AIJA

UK National Report 2014

Labour Commission

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1. **The legal position/status of a director and/or managing director in the different jurisdictions?**

   - **How to define the mandate of a director/managing director from a legal perspective? Distinctive factors between the mandate of director and the mandate of managing director;**

For the purposes of this report, we have taken the term "director" to refer to a person who holds office as a director of the company rather than someone with a nominal title of director who is not a member of the Board.

In the UK, a director's legal mandate derives principally from the company's articles of association, the authority vested in him/her by the board of directors and the terms of his/her contract with the company.

Most UK companies' articles of association are based either on the Model Articles set out in the Companies (Model Articles) Regulations 2008 or Table A of the Companies (Tables A to F) Regulations 1985. Both authorise directors to manage the company's business for which purpose they may exercise all the powers of the company. Most articles of association (including the Model Articles and Table A) allow the directors collectively to delegate these powers to individual directors, other persons or committees as they see fit.

The shareholders may also by special resolution require the directors to take (or stop them from taking) specific action (s 41 Companies Act 2006 ("2006 Act").

The appointment of a director under the articles secures a director's role as an officeholder but does not normally give a director any individual executive powers. These powers are normally delegated to directors by the board. Such delegation is often recorded in a board resolution and/or the terms of the directors' Service Agreements.

There are various types of director in the UK, including executive, non-executive, de-facto and shadow directors. In this report we focus on the most common types of director - being executive and non-executive directors.

Company law does not differentiate between executive and non-executive directors. Their authority as officeholders and their general duties as directors are the same.

Executive directors, in addition to being officeholders, will (as their name suggests) have delegated executive functions and will therefore be mandated to manage the day to day running of the company.

Non-executive directors of a company in addition to being officeholders do not exercise executive power. They are normally appointed to act as independent advisers to the company and act as a "check and balance" to the executive board.

A board will normally delegate management of the company to a managing director or CEO. A managing director will be an executive director. His mandate will depend on the articles of association, his contract and the powers delegated to him/her by the board. However traditionally, in the UK a managing director is the most senior executive member of the board. His/her delegated mandate is therefore to be responsible for the overall performance and strategy of the business of the company rather than one specific area of it. Other executive directors such as the finance director or marketing director will have a more limited mandate to act on behalf of the company.

- **Terminology: difference between managing director and CEO**

In the UK, the terms managing director and chief executive officer (CEO) are often used interchangeably to describe the most senior executive director of a company. Traditionally, the title CEO derives from the USA and managing director from the UK. The managing director/CEO is responsible for the overall performance and strategy of the company. However, this is dependent on the nature of the business/structure of the company in question. In certain UK industries, including financial services, there is a distinction between the remit of a managing director and a CEO. Such industries tend to follow the US corporate model and will have a main board of directors lead by the CEO and an executive committee (EXCOM) populated by managing directors responsible for specific areas of the business (fixed income, foreign exchange etc) and who report into the CEO.

- **Distinction between aspects of employment law and aspects of company law:**

  i. **What is the contractual relation with the company?**

The articles of association of UK companies (including table A and the model articles for public/private companies) usually allow the board the freedom to appoint directors and to determine the contractual terms on which they are appointed. The articles normally allow for a director to be appointed by the board of by an ordinary resolution of shareholders. In addition to the director's appointment as an officer of the company which is governed by the articles of association and the provisions of the 2006 Act, the company, acting through its board, can contract with its directors as employees, workers or self-employed contractors.

  ii. **Under what status does a director/managing director carry out his/her tasks: can a director and/or managing director carry out his/her duties as an employee?**

Directors will carry out certain tasks under their status of officeholders. These include tasks imposed on them under the articles/2006 Act such as making collective board decisions to manage the company for the benefit of the shareholders and various housekeeping tasks such as record keeping and filing (including complying with statutory accounting requirements, maintaining up to date accounting records and filing annual returns). Most of these tasks attach to a director's office rather than their contractual relationship as, for example, managing director.

Generally in the UK, the distinction between tasks carried out by a director as an office holder and those carried out under the director’s contractual relationship (be this as an employee, worker or self employed contractor) is a difficult and largely unnecessary one to draw.

The status of a director normally becomes relevant only when the office holder is removed or dismissed and tries to claim employment rights or when determining what fiduciary, common law or statutory duties the individual owes to the company. To this end, the distinction between tasks carried out as an officeholder or as an employee, can be a dangerous one to draw. For example, in the UK, a director’s fiduciary or statutory duties will often impact the manner in which they carry out their contractual tasks - for example, a commercial director, subject to the no profit and no conflict rule (see general duties below) may not exploit a business opportunity relevant to the company for him/herself even if the information about the opportunity comes into his/her possession other than in the course of employment with the company which can be contrasted to the position of a mere employee who does not owe fiduciary duties.

As mentioned above, the board has the freedom to determine the contractual terms on which directors are appointed. In the UK, any director including a managing director can be an employee. An executive director will usually be an employee and a non-executive director will not be an employee (non-executive directors are normally engaged under a contract for services), however, this is not always the case.

The question of whether an employment relationship arises under UK law is a question of fact. An executive director who is appointed to manage the business (the managing director) or a specific area of it (such as a finance director) is likely to be regarded as an employee by the UK courts as the core elements of an employment relationship (control, mutuality of obligations and personal service) are normally present. This is reflected by the fact that normally, executive directors are employed under Service Agreements which confirm their employment status as well as their executive duties.

A non-executive director on the other hand will normally not be an employee. They are instead probably likely to be engaged under a contract for services and will have self-employed or worker status. A non-executive director is typically appointed under a letter of appointment confirming their non-executive tasks and duties (for example, as non-executive chairman).

iii. Are there typical rights/obligations related to the mandate of director/managing director?

The typical rights and obligations in the UK apply equally to directors/managing directors and arise from three sources in the UK: the general duties owed by directors to the company, any specific obligations under the articles and any rights and obligations set out in the director’s contract with the company.

If the directors are employees, they will also be subject to certain implied common law duties including but not limited to the duty of fidelity.

General Duties

In general all directors, whatever their title, are subject to the seven general duties which are codified under the 2006 Act and include the duty:

- **To act within powers (section 171).**

A director must act in accordance with the authority delegated to them. This would include as well as more specific instructions: general authority conferred on directors under the articles to exercise all of the company's powers; any specific authority conferred by a special resolution of the shareholders for a particular director to do something; powers delegated from the board to an individual director or implied authority implied. Ordinary directors will have a limited amount of implied authority to for example deal with day to day management tasks for example, writing letters and signing cheques. The level of authority of a managing director will be greater. However, the extent of implied authority will very much depend on the facts.

- **To act in good faith and to promote the success of the company (section 172).**

This duty must be exercised with regard to key factors such as the likely long term consequences of any decision, the interests of the employees, the need to foster the company's business relationships with suppliers, customers and others; the impact of operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct and the need to act fairly as between the members of the company.

- **To exercise independent judgment (section 173).**

Directors should not allow others to influence their decisions or to make decisions for them. However to make the duty workable they are allowed to delegate to others and rely on professional advice where reasonable/authorised by the articles, provided that they exercise their own judgment when deciding to delegate/follow that advice.

- **To exercise reasonable care, skill and judgment (section 174).**

A director is expected to exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that both:

- may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
- that the director actually has.

The first stage is the basic objective standard. The second stage ensures that directors are judged by a higher standard if they possess particular knowledge, skills or experience (for example, a director who is also a chartered accountant will be judged by a higher standard when dealing with financial matters than others who do not have such a qualification).

- **To avoid conflicts of interest (section 175).**

This would include avoiding a situation where a director has or could have a direct or indirect interest that conflicts or may conflict with the company's interests. It applies in particular to the use of property, confidential information or business opportunities whether or not the company could take advantage of the same. Directors that disclose their interests may be allowed to continue if authorised by the board.

- **Not to accept benefits from third parties (section 176).**

This codifies the rule that directors should not exploit their position for personal benefit. Again, directors who disclose benefits may be permitted by the board to retain them.

- **To declare an interest in a proposed transaction or arrangement (sections 177 to 185).**

This duty is self-explanatory.

Prior to the introduction of the 2006 Act, these general duties in the UK were developed under common law and equity and fell into two categories:

- fiduciary duties of good faith and loyalty; and
- common law duties of skill and care.

Directors also owed the company a duty of confidence in equity.

The case of *Dorchester Finance Company v Stebbing [1989]* established that there was no difference between the common law/equitable duties owed by executive and non-executive directors.

The 2006 Act, is intended to put these common law and equitable duties on a statutory footing. The 2006 Act states that regard is to be had to the common law and equitable rules and case law when applying the statutory duties. The consequences of breach of the statutory duties also follow the common law and equitable duties.

Fiduciary duties may continue after the directorship ends. In particular, former directors must not take for themselves another maturing business opportunity which the company is pursuing *Hunter Kane v Watkins [2003].* A director may also be in breach of their fiduciary duties if they take preparatory steps before leaving to compete with the company after they leave *Shepherds Investments Limited v Walters [2003]*.

<u>Specific duties</u>

The 2006 Act also requires UK directors to comply with specific housekeeping duties. For example, the requirement to obtain shareholder approval for service agreements over 2 years long s188-189; obtaining shareholder approval of compensation for loss of office s215-222; complying with statutory accounting requirements Part 15 and maintaining up to date accounting records and filing annual returns 386,854.

Directors also have specific duties under the Fraud Act 2006, Securities law, the Insolvency Act 1986 (and in particular fraudulent and wrongful trading); Health and Safety, environmental and anti trust legislation to name but a few (see liability section below for further details).

Rights

In the UK a director's rights will be dictated predominantly by the terms of their contract with the company and their employment status.

If the directors (including a managing director) are employees, they will have the benefit of extensive statutory employment rights. In particular the right not to be discriminated against based on any of the nine "protected characteristics" under the Equality Act 2010; to receive statutory minimum notice on dismissal; not to be unfairly dismissed; not to be discriminated against or dismissed for whistleblowing; to receive a statutory redundancy payment; to comply with health and safety obligations and the right to certain statutory leave periods (maternity, paternity, adoption, parental, sick and annual leave) together with minimum pay levels during these periods and the national minimum wage.

For those directors who are workers (usually non-executive directors), the statutory employment rights are more limited. Key rights include protection from discrimination, unlawful deduction from wages, paid annual leave and the national minimum wage.

Directors who are self-employed enjoy no statutory employment rights although they may be protected by discrimination law.

Directors will also be entitled to the contractual rights determined by the terms of their letter of appointment/contract of employment/service agreement.

Directors who are employees will have certain implied contractual rights including but not limited to trust and confidence, the right to obtain redress for grievances and the right to have reasonable steps taken to ensure their health and safety.

As regards rights arising in consequence of a director's office, these are predominantly determined by the articles of association. For companies which adopt the model articles, these include:

- the right to call a meeting of directors, provided the specified notice is given;

- the right to be kept informed about the company's affairs and inspect the books of the company;

- the right to indemnity by the company for any liability the director might incur in relation to negligence, breach of duty or other liability incurred as a result of being an office or the company, subject to the limitations on such indemnities imposed by the 2006 Act.

i. What are the rights in the event of termination/dismissal?

In the UK, a director's rights on termination and dismissal are determined principally by the articles of association, the terms of his/her contract with the company and his employment status.

In terms of his office, the articles of association will normally set out the circumstances in which a director may be removed and/or will terminate automatically for example bankruptcy/they become mentally or physically incapacitated etc) and whether he/she will be entitled to compensation for loss of office on such termination. The board cannot usually remove a director from office unless expressly provided for in the articles. A director can however be removed from a board by an ordinary resolution under s.168 of the 2006 Act provided the correct notices are given. This overrides any provision which attempts to limit such a right of removal.

Normally, a director's removal from office will also terminate any appointment that he/she has with the company. However, this will depend on the drafting of the letter of appointment or service agreement.

In the case of an executive director where his office is integral to his executive role, for example, the managing director, his/her removal from office is likely to automatically terminate his contractual relationship with the company (normally employment), as he/she will be unable to carry on in his role if he is not a director.

However the contract can be drafted to provide that an individual's employment or engagement is entirely separate from their office. In these circumstances their removal from office will not automatically terminate their employment/engagement which is usually expressed to continue as in the position of "manager".

It is also common for executive directors' Service Agreements and non-executive letters of appointment to provide that the director will resign from their office on the termination of their employment/engagement and include a power of attorney in favour of the remaining members of the board to effect this resignation.

In the event of dismissal, if a director is an employee, his rights fall into two categories contractual rights (principally the right to receive his contractual notice) and statutory rights as highlighted in question 1 (iii) above (the most relevant of which are usually the right not to be unfair dismissal, not to be discriminated against or to be treated less favourably for blowing the whistle and to receive a statutory redundancy payment).

2. **What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director/managing director?**

   - **Distinction between listed and not listed companies**

The principal piece of corporate governance legislation which impacts the position of director/managing director in the UK is the 2006 Act which legislates for certain basic internal controls and codifies the duties owed by directors to their companies. The main part of the 2006 Act which applies to directors is part 10, sections 154-259. These sections dictate the minimum number of directors required per company, the minimum age of a director, directors' registration requirements, the appointment of directors, directors duties, transactions with directors which require members approval and directors liabilities.

However, in general, the UK favours a soft law approach to corporate governance. The UK Corporate Governance Code (the Code) published by the UK Financial Reporting Council (FRC) includes recommendations in relation to internal control for quoted companies with a premium listing (UK and overseas) which will have a significant impact on the roles of directors.

<u>Listed Companies</u>

Listing Rules

The UK Listing Authority Rules require a UK-incorporated listed company to confirm in its annual report and accounts how it has applied the Main Principles of the Code and whether or not it has complied with the Code's provisions (Listing Rule 9.8.6 (5) and 9.8.6 (6)). If quoted companies ignore the Code, then there will be penalties under the Listing Rules.

Corporate Governance Code

The Code only applies to a company with a premium listing of equity shares and not those with only a standard listing. Therefore directors of private companies (those which are not listed on a recognised stock exchange) do not have to adhere to the Code. This means that directors of listed companies have to comply with more stringent reporting requirements than those of non-listed companies (there are also parts of the Code which apply only to FTSE 350 companies, for example, the provisions on annual re-election of directors and external facilitation of board evaluations).

The Code is not a rigid set of rules. It consists of principles (main and supporting) and provisions. The Listing Rules require companies to apply the Main Principles and report to shareholders on how they have done so. The principles are the core of the Code and the way in which they are applied should be the central question for the directors as the board determines how it is to operate according to the Code. Companies are not bound to comply with the Code, but if they choose not to follow it then they must explain publicly why they chose not to do so.

The Code itself impacts directors/managing directors in the premium listed UK companies in many aspects in particular in relation to their role, remuneration and the composition of a board.

Requirements of the Main Principles of the Code

The Main Principles of the Code are divided into 5 sections covering leadership, effectiveness, accountability, remuneration and relationship with Shareholders. Of particular significance to all directors are the following principles:

Leadership:

- The Code requires the chairman to be responsible for leadership of the board. There should also be a clear division of responsibility on the board. No one individual should have unfettered powers.
- Non-executive directors are required to constructively challenge and help develop proposals on strategy.

Effectiveness

- There should be a formal, rigorous and transparent procedure for appointing new directors and the Code recommends that a nomination committee is set up for this purpose.
- Directors should be able to allocate sufficient time to the company to discharges their responsibilities effectively and should meet sufficiently regularly to discharge their duties.
- The board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties.
- The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.
- All directors should be submitted for reelection at regular intervals subject to continued satisfactory performance.

Accountability

- The board is also responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives. The board is required to maintain sound risk management and internal control systems. The board should establish an audit committee of at least 2-3 independent non-executive directors, depending on the size of the company.

Remuneration

- Remuneration should be sufficient to attract, retain and motivate directors but a company should avoid paying too much for this purpose. Directors remuneration should be linked to corporate and individual performance.
- There should be a formal procedure for developing policy on executive remuneration and fixing individual directors remuneration packages. No director should be involved in deciding their own remuneration.
- Directors' remuneration should be set by a remuneration committee consisting of independent non-executive directors.

Relations with Shareholders

- The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place.

As concerns a managing director in particular, the Code recommends that the CEO and the chairman should be separate individuals and that the CEO should not go on to become the chairman of a company.

The Code is supplemented by additional guidance in the UK to assist boards in implementing its recommendations. Such guidance includes the Turnball guidance. The Turnball guidance sets the standards for UK directors' duties in establishing and monitoring internal controls and communicating with shareholders in relation to the same. The FRC has just finished consulting on a new Integrated Code Guidance which will replace the Turnball Guidance and is expected to be published later this year.

<u>Non-Listed Companies</u>

Whilst non-listed companies are not obliged to comply with the Code, the Institute of Directors reports that its introduction has helped to encourage good standards of corporate governance in non-listed companies in the UK as well.

3. **Liability of a company director/managing director?**

- Civil liability
  - Contractual liability and liability on the basis of "tort";
  - Liability towards the company and liability towards third parties;
- Criminal liability
- Noteworthy specific liabilities?
- Are there in your jurisdiction over the last few years more court cases involving company directors or managing directors?

In the UK directors may incur personal liability, both civil and criminal, for their acts or omissions in directing the company.

Civil Liability

Breach of general directors' duties in the UK tend to fall within 3 categories of civil claims: breach of contract, tort and breach of fiduciary duty. The type of action will determine the remedies available. Each of the statutory duties set out in the 2006 Act are enforceable (with the exception of the duty of care, skill and diligence (s174)) as fiduciary duties owed by the directors.

As the duties are owed to the company, it is the company (and not the shareholders/third parties) who will generally have cause of action against the directors.

In general terms, the director will be required to compensate the company for any loss suffered. A director who breaches his/her contractual duties owed to the company will be liable to pay damages to put the company in the position that it would have been in if the contract had been performed. Alternative remedies would include an injunction or account for profits received by the director or loss suffered by the company.

If the director is in breach of fiduciary duties, the remedies available would also include damages but also restitution or tracing in relation to property acquired or an account of any profits made in breach of fiduciary duty. The transaction may also be voidable at the company's request.

A director who breached his/her duty of skill, care and diligence would incur potential liability in negligence or tort, the remedies for which would again be damages for the loss suffered by the company or an injunction.

Since directors owe these duties to the company and not individual shareholders, such claims must be brought by the company.

However, shareholders can also bring derivative proceedings on behalf of the company against a director for negligence, breach of duty or breach of trust. Any remedy granted would be to the company and not the individual shareholder.

Under the 2006 Act, shareholders can bring a claim for unfair prejudice against the company where the company's affairs are, or have been, conducted in a way that is unfairly prejudicial to the shareholder or shareholders in general.

Remedies available to the court include, ordering the company to buy out the claimant shareholders' shares or injunctive relief.

Liability for misrepresentations

UK directors can also acquire tortious liability to third parties under the principles in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, for negligent misstatements made by them on behalf of the company. In *Caparo v Dickman* it was held that if a statement was put into general circulation which might be relied on by any number of third parties for any number of different purposes which the maker of the statement had no specific reason to anticipate, there was no relationship of proximity between the maker of the statement and any person relying on it unless it was shown that (a) the maker knew his statement would be communicated to the person relying on it, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or a transaction of a particular kind, and that (b) that person would be very likely to rely on it for the purpose of deciding whether to enter into that transaction.

In certain cases directors have been found to be liable for the supply of misleading information to an offeror in a contested-take over bid. However this has been limited and depends on whether personal assurances were provided. However, the House of Lords held in *Standard Chartered Bank v Pakistan Shipping Corporation* that the fact that a director acted as an agent for a company and was not generally liable did not apply to fraudulent misrepresentations.

Criminal Liability

Individual directors are potentially liable for offences such as the common law offence of gross negligence manslaughter. Gross negligence manslaughter is proved when individual officers of a company (directors or business owners) by their own grossly negligent behaviour cause death. This offence is punishable by a maximum of life imprisonment.

Specific Liabilities

Insolvency Act 1986

If a company is insolvent, action can be taken against a director in relation to their conduct both before and during the insolvency process.

Wrongful Trading: Under s.214 of the Insolvency Act 1986, if a company has gone into insolvent liquidation and before that liquidation took place a director knew, or ought to have known, that there was no reasonable prospect that the company could avoid the liquidation, then the court may declare that the director may make a personal contribution to the company's assets. However, the director will not be made personally liable in circumstances where he/she can show that he/she took every step prior to the liquidation to minimise the potential loss to the company's creditors.

Although directors of non-listed insolvent companies are not usually liable for the debts of the company, there are instances where they can be held accountable for them. Once a company has become insolvent the directors must be able to demonstrate that they have acted in the best interests of the company. The directors cannot do anything which would cause the companies debts to increase or go unpaid. If a director fails to meet this liability they are likely to face severe personal liabilities and possible disqualification from acting as a director of a limited company.

Misfeasance or breach of fiduciary duty: under the Insolvency Act 1986, a director may be liable to repay, restore or account for misapplied money or property, or pay compensation in respect of misfeasance or a breach of fiduciary duties.

Fraudulent Trading: a director can also be liable for a criminal offence for knowingly carrying on of the company's business with the intent to defraud the creditors/ any other person or for any other fraudulent purpose.

Health and Safety at Work Act 1974

Health and safety law places duties on organisations and directors can be personally liable when these duties are breached: members of the board have both collective and individual responsibility for health and safety. Larger public and private sector organisations need to have formal procedures for auditing and reporting health and safety performance. If a health and safety offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the organisation, then that person (as well as the organisation) can be prosecuted under section 37 of the Health and Safety at Work etc Act 1974.
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Those found guilty are liable for fines and, in some cases, imprisonment. In addition, the Company Directors Disqualification Act 1986, section 2(1), empowers the court to disqualify an individual convicted of an offence in connection with the management of a company. This includes health and safety offences. This power is exercised at the discretion of the court; it requires no additional investigation or evidence.

Securities law

Market abuse: it is a criminal offence under the Financial Services Act to make, knowingly or recklessly, a materially misleading, false or deceptive statement, promise or forecast in order to induce a person to buy or sell securities. It is also a criminal offence under the Criminal Justice Act if an individual who has inside information (information that is not yet publicly known and which would affect the price of the shares if it were made public) deals in price-affected securities in relation to that information on a regulated market. It is also an offence if he encourages another person to deal or discloses such information other than in the proper performance of his duties.

Civil market abuse: Financial Services and Markets Act 2000 sets out the civil market abuse regime, under which the FCA can impose unlimited penalties on persons who are engaged in, or have encouraged other persons to engage in, insider dealing, tipping off, misuse of information, manipulating transactions or devices, disseminating false or misleading information, and market manipulation

E<u>nvironment</u>

A director who consented or connived to actions or omissions leading to the commission of an environmental offence may be criminally prosecuted.

<u>Anti-trust</u>

A director may be held liable for breaches of EU and UK competition law including: anti-competitive agreements (including price fixing), dishonestly limiting production and supply, market sharing and bid-rigging

<u>Bribery</u>

Bribery Act 2010: in the UK it is a criminal offence for a company to bribe another person (including a foreign public official) or to accept a bribe. If the offence was committed with the consent or connivance of a director, the director may be held criminally liable.

2006 Act: a director may acquire criminal liability for a number of offences under the 2006 Act including but not limited to failing to make certain regulatory filings.

Company Directors Disqualification Act 1986: A director may be disqualified from acting as a director for a variety of reasons (such as breaches of competition law). Acting as a director while being disqualified is also a criminal offence.

Recent cases

Christopher Willford, the former Finance Director of Bradford and Bingley was fined 30,000 by the City regulator (FCA) for failing to provide the board with up to date information ahead of its collapse five years ago. The regulator found that the information received three days before the banks unsuccessful £300m rights issue on May 19 2008, should have been raised with the board.

4. **Are there any recent changes in remuneration legislation/policies for company directors/managing directors?**

    - Fixed remuneration
    - Variable compensation (bonus etc)

- Stock options
- Golden parachute

The Corporate Governance Code 2012 (the Code) (section D) sets guidelines for directors remuneration, compensation, stock options and the payment of Golden Parachutes for listed companies.

The Code states that remuneration should be high enough to attract directors of sufficient skill and quality, but should not be higher than is necessary, no individual director should be involved in deciding his own remuneration and a remuneration committee should be set up (of at least 2/3 non-executive directors) to decide issues on remuneration etc. In particular Schedule A sets out that the remuneration committee should decide if directors are eligible for bonuses, benefits under long-term incentive schemes and shares or other types of deferred remuneration should not vest/be exercisable for at least 3 years.

Following amendments to the 2006 Act, which came into force in October 2013, companies with financial years ending on or after 30 September 2013 are required to comply with a new reporting and voting regime in relation to directors' remuneration. Introduced through changes to the 2006 Act, the Enterprise and Regulatory Reform Act 2013 and the Large and Medium sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013, the UK government intends this new regime to put directors pay back in sync with the performance of their company. The reforms will effect quoted companies (companies registered in the UK and with equity listed on the main market but not AIM listed companies).

Under the new rules the directors' remuneration report must include a statement by the chair of the remuneration committee, the company's policy on directors' remuneration and information on how the remuneration policy was implemented in the financial year reported on.

The remuneration policy will set out how the company proposes to pay directors and how that proposal supports the company's long term strategy and performance. It will also include details of proposed payments for recruitment and loss of office.

Shareholders will then have a binding vote to approve the remuneration policy at the first AGM and then at least every three years after that. If they wish to change the policy, they will need to present the new policy for shareholder approval.

Once a remuneration policy has been approved a company will only be above to make remuneration and loss of office payments determined in accordance with that policy unless they have separate shareholder approval to make that payment.

Companies will also have to produce a report demonstrating how the remuneration policy has been implemented and set out a figure for total directors' pay in that year.

From 1 October 2013 whenever a director leaves office, the company will be required to publish a statement as soon as reasonably practicable setting out what payments the director has received or may receive in future.

The institute of Directors anticipates that around 900 main market companies will be effected by these changes which will allow them a binding vote on executive pay policies.

In the UK a director of a company authorised by the Financial Conduct Authority (FCA) will be performing a controlled function under the FCA Handbook and therefore be treated as "Code Staff" for the purposes of the FCA Remuneration Code. The most important principles of the Remuneration Code which would impact Code Staff directors' variable remuneration include:

Guarantees – firms must no offer guaranteed bonuses of more than 1 year. Guarantees may only be given in exceptional circumstances to new hires for the first year of service.

Deferral – at least 40% of a bonus must be deferred over a period of at least 3 years. At least 60% must be deferred for the most senior management or when an individual's bonus in more than £500,000.

Proportion in shares – at least 50% of any bonus must be made in shares, share linked instruments or other equivalent non-cash instruments of the firm. These shares should be subject to an appropriate retention period.

5. **Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers)?**

- Can you give some examples
- Was this protest spontaneous or organised by certain groups/institutions?

International retailers (including Primark), some of whom are based in the UK have faced pressure over conditions of workers in factories overseas and changed their health and safety policies in relation to the same. The collapse of the Rana Plaza (which included various international retail factories) in Bangladesh killing 1,132 people has led to action from various stakeholders in respect of the interests they had in the retail industry. In May 2013 international retailers agreed to a new code of practice regarding safety inspections for factories.

Shell pulls out of artic - Shell's campaign to locate 20% of the world's yet-to-be-discovered oil and gas resources in the Arctic faced significant opposition from environmental groups. Whilst Shell have stated that their departure from the Arctic was due to a number of mechanical failures, it is possible that stakeholder pressure played a part in the decision. Shell faced opposition from in particular, Greenpeace, Oceana, Christophe de Margerie the head of Total SA.

6. **Has your jurisdiction issued specific legislation on female presence in the board of directors?**

- If no, was this ever a political topic?
- If yes, which obligations apply under these laws?

As yet there has not been specific legislation passed in the UK on female presence in the board room. However, pressure is increasing on companies to ensure that they have more female directors.

In 2011 a UK government enquiry published a report which suggested that FTSE100 companies should aim to achieve 25% female representation by 2015. If this figure is not met the report suggested that quotas could be introduced. A progress report published by Cranfield School of Management, found that women account for 19% of FTSE 100 and 15% of FTSE 250 board positions. The report also suggested that boardrooms should be required to report annually on their boardroom diversity policy. The UK Corporate Governance Code was amended to include provision B.2.4, which says that a listed company's annual report should include a description of the boards policy on diversity (including gender), any measurable objectives that it has set for implementing the policy and progress on achieving the objectives.

The European Union has made increased efforts to encourage the diversity of boards across Europe. In July 2011 the European Parliament passed a non-legislative resolution seeking an increase in the representation of women in corporate management bodies of enterprises. In 2012, the European Commission proposed a Directive which would require publicly listed companies to have at least 40% of non-executive directors be women, and to give priority between equally qualified candidates to women until that level of representation is reached. A draft directive is currently in the process of being approved by the Council, so that it may become law.

From January 2014 rules requiring the publication of gender targets and policies will take effect. All companies in the finance sector will be required to publish policy documents and larger institutions will be required to set internal targets.

7. **Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board?**

- Does this depend on the type of company?
- Does this depend on whether the company is listed or not?

There is no minimum requirement of independent/non-executive directors on the board of private company. Likewise there is no legal requirement on a public (listed) company to have a certain composition of independent/non-executive directors, however, the Corporate Governance Code recommends (under provision B.1.2) that for listed companies (except for smaller companies), at least half the board, excluding the chairman, should comprise non executive directors determined by the board to be independent. The code suggests that a smaller company should have at least two independent non executive directors.

8. **Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics?**

- Composition of Board of Directors?

See above.

- Compensation for Directors?

Under the 2006 Act private and publicly owned companies are subject to the same restrictions in relation to compensation. However, under the Code, publicly listed companies alone are subject to further restrictions in respect of compensation payable to directors for loss of office. Under provision D.1.4 remuneration committees must carefully consider what compensation commitments (including pension contributions and all other elements) their directors' terms of appointment would entail in the event of early termination. The aim is to avoid rewarding poor performance. Such committees are required to take a robust line on reducing compensation to reflect departing directors' obligations to mitigate loss.

- Obligation to have certain stakeholders represented in the board?

In the UK there is no general obligation to have certain stakeholders represented on the board. UK law does provide that companies incorporated at Community level as Societas Europaeas or Societas Co-operativa Europaea and registered in the Great Britain must make arrangements to inform and consult employees or their representatives about relevant matters which in some circumstances give them a right formally to participate in the management of its affairs on the board of directors. However, there are very few of these companies registered.

Otherwise, it is pretty common in the UK for an investor or private equity house to make a nominated director on the board a condition of their investment.

9. Position of directors/managing directors in the event of disposal and/or merger of the company?

- Is it typical to have wording on the position of the management in transfer agreements? If yes, which topics would usually be covered?

It is fairly typical to have wording in transfer agreements covering the position of management. The topics covered would depend on whether the buyer wishes to maintain the existing management team and if so, for how long.

Where a buyer wishes to maintain management post transfer it is common to negotiate a "lock in" directly with them to secure their commitment to remain with the business. This is usually achieved by changes to their terms of employment, which could normally include an extended notice period to be given by the director or some form of retention/loyalty bonus.

A buyer may also wish to vary the employees' terms of employment to include restrictive covenants to prevent them entering into competition with the business being acquired in the event that they leave the employment of the acquired business.

Conversely if the buyer does not wish to keep the management post transfer, it is common for the agreement to be conditional on the termination of their employment/office and the signature of a Settlement Agreement waiving all claims that they may have against the company.

- Is it common to have wording on discharge for the services performed prior to the disposal/merger?

It is fairly common for a buyer to insist on warranties being included in the transfer or share purchase agreement upon sale, in respect of the discharge of the directors of the duties owed to the company prior to the disposal.

Certainly, it is common for buyers to insist on exiting directors to sign Settlement Agreements including warranties as to their compliance with their duties to the acquired business prior to termination of their office/employment.

- Is it common to have contractual limitations of liability towards the acquirer?

In the UK it is common to have contractual limitations of liability towards the buyer both in terms of a de minimus principle - excluding liability for small claims. It is also fairly common for the seller to limit its aggregate liability under the warranties to the total purchase price. The seller will also seek limit liability to the buyer through matters disclosed in the disclosure letter.

- Is it common for the sale agreement to provide restrictive covenants on the part of directors/managing directors? If yes, what type of restrictive covenants?

It is common for the sale agreement to be conditional on directors/managing directors entering into new restrictive covenants on acquisition. This is likely to refer to executive and managing directors in relation to their employment. Such directors are likely to be restricted from competing with the company, soliciting or employing other employees and soliciting or dealing with customers and suppliers for a specified period and within a specified area. The enforceability of such covenants will depend on whether they can be deemed to be a restraint of trade i.e. whether they go no further than is reasonable and necessary to protect a legitimate business interest.

10. **Are there in your jurisdiction minimum requirements to become a company director?**

- Does a director need to prove certain knowledge on company business?
- Does he need to have certain degrees?

There are only certain minimum requirements which must be met in order for someone to become a director in the UK. Under s.157 of the 2006 Act a director must be at least 16 years of age. Subject to any provision in the company's articles, any person can be a director unless they have been disqualified from so acting under the Company Directors Disqualification Act 1986, or they are an undischarged bankrupt.

In respect of listed companies there is more guidance on the qualities which should be present in a director. Whilst there is no test or set level of knowledge a main principle of section B of the Code is 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.

The FRC Guidance on the Code (in particular paragraph 4.1) suggests that appointing directors who can make a positive contribution is a key element of board effectiveness. To increase the likelihood of making good decisions, directors should have the appropriate range and balance of skills, experience, knowledge and independence. Non-executive directors should have critical skills of value to the board and relevant to the company’s challenges.

11. **Does a company director have specific obligations with regard to:**

- Non-compete obligations?
- The obligation to reveal so called “corporate opportunities” towards the company?

Non-compete obligations

An executive director is likely to have specific non-compete obligations within his contract of employment/service agreement. This will limit the ability of the director, upon termination of his employment contract, to compete with the company. These will be subject to normal restraint of trade/enforceability principles under UK employment law. A non-executive director less likely to agree to restrictive covenants due to the nature of his appointment and his self-employed status.

A director's fiduciary duties and, in particular, the obligation to promote the success of the company and the no conflict and no profit rules mean that a director may be under an implied duty not to compete with the company or make secret profits whilst an officeholder. This duty is likely to be more extensive in an executive director who is an employee of the company than the duty of a director who is not employed. In *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd [1891]* it was held that a director who did not attend board meetings did not commit any breach of duty by being appointed a director of a competing company. Whereas in *Thomas Marshall (Exports) Ltd v Guinle [1979]* a Managing Director who set up two other companies in competition was held to be in breach of his fiduciary duty as a director.

Directors may also be under a duty not to prepare to compete with their existing employers during employment and if they do, to disclose their wrongdoing to their employer *Attwood Holdings Ltd v Woodward [2009].*

The obligation to reveal "corporate opportunities" towards the company

Under s.172 2006 Act a director is obliged to promote the success of the company. A director must therefore act in a way which he considers would be most likely to promote the success of the company. Therefore if a corporate opportunity arose a director would be acting in contradiction of his duty under s.172 if he failed to notify the company of such an opportunity.

There is also another situation where a director could be deemed to be under a duty to reveal corporate opportunities. Company directors under the 2006 Act are obliged to avoid situations in which they have, or could have, a direct or indirect interest which conflicts with, or might possibly conflict with, the interests of the company. Under s.175 2006 Act directors are obliged to avoid conflicts of interests and as such must avoid situations in which he has or can have a direct or indirect interest that conflicts with, or may conflict with, the company's. Therefore if a director attempted to take advantage of a corporate opportunity, rather than reveal such an opportunity to his company, he could be in contradiction of his duty of to avoid a conflict.