

**Consultation on the Review of the Corporate Governance Code
for Credit Institutions and Insurance Undertakings**

Consultation Paper CP 69

In response to Central Bank Consultation Paper 69 on the Review of the Corporate Governance Code for Credit Institutions and Insurance Undertakings (the “**Consultation Paper**”), we have set out below our comments on the proposed revised text of the Code and then separately our comments on what the Central Bank has referred to as “**Specific areas for comment**”.

1. Comments on Proposed Revised Text of Code

(i) High Level General Comments

Before setting out our specific comments on the individual paragraphs of the proposed revised Code, we have two general comments.

Firstly, we feel that there remains capacity for confusion with some of the terminology used to describe different categories of directors and, in particular, around the concept and practical application of “director independence”.

A number of terms are used to describe directors: *Non-executive; Independent non-executive; Group directors*. In addition some of these terms can be mixed so that one can have a Group executive director and a Group non-executive director. The first issue that we have relates to the practical application of the definition of “Director independence” which is relevant for determining whether an non-executive director is or is not to be treated as an “Independent non-executive director”.

It remains unclear whether, when determining independence, the fact that any one criterion from the list appearing under the definition of “Director independence” applies to the individual, that automatically means that he/she should not be deemed to be independent. The wording of the definition of “Director independence” states firstly what is “independence” [*the ability to exercise sound judgement and decision making independent of the views of management, political interests or inappropriate outside interests*] but then lists a set of criteria which it says “shall be considered and given reasonable weight” when determining if an individual is in fact independent.

In practice, despite the “given reasonable weight” wording, it seems that that the default conclusion of boards is that if any one of those criteria is present, the conclusion must be that the person is not independent. We would appreciate clarification on this point from the Central Bank as individuals who act in a completely independent manner seem to be being automatically excluded from being treated as independent by how this definition is applied in practice. Alternatively, the Central Bank could remove the “given reasonable weight” language and simply state that if any of the following criteria apply, the person cannot be deemed independent.

A related second issue is that when looking at the definition of “Group director” it seems to imply that “existing relationships with the institution’s direct or indirect parent”, disqualifies him/her from being independent although such relationships do not appear as one of the “independence” criteria. Does this mean that a “Group Director” can never be an independent director?

Both these issues are directly related to board composition and selection.

(ii) *Specific Paragraph Comments*

Our comments on the individual revised sections of the Code are set out below using the same section numbers as appear in the revised Code.

4.2 The new wording states “the board is responsible for determining (in the first instance) whether a breach is material based on the particular facts”. If the intention is to allow the board decide – which we consider to be the correct approach – the words “(in the first instance)” suggest that the board can be second guessed, presumably by the Central Bank. That may result in the boards not being willing to make a decision or, alternatively, simply reporting every deviation because of a fear that the Central Bank will at a later date question the board’s assessment of materiality. Boards have to make decisions and be allowed to do so.

7.3 Because of the loose wording of the “Director independence” definition, any individual in respect of whom any of the criteria applies will in our experience be automatically deemed not to be independent. It becomes the default, as the board may not want to take any risk that the Central Bank takes a different view. It also means that individuals who act in a completely independent manner may not be treated as “independent”.

One of the criteria used in assessing independence is where the individual has been employed by the institution or a group entity “in the past”. That might be rephrased instead to refer to the “recent past”. Note that criterion (iii) refers to an individual who has been a provider of professional services in the “recent past”.

7.5 The revised text suggests that attendance by tele/video conference is an exception – we do not think that that should be the case. Board composition may benefit from having foreign residents with particular expertise. Requiring physical attendance other than on what appears to be an exceptions basis may be counter-productive.

7.10 We suggest excluding from the numerical calculation directorships taken on solely for incorporation purposes where the director will resign prior to the company commencing to trade.

7.14 Does this mean that only independent non-executives are subject to the 9 year review?

8.11 Whilst we agree with the principle behind the Central Bank’s revision, we question whether the Central Bank should be imposing a prior approval in respect of a Group Chairman “assuming any such additional roles” as the issue of prior approval may really be a matter for

the regulator of those other companies. This is really just a matter of wording – perhaps it should be that the Chairman should be required to consider his/her time available to dedicate to the Irish institution if he/she proposes to assume additional Chairmanship roles. In the event of a material diminution in his/her time available to dedicate to the Irish institution, he/she should consider either resigning from the board of the Irish institution or not assuming the other Chairmanship role at all.

- 9.2 The second part of this section suggests that although a CEO can hold two other CEO positions, he/she can only do so in Irish Institutions as foreign (even EU) institutions would not be designated as Medium-Low or Low Impact. Is that intentional?
- 9.3 This section begins by requiring a CEO to have relevant “financial expertise” but then refers later to “financial services background”. We suggest the first reference be amended to read “financial services expertise”.
- 12.3 This section provides that the CRO shall “promote sound and effective risk management both on a solo basis and at group level”. This should be clarified to make it clear that when referring to the group here it means the Irish entity and its subsidiaries, not its foreign parent.
- 12.8 This provides that the CRO shall report to the board Risk Committee with direct access to the Chairman of the board. We would suggest that a CRO might also have a reporting line to executive management.
- 14.4 We think that boards would find it of assistance if the Central Bank would indicate the type of “adequate on-going” training it expects or at least confirm that that can be provided in-house (i.e. it is not a requirement that it be external training). It would be useful to clarify to avoid the question being raised by boards and then having to be dealt with by FAQs.
15. It might be useful to link the CRO role to certain parts of Section 15, in particular 15.3, 15.5 and 15.6.
19. We feel that the capacity to have the full Board act as the Audit and Risk Committee should not be limited to entities which have 5 board members. We consider that that should be allowed for Low and Medium-Low impact entities automatically and for Medium-High entities subject to prior Central Bank approval.
- 20(e). Same point as for Boards.
- 22.4 Whilst we understand the rationale we think the term “as a whole” may lead to confusion and more questions. This should be revised.
- 22.5 For Low impact and Medium-Low institutions, we feel that it should be permissible for the Committee to extend a standing invitation to the CEO, Board Chairman or other executives to attend Audit Committee meetings. It may make the process more efficient in our experience.

23.5 Whilst we understand the rationale we think the term “as a whole” may lead to confusion and more questions. This should be revised.

23.4 To require the Risk Committee to be comprised of a majority of non-executive directors (i.e. directors that are either an independent director or a group director) seems to place the “independence requirement” ahead of the “experience requirement”. To be of value to the board and to be effective as a separate risk committee, the members selected should be knowledgeable of the business activities and of risk mitigation and management, as well as having the time, energy, and willingness to serve as active contributors of such a committee. In our view it should be up to the board to select who is best placed to sit on such a risk committee rather than be obligated to only choose individuals on the basis of whether they are non-executive or executive.

The proposal that the risk committee is overseen by a Chair that is a non-executive director will address the independence matter.

2. Specific Areas for Comment

Composition of the Board

We do not feel competent to give any definitive view on the merits or otherwise of introducing a diversity requirement. We note that many reports internationally suggest that board diversity, including gender diversity, can help to avoid “group-think” but we also note that other reports suggest that there is no real evidence that that is the case and there are even some articles which suggest that the developing general acceptance that diversity avoids “group-think” is itself an example of “group-think”.

Perhaps the focus should be on ensuring that board candidates are given appropriate director training and ongoing education, proper induction and are persons willing and able and competent to challenge their fellow board members and an executive team.

Directorship Limits

We have not experienced any real difficulty with the current limits.

Dillon Eustace
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