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Notes:

[1] Indeed, this chapter might have been better entitled 'Members as an Organ of the Company', since not every company is limited by shares: see CA 2006 s 112.

[2] And every company must keep a register of members: CA 2006 ss 113ff.

[3] CA 2006 ss 182–231, see 'Special rules on notice requirements and members' approval for certain transactions: CA 2006 ss 182–231', pp 445ff.

[4] CA 2006 s 21, see 'Alteration of the articles', pp 219ff.

[5] CA 2006 ss 626–640, see 'Variation of class rights', pp 563ff.

[6] CA 2006 s 168, see 'Removal of directors', pp 284ff.

[7] CA 2006 ss 260–264, see 'The statutory derivative action: CA 2006 ss 260ff', pp 642ff.

[8] See the Companies (Model Articles) Regulations 2008 Sch 1, which prescribes the Model Articles for private companies limited by shares. Schedules 2 and 3 prescribe the Model Articles for private companies limited by guarantee and for public companies respectively.

[9] The small shareholders are often geographically dispersed and see no benefit in making the effort to attend; and the large institutional shareholders generally have sufficient access to the board and other parts of the corporate operation that these avenues, not a general meeting, provide their preferred way of influencing decisions.

[10] See '"Voice" in decision-making', p 204.

[11] By this compromise, the Statute for a European Company allows an SE to adopt either a one-tier or a two-tier board structure (Regulation (EC) 2157/2001, Arts 38–51). The former is the equivalent of the British company system and the board in this case is called the administrative organ. In the two-tier system there is a management and a supervisory organ. The functions of each of these organs have been prescribed in the Act. Under Directive 2001/86/EC, the form of employee involvement in an SE is to be determined by negotiation between the management or administrative organs of the existing companies and representatives of their companies' employees.

[12] The Companies (Model Articles) Regulations 2008 apply to all new companies incorporated under CA 2006 on or after 1 October 2009. Companies incorporated earlier than this are subject to Table A articles (as modified at different times): see the following extracts.

[13] This provision does not appear to have been changed despite the introduction of the following: the Companies

(Tables A to F) (Amendment) Regulations 2008 (SI 2008/739); the Companies (Tables A to F) (Amendment) (No 2) Regulations 2007 (SI 2007/2826) and the Companies (Tables A to F) (Amendment) Regulations 2007 (SI 2007/2541). Current Table A as updated is available on: www.companieshouse.gov.uk/about/tableA/index.shtml.

[14] CA 2006 s 33, see 'Members' personal rights', pp 250ff.

[15] Recall that CA 2006 abolishes the company's memorandum, in this old-style form, and s 28 provides that the provisions of any existing company memorandum which are not required to be in the new-style memorandum will be treated as provisions of the articles, amendable by special resolution. The 'new-style memorandum of association' (s 8) is a statement of intent in prescribed form authenticated by the subscribers to the new company.

[16] But now see CA 2006 s 168, which gives the general meeting power to remove the directors by ordinary resolution notwithstanding the terms of the articles: see 'Removal of directors', p 284.

[17] An Act containing special provisions for regulating companies incorporated by a special Act of Parliament.

[18] The members can now also remove the directors by ordinary resolution, by provisions first introduced into CA 1948: now see CA 2006 s 168.

[19] (1913) 108 LT 665.

[20] Section 89 of the Act enabled the remaining directors to fill up interim vacancies on the board: compare the 2006 Model Articles.

[21] Of course, meetings are still possible: CA 2006 s 281. But the written resolution procedure cannot be excluded by the articles for many types of decisions: CA 2006 s 300.

[22] This follows the very general common law rule about all decision-making in *AG v Davy* **[4.09]**.

[23] Where, clearly, the number of shares held by each voter is unknown.

[24] These tin-mining companies were unincorporated and governed by special statutes.

[25] Certain resolutions require special notice: see, eg CA 2006 ss 168, 511 and 515.

[26] Section 311 has been amended by SI 2009/1632 and now includes ss 311(2), 311(3) and 311A. These changes relate to the general meetings of traded companies only and deal with the contents of notice of meeting, and publication in advance of a meeting of a traded company.

[27] Public companies must also convene a general meeting if half or more of the company's capital has been lost: CA 2006 s 656.

[28] The CLR suggests that the figure today is probably nearer to 1%.

[29] J Ellis, 'Unanimous Consent of Shareholders: A Principle Without Form?' [2011] *Company Lawyer* 260.

[30] The paragraph cited was: 'It may be true, and probably is true, that a meeting, if held, would have done anything which Mr George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting.'

[31] Contrast the position as regards directors, see 'General issues', p 309.

[32] Of course, such a contract between shareholders may regulate other matters besides voting. See the discussion of shareholders' agreements, 'Shareholders' agreements', pp 244ff.

[33] See the Note at the conclusion of this extract.

[34] *Ebrahimi v Westbourne Galleries Ltd* **[16.13]**.

[35] There is no power in CA 2006 to alter the new-style memorandum (the s 8 'memorandum of association'), but then it does not contain elements that members would need or want to change. Under art 28(1), the provisions of existing companies contained in old-style memoranda which are not of the kind mentioned in CA 2006 s 8, will automatically be treated as provisions of the company's articles of association and the rules considered later will apply.

[36] Note also CA 1985 s 16, which renders ineffective any alteration which increases the liability of a member or obliges him to take more shares—unless he agrees in writing to be bound by the alteration.

[37] They succeeded on another ground, viz that the directors had improperly issued new shares to 'pack' the shareholders' meeting: see **[4.22]**.

[38] For 'commit', we should here read 'justify': see fn 40, p 223.

[39] (1879) 12 Ch D 705. [See also *Punt v Symons & Co Ltd* **[4.21]**.]

[40] Later cases (eg **[4.23]** and **[4.25]**) make it plain that this sentence should be understood to mean 'a company *cannot justify* a breach of contract by pleading the valid alteration of its articles', and not 'a company *cannot alter* its articles if to do so would break an existing contract'.

[41] Bodden was not, in fact, a plaintiff.

[42] [1902] AC 83, PC.

[43] See the Note following this case.

[44] See 'The old common law rule in *Foss v Harbottle*', pp 639ff.

[45] This was the last of many actions between the parties. The parties were involved in seven actions, five of which went to the Court of Appeal; Greenhalgh lost all but the first (LCB Gower, *Modern Company Law* (4th edn, 1979), pp 624–626). See further *Greenhalgh v Arderne Cinemas Ltd* **[11.09]**.

[46] For the meaning of this phrase, see 'Exceptions to the rule in *Foss v Harbottle*', pp 640ff.

[47] In the case of the last in the round of the many resolutions, just one day before CA 1948 s 210 came into force! Did the controllers of Arderne Cinemas Ltd have 'the foresight of a Hebrew prophet'?

[48] On 'class meetings', see 'Variation of class rights', pp 563ff.

[49] See, eg, *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)* [2012] EWHC 2090 (Ch) (Briggs J), appeal pending; and *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch), both cases concerning analogous limits on creditors' voting powers where the majority has power to bind the minority.

[50] See S Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches?' (2000) 116 LQR 638.

[51] (1877) 2 App Cas 366, PC.

[52] [1926] Ch 975.

[53] (1877) 2 App Cas 366, PC.

[54] Compare *Hogg v Cramphorn* **[7.11]**, and see the reference to that case in Note 1 following *Rights and Issues Investment Trust Ltd v Stylo Shoes Ltd* **[4.28]**, p 234.

[55] Although not exclusively. See, eg *Re Halt Garage* **[5.03]**, noted further later.

[56] Although, on special facts, a court could always find the shareholder's relationship to be fiduciary. Then, fiduciary duties will be owed, but this will be *because* of the relationship in question, not *because* the person is a shareholder.

[57] See S Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches?' (2000) 116 LQR 638.

[58] See PD Finn, 'Shareholder Agreements?' (1978) 6 *Australian Business Law Review* 97.

[59] Even if the company is not a party to the agreement, it may be able to rely on it as a defence: in *Snelling v John G Snelling Ltd* [1973] QB 87, the shareholders had lent money to the company and had agreed with each other that none of them would require the company to repay their loans while certain other funding arrangements were in place. The court refused to allow one of the shareholders to sue for repayment in breach of this agreement. (Is this defensible?)

[60] [1897] AC 299 at 331.

[61] Note that the directors' freedom on this front was limited: any new ventures that were within the *existing* objects of the company would be caught by the conflicts rule; but the conflicts rule generally stretches its tentacles beyond the defined existing business plans, and here any broadening of the company's activities could be constrained under the shareholders' agreement.

[62] See the *Hickman* **[4.37]** and *Eley* **[4.36]** cases.

[63] See *Pender v Lushington* **[13.19]** and *MacDougall v Gardiner* **[13.20]**, and see also the Notes and Further notes following *Pender v Lushington* **[13.19]**, pp 670ff.

[64] See *Johnson v Gore, Wood & Co* **[13.22]** and *Giles v Rhind* **[13.23]**, and 'The "no reflective loss" principle', pp 673ff.

[65] See the following Notes and the Notes following *Hickman*'s case **[4.37]**, pp 255ff.

[66] (1873) 8 Ch App 956.

[67] (1874) LR 9 CP 503.

[68] (1887) 37 Ch D 1, CA.

[69] This section required the registration in advance of all contracts for the issue of shares for a consideration other than cash.

[70] [1909] 1 Ch 311, CA, affd **[4.06]**.

[71] R Gregory (1981) 44 MLR 526 argues that for these reasons the decision in *Hickman*'s case is insupportable, and that it should be reconsidered despite its long acceptance.

[72] Reaffirmed in (1985) 48 MLR 158.

[73] See RR Drury, 'The Relative Nature of the Shareholder's Right to Enforce the Company Contract' [1986] CLJ 219.

[74] On relational contracts, see IA Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-Classical and Relational Contract Law?' (1978) 72 *North Western UL Rev* 854.

[75] (1885) 30 Ch D 629 at 633.

[76] [1949] 2 KB 500, CA.

[77] [1954] 1 QB 250, CA.

[78] Lord Denning's *dicta* in these cases were disapproved in *Beswick v Beswick* [1968] AC 58, HL. But it is arguable that the decision in *Beswick*'s case as a whole gives some support to the reasoning of Vaisey J here.

[79] [1893] 1 QB 256, CA.

[80] [1897] AC 59, HL.

[81] [1916] 2 Ch 426, CA

5. Corporate Governance

Chapter: **(p. 261)** 5. Corporate Governance
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General issues

The company is an artificial legal person, and can only act through its human representatives. We saw in the last chapter that a company's constitution typically divides management power between the board of directors and the general meeting. Members cannot instruct the directors on how to exercise the powers assigned to the directors (see 'Orthodox constitutional division of powers', pp 181ff). Indeed, many members of medium to large companies (but not small ones) are attracted to the corporate form precisely because it provides investment opportunities without management responsibilities (the famous 'separation of ownership and control'). Instead, management is conducted by the directors.

The 'agency problems' associated with this are obvious: the directors may use their extensive powers for their own benefit rather than for the benefit of the passive member investors. What mechanisms are typically put in place to manage this problem? As it turns out, there are relatively few imposed by law. The detailed construction and implementation of risk management and reward strategies is left largely to individual companies to work out for themselves. This does not always deliver satisfactory results. The few legal rules relating to the appointment, tenure and remuneration of directors allow those who control a company considerable scope to look after their own interests, generally without any serious risk of being successfully challenged by the minority.[1] Even where the directors do not hold the majority of voting shares, the passive attitude of most members towards company general meetings and corporate decisions means that directors can often ensure they are re-elected when their terms expire, that their service contracts contain advantageous provisions and that directors' fees, salaries and perks are set at an attractive level. Of these, the level of directors' remuneration often comes in for attack and unfavourable comment. The current financial crisis has focused public attention on these issues, especially in the context of banks, and many popular risk–reward strategies have come in for serious criticism.

Some of this has been carefully researched. In 2011, Professor John Kay was commissioned by the Secretary of State for Business, Innovation and Skills to 'examine investment in UK equity markets and its impact on the long-term performance and governance of UK quoted companies'. Professor Kay's findings were published in an Interim Report in February 2012, and a Final Report in July 2012.

In his Final Report, Professor Kay identified what he perceived as the major shortcomings in the status quo, before setting out a series of recommendations of good practice. He highlighted the palpable lack of trust and confidence generated by the current focus on the short-term interests of financial agents to the detriment of the long-term interests of the underlying beneficiaries/investors.

(p. 262) While the Kay Review is one of the most recent initiatives to review and make recommendations for improving the effectiveness of corporate governance, it is certainly not the first. The development of this type of soft law began as a private initiative, in response to falling public confidence in standards of corporate governance in major public companies, including public concern about levels of directors' remuneration. Little has changed, it seems. The 'Cadbury Committee' was set up in 1991 jointly by the Stock Exchange, the Financial Reporting Council (FRC) (see later) and the accountancy profession under the chairmanship of Sir Adrian Cadbury. The Committee's remit was to consider the subject of 'corporate governance', particularly its financial aspects. It published its report in December 1992, and, while it did not propose changes in the law, it proposed the adoption on a voluntary basis by larger (listed) companies of a code of best practice which addressed many of these matters of public concern. These best practice principles became known as the 'Cadbury Code'.

The Cadbury Committee spawned various successor committees seeking to improve upon its work. The most

important were those delivering the Greenbury (1995), Hampel (1998) and Higgs and Smith (2003) Reports. The Hampel committee not only reviewed the Cadbury Code, but also undertook a consolidation exercise, producing a new 'Combined Code' in 1998.[2] This code dealt more generally with matters of corporate governance, incorporating rules of best practice from both the Cadbury and Greenbury Committees' recommendations. This Combined Code became the responsibility of the FRC and has been further revised over the years, resulting in the renamed version, the UK Corporate Governance Code, the most recent edition of which is dated September 2012, and has applied to listed companies from 1 October 2012.[3] This provides at least some 'soft law' rules, although only for listed companies.

FRC and the UK Corporate Governance Code for listed companies

In the UK, the FRC is the independent regulator responsible for promoting high-quality corporate governance and reporting. It has responsibility for the UK Corporate Governance Code (the Code). This Code describes 'best practice' corporate governance for large public companies. It is not enshrined in legislation, but is 'soft law'—that is, there is no legal compulsion to obey. Nevertheless, even without statutory backing, it is in practice virtually obligatory for listed companies to adhere to it in most respects. The Stock Exchange has appended the Code to the Stock Exchange Listing Rules, and requires every listed company to include in its annual report a statement of whether it has applied the principles of the Code, how it has applied them and, to the extent that it has not applied them, the reasons why it has not. This approach is now routinely described as a 'comply or explain' regulatory regime, and has been adopted in many other jurisdictions around the world to address corporate governance issues.[4]

The UK Corporate Governance Code (like its predecessors) is different from legislation in two ways. First, it is not the product of a parliamentary process, but of a series of committees **(p. 263)** representing business and financial interests, and now an independent regulatory body. These have all elaborated the Code in recent years. Secondly, the Code is binding only on listed companies (by virtue of a provision in the Listing Rules) but, even then, only on a 'comply or explain' basis (see earlier): Listing Rules r 9.8.6(5) and (6).[5]

In the latest of these reviews of the Code, in December 2011, the FRC published 'Developments in Corporate Governance 2011: the impact and implementation of the UK Corporate Governance and Stewardship Codes' (the '2011 Review').[6] This Review evaluates successes and failures to date, and paves the way for further amendments. It also brings to the fore the wider question: to what extent are these non-binding codes effective and to be preferred to hard law? Baroness Hogg, Chairman of the FRC, notes some European pressure for additional *legal* limitations on the powers of boards and general meetings (rather than the more flexible 'comply or explain' codes of best practice). However, the FRC remains opposed to this approach, especially given the economic consequences any change might bring in deterring investment in the UK, and with it the flow of equity capital which is so necessary for economic growth.

Preference for this style of regulation—that is, best practice statements and guidance rather than detailed regulation—also finds support in the Final Report of the Kay Review. Establishing trust and respect within markets is seen as more likely if financial agents and market participants voluntarily impose such standards on each other, with those who do not comply coming under peer scrutiny, and peer-imposed withdrawal of employment and reward. The Kay Review therefore sets out Good Practice Statements for company directors, asset managers and asset holders. The intention is that these should be endorsed by the regulators and used to supplement and influence the development of the UK Corporate Governance Code and Stewardship Code, but not reduced to prescriptive legislation or regulation.

Regulation of listed companies by the UK Corporate Governance Code

The UK Corporate Governance Code addresses various aspects of board structure and internal management, and indicates *best practice* for improved standards of corporate governance for listed companies.[7]

Qualities of boards and board members

For listed companies, the London Stock Exchange Listing Rules, r 3.8, requires directors collectively to have

‘appropriate expertise and experience for the management of its business’. It also requires companies generally to ensure that each director is free of potential conflicts, and, where these exist, to ensure that appropriate arrangements are in place to avoid detriment to the company’s interests. Rule 3.9 requires the company to consult with the Exchange at an early stage if there are potential conflicts of interest issues for any of the company’s directors.

The Code does not suggest (even on a ‘comply or explain’ basis) that directors of listed companies ought to have particular qualifications. It does, however, suggest in Main Principle B.1 and its Supporting Principles that the board should have the appropriate balance of skills, experience, independence and knowledge of the company, and be neither too large nor too **(p. 264)** small to function effectively. Principle B.1.2 also suggests that smaller companies[8] have at least two independent non-executive directors, and that all other companies have at least half the board, excluding the chairman, comprising non-executive directors determined by the board to be independent. Principle B.1.1 defines ‘independent’ by reference to seven factors (including such matters as family ties, business and previous employment relationships, and so on).

The Code recommends the use of Nomination Committees to make recommendations to the board on all new board appointments. This committee should be chaired by the chairman of the board or by a non-executive director, and should have a majority of non-executive directors (NEDs) as members. The composition of the committee should be identified in the company’s annual report.

The Code also states that every director should receive training on the first occasion that he or she is appointed to the board of a listed company, and subsequently as necessary. The extent of training and by whom it should be given is left open.

Separation of the roles of chairman and managing director

The Code takes the view that the posts of chief executive officer (CEO) or managing director (where the CEO is also a director) and chairman of the board should not normally be held by the same person, and that there should be a clear and written division of responsibilities that will ensure a balance of power and authority with no one individual having unfettered powers of discretion. If the company nevertheless decides that one person should hold both posts, this should be publicly justified. In addition, a third person should be identified, a ‘senior independent director’ (by implication a NED), to whom the concerns of the NEDs can be conveyed.

Although the Higgs Report recommended a blanket prohibition on the CEO (or managing director) of a company subsequently being appointed chairman, the current Code takes a more lenient line and permits a former managing director to become chairman after advance consultation with the company’s major members and appropriate explanation subsequently.

Although it is only listed companies that are under any formal obligations concerning the Code, the failure to have analogous safeguards in place in a relatively small company drew unfavourable comments from Arden J in *Re Macro (Ipswich) Ltd* **[13.28]**.

Balance of executive and non-executive directors

There is a substantial practical difference between the office of a director remunerated, if at all, by the payment of directors’ fees (*a non-executive director*) and that of a person who, in addition to serving as a director, holds a management or executive position within the company, whether on a full-time or part-time basis, and is paid a salary in respect of this employment (*an executive director*).

The law generally treats both categories of director similarly as a matter of principle, but the difference between an executive director and a NED can be very important in practice. For instance, an executive director is likely to have greater authority to represent the company in its dealings with third parties; to be more difficult to remove because of entitlements to substantial compensation for loss of office; to be subjected to higher standards of skill and care in the discharge of his or her duties; and, as a working ‘insider’, to have better access to market sensitive and other information and much greater knowledge of the company’s affairs than a NED.[9]

(p. 265) New significance has been accorded to the role of the NED in the Code, following the recommendations

of each of the contributing committees to the Code. The current Code now prescribes that half the number of board members should be independent NEDs in the case of FTSE 350 companies; that board committees should be dominated by independent NEDs (with the exception of the remuneration committee, which should be constituted exclusively by NEDs), and that these committees should take on more responsibilities; that NEDs should be appointed from a wider range of possible candidates; and that a NED's tenure on the board can in theory run longer than nine years, subject to both a re-election process every one to three years depending on the size of the company and a thorough review of any decision to re-elect a NED beyond the six-year mark. According to the current Code, NEDs will no longer qualify as 'independent' if they have held their position for longer than nine years.

Given these best practice rules, concerns are now emerging as to whether the pool of NEDs is adequate to meet the demand for quality people to take on the role, especially from the perspective of smaller companies, which find it especially difficult to attract suitable candidates. The 2011 Review accepts that there is some evidence to support this perception, and recognises that the problem is exacerbated in the current economic climate which places increased demands on the time and expertise of NEDs. Nevertheless, the FRC reaffirms its Code policy that companies of all sizes are to look beyond the 'usual suspects' when sourcing candidates to fill non-executive positions.

For financial institutions, the Financial Services Authority (FSA)[10] had also provided draft Guidance on the role of NEDs.[11] The Guidance comes from a 'retail conduct risk perspective', and therefore encourages NEDs to challenge whether, for example, appropriate risk policies are in place, and whether the board is able to take appropriate action in response to problems when they arise.

Directors' remuneration

The Code makes various recommendations related to remuneration of directors. It suggests that companies should have a formal and transparent policy on executive remuneration, as well as a remuneration committee consisting wholly of NEDs charged with responsibility for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration. Decisions on the remuneration of executive directors should be taken by a remuneration committee made up exclusively of NEDs (para D.2.1). The remuneration of NEDs should be set by the board itself unless the articles require this remuneration to be determined by the members (para D.2.3).

Every company's annual report should contain a statement of its remuneration policy, and details of the remuneration of each individual director. The Turnbull (1999) and Higgs (2003) Reports were especially influential in strengthening the role of NEDs in the management of the company.

Despite these developments, directors' salary and benefits packages continue to attract unfavourable attention: awards that are thought to be excessive (especially if they are out of step with the performance of the company or individual in question) draw weighty criticism from the media and in Parliament. Further efforts in recent years have focused on increasing the transparency of decisions concerning directors' remuneration, including a series of fresh reforms to be implemented by October 2013 (see later).

(p. 266) Nomination committees

The Code, Main Principle B.2, states that 'There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board'. A listed company's board should establish a nomination committee to make recommendations to the board on all new appointments (para B.2.1). A majority of the members of the nomination committee should be independent NEDs, and the chair should be either the chair of the board or an independent NED.

Code provision B.7.1 requires all directors of listed companies to submit themselves for re-election at least every three years (annually for directors of FTSE 350 companies), and sufficient biographical detail should be supplied on a person submitted for election so as to enable members to take an informed decision on the election. The rules make specific reference to the need to refresh the board and maintain the independence of NEDs. Notwithstanding the controversy surrounding the annual election recommendation, the 2011 Review refers to data

which shows that 80% of FTSE 350 companies put all directors up for re-election in 2011, in contrast to only 10% in 2010. It is expected that the figure will continue to rise given the remaining companies' willingness to review their practice ahead of 2012.

Gender diversity

In recent years, there has been heightened concern for a more diverse board culture, with current attention focused on increasing the representation of women on boards. In 2010, Lord Davies of Abersoch was commissioned to review the current situation. His report, published in February 2011,[12] presents the business case for gender diversity on boards: namely, improving performance; accessing the widest talent pool; being more responsive to the market; and achieving better corporate governance. Davies urges that it is in the interests of businesses (and shareholders) to encourage gender diversity, and, although he rejects the use of 'quotas' for the time being, he sets out recommendations designed to achieve 25% female representation on boards by 2015.

Two of these recommendations have already been incorporated in the UK Corporate Governance Code and apply to financial years beginning on or after 1 October 2012. The first requires the board to describe the board's policy, objectives and progress on developing gender diversity (Principle B.2.4). The second requires board evaluation to include consideration of the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit and other factors relevant to its effectiveness (Principle B.6).[13]

The full impact of these, and other, changes on board culture and board effectiveness remains to be seen. However, a progress report[14] published in 2012 points to the 'biggest-ever reported increase in the percentage of women on boards' and concludes that there has been a 'culture change' in how women are seen within the workforce. If the rate of increase in representation persists, then it is suggested that a record 26.7% female board representation will be achieved by 2015.

The European Commission is on the bandwagon, and has launched its own consultation and investigation on gender imbalance as a cross-EU issue. A House of Lords Sub-Committee has now launched an inquiry into the subject matter, in aid of the European Commission's consultation.[15] This may result in the introduction of further measures, on an EU level, including the possibility of imposing 'quotas' for corporate entities.

(p. 267) ➢ Questions

1. In *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) at [41], Langley J suggested that 'a company may reasonably, at the least, look to NEDs for independence of judgment *and supervision of the executive management*' (emphasis added). Companies do not appoint NEDs without good reason; they are usually chosen for their specific expertise, experience or business connections. NEDs who provide these services can expect to be paid reasonably well for their contributions, but of course this means that they may become financially dependent on the company to a greater or lesser extent. Is it realistic to expect NEDs to be 'independent', and to supervise executive management? Equally, is it realistic to expect companies to appoint and pay fees to individuals who have little to offer apart from independence and a policing role?

2. How is a line to be drawn between achieving gender diversity and avoiding positive discrimination?

Regulation of institutional investors by the UK Stewardship Code

One phenomenon which had remained largely overlooked until recently was the rise in the number of shares—particularly shares in listed public companies—held by 'institutional' shareholders such as pension funds, insurance companies, unit trusts and mutual funds.[16] The percentage of their holdings overall has grown from about a quarter in the 1960s to about two-thirds in more recent years, and in some companies may be as high as 80% or more, although in some spheres it is now declining.