

Consultation on Reform and Consolidation of Ireland's Statutory Framework for Ethics in Public Life

ESB Submission

Question 1: Do you agree with the broad policy approach as a viable basis to guide legislative reform for the statutory framework for ethics?

ESB supports the broad policy approach in principle. However, it is not clear from the consultation document whether it is intended to apply the arrangements proposed in the consultation document in full to all categories of public official or whether a less onerous regime might apply depending on whether an official is in Category A, B or C¹. In this regard, we note the proposed Category A includes Chairpersons and CEOs of public bodies as well as those remunerated at or above the level of Deputy Secretary General. We suggest including employees of a commercial semi-state utility by virtue of their salary in the same category as elected representatives at national, local and European level may not be appropriate. We note the proposed Category B includes those in ESB currently in-scope of disclosure requirements under the Ethics Acts i.e. persons remunerated at and above Principal Officer level (designated positions of employment) and board members of public bodies (designated directors). It is difficult to comment on the broad policy approach without knowing the extent to which obligations will apply to the different categories.

ESB would have a range of concerns highlighted below if it is proposed that the arrangements referred to in the consultation document would apply in full and suggest that this should not be the case.

In particular ESB notes the proposal of the imposition of key new statutory prohibitions on:

- The use of insider information;
- Public officials seeking or accepting benefits.

Such prohibitions overlap with other legislation that is already applicable to ESB (e.g., Regulation (EU) No. 596/2014 on market abuse (MAR); Regulation (EU) No. 1227/2011 on wholesale energy market integrity and transparency (REMIT); Criminal Justice (Corruption Offences) Act 2018) and ESB has internal policies and procedures to ensure compliance with the existing legislation (e.g. gifts related procedures). Given this overlap, we note the risk of confusion to ESB staff that fall under the Ethics in Public Office regime, in addition to a concern around the overhead of ensuring consistency between legislative instruments if arrangements are to be included under multiple instruments.

We also observe that the consultation proposes a significant extension of the current disclosure regime requiring the disclosure "*as a matter of routine actual and potential conflicts of interest that arise in the context of the performance of their duties*". Currently ESB requires a return from relevant staff if, and only if, those interests "*could materially influence the person in the performance of*" their ESB functions. We believe that an extension to include a potential conflict of interest risks introducing a level of uncertainty. In addition, this uncertainty may lead to all manner of disclosures not relevant to the person's performance of their duties.

¹ It appears from page 10 that a graduated approach for different categories of public official may apply but it is not clear what distinctions are being proposed.

Question 2: What, if any, drawbacks can you see with this approach? - What unintended consequences might it have?

As outlined above, if it is intended to apply the same arrangements in full to all categories of public official, we believe a risk emerges that the role of director becomes unduly onerous and deters candidates from accepting such roles. Given the scale of subsidiaries and non-wholly owned entities, ESB requires a significant number of suitably experienced directors to ensure appropriate governance arrangements are in place and implemented for these entities - arrangements that result in the role becoming unattractive would significantly constrain our capability in this regard.

In addition, if applied to all directors and employees earning over a certain threshold, these additional proposals would increase the burden for Company Secretariat functions with limited, if any, benefit.

Question 3: Placing certain basic principles on a statutory basis (i.e. concern for the public interest) are likely to form part of proposals. Do you agree with this approach? What principles would you like to see in Ireland's statutory framework for ethics?

In relation to the proposal of a public interest consideration, it is unclear as to whether this would be intended to be as a guidance in developing the underlying policy principles, or as a formal public interest test, to be applied either to the disclosure itself or the decision in relation to publication, similar to what is included under the Freedom of Information and Access to Information on the Environment legislation. ESB supports the former as a principal in driving policy. However, if the latter is proposed, it is not clear what the additional requirement would add, and note it risks an increasingly complex assessment around the question of disclosure. A simpler and more appropriate assessment is to remain with the current consideration of whether there is a risk that something could materially influence you in or in relation to the performance of your official functions - if yes, it should be disclosed.

Question 4: In so far as the statutory framework for ethics may interact with personal rights (i.e. privacy by published registers of interests and the right to earn a livelihood by restrictions post-term employment) – what sort of measures would represent a fair and appropriate balance between personal rights and the public interest?

It is unclear whether it is proposed that the publication of registers of interest would apply to all public officials. While it might be appropriate to elected representatives at national, local and European level, we believe that it would not be appropriate to publicly publish the register of interest for Chairpersons and CEOs of public bodies and those remunerated at or above the level of Deputy Secretary General (currently proposed in Category A) nor persons remunerated at and above Principal Officer level² and board members of public bodies³ (currently proposed in Category B). We believe that there is no adequate justification to risk the breach of a right to privacy of these individuals as enshrined under GDPR. In addition, if publication of interests is

² Akin to Designated Positions of Employment under existing legislation.

³ Akin to Designated Directors under existing legislation.

extended to such persons, as indicated above, we believe it may make the role of director unattractive and could deter candidates from accepting such roles. In particular, if publication of interests is extended to employees earning over a certain threshold rather than to the sensitivity and materiality of the role itself or decisions made, it may present a breach of a personal right to privacy without any justification.

It is also unclear as to whether it is proposed that the proposal to restrict post term employment would apply to all public officials. ESB does not believe that this would be appropriate for application in relation to directors and employees earning over a certain threshold in a commercial semi-state utility such as ESB. A thorough consideration of employment contracts and arrangements would need to be considered in the context of any such proposals.

Question 5: What further suggestions for changes, if any, would you make? Please explain the reason for your proposed change, and where possible, advance evidence or arguments in support. Evidence might be factual, legal or based on your experience.

ESB wholeheartedly supports the proposal of "*A more effective, streamlined and efficient process for the submission of periodic statements of interests*" and welcomes the continued practice that no declaration is required where a disclosable interest does not arise (although a nil statement may be made).

In line with the aspiration of "*a more effective, streamlined and efficient process*", we would suggest that provision should be made for digital signatures and electronic filing of returns. We would also suggest that there should be no requirement for paper copies to be retained.

In the context of the proposal that "*no declaration (or nil statement) will be required unless there has been a significant change*", we suggest that a broader application of this approach might be considered such that, where there is no change to the disclosure in a statement of interests to be made i.e. that only changes are notified rather than annual returns of the same information.

In the interests of efficiency, consideration should be given to whether it would be possible to streamline the returns such that, for example, a director on the board of a number of public bodies⁴ could avoid making multiple returns of the same information i.e. only one return would be required. An even broader application could see this approach extended to Designated Positions of Employment i.e. only one return required to cover all Designated Directorships and a Designated Position of Employment, if applicable.

As part of the review, we suggest greater clarity should be outlined in respect of retention periods of returns.

Finally, we suggest the current practice of listing 'public bodies' in biennial Statutory Instruments be discontinued and instead a principles-based approach to the application of ethics legislation to Irish subsidiaries and ESB appointed directors to non-wholly owned Irish entities be adopted. This would dispense with the need to update the schedule of public bodies on a regular basis.

⁴ In ESB's case there are many individuals who sit on the board of more than one subsidiary board.