



Roles and Responsibilities of Non-Executive Directors of Boards of Companies

By Dr. Philip Byrne, D.B.A, M.B.A, B.A., MMII, Examiner, P2 Strategic Corporate Finance.

Introduction

The context for this article is the increasing focus on the governance implications for people who are nominated to the boards of companies (both in the private and public sectors) as non-executive directors. Non- executive directors are generally regarded as those directors who, unlike their executive colleagues, do not hold any executive or management position in the company in addition to their role as a member of the board. Like other directors of a company, non-executive directors have to comply with the duties of directors.

This brief article firstly sets out the key fiduciary and statutory duties of non-executive board directors. The article will then examine some of the issues associated with the nomination and appointment of non-executive directors. Thirdly, the article will focus on the implications for non-executive board members associated with their roles and responsibilities. The fourth part of the article discusses the areas where conflict of interest for non-executive board directors may arise. The final part of the article will set out some personal liabilities that non-executive board members may be faced with if they breach their roles and responsibilities.

Fiduciary and Statutory duties

The Companies Act 2014 is the most recent consolidated piece of legislation that sets out the fiduciary and statutory duties of non-executive board members. The following fiduciary duties are set out in the act:

- Directors must act in good faith in what they consider to be the best interest of the company;
- Directors must act honestly and responsibly when conducting the affairs of the company;
- Directors must act in accordance with the company's constitution and exercise their powers only for the purposes allowed by law;
- Directors must not use the company's property information or opportunities for their own or anyone else's benefit unless expressly permitted by the company's constitution or approved by a resolution in a general meeting;
- Directors must not agree to restrict the director's power to exercise and independent judgement unless expressly permitted by the company's constitution or approved by a resolution in a general meeting;
- Directors must avoid any conflict between the director's duties to the company and their others, including their personal interests;
- Directors must exercise the care, skills and diligence which would be exercised in the same circumstances by a reasonable person having the knowledge and experience of a director;
- Directors must have regard to both his employees and its members.

(Companies Act , 2014)

Statutory duties

There are also a range of statutory duties that non-executive directors are expected to be aware of. In essence, it is the duty of each director of a company to ensure that the Companies Act is complied with by the company. An officer is in default if he or she is in breach of their duty as an officer of a company or authorises or permits a default to take place. The duties are as follows:

- Duty to keep adequate accounting records;
- Duty to prepare annual financial statements;
- Duty to have financial statements audited;
- Duty to maintain certain registers and documents;
- Duty to file certain documents with the registrar of the companies;
- Duty of disclosure of certain personal information;
- Duty to convene general meetings of the company;

(Companies Act , 2014)

While the previous sections have listed the range of fiduciary and statutory duties of directors, there are also normative role and responsibilities for non-executive board members and these include the necessity to ensure that the assets of the company are safeguarded and that the purpose and mandate of the company is progressed to the maximum extent possible. It is important to remember that the company directors only have powers to do what the company itself is legally entitled to do as enshrined in the memorandum and articles of association.

The Director's normative roles include establishing the vision, mission and values for the company, agreeing strategy and structure, delegating to management and ensuring effective accountability to shareholders and relevant stakeholders. (ODCE, 2015)

While the Company Act's requirements are mandatory for all types of Directors, best practice may mean that non-executive Directors in the public/ state/non-profit sector will have particular roles and responsibilities in the organisation. This is evident from the document "Boardmatch Ireland: Guide to Board Membership", which shows, for example, that for non-profit organisation directors, many responsibilities are similar to and consistent with the Company Act, but often more is expected of people in director positions.

In addition to the above mentioned fiduciary and statutory duties Appendix 1 sets out a range of issues and concerns non-executive directors should be aware of before joining boards of companies.

Nomination and appointment of directors

The nomination and selection of non-executive directors is a critical part of good corporate governance. In relation to good governance the emphasis is on ensuring that the board has the range of knowledge, skills and competencies required to lead and govern the organisation. The overall intention is to ensure that those nominated have the experience and capacity to undertake the role. The Institute of Directors and other professional bodies has produced guidance on this area.

“Non-executive directors are usually chosen because they have a breadth of experience, specific skills and can bring specialist knowledge to the board. Of greatest importance is their independence from the management of the company and any of its interested parties. Non-executive directors should take responsibility for monitoring and challenging the performance of management, especially with regard to progress made towards meeting the company’s strategic objectives.” (IOD, n.d.)

Implications of the roles and responsibilities

One of the key implications for any non-executive board director is the fact that he/she can be liable in certain circumstances if the above mentioned duties are breached. Directors are themselves responsible for ensuring that the company complies with various company law regulatory and legal requirements. Any type of Director must be aware of these legal duties and carry them out, as ignorance is not a possible defence. (Beal, 2014)

One of the striking implications of the responsibilities and roles is the fact that no matter what or where the Director’s other responsibilities and interests are, while acting as a Board member, they must act in the best interest of the company at all times. It is the most important fiduciary duty of a Director: the duty of loyalty. (Black, 2001) Directors, if they are also shareholders, need to be aware that they are wearing two different ‘hats’. Shareholders are allowed to act and vote in their own self-interest. Directors, by contrast, must always consider their duties and act in the best interest of the business. It is important not to confuse the two roles – blurring the lines between them is a common problem in companies where the directors and shareholders are one and the same. (Beal, 2014)

Another core duty of directors is the duty of care and diligence. The implication is that Directors must pay attention and try to make good decisions. Directors must also have all the necessary skills to carry out their duties. Directors must also have an understanding and knowledge of the organisation’s stakeholders or particular business sectors. A Director should also bring specific personal skills and attributes to complement the current Board membership. In addition to those skills, Directors on non-profits or public sector organisation boards must also reflect the values and culture of their sector, as well as the values of integrity, honesty and transparency. (Cabinet Office, 2007).

A Director must be aware of the risk of conflict of interest. They are prohibited from benefiting where their personal interests and their duty as directors conflict.

Conflict of Interest

“A conflict of interest exists in any situation where the personal or other interest of a director or a connected party might in any way affect the discharge by a director of his/her duties or his/her deliberations in a situation where a director or a connected party could benefit. It makes no difference that the Company does not suffer by the conflict of interest. A director or his/her relatives, friends or associates must not under any circumstances obtain any such benefit.” (Data Ireland, 2013)

The normal duties of directors concerning conflicts of interest:

- Directors must not put themselves in a position where their personal interests and their fiduciary duties may conflict;
- Directors cannot make a personal gain from their position as director;
- Must not appropriate for himself/ herself or by way of diversion to another entity associated with him/ her, any business opportunities which the company is actively pursuing.

Circumstances where conflicts of interest can occur:

- Directors failing to disclose interests or potential interests in contracts involving the company;
- Conflicts may also arise for elected members in the context of their reserved functions in the transactions of local authority business where they are directors of companies;
- Directors voting in relation to a gain or potential gain which involves someone connected to the director (i.e. child, spouse, related company).

(Burke, 2006)

In relation to the disclosure and declaration of interests Appendix 2 sets out a wide range of issues non-executive directors should be aware of.

Personal Liabilities

Directors can be faced with personal liabilities. Under the Companies Act 2014, there is personal liability where a company which was notified of a restricted director carries on business without the required capitalisation or contribution, and is subsequently wound up and unable to pay its debts, the Court may declare that any person who is an officer of the company may be personally liable without limitation for the debts of the company. (IOD, n.d.)

In the context of companies registered as charities, an action may be brought by the organisation against the Director to render him personally liable for any loss to the company by or to account for any profit obtained by him from his misconduct. (Cox) A director is personally liable to different punishments including fines and imprisonment, restriction and disqualification orders, and injunctions.

In Irish local government, Directors of companies, where the companies have been established by local authorities, must follow and respect the same guidelines and legislation (as mentioned above), and are liable in the same situations. They must also respect and make sure that the local authority is following and in line with certain laws and legislation such as Article 28A of the Irish Constitution and the Local Government Act 2001 as amended. They could be personally liable if the organisation was found not to be. The main defence in all these situations is to demonstrate that, at all times, one acted with due care and diligence.

Conclusion

This brief article has sought to highlight some of the main issues surrounding the appointment of individuals as non-executive board members to companies. In particular the article specifically highlighted the very significant duties, roles and responsibilities that go with this appointment. Finally, it should be noted that any discussion on the roles and responsibilities of non-executive board directors of companies, has to be seen within the context of the broader corporate governance framework.

APPENDIX 1

Before joining the Board, the Directors:

- Must be over 18 years of age and an eligible person. A person being proposed as a Director may be required to complete a declaration that he/she is not barred from acting as a director
- Must be aware that they will not receive remuneration from their position as non-executive director but will be entitled to claim for all relevant expenses
- Must know that they cannot profit from the position. Any outside interests must be declared
- Must understand the role of the board. The board has and must accept ultimate responsibility for directing the affairs of the organisation ensuring it is solvent, well-run and delivering the outcome for which it has been set up
- Must accept the legal duties and responsibilities that being a non-executive director of a non-profit brings
- Must be available to attend board meetings probably 5-12 times a year and willing to furnish an explanation if unable to attend
- Must be interested in the organisation
- Must have met with fellow directors and must have taken the initiative to obtain full detail of the organisation's property, investments and income and to have read recent accounts and minutes of meetings to learn the organisation's finances and policies and carried out a due diligence check
- Must ensure they do not represent the interests of any outside organisation or their own personal interests
- Must be prepared to act with integrity.

Once on the Board, the Directors:

- Must be aware of the specific duties and obligations owed by a director to a company
- Must ensure company secretarial requirements of the Companies Acts are carried out in a thorough fashion
- Must be commercially and financially astute
- Must be a collaborative team player
- Must contribute
- Must be enthusiastic
- Must have an ability to think strategically and plan creatively
- Must resolve to set high standards and share responsibility for the results with fellow directors

In particular, the Directors' role in the non-profit sector is:

- To give the necessary time and effort to the management of the organisation
- To demonstrate high standards of corporate and personal conduct
- To ensure that management systems are in place to give accurate information to the board, such as information about financial resources
- To be responsible for setting and maintaining a framework of delegation and internal control and agreeing or ratifying all policies and decisions on matters which may create a risk to the organisation, financial or otherwise
- To ensure that the board acts always in the best interests of the organisation.

(Cox)

More information can also be found in the document by "Boardmatch Ireland: Code of Conduct for Board Members".

In the UK, guidance was published specifically for the establishment of Non-Executive Directors in any kind of Governmental association. The guidance goes into a lot of detail on how to appoint the Director and what is expected of them.

From the guidance, a good, well-performing Non-Executive Director should be:

- Seen to be working in the best interests of the organisation
- Willing to offer the benefit of his/her skills, knowledge, experience and contacts
- Participating fully in board discussions
- Willing to stand his/her ground and challenge board discussions and decisions when necessary
- Supporting the Chairman as appropriate
- Bringing strategic thought to his/her contribution
- Motivating and encouraging the Board to enhance performance and achievement
- Demonstrating an appropriate interest in increasing his/her understanding of the organisation
- Devoting the necessary time to the affairs of the board and is reasonably available outside of formal meetings
- Adding value to the organisation

In exchange, a well supporting Board should:

- Offer an adequate explanation of his/her role and responsibilities, and those of the Board as a whole;
- Encourage the Non-Executive Board Member to pursue appropriate opportunities to develop their knowledge of the working environment.
- Appreciate that the Non-Executive Board Member has other commitments outside the organisation
- Provide the support and information required by the Non-Executive Board Member
- Make sure that the Non-Executive Board Member is involved in all board discussions, and is invited to attend all board meetings and events
- Actively seek the views and ideas of the Non-Executive Board Member
- Give appropriate consideration to the Non-Executive Board Member's contributions
- Regularly offer the Non-Executive Board Member constructive feedback on his/her performance
- Make sure that the Non-Executive Board Member feels appreciated by the Board
- Make sure that The Non-Executive Board Member is content with the arrangement

(Cabinet Office, 2007)

Appendix 2

The Declaration of Interest must follow these guidelines:

- The declaration required by a director shall—
 - a. in the case of a proposed contract, be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration or, if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he or she became so interested; and
 - b. in the case of his or her becoming interested in a contract after it is made, be made at the first meeting of the directors held after the director becomes so interested.
- Where the Director is also a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm, or
- Where the Director is to be regarded as interested in any contract which may, after the date of the notice, be made with a specified person who is connected with him or her, shall be deemed to be a sufficient declaration of interest in relation to any such contract.
- A copy of every declaration made and notice within 3 days after the date of making or giving of it must be entered into a book kept by the company for this purpose.
- That book shall be open for inspection, without any charge, by any director, secretary, statutory auditor or member of the company at the registered office of the company and shall be produced at—
 - a. every general meeting of the company; and
 - b. any meeting of its directors if any of its directors so requests in sufficient time to enable the book to be available at the meeting.
- A company shall, if required by the Director of Corporate Enforcement, produce to the Director for inspection the book and shall give the Director such facilities for inspecting and taking copies of the contents of the book as the Director may require.

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