Corporate Governance

Board structures and directors' duties in 35 jurisdictions worldwide

2013

Published by
Getting the Deal Through
in association with:

Amarchand & Mangaldas & Suresh A Shroff & Co
Anderson Mōri & Tomotsune
Arnauts Attorneys
Arzinger
Badri and Salim El Meouchi Law Firm
Bonn & Schmitt
Carey & Allende Abogados
Cervantes Sainz SC
Davies Ward Phillips & Vineberg LLP
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek NV
Delacour
Duane Morris & Selvam LLP
Hausmaninger Kletter Rechtsanwälte-Gesellschaft mbH
Khrenov and Partners
KK Legal
Levy & Salomão Advogados
Mamić Perić Reberski Rimac
Mehmet Gün & Partners
METIS Rechtsanwälte LLP
Migallos & Luna Law Offices
Nishimura & Asahi
Nomos Law Firm
Polenak Law Firm
Popovici Nițu & Asociații
Price Sanond Prabhas & Wynne
Rentsch Legal
S Horowitz & Co
Schellenberg Wittmer
Schönherr
Šelih & partnerji o.p. d.o.o.
Slaughter and May
Sparke Helmore Lawyers
SRS Advogados
Streamsowers & Köhn
Ughi e Nunziante – Studio Legale
Vivien & Associés
Weil, Gotshal & Manges LLP

Corporate Governance 2013

Contributing editors
Ira Millstein and Holly Gregory
Weil, Gotshal & Manges LLP

Business development managers
Alan Lee
George Ingledew
Dan White

Marketing managers
Rachel Nurse
Zosia Demkowicz

Marketing assistants
Megan Friedman
Cady Atkinson
Robin Synnot
Joseph Rush

Administrative assistants
Parween Bains
Sophie Hickey

Subscriptions manager
Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production
Adam Myers
Production coordinator
Lydia Gerges

Senior production editor
Jonathan Cowie
Production editor
Martin Forrest

Chief subeditor
Jonathan Allen
Senior subeditor
Caroline Rawson

Editor-in-chief
Callum Campbell
Publisher
Richard Davey

Corporate Governance 2013
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2013
No photocopying: copyright licences do not apply.

ISSN 1476-8127

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. No legal advice is being given in the publication. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2013, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

Global Overview Arthur Golden, Thomas Reid, Kyoko Takahashi Lin and Sapna Dutta *Davis Polk & Wardwell LLP* 3

Australia Nick Humphrey, Hal Lloyd and Michelle Segaert *Sparke Helmore Lawyers* 8

Austria Robert Bachner *Schönherr* and Mark Kletter *Hausmaninger Kletter Rechtsanwälte-Gesellschaft mbH* 17

Belgium Laurent Arnauts *Arnauts Attorneys.* Please see www.gettingthedealthrough.com

Brazil Carlos Portugal Gouvêa *Levy & Salomão Advogados* 25

Canada Carol Hansell *Davies Ward Phillips & Vineberg LLP* 31

Chile Jorge Allende D and Fernando de Cárcer *Carey & Allende Abogados* 37

Croatia Natalija Perić *Mamić Perić Reberski Rimac* 44

Czech Republic Rudolf Rentsch and Ladislav Vajdík *Rentsch Legal* 49

Denmark Peter Bruun Nikolajsen, Eskil Bielefeldt and Kristian Tokkesdal *Delacour* 55

France Bernard Laurent-Bellue and Emmanuel Chauvet *Vivien & Associés* 62

Germany Lars Friske, Bernhard Maluch and Andreas Rasner *METIS Rechtsanwälte LLP* 71

Greece George Chatzigiannakis and Maria Vastaroucha *Nomos Law Firm* 80

Hungary Zoltán Kató and Gyula Kőrösy *KK Legal* 87

India Kalpataru Tripathy and Varun Bajaj *Amarchand & Mangaldas & Suresh A Shroff & Co* 93

Israel Amit Steinman and Guy Firer *S Horowitz & Co* 103

Italy Fiorella Federica Alvino *Ughi e Nunziante – Studio Legale* 111

Japan Takeshi Watanabe *Anderson Mōri & Tomotsune* 118

Lebanon Chadia El Meouchi and Samia El Meouchi *Badri and Salim El Meouchi Law Firm* 124

Luxembourg Candice Wiser and Philipp Moessner *Bonn & Schmitt* 135

Macedonia Kristijan Polenak and Tatjana Siskovska *Polenak Law Firm* 141

Mexico Diego Martinez *Cervantes Sainz SC* 151

Netherlands Bernard Roelvink and Michael Schouten *De Brauw Blackstone Westbroek NV* 157

Nigeria Tamuno Atekebo, Otome Okolo and Adebisi Sanda *Streamsowers & Köhn* 165

Philippines Barbara Anne C Migallos *Migallos & Luna Law Offices* 173

Portugal Paulo Bandeira *SRS Advogados* 180

Romania Alexandru Ambrozie and Alexandra Malea *Popovici Niţu & Asociaţii* 187

Russia Alexander Khrenov and Elvira R Gadelshina *Khrenov and Partners* 194

Singapore Leon Yee *Duane Morris & Selvam LLP* 202

Slovenia Nina Šelih, Mia Kalaš and Tjaša Lahovnik *Šelih & partnerji o.p. d.o.o.* 210

Switzerland Lorenzo Olgiati *Schellenberg Wittmer* 216

Thailand Andrew Wynne and Poosit Luengruengtip *Price Sanond Prabhas & Wynne* 224

Turkey Pelin Baysal, Filiz Toprak Esin and Görkem Bilgin *Mehmet Gün & Partners* 231

Ukraine Maksym Cherkasenko and Lada Shelkovnikova *Arzinger* 239

United Kingdom Mark Bennett *Slaughter and May* 247

United States Holly J Gregory and Rebecca C Grapsas *Weil, Gotshal & Manges LLP* 272

Vietnam Hikaru Oguchi, Masataka Sato and Vũ Lê Bằng *Nishimura & Asahi* 286

Global Overview

Arthur Golden, Thomas Reid, Kyoko Takahashi Lin and Sapna Dutta

Davis Polk & Wardwell LLP

This year, we have seen executive compensation issues continue to dominate the global governance agenda, especially in Europe in the wake of the recent Swiss referendum, in which voters approved the most stringent package of restrictions on executive pay that we have seen to date, and the passage by the European Parliament of legislation limiting banker bonuses to 100 per cent of annual salary, or 200 per cent where approved by shareholders. Following the publication in late 2012 of its 'Action Plan' to modernise European governance, the European Commission (the Commission) has underscored its desire to introduce harmonised legislation requiring say-on-pay votes across member states. What remains to be seen is the extent to which the Swiss referendum results, and the pending UK proposals for binding say-on-pay, inform the scope and stringency of any EU-wide proposals from the Commission or prove to be a driver for US investors seeking further regulation of executive compensation.

We also continue to see a resurgence in shareholder engagement globally, though for different reasons. In the EU, there has been direct regulator involvement on this issue, with the Commission's April 2011 Green Paper and the 2012 Action Plan both proposing initiatives to improve companies' ability to identify their shareholder base, as well as to encourage long-term shareholder engagement. In the US, on the other hand, this has largely been the inevitable consequence of the say-on-pay regime and a desire of companies to avoid becoming the target of governance-related shareholder proposals at their annual meetings.

We are also observing the evolution of aggressive activist tactics designed to drive strategic change at public companies using the mechanics of corporate governance and the use of such tactics against very large companies once thought to be immune to them. We are witnessing a variety of activist approaches, including, or threatening, campaigns to replace some or all of the company's existing board members and then to implement alternative business strategies, ranging from the distribution of existing cash reserves through special dividend payments, or increasing leverage for a special dividend or stock buyback, to asset dispositions (often a sale of the entire company), acquisitions or spin-offs of business divisions. The increasing willingness of certain institutional investors to align with the more 'respectable' activists increases the array of potential targets and decreases the commitment the activist needs to make in any particular instance. The result is a real concern that this increase in activism has created a distraction from actual operational decisions and serves only to benefit a minority of investors pursuing idiosyncratic return targets at the expense of companies' long-term prospects and the interests of all shareholders.

United States

In the US, 2013 represents the third year of say-on-pay for most public companies and the second year of the effectiveness of the 'private ordering' proxy access rules. While 2013 is unlikely to be quite as eventful as recent years, at the time of writing we are early in the season and there are nonetheless issues to watch. In particular, an unwelcome development for US companies this year has been the increase in challenges of executive compensation decisions that have been brought by an aggressive plaintiffs' bar. We have seen shareholder litigation extend to, among others, claims of allegedly inadequate disclosures by companies in annual meeting proxy statements, particularly in connection with say-on-pay proposals and proposals to increase the number of shares available under equity plans. With plaintiffs in these cases seeking injunctions against annual shareholder meetings, pending the issuance of supplemental or corrective disclosure, these developments have highlighted the need for companies to be attentive to their executive compensation disclosure.

Trends in say-on-pay voting

For the majority of companies, the 2012 say-on-pay votes proved to be uneventful. Voting results were largely consistent with 2011 in terms of average levels of support for say-on-pay proposals and the percentage of companies achieving approval of 70 per cent or higher.

Still, there were some noteworthy features of the 2012 results, which can inform the way that companies approach say-on-pay votes. First, in terms of those companies that fared poorly in 2012, while the number of companies that received less than majority approval remained small, it was noticeably higher than in 2011, and many of these companies had previously received high approval ratings in 2011. Second, on a more positive note, there were not many recurring failures. Most of those companies that had failed the vote in 2011 passed in 2012, often with high approval rates.

These aspects of the voting results serve as reminders that a successful say-on-pay vote in one year does not lessen the need to be attentive to executive compensation decisions, proxy disclosure or shareholder engagement in subsequent years. For those companies that were successful in 2011 and subsequently failed votes in 2012, it reinforces the need to be vigilant from year to year with regard to say-on-pay votes and mindful of the ways in which changes in company performance or compensation programmes can affect investor perceptions of pay for performance. Early indications from the 2013 season emphasise this further. As of 10 April 2013, four Russell 3000 companies had failed to receive majority support for their say-on-pay proposals, of which three, Navistar International, Nuance Communications and Biglari Holdings, had achieved over 70 per cent approvals in 2012.

It also, however, demonstrates that there is a path forward for companies that have failed say-on-pay votes and illustrates the trend emerging from the say-on-pay regime towards increased outreach to investors. The success in 2012 of companies with failed votes in 2011 is the result of, among other factors, effective shareholder engagement. In particular, these efforts have focused on clear communications to shareholders of the company's performance and why compensation decisions are appropriate in light of that performance (including through the use of additional soliciting materials, often in response to negative recommendations from proxy advisors) and on

addressing shareholder concerns through substantive compensation changes.

The 2012 results also underlined the significance of providing detailed and clear information regarding companies' peer selection process. One of the larger problems that some companies faced in 2012 was the extent to which the peer groups selected by ISS were different from the groups used by the companies themselves. Under the ISS grouping model, many companies were placed in peer groups with companies that operate in different industries or industry segments. Both ISS and Glass Lewis have changed their methodologies to better track company-selected peers during the proxy season, but companies' own disclosure in this respect remains important.

Evolution of executive compensation-related litigation

Say-on-pay litigation, which began to emerge soon after the first say-on-pay votes were held in 2011, has continued. Notwithstanding the advisory nature of the say-on pay vote, a number of companies with low say-on-pay approval votes have continued to be the subject of (mostly unsuccessful) lawsuits with regard to executive compensation decisions, alleging that the directors breached their fiduciary duties.

However, we have also seen the evolution of newer waves of cases, one category of which involves claims relating to companies' annual proxy disclosure. Until recently, conventional litigation alleging inadequate proxy disclosures related to disclosures in merger proxies, where shareholder approval was solicited in the context of a public company acquisition. Now, however, such lawsuits have also begun to focus on disclosures relating to certain proposals in annual meeting proxy statements – in particular, proposals to increase the number of shares available for issuance under equity plans and say-on-pay proposals. Generally, the plaintiffs have requested that the vote on the contested proposal be enjoined pending the issuance of supplemental or corrective disclosure.

These lawsuits have so far produced mixed results. At least with regard to say-on-pay proposals, the advisory nature of the say-on-pay vote and courts' focus on customary industry practices have created obstacles for plaintiffs. As to the equity plan proposals, one of the earlier lawsuits, *Brocade*, put pressure on companies to settle these types of litigation in order to avoid the risk of a court enjoining a shareholder vote. Early indications from subsequent cases suggest that the more a company's disclosure is in line with customary industry practice (and, perhaps, the less executive-friendly the equity plan proposal is or where dilution is not an issue) the less likely a plaintiff will be able to succeed in obtaining injunctive relief. However, at this time, several other cases are still pending and plaintiffs' strategies continue to evolve. Even unsuccessful claims can result in costly disruptions and harm to the reputation of companies, especially where injunctions against annual shareholder meetings are threatened, and we strongly encourage companies to pay very close attention to their executive compensation disclosure.

Finally, another wave of executive compensation-related litigation in which there has been a recent increase involves claims relating to section 162(m) of the Internal Revenue Code, which limits the tax deduction that a public company may take for compensation paid to covered executives over US$1 million per year unless it is performance-based compensation that meets certain criteria approved by shareholders. Plaintiffs have pursued a number of theories, claiming, for example, that directors wasted corporate assets or breached their fiduciary duties by awarding executive compensation that exceeded the amount of the shareholder-approved plan, or claiming false or misleading disclosure in connection with statements made in public filings with regard to compliance with section 162(m). Though not without exception, these claims have generally failed on procedural grounds. However, they continue to be filed, and those that have been permitted to move forward do not differ significantly in terms of legal theory or factual background from those that failed, and so companies continue to face uncertainty as to the future of these types of suits. Additionally, though they remain at a very early stage, we are now starting to see an even newer category of lawsuits in which the plaintiffs' focus is on allegations that companies have granted equity compensation awards in excess of the limits provided by the companies' plans.

Final independence rules for compensation committees and advisors

In June 2012, the SEC adopted final rules to implement Dodd-Frank's requirements regarding the independence of compensation committees and their advisors and, in January 2013, it approved revisions to the listing standards of the NYSE and Nasdaq to implement the new rules. Under the final rules, among other things, listed companies will be required to expand compensation committee authority for the oversight of compensation consultants and other advisors to the committee, compensation committee members will be subject to heightened independence standards and compensation committees will be required to conduct an independence assessment taking into consideration specified factors before being permitted to receive advice from an advisor.

NYSE-listed companies have until their first annual meeting after 15 January 2014, or, if earlier, 31 October 2014, to comply with the compensation committee member independence standards. Other standards, including the need to evaluate compensation committee advisors and the compensation committee authority and charter requirements, will become effective on 1 July 2013. For Nasdaq-listed companies, the compensation committee advisor and compensation committee authority requirements become effective on 1 July 2013 and companies will have until their first annual meeting after 15 January 2014, or, if earlier, 31 October 2014, to comply with other standards.

Proxy access

The 2012 proxy season saw the introduction of the 'private ordering' proxy access rules, which permit shareholders of US public companies to seek to implement proxy access on a company-by-company basis by proposing amendments to companies' organisational documents permitting shareholders to include director nominees in the company's proxy statement.

One of the most noticeable features of proxy access last year was the significant number of proposals that were excluded on a variety of technical grounds. As a result, it is likely that this year we will see fewer, but more refined, proposals as proponents seek to avoid the technical pitfalls that resulted in numerous exclusions in 2012. 2013 is also the first year that companies are presenting their own proxy access proposals. Given the ongoing variation in structure and terms, it is unlikely that many companies will pre-emptively make their own proxy access proposals at this time, though we may see some companies inclined to do so in order to exclude a conflicting proposal from a shareholder proponent.

Corporate political activities

With 2012 being a presidential election year, and the first one after the Supreme Court's *Citizens United* decision, it is not surprising that a higher number of shareholder proposals were brought on corporate political activities (74 proposals during the 2012 calendar year compared with 56 during the 2011 calendar year). That level has continued in the immediate aftermath of the presidential elections, with the number of proposals brought at April 2013 being comparable with the same time in 2012.

While average support for shareholder proposals relating to corporate political activities has remained low (and lower than for governance-related proposals), there have nonetheless been high-profile examples of companies relenting to pockets of continued investor pressure to disclose political spending. In January 2013, Qualcomm became the subject of a lawsuit filed against it by the New York State

Common Retirement Fund (the Fund) over political spending disclosure, in which the Fund sought the right to inspect the company's books and records to determine how shareholder funds were being spent for political purposes. Shortly thereafter, in February 2013, Qualcomm announced that the Fund had withdrawn the suit and Qualcomm had implemented and publicly posted an 'industry leading' political contributions and expenditure policy, including, among other things, information on contributions to political candidates and parties, expenditures to trade associations and contributions to influence ballot measures.

Additionally, not long before the announcement of Qualcomm's policy, in December 2012 the SEC indicated in its semi-annual regulatory agenda that the SEC staff are considering whether to recommend that the SEC issue a proposed rule requiring disclosure of corporate political contributions.

Other governance-related shareholder proposals

The number of shareholder proposals during the 2012 proxy season relating to other governance matters continued to be high. In particular, there has been heightened focus in the US on the separation of the roles of CEO and board chairman. Overall, shareholder support for independent board chair proposals remains low, with only five proposals passing in 2012 of 59 proposals brought. However, activist pressure on companies to split the CEO and board chair role has continued to increase and the CEOs of many large companies, especially of large financial institutions such as J P Morgan and Goldman Sachs, have been targeted. Goldman Sachs has, so far, been relatively successful in resisting shareholder proposals to split the CEO and chair positions. In 2012, it was able to negotiate for the withdrawal of this proposal in exchange for the appointment of an independent 'lead' director and, in April 2013, again succeeded in doing so by agreeing to increase that lead director's responsibilities. In J P Morgan's case, however, a shareholder proposal for independent board chair won 40 per cent support in 2012 and is back on the agenda for 2013 (supported by CwT, the proponent that agreed to withdraw the same proposal for Goldman Sachs, as discussed above), notwithstanding unanimous board support for Mr Dimon to continue in both roles.

Other proposals that are likely to remain prevalent in 2013 include board declassification, majority voting and action by written consent. Board declassification proposals, of which 132 were brought in 2012, remain strongly supported and over 100 of the proposals passed, including over 85 that received an approval rate of 90 per cent or more. Shareholder proposals for the adoption of majority voting in director elections (as opposed to plurality voting) and for the right of shareholders to act by written consent also continued to attract interest in 2012. 64 proposals on majority voting and 30 on action by written consent were brought in 2012, of which 48 and 14 passed, respectively.

US rulemaking update: the Dodd-Frank Act and the JOBS Act implementation

Unsurprisingly, rulemaking progress in the US continues to be slow as we approach the three-year anniversary of Dodd-Frank in July 2013. As of 1 April 2013, approximately 63 per cent of Dodd-Frank-required rulemaking deadlines had been missed, and only 36.9 per cent had been met with finalised rules. Additionally, just over one year ago, the US Jumpstart Our Business Startups Act (JOBS Act), was signed into law and the SEC continues to move forward on the various required rulemakings. While it is clear that regulators continue to make efforts to finalise outstanding rulemakings, it is much less clear, given the continuing and significant burden of requirements, that there will be meaningful improvement in progress rates in the near-term.

Europe

Following the publication in April 2011 of the Commission's Corporate Governance Framework Green Paper (the April 2011 Green Paper), governance has continued to be a key theme throughout Europe. European regulators have sustained their drive to harmonise governance across member states. Consequently, we expect to see the stream of publications, guidance and initiatives coming out of Europe continue, at least for the time being, with the potential for resulting legislation or other softer implementing measures, though it still remains unclear how far-reaching any such measures would be.

December 2012 saw the latest development in the line of recent governance publications by European regulators: the release of the Commission's 'Action Plan' on the modernisation of European corporate governance (the Action Plan). The Action Plan outlines 16 initiatives that the Commission intends to take in order to modernise company law and corporate governance. It is organised around three primary themes:

- enhancing the transparency of companies' governance through improved disclosures;
- increasing long-term shareholder engagement in corporate governance (including, potentially, through the introduction of mandatory say-on-pay votes); and
- simplifying cross-border operations of European businesses.

The Commission has also announced the publication of another Green Paper, on the long-term financing of the European economy. According to the Commission, it may take further input from this paper as to how long-term shareholder engagement can be encouraged and how appropriate governance arrangements might support long-term financing, though it remains to be seen how the Commission uses, or attempts to put into practice, any such input.

Additionally, in November 2012, in what has been a highly divisive issue across the EU, the Commission published proposals for an 'objective' to apply to large European listed companies of achieving at least 40 per cent representation of women in non-executive director positions by 2020. While these proposals reflect a dilution of the Commission's original plans to impose stronger, mandatory quotas, which met with significant opposition from some EU member states as well as from many within the Commission itself, they continue to face real resistance from member states and, in many cases, from women themselves, including prominent female directors, who believe that quotas would undermine the perception of women on company boards or the ability of women to achieve those roles on merit alone.

Say on pay: a move towards harmonised EU requirements?

Say-on-pay continues to increase in traction across Europe. An important development was the Swiss referendum held on 3 March 2013, in which Swiss voters approved with a significant majority some of the most stringent controls yet on executive pay. Nearly 68 per cent of voters approved mandatory, binding say-on-pay votes. The approved measures go further, however, by prohibiting payments such as golden parachutes and change in control agreements. The rules are yet to be adopted, but under the proposals, failure to comply with the new rules could result in up to three years in prison or fines of up to six times' annual salary.

In other developments, a binding shareholder vote on executive pay in the UK is also in the works, following the proposals released by the UK government in 2012, which could be approved later in 2013. Additionally, in a move opposed by the UK government, in April 2013 the European Parliament approved new rules, to come into effect in January 2013, limiting banker bonuses to 100 per cent of annual salary, or up to 200 per cent of annual salary if approved by shareholders, as part of a wider reform of the regulatory scheme for banks.

While the Swiss package of executive compensation restrictions is by far the most extensive approved to date, across other EU member states say-on-pay votes have been implemented in varied ways in the absence of an EU-wide requirement. A key item in the Action Plan is the Commission's proposal to expand the possibilities for shareholder oversight of remuneration through, potentially, legislating at the EU level for mandatory say-on-pay votes, which would go some way in harmonising these measures. The Action Plan does not, however, currently indicate whether the vote would be advisory or binding in nature, or whether it would address compensation of executive management in addition to directors. What also remains unclear is how far the Commission will go in the wake of the results of the Swiss referendum.

Enhancements in governance disclosures; comply or explain

The Commission's Action Plan also addresses the ongoing discussion in Europe about the quality of 'comply or explain' disclosures, which are intended to be the channel through which companies explain any departures from applicable governance code requirements. Alongside growing criticisms of the utility of the 'comply or explain' approach, the Commission has noted that the explanations provided by companies are insufficient where they simply note non-compliance with governance requirements without explaining in necessary detail the reasons for departure from these requirements.

To that end, the Action Plan announces an initiative planned for 2013, likely through a non-legislative approach, to improve the standard of companies' explanations under the 'comply or explain' principle. It also indicates that the Commission intends to encourage further cooperation between the national bodies in charge of monitoring application of corporate governance codes, in particular through exchange of best practices developed in different member states.

The Action Plan also includes a number of other initiatives designed to improve the quality of governance disclosures, including to strengthen disclosure of board diversity policies and increase disclosure of non-financial risks. These are mainly expected to be addressed through amendments to EU Directive 76/660/EEC (the Accounting Directive).

Shareholder rights and engagement in corporate governance

The April 2011 Green Paper raised a number of considerations regarding the ongoing focus on the stewardship role of investors and on ways to improve investor engagement. The Commission solicited feedback on a number of questions on how to encourage shareholders to take an interest in sustainable investment returns and long-term company performance in an attempt to counter short-term investment models and the associated effect that they can have on governance. Respondents demonstrated strong support for the implementation of a form of European mechanism to help companies identify their shareholders in order to facilitate dialogue on corporate governance issues. In furtherance of this, in the Action Plan the Commission has indicated its intention to propose legislation to improve the visibility of shareholdings in listed companies in Europe.

The Commission will also consider measures to improve the transparency and conflict of interest frameworks applicable to proxy advisors, possibly through amendment to EU Directive 2007/36/EC (the Shareholder Rights Directive). Proxy advisors are not currently regulated at the EU level, and the Commission has raised concerns over the influence of proxy advisors over, for example, institutional investors with highly diversified equity portfolios who face practical difficulties in assessing how they should vote at general meetings of investee companies. These concerns include potential conflicts of interest when the proxy advisor advises on shareholder resolutions proposed by one of its clients, the lack of competition in the proxy advisory sector and a lack of transparency in the methods used by proxy advisors in the preparation of their advice.

The Commission is also focused on improving transparency on the voting policies adopted by institutional investors themselves, including asset management firms, and the exercise of those policies. Certain member states, including the UK (through the Stewardship Code), already recommend that institutional investors be transparent about the way they exercise their ownership and stewardship responsibilities, including information about voting and engagement. In the Action Plan, the Commission has announced intended initiatives on the disclosure of voting and engagement policies as well as voting records by institutional investors.

Diversity and gender equality on boards

Pressure from the Commission on European companies to increase the number of women on their boards has continued to grow and this issue gained even greater prominence in 2012. According to the Commission, despite intensive ongoing public debate and attempts at voluntary initiatives at national and EU levels, the number of women on European boards has not changed significantly in recent years, with an average increase of just 0.6 percentage points since 2003.

The Commission continued to take steps in 2012 toward accelerating the achievement of gender equality on boards, but not without controversy. In November 2012, faced with significant opposition, the Commission indicated that it would not pursue far-reaching proposals that would have required large European companies to achieve at least 40 per cent representation of women in non-executive board positions by 2020, or face sanctions. Instead, it published proposals that set an 'objective' for large European-listed companies to achieve the same goal. Listed public undertakings (those over which public authorities exercise a dominant influence), would have the same 40 per cent objective, but by 2018. The proposal also contemplates, as a complementary measure, a 'flexi-quota', under which companies would set individual, self-regulatory targets regarding gender representation. Under the proposal, member states would be asked to lay down 'effective, proportionate and dissuasive sanctions' for companies that do not meet the objective, though they would retain some flexibility as to how to implement this.

The approach to legislated measures for gender equality on company boards has been a fragmented one across the EU, which the proposed Commission legislation seeks to harmonise. A number of EU member states have already introduced some form of legislation, including Austria, Belgium, Denmark, Finland, France, Greece, Italy, The Netherlands, Portugal, Slovenia and Spain. At the other end of the spectrum, eleven states have neither self-regulation measures nor legislation in place, and in April 2013 the German parliament rejected a proposed binding quota for female company directors. Others still, somewhere in the middle, have adopted some form of self-regulatory measures. For example, in the UK, Lord Davies' report and recommendations set out recommended targets of 25 per cent by 2015 for FTSE 100 companies and a recommendation that FTSE 350 companies set their own aspirational targets to be achieved by 2013 and 2015.

While the Commission's move away from its original proposal for mandatory 40 per cent quotas has been welcomed, the proposed objectives continue to face strong opposition from within the EU. The UK has led the campaign against the proposals, backed by ministers from a number of other countries and representatives of several large companies, arguing that, among other things, measures to improve the representation of women are best considered at the national level; a 'one size fits all' approach fails to account for differences in industry sectors, individual companies and the way in which corporate boards function and that the overridingly determinative factor in board appointments should be the competence of candidates, regardless of gender.

The ultimate fate of the proposal remains to be seen. The proposal will now pass to the European Parliament and Council of the European Union, for consideration under the normal legislative procedure.

On a related point, it is worth noting that in April 2013, the European Parliament placed a similar – though softer – emphasis on board diversity within the banking sector in the context of its adopted proposals for the Capital Requirements Regulation and the Capital Requirements Directive (CRD IV), which is designed to implement Basel III within the EU. While the proposals cover a broad range of non-governance related matters, in them the European Parliament also highlighted the importance of management bodies of financial institutions having sufficient diversity in age, gender, and educational and professional background, among other things, and indicated that diversity should be one of the criteria for financial institutions in board composition. While CRD IV is generally expected to take effect from 1 January 2014, the proposals contemplate that the European Banking Authority will issue guidelines on the board composition matters outlined above by the end of 2015.

Asia

Hong Kong

Corporate governance reform in Hong Kong has continued in a variety of aspects. In some respects, trends and issues that have garnered focus in the US and Europe have carried over to Hong Kong, including on the topics of shareholder engagement and board diversity.

First, after a long exercise in rewriting, the new Companies Ordinance (the Ordinance) was passed in July 2012, representing a significant step in the progression of company law in Hong Kong. One of the main objectives of the Ordinance, which is expected to commence operation in 2014, is to enhance corporate governance. The key measures of the Ordinance relating to governance improvement include:

- the introduction of a requirement that every Hong Kong private company have at least one director who is a natural person, with the goal of improving transparency and accountability;
- clarifying directors' duties of care, skill and diligence;
- enhancing shareholder engagement in the decision-making process by reducing the threshold requirement for shareholders to demand a poll from 10 per cent to 5 per cent, and strengthening shareholder protections through more developed rules addressing director conflicts of interest;
- strengthening auditor powers to obtain information from a wider range of persons in order to perform their duties, including from the officers of a Hong Kong incorporated company, its Hong Kong incorporated subsidiaries and persons accountable for or holding the accounting records of such company or subsidiaries; and
- replacing the 'headcount test', under which a majority in number representing 75 per cent in value of the members or creditors present and voting at the relevant meeting could approve a scheme of arrangement of a Hong Kong company with, in some cases, a 'disinterested shares' test, and in others, with court discretion to dispense with the headcount test.

Second, in December 2012 the Stock Exchange of Hong Kong (the HK Exchange) published the conclusions of its consultations on board diversity. The consultation found that there is strong support for new measures to promote board diversity at listed companies, and the HK Exchange has decided to implement its proposed new measures, effective as of 1 September 2013. These proposed measures include introducing a provision in the corporate governance code, subject to comply or explain, that the company must have a policy on board diversity and also disclose the policy or a summary thereof in its corporate governance report, along with any measurable objectives for implementing the policy, and progress on achieving those objectives.

Finally, a new statutory disclosure regime became effective on 1 January 2013, requiring Hong Kong listed companies to disclose price-sensitive or inside information as soon as reasonably practicable after the information comes to its knowledge. While several safe harbours are available, the regime imposes a range of possible civil sanctions in the event of non-compliance, including director disqualification for up to five years, a 'cold shoulder' order on the officer depriving him or her from the ability to deal in securities and other investments for up to five years and regulatory fines of up to HK$8 million on the company, each of the directors and the company's chief executive.

Japan

In December 2011, the Japanese Ministry of Justice (MOJ) published an interim proposal regarding proposed revisions to the Japanese Companies Act to improve governance standards. These proposals continued to progress in 2012 with the publication by the MOJ of the specific draft amendments in August 2012. Among others, the proposed amendments adopt a form of 'comply or explain' principle from the EU by requiring listed companies without outside directors to disclose the reasons why they consider appointing outside directors inappropriate. The term 'outside director' generally refers to a non-executive director under the current Companies Act; that too is proposed to be changed under the amendments to include a form of independence test (which would exclude, for example, individuals who are related to the parent of, or a company under common control with, the listed company, and individuals who are close relatives of the listed company's management).

In response to the draft amendments, the Tokyo Stock Exchange has expressed in a statement its commitment to move swiftly to review its listing regulations once the amendments have been finalised, and has said that it views these amendments as an important turning point towards a more transparent securities market in Japan. In the aftermath of the significant governance, accounting and compliance failings by Olympus in 2011, it will be some time yet before we have more clarity on whether this combination of the proposed amendments and regulator commitment is sufficient to avoid similar situations in future.

GETTING THE DEAL THROUGH®

Annual volumes published on:

Acquisition Finance
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection and Privacy
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property & Antitrust
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax Controversy
Tax on Inbound Investment
Telecoms and Media
Trademarks
Vertical Agreements

For more information or to purchase books, please visit:
www.gettingthedealthrough.com

The Official Research Partner of the International Bar Association

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Strategic research partners of the ABA International section

 ISSN 1476-8127