

The Continuing Role Of Independent Directors On Our Corporate Boards

Professor Blanaid Clarke, School of Law, University College Dublin

In the last twenty years our expectations of the role to be played by non-executive directors and our ensuing demands in terms of their qualification, suitability and representative base have grown exponentially. Largely this has been the consequence of our tendency to react to each corporate scandal by seeking to “learn from past mistakes”. This has typically involved reviewing the existing regulation and then adding to the list of must-haves or must-have-nots and even moving between hard law and soft law in the process. Enron and the 2002 scandals placed the focus firmly on the need for boards to be independent. However, the failure of companies with apparently strong independent boards in the 2008 banking crisis and the emergence of a body of empirical research which might be seen to undermine the contribution of independent directors to their companies has led to the questioning of this approach. This presentation examines the continuing role of independent directors on our boards through the lens of a sustainable companies agenda.

Firstly, the presentation considers the possibility that the focus on independence is correct but that we need to refine and extend the list of attributes sought and the list of disqualifying relationships further. For example social relationships and common boards may need to be considered as factors affecting a director’s independence. Although EU guidance would be helpful in developing such a list, further work would need to be done at a national and a company level on the basis that some of the problems we are seeking to fix differ between jurisdictions and between companies and what improves governance in one may be fruitless or even detrimental in another.

Secondly, the presentation considers another approach, not necessarily exclusive of the first, which is to strengthen our boards by improving the level of expertise and commitment of directors and the diversity of boards. Again the means by which this is done will require further consideration. The recent European Commission Green Paper (Com(2011)164 final) considers whether a limit on the number of mandates directors are allowed to hold might ensure greater commitment on their parts. It also notes that “more diversity leads to more discussion, more monitoring and more challenges in the boardroom”. Although the Green Paper refers to the benefits of professional and international diversity, the focus of late has tended to be on gender diversity and EU’s justice commissioner has indicated that European boards should be 30% female by 2015 and 40% by 2020 and that legislation will be introduced if firms fail to make sufficient progress on this front.

Even if the relevant positive and negative characteristics of directors can be defined, it is submitted that ensuring that individual directors meet these criteria will not be straightforward. We all know for example that directors need to be “independent of judgment” and assertive but how do we regulate for this? How can we ensure that board dynamics will not affect their independence? While an effective board appointment and

board assessment processes will play a crucial role in this context, these are the challenges which remain to be met.