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# Briefing

## Appointing a Director:

### Issues to Consider



INSTITUTE OF DIRECTORS  
IN IRELAND

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A director can be appointed in several different circumstances whether appointed at the time of incorporation of a company or appointed afterwards (either to fill a vacancy or as an additional director). A director can also be re-elected at the expiry of his or her term of service. This briefing considers some of the legal requirements and issues to consider in the appointment process.

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### Legal Considerations

The appointment of a director is governed largely by the Companies Act 2014 (the “Act”) and a company’s constitution. A private company limited by shares may have a single director. Other types of Irish company require a minimum of two directors but the Act does not prescribe a maximum number. Certain persons, such as a body corporate or an undischarged bankrupt or a person under the age of 18 years, cannot act as a director, nor can a person who is disqualified from doing so under the Act.

#### *First Appointments*

The first directors are appointed at the time of registration of the company and the persons named in the Form A1 will be deemed to have been appointed as the first directors. Every Irish registered company requires at least one director to be resident in a member state of the EEA, failing which, an insurance bond is required or a certificate (from the Registrar of Companies) that the company has a sufficient economic link with Ireland is necessary. There is a limit on the number of directorships a person may hold in Irish registered companies. Subject to exceptions, a person may not hold any more than 25 directorships in Irish companies (other than PLCs).

### ***Subsequent Appointments***

In addition, subsequent appointments of directors are governed by the constitution of the company but any shareholders' agreement should also be considered. The company's constitution may specify a minimum number of directors and also may impose a maximum limit. If the constitution does prescribe a maximum, appointments in excess of that number will generally be void.

Typically, the constitution will provide for the Board itself to appoint a new director to fill a casual vacancy, or to appoint additional directors up to the maximum number permitted by the constitution. The Board will need to pass a resolution in the normal way ensuring that proper notice of the meeting is given, that it is quorate and the resolution is passed by a majority of the votes cast (including any qualified majority for which the company's constitution or any shareholders' agreement may provide). Alternatively, a written resolution may be used if permitted by the company's constitution. A director must signify his or her consent to being appointed. A Form B10 must be filed at the Companies Registration Office within 14 days of the appointment.

### ***Expiry of Office Term***

The Act requires directors appointed by the Board to retire at the next Annual General Meeting and seek reappointment by the shareholders but the constitution may alter this default provision. The company's constitution will typically prescribe the term of service for directors. This will include the duration in office before becoming eligible for re-election and when the re-election will happen. Elections or re-elections of directors following retirement by rotation and the removal of directors (covered in an earlier factsheet ([here](#)) are reserved to the company in general meeting.)

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## **Contractual Considerations**

If the director is to hold an executive position he or she should also be given a service agreement setting out the terms of the directorship (which may or may not be subject to shareholder approval). The agreement must be in accordance with employment law and should cover matters such as the role of the director and the requirement for the director to comply with the internal policies and procedures of the company. The agreement should address controls and limitations on the director engaging in business outside of the company and, should include provisions on disclosure of confidential information and intellectual property matters

The non-executive director should also have written terms of engagement so that, at the very least, an appointment letter should include a job description and commitments on what he or she is permitted to do with the company's property and opportunities.

A director should be reminded to acquire the share qualification (if any) specified in the constitution.

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## Conflicting Appointments

A director is permitted to also serve as the company secretary. However, if something must be done by both the company secretary and by a director, then the same person may not fulfil both roles in respect of that particular procedure. Further, a person may not be both a director of the company and the statutory auditor of the company.

Most directors will act as director or non-executive director of more than one company which may be regarded positively by the companies concerned because this will broaden the experience and network of the director and most constitutions will allow this. Companies need to be very clear, at the outset, on how any such outside interests are to be managed, not only because of potential conflicts of interest but also because of the need for the director to have sufficient time to perform his or her role in the company. This can be more of a consideration for non-executive directors.

The time demands on a director will depend on a number of circumstances such as the company's size, the growth stage at which that company is at, whether it is a private company, a publicly-listed company, or a subsidiary. Demands will also depend on whether the company is in a regulated sector such as financial services. Regardless, expectations for time commitments should be agreed in advance. Expectations will also depend on whether the role being assumed is that of an executive director or a non-executive director bearing in mind that the Act does not distinguish between the roles in terms of duties and liability.

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## Recruitment

Directors are a key component of the corporate governance framework so their recruitment demands a thorough and professional approach. Some companies will establish a board level nomination committee as part of their overall corporate governance structure. The main role of this sub-committee will be to identify potential directors. In identifying potential directors, the Board and sub-committee (where relevant) should be clear about the:

- attributes it requires in a director, being particularly mindful of the current focus on corporate culture and what is the “tone from the top”; and
- combination of skills, experience and knowledge it requires on the Board.

Once identified, the Board should ensure that the prospective director is aware of what will be his or her powers, duties and responsibilities and is aware of the law and practice relating to matters such as disclosures of personal interests, conflicts of interest, insider dealing (where relevant) and related-party transactions. The company secretary will typically be requested to organise an induction exercise for a new director to cover these issues.

All directors should be clear about his or her role and whether the role is a performance role or a conformance role or both and what resources are to be applied to either / both. Whether the director is responsible for ensuring that the company complies with the law or whether the director is responsible for adding value in terms of strategy (or both) will impact on the resources and support that the director will need to perform that role and the responsibilities that go with it. It is only then that any director's potential value can be matched with their talents and the needs of the company.

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## Additional Considerations

Additional considerations will apply to the appointment of a director to a Board if the company:

- is regulated by the Central Bank of Ireland (“CBI”). There are specific requirements, for example, in the Corporate Governance Requirements for Credit Institutions 2015 concerning criteria for director independence, composition of the Board (size and expertise), time commitments of directors and limits on the number of directorships held. Additional processes will apply if the director is to be appointed to a Pre-Approval Controlled Function;
- has shares listed on an exchange as the rules of the exchange need to be borne in mind. The UK Corporate Governance Code, for example, sets out requirements for the appointment of new directors and the re-election of directors as well as for the length of service of a Board, approval of service agreements and remuneration of directors.

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## Further Information

Publications that address some of the areas referred to in this briefing are available on the Institute of Directors' website. These include the Directors' Handbook, A Handbook for Directors of Regulated Financial Services Companies in Ireland and briefing on Directors' Conflicts of Interest and Directors' Time Commitments.

*Further information is available from*



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*Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.*



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