

## Good for Business? *Worker Participation on Boards*



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## Good for Business? Worker Participation on Boards

### Preface

Why examine the issue of employee-elected board directors ('worker directors')?

*"The assumption underlying the quest for improved participative systems is that the total resources of the company must be harnessed if company objectives are to be attained. For this purpose new mechanisms have to be found whereby workers' knowledge and ideas can make a valuable and positive contribution to the quality of company decisions."*

When Minister for Labour Michael O'Leary said this in 1977, he was envisaging a new dawn in the operation of companies as social and collaborative institutions where *"management based on the traditional hierarchy principle is increasingly becoming an anachronism"*. The Oireachtas debate on the legislation shows that a broadly similar vision of the social company was shared by all speakers.

This vision was overtaken by a range of developments, from the liberal renewal in the 1980s to the development of social partnership and other modes of employee involvement in Ireland. Yet it is worth taking a moment to reflect on whether Michael O'Leary's vision still has merit. As it happens, consciously or not, he correctly anticipated two major trends in the economy.

Firstly, long-term economic growth is not built on crude resource exploitation or on ever-more consumption, but instead on *"knowledge and ideas"*, most of which come from workers. Innovation and improvements in productivity are at the heart of sustainable economic development. Advanced economies are increasingly reliant on 'knowledge workers'; the innovators who use technology and drive productivity in all sectors. To optimise this resource and get long-term commitment from employees, it makes sense for companies to allow for more worker participation. And innovation is not just for 'high tech' industries: it is something that happens at all levels of technology and in all sectors, whenever someone finds a more efficient way of achieving the same outcome using fewer resources or in less time.

The second trend reinforcing the vision of employee participation is that knowledge workers do not thrive in traditional hierarchical companies. On the contrary, well-educated and innovative workers are also highly mobile, and companies have to be increasingly flexible to attract and retain them. Frank Ostroff (*The Horizontal Organisation*) gives examples of major manufacturing companies in the USA that have adopted part-horizontal management systems. These models give project teams priority over layers of management and allow the people developing new processes to take the lead, without having to submit ideas up and down a rigid hierarchy. In Ireland, the recent rise of interest in social enterprise and cooperative models also reflects a demand for different organisational forms.

All of this goes to show that a traditional, top-down way of thinking about how companies should be run may be outmoded and inefficient. There are different ways of including employees in decision-

making and, as this report shows, other countries have quite different conceptions of how companies should be organised. Across Europe there are many examples of employee-elected directors in private companies as well as public bodies. The strongest tradition of worker participation in private companies is in Germany, with works councils in smaller enterprises and employee directors occupying up to half of directors' seats in medium to large companies.

The issue of scale is important. Once companies move from being individual to collective enterprises, productivity and achievements likewise result from collective effort rather than individual ability. In this context, employee participation is not only efficient but it represents deeper collaboration between workers, managers and owners.

It is in relation to this aspect of employee participation that TASC undertook to examine Ireland's experience of employee-elected directors on the boards of Ireland's commercial semi-state companies and other public bodies.

The corporate governance of companies and the conduct of boards of management is rightly a topic of current concern. The new Financial Regulator has taken significant steps towards tightening corporate governance of Ireland's financial institutions – institutions which have done such damage to the economy and society. The Government's appointment of 'public interest' directors to the restructured bank boards is an example of ensuring that there is a voice at the table expressing wider stakeholder concerns.

In our *Mapping the Golden Circle* report, TASC identified four aspects of good practice for board members, especially non-executive directors: independence, diversity, sufficient time commitment, and restrained remuneration. What the present report shows is that employee-elected directors are quite capable of providing or developing the skills required for them to act as trusted, loyal and respected company directors. While there are training needs with respect to technical skills (such as scrutinising financial accounts), this applies to many directors, not just worker directors.

The findings of this report also suggest that stakeholder representation at board level brings a unique contribution. Even those sceptical of the benefits of employee-elected directors acknowledged that they brought unique insights that improved the board's capacity in a number of areas, such as avoiding 'groupthink', helping plan operational changes and understanding employees' concerns during industrial relations disputes. Worker directors also provided other non-executive board members with an alternative source of information to prevent executive dominance of the board.

With Ireland's EU/IMF loan deal, the future ownership and management structure of some commercial semi-state companies is unknown. There is a risk that a blind rush to 'privatisation' as the perceived only route to enhanced economic efficiency will not best serve the public interest. TASC addressed some of these issues in a recent report, *The Strategic Role of State Assets*.

Many other changes to how boards are constituted are also needed. In particular, in a recent position paper, *Public Appointments: Options for Reform*, TASC has argued that we need an

independent process for appointing people as directors of Ireland's public bodies, including stakeholder representation.

The experience of employee-elected board directors is only one component in the much larger arena of public sector reform and the development of Ireland's utilities. Nonetheless, worker directors are an important example of where corporate governance has worked well in many of Ireland's public bodies and it would be regrettable if this positive experience was lost in a rush to adopt traditional top-down modes of organising privatised or part-privatised companies.

We are very grateful to those who made themselves available for interview in the preparation of this report. The production of this report involved speaking to a diverse range of interviewees who had worked alongside employee-elected directors. The report has found that the overall experience in Ireland has been one where worker directors have indeed, as Minister O'Leary anticipated over three decades ago, made a *"valuable and positive contribution to the quality of company decisions"*.

**Nat O'Connor**  
**Director, TASC**

## Executive Summary

The appointment of worker directors is designed to give workers a role in an enterprise's strategic direction. In Ireland the role of worker directors on Boards is underpinned primarily by the Worker Participation Acts 1977-1988. Candidates are generally nominated by recognised trade unions for election by all employees.

The re-organisation and privatisation of the commercial semi-state companies over the last few decades, has led to a slow erosion of the prevalence of worker directors. In some cases, the position of worker director was replaced by a representative of the employee shareholders (Aer Lingus, Eircom). At the same time, social partnership generated an increased focus on providing for trade union, business, community and farming voices on state boards.

In contrast to Northern European states such as Germany, Irish provision for worker directors is limited to State-Owned Enterprises and a number of state agencies. The list of companies covered has grown and contracted over the years as a result of amalgamations, privatisations and closures.

The two main arguments generally advanced in favour of worker directors can be characterised as the 'democratic' and the 'instrumentalist' argument. The former views workers as citizens in the workplace, and worker director provision as part of a wider industrial democracy agenda. The latter argument holds that involving workers in the decision-making process enhances a company's performance and helps mitigate industrial relations conflict.

Relatively few econometric studies have been carried out to assess the benefit, or otherwise, of worker directors to enterprise performance, and what studies have been carried out relate primarily to Germany. Recent reviews of these studies, by the European Trade Union Institute and the Biedenkopf Commission established to examine the issue in Germany, found that the balance of evidence is inconclusive and no causality could be established.

Given that worker directors are less common in Ireland, there has been relatively little research and what there is has tended to focus on partnership (at both enterprise and national level) and on employee share ownership.

This report by TASC, prepared with the support of the National Worker Directors Group, benefited from consultations with a focus group of nine worker directors, as well as interviews with non-worker board members, company executives and independent experts. These consultations addressed five key questions:

- To what extent do worker directors have conflicting loyalties between their board obligations and obligations to their electorate?

- What are the implications for industrial relations?
- What is the nature of the relationship between worker directors and other board members? Is it one of mutual respect or is it underpinned by distrust and conflict
- Are worker directors treated equally to other non-worker director board members? Are there any restrictions on their participation in board committees for example?
- Do worker directors make a unique contribution to corporate governance and the operations of the board and if so is this contribution positive or negative?

Overall, TASC's research found that:

- Worker directors were felt to be loyal to the company, trustworthy and diligent in their duties; their contribution was viewed as positive and unique by over three-quarters of respondents; in particular, their intimate operational knowledge of the enterprise was highlighted by respondents. Almost all respondents stated that they had never heard of a breach of confidentiality or conflict of interest in relation to worker directors.
- Over half the interviewees mentioned the importance of having a contrary voice on the board in conjunction with the need to avoid groupthink and promote diversity.
- While in general worker directors did not feel that they were treated differently by other board members because of their elected status, almost all worker directors interviewed felt excluded from the audit and remuneration committees, and in particular felt that CEOs would not welcome a worker director on a remuneration committee. This perception was borne out by non-worker-director interviewees, over half of whom felt that worker directors should not sit on remuneration committees due to a potential conflict of interest.
- Interviewees felt that the contribution made by worker directors in the area of industrial relations was extremely positive, primarily because they act as a two-way conduit for information in times of conflict.
- A number of interviewees highlighted the need to ensure that the roles of trade union officials and worker directors are properly understood and delineated in order to avoid the potential for conflict.
- A majority of interviewees felt that the worker director system should be extended across the public sector; however, a smaller majority (just under two-thirds) also felt that it would not be appropriate in the private sector.

### **Recommendations**

- The worker director model should be extended across the public sector.
- Mandatory introductory training would improve the workings of the board, it is a feature of many companies and organisations but not all of them.
- All boards should conduct regular skills audits and independent directors should be

- appointed to boards based on their skills and experience.
- In order to ensure that worker directors are not isolated on boards, there should be a minimum 25% employee representation on the boards.
- Workers should be better informed of the role and obligations of the worker director at election time, in order to ensure that those elected are not subject to unrealistic or unreasonable expectations.



## 1 Introduction

- 1.1 The appointment of worker directors is a form of industrial democracy aimed at giving workers a role in the strategic direction of the enterprise in question through representation at board level. In Ireland the role of worker directors on boards is underpinned primarily by the Worker Participation Acts 1977-1988, as well as by other general legislation and codes on corporate governance.
- 1.2 The legislation stipulates varying degrees of worker participation on boards, ranging from one or two people to up to a third of board directors – the latter being the case for commercial semi-state companies. A number of other public bodies not covered by the Worker Participation Acts have similar, but not equivalent, provisions for employee representation at board level. Candidates are nominated by recognised trade unions (where they exist) for election by all employees, and worker directors must be afforded sufficient time and resources by public bodies to fulfil their functions.
- 1.3 The economic crisis raised concerns about corporate governance in the banking and financial sector and across the economy in general, with broad agreement that reform was needed to ensure that companies (publicly and privately-owned) take account of the wider public interest. The appointment of public interest directors to the main banks is an example of how the need for more diverse representation at board level has been acknowledged.
- 1.4 While they have been a feature of a number of state-owned companies and organisations for over thirty years, the re-organisation and privatisation of commercial semi-state companies over the last few decades has slowly reduced the prevalence of worker directors. In some cases, worker directors were replaced by representatives of the employee shareholders (Aer Lingus, Eircom). At the same time, through social partnership, there has been an increased focus on providing for trade union, business, community and farming voices on state boards. While there has been some discussion regarding the merits of this approach recently (most notably in regard to specific state agencies), the role and position of worker directors is less examined.
- 1.5 The representation of social partners and employee shareholders on boards, while also encouraging the employee/worker voice, differs in nature from that of worker directors. The Worker Participation Act 1977 sought to establish what was then an emerging concept internationally: the concept of the company as a social institution. The social institution promoted a stakeholder approach to governance. The then Minister for Labour, Michael O’Leary, believed that the company should include a variety of interest groups including, *“shareholders, financiers, management, employees and consumers, each of which is indispensable to the company’s overall well-being and success.”* (O’Leary, Second Stage, 1977)
- 1.6 The participation of workers in the decision-making process in the company was viewed as an

*'entitlement' and the company should not be considered purely as 'the exclusive property of shareholders':*

*"Ownership of its physical assets [the company] is no longer regarded as conferring an absolute right to exercise control without taking into account other interests such as those of employees or society generally." (O'Leary, Second Stage, 1977)*

1.7 Behind this more inclusive view of the company was a recognition that the actions of companies have an impact beyond the financial bottom line. The company as a social institution recognised these impacts on its employees, customers and society in general. Thus, in order to reflect and manage this impact, decision-making should take account of these diverse and sometimes potentially conflicting backgrounds views and interests

1.8 Thus, worker participation in decision-making was regarded as a right; a form of industrial democracy. It was also seen as providing other benefits to the company, including improved decision-making and a greater appreciation for the contribution of the worker.

*"The assumption underlying the quest for improved participative systems is that the total resources of the company must be harnessed if company objectives are to be attained. For this purpose new mechanisms have to be found whereby workers' knowledge and ideas can make a valuable and positive contribution to the quality of company decisions. In this way participation should make for greater efficiency and more worthwhile employment. In this context management based on the traditional hierarchy principle is increasingly becoming an anachronism as new industrial structures develop. Industry in the future will tend to be organised increasingly along these lines in this general direction." (O'Leary, Second Stage, 1977)*

1.9 Unlike many northern European countries (e.g. what was then West Germany), the Worker Participation Act confined the establishment of worker directors to state-owned enterprises (SOEs). The Minister at the time was particularly concerned with the SOE as an economic driver and the organisations closest to the ideal of the social institution, and now saw the opportunity to use SOEs as test beds for industrial democracy, thereby adding to their contribution to *'the general wellbeing'* of the nation. (O'Leary, Second Stage, 1977)

1.10 While he lauded their economic achievements, O'Leary was concerned by the industrial relations climate in Ireland's SOEs. He believed that the labour unrest and level of confrontation in SOEs mirrored that in private companies, and speculated that this might be due to the large number of unions organising a relatively small number of workers. While the Government had sought to improve this through the 1975 Trade Union Act, O'Leary believed that greater industrial democracy at company level would lessen the potential for inter-union conflict.

1.11 The Act initially targeted seven companies which had commercial operations, a medium to high level of technology use and a developed trade union/management relationship. In order

to ensure that the legislation had a national scale, some of the companies were geographically centralised and other were geographically dispersed. The companies selected were Aer Lingus, Bord na Móna, B & I, The Irish Sugar Company, CIE, ESB and Nítrigin Éireann.

- 1.12 The list of companies covered by the Worker Participation Acts and other legislation grew and contracted over the years, as some SOEs were amalgamated, privatised and closed. The 1988 Worker Participation Act added Aer Rianta and the National Rehabilitation Board to the list.
- 1.13 However, this act was primarily focused on worker participation at a sub-board level, as required by the relevant commitment in the *Programme for National Recover* agreed in October 1987.
- 1.14 Thus, the main aims of the initial legislation can be stated as follows:
  - (i) To provide for the entitlement of workers to worker participation in decision-making, as envisaged by the idea of the 'social company'
  - (ii) To provide for the channelling and use of worker knowledge in decision-making
  - (iii) To promote a more harmonious industrial relations climate
- 1.16 Section 2 will examine the experience and aims underpinning the concept of worker directors in other countries. Section 3 will outline the relevant legislation in the area, including that pertaining to worker participation and corporate governance. Finally, section 4 will discuss the results of the consultation carried out by TASC on the role and contribution of the worker director in Ireland.

## 2 Worker Directors: experience, aims and underlying thinking

2.1 Employee representation on boards is common across many European countries. When Ireland first introduced the concept in 1977, it was considered a progressive and forward-thinking idea, related to a greater appreciation of the opinions of employees and a desire to promote greater industrial peace. However, in recent years it has fallen out of favour in some countries (most notably the UK), in line with a more liberal economic approach and a general weakening of trade union power in many countries.

2.2 Employee participation in European companies takes many forms, and is often categorised as direct or indirect participation (Poutsma, Huijgen, 1999). According to Poutsma and Huijgen, some countries focus on schemes of participation by representatives, while practices in other countries focus on more direct participation such as team-based work. Poutsma and Huijgen also examine financial participation, where the focus is on employee ownership.

Indirect Participation: Co-determination; collective bargaining; works councils;  
**worker directors**

Direct Participation: Consultative; delegative

Financial Participation: Share ownership; profit sharing

2.3 Participation within these categories can be superficial or extensive, ranging from the provision of information, via consultation, to joint decision-making.

2.4 According to Poutsma and Huijgen, one of the arguments for financial participation is that it commits employees to the company and helps develop an entrepreneurial attitude (Poutsma, Huijgen, 1999: 200). While one might argue that some form of combination of financial participation and indirect or direct participation would produce a solid partnership company, *"indirect participation might conflict with financial participation since the former mainly focuses on solidarity and social justice and financial participation tends to stress diversity in rewards"* (Poutsma, Huijgen, 1999: 200).

2.5 The European Trade Union Institute has undertaken a number of studies on the area of worker participation at board level across Europe. One study (Gold, M., Kluge, N., Conchon, A., "In the union and on the board": experiences of board level employee representatives across Europe", 2010) took the form of interviews [see Section 4]<sup>1</sup>, while the other study (Vitols, S., Kluge, N., (ed.), *The Sustainable Company*, 2011) looked at worker participation, including board-level representation, in the context of improved Corporate Social

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<sup>1</sup> See also, Gold, M., "'Taken on board': An evaluation of the influence of employee board-level representatives on company decision-making across Europe", *European Journal of Industrial Relations*, 2011 and Cressey, P. '2009 Employee Participation', in Gold, M, ed., *Employment Policy in the European Union: Origins Themes and Prospects*, 2009

Responsibility. A third study in 2011 (Conchon, A., Board-level employee representation rights in Europe Facts and trends, Report 121, ETUI), was an examination of the current level of worker representatives on boards across the EEA. It found that 17 of the 28 EEA countries had some form of employee board representation. Although this form of representation was more common in state-owned companies, many European countries – such as Germany, Denmark and the Netherlands – have legislative provision for board level representation in both the public and the private sector.

- 2.6 Many countries, such as Ireland, have a monistic (one-tier board of directors) system, while others (such as Germany) may have either a monistic or dualistic (supervisory board and management board) structure.
- 2.7 The 2010 ETUI study examined the ‘*common prejudice*’ that Board Level Employee Representatives (BLER) will focus exclusively on members’ interests rather than the corporations’ interests. The study found that BLERs help defend the company’s interests instead of particularistic ones. The author therefore argued that the model should be spread as a way of ‘*ensuring the sustainability of business*’. (Conchon, 2011)
- 2.8 Worker directors are most associated with the German system. Introduced in the mid-1970s, co-determination, (e.g., worker participation on supervisory boards and works councils), provided a stakeholder approach to governance and has often been credited with explaining the ‘German miracle’. (Conchon, p.7). This approach underpins corporate governance in many European countries. While Germany was the first country to legislate for worker directors, it was joined by seven other countries in the 1970s<sup>2</sup>, a further four countries in the 1980s<sup>3</sup> and another four in the 1990s<sup>4</sup>. All in all, in 17 out of the 24 EU member states and Norway, employees are granted a place on the board with decision-making power.
- 2.9 The arguments for providing for worker directors on boards of governance have generally echoed those expressed by Michael O’Leary in 1977. Such arguments conceptualise workers as citizens in their workplace and form part of a broader agenda of industrial democracy. The second argument promotes the “*instrumentalist vision*”, whereby the granting of decision-making rights to workers “*brings added value to a company’s economic performance* “. (ETUI, 2011: p.10)
- 2.10 The first argument – the fundamental right to partake in decision making at a high level in the workplace – has been constitutionally underpinned in both France and Slovenia.
- 2.11 “*Workers should be seen as participants in the company, just like shareholders, in the sense that they sustain risks arising from the company’s choices*” (Vitols, Kluge, 2011: 7) Stakeholder theory conceptualises the company as a social organisation, which is dependent on different

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<sup>2</sup> The Netherlands, Austria, Ireland, Denmark, Luxemburg, Sweden and Portugal.

<sup>3</sup> Poland, France, Greece and Hungary.

<sup>4</sup> Finland, The Czech Republic, Slovakia and Slovenia

groups in order to produce goods and services. These different groups include employees, who provide skills and labour; investors who provide capital; and the community, which provides some of the social and economic infrastructure in which the company operates, e.g. education and social services. Each of these groups in turn has an interest in ensuring the long-term success of the company for jobs, profit, goods and services, and tax revenues. (Vitols, Kluge, 2011)

*“Although at first glance corporate governance seems a matter only for shareholders and managers, workers also have a legitimate claim. They are not only parties to employment contracts, but also investors in their pension funds or employee shareholders, as well as citizens interested in quality goods and services. Consequently, they are affected by corporate decisions in a number of ways. Not only a shareholders, but also workers, other citizens and the community at large have an interest in good corporate governance.”* (Vitols, Kluge, 2011: 15)

- 2.12 Whether the introduction of worker directors is beneficial or detrimental to a company’s performance has been the subject of few econometric studies, and most of those which have been carried out have predictably focused on Germany. Given the paucity of econometric studies on this topic and the wide varieties of methodologies and panel data used, it is perhaps unsurprising that the balance of evidence is inconclusive. (ETUI, 2011)
- 2.13 Some of the studies examined company performance based on a comparison between companies with and without worker directors, while others compared companies with a one-third representation with companies with parity (50 per cent) representation. An ETUI 2011 review of existing studies established that ten studies found some positive effects of board level representation, while eleven studies found no significant effects, positive or negative. Seven studies found negative effects. However, in two of those studies the negative effect was observed in companies with parity representation and had been compared with those with one-third representation.
- 2.14 The ETUI review also points out that not only is there no clear correlation between employee board level participation and company performance, but neither is there any case evidence of a causal link. (ETUI: 16) A similar review conducted by the Biedenkopf Commission in 2006 also found that, despite an increasing number of econometric studies on the topic, due to the complexity of the issue a causal relationship still could not be established. (Biedenkopf *et. al.* 2006: 15).<sup>5</sup>

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<sup>5</sup> See also Addison, J.T., Schnabel, C., 'Worker Directors: A German Product that Did Not Export?', Industrial relations, 2011, which also found conflicting empirical evidence on the effects of co-determination on company performance. The first phase of their study found lower productivity and profits associated with co-determination but the second and third phases reversed some of these findings and found new results, including higher level of innovation, as measured by patent numbers. “Third and most intriguing of all, were the findings of a recent financial study of the market value of the firm, which held out the prospect that good

- 2.15 Thus, given the equivocal nature of evidence at present, one cannot argue with any great certainty that employee participation at board level improves company performance. However, it is also worth pointing out that, on balance, the econometric studies lean more towards a positive or neutral effect on company performance, and that few studies show a negative effect. Kluge (2005) argues that *“worker participation is portrayed [by its critics] as affecting a country’s ability to compete for inward investment”*. However, while there is no *“conclusive proof that board level worker participation has positive financial impact”*, there is *“some indication that there is in fact no negative correlation between worker participation and the strength of a country’s economy.”* (Kluge, 2005: 174)<sup>6</sup>
- 2.16 In Ireland, where worker directors are less common, the focus of research on worker participation over the past number of years has tended to be on partnership (at a company level and a national level) and employee share ownership. A 2009 study by William Roche posed the question: *“who gains from workplace partnership?”*. (Roche, 2009) Much of the literature on workplace partnership is based on the premise that partnership-related practices give rise to gains for all stakeholders. Much like the studies on employee board level representation, Roche claims that the pattern of findings is variegated. While many studies do indeed report gains for all stakeholders, others report few gains for employees or unions and *“the weight of evidence available suggests that where gains accrue to stakeholders, the balance of mutuality may commonly favour employers”*(Roche, 2009). Geary (2009), on the other hand, in a study focused on company level partnership in Ireland, finds that unions do benefit from working in partnership, especially where they have a high level of penetration in the company.
- 2.17 Employee representation has been described using different terms over the years, such as worker participation, employee involvement, industrial democracy and employee voice (Gospel, 2011: 56). The subject of employee “voice” has been a popular topic of study since the publication of the 1984 seminal work *What Do Unions Do?* by Richard B. Freeman and James L. Medoff. This study presented a positive view of the value of the collective employee voice. A 2006 study on employee information and consultation in Ireland found that, in response to a strengthening of regulatory rights for employee voice, some employers resorted to a counterbalancing form of “pseudo consultation”(Dundon, Curran, 2006). Driven by European legislation<sup>7</sup> and a desire to improve organisation performance, the issue of

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corporate governance might include employee representation by virtue of the monitoring function and the reduction of agency costs.” (p.372)

<sup>6</sup> An Irish example of this criticism can be found in a 2005 article in the Irish Times by John McManus. Commenting on a well-publicised dispute between two worker directors and the rest of the board in the ESB, he argues, “At one remove Mr LaCumbre and his fellow worker director Pat Smith are taking the sort of principled stance that most investors should be delighted with. They have refused to sign off on the ESB’s accounts because they do not think it is prudent for the company to be paying massive dividends to the Government (€77.5 million this year) until it has sorted out its €1.3 billion pension deficit. But, in fact, this sort of behaviour strikes fear into the heart of investors”, McManus, J., ‘It’s hard to see where worker directors fit into ICTU’s plans’, *Irish Times*, 11 July 2005

<sup>7</sup> European Directive on Employee Information and Consultation

employee voice has been given greater prominence.

- 2.18 Worker directors do not represent the only form of worker representation on boards. Employee participation/‘profit sharing’ can allow employee organisations to accumulate a substantial stake in a company, and thus enable them to exercise greater power at shareholder level. However, while this form of worker participation is more frequently discussed, mostly due to the high profile privatisation of both Aer Lingus and Telecom Éireann, it too provides a poor proxy for the examination of employee participation on boards, given that the ESOT is a **shareholder** while the worker director is a **stakeholder**.

### ***Corporate Social Responsibility and the sustainable company***

- 2.19 The importance of worker participation in the creation of the “*the good company*” has been highlighted by the ETUI, (Kluge *et. Al. 2011*). Understanding the company as a social institution and taking on board the views of stakeholders (including employees) can better equip a company to embrace Corporate Social Responsibility (CSR).
- 2.20 CSR is increasingly seen as an important component in company strategy and engagement with society, not only in terms of fulfilling the company’s responsibilities to society and the environment, but also as a way of bringing benefits in terms of cost savings, consumer relations, risk management etc. CSR requires engagement with stakeholders, which can generate a better understanding of “*societal expectations and operating conditions*”, thus helping develop new markets and create opportunities for business.
- 2.21 The European Commission defines Corporate Social Responsibility as ‘*the responsibility of enterprises for their impacts on society*’.

*“Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:*

- *maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;*
- *identifying, preventing and mitigating their possible adverse impacts.”* (EC, 2011)

- 2.22 Addressing CSR is therefore in the interests of the company and worker participation, and is seen by many proponents as key to assisting companies in this endeavour.

- 2.23 The following questions will be considered in Section 4:

- To what extent do worker directors have conflicting loyalties between their board



obligations and obligations to their electorate?

- What are the implications for industrial relations?
- What is the nature of the relationship between worker directors and other board members? Is it one of mutual respect or is it characterised by distrust and conflict?
- Are worker directors treated equally with other non-worker director board members? Are there any restrictions on their participation in board committees, for example?
- Do worker directors make a unique contribution to corporate governance and the operations of the board, and if so is this contribution positive or negative?

### 3 Corporate Governance and Worker Participation legislation in Ireland

#### *The Irish Corporate Governance System*

- 3.1 Corporate governance in Ireland, as in many other common law countries (e.g., the United Kingdom), involves a self-regulatory code underpinned by a regulated statutory environment. However, recent corporate governance failures in the financial system have raised questions regarding the extent to which this regulated statutory environment was enforced. In response to such governance failures, the Companies (Amendment) Act 2009 was introduced, addressing issues such as loans to directors and extending the powers of the Director of Corporate Enforcement.
- 3.2 The Companies Acts 1963 – 2009 provide the main legal framework for corporate governance, supplemented by various other pieces of primary and secondary legislation. As mentioned in Section 2, Ireland has adopted the unitary board system and articles of association delegate the management of the company to its directors. Company directors do not need specific qualifications for the role except in the case of directors of financial services companies.
- 3.3 The duties of a director are set out in statute (national and European) and in common law. The Office of the Director of Corporate Enforcement sets out these duties as follows (ODCE, 2011):
- A. **Directors' Common Law Duties** can be summarised in three principles:
- (i) The exercise of powers in good faith. Directors must act in the best interests of the company as a whole and not in the interests of any particular member or members. They must not abuse their powers.
  - (ii) Directors must disclose any profit they make from their position as directors.
  - (iii) Directors must carry out their duties with "*due care, skill and diligence*".
- B. **Directors' Statutory Duties** find form in the Companies Acts and related legislation
- (i) Duties as a Company Officer: a director, as an officer of a company, has a duty to comply with his or her obligations under the Companies Acts and to ensure that the requirements of the Companies Acts are complied with by the company.
  - (ii) Duty to Maintain Proper Books of Accounts
  - (iii) Duty to Prepare Annual Accounts (Financial Statements)
  - (iv) Duty to Have an Annual Audit Performed
  - (v) Duty to Maintain Certain Registers and Other Documents
  - (vi) Duty to File Certain Documents with the Registrar of Companies

- (vii) Duty of Disclosure
- (viii) Duty to Convene General Meetings of the Company
- (ix) Directors' Duties Regarding Transactions Between the Directors and the Company
- (x) Duties of Directors of Companies in Liquidation and Directors of Insolvent Companies

3.4 Thus all directors, regardless of how they are appointed have a duty to act in the best interest of the company.<sup>8</sup> This includes a duty to exercise their powers for their proper purpose, a duty not to make a profit from corporate information and a duty of disclosure.

3.5 While a director must place the interests of the company above the interests of any particular member or members, the Companies Act 1990 also requires that the directors of a company have regard to the interests of the company's employees, as well as its shareholders.

*52.—(1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.*

*(2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.*

3.6 The Companies Acts have been undergoing revision for a number of years, and the role and obligations of company directors is expected to be set out in Part Five of the new Companies Bill (See Appendix A). This bill will codify these duties as follows: *"relevant duties are based on certain common law rules and equitable principles as they apply in relation to the directors of companies and shall have effect in place of those rules and principles as regards the duties owed to a company by a director."* (Draft Companies Bill, Part Five, Section 224 (2)).

3.7 Thus, legislation is clear that while a worker director may be elected by his or her work colleagues, the worker director's duties, roles and obligations are the same as all other directors.

3.8 This approach to corporate governance contrasts with the stakeholder approach taken in some other European countries, most notably Germany, where the management board is obliged to

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<sup>8</sup> "A company director stands in a special relationship to the company of which they are an officer. This special position is known as a 'fiduciary position' and the director is known as a 'fiduciary'. A fiduciary is required to act in a manner which is legally becoming of their office and which places the interests of the company ahead of their own. Perhaps somewhat surprisingly to many, a director's duties are usually owed in the first instance to the company and not to the members, creditors or employees of the company.", Office of the Director of Corporate Enforcement, 2011, pp. 7-8

take the interests not only of its shareholders, but also its stakeholders, into account. *“The Management Board is responsible for independently managing the enterprise in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value..” “The Supervisory Board appoints, supervises and advises the members of the Management Board and is directly involved in decisions of fundamental importance to the enterprise. The chairman of the Supervisory Board coordinates the work of the Supervisory Board.”* (German Code of Corporate Governance, 2010)<sup>9</sup>

### **Codes of Practice and Ethics**

- 3.9 The practice of employee participation at board level only exists in the public sector and state-owned companies; worker directors in these organisations are also bound by codes of practice and ethics produced by Government and their own companies.
- 3.10 The Department of Finance issued its first set of guidelines on Corporate Governance in State Bodies in 1992. It has since been updated a number of times, most recently in 2009. The Code of Practice is designed to provide guidance on corporate governance in state bodies supplementary to legislative provisions. It *“provides a framework for the provision of best practice”* in commercial and non-commercial bodies, but acknowledges that the guidelines will not be suitable for all organisations (DOF, 2009). Where this is the case, organisations must use their own judgement, within the law.
- 3.11 The Code of Practice sets out the key roles and responsibilities of the board, including the production of annual accounts and reports and establishing audit procedures. It also includes the requirement to put in place procedures on confidential disclosures and to draw up codes of business conducts for directors and employees. The code also includes a requirement to provide support and briefing to directors.
- 3.12 In addition to the code of practice on governance, each organisation is required to produce a code of ethics for its staff and its directors.<sup>10</sup> Codes of ethics generally include guiding principles on board behaviour, confidentiality, fairness, conflict of interest etc.

### **The Worker Participation Acts 1977, 1988**

- 3.13 As discussed in the Introduction, the aim of the Worker Participation Acts is to include aspects of the stakeholder approach in corporate governance reflecting the idea of the company as a *“social institution”*. According to its sponsors, this would improve industrial relations, increase

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<sup>9</sup> <http://www.corporate-governance-code.de/eng/kodex/4.html>

<sup>10</sup> The ESB code of ethics for board members can be found in Appendix C

workplace democracy and provide a counter-weight against 'economic liberalism'. It was also hoped that inter-union relations would be improved through the establishment of a Worker Directors Group in the ICTU. It was intended that the initial seven companies would form a sort of 'test bed', and that the model would be expanded in the state sector and then possibly into the private sector sometime in the future.

3.14 The 1977 Act was initially applied to Aer Lingus (and Airlínte), Bord na Móna, B&I, The Irish Sugar Company, CIE, ESB and Nitrigin Éireann. The total number of employees covered at that time by the Act was 50,000

3.15 The legislation provided for the election of worker directors. The elections were to be held by secret ballot and proportional representation. The electors must be over 17 and have worked for the company for not less than one year. The candidates must also be over the age of 17, younger than 66, and have worked for the company not less than one year. The role of the trade union was determined by whether or not a trade union was recognised for the purposes of collective bargaining. Provisions for worker directors were extended to An Post and Telecom Éireann in 1983 through the Postal and Telecommunications Services Act which established both companies.

3.16 The 1988 Act added Aer Rianta and the National Rehabilitation Board to the list of semi-state bodies with worker directors. This act also provided for the introduction of sub-board participative arrangements in 35 state enterprises. These arrangements are to be activated upon request by a trade union, or by the majority of employees of the enterprise. The legislation was designed not to be too prescriptive in terms of the arrangements to be introduced. However, it did specify the inclusion of the following features:

- a regular exchange of views and information between management and employees concerning matters which are specified in the agreement
- timely delivery of information about certain decisions which are liable to have a significant effect on employees' interests
- dissemination to all employees of information and views arising from the participative arrangements

3.17 As they have been established, other public bodies and agencies have included worker directors in the boards but this has occurred on an ad hoc rather than a systematic basis. For example, the Labour Services Act 1987 provided for the appointment of worker directors to the board of FÁS and the Court Service Act 1998 provided for worker directors in the Court Service.

3.18 It has been argued that the system of worker directors in Ireland took a number of years to 'bed down'. The non-worker directors viewed the new arrangement sceptically and often excluded worker directors when they were first appointed, even holding private meetings without them (McNamara, 1990). As can be seen in Section 4, TASC's findings show that this is

no longer the case.

### ***Worker directors across Europe***

- 3.19 As discussed in Section 2, employees have been granted the legal right to be represented on the board of directors or the supervisory board of their company in 17 out of the 27 European Member States plus Norway. In the case of some countries, such as Ireland, this right is extended only to employees in specific state-owned companies. In other countries, they may only be represented at board level where the state has a 50 per cent or greater holding in a company. (Kluge and Stollt 2009)
- 3.20 In some companies, the BLER rights can be applied to both the public and the private sector, such as France, Luxemburg, etc. The size of the company may also determine whether or not BLER rights are applied. In many countries, there are minimum thresholds, for example between 25 and 50 employees.
- 3.21 In many countries where the dualistic model applies, there is a growing trend towards moving to a monistic model, such as applies in Ireland. Laws providing for worker directors take account of these changes in corporate governance. While the level of representation varies between countries (e.g., one third of the board in Ireland and 50 per cent of the board in many German companies), in no country can the worker side prevent a board decision where the shareholder side speaks with one voice (Conchon, 2011)
- 3.22 The relationships between the employee representatives and the company also varies across countries. In the majority of countries, board representatives must be employees of the company, whereas in the Netherlands, for examples, this is “explicitly forbidden”. (Kluge, 2009) In Germany, where trade unionists may represent workers, both categories exist. A relationship between the worker representatives and trade unions is also strong in most countries.

## 4 Consultation findings

- 4.1 As there has been little research into worker directors in Ireland, there is very little data collected on the topic. Studies by the European Trade Union Institute focused on gathering data on the operation of boards and the role and contribution of worker directors through interviewing a number of participants from each country.
- 4.2 This study seeks to examine the role and contribution of the worker director, and possible conflicts inherent in that position, in a similar fashion. A focus group comprising nine worker directors from six different companies and organisations was held. Thirteen interviews were also held in order to ascertain the opinions of non-worker director board members, company executives and independent experts.
- 4.3 The following areas were discussed with both categories of participant:
- Operation of board and subcommittees
  - Supports and training
  - Election procedures
  - Relationships with other board members
  - The issue of confidentiality
  - Contribution of worker director to corporate governance
  - The importance of corporate social responsibility
  - Links with workplace representatives and colleagues
  - Conflicts of interest
  - Links with the trade unions
  - Effect on collective bargaining
  - The potential for extending the model to other companies/organisations
- 4.4 The following questions were considered:
- To what extent do worker directors have conflicting loyalties between their board obligations and obligations to their electorate?
  - What are the implications for industrial relations?
  - What is the nature of the relationship between worker directors and other board members? Is it one of mutual respect or is it characterised by distrust and conflict?
  - Are worker directors treated equally to other non-worker director board members? Are there any restrictions on their participation in board committees for example?
  - Do worker directors make a unique contribution to corporate governance and the operations of the board, and if so is this contribution positive or negative?

**Operation of the board and representation of worker directors on committees**

- 4.5 Boards generally meet once a month, a minimum of ten times a year. Much of the work of a board is conducted through its committees. In particular, the audit and remuneration committees are extremely important, not only in terms of corporate governance but also in terms of the power structure on a board. Most boards have at least these two standing committees. They may also have a mixture of standing and ad hoc committees on issues such as strategy, corporate social responsibility, health and safety etc. The audit committee in particular demands a keen eye and preferably experience in understanding company accounts.
- 4.6 The remuneration committee provides the greatest potential for conflict, dealing as it does with the remuneration of senior executives/CEO. There was a broad consensus among the worker directors that CEOs would not welcome a worker director on the remuneration committee.

**Table 4.1: Committees on which worker directors currently sit**

<b>Committee</b>	<b>No of Worker Directors in focus group</b>
Health and Safety/Customer Service	1
Finance	1
Community Relations	1
National Disability Strategy	1
Health and Safety	1
Regulation	1
None	3

- 4.7 Generally, board members are nominated to specific committees by the chair. Most of the worker directors claimed that they were never invited to join either the audit committee or the remuneration committee. The worker directors felt that there was a perception that they had a conflict of interest precluding them from serving on sensitive committees. This applies to the remuneration committee in particular, but also to a lesser extent the audit committee. In the case of the audit committee, they felt that there was a perception that worker directors did not possess the skills and knowledge needed to sit on this committee. However, while the trend was not to nominate worker directors to the audit and remuneration committees, a small number of semi-state companies have, or had previously,



included worker directors in audit, finance and remuneration committees. Board na Móna, for example, has a worker director on its remuneration and finance committees.

4.8 The responses of the interviewees seem to bear out the perceptions of the worker directors. Non-worker director interviewees were asked if all committees/subcommittees should be open to worker directors, or if there were some committees on which they should not sit. The answers could be grouped in four responses (one or more per respondent):

- (i) Just over half of the interviewees felt that worker directors should not sit on the remuneration committee due to a possible conflict of interest or the potential for conflict in the workplace. The idea of workers adjudicating on the pay of the CEO/Director was deemed inadvisable by these interviewees. A number of interviewees also argued that it might be to the benefit of the worker director not to sit on the remuneration committee, thus protecting him/her from future conflict in the workplace. Another interviewee also felt that it was unwise to nominate worker directors on to succession committees or internal appointment committees. The idea that those appointed to remuneration and audit committees should be completely independent (i.e., not company employees) was expressed by a number of interviewees and was regarded as good governance.
- (ii) One third of interviewees felt that, in theory, there was no reason why the worker directors should not sit on the remuneration, audit or any other committees. If one believed that all directors are equal under the law, then there was no reason to exclude them from any particular committee. A few respondents mentioned that it was a matter of perception. It was the perception of conflict of interest that excluded worker directors from participating in all committees, rather than any evidence of such conflict. In some cases, interviewees pointed out that in some companies worker directors are currently sitting on, or have sat on audit and remuneration committees with no negative repercussions or breaches of confidentiality. Worker directors are not precluded technically from participating in any committees by any legislation or standing orders. One interviewee expressed the view that not only was there no reason why worker directors should be excluded from serving on sensitive committees, but also that given their unique insight into the workings of the company it would be good practice to ensure their inclusion on audit committees in standing orders. There was almost unanimous agreement that worker directors currently serving on boards understand their obligations and had proven extremely trustworthy.
- (iii) A third of interviewees felt that it was a lack of specialist skills experience that precluded worker directors from serving on audit committees. A number of these interviewees said that if worker directors had the requisite background and skills to sit on an audit committee than that option should be available to them.

- (iv) Most boards have, or have had, other committees (either standing or ad hoc) from time to time, and in general there has been no barrier to worker directors taking part in most of these, unless they are specifically related to pay and conditions of the workforce, e.g., a restructuring committee. Committees where worker directors may be involved in evaluating their managers may also provoke conflict and/or conflict of interest and need to be sensitively handled.
- 4.9 In their interviews with ETUI (2011), worker directors from An Post and Eirgrid both stated that worker directors have served on audit committees in their respective companies but worker directors are historically not members of the remuneration committee. The Eirgrid participant was a member of both the audit and the pensions committees but didn't think that membership of the remuneration committee would be "tenable".
- 4.10 In the two tier system not all supervisory boards have committees, but of those that have, very few were closed to worker directors (Conchon, 2011). The France Télécom Group provided a counterpoint to this, as worker directors were "partly excluded" from the audit and remuneration committees (Conchon: 57). However, in the case of a company under an *Societas Europaea*, (SE)<sup>11</sup> agreement, equal representation on all committees was laid down. A worker director in a French defence company believed that having a position on the remuneration committee was useful "because he managed to get a social criterion included in the pay package of the Chief Executive Officer" (Conchon: 49). This ties in with the conception of the worker director as a moderating influence with a wider social agenda.
- 4.11 Many respondents mentioned the need to ensure that there are skills audits of the boards to ensure the requisite skills mix and diversity.

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<sup>11</sup> *Societas Europaea*, The European Company is a legal form for companies established by the "Council Regulation on the Statute for a European Company" (EC/2157/2001) [http://ec.europa.eu/internal\\_market/company/se/index\\_en.htm](http://ec.europa.eu/internal_market/company/se/index_en.htm). An SE must be located in one of the members states of the EEA can transfer to another member state once established. SEs have a choice between one-tier and two-tier systems of corporate governance. Employee participation is provided for in the "Directive supplementing the Statute for a European Company with regard to the involvement of employees" (2001/86/EC). A 2008 study found that 31 SEs had a one-tier structure, 16 had a two-tier structure and 18 used the foundation of the SE to move from a two-tier structure to a one-tier structure. The analysis showed that those SE companies with two-tier structures had a higher level of worker participation at board level. (Keller, B., Werner, F., 2008)

### ***Election Procedures***

- 4.12 The worker directors all expressed satisfaction with the current system of elections to the board.
- 4.13 Nearly all interviewees felt that the current structures and procedures for elections to the board were appropriate and rigorous. Those organisations which are not covered by the Worker Participation Acts had developed their own rules and procedures, similar to those required by the act and no less rigorous. Most of the interviewees were keen to point out that elections are generally closely contested, and that they were tightly regulated by the company secretary or equivalent person. Most interviewees believed that the candidates put in serious time and effort in order to get elected.
- 4.14 However, over half of the interviewees felt that the procedures should include some level of education for the prospective nominee and for the electorate on what the role and obligations of a worker director entail. This would help ensure that the subsequent successful candidate is no subject to unrealistic expectations.
- 4.15 A small minority of interviewees were of the opinion that, as the Worker Participation Acts specify that the candidates are nominated by the unions, this could be construed as undemocratic, if this meant that those who were not in a recognised union or had fallen out of favour with their union representative were precluded from seeking election. However, this view was disputed by a number of other interviewees.
- 4.16 One interviewee was opposed to quotas of any kind on a board and suggested, that as part of a new system of independent appointments, membership of boards should be opened to appointments from all citizens on the basis of merit, including employees. This would allow board members to be appointed on the basis of skills and experience rather than any other criteria.
- 4.17 The election procedures in Ireland are not too dissimilar from those in other European countries, with perhaps with the exception of those European companies which have works councils. In these cases, the works council rather than the union sometimes nominates the worker director.

### ***Training and Supports***

- 4.18 In the midst of concerns over corporate governance, the need for adequate training and support for board members both in the public and private sector has been increasingly recognised over the last few years.
- 4.19 However, despite this growing concern, systematic formal training is not offered in all companies/organisations. While all organisations offer some training (generally half-day to full-day sessions), it is usually offered on an ad hoc basis.
- 4.20 Most new board members received induction packs including relevant company information, and where appropriate board members are regularly provided with on-site visits to different parts of the company/organisation.
- 4.21 Training is generally supplied if requested, and board members are routinely supplied with relevant conference and training session information.
- 4.22 Most interviewees felt that training for new members and ongoing support for other board members was vital to ensuring good corporate governance. The practice of board evaluations also presented a good opportunity for board members to learn from each other and improve on their performance collectively.
- 4.23 Worker directors who are union members are welcome to join the worker director group of the ICTU. This group offers support to its members and organises training, information and discussion sessions. It is considered to be an important conduit for information. Where worker directors are alone on a board it can offer support and stops them from feeling isolated. Its role in providing for training and discussion on good governance is very important to its members and provides another avenue for debate and support.
- 4.24 The worker directors believe that new members are now receiving more training than in previous years, but that corporate governance is constantly evolving and training should be ongoing. However, given the strength and experience of the worker directors group, it is easier now for the worker directors themselves to 'fill the gap'. There was some level of expectation that the worker directors could avail of trade union support for the work on boards. However, this was not necessarily so on an individual basis and worker directors got more support from the worker director group than from individual unions.
- 4.25 Although some worker directors believed that the training they received was adequate, and in particular appreciated the niche training they had received from organisations such as the IPA, they also were aware that the company would always facilitate any extra training they

felt necessary. The role of the company secretary in monitoring and arranging training was acknowledged.

- 4.26 The worker directors also highlighted the usefulness of board evaluations and training conducted at a board level, collectively and felt that this should be mandatory.

### ***Relationships with other board members***

- 4.27 There was unanimous agreement that relations with other board members are generally excellent and that there is a good level of respect between all board members. It was also unanimously agreed by the interviewees and the worker directors that by and large all directors are treated as equal on the board. Only one instance of reticence towards the position of worker directors from another board member was mentioned, and this was the result of an ideological opposition to the concept.
- 4.28 However, a number of interviewees and the worker directors themselves spoke of the importance of personalities – not only those of the worker director, but also in particular, the CEO and the chair. A good chairperson can create an atmosphere of mutual respect, while a poor chair can create an atmosphere of tension and mistrust.
- 4.29 Where conflict arises between the worker director and another board member, it is generally with the CEO. However, this need not be viewed as problematic since disagreements between the CEO and the worker director add to the sum of the knowledge of the other directors. It was suggested by the worker directors that they be facilitated in giving an annual presentation to the board without the CEO being present.
- 4.30 One interviewee spoke of the respect that a worker director may en due to the perception that they have the weight and the power of the trade union behind them.
- 4.31 There was also near unanimous agreement that the elected status of the worker director did not in general affect their position or behaviour on the board. A small minority of interviewees believed that the run-up to an election sometimes produced slight behavioural change external to the business of the board, such as more radical pronouncements. While one interviewee felt that there may be increased tension at the management level at election time with regard to the possible leaking of confidential information, it had not happened during their tenure on the board.
- 4.32 The loyalty shown to the company by worker directors and the diligence displayed by them in their work also impressed some interviewees, and added to the feelings of respect that they had towards the worker directors themselves.

- 4.33 Most of the worker directors echoed the views of the interviewees that relationships on the board were on the whole positive. They agreed that they were viewed as equal and felt that other members of the board had respect for them and their position.
- 4.34 One participant spoke of occasions where information was not shared with the worker directors but agreed that such instances were exceptions rather than the norm.

### ***Contribution to corporate governance***

- 4.35 Interviewees were asked if worker directors brought a unique contribution to the board and whether that contribution was positive or negative.
- 4.36 Over three-quarters of the interviewees responded that worker directors brought a positive and unique contribution to the board. A small minority questioned whether or not the contribution was always positive, in particular where the worker director was the only stakeholder on the board. However, those that questioned whether or not the contribution was positive did believe that it was unique. Only one interviewee questioned whether or not the worker director brought a unique contribution to the board.
- 4.37 In particular, interviewees highlighted the intimate knowledge of the company that the worker director brought to the board. This was different in nature to the knowledge that the CEO brought to the board as it emanated from the shop floor and could be more detailed and operational in nature. The specialist knowledge brought by the worker director was not necessarily strategic, but it was useful in helping the board understand how decisions taken can be operationalised. The worker director could also help the board anticipate impacts from specific decisions, and therefore possible industrial relations conflict.
- 4.38 Many of the interviewees discussed how the business knowledge of the CEO, the company secretary and the worker director complemented each other, providing a fuller picture of company operations.
- 4.39 Over half the interviewees spoke about the importance of having a contrary voice on the board. The need to avoid groupthink and promote diversity on the board was highlighted by a number of interviewees, especially in light of the role of groupthink in the failure of corporate governance in the financial sector.
- 4.40 The value of ensuring the stakeholder view was brought to the board was also mentioned by a small number of interviewees. Where worker directors do not exist it is often difficult for

the board to get a feel for the position and opinions of employees, especially in times of conflict.

- 4.41 The loyalty shown by worker directors towards the company was also highlighted by a small number of people as a positive contribution, as was their diligence and preparation for their work on the board.
- 4.42 The worker directors also felt that they had a unique and positive contribution to make to corporate governance and the operation of the board. Like the interviewees, they highlighted their specialist and in-depth knowledge of the company as a positive contribution. They also agreed that their role as a 'sounding board' could help the board and management understand what the likely response from employees to changes may be.
- 4.43 Where worker directors met with resistance or reticence from a board member, they felt it was imperative that they challenge the negative perception. Many of the group felt that board members who viewed the concept sceptically would often change their minds following greater interaction and co-operation with worker directors. They felt that the open-minded and diligent board member would appreciate views, or the company itself, being challenged if done in a constructive way.

### ***Confidentiality and conflict of interest***

- 4.44 The interviewees were nearly unanimous in their opinion that they had never witnessed or heard of a breach of confidentiality or actual conflict of interest in relation to worker directors.
- 4.45 Nearly all interviewees stated that there are obvious pressures on worker directors in terms of maintaining confidentiality which do not apply to non-worker directors. Most of the interviewees, while highlighting their own trust in the current group of worker directors, spoke of the possible perception that worker directors may be less trustworthy than other board members when it came to maintaining confidentiality. The possible expectations placed on worker directors by their electorate gave rise to a perception that maintaining confidentiality from work colleagues will be more difficult for worker directors than other directors.
- 4.46 The effect of this perception is that an additional onus is placed on the worker to act in an almost exemplary fashion.
- 4.47 Interviewees also highlighted the perception that worker directors may have a greater potential for conflict of interest. Again, however, most interviewees pointed out that there

- was little evidence of damage caused by a breach of confidentiality or actual conflict of interest on the part of the worker directors.
- 4.48 The potential for conflict of interest also arises for board members who are not worker directors. Most interviewees acknowledged this and believed that, where conflict of interest may arise, the procedures were strong enough to deal with the situation.
- 4.49 A minority of interviewees also spoke about the current system of appointments to state boards. While this remains in the gift of political parties, the perception of conflict of interest and lack of independence shadows all directors, not only worker directors.
- 4.50 Where there is a possibility of industrial relations conflict, maintaining confidentiality and acting in the best interests of the company rather than the employees led a number of interviewees to imagine that worker directors were often placed in an impossible position.
- 4.51 A possible recommendation to ensure that confidentiality is maintained and conflicts of interest avoided would be to introduce the practice of requiring all board members to sign a declaration at the beginning of all meetings, thus addressing the issue from the outset.
- 4.52 Some worker directors, although they have never breached confidentiality, also acknowledged the possible challenges for them personally in maintaining confidentiality: *“all information creates a problem”*. However, others believed that it did not represent a greater burden than that placed on other board members.
- 4.53 The issue of the relationship between middle management and the worker director can also be complicated by the worker director’s access to information and decision-making *‘above their grade’* so to speak, as it may be resented by more senior colleagues. In addition, the worker director could find themselves the object of greater attention from middle-management, both positive and negative. Some of the worker directors said that they get very few questions regarding the operations of the board and that the employees were rarely interested in the detail, only desiring assurance on the issue of job security.
- 4.54 Again the issue of personality was highlighted: both the worker directors and a majority of the interviewees agreed that personality and strength of character determined a worker director’s response to requests to breach confidentiality or to possible conflict of interest.
- 4.55 The worker directors believed that legislation and procedures guarding against conflict of interest were sufficient and that it is not possible to legislate for every eventuality.



### ***Industrial relations***

- 4.56 The area of industrial relations is one where the interviewees felt that the contribution of worker directors was extremely positive.
- 4.57 The main reason for this is the possibility of using the worker director as a conduit for information. In times of conflict, many of the interviewees felt that the worker director had a positive role to play in explaining the decisions of the board to the workforce.<sup>12</sup> Given the level of trust placed in the worker director by their electorate, employees were more likely to believe information when conveyed by the worker director than by management. One interviewee responded that the worker director helped to put a more human face on the board: employees would be less likely to ascribe nefarious motivations to decisions made when they have a representative on the board.
- 4.58 The conduit also works the other way, bringing information from the staff to the board. This works well both in times of conflict and in times of industrial peace. It provides a good channel for ideas on changing work practices. Where there is potential for conflict, a worker director can explain the possible impacts of a decision on employees and the probable reaction to it. This may prompt the board to rethink their decision or find a less conflict-prone route to change.
- 4.59 One interviewee described worker directors as providing a form of “comfort blanket”. This means that worker directors provide assurance to employees that they are paying attention to the activities of the board and of management and that they will be privy to the major decisions made by the board.
- 4.60 However, it was pointed out by a number of interviewees that there was potential for conflict between union officials and worker directors in those cases where the roles were not well understood or properly delineated. The worker director had the potential to take some of the power of the trade union official/shop steward.
- 4.61 Some of the worker directors spoke about the nature of the trade union with which they had links and whether or not there was a good understanding on the part of that trade union of the role and obligations of the worker director. They also noted the need for the worker director to be clear about his or her own role and where the intersection with the union lay. While worker directors may give advice to or assist an individual, they could not

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<sup>12</sup> This is in keeping with a 1991 study of worker directors in US firms which found that although both managers and worker directors emphasised the communication benefits of employee board level participation, they had different perspective on the information flow. Managers highlighted the flow from the board to the greater staff and the worker directors highlight the flow of information from greater staff to the board/management. Hammer, T.H., Currall, S.C., Stern, R.N., (1991)

assist or represent a group. In general, however, where issues arose the worker director would consult with the trade union official/shop steward on the matter.

- 4.62 A number of non-worker director interviewees also highlighted the need to ensure that roles were understood not just by the worker directors, but also by those who elect them and by the union representatives.
- 4.63 Most worker directors were not union representatives, but in cases of a small organisation or where there was undeveloped management/union relationship, a shop steward may also be nominated as a worker director. According to the worker directors, there has been little conflict due to a dual mandate of worker director/shop steward, as the worker director can excuse themselves from any discussion where a conflict of interest may arise.

### ***Extension of the model***

- 4.64 A majority of the non-worker director interviewees said that they believed that the system should be extended across the public sector. In their experience the worker directors provided a positive and unique contribution and brought diversity to the board.
- 4.65 A smaller majority of non-worker directors said that it wouldn't be appropriate in the private sector. Given the dynamics in the private sector, the focus on profit and the varying sizes of companies, most interviewees felt that the worker director system should not be extended to the private sector. However, just over one third of interviewees felt that the system could be extended into the private sector and that this possibility should be explored.
- 4.66 The worker directors themselves felt that the model should be extended to both the public and the private sector.

## 5 Conclusions

- 5.1 The architects of the 1977 worker director legislation believed that the company was a social institution, the governance of which should be inclusive. The company was not the “exclusive property of the shareholder”, and stakeholders such as workers had the potential and the right to contribute to decision-making.
- 5.2 It was originally hoped that the legislation would be extended beyond the small number of state-owned companies included in the Worker Participation Act. However, although a number of other companies and state agencies were brought under the legislation, the model did not extend across the public sector as intended.
- 5.3 Critics of the worker director system argue that, due to the fact that they are elected by their peers, they will be motivated to act solely in the interests of employees. Niamh Brennan, in a 2003 article in the Irish Times, argued that

*“in the case of worker directors elected by staff, their central interest would in many cases be that of the employees who elected them, which would not necessarily be consistent with the legal requirement of directors owing their fiduciary duty to the company.” (Brennan, 2003)*

- 5.4 A clear finding of this report is that the worker directors understood that worker directors are under the same legal obligations to the company as all other directors. Equally, the non-worker director interviewees believed that the worker directors act in the best interests of the company.
- 5.5 The literature on worker directors across Europe does not point to any clear evidence that worker directors have negative impacts on company performance. On the contrary, what evidence does exist is equivocal on the effect of employee board level participation on performance.
- 5.6 Overall, TASC’s research found that:
- Worker directors were felt to be loyal to the company, trustworthy and diligent in their duties; their contribution was viewed as positive and unique by over three-quarters of respondents; in particular, their intimate operational knowledge of the enterprise was highlighted by respondents. Almost all respondents stated that they had never heard of a breach of confidentiality or conflict of interest in relation to worker directors.
  - Over half the interviewees mentioned the importance of having a contrary voice on the board in conjunction with the need to avoid groupthink and promote diversity.

- While in general worker directors did not feel that they were treated differently by other board members because of their elected status, almost all worker directors interviewed felt excluded from the audit and remuneration committees, and in particular felt that CEOs would not welcome a worker director on a remuneration committee. This perception was borne out by non-worker-director interviewees, over half of whom felt that worker directors should not sit on remuneration committees due to a potential conflict of interest.
- Interviewees felt that the contribution made by worker directors in the area of industrial relations was extremely positive, primarily because they act as a two-way conduit for information in times of conflict.
- The importance of personalities must be highlighted: where there is a strong, supportive and capable Chair, the board functions better.
- A number of interviewees highlighted the need to ensure that the roles of trade union officials and worker directors are properly understood and delineated in order to avoid the potential for conflict.
- A majority of interviewees felt that the worker director system should be extended across the public sector; however, a smaller majority (just under two-thirds) also felt that it would not be appropriate in the private sector.

### **Recommendations**

- The worker director model should be extended across the public sector.
- Mandatory introductory training would improve the workings of the board, it is a feature of many companies and organisations but not all of them.
- All boards should conduct regular skills audits and independent directors should be appointed to boards based on their skills and experience.
- In order to ensure that worker directors are not isolated on boards, there should be a minimum 25% employee representation on the boards.
- Workers should be better informed of the role and obligations of the worker director at election time, in order to ensure that those elected are not subject to unrealistic or unreasonable expectations.

## Appendices

Appendix I: Part Five Draft Companies Bill

Appendix II: Code of Practice for State Bodies

Appendix III: ESB Code of Business Conduct for Board Members

**Appendix I: Part Five, Chapter 2 Draft Companies Bill**

Sections that related to the duties of directors

**Chapter 2**

General Duties of Directors and Secretaries and Liabilities of Them and Other Officers

**Duty of each director.**

**220.** (1) It is the duty of each director of a company to ensure that this Act is complied with by the company.

(2) The consent in respect of a director to accompany –

(a) a statement under *section 21(1)(a)*; and

(b) a notification under *section 147(8)*, shall include a statement by the director (immediately above his or her signature on the consent) in the following terms :

*“I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law.”*

**Directors to have regard to interests of employees.**

**221.** (1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company’s employees in general, as well as the interests of its members.

(2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

**Fiduciary duties of directors – provisions introductory to *section 225*.**

**224.** (1) Without prejudice to the provisions of any enactment (including this Act), a director of a company shall owe the duties set out in *section 225* (the “relevant duties”) to the company (and the company alone).

(2) The relevant duties shall be enforced in the same way as any other fiduciary duty owed to a company by its directors.

(3) The relevant duties are based on certain common law rules and equitable principles as they apply in relation to the directors of companies and shall have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The relevant duties shall be interpreted, and the provisions concerned of *section 225* shall be applied, in the same way as common law rules or equitable principles; regard shall be had to the corresponding common law rules and equitable principles in interpreting those duties and applying those provisions.

**Statement of principal fiduciary duties of directors.**

**225.** (1) A director of a company shall—

- (a) act in good faith in what the director considers to be the interests of the company;
- (b) act honestly and responsibly in relation to the conduct of the affairs of the company;
- (c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- (d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless –
  - (i) this is expressly permitted by the company's constitution; or
  - (ii) the use has been approved by a resolution of the company in general meeting;
- (e) not agree to restrict the director's power to exercise an independent judgment unless
  - (i) this is expressly permitted by the company's constitution; or
  - (ii) the case concerned falls within *subsection (2)*;
- (f) avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned by a resolution of it in general meeting;
- (g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both -
  - (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and
  - (ii) the knowledge and experience which the director has; and
- (h) in addition to the general duty owed to employees under *section 221*, have regard to the interests of its members.

(2) If a director of a company considers in good faith that it is in the interests of the company for a transaction or engagement to be entered into and carried into effect, a director may restrict the director's power to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this.

(3) Without prejudice to the director's duty under *subsection (1)(a)* to act in good faith in what the director considers to be the interests of the company, a director of a company may have regard to the interests of a particular member of the company in the following

circumstances.

(4) Those circumstances are where the director has been appointed or nominated for appointment by that member, being a member who has an entitlement to so appoint or nominate under the company's constitution or a shareholders' agreement.

**Other interests of directors.**

**226.** (1) Save to the extent that the company's constitution provides otherwise, a director of a company may be or become a director or other officer of, or otherwise interested in, any company promoted by the company or in which the company may be interested as shareholder or otherwise; but neither this subsection nor anything in the company's constitution governing the foregoing matter overrides *section 225*.

(2) No such director shall be accountable to the company for any remuneration or other benefits received by him or her as a director or officer of, or from his or her interest in, such other company unless the company otherwise directs.



## ***Appendix II: Code of Practice for the Governance of State Bodies (2009)***

### **A. THE BOARD AND DIRECTORS**

**Each body should be clear about its mandate and from that identify the various functions, roles and responsibilities entailed in the delivery of that mandate.**

#### **2. The Board**

*The Board is collectively responsible for promoting the success of the State body by leading and directing the Body's activities. It should provide strategic guidance to the State body, and monitor the activities and effectiveness of management. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the State body, subject to the objectives set by Government.*

#### ***Matters for decision of the Board***

2.1 The Board should have a formal schedule of matters specifically reserved to it for decision to ensure that the direction and control of the body is firmly in its hands (some of these matters may require Ministerial approval and this should be noted). This schedule should include, at least, the following:

- significant acquisitions, disposals and retirement of assets of the State body or its subsidiaries; the schedule should specify clear quantitative thresholds for contracts above which Board approval is required;
- major investments and capital projects;
- delegated authority levels, treasury policy and risk management

policies;

- approval of terms of major contracts;
- in commercial State bodies, policy on determination of senior

management remuneration (with the exception of the Chief Executive);

- in non-commercial State Bodies, compliance with statutory and administrative requirements in relation to the approval of the number,

grading, and conditions of appointment of all staff;

- approval of annual budgets and corporate plans;

- production of annual reports and accounts;
- appointment, remuneration and assessment of the performance of, and succession planning for, the Chief Executive; and
- significant amendments to the pension benefits of the Chief Executive and staff (which may require Ministerial approval).

2.2 The Board should meet regularly. The collective responsibility and authority of the Board should be safeguarded. All Board members must be afforded the opportunity to fully contribute to Board deliberations while excessive influence on Board decision-making by one or more individual members should be guarded against.

2.3 The Board is responsible for compliance with all statutory obligations applicable to the State body that may be set out in the legislation governing the establishment of the body or in other relevant legislation. The Board should satisfy itself that all such obligations are identified and made known to it.

2.4 The Board is required to confirm annually to the relevant Minister that the State Body has a system of internal financial control in place.

2.5 Decision on major items of expenditure should be aligned with medium to long- term strategies so as to ensure that such expenditure is focused on clearly defined objectives and outcomes. A performance measurement system should be put in place to assess the effectiveness/outcome of such expenditure and this should be reported to the Board.

2.6 The Board should also, in a manner most effective to the State body, deal with the issue of post resignation/retirement employment, appointment and/or consultancy of its Directors and employees by the private sector and should ensure that any procedures that it may have put in place in this regard are monitored and enforced.

2.7 The Board should have procedures to monitor and manage potential conflicts of interest of management and Board members.

### ***Annual Report and Accounts***

2.8 The Board has a duty to ensure that a balanced, true and understandable assessment of the body's position is made when preparing the annual report and accounts of the body and when submitting these to the relevant Minister. If the State body operates on a commercial basis, the Board should report that the business is a going concern with supporting assumptions or qualifications, as necessary.

### ***Audit***

2.9 The Board should establish procedures for maintaining an appropriate relationship with the external auditors.

2.10 The Board Audit Committee and other Board committees should have written constitutions and written terms of reference and the Board should agree the intervals within which these should be reviewed by the main Board and updated as appropriate.

### **Confidential Disclosures**

2.11 The Board should put in place procedures whereby employees of the State Body may, in confidence, raise concern about possible irregularities in financial reporting or other matters and for ensuring meaningful follow-up of matters raised in this way.

### ***Strategy***

2.12 The preparation and adoption of a strategic plan is a primary responsibility of the Board of a State body. Such plans should set appropriate objectives and goals and identify relevant indicators and targets against which performance can be clearly measured. All State bodies, whether they are commercial, non-commercial or, for example, regulatory bodies, should have a formal process in place for setting strategy.

2.13 The Board of a commercial State body should within the first six months of each year approve annual rolling five-year business and financial plans, encompassing strategy (taking account of general sectoral policy), planned investment and appropriate financial targets. Plans should reflect shareholders' objectives, as appropriate, and the strategic mandate of the body.

2.14 The Board of each non-commercial body should adopt a statement of strategy for a period of 3-5 years ahead. Implementation of the strategy by the management of each body should be supported through an annual planning and budgeting cycle. The Board of each body should approve the annual plan and budget and should formally consider an evaluation of performance by reference to the plan and budget on an annual basis and reflect this, as appropriate, in the annual report.

2.15 A copy of the draft strategic/corporate plan (including, where relevant, plans for levy setting or own income generation) should be sent to the relevant Minister before the plan is finalised and adopted by the Board. Views which the Minister/Department wishes to have reflected in the final plan should be made known to the body within a maximum period of six weeks of submission. While final responsibility for the content of the plan rests with the Board in each case, the views of the Minister under whose aegis the body falls and consideration of the public interest should be carefully weighed by the Board.

### ***Separation of Roles at the Top Level***

2.16 The role of Chairperson and Chief Executive Officer should not normally be combined. When this occurs, it should be with the consent of the relevant Minister. The respective roles should be agreed and documented.

### ***Composition of the Board***

2.17 The Board should constantly review its own operation and seek to identify ways of improving its effectiveness. This will include the identification of gaps in competencies and ways these could be addressed. Where a Board Chair is of the view that specific skills are required on the Board, he/she should advise the relevant Minister of this view for his/her consideration sufficiently in advance of a time when board vacancies are due to arise in order that the Minister may take the Chair's views into consideration when making appointments.

## **3. Directors**

3.1 Non-executive Directors should bring an independent judgement to bear on issues of strategy, performance, resources, key appointments, and standards of conduct.

3.2 Section 5 sets out the approach to dealing with any business or other interests of a Director that could affect the Director's independence.

3.3 The Directors should state in the annual report that they are responsible for preparing the accounts<sup>4</sup>. There should also be a statement by the external auditors about their reporting responsibilities.

3.4 The Directors should ensure that the Chairperson keeps the relevant Minister advised of matters arising in respect of the State body.

3.5 If a Director finds evidence that there is non-compliance with any statutory obligations that apply to the State body, he/she should immediately bring this to the attention of their fellow Board members with a view to having the matter rectified. The matter should also be brought to the attention of the relevant Minister by the Chairperson indicating (i) the consequences of such non-compliance and (ii) the steps that have been or will be taken to rectify the position.

### **Support to Directors**

*Best practice in corporate governance requires that the Board be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties. All directors should receive a formal induction on joining the Board and should regularly update and refresh their skills and knowledge*

3.6 The Board should be supplied with information which is of a suitable quality to enable Board members to satisfactorily discharge their duties.

3.7 The Board should, in a Board resolution, lay down formal procedures whereby Directors, in the furtherance of their duties, may take independent professional advice, if necessary, at the reasonable expense of the State body. Such procedures should also be set out in the Code of Conduct for Directors. The Board should have in place a procedure for recording the concerns of Directors that cannot be resolved.

3.8 The Board should keep under review its own performance and that of its committees and individual directors. The attendances of each Board Member at Board meetings should be reported in the Annual Report.

3.9 Directors of State bodies incorporated under the Companies Acts have duties under these Acts and it is the responsibility of each Director to act in conformity with the applicable provisions of those Acts.

### **4. Briefing for new Directors**

4.1 On appointment of new Directors, the Secretary of the body should provide them with the following information:

- a formal schedule of matters reserved to the Board for decision;
- procedures for obtaining information on relevant new laws and regulations;

- procedures to be followed when, exceptionally, decisions are required between Board meetings;
- a schedule detailing the composition of all committees and their terms of reference;
- a statement explaining the Directors' responsibilities in relation to the preparation of the accounts, the State body's system of internal control and audit and for reporting on the business as a going concern with supporting assumptions or qualifications as necessary;
- a statement informing the Directors that they have access to the advice and services of the Secretary, who is responsible to the Board for ensuring that Board procedures are followed and comply with the applicable rules and regulations;
- a copy of the code of ethics/conduct for Directors, including requirements for disclosure of Directors' interests and procedures for dealing with conflict of interest situations. The procedures regarding disclosure of interests of Directors are set out in Section 5 below;
- specific company information;
- a copy of relevant legislation (or excerpts thereof) together with the most up to date version of this Code of Practice and any relevant circulars and/or guidance notes; and
- a listing of the statutory requirements relating to the body.

### **Codes of Conduct, Disclosure, Ethics in Public Office**

*Individual behaviour is a major factor in the effectiveness of the Board, and also has an influence on the reputation of the organisation, the confidence and trust that members of the public have in it and the working relationships and morale within it. Conflicts, real or perceived, can arise between the State body's interests and those of individual directors. Public trust can be damaged unless the organisation implements clear procedures to deal with these conflicts.*

### **5. Codes of Conduct for Directors and Employees**

5.1 All State bodies should have written Codes of Business Conduct for their directors and should be approved by the Board. Up-to-date codes of business conduct should be available upon request through the State body's website. A hard copy should be circulated to all directors, management and employees for their retention.

5.2 The Code should contain a description of nature, intent and scope of application of the Code and a statement of the guiding principles and obligations.

5.3 The Code should refer to the need for directors and staff to comply with the requirements of the Companies Acts, if applicable, and any other relevant legislative and regulatory requirements. It should identify the relevant provisions regarding conduct/conflicts of interest in the governing legislation of the body.

5.4 The Code should set out procedures for addressing conflict of interest.

5.5 The Code should make clear that certain obligations to the State body regarding, in particular, the non-disclosure of privileged or confidential information do not cease when Board membership or employment in the body has ended. In particular the Code should recommend that the acceptance of further employment where the potential for conflict of interest arises should be avoided during a reasonable period of time after the exercise of a function in the State body has ceased.

5.6 The Code should also refer to the need for each member of the Board of a State body and each person holding a Designated Position of employment with a State body to ensure his/her compliance with relevant provisions of the Ethics in Public Office Act, 1995 and the Standards in Public Office Act, 2001. Appendix I contains an outline of the obligations under the above Acts.

### **Disclosure of Interests by Directors**

In addition to the requirements under the Ethics in Public Office Act 1995 and the Standards in Public Office Act 2001 the following procedures should be observed:

- i) On appointment, each Board member should furnish to the Secretary of the body details relating to his/her employment and all other business or professional interests including shareholdings, directorships, professional relationships etc., that could involve a conflict of interest or could materially influence the member in relation to the performance of his/her functions as a member of the Board.
- ii) Any interests of a member's family of which he/she could be expected to be reasonably aware or a person or body connected with the member which could involve a conflict of interest or could materially influence the member in the performance of his/her functions should also be disclosed. For this purpose, persons and bodies connected with a member should include:
  - (a) a spouse, parent, brother, sister, child or step-child;
  - (b) a body corporate with which the member is associated; (c) a person acting as the trustee of any trust, the beneficiaries of which include the member or the persons at (a) above or the body corporate at (b) above; and (d) a person acting as a partner of the member or of any person or body who, by virtue of (a) - (c) above, is connected with the member. Similarly, each member should furnish to the Secretary details of business interests on the lines above of which he/she becomes aware during the course of his/her directorship.
- iii) Where it is relevant to any matter which arises for the State body, the member should be required to indicate to the Secretary the employment and any other business interests of all persons connected with him/her, as defined at (i) and (ii).
- iv) Boards may exercise discretion regarding the disclosure by members of minor shareholdings. As a general guideline, shareholdings valued at more than €15,000 or of more than 5 per cent of the issued capital of a company should be disclosed.

- v) If a member has a doubt as to whether this Code requires the disclosure of an interest of his/her own or of a connected person, that member should consult the Chairperson.
- vi) Details of interests disclosed should be kept by the Secretary to the Board in a special confidential register and should be updated on an annual basis. Changes in the interim should be notified to the Secretary as soon as possible by members. Only the Chairperson, Secretary and Chief Executive of the body should have access to the register.
- vii) Where a matter relating to the interests of the Chairperson arises, he/she should depute the Deputy Chairperson or another Director to chair the Board meeting and should absent himself/herself when the Board is deliberating or deciding on a matter in which the Chairperson or a person or body connected with the Chairperson has an interest.
- viii) Board or State body documents on any deliberations regarding interests should not be made available to the member concerned prior to a decision being taken. (Such documents should be taken to include those relating to cases involving competitors to this Board member to the above interests). Decisions once taken should be notified to the member.
- ix) As it is recognised that the interests of a Director and persons connected with him/her can change at short notice, a Director should, in cases where he/she receives documents relating to his/her interests or of those connected with him/her, return the documents to the Secretary at the earliest opportunity.
- x) A Director should absent himself/herself when the Board is deliberating or deciding on matters in which that member (other than in his/her capacity as a member of the Board) or a person or body connected with the member has an interest. In such cases a separate record (to which the Director would not have access) should be maintained.
- xi) Where a question arises as to whether or not a case relates to the interests of a Director or a person or body connected with that Director, the Chairperson of the Board should determine the question.
- xii) Former Directors should treat commercial information received while acting in that capacity as confidential.
- xiii) Directors should not retain documentation obtained during their terms as Director and should return such documentation to the Secretary or otherwise indicate to the Secretary that all such documentation in their possession has been disposed of in an appropriate manner. In the event that former Directors require access to Board papers from the time of their term on the Board, this can be facilitated by the Board Secretary.
- xiv) The procedures set out above should also be adopted in subsidiaries of State bodies.



### ***Appendix III: ESB Code of Business Conduct for ESB members***

#### ***Intent and Scope***

The Board has determined that specific guidance on ethical standards should be provided to Board members. In addition, the Code of Practice for the Governance of State Bodies requires ESB to adopt a Code of Business Conduct for its Board Members. Accordingly the Board has approved this Code of Ethical Standards and Business Conduct for ESB Board Members. This Code also applies to ESB nominees of Boards of Subsidiary and Associated Companies.

#### **Objectives**

The basic objectives of this Code are:

- the establishment of an agreed set of ethical principles as more fully set out below;
- the promotion and maintenance of confidence and trust in ESB including
- the protection of the good name of ESB;
- the prevention of the development or acceptance of unethical practices.

#### ***General Principles***

##### ***Integrity***

Board members should behave with integrity. This will require:

- disclosure by Board members of outside employment/business interests in conflict or in potential conflict with the business of ESB as more fully described below;
- avoidance of the giving or receiving of corporate gifts, hospitality, preferential treatment or benefits of any kind which might affect or appear to affect the ability of the donor or the recipient to make independent judgement on business transactions;
- commitment to compete vigorously and energetically but also ethically and honestly;
- ensuring a culture of claiming expenses only as appropriate to business needs and in accordance with good practice in the public sector generally;
- ensuring that all statements or publications issued by ESB are accurate and truthful;
- avoidance of use of ESB's resources for personal gain, for the benefit of persons/organisations unconnected with ESB or its activities or for the benefit of competitors; and
- commitment not to acquire information or business secrets by improper means.

##### ***Confidentiality and Accountability***

Board should take all reasonable steps to ensure that information is handled responsibly by ESB, including:

- support for the provision of access by ESB to general, non-commercially sensitive information relating to ESB's activities in a way that is open and enhances its accountability to the general public.
- respect the confidentiality of sensitive information held by ESB. This would constitute material such as:
  - commercially sensitive information (including, but not limited to, future plans or details of major organisational or other changes such as restructuring);
  - personal information; and
  - Information received in confidence by ESB.
- observance of appropriate prior consultation procedures with third parties where, exceptionally, it is proposed to release sensitive information in the public interest.
- compliance of with relevant statutory provisions (e.g. data protection legislation, the Freedom of Information Acts, 1997 and 2001).

The unauthorised release of confidential information, directly or indirectly to third parties, including the media, represents a gross breach of trust which can be highly damaging to the Company. The Board has resolved that as a rule the Chairman and Chief Executive or persons authorised by either of them should deal with the media on commercially sensitive matters relating to ESB. Board members are asked to exercise prudent judgement including, where appropriate, redirecting any media queries to the Chairman or Chief Executive.

Members should take particular care to safeguard adequately all Company documents. A Member, on ceasing to be such, is hereby advised that all Company documents in her or his possession should be returned to the Company. Pending such return the strict duty of confidentiality remains.

### ***Obligations***

Board members should take all reasonable steps to ensure that ESB:

- fulfils all regulatory and statutory obligations imposed on ESB;
- complies with all applicable tendering and purchasing procedures, as well complying with prescribed levels of authority for sanctioning any relevant expenditure;
- introduces controls to prevent fraud including adequate controls to ensure compliance with prescribed procedures in relation to claiming of expenses for business travel.

In addition Board members should:

- use their reasonable endeavours to attend all Board meetings; and
- conform with procedures laid down by the Board in relation to conflict of interest situations, including in regard to acceptance of positions following membership of the Board which may give rise to the potential for conflicts of interest and to confidentiality concerns;
- promote throughout ESB the highest standards of business ethics.

### ***Loyalty***

Board members should be loyal to ESB and fully committed to the success of its business activities while giving due account to the interests of ESB's owners, customers, employees, creditors and other stakeholders.

### ***Fairness***

Board members should take all reasonable steps to ensure:

- compliance with employment equality and equal status legislation;
- commitment to fairness in all business dealings; and
- that customers are valued and that all customers are treated equally.

### ***Work/External Environment***

Board members should take all reasonable steps to ensure that:

- the highest priority is placed on promoting and preserving the health and safety of employees;
  - to ensure that ESB's obligations to local communities and at national level are fully considered;
  - any detrimental impact of ESB's operations on the environment is minimised; and y that all suppliers are treated fairly and should each have a reasonable opportunity to compete successfully for business.

### ***Conflicts of Interest***

Board members are governed by the following:

- Section 11 of the Electricity (Supply) Act 1927 prohibits Board Members from having shares in any electrical undertaking;
- Section 20 of the Worker Participation (State Enterprises) Act 1977 which requires Board Members to disclose any interest in any arrangement to which the Company is party and not to vote on the matter;
- The Ethics in public Office Acts 1995 and 2001;
- The Code of Practice for the Governance of State Bodies;
- Regulations of the Electricity Supply Board.

Detailed briefing on all of these obligations is provided to Board members on appointment and annually thereafter.

In summary these obligations require that where a Board Member is interested directly or indirectly, otherwise than in his/her capacity as a Board Member, in any matter before the Board, the Member shall disclose such interest to the Board and withdraw from the meeting or the deliberations of the board while the matter is being dealt with and shall not vote on the matter.

Each member on appointment and thereafter at least annually (and more frequently if there are changes in his/her disclosable interests) shall register with the Secretary details relating to disclosure of interests. Where an actual conflict of interest arises this should be brought to the notice of the Secretary to the Board as soon as possible.

The Chairman of the Board has a determining role where an issue in regard to a conflict of interest arises.

Members in dealing with third parties should be careful not to suggest or to imply that they are prepared to intervene with the Company on their behalf in any unusual or abnormal fashion.

Former ESB Board members in considering whether or not to accept any position or role are asked to give due weight to whether the position or role would:

- be likely to compromise their ability to comply with continuing obligations to respect the confidentiality of information obtained as a Board member of ESB;
- be likely to cause material damage to ESB if such damage would not otherwise have arisen had they not been a Board member of ESB.

The Employee Code of Business Conduct complements this Code of Business Conduct for Board members as both seek to apply the same ethical principles. The Board requires its members to observe the highest ethical standards based on the Board's conviction that good example from the Board will ensure that proper ethical values are promoted at all levels in the Company (January 2010).

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