New governance requirements for State Bodies

The Department of Public Expenditure and Reform's new Code of Practice for the Governance of State Bodies will have significant implications for state bodies. In addition to a heightened focus on audit and risk, and Board effectiveness reviews, it will impact on areas such as reporting, strategy alignment, and state body-department relations. The Code takes effect from 1st September 2016, and state bodies will now be working in the coming months to ensure that they comply with the full range of its requirements.

The natural question which arises amongst our state body clients is what are the key differences between the new Code and its predecessor, published in May 2009? This post aims to outline the main differences.

Firstly, this is a longer, more detailed document. The 2009 version totalled 39 pages in all. The new Code comprises 74 pages, and is accompanied by four "associated Code requirement and guidance documents", which bring the total document to 128 pages.

The influence of the UK Corporate Governance Code (2016) is evident in the structure of the main document, with each section beginning with key principles, followed by specific provisions or requirements. Equally, its influence is apparent through a number of footnote references to the UK Code. In this vein, the G20/OECD Principles of Corporate Governance (2015) and Companies Act, 2014 have also had an influence on the new code.

The new Code has a number of new features vis à vis the previous 2009 version:

- It establishes criteria which help to define what is and isn't a state body (p.9), and it provides a Governance Framework (p.10) to illustrate the reporting and accountability channels for various actors, including the Minister, Board, CEO, and Public Accounts Committee.
- It provides enhanced clarity on the key roles of the Board, such as leadership, setting the tone (incl. ethics), and oversight of the Executive (Section 1).
- It devotes more attention to the statement of strategy, including that the strategy of a non-commercial state body should align with the specific objectives in the parent Department's strategy (to the extent relevant), and be consistent with Government policies for the reform and modernisation of the public service. It also allows the Minister 12 weeks to revert with views on a state body's draft strategy (where currently 6 weeks is provided for)(Section 1).
- It includes, for the first time, a focus on the Secretary to the Board, an important role in the effective functioning and operations of the Board. As per the UK Code, it states that the Board should ensure that the person appointed as Secretary has the skills necessary to discharge the duties of the role; that the appointment and removal of the Secretary should be a matter for the Board; and it recognises the key relationship between the Secretary and the Chairman (Section 1).
- The respective roles of the Chairman and Board members are also explicitly laid out in the Code. The Chairman, amongst other things, is to ensure openness and debate within the state body; that there is timely information flows to the Board; and that there is effective communication with all stakeholders (Section 2).
- The Code, like the Companies Act, 2014, lists the fiduciary duties of Board members and incorporates the obligations of civil servants who serve on Boards of state bodies (effectively, circular 12/2010), where they have unanswered concerns regarding, inter alia, disagreement on a major public policy issue, control weaknesses, or significant risks that are not being addressed (Section 3).

- Board members are expected to observe a 100% attendance record and the Code states that a member's attendance record should be assessed in advance of potential re-appointment (Section 3).
- The Code includes a section on Board effectiveness, including requiring Boards to undertake an annual self-assessment evaluation (previously the time period was unspecified), and that en external evaluation should be carried out at least every three years. A self-assessment questionnaire is one of the four associated Code documents (Section 4).
- It also requires that the Annual Report of state bodies include a statement of how the Board operates, which will in effect mean greater clarity on the separation of duties between the Board and Executive, and the delegated authorities in place (Section 4).
- The Code has enhanced coverage on business and financial reporting requirements (Section 6), which are further detailed in an associated Code document.
- On risk management, the Code requires the Board in its annual report to confirm that it has carried out an assessment of the body's principal risks, including a description of the risks, where appropriate, and associated mitigation measures or strategies (Section 6).
- The Code specifically requires all bodies to have an Audit and Risk Committee (the previous Code spoke of an Audit Committee), illustrating the heightened focus on risks management in the new Code (Section 7).
- Internal Audit will be required to draw up an annual programme of audits in consultation with the Audit and Risk Committee, having regard to the state body's strategy and risks (Section 7).
- The Code is stronger than its predecessor on the area of the relationship between the state body and its parent department, seeking, as it were, to strengthen relationships. In Section 8, it requires an "oversight agreement" to be put in place between each department and state body, with the broad content of such agreements outlined in section 8.4, including a "Performance Delivery Agreement" (PDA). It states that the PDA will be a performance contract and should be aligned, once again, to the Department's statement of strategy. Appendix E provides more detail on the particulars of a PDA.
- Finally, and notably, but in line with recent consolidation of the state body landscape, the Code provides for "periodic critical reviews" no later than every five years, with the review, led by a working group of Department, State Body and Department of Public Expenditure and Reform Officials, to consider, inter alia, the ongoing business case for a state body (Section 8).

There is a lot of content in the new Code of Practice and its four accompanying documents. Indeed it will take some time to distil all of its specific requirements. But without doubt it creates an additional set of obligations on top of those which existed under the previous Code.

Crowe Horwath provides a range of governance support services to state bodies, including compliance gap analyses and support in meeting requirements, as well as independent Board evaluations. If your organisation would benefit from our assistance, please don't hesitate to contact me.

About the author

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