TASC

June 2010

Submission to the Central Bank and Financial Services Authority of Ireland

in relation to Consultation Paper CP41 on Corporate Governance Requirements for Credit Institutions and Insurance Undertakings

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Preamble

1. TASC welcomes the opportunity to make this submission on the corporate governance requirements for credit institutions and insurance undertakings.

2. TASC is an independent think tank dedicated to combating Ireland's high level of economic inequality and ensuring that public policy has equality at its core. TASC regards good corporate governance, in both private companies and state-owned bodies, to be of major importance in bringing about more economic equality.

3. TASC's arguments are evidence-based. TASC's recent research includes an analysis of the corporate governance of state-owned bodies (*Outsourcing Government: Public bodies and accountability*) and a research report that examines the extent of multiple directorships between the boards of 40 of Ireland's top private companies and state-owned bodies (*Mapping the Golden Circle*). A report in relation to public appointments is due to be published later this year. These reports constitute the evidence base for the substantive points that TASC makes in this submission. Copies of the two published reports are included with this submission. An electronic copy of *Mapping the Golden Circle* is available on TASC's website (www.tascnet.ie).

4. The problems that TASC's research has identified signal that we cannot afford to go back to 'business as usual' by making merely cosmetic changes to the codes that govern corporate governance. Irish society is struggling to deal with the consequences of poor corporate governance, evident in the bailout of financial institutions. These bailouts will place a substantial burden on society for years to come. The problems of corporate governance do not just affect financial institutions, but extend across all sectors. Reform of corporate governance is thus required for all private companies and state-owned bodies. Ireland must now make a fundamental shift towards enforcing legal compliance with corporate governance rules designed to protect the public interest. Constructing a new regime of corporate governance in Ireland must rest on a fundamental shift from the failed notion of 'shareholder value' to real stakeholder involvement. Ireland's corporate governance system must be governed by stricter and more transparent rules to safeguard the interests of citizens affected by the behaviour of companies.

The Public Interest and Corporate Governance

5. TASC defines the public interest as the well-being of the general public, including marginalised sub-groups, and ensuring that the actions of organisations in the economy and society promote this well-being, or at least do not negatively impinge upon it. As such, TASC argues that the public interest must be safeguarded as part of the corporate governance of private and publicly-listed companies of major importance to the economy. This requires regulation in line with the requirements of the public interest, which include *inter alia* a strong legislative basis underpinning the requirements for good corporate governance, strong sanctions for non-compliance with the rules of corporate governance, greater transparency around companies' activities and limits on excessive remuneration. State-

owned bodies should be subject to even stricter corporate governance requirements because of their primary concern with the public interest.

6. While adequate regulation (and implementation of that regulation) governing numbers of directorships, cross-directorships, multiplicity of roles, selection and remuneration must be addressed and forms an important part of the solution to governance problems in both the public and the private sectors, such regulation in itself will not address a far more fundamental issue: the need to ensure that the public interest is central to corporate governance. The basic motivation of private companies must be restated in a way that incorporates the public interest, while there must also be far greater accountability and transparency in the way our State-owned organisations are run.

7. For a company to function in the public interest, it must be run in a manner which protects its long-term viability and is consistent with the general welfare of the economy and society as a whole. Reasons for regulating in the public interest include the need to provide for market failure; to redistribute resources; to provide for unemployment, ill health and old age; and to limit the damage to the environment.

8. Currently, both company law and the voluntary Combined Code on Corporate Governance are structured so as to protect 'shareholder interests'. The pre-eminence given to shareholders is linked to the notion of maximising 'shareholder value' (a stock market's valuation of a company's shares). However, there is a considerable body of evidence that this shareholder value model brings with it significant adverse economic and social consequences, not least greater income and wealth inequalities in society as a whole.

9. Not all companies are focussed on maximising shareholder value, and many countries and regions have laws which insist on wider interests being taken into account in corporate decision-making. About half of the states in the US have enacted some form of stakeholder-oriented laws (primarily concerning a corporation's employees). Other business models exist in most of Europe (excepting Ireland the UK) which seek to protect not just investors but a wider set of stakeholders – including employees and customers. For example, some German companies are governed by boards on which workers and management are equally represented.

10. A new frame of reference for stronger corporate governance must rest on a fundamental shift from the failed notion of 'shareholder value' to real stakeholder involvement. A new legislative framework could include, *inter alia*: an obligation to make the board's overriding duty the promotion of the long-term success of the company; statutory recognition of stakeholders such as employees, customers and the wider public interest; quotas to ensure diversity on boards; clear, easily accessible reporting; disclosure of voting records; and provision for statements on environmental and social impact.

Scope of Requirements

11. TASC **welcomes** the recognition by the Financial Regulator of the costs “to the economy and society at large” (1.1, p. 2).

12. TASC **welcomes** the recognition that boards are responsible for “ethical oversight” of their institutions (8.1, p. 21).

13. TASC **urges** the Financial Regulator to put in place robust corporate governance requirements that go beyond protecting companies, but which place the public interest to the fore and protect the wider economy and society from poor corporate governance.

14. TASC **notes** that the Financial Regulator proposes to, “inter alia:
    - Impose requirements in terms of the minimum number of directors on the Board;
    - Limit the number of directorships which directors may hold so as to ensure they can comply with the expected demands of Board membership of an institution;
    - Require that Board membership is reviewed at a minimum every 3 years;
    - Require clear separation of the roles of Chairman and CEO and preclude an individual who has been CEO, director or senior manager during the previous five years from becoming Chairman of that institution;
    - Set out clearly the role of the independent non-executive directors;
    - Require the Board to set the risk appetite for the institution and to monitor adherence to this on an ongoing basis;
    - Set out the minimum requirements for Board committees; and
    - Require annual confirmation of compliance to the Financial Regulator.” (1.5, p. 3)

15. TASC **urges** the Financial Regulator to include the following requirements (which are detailed in the sections below), inter alia:
    - Recognise the public interest as the basis for corporate governance and its regulation;
    - Recognise risk as applying to the wider public interest in the economy and society, as well as to a company and its shareholders;
    - Recognise the lack of diversity as a risk to good governance on boards;
    - Require institutions to increase the diversity of directors on their boards, including through employee representation and a 40 per cent gender quota;
    - Recognise sustainability and moderation as relevant factors to be considered when boards are setting remuneration levels;
    - Recognise certain requirements of corporate governance as ‘core’, such as independence and conflict of interest, to which proportionality should not apply;
    - Publish guidelines and clarifications about certain key issues, such as time commitment by board members;
    - Publish guidelines and clarifications in relation to how the Financial Regulator will arrive at decisions in enforcing these requirements;

- Publish clearly the sanctions that can be used to enforce the Financial Regulator's requirements, and to seek new legislation from the Government to supplement these sanctions where they are weak or non-existent;
- Require institutions to make certain information publicly available online;
- Make stronger requirements in relation to independence, conflict of interest and the role of independent non-executive directors;
- Make stronger requirements apply to the Central Bank than for other financial institutions.

16. TASC **supports** the suggestion that investment firms should be subject to the requirements outlined in CP41 (1.2, p. 2). This is because TASC advocates that stronger regulation of all companies is required, in order to ensure that the public interest is safeguarded.

Legal Basis

17. TASC **notes** the Financial Regulator's statement that "the danger of poor decision making resulting in public support of these [financial] institutions justifies the need for the Financial Regulator to issue requirements that are more prescriptive than those applying to non financial companies" (1.1, p. 9).

18. TASC **argues** strongly that the state has a democratic mandate to regulate all companies and economic activity to safeguard the public interest. While agreeing that weak corporate governance and excessive risk taking occurred in many financial institutions, TASC argues that the democratic mandate of the state to protect the public interest makes it unnecessary for the Financial Regulator to provide additional justification for imposing regulations on some or all companies.

19. TASC **notes** that the Financial Regulator identified the following pieces of legislation as providing the mandate for the requirements proposed in CP41: The Central Bank Acts 1942, 1971, 1997; Asset Covered Securities Act 2001; Building Society Act 1989; Insurance Act 1989; as well as European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992); European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I. No. 359 of 1994); and European Communities (Life Assurance) Framework Regulations 1994 (S.I. No. 360 of 1994). (2.1-2.6, p. 12)

20. TASC **argues** that the above legislation does not provide sufficient or appropriate sanctions that can be applied to individual directors or boards who breach the requirements, and hence does not sufficiently underpin the Financial Regulators ability to provide strong regulation.

21. TASC **argues** that new legislation is required to place corporate governance requirements for all companies, including financial institutions, on a stronger statutory basis with an appropriate range of sanctions for non-compliance.

The Programme for Government

22. TASC **notes** the commitment to legislate as part of banking reforms in the Renewed Programme of Government, October 2009 (pp.13-14). In particular, this commitment includes the following:

> "We will put the principles of the 'Combined Code' of Corporate Governance on a legislative footing for all banks, public companies and state-sponsored bodies to deal with the following key areas of governance of institutions:
>
> - Board composition and independence
> - Segregation of CEO and Chair
> - Clear definition of executive and non-executive responsibilities
> - Composition, independence, role and function of the Audit committee
> - Responsibilities and composition of board committees
> - Segregation of committee chairs
> - Risk management
> - Selection of non-executive directors
> - Sanctions for non-compliance
>
> "Additionally, and consistent with this, in the context of the planned reform of the regulatory structures of for financial regulation, the Government in consultation with the Financial Regulator will develop new statutory rules in relation to the governance of major financial institutions."

23. TASC **asks** the Financial Regulator to clarify how the consultation document relates to the Government's programme.

24. TASC **urges** the Financial Regulator to seek new legislation to provide stronger sanctions to underpin the proposed requirements in the consultation document.

Transitional Arrangements

25. TASC **supports** the timeframe of six months for the implementation of the requirements (and twelve months where changes to board membership are necessary). This timeframe seems realistic, while preserving the urgency for reform of corporate governance, which is required in the public interest.

International Comparison

26. TASC **notes** the Financial Regulator's stated intention to align corporate governance requirements with international initiatives (1.4, pp. 2-3).

27. TASC **recommends** that the Financial Regulator examine the Code of Practice[1] put in place by the Commissioner for Public Appointments in England and Wales (www.publicappointmentscommissioner.org). In particular, the definitions and rules in relation to conflict of interest and independence given in the Code of Practice seem to set these requirements at an appropriate level of probity, which could be imitated in the context of corporate governance requirements in Ireland.

28. In addition, TASC **urges** the Financial Regulator to consider the diversity of initiatives and requirements of corporate governance across Europe, in addition to the traditional comparisons that are made between Ireland and other Anglophone countries. For example, the legal requirement of employee representation on the boards of larger German firms and legal quotas requiring 40 per cent women's representation on boards in Norway, Spain and France.

Independence and Conflicts of Interest

29. TASC **welcomes** the importance given to 'independence' throughout the requirements, for example the role of independent non-executive directors, the independence of audit committees, the requirement that "The Board shall have a majority of independent non-executive directors" (4.1, p. 15) and the requirement that the chairperson and deputy chairperson must be independent non-executive directors (5.6, p. 18).

30. TASC **supports** the clear statements that "No one individual may have unfettered powers of decision." (3.5, p. 13) and "The Board shall define and document the responsibilities of directors, Board committees and senior management to ensure that no single person has unfettered control of the business." (9.4, p. 22).

31. TASC **supports** "Cross committee membership by an individual shall be managed by the institution to ensure that no one individual exercises excessive influence or control" (15.1 e, p. 28).

32. TASC **urges** the Financial Regulator to publish guidelines on how to achieve the aims outlined in 3.5, 9.4 and 15.1 e.

33. TASC **notes** the definition of 'independence' provided in the consultation document:

> "1.5 Director Independence: Independence is defined as the ability to exercise sound judgement and decision making independent of the views of management, political interests or inappropriate outside interests.
>
> "The following criteria shall be considered and given reasonable weight when determining if a director is independent:

[1] https://www.publicappointmentscommissioner.org/web-app/plugins/spaw2/uploads/files/Code%20of%20Practice%20August%202009.pdf

- any financial or other obligation the individual may have to the financial institution or its directors;
- whether the individual is or has been employed by the financial institution or a group company in the past and the post(s) so held;
- whether the individual has been a provider of professional services to the financial institution in the recent past;
- whether the individual represents a significant shareholder;
- circumstances where the individual has acted as an independent non-executive director of the financial institution for extended periods;
- any additional remuneration received in addition to the director's fee, related directorships or shareholdings in the financial institution; and
- any close business or personal relationship with any of the company's directors or senior employees." (1.5, p. 11)

"7.1 As an integral component of the Board, independent non-executive directors represent a key layer of oversight of the activities of an institution. It is essential for independent non-executive directors to bring an independent viewpoint to the deliberations of the Board that is objective and independent of the activities of the management and of the institution." (7.1, p. 20)

"7.4 The independent non-executive directors shall comprise individuals with relevant skills, experience and knowledge (including accounting, auditing and risk management knowledge) who are able to provide an independent challenge to the executive directors of the Board." (7.4, p. 20)

"7.6 To ensure independence, an independent non-executive director shall be independent of management and large shareholders and not have any business or other relationship that could materially interfere with the exercise of independent judgement." (7.6, p. 20)

34. TASC **argues** that 'independence' and 'conflict of interest' need to be considered as inseparable concepts. Hence, there is a need to ensure that the definition and further elaboration of these concepts is consistent (and consistently robust) throughout the requirements. As will be seen below, TASC identifies some equivocation in how conflict of interest is defined, which may impinge negatively upon a strict reading of independence requirements.

35. TASC **notes** that the term 'conflict of interest' is used with variable meaning in the consultation document, as follows:

> "4.9 In considering director appointments, the Board shall assess and document its consideration of possible conflicts of interest among its members, including but not limited to personal relationships, business relationships and common directorships among its members or proposed members." (pp. 16-17)
>
> "4.10 Appointments shall not proceed where possible conflicts of interest may emerge which are significant to the overall work of the Board." (p. 17)
>
> "4.11 Directors shall not participate in any decision making/discussion where a reasonably perceived potential conflict of interest exists." (p. 17)
>
> "11.4 The Board shall establish a documented 'conflict of interest' policy for its members and where conflict of interests arise the Board shall ensure that they are noted in the minutes." (p. 24)
>
> "11.5 If ongoing conflicts of interest arise, consideration shall be given to changing the membership of the Board." (p. 24)

36. TASC **asks** the Financial Regulator to clarify what is meant by "significant" conflict of interest in 4.10 and "reasonably perceived potential conflict of interest" in 4.11.

37. TASC **argues** that the "may emerge" clause in 4.10 is insufficient, and that there should be a definite requirement on candidates for appointment to declare any non-negligible conflicts of interest that may arise upon their appointment to the board.

38. TASC **argues** that the "consideration shall be given" requirement in 11.5 is insufficient, and that there should be a definite requirement for changing membership of the board where ongoing conflicts of interest arise.

39. TASC **urges** the Financial Regulator to provide clearer definitions of independence and conflict of interest.

40. TASC **notes** that the issue of conflict of interest will inevitably require a degree of self-assessment and forthright declarations on the part of directors. It is unrealistic to assume that this area can be fully policed given the complex nature of the social and business networks that individuals may belong to.

41. TASC **argues** that the regulation of self-assessment of conflict of interest requires the counter-balance of strong sanctions, so that individuals have no doubt as to the seriousness of conflicts of interest and are motivated to make full and frank declarations where they arise (such as in the above excerpts 4.9-4.11 and 11.4-11.5). It should be made clear through regulations that, when in doubt, individuals should opt for disclosure of non-negligible conflicts rather than keeping silent. In a small country, such as Ireland, it is inevitable that conflicts of interest will arise, and hence it is essential that the procedures for dealing with

them are robust and transparent, with the aim of changing business culture towards the habitual avoidance of such conflicts.

42. TASC **urges** the Financial Regulator to provide clear indication of the sanctions that should apply in cases where conflicts of interest are not declared.

Proportionality

43. TASC **notes** the Financial Regulator's suggestion that corporate governance requirements will be applied proportionately, depending on the significance and risk activities of institutions (see, for example, 1.4, p. 9).

44. TASC **suggests** that certain requirements of corporate governance should be deemed to be 'core' requirements, which should apply in full regardless of the size of the institution in question or of the risk activities carried out. Examples of such core requirements should include, *inter alia*, the independence of non-executive directors, requirements in relation to conflicts of interest, and remuneration levels.

45. TASC **suggests** that there are three bases upon which to measure proportionality: (1) the type of institution; (2) the scale and complexity of an institution; and (3) whether the issue is a core requirement of corporate governance or not.

Stakeholders

46. TASC **notes** that the Financial Regulator recognises "other stakeholders" in addition to the board, managers and shareholders (1.5, p. 10).

47. TASC **urges** that the Financial Regulator define the term more clearly and specify what responsibilities are owed to different stakeholders.

48. TASC **urges** the Financial Regulator to explicitly recognise employees, customers and other individuals or groups directly affected by an institution's activities as stakeholders to whom the board is responsible, alongside shareholders.

49. TASC **urges** the Financial Regulator to require one or more public interest directors on the board of institutions where a significant number of customers and/or members of the public are likely to be affected by the activities of the institution.

50. TASC **urges** the Financial Regulator to require boards to specify in writing how they envisage the public interest to apply in relation to their institution, and for these documents to be made publicly available online.

Role of Boards

51. TASC **notes** the requirement that "The Board shall establish a formal schedule of matters specifically reserved to it for decision. This schedule shall be documented and updated in a timely manner." (12.1, p. 25).

52. TASC **urges** the Financial Regulator to require this schedule to be made publicly available online so that all stakeholders (including the general public) can understand the level of corporate governance being provided by the board.

Role of Non-Executive Directors

53. TASC **notes** the requirement that "the majority of directors present and eligible to vote at all Board meetings shall be non-executives" (4.2, p. 15).

54. TASC **urges** the Financial Regulator to further require that the majority of directors present and eligible to vote at all board meetings shall be *independent* non-executives. This is a logical extension of the requirement that the majority of directors on the board must be independent non-executive directors (4.1, p. 15) and it would reinforce the board's independence from that institution's executive.

55. TASC **notes** the requirement that "non-executive directors and in particular independent non-executive directors shall play a leading role" in committees (14.3, p. 27).

56. TASC **urges** the Financial Regulator to require a majority of independent non-executive directors to be present at all committee meetings.

57. TASC **suggests** that if the Financial Regulator does not adopt the above requirements in full, consideration could be given to implementing it proportionately, with major financial institutions required to have a majority of independent non-executive directors at all board meetings and committee meetings.

Appointment of Directors

58. TASC **supports** the requirement that "An individual who has been the CEO, executive director or member of senior management of an institution, during the previous 5 years, shall not advance to the role of Chairman of that institution." (5.9, p. 18).

59. TASC **supports** the requirement that "The Chairman shall not hold the position of Chairman or CEO of a credit institution or insurance undertaking for more than one institution at any one time." (5.10, p. 18).

60. TASC **supports** the requirement that "The CEO shall not hold the position of CEO of a credit institution or insurance undertaking for more than one institution at any one time." (6.2, p. 19).

61. TASC **supports** the requirement that boards “shall be responsible for endorsing the appointment of people who may have a material impact on the risk profile of the institution and monitoring on an ongoing basis their appropriateness for the role.” (9.1, p. 22), “The Board shall be responsible for appointing a Chief Executive Officer and senior management with appropriate integrity and adequate knowledge, experience, skill and competence for their roles.” (9.2, p. 22), and “...the Board shall ensure that non-executive directors are given adequate training about the operations and performance of the institution.” (9.3, p. 22).

62. TASC **supports** the principle that boards should have primary responsibility for drawing up the list of competencies required in their appointments.

63. TASC **urges** the Financial Regulator to require boards to have written documents outlining the required competencies and for these to be publicly available online.

64. TASC **urges** the Financial Regulator to publish guidelines about how the above standards of training, levels of knowledge, etc will be adjudicated on by the Regulator, and what sanctions will apply for non-compliance.

Multiple Directorships

65. TASC **supports** the requirement that “The number of directorships held by directors of institutions shall be limited.” (4.5, p. 16). Our recent research showed that for the 39 directors with two or more directorships in 40 of Ireland’s top private companies and state-owned bodies, each had an average of ten other directorships in other private companies (including subsidiaries). The nine most well-connected directors, all of who were board members of one of Ireland’s four major banks/building societies, had an average of 17 directorships each.

66. TASC **notes** the requirement that “the number of directorships of credit institutions and insurance undertakings held by a director shall not exceed three.” (4.5, p. 16).

67. TASC **urges** the Financial Regulator to supplement the above with a limit of one directorship in major financial institutions, to prevent individuals holding multiple directorships in more than one of Ireland’s major financial institutions. In TASC’s research, a positive finding was that no individual held two or more directorships in Ireland’s four largest banks/building societies during the period 2005-2007 (*Mapping the Golden Circle)* and TASC believes that this should be the norm.

68. TASC **notes** the Financial Regulator’s view that “an individual holding more than 5 directorships creates a rebuttable presumption that the director has insufficient time available to fulfil his [sic] role and functions as a director of a financial institution” and “fewer than five directorships may also indicate a possible constraint on the ability of a director to comply.” (4.6, p. 16).

69. TASC **supports** the reduction in the number of directorships held by individuals. TASC's research showed that 24 of the 39 directors, who had two or more directorships in 40 of Ireland's top private companies and state-owned bodies, sat on the board of one of Ireland's four largest banks/building societies. On average, these individuals held an average of 11 directorships each, including subsidiaries, during the period 2005-2007. This group included seven chairpersons, two CEOs and one person who was both a chairperson and CEO (*Mapping the Golden Circle*, p. 10 and p. 34).

70. TASC **notes** that "Where it is proposed that a director of an institution hold more than five directorships, the institution shall... seek the prior approval of the Financial Regulator" (4.6, p. 16).

71. TASC **urges** the Financial Regulator to publish clear, evidence-based guidelines that explain the criteria by which it will be decided whether or not to approve directorships in these circumstances.

72. TASC **argues** that the prevalence of multiple directorships across all sectors, not just the financial sector, is evidence that the same rebuttable presumption exists that directors do not have enough time to fulfil their role as directors. Hence, all companies, not just financial institutions, should come under the tighter regulations that the Financial Regulator is proposing here for certain financial institutions.

Time Commitment of Directors

73. TASC **supports** the requirement that "Each member of the Board shall have sufficient time to devote to the role of director and associated responsibilities. This is particularly important in the case of non-executive directors. The Board shall indicate a time commitment expected from directors in letters of appointment." (4.4, pp. 15-16).

74. TASC **supports** the requirement that "to ensure that a Chairman has sufficient time to devote to his responsibilities as Chairman, the prior approval of the Financial Regulator shall be obtained prior to taking on any other directorships." (5.8, p. 18).

75. TASC **suggests** that the Financial Regulator publish guidelines on what is meant by "sufficient time", especially for work on sub-committees as well as the main board meetings. For example, the 2009 Walker Review in the UK recommends that non-executive directors on the boards of banks should be expected to give greater time commitment than has been normal in the past and that there should be a minimum expected time commitment of 30 to 36 days on a major bank board. In relation to the chairperson, a minimum of two-thirds of his/her time is recommended, with some arguing that it should be no less than a full-time position. In addition, the 2003 Higgs Review in the UK recommended that a board should not agree to a full time executive director taking on more than one non-executive directorship in a publicly quoted company, or the chairpersonship of such a company.

76. TASC **urges** the Financial Regulator to publish clear guidelines as to how it will be decided whether or not a chairperson or a CEO can take on any other directorships.

77. TASC **urges** the Financial Regulator to require the time commitment expected by boards to be made publicly available online so that all stakeholders (including the general public) can assess the rigour of corporate governance in institutions affecting them.

Diversity on Boards

78. TASC **argues** that diversity on boards is essential to prevent 'groupthink'. This is a well-recognised psychological phenomenon that occurs when small groups are involved in making decisions. Groupthink is when conclusions are reached, and/or decisions are made, which ignore alternative or contrary evidence, as a result of a group's desire to reach consensus. A major contributing factor to groupthink is where group members all, or mostly, come from similar backgrounds. While the issue of lack of diversity in boards of Irish companies is hard to quantify across many factors, such as social class or educational privileges, evidence is available in relation to gender. In TASC's study of 40 top Irish private companies and state-owned bodies, only one in nine directors were women overall, and in the private sector only one in 14 directors were women (*Mapping the Golden Circle*, pp. 24-25). The state has a target for at least 40 per cent of board members of public bodies to be women. In addition, there is a strong perception that many board members share a similar background in relation to social class, education, profession, etc.

79. TASC **urges** the Financial Regulator to recognise the increased risk of weak corporate governance that can occur when boards are composed entirely or mostly of people from very similar backgrounds.

80. TASC **urges** the Financial Regulator to impose a requirement of employee representation on boards, as one way of increasing diversity among board members, thus ensuring boards are more independent and can challenge the decisions of executives.

81. TASC **urges** the Financial Regulator to impose a quota of at least 40 per cent for the representation of women on boards, for reasons of equality and as another way of increasing diversity among board members, thus ensuring boards are more independent and can challenge the decisions of executives. Norway has a legal quota of 40 per cent of women on company boards. Spain and France have voted to implement similar quotas by 2015 and 2016 respectively (The Economist, 11 March 2010).

82. TASC **suggests** that the Financial Regulator should adopt the gender-neutral term 'chairperson' rather than 'chairman'. It is appropriate that the Regulator, as a state body, should not reinforce the persistent business culture in Ireland that assumes senior corporate positions are by default the preserve of men. Such business culture can have real effects in normalising a lack of diversity among board directors and can deter women's participation.

Remuneration

83. TASC **notes** the Financial Regulator's stated intention to introduce requirements in relation to remuneration (1.3, p. 2).

84. TASC **urges** the Financial Regulator to conduct a similar consultation exercise in relation to these requirements.

85. TASC **notes** the requirement for institutions to have "remuneration policies and practices that are consistent with and promote sound and effective risk management" (3.3, p. 13).

86. TASC **urges** the Financial Regulator to require that remuneration policies and practices should also be consistent with and promote sustainability and moderation in the economy and society as a whole. TASC's examination of 40 of Ireland's top private companies and state-owned bodies found that board remuneration was multiples of what is considered 'high pay' in the economy. For example, the average remuneration of non-executive directors in private companies was €66,769 – for very part-time positions – and the average remuneration of chairpersons was €267,600 (*Mapping the Golden Circle*). Many directors held multiple positions as well as their main employment, which was often a well-remunerated senior position. In addition, the rate of increase of pay from 2005-2007 was multiples of the inflation rate (at a cumulative 9.1 per cent for the same period). This type of income growth is unsustainable and undesirable in a democratic state. In addition, such inequality undermines the sense that directors can represent the public interest, when their personal circumstances remove them utterly from the income level of even the best-paid professions in the state.

87. TASC **argues** that pay moderation is in line with the responsibility identified by the Financial Regulator for boards to engage in the "ethical oversight" of their institutions (8.1, p. 21).

88. TASC **urges** the Financial Regulator to require institutions to have remuneration policies and practices that are consistent with, and safeguard, the public interest, including the public interest in sustainability and moderation in the distribution of wealth and incomes.

89. TASC **supports** the requirement that "The Board shall ensure that the institution's remuneration practices do not promote excessive risk taking. The Board shall design and implement a remuneration policy to meet that objective and evaluate compliance with this policy." (10.7, p. 23).

90. TASC **notes** the requirement that "The Chairman of the Board shall not be the Chairman of the Remuneration Committee." (19.3, p. 32).

91. TASC **urges** the Financial Regulator to require that neither the Chairman nor the CEO of the Board shall be a member of the Remuneration Committee. TASC identifies a risk that a small circle of people may compensate each other based on unreasonable assumptions about 'acceptable pay' or 'industry norms'. For example, this point is well illustrated by Richard Posner, a prominent US scholar and federal judge, who says in a dissenting opinion that

"executive compensation in large publicly traded firms often is excessive because of the feeble incentives of boards of directors to police compensation … Directors are often CEOs of other companies and naturally think that CEOs should be well paid. And often they are picked by the CEO." (Jones v. Harris, 527 F.3d 627).

92. TASC **notes** the requirement that "Where possible, all members of the Remuneration Committee shall be independent non-executive directors" (19.1, p. 32).

93. TASC **urges** the Financial Regulator to require that all members of the Remuneration Committee shall be independent non-executive directors.

94. TASC **suggests** that, if the Financial Regulator does not impose the requirements proposed above, guidelines should be published about what makes it not "possible" for all members to be independent non-executive directors.

Risk Appetite

95. TASC **notes** the requirement that "The [institution's] risk appetite definition shall be comprehensive and clear to all stakeholders." (10.2, p. 23)

96. TASC **urges** the Financial Regulator, alongside publishing a more detailed definition of stakeholders, to ensure that 'risk' is understood to include risks to the wider economy and society, and that risk should be managed in the public interest, not just in the interest of the company and its shareholders.

Reporting to the Financial Regulator

97. TASC **notes** the Financial Regulator's requirement for "institutions to notify the Financial Regulator within 5 working days of identifying a deviation from the Requirements, advising of the background to the deviation and the proposed remedial action" (4.2, p. 5)

98. TASC **asks** the Financial Regulator to specify what sanctions will apply to institutions that do not comply with this requirement.

99. TASC **notes** that "The Financial Regulator proposes to require each institution to submit an annual compliance statement specifying whether the institution has complied with the Requirements." (4.3, p. 5)

100. TASC **notes** the stated intent in the Renewed Programme for Government to place the Combined Code of Corporate Governance on a legislative footing. This indicates a shift away from the voluntary nature of the Code as it exists at present. It also indicates a shift away from the 'comply or explain' approach, whereby companies can provide explanations as to why they did not comply with the requirements of the Combined Code, towards enforceable requirements with sanctions for non-compliance.

101. TASC **asks** the Financial Regulator to specify what sanctions will apply to institutions that do not comply fully with the requirement to submit an annual compliance statement, to specify how the Financial Regulator will test compliance with this requirement, and to specify what sanctions will be brought to bear on institutions on the basis of their declared non-compliance with the requirements.

102. TASC **notes** the Financial Regulator's instruction that "Any director who has any concern about the overall corporate governance of an institution shall report these concerns promptly to the Financial Regulator." (3.7, p. 13).

103. TASC **suggests** that this requirement may not be realistic at present, where it extends to executive directors who are employees of the institution in question. This is because executive directors may have little or no legal protection available to them in terms of their job and future career prospects.

104. TASC **argues** that 'whistleblower' legislation is required to give executive directors some legal protection should they reveal wrongdoing or risky behaviour in their institution to the Financial Regulator.

Transparency

105. TASC **supports** the requirement that "The authority, functions, membership and reporting lines of the committees as well as meeting frequency, voting rights and quorums shall be clearly outlined in written terms of reference established by the Board." (16.1, p. 29).

106. TASC **urges** the Financial Regulator to require that these terms of reference are publicly available online so that they can be consulted by all stakeholders (including the general public).

107. TASC **supports** the requirement that "An institution shall submit to the Financial Regulator a compliance statement specifying, in accordance with any relevant guideline issued by the Financial Regulator, whether the institution has complied with these Requirements during the period to which the statement relates." (21.1, p. 34).

108. TASC **urges** the Financial Regulator to require that these compliance statements are publicly available online so that they can be consulted by all stakeholders (including the general public).

State-Owned Bodies

109. TASC **notes** that the state holds a majority shareholding in one or more of the institutions targeted by the proposed corporate governance requirements.

110. TASC **argues** that state-owned bodies should be subject to stricter requirements than those governing private companies because state-owned bodies have a greater obligation to promote the public interest.

111. TASC **argues** that appointments to the boards of state-owned bodies should be made through an independent and transparent system, based clearly on competency and experience. TASC will shortly be publishing specific proposals in this regard.

Corporate Governance of the Central Bank

112. TASC **notes** that the Central Bank is in a unique position with respect to corporate governance requirements. Not only is it a financial institution (which the Financial Regulator has identified as a reason for enhanced requirements), but it is also a state-owned body (which TASC argues should give it a higher requirement to promote the public interest) and it is the financial regulator (which must have its independence preserved).

113. TASC **argues** that the Central Bank should be subject to stricter corporate governance requirements than any other financial institution.

114. TASC **urges** the Financial Regulator to require that directors of the Central Bank may not simultaneously hold directorships in any other financial institution

115. TASC **urges** the Financial Regulator to require that there is no movement of directors from the Central Bank to the board of any financial institution for a period of five years subsequent to leaving the Central Bank, which is the same length of time identified for the preclusion of CEOs and other executives from becoming chairpersons of the same institution (5.9, p. 18).