company held by them (see questions 3.3 and 3.4).

Copies of the articles of association may be requested from the relevant commercial register with which the articles of association must be filed. The SCBP recommends that the articles of association be made available from the company in writing or in electronic form at any time. The company's organisational regulations do not need to be made publicly available. However, the company must inform the shareholders upon their request about the organisation of the management (see question 3.8). Often, the articles of association, as well as the organisational regulations, can be downloaded from the company's website.

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

The company's auditors have to audit the annual financial statements (but not the interim financial statements) and, since the adoption of the OaEC, the compensation report. In addition, as the information on remuneration and the shareholding interests of the board of directors and the executive board must be disclosed in the notes to the annual financial statements, such disclosures in the notes must be verified by the company's auditors in the course of their ordinary audit activities. Furthermore, the company's auditors have to verify whether an internal control system exists.

5.4 What corporate governance-related information should be published on websites?

Listed companies are required to make the published annual and interim financial reports available in electronic form on their website. They must also make available any *ad hoc* information on the company's website at the same time as it is distributed to the SIX Swiss Exchange and electronic information systems such as Bloomberg, Reuters or SIX Financial Information, and keep such information posted on the website for at least two years. Finally, listed companies must maintain a so-called "push system", a service that allows investors wishing to receive *ad hoc* information from the company directly to sign up for future distributions on the company's website.

Patrick Schleiffer
Lenz & Staehelin
Brandschenkestrasse 24
CH-8027 Zurich
Switzerland

Tel: *+41 58 450 80 00*
Email: *patrick.schleiffer@lenzstaehelin.com*
URL: *www.lenzstaehelin.com*

Patrick Schleiffer has been a partner with Lenz & Staehelin since 2002 and is co-head of the capital markets group in Zurich and a leading expert on financial market law, particularly capital markets, stock exchange and securities law, investment fund law, financial services regulation, corporate law and corporate governance. Patrick Schleiffer holds lic. iur. and Ph.D. degrees from the University of Zurich and an MCJ degree from the New York University School of Law, New York. He was admitted to the Zurich Bar in 1995 and to the New York Bar in 1997. Patrick Schleiffer is admitted as a recognised representative for the listing of securities on the SIX Swiss Exchange. He lectures capital markets and securities law in the LL.M. Programme of the University of Zurich and is a regular speaker at conferences. He is co-editor of the Swiss internet-based law journal CapLaw and the current newsletter editor of the Securities Law Committee of the International Bar Association (IBA).

Andreas von Planta
Lenz & Staehelin
Route de Chêne 30
CH-1211 Geneva 6
Switzerland

Tel: *+41 58 450 70 00*
Email: *andreas.vonplanta@lenzstaehelin.com*
URL: *www.lenzstaehelin.com*

Andreas von Planta was a partner with Lenz & Staehelin from 1988 to 2017. Since 2018 he has been Senior Counsel at Lenz & Staehelin. He is a leading expert in corporate law, stock exchange regulation and one of the most experienced M&A practitioners in Switzerland. Andreas von Planta holds lic. iur. and Ph.D. degrees from the University of Basel and an LL.M. from the Columbia University School of Law, New York. He specialises in corporate law, corporate finance, company reorganisations and M&A. He is a member of governing or supervisory bodies of several Swiss listed companies such as Helvetia Holding AG and Novartis AG. Furthermore, he has been admitted as a recognised representative for the listing of securities on the SIX Swiss Exchange. Since 2008, Andreas von Planta chairs the Regulatory Board of the SIX Swiss Exchange, its independent body entrusted with the adoption of self-regulation.

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Turkey

Arzu Aksaç

Aksac Law Office

Yaprak Derbentli

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The corporate entity under Turkish Law that may offer tradeable shares to the public is the joint stock company ("**JSC**"). Our replies below are structured so as to capture corporate governance issues both from the perspective of closely and publicly held JSCs. In addressing the issues pertaining to publicly held JSCs, we have made a distinction between listed and non-listed JSCs, where necessary.

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

The main legislative and regulatory sources in relation to corporate governance in Turkey are:

- Turkish Commercial Code no 6102 ("**TCC**") and the underlying legislation;
- Capital Markets Law no 6362 ("**CML**");
- *Communiqué* on Corporate Governance ("**CGC**");
- *Communiqué* on public disclosure of material events (II-15.1) ("***Communiqué* no II-15.1**"); and
- *Communiqué* on public disclosure of material events concerning corporations whose shares are not traded on the stock exchange (II-15.2) ("***Communiqué* no II-15.2**").

The Ministry of Customs and Trade ("**Ministry**") acting through its provincial Trade Registry directorates is responsible for the due implementation and enforcement of the corporate governance principles embodied in the TCC and the underlying secondary legislation.

In the field of capital markets, it is the Capital Markets Board ("**CMB**"), an independent regulatory and supervisory authority that is in charge of the application and enforcement of the CML in general and, in particular, the corporate governance-related secondary legislation. The CMB is also empowered by law to regulate the capital markets by way of issuing secondary legislation which usually takes the form of regulations, *Communiqués* and principle resolutions, all of which are of a binding nature. The main duty of the CMB is to ensure the fair and orderly functioning of the capital markets, while protecting investor rights. In order to achieve this goal, it determines the terms and conditions for the due operation of capital markets and capital market institutions. It is also responsible for cooperating with other financial regulatory bodies in order to ensure financial stability. From among the CMB *Communiqués* enlisted above, all of them are mandatory, except for the *Communiqué* on Corporate Governance, which is compulsory only for certain publicly held JSCs.

Borsa Istanbul A.Ş. ("**Borsa Istanbul**"), formerly named the Istanbul Stock Exchange, was founded at the end of 1985 and was demutualised in 2013 following the enactment of the CML. For the time being, it is the only exchange in Turkey where securities, derivatives and commodities are being traded. It has some self-regulatory authority on its members, but decisions on major important issues are subject to the approval of the CMB. The principles regarding: listing, de-listing, trading and suspension of trading; transmitting and matching of orders; performing in due time obligations related to executed trades; granting of authorisations to trade at the Borsa Istanbul; operation, audit and surveillance systems of the Borsa Istanbul; and establishing, operating and managing markets, etc. are set forth under the Regulation on Exchange Business Activities of Borsa Istanbul A.Ş. which was published in the Official Gazette no 29150 dated October 19, 2014.

Apart from the foregoing, the Turkish Capital Markets Association ("**TCMA**"), a self-regulatory organisation, sets forth professional rules of conduct and monitors the members to provide a fair and disciplined capital market. It issues and implements regulations on the subjects determined by law or by the CMB. All investment firms, banks that are authorised for capital market operations, portfolio management companies and investment trusts are required to become members of the TCMA.

As far as the constitutional documents of the corporate entities are concerned, Articles of Association ("**AoA**") encompass, among others, the main corporate governance rules. According to common practice, AoA mirror the mandatory provisions of the TCC regarding corporate governance. In addition to these, companies which voluntarily choose to adopt those principles of law which are of a non-binding nature may insert in their AoA appropriate provisions to this end. The AoA, and therefore any corporate governance rule contained therein, is binding on the shareholders, Directors and the JSC and third parties.

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

The TCC, which came into force in 2012, does not include a catalogue of corporate governance principles; however, it introduces certain mandatory provisions with respect to corporate governance. On the other hand, the CML came into force in 2012 within the context of modernisation of the rules that govern capital markets in Turkey. In contrast with the TCC, the secondary legislation issued under the CML contains corporate governance principles, some of which are optional and some of which are compulsory.

The replacement of outdated legislation, which could no longer respond to the needs of the developing Turkish economy, is later followed by the enactment of certain supplementary legislation such as the CGC, which became applicable in 2014.

In terms of corporate governance, TCC has wider application, in the sense that its provisions are applicable both to closely held and publicly held JSCs, whereas the CML exclusively applies to publicly held JSCs.

The CMB is conferred with the authority under TCC and CGC to determine the corporate governance principles that will be applicable to public companies, as well as which of those principles shall qualify as mandatory in nature and which ones shall be optional.

The current challenges to corporate governance in Turkey, as further explained below, can be listed as **i)** lack of legal provisions regulating indemnity of Directors, **ii)** the immature practice of obtaining Directors' liability insurance, **iii)** Directors' personal liability for any outstanding public receivables owed by the JSC, and **iv)** auditing not being compulsory for the companies which are not subject to compulsory independent auditing.

Apart from the above, the State has strong influence in Turkish economy and expropriation is quite common. The number of public companies in the market is quite low and most companies are owned by families.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Answer not available at time of print.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Rights and powers with respect to the operation and management of the corporate entity are vested in the Board of Directors ("**BoD**") as explained in section 3 below.

Save for the minority's rights as described below, shareholders do not hold any unmediated operational or managerial powers individually, with the exclusion of a few indirect management rights explained below. However, certain powers are granted by law to the General Assembly of Shareholders ("**GAS**") and have direct effect on the operation and management of a JSC. These non-transferable powers are:

- Amendment of the AoA of the JSC.
- Appointment, discharge and release from liability of Directors, determination of their term of office, attendance fee and premiums.
- Election and discharge of auditors of the JSC, as required by law.
- Distribution of dividends.
- Dissolution of the JSC.
- Wholesale of a substantial part of the JSC's assets.

Apart from the foregoing, shareholders who own a minimum of 10% of the share capital in a closely held JSC and a minimum of 5% of the share capital in a publicly held JSC are specified as "**minority shareholders**" under the TCC, and as such qualify for exercising a set of special rights related to corporate governance. These rights are:

- Right to request the convocation of the GAS from the BoD; failing which, from the competent commercial court.
- Right to request the insertion of a subject in the agenda of the GAS.
- Right to postpone the deliberations on the balance sheets and financial accounts.
- Right to request the replacement of the auditor of the JSC by way of a lawsuit subject to certain conditions.
- Right to veto the discharge of Directors, founders and auditors of the JSC from liability concerning foundation of the JSC and any capital increase.
- Right to request the dissolution of the JSC on the basis of justified reasons.
- Right to request the attendance of a Ministry representative to the GAS meetings.
- Right to be represented at the BoD if it is regulated under the AoA of the JSC.
- Right to request the appointment of a special auditor by the commercial court, in cases where a previous request on the same issue that was directed at the GAS was dismissed.

Finally, the following rights of shareholders which relate to the management of the JSC can be exercised by a shareholder, individually:

- Right to request cancellation of GAS resolutions, subject to certain conditions.
- Right to request information from the BoD on the operations of the JSC, and the method of auditing used by auditors and its results at GAS meetings.
- Right to examine commercial books and related correspondences of the JSC subject to the consent of the BoD.
- Right to apply to the court in cases where any of the JSC's compulsory organs cease to exist due to e.g. vacation of seats in the case of the BoD and consequent incapability to satisfy meeting quorum.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Participation, representation and voting at the GAS are essential rights and responsibilities vested in shareholders. As explained below, the GAS is the primary decision-making organ of a JSC.

Save for those particular rights which are exclusively vested, by law, in the GAS and shareholders as explained at question 2.1 above, shareholders do not, in principle, hold any responsibilities in terms of corporate governance. Nevertheless, in cases where the AoA expressly specifies any particular issues or transactions which require shareholders' approval, the JSC can only engage in the transaction concerned or take any action as regards to the issue at hand subject to the said GAS approval. At present, there are no particular statutory provisions, *Communiqués*, decrees, nor any settled practices of the regulatory bodies (in the case of publicly held companies) which set forth any codes of conduct which the shareholders should sign up to in engaging with the companies they invest in or which encourage them to take more interest in and/or exercise more control over corporate governance issues. However, as explained above, there is no legal impediment to regulate this issue in detail in the AoA, and grant wider rights than usual to the GAS in terms of corporate governance. It should also be noted that those powers of the BoD which are specified by law as non-transferable cannot be conferred upon the GAS.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

GAS meetings are commonly held in two types: (i) ordinary GAS meeting; and (ii) extraordinary GAS meeting. It is mandatory for companies to hold an ordinary GAS meeting within three months of the end of each fiscal year. In accordance with the TCC, the following issues should be discussed and resolved at an ordinary GAS meeting:

- Election of the BoD, and if applicable, the auditors of the JSC.
- Discussion and approval of financial statements and annual activity report of the BoD.
- Determination of profit and its distribution.
- Release of members of the BoD.
- Decisions on other necessary issues related to the relevant fiscal year of the JSC.

On the other hand, extraordinary GAS meetings can be held as and when needed.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders who are not BoD members, nor specifically designated agents of the JSC, do not, in principle, have any liability for acts or omissions of the JSC.

Although Turkish statutory law does not adhere to the doctrine of lifting the corporate veil in the practice of the Turkish Court of Cassation, there are just a few precedents whereby shareholders were personally held liable for the acts of the JSC in accordance with the general principle of *objective good faith* embodied in Article 2 of Turkish Civil Code no 4721, and a set criteria applied by court.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Shareholders have the right to take legal action against Directors and demand compensation for a JSC and themselves in cases where the Directors concerned wrongfully breached any of their duties and responsibilities under the law or AoA. The Directors' liability is a fault liability.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

As a rule, there are no restrictions in relation to interest in securities held by shareholders.

However, with regard to publicly held JSCs, the shares of which are not traded at the stock exchange, there are certain disclosure requirements in respect of the quantity and acquisition price of the shares acquired by any shareholder, as well as any other information that may affect decisions of the investors.

With regard to public companies, it is obligatory to make a public disclosure, in the case that the total voting rights held by any real person or legal entity shareholder, or others acting in concert together with the said shareholder, reaches 5%, 25%, 50%, 67% or 95% of the share capital or drops below any of these percentages, or in cases where a direct or indirect change in management control occurs by way of a contract or other means.

Under the Foreign Direct Investment Law, companies with foreign capital are obliged to notify the General Directorate of Incentive Practices and Foreign Capital of any share transfers made by, and between, the existing local and foreign shareholders.

Finally, share transfers may trigger approval requirements under the applicable anti-trust laws, and depending on whether they involve any particular regulated sector, they may be subject to the prior approval of the regulatory body concerned, and, in the case of publicly held JSCs, of the CMB.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Answer not available at time of print.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The management body of a JSC is the BoD. The BoD is vested with the authorities to manage and represent the JSC. Both of these powers are, in principle, transferable subject to certain limitations prescribed by law. Turkish Law adheres to the single-board system. Hence, there is no separate supervisory body and supervision powers lie with the GAS.

The management power of the BoD can be delegated, wholly or partially, to one or multiple Directors or third-party individuals, provided that the AoA of the JSC expressly allows such delegation and the BoD issues and registers with the Trade Registry an internal directive specifying the persons to whom and to what extent the management powers are delegated. Subject to the limitations described below, the BoD may appoint a Director as CEO or a non-Director CEO from outside the BoD. In this case, the BoD remains vested with those management rights which are specified by law as non-transferable. These non-transferable rights are (i) high-level management of the JSC, (ii) to form the managerial structure of the JSC, (iii) to supervise those who are responsible for the day-to-day management of the JSC including the CEO and operation directors, (iv) to ensure compliance with law, AoA, internal directives and written instructions of the BoD, (v) to keep the book of shares of the JSC, minutes of BoD and GAS meetings, and (vi) to conduct the preparations for GAS meetings and to execute GAS resolutions.

Unless specified otherwise under the AoA and unless the BoD is a single Director BoD, the power to represent the JSC is exercised with the joint signatures of two Directors. In cases where the representation authority is delegated to a single non-Director, one BoD member must also retain the power to represent the JSC. Upon the delegation of the representation authority, Directors who no longer have the power to represent the JSC become non-executive Directors, whereas those conferred with the power to represent the JSC become executive Directors.

The BoD can set up committees or commissions for the purposes of monitoring the operations of the JSC, preparing reports on specified issues, ensuring the due application of its resolutions and providing an internal control mechanism.

In companies, the shares of which are traded at the stock exchange, the BoD must establish a committee for early detection of risks so as to determine any development which may potentially pose a threat to the existence, growth or continuation of the JSC and to take measures, as appropriate.

Additionally, the CGC contains mandatory provisions regarding the establishment of certain committees, including the nomination committee and the remuneration committee.

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

BoD members are initially appointed by the AoA at the stage of incorporation. Subsequent members are appointed by the GAS. The maximum tenure for BoD membership is prescribed as three years under the TCC, and Directors can be re-elected. The BoD can consist of one or multiple members and the TCC does not set out an upper threshold for the number of Directors. Nevertheless, the CGC regulates that JSCs whose shares are traded on the stock exchange shall have at least five Directors, the majority of which must be non-executive. Among these non-executive Directors must exist what the CGC refers to as independent Directors, the selection criteria for whom are also listed thereunder. At least one-third of the BoD must be comprised of independent Directors.

Directors do not have to be a citizen of the Republic of Turkey and foreign individuals and corporates can act as Directors in JSCs.

Legal entities can be designated as Directors; in which case, a real person representative must be appointed to serve on the BoD on behalf of them.

Certain share groups, group of shareholders or minority shareholders can be granted the right to be represented at the BoD, if the AoA so provides.

In cases where a Director's seat becomes vacant due to his death, resignation or dismissal within his tenure, the BoD can temporarily appoint a new Director until the immediately following GAS. The temporary member will then be voted in or out by the GAS at this meeting.

The BoD membership of a Director shall cease automatically, if such BoD member is declared bankrupt, loses his/her legal capacity or can no longer meet any special requirements stipulated in the AoA or the applicable legislation. Additionally, BoD members can always be dismissed by way of a GAS resolution, even if such dismissal was not on the meeting agenda.

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

The TCC and CML both contain provisions regarding the remuneration of Directors, according to which salary, bonus, premium and/or meeting attendance fees can be paid to Directors. Directors can be allotted a certain share from the annual profit of the JSC, provided that the amount of these payments are determined under the AoA or by way of a GAS resolution and legal reserves and dividends are duly allocated.

Pursuant to the CML, Directors cannot receive a share from the annual profit in publicly held companies, unless the legal reserves and dividends are duly allocated.

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

Under the TCC, there are no limitations in terms of the value or percentage of shares which a Director can hold in a JSC. With that being said, a Director who holds a stake exceeding the thresholds specified by law becomes subject to the disclosure requirements explained under question 2.7, above.

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

There is no prescribed form of convocation for BoD meetings. It is permissible for all or some Directors to attend and vote in BoD meetings in an electronic environment, provided that certain requirements listed under the TCC, e.g. that the JSC must have a website allocated for this purpose, are duly satisfied. The frequency of BoD meetings can be determined in the AoA. In any case, the BoD can convene at any time it deems necessary. Unless a higher quorum is specified under AoA, the BoD shall convene with the simple majority of its members and pass resolutions with the affirmative votes of the majority of those who attend, regardless of whether the meeting is held physically or electronically. If none of the Directors calls for a physical meeting, BoD resolutions can be passed by way of one Director drafting a resolution template containing his proposals, sending it to all Directors in the JSC and obtaining the written approval of the majority of the BoD.

The chairman does not have a privileged vote, and in the case of equal votes, a second meeting must be held. If there is still a tie in votes in the second meeting, the proposal is deemed to have been refused.

The CGC sets forth certain principles regarding BoD meetings, which are not compulsory in nature and only advisory.

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

The main fiduciary duties of Directors can be listed as the duty of acting diligently and prudently, the duty of loyalty and non-compete and the duty of care. The TCC stipulates that Directors who breach their duties, as defined by the law and AoA, by way of fault, shall be liable for any losses and damages caused against the JSC, shareholders and JSC creditors. Unless a distinction was made between executive and non-executive Directors or the duties of the BoD were transferred to a CEO, all Directors should hold appropriate professional skills and experience reasonably required in the corporate field of activity of the JSC. In addition, the Directors should, in all their acts and dealings, observe and respect the rights and interests of the JSC and the shareholders within the framework of the applicable laws and the AoA. The liability of Directors in publicly held JSCs is more extensive. In the case of public offerings, any loss, which may be sustained by investors due to any inaccurate, misleading and incomplete information included in the prospectus can be demanded from the Directors who are proved to be at fault, subject to certain conditions. Furthermore, Directors shall be liable for damages arising from the interim financial statements failing to reflect the actual status of the JSC or not being prepared in accordance with the legislation and the accounting principles and rules adopted by the JSC.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Generally speaking, to the extent that the AoA provide for the setting-up of special committees for internal control systems, early risk detection and risk assessment or management processes and systems and the like, the BoD shall be responsible for forming these committees from among the company personnel with the appropriate level of expertise and qualifications, and where necessary, outsource any associated ancillary services. Each of these committees will operate under the supervision of, and report to, the BoD. Thus, ultimate liability for ensuring that the subject committees fulfill their duties in compliance with the law and the objectives drawn up in the AoA is vested in the BoD. Moreover, unless the members of any committee are called in to brief the shareholders on any specific issue, the liability for reporting and informing the GAS about the committees' performances is vested in the BoD. In regard to the key current challenges faced by the management body, it would not be incorrect to state, particularly from the perspective of closely held JSCs, that corporate governance still remains a not well-settled area. This is mainly because, except for big conglomerates and companies operating in regulated sectors, many closely held JSCs are family-run businesses.

Even though statutory law keeps up quite well with the fast-changing world and its trends, locally owned corporates generally remain slow in implementing the corporate governance rules in their practices.

In contrast with the foregoing, companies operating in regulated sectors, such as banking, insurance and electrical energy, as well as publicly held JSCs, observe and comply with the corporate governance rules quite successfully.

As for the current challenges for the BoD, one of the biggest risks Directors presently face is such that they are not insulated against personal liability for any public debts of the JSC, which remain outstanding. Pursuant to Law on the Collection Procedure of Public Receivables no 6183 ("Law no 6183"), where public receivables cannot be collected from the JSC's assets, Directors shall be personally liable for such receivables.

Another big challenge for the BoD derives from the non-compulsory nature of the Directors' liability insurance, the market for which is quite immature in the Turkish insurance industry. It is currently not common practice for companies to pay for the said insurance product since Turkish insurers have to reinsure their liability under Directors' liability insurance policies in order to be able to face any potential claim, which indirectly increases the premium amounts companies have to pay.

Finally, there is no specific legislation under Turkish Law stipulating that companies must indemnify their Directors against personal liability caused by reasons beyond their control and despite their lack of fault. Although it is not a prohibited practice, the lack of any mandatory legal provision concerning the matter causes companies to not include any provisions in their AoA to this effect. As a result, combined with the problems regarding Directors' liability insurance, Directors are exposed to a wider range of risks under Turkish Law, and have to seek protection on the basis of general provisions of law.

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

Please refer to or explanations set out at question 3.7 above.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

Answer not available at time of print.

4 Other Stakeholders

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

There is no specific rule under the legislation regarding the role or importance of employees in corporate governance, be it as whistle-blowers or otherwise. Similarly, there is no concept of works councils in Turkish Law presently in force.

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

Answer not available at time of print.

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

Corporate Social Responsibility ("**CSR**") is not regulated under TCC. Nonetheless, there are a few pieces of legislation, such as the Protection of Consumers Law no 6502 and Renewable Energy Law no 5346, which include provisions aiming at minimising any negative impact which may be caused by the acts or omissions of corporations on the wider community.

Principles also include a section on CSR issues which are of a non-compulsory nature. The Principle 3.5 entitled "Ethical Rules and Social Responsibility" sets forth that the operations of the corporations shall be carried out in accordance with the ethical rules of conduct, with a special emphasis on the protection of the environment, consumers and public health.

With regards to disclosure requirements concerning CSR, Principle 2.2.2 states that information on social rights granted to, and professional trainings organised for, the employees and any CSR activities arranged in connection with the corporate field of activity of the company, and which produce any positive effects on the society and environment shall be included in the corporation's annual reports.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

Under the TCC and relevant law, BoD can be explained as the key corporate body in relation to corporate governance-related disclosure. Article 375 of the TCC provides that along with its other non-transferable duties and authorities, the BoD is responsible for preparing the annual activity report. It is further responsible for preparing the financial statements of JSCs in accordance with the Turkish Accounting Standards ("**TAS**"). The BoD is also responsible for preparing a corporate governance compliance report ("**Compliance Report**") and submitting it to the GAS as one of its inalienable duties. In addition to the above, in the case of JSCs that are subject to independent auditing, the BoD shall establish a corporate website and ensure that the website contains the relevant information stipulated under the law. BoD members are accountable

for breach of their duties concerning corporate website and its required content. For a detailed explanation regarding corporate websites, please refer to our answer to question 4.4.

Apart from the foregoing, in accordance with Article 15 of the CML and the *Communiqué* no II-15.1, listed companies shall disclose to the public the information, events and developments which may affect the value and price of capital market instruments or the investment decision of investors. Information, events and developments which qualify as "material events" shall be disclosed by the company officer designated and authorised to use a secure electronic signature through the Public Disclosure Platform ("**PDP**"). Any listed corporations, the capital market instruments of which are not traded at the exchange or are traded exclusively in certain specified markets of the stock exchange are exempt from the obligation to disclose information at the PDP as provided under the *Communiqué* on Public Disclosure Platform (VII-128.6).

5.2 What corporate governance-related disclosures are required?

As explained in our answer to question 4.1 above, the annual activity report of the BoD is one of the primary documents utilised in disclosing the financial status of the JSC. The Regulation on the Minimum Contents of the Annual Activity Reports of Companies provides that certain matters shall be addressed in the annual activity report. This includes i) general information on the relevant financial year, and structure of the JSC; in particular, its share capital, shareholders and organisation, ii) business activities and significant developments, e.g. information on the investments made, internal control systems and auditing activities, etc., iii) financial status of the JSC, i.e. assessment of risks and of the management's performance, the level of accomplishment in undertaking the planned business activities, situation of the JSC in view of the designated strategic targets, etc., and iv) information on the risk management policy of the JSC and a forecast on potential risks concerning sales, efficiency, revenue generation capacity, profitability, debt/equity ratio and similar matters. Apart from them, disclosure should also be made on any financial benefits extended to Directors and executive officers.

In regard to publicly held JSCs, Corporate Governance Principles ("**Principles**") annexed to CGC contain rules similar to those explained for closely held JSCs in the preceding paragraph. Article 8 of the CGC regulates that annual activity reports should specify whether the applicable disclosure requirements are duly satisfied by the JSC. As per the decision of the CMB dated February 27, 2014 and numbered 2/35, a similar disclosure should also be made in the Compliance Report. Apart from the disclosure of material events, listed companies are required to disclose various information at the PDP in relation to the structure and practice of the GAS and BoD under the CCG and the Principles.

The last primary source of corporate governance-related disclosure and transparency is the corporate website. Please refer to our answer to question 4.4 for detailed information on the requirement to establish a corporate website and the relevant content to be published.

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

Independent audit of JSCs is regulated in Articles 397 to 406 of TCC. In accordance with Article 397/4, JSCs which are subject to independent auditing are determined by the Resolution of the Council of Ministers numbered 2012/4213. The criteria for designating such companies under the Resolution is reset each year. On the other hand, concerning the auditing of companies which are exempt from independent audit TCC provides that the rules and principles for auditing of such companies will be determined under a Regulation to be prepared by the Ministry and published by the Council of Ministers. It should be emphasised that such regulation has not been issued yet.

The main purpose of independent audit is defined by law so as to form an objective opinion on the financial standing of a JSC in view of the applicable laws and internal early risk detection and management systems adopted by the JSC and by means of an in-depth review of the financial tables, annual activity report of BoD and any other financial information pertaining to the JSC which may be procured by auditors in the course of their audit. JSCs which are subject to the independent audit requirement shall specify at the outset of their financial tables and BoD's annual activity report that these have been duly audited and also, explain the opinion of their auditors. In the absence of a duly conducted audit, financial tables and the annual activity report shall be considered as null and void.

With regard to independence of auditors, Article 400/1 enlists, on a non-exhaustive basis, persons who shall not qualify as auditors. These include shareholders, managers, or employees of the JSC to be audited, persons who are legal representatives, BoD members, managers or legal owners of a corporation associated with the JSC to be audited, who work at a company that has dealings with the JSC to be audited or have more than a 20% share in such a JSC, who have undertaken works for or have contributed to the bookkeeping or preparation of the financial statements of the JSC to be audited other than the auditing itself. Furthermore, Article 400/2 of the TCC regulates that if the same person or entity was appointed as an auditor for a JSC for a total period of seven years in the last 10 years, the said auditor cannot be re-appointed for at least three years. An auditor is also prohibited from providing advisory services to a JSC he audits except for in cases concerning tax advisory and tax audit, and to conduct this through any subsidiary JSC under Article 400/3 of the TCC.

Apart from the foregoing, listed companies are required to comply with Principle 4.5.9 with respect to the formation of audit committees which will report to BoD. Accordingly, in these JSCs, an audit committee shall be formed to supervise the corporation's accounting system, the making of required public disclosures, the appointment of independent auditors and overviewing the operation and efficiency of internal control and internal audit system. Election of independent auditors, initiation of the independent audit process by concluding required engagement contracts with independent auditors, and overviewing the works of independent auditors at all stages are among the duties of the audit committee. The audit committee shall disclose its evaluations on the veridicality and accuracy of the annual and interim financial statements to the public and accounting principles observed by the corporation to the BoD in writing, together with the opinions of the responsible executives and independent auditors of the corporation. There shall be an explanation in the annual report with regard to the activities and meeting results of the audit committee.

5.4 What corporate governance-related information should be published on websites?

Article 1524 of the TCC provides that companies which are subject to independent audit requirement shall set up a website within three months as from the date of their incorporation. BoD members and managers of companies who fail to set up the JSC website and publish the required content on it shall be charged with a fine as regulated under Article 562/12 of the TCC.

According to Article 6 of the Regulation on the JSC Websites ("**Regulation on Websites**"), the following information shall be published on the JSC's website on a permanent basis:

- The JSC's Central Registry Recording System ("**MERSIS**") number, commercial name, head office, subscribed capital, paid-in capital, and names and surnames of the president and members of the BoD.
- In the case of legal entity Directors, the MERSIS number of this legal entity Director, commercial name, head office, and the name and surname of its registered representative.
- The name and surname/title, residence/head office and registered offices, if any, of the selected auditor.

On the other hand, along with certain other content specified in the Regulation, the below information shall be posted at the website for a minimum period of six months:

- Any merger agreements, merger report, financial tables and reports pertaining to the last three years and interim financial statements shall be placed on the JSC's website for a review by shareholders within 30 days before the scheduled date of the GAS meeting.
- Calls for GAS meetings and GAS resolutions amending the AoA.
- The GAS minutes of the JSC.
- The decision of the BoD regarding the appointment of the signature powers. Internal directive of the GAS.

In addition to above, the Principles set forth certain rules regarding corporate websites which are compulsory for publicly held companies whose shares are traded on the Borsa Istanbul.

Apart from the foregoing, according to Article 24 of the *Communiqué* no II-15.1, within no later than one business day immediately after the date of disclosure of any material event to the public, publicly held JSCs must publish their subject disclosures on their corporate website. The disclosed information must be retained on the website for a period of five years.

Arzu Aksaç
Aksac Law Office
Inonu Caddesi, No:57
Meric Apt. Kat:3, Daire:5 34437
Gumussuyu, Taksim
Istanbul
Turkey

Tel: +90 212 270 79 81 / 82
Email: arzuaksac@aksac-law.com
URL: www.aksac-law.com

The Founding Partner Arzu Aksaç, with her 25-year professional experience, is an internationally recognised lawyer. She founded the firm in September 2010 after having worked for nine years as partner at an Istanbul-based Turkish law firm with international practice. She worked as overseas legal counsel in the banking department at Allen & Overy LLP, London (1998–2001). She has vast experience in major projects, complex financial work, M&As, and corporate and commercial work. She also has substantial experience in oil, gas and power, as well as mining law. She holds an LL.B. from Dokuz Eylul University, Faculty of Law, İzmir (1990) and an LL.M. in the United States Legal Studies from the University of Connecticut, School of Law (1995). She is fluent in English and German.

Yaprak Derbentli
Aksac Law Office
Inonu Caddesi, No:57
Meric Apt. Kat:3, Daire:5 34437
Gumussuyu, Taksim
Istanbul
Turkey

Tel: +90 212 270 79 81 / 82
Email: yaprakderbentli@aksac-law.com
URL: www.aksac-law.com

Yaprak Derbentli, an Associate Attorney at Aksac Law Office, is a Turkish qualified lawyer who has been registered at the Istanbul Bar Association since 2011. She is involved in energy law, including, in particular, renewable energy law, corporate and commercial law, property law, competition law, employment law, regulatory matters and litigation. She advises Turkish and foreign corporates from various sectors; mainly energy, healthcare, construction, real estate and FMCG on their local and cross-border transactions, with regards to both Turkish and international law aspects. She graduated from Bahcesehir University Faculty of Law in 2010 with a Dean's Honor degree and holds an LL.M. from the University of Kadir Has (2015). She is fluent in English.

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United Kingdom

Slaughter and May

William Underhill

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

The discussion will focus on public companies incorporated in the UK with a Premium Listing in the UK, which are subject to the UK Corporate Governance Code. Public companies whose shares have a standard listing or are traded on other markets, such as the AIM market operated by the London Stock Exchange are subject to similar, but lighter touch, regulation.

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

The statutory foundation is the Companies Act 2006, which sets out the legal duties of directors and requirements for annual disclosures, for appointment and removal of directors and in relation to the remuneration and other terms of employment of directors. All companies also have a principal constitutional document known as articles of association, which prescribe regulations for the company including rules on, for example, shareholder meetings, borrowing powers, powers and duties of directors and many other aspects relating to the governance, in its widest sense, of the company. The articles should be consulted in relation to governance issues. While the law is generally not prescriptive as to the contents of the articles and individual companies may include special terms, articles generally follow a similar pattern.

Companies with a Premium Listing are also subject to the Corporate Governance Code issued by the Financial Reporting Council ("FRC"), which sets out the core governance standards, on a "comply or explain" basis. The Listing Rules made by the Financial Conduct Authority require listed companies to report on their compliance with the Corporate Governance Code and impose additional requirements for shareholder approval of certain transactions. The Transparency Rules made by the Financial Conduct Authority in implementation of certain provisions of the Transparency Directive (European Parliament and Council Directive on the harmonisation of transparency requirements (No. 2004/109/EC)) impose additional disclosure obligations.

Companies will also have regard to the guidelines and pronouncements of investor protection groups, such as the Investment Association and the Pre-emption Group, and of proxy advisory services (or individual investors). Whilst these do not have the force of law, they are generally adhered to by companies because they are likely to be followed by investors in UK companies in relation to the many matters on which shareholder approval is required (as discussed in question 2.1).

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

In 2017, the UK government outlined proposals for reform in three areas: the involvement of non-shareholder stakeholders in board decision-making; curbing excessive executive remuneration; and the application of corporate governance principles to private companies. In response to this, the FRC has consulted on a revised Corporate Governance Code which addresses the first two issues. In March 2018, the UK government began a consultation on insolvency related corporate governance issues, including in relation to the duties of the directors of a parent company selling a subsidiary in distress. In addition to these issues, there continues to be a focus on increasing diversity of boards, both as regards gender and more broadly.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

The risks of short-termism have been recognised for some time. The proposals for greater involvement of non-shareholder stakeholders in board decision making referred to in question 1.3 (including some of the proposals of the FRC in its revised Corporate Governance Code) are part of the drive to encourage boards to take a longer-term view. In addition to these initiatives, there continues to be a focus on the stewardship responsibilities of shareholders.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

While it is theoretically possible for the articles of association of the company to provide for shareholders to participate directly in these matters, that would be very exceptional for a listed company. Conventionally therefore, shareholders influence these matters through their interactions with directors. There are many matters which require approval of shareholders and these provide levers which can be used by shareholders to signify publicly their

support or otherwise of the board. Examples of matters requiring shareholder approval include: the annual re-election of all directors on an individual basis; directors' remuneration (which must be within the scope of a policy approved at least every three years); the grant of authority to issue new capital on a non-preemptive basis; and approval of major transactions and related party transactions (under the Listing Rules). In practice, therefore, shareholders play a significant role in shaping the strategy of the company.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Shareholders have no legal responsibilities to the company or its other shareholders for corporate governance of the company concerned. The Code applies on a voluntary basis to owners and managers of equity holdings in UK listed companies. Entities who sign up to the Code are expected to disclose publicly how they apply the Code (or explain if they do not). The Code, which is expressed in general terms, sets out expectations that investors will monitor their investee companies, be willing to act collectively with other investors and disclose their policy on voting (and report on their voting activities).

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Companies must hold a shareholder meeting at least once each year (the annual general meeting). In addition, companies may need to convene a meeting to obtain approval from shareholders where the requirement for that approval could not be anticipated at the time of the annual meeting. Shareholders in listed companies (holding 5% of the issued shares or being at least 100 in number) may require the company to consider a resolution or other matters at the annual meeting and for that purpose to circulate the resolution(s) or a statement relating to those matters prior to the meeting. Shareholders who together hold 5% of the issued shares can require the company to convene a shareholders meeting or to circulate a statement prior to any general meeting.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Shareholders do not owe duties to the company or to other shareholders (the limited exceptions to this relate to the exercise of majority power to make changes to the constitution of the company or to approve certain other matters that change the position of a dissenting minority). English law respects the distinction between shareholders and the company and shareholders will not generally be liable for the acts and omissions of the company. This principle does not apply in a case where the separate legal personality of the company is being abused for purposes of wrongdoing, specifically where the company is used to frustrate or evade an obligation of the shareholder.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

In principle, directors owe duties to the company and those duties should be enforced by the company. However, shareholders can take action to enforce directors' duties in certain limited circumstances, essentially where the court is satisfied that it is necessary for them to do so in order to ensure that legitimate claims are pursued. In addition, shareholders can take action against the company to enjoin actions in breach of the constitution. It is also possible for shareholders to obtain relief from the court on the grounds that the company's affairs are being, or have been, conducted in a way that is unfairly prejudicial to shareholders or some of them.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Shareholders, other than fund managers, are required to disclose interests in shares amounting to 3% of the issued share capital (and changes above that level). Fund managers must disclose when their interests exceed 5%. Interests under derivative agreements are included even if the derivative provides for cash settlement. Disclosure must be made to the company within two trading days and the company is required to make this information public as soon as possible. Net short positions greater than 0.2% must also be disclosed (if the net short position is 0.5% of the issued share capital the disclosure must be made public). All shareholders must disclose their interest in shares (however small) on request by the company. Additional disclosure requirements apply if the company becomes subject of a proposed takeover bid (all shareholders with a holding of 1% or more must disclose their position and any subsequent dealings). In rare cases, there may be limits on the size of interest that is permitted. These would be set out in the constitution of the company and would typically be included in order to protect the regulatory position of the company (for example to ensure that an airline adheres to nationality rules).

The Takeover Code, which regulates takeovers in the UK, also provides that certain consequences may follow from the acquisition of shares above prescribed thresholds or in specified circumstances. In addition, in specific sectors special rules may apply that impose limits on the size of holding that may be acquired without approval from a regulator (for example financial services).

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Shareholders are not required to make such disclosures.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Management of the company is the responsibility of its directors. The directors will typically include the CEO and one or more executive directors who have day to day responsibility with broad powers delegated by the board. It would be usual for a company to have a management committee that would be led by the CEO and include the other executive directors and other senior managers.

The Corporate Governance Code provides that boards should contain an appropriate combination of executive and non-executive directors (including independent non-executive directors) so that no one individual or group can dominate board decisions. In particular (except for smaller companies), at least half the board (excluding the chairman) should be comprised of independent non-

executive directors, one of whom should be designated as a senior independent non-executive director having certain prescribed skills. Independence is defined in terms of independence in character and judgment and freedom from relationships or circumstances which are likely to affect, or have the appearance of affecting, the director's judgment.

The Corporate Governance Code stresses that the board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.

Generally, companies are headed by a non-executive chairman who is responsible for leadership of the board. Other than in exceptional cases, the Corporate Governance Code provides that the roles of chairman and chief executive should not be combined.

The Corporate Governance Code requires boards to establish the following committees (although it is always the board that remains responsible for ultimate decisions):

- a nomination committee, to lead the process for board appointments;
- a remuneration committee, responsible for recommendations on remuneration strategy and policy for executive directors and senior management; and
- an audit committee, with wide responsibilities including: monitoring the integrity of the company's financial statements; reviewing internal financial controls and broader internal controls and risk management systems; and the company's relationship with its auditors.

It is common for boards to establish additional committees, to allow greater focus on specific areas of the board's responsibility, such as risk or health and safety.

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

Directors are appointed or removed by shareholder vote, by a resolution passed by a bare majority of shareholders present and voting at a shareholders' meeting. Directors may also be appointed by the board but will typically be required by the constitution of the company to retire and stand for election by shareholders at the next annual meeting after their appointment. The constitution may also give the board powers to remove directors, including, commonly if the resignation of the director concerned is requested by all or a large majority of the other directors. The Corporate Governance Code requires all directors to retire at each annual general meeting of the company.

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

The Companies Act 2006 prohibits a company entering into a service agreement with a director with a fixed duration of longer than two years. It also prohibits remuneration payments to directors except in accordance with a remuneration policy approved by shareholders and requires extensive annual disclosure of the past and prospective remuneration of the directors. These requirements can be overridden with approval from shareholders but this is rarely given. The Corporate Governance Code requires service agreements to be not longer than one year (which is the almost universal practice) and contains provisions on remuneration.

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

Directors (and other "persons discharging managerial responsibilities") must disclose their shareholdings in the company in the annual report and must notify the company of any changes as they occur (the company is required to make this information public). Directors (and PDMRs) may not purchase or sell shares in the company during a period of 30 days prior to publication of the annual report. Directors may not purchase or sell shares while in possession of inside information relating to the company. In practice many companies impose longer periods during which transactions in shares are prohibited, including while the company has inside information even if not known to the director (or PDMR) concerned.

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

The procedures for meetings of the board of directors are set out in the articles of association, which will generally allow considerable flexibility (including telephone meetings and meetings on short notice). The articles of association will specify the quorum required for a meeting to be validly held. The board generally has discretion to determine the frequency of board-scheduled meetings. The Corporate Governance Code requires that the board should meet sufficiently regularly to discharge its duties effectively. Every year the company's annual report should set out the number of board meetings (and committee meetings) held as well as attendance by individual directors. In addition to scheduled meetings, the board will be expected to meet, possibly on short notice, to deal with matters that arise unexpectedly.

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

The principal duty of a director is to act in the way that director considers, in good faith, would be most likely to promote the success of the company for the benefit of shareholders as a whole. In addition, directors owe duties to act within their powers, to exercise independent judgment, to exercise reasonable care, skill and diligence, to avoid conflicts of interest, not to accept benefits from third parties and to make known to the other directors any interest they have in a transaction or arrangement with the company.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

The board of directors is responsible for: setting the strategy of the company; ensuring there are prudent and effective controls; ensuring the company has the resources it needs; and reviewing the performance of the executive management. The board will determine the approach to risk and receive regular updates on the operations and results of the company. The board will decide what matters should require its approval and what is delegated to the managers. Key current challenges include: meaningful disclosure of viability (the resilience of the company to identified risks); executive remuneration; succession planning; and the approach to taking into account employee and other wider (non-shareholder) stakeholder interests.

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

A company may not indemnify its directors for their liability to the company arising out of a breach of duty or other default by the director. Any purported indemnity in breach of this prohibition is void. The company may indemnify its directors for liabilities to third parties (but not fines or regulatory penalties) and for costs incurred in successfully defending claims by the company. The company may arrange insurance for directors. These restrictions do not apply to indemnification of employees who are not directors.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The directors are responsible for determining the strategy of the company (and for changing that strategy).

4 Other Stakeholders

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

Directors are required to have regard to the interests of employees. Current consultations propose new requirements for boards to describe the arrangements they have made to involve employees in their decision making processes. This may be by including employee representatives on the board, allocating to a director specific responsibility for ascertaining the views of employees or by any other mechanism the board considers appropriate.

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

Other non-shareholder stakeholders have no formal role in corporate governance, although directors are required to have regard to the need to foster business relationships with suppliers, customers and others and to the impact of the business on the community and environment. The proposed reforms discussed in question 1.3 will, if adopted, require disclosure of the way these wider stakeholder interests have been taken into account.

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

Directors are required to have regard for the impact of the company's operations on the community and the environment and it has become customary for companies to produce detailed CSR reports annually. That practice is codified in requirements to include in the annual report disclosures (a non-financial information statement) regarding environmental matters, employees, social matters, respect for human rights and anti-corruption and bribery. Disclosures should include corporate polices and the outcomes achieved, principal risks and relevant KPIs.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The board has responsibility for periodic reporting (annual reports and half year reports) and for *ad hoc* reporting. While this is a collective responsibility of the whole board, enforcement action may be taken against individual directors who are "knowingly concerned" in a failure to comply with the requirements.

5.2 What corporate governance-related disclosures are required?

The annual strategic report must include the CSR disclosures described in question 4.3. The remuneration report must contain detailed information on remuneration of directors during the previous and current financial year. The company must disclose that it is subject to the Corporate Governance Code and its corporate governance practices. Any departures from the Code and the reasons for them must be explained. The company's internal control and risk management systems must be described. In addition, the diversity policy applicable to the board of directors and senior management, the objectives of that policy, its implementation and the results achieved must be described. The Corporate Governance Code requires additional disclosures (on a comply or explain basis) regarding matters such as board evaluation, risk management, and how the board understands the views of major shareholders. It also requires a separate report on the work of the audit committee.

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

The auditors are required to review the narrative reports that accompany the audited financial statements in the annual report and any separate corporate governance statement and to report on the consistency of the disclosures with the financial statements, compliance with legal requirements and whether the disclosures include any material misstatements.

5.4 What corporate governance-related information should be published on websites?

The annual report, including the governance disclosures described in question 5.2, must be made available on a website.

William Underhill
Slaughter and May
One Bunhill Row
London EC1Y 8YY
United Kingdom

Tel: *+44 20 7090 3060*
Fax: *+44 20 7090 5000*
Email: *william.underhill@slaughterandmay.com*
URL: *www.slaughterandmay.com*

William Underhill specialises in corporate finance and corporate governance acting for a number of major corporate clients on a wide range of transactions and advisory matters. He has acted on a number of privatisations and numerous public and private acquisitions and disposals. William has been an editor of Weinburg & Blank on Takeovers since March 1995. William was formerly Chairman of the City of London Law Society Company Law Committee.

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Sabastian V. Niles

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This discussion focuses on publicly traded corporations incorporated under the laws of a state within the United States of America (for example, Delaware, the most common state of incorporation for U.S. companies) with securities listed on a U.S. stock exchange. Non-U.S. companies afforded "foreign private issuer" ("FPI") status whose securities are traded on a U.S. stock exchange are generally subject to the laws of their home state of incorporation and modified versions of U.S. stock exchange rules, but some U.S. laws will apply equally to FPIs and U.S. companies.

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

U.S. companies are governed by a variety of legal regimes relating to corporate governance matters. These consist of state law and federal statutory rules and regulations of various government agencies, including rules promulgated by the U.S. Securities and Exchange Commission (the "SEC") and self-regulatory organisations such as stock exchanges that impose requirements on companies whose securities are listed and trade on such exchanges. In addition to those sources of law, the U.S. corporate governance regime derives principles from a variety of non-legal sources.

State corporate law rules are derived from the laws of the state of incorporation and the organisational documents of each company. Each state has its own corporate code, with Delaware's General Corporation Law (the "DGCL") being the most common for large, publicly traded corporations, as the majority of U.S. public companies are incorporated under the laws of the state of Delaware. State corporate laws generally include a mix of mandatory provisions as well as "default" rules that may be modified by provisions in a company's certificate of incorporation (also referred to as a charter) or bylaws, enabling self-ordering and tailored governance features to be established on a company by company basis.

The primary sources of federal rules and regulations include the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") and regulations promulgated by the SEC under those and other acts. The Securities Act regulates the offer and sale of securities, primarily through a disclosure-based approach that reaches some governance topics. The Exchange Act mandates certain annual, quarterly and interim reporting of financial and other material matters in addition to proxy disclosure and other requirements concerning shareholder votes and meetings. Other relevant federal regulations imposing disclosure and compliance requirements include the Sarbanes Oxley Act of 2002 ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). SOX imposed a variety of substantive requirements to enhance the integrity of financial statements and reporting. The Dodd-Frank Act requires additional disclosure in proxy statements, non-binding shareholder votes on items related to executive compensation and facilitated greater access for shareholder-proposed director nominees to the company proxy.

Certain federal statutes and rule-makings provide for streamlined or reduced disclosure requirements on smaller public companies, and various pending pieces of legislation may further modify these federal statutes, especially as to Dodd-Frank matters. Particular areas of corporate practice are governed by specialised federal statutes as well that may have governance implications (for example, regulations promulgated by the Federal Reserve and other federal and state agencies with respect to banks and other financial institutions, and by other similar regulatory bodies in respect of communications, transportation and other regulated fields).

Stock exchange listing rules are issued by the New York Stock Exchange ("NYSE") and the NASDAQ, the two predominant U.S. stock exchanges. Companies must comply with these rules, many of which relate to corporate governance matters, as a condition to being listed on the exchange. Exchange listing rules address a variety of corporate governance matters, including director independence, the composition of various board committees, requirements to submit certain matters to a vote of shareholders beyond the requirements of state law and the company's organizational documents, regulation of dual-class stock structures and other special voting rights, topics to be covered by corporate governance guidelines and their publication, and certain requirements related to disclose on the corporation's public website. These rules are enforced by the threat of public reprimand from the exchanges, temporary suspension of trading for repeat offences and permanent delisting for perennially or egregiously non-compliant companies. Other stock exchanges are in the process of emerging and may have their own governance-related listing rules that go beyond or otherwise differ from NYSE and NASDAQ frameworks.

Non-legal sources such as industry and third-party best practice guidelines, recommendations, shareholder proxy advisory firms such as Institutional Shareholder Services ("ISS") and Glass Lewis, proposals advanced by shareholders and the evolving views of the institutional investor community provide additional sources of governance "principles". The investor community's views have

become particularly influential as the shareholder base of most US publicly traded corporations consists of an overwhelming majority of institutional shareholders, including index funds, mutual funds, hedge funds and pension funds. As a result, major institutional investors are increasingly developing their own independent views on preferred governance practices.

Because of the federal system of U.S. law, different sources of law are not always harmonised and corporations are often subject to different obligations to federal and state governments, regulators at each level of government and demands of other relevant bodies, such as the applicable stock exchange. This mosaic of rules and regulations, and the mechanisms by which they are implemented and enforced, make for an environment of frequent change and evolution.

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

In the US, questions about the basic purpose of corporations, how to define and measure corporate success, the weight given to stock prices as reflecting intrinsic value, and how to balance a wider range of stakeholder interests (including employees, customers, communities, and the economy and society as a whole) beyond the investor have become issues for concern and focus within corporate boardrooms and among policymakers and investors. In addition, many of the corporate governance issues facing boards today illustrate that corporate governance is inherently complex and nuanced, and less amenable to the benchmarking and quantification that was a significant driver in the widespread adoption of corporate governance "best practices". Prevailing views about what constitutes effective governance have morphed from a relatively binary, check-the-box mentality – such as whether a board is declassified, whether shareholders can act by written consent and whether companies have adopted majority voting standards – to tackling questions such as how to craft a well-rounded board with the skills and experiences that are most relevant to a particular corporation, how to effectively oversee the company's management of risk, and how to forge relationships with shareholders that meaningfully enhance the company's credibility. Today, many key corporate governance discussions focus on:

- How boards of directors and management teams can collaborate on developing, adjusting and communicating the company's long-term strategy and anticipating threats to progress.
- Assessing board strength, composition, performance and practices, including as to director expertise, average tenure, diversity, independence, character, and integrity and the board's role in succession planning and selection and oversight of the CEO.
- Recognising that vibrant board and corporate cultures are valuable assets, sources of competitive advantage and vital to the creation and protection of long-term value.
- How companies can effectively own business-relevant sustainability concerns, integrate relevant corporate social responsibility issues into decision-making and enhance disclosures in appropriate ways, while resisting one-size-fits-all approaches delinked from long-term business imperatives.
- The appropriate level of executive compensation and incentive structures, with awareness of the potential impact of compensation structures on business priorities and risk-taking, as well as investor and proxy advisor views on compensation.
- Oversight of risk management and compliance efforts and how risk is taken into account into business decision-making.
- Ensuring that the CEO and board are prepared to deal with takeover threats and shareholder activism.
- Cultivating strong relationships with investors that will support the company's execution of its strategy.
- Disintermediating the outsized influence of proxy advisory firms, including through efforts like the U.S. Investor Stewardship Group ("ISG") and increased investments by active managers and passive investors in their own governance teams and policies, even as proxy advisory firms retain significant power and influence over voting outcomes and company practices.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

"[H]elp[ing] the corporation build long-term, sustainable growth in value for shareholders and, by extension, other stakeholders" has been described by the NYSE Commission on Corporate Governance as the "fundamental objective" of the board. In light of increasing pressure on public companies to promote short-term interests at the expense of long-term value and a decline in long-term investment, corporate governance is being increasingly viewed as a framework for aligning boards, management teams, investors and stakeholders towards long-term value creation and guarding against the perils of short-termism. In particular, there is increasing recognition that the value chain for alignment towards the long-term across public companies, asset managers, asset owners and ultimate beneficiaries (long-term savers and retirees) – each with their own time horizons, goals and incentives – is broken.

While some argue that short-termism is not a concern, additional academic and empirical evidence is being published showing the harms to GDP, national productivity and competitiveness, innovation, investor returns, wages and employment from the short-termism in US public markets. Absent evidence that private sector solutions to resist short-termism are gaining traction, legislation to promote long-term investment and regulation to mandate long-term oriented stewardship is expected to be considered.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

In the U.S., a unitary board of directors, elected by shareholders and subject to fiduciary duties, is charged with overseeing the corporation's business and affairs. Accordingly, unlike in some jurisdictions where shareholders directly determine key business matters, such as corporate strategy, dividend and share repurchase policy, capital raising and material acquisitions, the U.S. model is director-centric, giving broad authority to the board of directors to exercise their business judgement on most matters and delegate day-to-day decision making to management. The U.S. model is director-centric, giving boards broad authority to exercise their business judgment on most matters and. Therefore, under U.S. state law, it is generally not necessary to seek shareholder approval of management decisions other than for fundamental changes. Under most state laws, shareholder approval is generally required to approve only relatively fundamental matters such as: (1) an amendment to the corporation's charter; (2) a merger; or (3) the sale of all or substantially all of the corporation's assets. Accordingly, in

most cases, including most asset sales and spinoffs, absent a special provision in the company's governing documents, shareholders do not have a right to vote on or ratify management's decisions. Under NYSE and NASDAQ exchange rules, shareholder approval may be triggered by share issuances involving: (1) 20% or more of the common stock or voting power of an issuer; (2) a change of control (often in the context of funding a large acquisition); and (3) issuances to certain related parties (subject in each case to certain limited exceptions). While shareholder approval is not required for most business matters, shareholders will typically engage with the management teams of U.S. companies and, in certain cases, with directors to provide input and perspectives to be considered by the board and management. If shareholders are not satisfied with the company's strategic direction, governance, operation or management, they may seek to change the composition of the board of directors (including through nominating their own candidates), register dissatisfaction through their votes, submit shareholder proposals (generally precatory) to be voted on by shareholders, inspect corporate books and records for proper purposes, pursue litigation and/or apply public and private pressure. See also question 2.3 regarding shareholder meetings.

In addition, Delaware law, as a general matter, requires shareholders to be treated equally (e.g., with respect to dividends) within share classes. As a result of this basic tenet of Delaware law, all shareholders, whether a minority or controlling shareholder, have a number of equal rights with respect to their shares, on a per share basis where applicable.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Generally none. However, concerns regarding the excesses of short-termism and shareholder power are giving rise to debates regarding whether shareholders should have governance-related responsibilities (even if not liability), such as through voluntary stewardship obligations and taking a long-term view with respect to governance matters. In addition, shareholders may vote on governance-related shareholder proposals and influence corporate governance that way too. See also question 2.4 regarding duties of controlling shareholders, which most U.S. companies do not have.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

Shareholders' meetings are typically held annually, as provided by state law and the organisational documents of the company. The DGCL, for example, requires annual meetings to be held for director elections and, if a company has not held such a meeting within 13 months of the prior year's meeting, shareholders may petition the Delaware courts to order such a meeting. Annual and special meetings may be convened by the board and, to the extent provided for in the company's charter or bylaws, shareholders satisfying certain ownership requirements (which vary across companies) may have the right to call special meetings of the shareholders or act by written consent in lieu of a meeting. Subject to the inclusion of any shareholder proposals or nominations that are submitted in accordance with state and federal law, the board sets the agenda of the meeting. Actions to be considered at a meeting may be binding or non-binding (precatory), and a typical annual shareholder meeting will include, at a minimum, election of directors, ratification of the company's selection of an outside auditor (voluntary) and the non-binding "say on pay" vote. Many companies have adopted advance notice bylaws that require shareholders to provide advance notice and satisfy other procedural requirements in order to propose business at a meeting.

Shareholders have the right to attend meetings in order to vote but more commonly vote by "proxy". Shareholders also have the right, subject to applicable law and satisfying disclosure and filing requirements when applicable, to communicate with other shareholders privately or publicly regarding matters to be considered at a meeting and may through their votes support, oppose or abstain from matters. Shareholders' meetings are usually held in person, although companies are increasingly experimenting with virtual shareholders' meetings conducted entirely online. Each meeting has a "record date" fixed by the board, and only persons holding shares as of such date are entitled to vote. Advance notice of the meeting must be given to shareholders by specified deadlines, and such notice must set forth the matters to be considered at the meeting. When items are subject to a shareholder vote, the company must provide shareholders with comprehensive proxy statements containing the recommendation of the board, information about the proposals to be considered, disclosure of interests of directors and officers that may differ from the general interests of shareholders and other mandatory items.

Shareholder meetings are conducted in accordance with the company's charter and bylaws, including as to who chairs the meeting. Depending on the topic at issue, the specific vote requirement for shareholder action may be a majority of the outstanding shares, a majority of the shares present and entitled to vote, a majority of voted shares, or a plurality of voted shares. In certain cases involving related party transactions subject to a shareholder vote, the standard is voluntarily tightened to count only votes of unaffiliated or disinterested shareholders, but this is typically not legally required, and related party transactions are typically matters of board review and approval rather than the subject of a shareholder vote. Actions taken at a meeting will not be effective in the absence of a sufficient quorum of shares being represented at the meeting. The specific quorum requirement is generally specified in the company's bylaws.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

By nature of the corporate form, shareholders are not liable for the acts or omissions of the corporation and generally do not owe any duties to other shareholders or to the corporation. This lack of fiduciary duties on the part of shareholders to other shareholders has recently become a point of controversy, however, now that shareholders wield extraordinary influence over the decisions of – and regularly exert substantial pressure on – the boards of directors and management teams, including in situations where the interests and priorities of a given investor may not align with the interests of other shareholders. Concepts of stewardship – perhaps in time backed by potential liability or other enforcement mechanism – are in the early stages of emergence to address the concern that shareholders may be exercising power without responsibility.

While specific requirements often seen in Europe and other jurisdictions related to the protection of minority shareholders, such as mandatory tender offer obligations, are generally not hardwired into the U.S. rules and regulations, certain attention must be paid to minority shareholders when there is a controlling shareholder. Companies with a controlling shareholder (and such controlling shareholder) are generally subject to heightened legal scrutiny

and disclosure requirements with respect to transactions between such companies and their controlling shareholders. Corporate shareholders generally acquire fiduciary duties only if they control the corporation, which is rarely the case at most U.S. publicly traded companies in which shareholdings are widely dispersed and is itself a high bar, generally requiring ownership of more than a majority of the common stock or otherwise demonstrating "domination' of the corporation through actual exercise of direction over corporate conduct and, in the limited subset of cases where such shareholder-level fiduciary duty may apply, are generally limited to precluding a controlling shareholder from leveraging its position as such to extract benefits from the corporation at the expense of the minority shareholders or from transferring control to a known "looter".

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Yes. State law fiduciary duties of directors and officers are predominantly enforced by private actions led by plaintiffs' lawyers. These private actions generally fall into one of two categories: direct suits, typically in the form of class-action suits on behalf of a particular group of the corporation's shareholders (typically all shareholders who bought or sold during a particular period or all unaffiliated shareholders); and 'derivative' suits purportedly on behalf of the corporation itself. Putative class-action suits must satisfy the criteria under the Federal Rules of Civil Procedure or analogous provisions of state law before being permitted to proceed as a class action, including the numerousity of the class members, the commonality of legal and factual issues between members of the class, the typicality of the claims or defences of the representative parties to the class, and the fairness and adequacy of the representative parties' protection of the class interests. Derivative suits, creatures of state corporate law, provide a mechanism by which shareholder plaintiffs can, in theory, represent the corporation in suing the corporation's own board of directors or management, sometimes after complying with a 'demand' procedure in which the plaintiff must request that the corporation file suit and be rebuffed. In certain circumstances, especially when it can be shown that the board of directors is for some reason conflicted with respect to the alleged breach of duty, this 'demand' requirement is excused and the shareholder will be permitted to pursue a claim in the corporation's name without further enquiry.

Shareholders may also seek to have the SEC or other regulatory and enforcement bodies initiate investigatory and enforcement actions against companies and their personnel for violations of applicable law.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Certain state laws and provisions of a company's organisational documents may impose restrictions (or special approval requirements) on covered transactions between a company and significant shareholders. For example, Section 203 of the DGCL restricts the ability of a shareholder who owns 15% or more of a company's outstanding stock from engaging in certain business combination transactions with the company unless certain requirements are met or an exception applies.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) and relevant regulations hereunder, a shareholder's acquisition of voting securities in excess of specified thresholds usually requires prior notice to the Federeal Trade Commission and U.S. Department of Justice and clearance from regulatory authorities. In addition, investments and acquisitions by non-U.S. persons may also be regulated and restricted by applicable laws, such as where national security concerns are relevant through the auspicies of the Committee on Foreign Investment in the United States ("CFIUS") and implementing statutes and regulations, as well as in regulated industries where special considerations apply, such as aircraft, financial services, and communications media.

In addition, in terms of limitations on acquiring stakes in public companies, a critically important tool for enabling boards of directors to discharge their fiduciary duties in the face of the threat of hostile takeovers and significant accumulations under current law remains the shareholder rights plan, or "poison pill". The shareholder rights plan entails a dividend of special "rights" to each of the corporation's shareholders. In the event that a shareholder amasses equity ownership in excess of a predetermined threshold – often 10 to 15 per cent – without the approval of the board of directors, the rights held by every other shareholder 'trigger' and convert into the right to purchase stock of the corporation at a price substantially below the current market value. Alternatively, most rights plans provide that the board of directors may instead choose to exchange one share of common stock for each right held by shareholders other than the hostile bidder or activist shareholder. Either way, the result of this conversion or exchange is that the ownership position of the triggering shareholder is substantially diluted. The rights plan is the only structural takeover defence that allows a board to resist a hostile takeover attempt, and it has also been deployed in numerous activism situations. While it does not provide complete immunity from a takeover, it allows the board to control the process and provides the corporation with leverage to bargain for a higher acquisition price and the power to reject underpriced or otherwise inappropriate bids. It is also implemented exclusively by the board of directors and does not require shareholder approval, so it can be put in place in very short order. Whether or not to implement a rights plan in a given situation requires significant judgment, including taking into account investor reaction and the potential of ISS "withhold" recommendations if a rights plan has a term of greater than one year and is not subject to shareholder ratification. As a result, and because a rights plan can be adopted quickly, most corporations adopt a rights plan only after a threat appears – and prior to that time, the plan is kept 'on the shelf'. Keeping a rights plan on the shelf offers almost all of the protection of an active rights plan without any risk from an adverse ISS recommendation, but it can leave a corporation vulnerable to 'stealth acquisitions', in which an activist shareholder purchases just under 5 per cent of the company's stock, and then buys as much as possible on the open market within the next 10 days. Because Regulation 13D under the Securities Exchange Act gives shareholders 10 days after acquiring over 5 per cent of a company's stock to publicly disclose their ownership stake, this technique can result in an acquisition of a substantial portion of a company's equity before it is ever disclosed. Similarly, Regulation 13D does not cover all forms of derivatives. While all interests must be disclosed after a shareholder crosses the 5 per cent threshold, only some derivative interests are counted towards that threshold – generally, only those that are settled "in kind" (for stock of the corporation rather than for cash from the derivatives counterparty), and only those that can be exercised within the next 60 days. However, because an activist may accumulate its position in a corporation, without public disclosure, the board of directors may not have any warning of the activist's behaviour, and there is thus some risk that a company may not be able to adopt a rights plan in time to avoid a significant accumulation of stock in unfriendly and opportunistic hands.

With respect to disclosure, shareholders or groups of shareholders who own or acquire beneficial ownership of more than 5 per cent of a corporation's registered equity securities will also be required to file reports with the SEC under Regulation 13D. Investors who are not "passive" and are interested in influencing the Company, or are directors or officers, will be required to file a Schedule 13D within 10 days of the acquisition of more than 5 per cent in beneficial ownership of the Company's stock disclosing such ownership and the investment purpose (e.g., control intent), as well as amendments to report subsequent changes of more than 1 per cent. However, this 10-day filing requirement only starts ticking once the 5 per cent beneficial ownership threshold is reached. During the 10-day period between crossing the 5 per cent threshold and making the Schedule 13D filing, investors are permitted to further increase their ownership. This may involve making direct share purchases, as well as purchasing options and other derivatives. The 10-day window allows investors the ability to increase their interest in a company, in some cases quite dramatically, before the Schedule 13D alerts the market as to their ownership, even after crossing the 5 per cent threshold. Investors who have a "passive" interest in the Company and own more than 5 per cent but less than 20 per cent of the Company's stock or are otherwise exempt investors will be permitted to file the shorter Schedule 13G on a delayed schedule after year-end.

Section 13F of the Exchange Act requires institutional investment managers with over $100 million of assets under management to disclose their ownership of exchange-traded stock, shares of closed-end investment companies, shares of exchange-traded funds and certain convertible debt securities, equity options and warrants within 45 days after the end of each quarter, rather than equity positions as of the date of filing (resulting in a meaningful lag). Hedge funds who have transferred their equity positions into total return swaps or other derivatives prior to the end of a quarter may be able to avoid disclosing such positions under Schedule 13F, even if they still have economic exposure to the company. Confidential treatment of specific 13F positions may also be sought from the SEC while the investment manager is in the process of accumulating a position, and the SEC often grants such requests for Schedule 13F purposes, including in the context of activist or strategic accumulations.

As noted in question 3.4, Section 16 filings of transactions in the company's securities are required to be made of directors, officers and 10 per cent shareholders, and a company's annual proxy statement is required to specify the beneficial ownership in the company's equity securities of the company's directors, officers and 5 per cent shareholders.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Investors who do not have a "passive" intent and cross the 5 per cent threshold must publicly report their ownership positions and intent on a Schedule 13D. This disclosure must also address the shareholder's identity and background (including as to members of any filing group), source of financing include a discussion of the shareholder's plans or proposals with respect to the company as to a wide variety of matters (including as to extraordinary transactions, acquisitions and dispositions , or changes to the company's board or management, dividend policy, corporate structure or business) and set forth various arrangements, relationships or undersatndings regarding the company's securities and include certain items as filed exhibits. Material changes to these disclosures must also be publicly reported. In addition, under the U.S. antitrust rules, the acquisition of equity securities in excess of specified thresholds usually requires prior approval of regulatory authorities. Such approval, in turn, would require notice to be given to the targeted company of the intention to exceed this amount, effectively previewing to the target the shareholder's intention to not be a "passive investor" who would qualify for certain exemptions from such notice. While such filings may be confidential as to third parties, the target will be on notice of potential activity.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

U.S. companies are managed under the direction of a single-tiered, unitary board of directors, elected by the shareholders and subject to fiduciary duties, and with full control over the company's business and affairs. Directors must be natural persons under state law but need not be shareholders (though directors usually do have equity in the company). The board's basic responsibility is to exercise its business judgment and act in a manner reasonably believed to be in the best interests of the company and its shareholders. Boards typically delegate day-to-day management to the CEO and other senior management, all of whom serve at the pleasure of the board. Outside directors are typically referred to as non-management directors and as independent directors where they qualify as such under applicable rules. Boards will also determine their own committee structures (including as to the exchange-managed committees, such as the nominating and governance committee, the compensation committee and the audit committee) and board leadership structures (for example, with respect to the identity of the chair of the board and whether the chair is a different person than the CEO). Directors owe the corporation and its shareholders fiduciary duties such as the duty of care and the duty of loyalty. The duty of care encompasses the obligation to act on an informed basis after due consideration and appropriate deliberation. The duty of loyalty encompasses the obligation to act in the best interests of the corporation and the shareholders, as opposed to the directors' personal interests. Corollary duties – such as duties of good faith and duties of candour and disclosure to shareholders when submitting matters for shareholder action – also often apply, and there is a legal framework for considering director's oversight duties. The board is generally entitled to take into account long-term as well as short-term interests and set the appropriate time frame for achievement of corporate objectives. Under U.S. law, courts will typically not second-guess business decisions of the board where the 'business judgment rule' applies, which involves a rebuttable presumption that directors are discharging their duties in good faith, on an informed basis and in a manner the directors reasonably believe to be in the best interests of the corporation and its shareholders.

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

Members of the board of directors are elected by the shareholders, with the board having the right to alter the size of the board and appoint directors to fill vacancies, whether created by newly created directorships or resignations of incumbent directors. State law and the corporation's charter will establish the extent to which directors may be removed with or without cause, whether a shareholder vote is required for removal, the voting standard that must be met and any judicial authorities to remove directors. The board of directors, and not the shareholder body, appoints and removes corporate officers.

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

The board of directors has the legal authority to determine compensation for directors and officers. At public companies, stock exchange rules mandate that committees of the board play a central role in compensation decisions. On account of these requirements, an independent compensation committee of the board usually determines and approves the CEO's compensation. Non-CEO executive officer compensation is also usually determined by the independent compensation committee, although stock exchange rules permit the full board to make such determinations after receiving the compensation committee's recommendation. Heightened independence rules apply to the members of compensation committees and committee advisors. Using an independent compensation committee also facilitates tax deductibility of certain compensation, although tax rules in this regard are in a period of flux.

Compensation philosophies and programmes are often developed with the input of third-party compensation consultants. The appropriate mix of fixed compensation (for example, annual base salary) and variable compensation (that is short- and long-term performance incentives), as well as the form of compensation (for example stock options, restricted shares, restricted stock units or cash-based payments) vary among companies, as determined by the compensation committee in its business judgment based on the particular needs of the business. Equity-based components are common, and shareholder approval is required of most equity compensation plans under stock exchange rules, including those involving grants of equity-based awards to directors and officers. In addition, Dodd-Frank's requirement of non-binding shareholder advisory votes on executive compensation, popularised as "say on pay", provides shareholders with means for expressing dissatisfaction with compensation practices, which may also be expressed directly to the company outside of the annual meeting context. While these votes are non-binding, companies that receive low approval ratings face intense pressure to modify executive compensation programmes. Courts typically respect compensation decisions so long as the directors act on an informed basis, in good faith and not in their personal self-interest. Except in the case of certain financial institutions (where special "safety and soundness" provisions apply), regulators generally cannot contest compensation decisions.

Director compensation is also within the purview of the board of directors and the company's director compensation programme must be publicly disclosed. In recent years, there have been a handful of instances where outsized director compensation has been scrutinised and litigation has been pursued.

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

Directors and officers (as well as 10 per cent shareholders) are required to file Section 16 forms reporting their beneficial ownership of the Company's registered securities. Such persons must file a Form 3 at the time the Company registers its securities (or within 10 days after becoming subject to the provision), a Form 4 within two days of changes in beneficial ownership, and a Form 5 within 45 days after the end of the Company's fiscal year to report any transactions that should have been reported earlier on a Form 4 or were eligible for deferred reporting.

Company insiders (including officers, directors and 10 per cent shareholders) can be forced to return any profits made from the purchase and sale (or sale and repurchase) of Company stock if both transactions occur within a six-month period and applicable exemptions do not apply.

To the extent a director or officer acquires or holds substantial equity positions, the limitations and disclosures that would apply generally to shareholders seeking to acquire or hold such positions as discussed in question 2.6 would also generally apply to the director or officer.

Companies may also establish (and enforce) company-specific stock ownership guidelines on directors and officers as well as restrictions on hedging or pledging of securities by such individuals.

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

In addition to regular meetings of the board of directors, boards may convene more frequently through special meetings of the board. Who may call a special board meeting is set forth in the company's organisational documents and governance guidelines. Notice and quorum requirements for board meetings are also set forth in the company's charter or bylaws (as is ability to waive notice requirements); the DGCL sets a majority of the total number of directors as the default quorum requirement. Board business may also be conducted through duly-constituted committees, which will also meet and act as needed and in accordance with notice and quorum requirements and committee charters. Boards may generally act by written consent in lieu of a meeting if such consent is unanimous.

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

See questions 3.1, 3.8 and 5.1.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Effective boards typically perform dual roles: (i) advisor to and business partner of management; and (ii) monitor and overseer of management. Core board responsibilities include:

- Establishing the appropriate "tone at the top".
- Choosing and monitoring the performance of the CEO and establishing succession plans.
- Monitoring corporate performance and providing advice to management as a strategic partner.
- Evaluating and approving the company's annual operating plan, long-term strategy and major corporate actions.
- Determining risk appetite, setting standards for managing risk and monitoring risk management matters.
- Planning for and dealing with crises.
- Determining executive and director compensation.
- Interviewing and nominating director candidates and monitoring the board's performance and effectiveness.
- Reviewing the company's corporate governance practices and considering changes.
- Interviewing and nominating director candidates and monitoring the board's performance and effectiveness.
- Taking centre stage in any proposed transaction involving a conflict of interest with management.

- Setting high standards for corporate social responsibility.
- Monitoring compliance.
- Supporting long-term relationships with shareholders.
- Overseeing relations with government, community and other constituents.

See also questions 1.3 and 1.4.

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

Yes, and the available scope of indemnification and permitted insurance is broad. Under Section 145 of the Delaware General Corporation Law ("DGCL"), companies have extensive power to indemnify directors, officers and others against threatened, pending and completed legal actions. The only limitations in civil suits are first, that the indemnified person must have acted in good faith and with a reasonable belief that he or she was serving the best interests of the company, and second, that a company may not indemnify a person found liable to the company itself, unless a court rules otherwise. In addition to providing broad indemnification protections in corporate bylaws, U.S. companies commonly opt to protect their directors further by including in their corporate charters a provision eliminating or limiting personal liability for monetary damages for breach of fiduciary duty as a director. DGCL Section 102(b)(7) 3 permits such provisions so long as they do not eliminate or limit liability for any breach of the duty of loyalty, for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, for unlawful dividend payments or unlawful stock purchases or redemptions, or for any transaction from which the director derived an improper personal benefit. Charter provisions implemented pursuant to DGCL Section 102(b)(7) provide powerful protection for directors. Expense advancement is also an important and customary aspect of indemnification bylaws. DGCL Section 145(e) provides that companies may provide advance payment of expenses to officers and directors in defending legal actions upon receipt of an undertaking to repay the advancement if it is ultimately determined that the person is not entitled to indemnification. It further provides that companies have the discretion to determine the terms and conditions under which they wish to provide advancement to former directors and officers or other employees or agents. D&O insurance is also regularly provided to directors and officers at the company's expense and in some cases companies will enter into additional direct agreements with directors regarding indemnification.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

As discussed above, a unitary board of directors, elected by shareholders and subject to fiduciary duties, is charged with overseeing the corporation's business and affairs, including setting and directing corporate strategy. Directors are fiduciaries of the corporation and its shareholders and are expected to focus on promoting and developing the long-term and sustainable success of the company. In the U.S., hostile takeovers and shareholder activism can pose significant threats to U.S. corporations and execution of long-term corporate strategies, especially where such developments result in the capture of corporate control or influence over corporate policy by short-term oriented shareholders or bidders pursuing short-term profits, short-sighted breakups of a company, the excess return of capital to shareholders or incurrence of inadvisable amounts of leverage. In other situations, companies are able to navigate such situations effectively, including through making prudent adjustments to the corporate strategy in a manner that is responsive to the interests of long-term shareholders and other stakeholders and aligned with the long-term success of the company.

4 Other Stakeholders

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

With respect to board composition, there are no requirements for employee or labour representation (or other mandated representation for particular constituencies) on the board of directors. In the M&A context, there are no required pre-notification or consultation provisions in the U.S. relating to employees. Some collective bargaining agreements ("CBA") may contain provisions that provide union employees with certain benefits, or the right to re-re-negotiate their CBA, in the event of a change in control, but these matters are contract-specific, however, are not legally required and do not provide a consent right on a bid.

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

The interests of non-shareholder constituencies may be considered by the board for their impact on creating corporate and shareholder value, and many states formally permit boards to consider the interests of non-shareholder constituencies such as employees, business partners and local communities, as well as broader constituencies such as the economy as a whole. As a practical matter, U.S. companies and large institutional investors are increasingly recognising that the long-term success of the company and its status as a durable enterprise requires giving due regard to the interests of important stakeholders, rather than focusing solely on the desires of shareholders.

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

While not a matter of significant legal regulation in the U.S. beyond compliance matters, corporate social responsibility, including treatment of environmental, social and ethical issues, is an appropriate matter of business judgment for the board, and the modern public company is expected to set, and meet, high standards of social responsibility. Related risks are expected to be addressed through robust risk oversight and management processes. Companies often voluntarily disclose performance and policies in this area. Specific disclosure requirements may apply in some of these areas and substantive laws may also apply, such as for anti-bribery, anti-corruption and anti-discrimination rules or environmental mandates. Shareholder proposals increasingly involve sustainability, environmental and social issues, including greenhouse gas emissions and renewable-energy concerns; international labour standards and human rights; and diversity, equality and non-discrimination issues, particularly with respect to sexual orientation. Where such proposals receive significant support, companies will have to determine whether and how to demonstrate responsiveness.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The fundamental responsibility for a company's financial statements and disclosures rests with management and the independent auditor. Each NYSE-listed company must have an internal audit function to provide management and the audit committee with ongoing assessments of a company's risk management processes and systems of internal control. However, as part of its oversight role, the board has ultimate responsibility for overseeing management's implementation of adequate disclosure controls and procedures. Under the federal securities laws, directors can be held liable for their material misstatements or omissions of material facts in public filings. In some cases, liability is limited to circumstances where the director acted with scienter (actual knowledge or reckless disregard), and various defences, including demonstrating appropriate due diligence, may be available. Violations of the corollary fiduciary duties of candour and disclosure may also result in liability. Regulation FD generally prohibits selective disclosure of material information and requires public disclosure of information selectively disclosed to investors, subject to certain exceptions.

The federal securities laws require public companies to file annual, quarterly and periodic current reports triggered by the occurrence of specified events. The contents of such reports are prescribed by law, and false and misleading statements are generally prohibited. Annual reports contain audited financial statements and comprehensive information about the business, performance and relevant risk factors, quarterly reports contain unaudited interim financial statements and other business information, and current reports disclose the occurrence of certain material events, such as entry into material agreements, completion of significant acquisitions or dispositions of assets, and changes in officers or directors and amendments to the corporation's charter or bylaws. Public companies must have adequate internal controls over financial reporting, and publicly filed annual and quarterly reports must contain related certifications from the CEO and CFO. All public companies must have their financial statements audited annually by a registered independent accounting firm in compliance with US generally accepted accounting principles and generally accepted auditing standards (US GAAP and US GAAS). The company's external auditor – in the case of large public companies, usually one of the major registered public accounting firms – must publicly file its signed annual report attesting to the quality of the audit and the company's internal control over financial reporting. The federal securities laws require prompt disclosure with respect to changes in the external auditor and any revision to or inability to rely on prior audited financial statements.

A public company's accounting and audit function involves an independent committee of the board (referred to as the audit committee), external independent auditors, internal auditors and senior management. Federal law and stock exchange rules require that an independent audit committee of the board (comprised of financially literate members, none of whom may accept consulting or advisory fees from the company, with "comply or explain" disclosure required if no member qualifies as a financial expert) be responsible for the appointment, compensation, retention and oversight of the independent auditor and for oversight of certain internal audit function-related matters. While not required, shareholders are typically asked to ratify such auditor's appointment. No aspect of an audit committee's role is more vital than its oversight of the audit process. An audit committee should have procedures in place to ensure that it stays abreast of evolving standards and best practices in this area. The PCAOB has promulgated strengthened independence and ethics rules and adopted auditing standards relating to the transparency and quality of audit reports, including requirements for enhanced disclosures of certain "critical audit matters", and the effectiveness of communications between an audit committee and the independent auditor.

5.2 What corporate governance-related disclosures are required?

Required governance-related disclosures include: information concerning the composition of the company's board of directors and management team; independence determinations regarding the board and director qualifications; the existence of a board diversity policy; corporate governance guidelines that address qualification standards for directors, responsibilities for directors, director access to management and independent advisers, compensation of directors, education and orientation of directors, management succession, and evaluation of board performance (as provided under NYSE rules); board committee structures and committee charters; the number of board meetings held and whether any directors attended less than 75 per cent of board and committee meetings; how shareholders may communicate with the board; whether the company has a code of ethics and any waivers of such codes; the board's leadership structure and role in risk oversight; risks arising from compensation policies that may have a material adverse effect on the company; related party transactions; and other matters.

When items are brought before the shareholders for their approval, such as for election of directors or consideration of significant transactions such as mergers or the sale of all or substantially all corporate assets, proxy statements containing the recommendation of the board, information about the proposals to be considered, disclosure of interests of directors and officers that may differ from the general interests of shareholders and other mandatory items must be filed. Proxy statements for the annual meetings at which directors are elected contain extensive information about the board and senior management, governance practices, director and executive compensation, auditor information and other matters.

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

See question 5.1.

5.4 What corporate governance-related information should be published on websites?

The websites of major public companies will typically include corporate governance-related information, including the company's organisational documents (charter and bylaws), key corporate governance guidelines and policies including as to director independence criteria, committee charters for the audit, compensation and nominating and governance board committees, business codes of conduct, proxy statements and annual reports, Section 16 filings reporting trades by directors and officers and information concerning the company's board of directors and management teams. While not generally required, companies are also increasingly posting sustainability-related information, corporate social responsibility initiatives and progress publicly on company websites and bringing such matters to the attention of investors. While stock exchange rules require or provide the option of posting certain governance information to the company's website, most company websites go beyond what is strictly required.

Sabastian V. Niles
Wachtell, Lipton, Rosen & Katz
51 W 52nd Street NY
NY 10019
USA

Tel: +1 212 403 1000
Fax: +1 212 403 2000
Email: svniles@wlrk.com
URL: www.wlrk.com

Sabastian V. Niles is a Partner at Wachtell, Lipton, Rosen & Katz where he focuses on rapid response shareholder activism, engagement and preparedness, takeover defense and corporate governance; risk oversight, including as to cybersecurity and crisis situations; U.S. and cross-border mergers, acquisitions, buyouts, investments, divestitures, and strategic partnerships; and other corporate and securities law matters and special situations.

Sabastian advises worldwide and across industries, including technology, financial institutions, media, energy and natural resources, healthcare and pharmaceuticals, construction and manufacturing, real estate/REITs and consumer goods and retail.

In addition to serving as Consulting Editor for the New York Stock Exchange's Corporate Governance Guide, Sabastian writes frequently on corporate law matters and has been a featured speaker at corporate strategy and investor forums. His speaking engagements have addressed topics such as Shareholder Activism; The New Paradigm of Corporate Governance; Hostile Takeovers; Strategic Transactions and Governance; M&A Trends; Board-Shareholder Engagement; Confidentiality Agreements in M&A Transactions; Negotiating Strategic Alliances with U.S. Companies; Current Issues in Technology M&A; Corporate Governance: Ethics, Transparency and Accountability; and Developments in Cross-Border Deals.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.co.uk