

As reforms heap more pressure on directors, maybe it's time for a basic change in the way companies are run, says Bob Mitchell

The unitary board, where all directors decide company policy by consensus, is one of the great strengths of British business. Today, though, it is beginning to look like the frog which, immersed in water that is gradually heated up, finds itself - to its surprise - boiled alive.

That fatal increase in temperature may come as a consequence of the consultative document recently issued by the Department of Trade & Industry on directors' and auditors' liability. It asks: "Might it be appropriate to permit companies to indemnify non-executive directors even in circumstances where this is not considered appropriate in respect of executive directors?"

The director's duty is to the company (as is the auditors' - and what a mess that is). We should put "non-executive" in inverted commas because all directors are the same - when it comes to liability. The law makes no distinction between executives, non-executives, and the chairman who occupies an undefined territory above and between the executives and non-executives. The question asked by the consultative document brings the problem to the fore.

It is now a year since the Higgs Report, with its strongly pro-unitary board approach and the unique role of chairman as neither executive nor non-executive. Such is the pace of pronouncements that 12 months is a long time in modern corporate governance, and from last November the Higgs proposals are now duly implemented, with a little bit added, a little bit taken away, the rough edges smoothed, by the Financial Reporting Council.

Things are not stopping here. The Government continues to be busy with its proposals for company law reform, a once-in-a-lifetime opportunity to take a fresh look at fundamental structures, to think the unthinkable if you like. There continues to be, not just from Higgs but almost all commentators, overwhelming support for the unitary board - to the extent the two-tier board has not even come under starter's orders in terms of a proper debate.

The unitary board concept is now facing increasingly rough going. John Jackson, in his excellent submission to the Higgs review, highlights the fundamental question of board governance: is it better to have a system of checks and balances (a two-tier model, variants of which are found in the US and Europe), or a system based on the attempt to reach consensus (the current UK model)? It is the key question, because the two systems require non-executive directors who have quite different roles, skills and attitudes.

Mr Jackson comes down emphatically in favour of the consensus model, with its tradition of constructive challenge, wise counsel and support from non-execs, based both on a knowledge of the business and "experienced ignorance". Yet the ground is shifting beneath the directors' feet. A decade of corporate governance reports,

recommendations and exhortations has greatly increased the demands on non-executives.

Control of the executive is now paramount, to the extent that it is to boards' and chairmen's credit that most companies have been able to manage the resultant tension thus far.

Added to this is the liability question. It has always been the case that non-executives may be personally liable for matters relating to health and safety, environment and insolvency, even though they cannot possibly expect to have sufficient detailed knowledge of the business to be culpable.

Now the DTI's document is questioning whether members of a board should have different levels of liability for a consensus decision. It seems to me that many of the UK's corporate governance controversies would fall away with the formal establishment of a two-tier board, without losing the advantages of the current system.

After all, executives can reap the benefit of wise counsel in other corporate forums. The question of the division of accountabilities and duties between each tier can wait - I am simply suggesting that the two-tier board makes a better legal reality.

The real danger is that the totem of the unitary board becomes a barrier to implementing desirable and necessary governance and liability reforms. The frogs may not have noticed the temperature in the cooking pots of today's boardrooms, but things are indeed hotting up.

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