

3.5 Non Executive Directors

As the company develops, additional skills may be required to support its strategy, for example the company may be looking to expand into a different country or acquire certain types of companies. The appointment of a Non Executive Director with these particular skills to the Board can help to achieve the company's strategy.

As with the appointment of a Chairperson, the appointment of Non Executive Directors means that the Managing Director/ Chief Executive will be answerable to a greater number of people with differing skills and experience. Consequently, this should improve overall company performance.

Before considering the appointment of Non Executive Directors, it is critical that the role they are being asked to perform is clearly thought through and communicated to them for consideration.

Non Executive Directors may also be appointed to the Board for other reasons. If funds are being provided by a venture capital company, the provision of funding may be contingent on a representative of the firm being appointed to the Board. This often results in greater accountability for shareholder funds and improved company performance.

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Role of Non Executive Directors

- Provide objective and independent advice to the Board to enable it to make better decisions in the interest of all shareholders

Responsibilities of Non Executive Directors

- Bring a genuine independent perspective to enhance decision making
- Provide value added input to strategy and strategic development
- Act in the best interests of the company as a whole rather than any one particular group of shareholders
- Assist in carrying out the duties of the Board, such as:
 - reviewing, approving and on-going monitoring of the strategic plan
 - reviewing organisational capability in relation to stated objectives
 - reviewing financial performance against targets
 - raising capital
 - reviewing any major changes in the company, such as financial and organisation structure
 - providing advice on major investments/divestments to be made
 - monitoring legal, ethical, risk and environmental compliance where appropriate
- Act as a catalyst for change and challenge the status quo, when appropriate
- Monitor and challenge the performance of Executive Directors and the Management Team
- Take an active role in the appointment and replacement of key senior management and in plans for management development and succession
- Attend Board Committee meetings, as appropriate (a Non Executive Director may also have special responsibility for audit, nomination and/or remuneration committees)
- Attend Board meetings, ad hoc meetings with the Chairperson, and meetings of Non Executive Directors, as appropriate
- Satisfy themselves that financial information is accurate and that financial controls and systems of risk management are robust and defensible
- Maintain the confidentiality of information received
- Carry out functions with due skill, care and diligence
- Devote sufficient time to responsibilities

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Insights and practical suggestions

Independence of Non Executive Directors

- Ideally, the Non Executive Director should be financially independent. Independent means not having to rely on the company for a major part of his/her income. This ensures that the Non Executive Director does not have to consider the personal financial consequences of his/her independent advice if it is rejected by the Board for whatever reason
- Shareholding by Non Executive Directors is a contentious issue as it may not be compatible with complete independence. However, there may be circumstances where a reward of equity may be appropriate
- Non Executive Directors should have the blend of experience, independence and objectivity that is best suited to the requirements for particular Board memberships

Appointing Non Executive Directors

- In a public or private company, it is usual for the Articles of Association of the company to provide that Directors are appointed by the company at an annual general meeting. Directors are usually allowed, in the interim, to co-opt additional Directors and/or to fill casual vacancies until the next annual general meeting, at which stage a decision is made by the members as to whether such a person should continue as a Director
- It is the responsibility of the Chairperson and the Managing Director/ Chief Executive in the absence of a Nomination Committee, to lead the process for the appointment of Directors to the Board. The Board as a whole then appoints Executive and Non Executive Directors, subject to the power of the members in general meetings
- Appointing former Executive Directors to be Non Executive Directors is often regarded as a questionable practice as it may negate the independence and fresh outlook usually required of Non Executive Directors
- Careful thought needs to be given to defining the precise Terms of Reference for a Non Executive Director, and to the competencies required from each Non Executive Director
- An induction process is useful once a Non Executive Directorship has been accepted. This should include visiting the facilities, understanding the business strategy, explaining the planning process and being introduced to senior staff

Number of Non Executive Directors

- The size, complexity and nature of the company's business will have an influence on the number of Non Executive Directors serving on the Board
- It is important to have an adequate number of Non Executive Directors on a Board and to have fresh blood coming in on a periodic basis. A correct balance of Non Executive Directors will help to avoid the 'forcing through' of proposals from Executive Directors

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- It is considered better to have two Non Executive Directors rather than one, as one Non Executive Director may be too influential or not influential enough on the Board
- According to the Combined Code 2003 at least half of the Board (excluding the Chairperson) in a listed company should be comprised of Non Executive Directors
- In the case of smaller listed companies two independent Non Executive Directors are recommended

Potential Senior Independent Director role

- There may be a role for a Senior Independent Non Executive Director to:
 - assess the performance of the Board/Chairperson
 - be available to shareholders if they believe their concerns are not being resolved through the normal channels of Chairperson or Managing Director/Chief Executive or if such contact is not appropriate
 - act as the voice of the Non Executive Directors
 - act as the 'conscience of the Board'

Non Executives Directors' term of office

- The term of Non Executive Directors may vary depending on the company, but they should be appointed for a defined period
- The reappointment of Non Executive Directors should not be automatic
- In determining their term of office, the following should be considered:
 - The period should be sufficiently long enough for the Non Executive Director to be of benefit to the company, particularly if it is a complex business
 - The period should not be so long that it compromises the ability of the Non Executive Director to be independent and objective

Induction

An individual appointed to the Board should receive the appropriate induction in relation to the responsibilities of a Director. Subsequent training should be provided, particularly in relation to new laws and regulations

Other considerations

- An adequate time commitment is necessary if an effective contribution is to be made as a Non Executive Director. The role of a Non Executive Director is much more time-consuming now, compared to the past. Today's Non Executive Directors hold much more responsibility as there tends to be a greater focus on them if things go wrong
- If a Director is to represent the interests of the shareholders, s/he must share those same interests and be intimately familiar with them. In making

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decisions, however, all Directors are required to act in the best interests of the company

- It is important to keep in mind that although companies may try their best to keep Non Executive Directors as well informed as possible, the reality is that the Executive Directors will always be more knowledgeable about the company's internal operations and therefore it may be difficult to challenge them on matters of detail
- If listed on a stock exchange, the Non Executive Directors should be familiar with the major stock analysts who cover the industry and the company
- The Non Executive Directors should be familiar with the largest shareholders, their interests, politics, and priorities
- The Chairperson and the Non Executive Directors should meet a couple of times a year, apart from Board meetings

Key legal considerations

- Irish company law does not distinguish between Executive Directors and Non Executive Directors. The term 'Non Executive' Director is understood, in practice, to mean a Director who is not an employee of the company and is, therefore, not directly involved in its day-to-day management. S/he is only required to dedicate part of his/her time to the company's affairs. Non Executive Directors participate fully in Board deliberations, but have no executive function in the company's management
- The same legal duties and obligations apply to all Directors, although the courts may apply different standards when determining the level of skill and standard of care that a Non Executive Director can be expected to demonstrate
- Duties and liabilities of Directors are set out in statute. In addition, there are non-statutory fiduciary duties which are also owed by the Directors and which are applied by the courts

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10 Questions a Non Executive Director should ask prior to accepting a Directorship:

- 1 What is the mission and business of this organisation?
 - (a) Do I understand the business enough to function effectively as a Director?
 - (b) Does the organisation have a strategic plan with strategic goals for the next three to five years?
- 2 What is the organisation's financial position? The following details should be obtained:
 - (a) Recent financial statements of the organisation
 - (b) Views on potential financial problems in the future
 - (c) Ownership structure of the company
- 3 Are there risk management procedures for the company?
- 4 What record does the company have on Corporate Governance issues?
- 5 What is the specific role and responsibility of the Board in this organisation?
 - (a) Why does the Board exist?
 - (b) What are the legal responsibilities of the Board?
 - (c) What time and commitment is required?
 - (d) How often does the Board meet?
- 6 Why am I being asked to serve on this Board?
 - (a) What role does the company expect me to play?
 - (b) What skills and experience does the company expect me to bring to the Board and will I be able to make a positive contribution to the Board?
 - (c) Whose interests on the Board am I representing?
- 7 Who are the other Board members, how long have they been involved and how long more do they expect to serve on the Board?
- 8 Is there an evaluation process in place for members of the Board?
- 9 What insurance cover is available to Directors and what is the company's policy on indemnifying Directors?
- 10 How does the Managing Director/ Chief Executive interact with the Board?
 - (a) Is there open discussion?
 - (b) Does s/he provide all requested information, and is it accurate?