
Briefing

Non-Executive Directors:

A Special Role



INSTITUTE OF DIRECTORS
IN IRELAND

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The non-executive director (“NED”) has become a key player in corporate governance. In this role he or she must help to achieve corporate objectives, oversee executive activities and ensure legal and regulatory compliance. To perform this special role a NED must have access to certain information and training and the support of executive management.

The Role

This briefing highlights some steps which a NED can take to ensure that he or she performs the role effectively. The specifics of any particular NED role will depend upon the reason for that director's appointment: for example, there may be a legal requirement that the company has a NED or an investor may insist upon it, or the board itself may have identified a need for additional expertise. However, Irish law applies the same legal responsibilities to every person who is occupying the position of a director and so to executive directors and NEDs alike, regardless of the specifics of their individual roles.

Due Diligence and Appointment

It is important for the prospective NED to:

- do his or her due diligence on the company;
- review the company's previous annual reports;
- look at the rate of turnover of both executive directors and NEDs, on the board;
- have his or her arrangement with the company confirmed in writing;

- agree in writing an accurate role description, clarifying whether the role is to ensure that the company complies with the law (a conformance role) or to add value in terms of strategy and development (a performance role), or both; and
- know the different disciplines and responsibilities required for a performance role and for a conformance role and agree what resources and support are required for these purposes.

Duties and Potential Conflicts

Every director must understand his or her legal duties and responsibilities. Many NEDs will act as director of more than one company which may be considered an advantage because this extends the experience and the network of the director. However, a NED with several directorships will also be exposed, to a greater degree than executive counterparts, to potential conflicts of interest. Therefore, for each company on the board of which a NED sits, he or she should:

- know exactly what the NED is permitted to do with company property and opportunities (including confidential information);
- be mindful of his or her duty to avoid conflicts of interest, particularly in relation to information or property secured and opportunities arising as a result of other appointments (external conflict);
- understand the company's constitution as regards other offices held and the company's conflicts of interest policy;
- remember that, often, he or she will have been recruited for the NED's experience and potential contribution to performance which can mean further exposure to the risks of external conflict;
- ensure that he or she can devote sufficient time to each company; and
- make it clear which company he or she is representing in dealings with third parties.

It is only once the company has been made aware of the opportunity or external conflict or chance to make a profit by the particular NED that the shareholders can make a binding decision whether to authorise or not. The NED should ensure the proper recording of declarations at board meetings as this is vital to discharge the duty of disclosure that a NED owes to the company.

Support and Risk Management

A NED should obtain formal training and professional development that is tailored to the individual needs of the NED and to his or her role in the particular company.

For a NED to be effective in terms of the company's risk management he or she needs to seek, and be provided with, full information on risks that the company faces. It is only then that the NED can explore these risks and ask challenging and revealing

questions about corporate strategy, leadership and governance. Therefore, it is only with co-operation between the executive directors, the chairperson and the NED that certain risks can be uncovered and managed.

Company Culture

It is important that every NED understands the culture that management is imposing within the company and whether it may encourage directors to achieve business objectives at any cost (for example, appropriating confidential information of another company of which he or she is a director). The correct culture is essential to avoid wrongdoing and potential litigation. Shareholders' rights and powers to scrutinise are increasing and they seem increasingly inclined to enforce those rights.

Independent Non-Executive Directors

The NED should be aware that, where a criterion for "independence" arises (for example, on the boards of "public interest entities"), it will require the NED to not have any relationship with the company other than the directorship. For companies, this can be a bad thing (at least initially) because it may mean that the independent NED may have relatively little knowledge of the company's industry. This makes it all the more important for the NED to seek training and to ensure that he or she is provided with the information that is necessary for the effective performance of the NED's role.

Further information is available from



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