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DRAFT HARBOURS BILL (NORTHERN IRELAND)

This paper provides an analysis of the draft Harbours Bill being devised by the Department for Regional Development. The overarching aim of the Bill is to remove the constraints of being a Public Corporation from the Harbour Authorities in Northern Ireland and allow them the opportunity to operate with a greater element of commercial freedom which would bring greater benefit to the Northern Ireland economy.

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SUMMARY OF KEY POINTS

There are four commercial trust ports in Northern Ireland all of which are vital to the economic infrastructure of the Northern Ireland and the island of Ireland as a whole.

These ports once enjoyed the commercial freedom which is required to function effectively in a highly competitive marketplace; however, much of this freedom was taken away when they were reclassified as Public Corporations in 2001

It has been considered for some time that in order to maximise the positive impacts of the ports on the economy of Northern Ireland that enhanced commercial powers similar to those enjoyed by a privately operated enterprise would be necessary while maintaining an element of public accountability which takes into account the significance of the public asset which they control.

This paper provides a brief background to the Bill and details its purpose. The Bill itself, which as stated, aims to increase the commercial powers of the ports, consists of 22 clauses which cover both commercial powers and those powers which relate to safety, there are a further three supplementary provisions.

The power to undertake commercial activities include:

- The power to develop land;
- The power to promote tourism;
- The power to make investments (home and abroad); and
- The power to provide service e.g. consultancy

In terms of safety the draft Bill allows the harbours to implement safety arrangements and to provide directions to that effect.

The subordinate legislation in the form of the Harbour Bill will be taken forward at a later date and will provide a revised constitution for the Belfast Harbour Commissioners; for the Londonderry Port and Harbour Commissioners; and the Warrenpoint Harbour Authority. It is proposed that the Coleraine Harbour should become a municipal port with ownership being transferred from Coleraine Harbour Commissioners to Coleraine Borough Council.

The information given regarding the content of the Harbour orders states that they will include: guidance on appointing the board members of the authorities (to be supplemented by a code of practice). They will also provide guidance on directions for operating the boards and detail new borrowing powers in line with the new commercial powers.

CONTENTS

Background and Purpose of The Bill	1
Trust Ports	1
Status of Trust Ports	1
Problems with Public Corporation Status	1
Ports Policy Review	2
Aims of the Bill	2
Clauses of The Bill	3
Clause 1: Power to Undertake Commercial Activities	3
Clause 2: Power to procure development of certain land	3
Clause 3: Powers in relation to promotion of harbour and as ship's agent.....	3
Clause 4: Power to invest outside Northern Ireland	4
Clause 5: Repeal of the power of the Department for Regional Development to give directions	4
Clause 6: Repeal of powers in relations to relevant port authorities.....	4
Clause 7: Powers to promote leisure activities and aquaculture	4
Clause 8: Power to provide advice and assistance	5
Clause 9: Power to give harbour directions with respect to ships.....	5
Clause 10: Procedure for harbour directions	5
Clause 11: Enforcement of harbour directions	5
Clause 12: Power to require security	5
Clause 13: Additional powers for harbour authorities	5
Clause 14: Interference with safety apparatus	5
Clause 15: Compulsory acquisition by harbour authorities.....	6
Clause 16: Definition of "Ship"	6
Clause 17: Safety Directions	6
Clause 18: Harbour Master: Qualifications	6
Clause 19: Section 18 Supplemental.....	6
Clause 20: Interpretation	6
Clause 21: Repeals	7
Clause 22: Short title and commencement.....	7
Proposed Subordinate Legislation.....	7
The Revised Constitution	8

Code of Practice	9
Annex 1	10
Responsibilities of individual board members.....	10
Independence	10
Selflessness.....	10
Integrity	10
Objectivity	10
Accountability.....	10
Openness	10
Honesty.....	10
Board members must:	10

BACKGROUND AND PURPOSE OF THE BILL

TRUST PORTS

“Trust ports are autonomous, self-financing statutory bodies charged with the authority for maintaining and managing harbours. They operate on a commercial basis with the profit generated by their activities re-invested to improve their facilities and services. There are four commercial trust ports in Northern Ireland: Belfast, Londonderry, Warrenpoint and Coleraine and collectively they handle 84% of Northern Ireland’s seaborne trade. The remainder is handled by the privately owned harbour of Larne”.¹

The ports of Belfast, Londonderry and Warrenpoint are vital elements of the economic infrastructure of Northern Ireland and of the island of Ireland. All three were established as Trust ports, as were many ports elsewhere in the UK.

STATUS OF TRUST PORTS

Though quasi-public bodies, Trust ports traditionally operated independently and enjoyed considerable commercial freedom; they had the power to set charges, determine the range of services they provided and borrow without Government approval. However in September 2001, the major Trust ports were classified as “Public Corporations” by the Office of National Statistic (ONS) because the Government was deemed to have an overall controlling interest since:

- A majority of Trust Port board members are appointed by Government (the Department of Regional Development (DRD) in the case of NI), and
- The Secretary of State for Transport has the power to privatise Trust ports with a turnover of more than £7.2m per annum

In addition, the Trust Ports in Northern Ireland are also subject to a third control through the involvement of the DRD via the Harbours (NI) Order 2002 which confers the “power of direction” on the DRD. Memorandums of Understanding have also been concluded between each of the three ports and the DRD which govern, *inter alia*, the disposal of land and the change of use of land within the harbour estates.

PROBLEMS WITH PUBLIC CORPORATION STATUS

Public corporation status is a problem for trust ports because;

- The rules which govern government departments are not necessarily suitable for commercial enterprises. Such as those which dictate borrowing;
- Trust ports trade commercially and generate income for the exchequer while receiving no government funding; and
- There is too much red tape, disadvantaging trust ports as they are slow to make decisions in a commercially competitive environment.²

¹ DRD (2008) “*Proposed Harbours Bill (NI) and Related Matters: A Consultation Paper*”. DRD: Belfast

² NI Harbour Authorities (2006) “*Governments Ports Policy Review: A Report on the issues affecting the Trust Ports sector in Northern Ireland*”. 30th June 2006 [\[online\]](#)

PORTS POLICY REVIEW

The principle aim of the Harbours (Northern Ireland) Order 2002 was to enhance public accountability of the main trust ports and to improve arrangements to safeguard public interests. At the time of making this order a commitment was made to enhance the commercial powers of the ports to make them more competitive and bring greater benefit to the economy of Northern Ireland.

A consultation of ports policy was published in June 2006 and this sought to address some of the issues which had been hampering the growth of ports in Northern Ireland and their ability to operate competitively within the market. The consultation asked if they (the ports) should be given more commercial powers, whether trust port status was suitable and whether the land holding's of Belfast should be considered in the decision making process.

Following the consultation it was concluded that ports must be provided with sufficient powers to enable them to respond quickly to opportunities; and this would be achieved through greater commercial powers. Furthermore it was concluded that trust ports must be freed from the constraints of the public expenditure system and this would be achieved through removal of a number of legislative controls:

- 1) The power to privatise a trust port (contained in the Ports (NI) Order 1994);
- 2) The power of DRD to give a trust port directions of a general or specific nature as to the exercises of its functions (contained in the Harbours (NI) Order 2002); and
- 3) The power of the DRD to appoint the majority of the members of the boards of trust ports.

AIMS OF THE BILL

It is proposed that new primary legislation will act to remove the first two controls while subordinate legislation in the form of new Harbour Orders will remove the third. At the same time as empowering the ports commercially it is still important to maintain the level of accountability that was instilled through the Harbour (NI) Order 2002 and this will be achieved through a revised code of practice for the ports as well as new memorandums of understanding regarding the change of use and disposal of land. In addition to the commercial aspects of the harbour activity this Bill proposes the inclusion of new marine safety measures. The aims therefore of the draft Harbours Bill are:

- 1) To remove the trust ports from their current classification by the ONS as public corporations;
- 2) To provide extended commercial powers;
- 3) To modify financial controls under which the ports operate; and
- 4) To introduce safety measures

CLAUSES OF THE BILL

CLAUSE 1: POWER TO UNDERTAKE COMMERCIAL ACTIVITIES

Clause one allows for a designated harbour authority to carry out any commercial activity which it believes would benefit both the harbour itself and the overall economy of Northern Ireland. Any commercial activities undertaken by the Ports must be done through a (wholly owned) subsidiary company, a subsidiary of such a company or an individual acting with such a company. This measure effectively protects the Ports assets³ as even though it still owns and controls the subsidiary it will not be exposed to any of its liabilities.

Clause one grants the power for the Ports to transfer land and assets to the subsidiary company while also allowing it to act as a guarantor for any obligations entered into by the subsidiary. However, these measures are only applicable so long as the Port does not feel it would affect, in any way, its own ability to carry out its statutory functions of improving, maintaining or managing the harbour.

CLAUSE 2: POWER TO PROCURE DEVELOPMENT OF CERTAIN LAND

This clause grants the Ports the power to develop its land when it is of the opinion that it is no longer required for it to be able to function. Again, as was the case for the undertaking of commercial activities in clause 1, development must not be undertaken directly by the port. Clause 2 states that a development can be undertaken by a wholly owned subsidiary company, however, subsidiaries of such companies and individuals acting with these companies may only undertake a development in line with an agreement with the Port.

As well as development this clause gives the port the power to dispose of all or any part of the land which it no longer deems necessary however this must be done within the arrangements made with the Department for Regional Development (DRD). In addition sub section (7) of the clause references the power of the harbour authority to acquire land under section 25 of the Harbours Act stating that if this land adjoins land it already owns then it could be acquired particularly if it would benefit the port in terms of adding to development or resale potential.

This power would indeed benefit the port of Belfast which has an abundance of land and could therefore expand in size giving it great potential as a key port, not only in Northern Ireland but across the island of Ireland. A report issued by the Port Authorities of Northern Ireland on the implications of the port policy review for Northern Ireland identified this as a key power to the success of ports in Northern Ireland:

“To enable NI Ports to respond appropriately to this combination of opportunity and threat, it is vital that they are able to meet the market’s needs for capacity and services within an appropriate timeframe”.⁴

CLAUSE 3: POWERS IN RELATION TO PROMOTION OF HARBOUR AND AS SHIP’S AGENT

This clause would allow the port to promote tourism which would be likely to benefit it by generating income from increased numbers of tourist ships while the tourists

³ (DEFM) Draft Explanatory and Financial Memorandum

⁴ NI Harbour Authorities (2006) “Governments Ports Policy Review: A Report on the issues affecting the Trust Ports sector in Northern Ireland”. 30th June 2006 [\[online\]](#) Page 10.

themselves would bring a much wider benefit to the Northern Ireland economy through their spending while in port.

The clause further provides the port with the power to provide ship's agency services to vessels and owners of vessels. Ships agents carry out a number of roles and are an invaluable resource to all those who use the port, services which they may arrange include pilotage; schedule tugs and line service, provide customs brokerage and order services for the ship. In short, anything a ship needs while in port is coordinated through the ship's agent and therefore this too could provide a lucrative source of income which could benefit the port and the wider economy.

CLAUSE 4: POWER TO INVEST OUTSIDE NORTHERN IRELAND

Clause 4 is an amendment to section 24 of the Harbours Act (Northern Ireland) 1970 which deals with "the power of harbour Authorities to acquire a harbour business or shares in a harbour business". Section 24 provides Harbour Authorities with the power to acquire any business or undertaking that is relevant i.e. involved in harbour operations so long as it gets permission from the Ministry which would now be the Department.

The clause calls for subsection 4 to be substituted with a new subsection that, while retaining the harbour authorities' power to acquire relevant businesses makes it clear that this includes the power to invest in, or buy businesses from outside Northern Ireland.

Deals such as acquiring a foreign company or shares in such a company constitute a commercial activity and as such are subject to the same guidelines identified in clause 1(3) which state that commercial activities must be undertaken by a subsidiary company.

CLAUSE 5: REPEAL OF THE POWER OF THE DEPARTMENT FOR REGIONAL DEVELOPMENT TO GIVE DIRECTIONS

Article 4 of the Harbours (Northern Ireland) Order 2002 "allows the Department to issue directions of both a general or specific nature to the Harbour Authorities in the exercise of their functions".⁵ This clause repeals this power in line with the main aim of the Bill.

CLAUSE 6: REPEAL OF POWERS IN RELATIONS TO RELEVANT PORT AUTHORITIES

Article 12 of the Ports (Northern Ireland) Order 1994 allowed the department to compel port authorities to form a limited company (registered under the Companies (Northern Ireland) Order 1996) if it met the annual turnover requirement. This would have the effect of protecting the Ports assets by separating what the company owns from what the Port owns in line with the requirement in clause 1 to run all commercial activities through a subsidiary company.

In repealing this power this clause essentially enables the powers identified in clause 1 which allow the Port Authority to carry out any commercial activity the authority feels will benefit it and the wider economy, without consulting the Department.

CLAUSE 7: POWERS TO PROMOTE LEISURE ACTIVITIES AND AQUACULTURE

This clause allows the harbour authority to promote leisure activities or aquaculture activities within the harbour limits

⁵ Assembly Research and Library Service (2002) "The Harbours Bill". Bill Paper 77/02. NI. Assembly [\[online\]](#)

CLAUSE 8: POWER TO PROVIDE ADVICE AND ASSISTANCE

This clause allows the harbour authority to act as a consultant to outside bodies or individuals on relevant issues such as improvement, maintenance and management of harbours.

CLAUSE 9: POWER TO GIVE HARBOUR DIRECTIONS WITH RESPECT TO SHIPS

This clause relates to the safety elements of the Bill and allows a harbour authority to give “harbour directions” in respect of ships either within the harbour or when entering or leaving the harbour. The harbour may give directions which relate to the movement of ships; mooring or unmooring; equipment and the manning of ships and the person who at that time has command of the ship may have to provide information for the harbour authority for this.

CLAUSE 10: PROCEDURE FOR HARBOUR DIRECTIONS

This clause relates directly to the previous clause stating that harbour directions must be provided in writing following consultation with harbour users. These directions must then be published in a specialist shipping publication and made available to everyone who requests them although the harbour authority has the power to charge for this.

CLAUSE 11: ENFORCEMENT OF HARBOUR DIRECTIONS

This clause makes it clear that failure to comply with harbour directions is an offence and the person found guilty of the offence can be fined, up to level four on the scale which is a maximum of £2,500⁶.

CLAUSE 12: POWER TO REQUIRE SECURITY

Section 5 of the Harbours Act (Northern Ireland) 1970 allows the harbour authorities to levy certain charges as it sees fit for the improving, maintaining and managing of a harbour. This clause is in addition to the powers given and allows the harbour authority to seek security from anybody in relation to payment of these charges.

CLAUSE 13: ADDITIONAL POWERS FOR HARBOUR AUTHORITIES

Schedule 1 paragraph 8 of the Harbours Act (Northern Ireland) 1970 states that a Harbour Order may be made to agree or change the role of a harbour authority. This clause adds to this and allows the harbour authority to close part of a harbour or reduce the facilities it offers.

Paragraph 9 states that an Order may be made to allow for the movement of ships to be controlled in the interests of safety of ships and to allow them to move freely both in the harbour and on their approach to the harbour. This clause allows the harbour authority to reserve a part of the harbour for the exclusive use of a ship or to carry out any other activity.

This clause adds an additional paragraph allowing for the Department to make an order for anything which it deems will allow the harbour to function efficiently.

CLAUSE 14: INTERFERENCE WITH SAFETY APPARATUS

This clause states it is an offence to intentionally or recklessly interfere with any safety equipment supplied by the harbour, with the exception that it is done in an emergency to prevent loss or damage of property or injury to a person or if consent

⁶ OPSI [online] <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2904760>
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has been gained from the harbour authority. A person found guilty of a interfering with equipment illegally will face a fine up to £1,000⁷

CLAUSE 15: COMPULSORY ACQUISITION BY HARBOUR AUTHORITIES

This clause updates section 26 of the harbours Act (Northern Ireland) 1970 which identifies the procedures by which a harbour authority may acquire land compulsorily. The procedures to be used are those provided by schedule 6 of the Local Government Act (Northern Ireland) 1972.

CLAUSE 16: DEFINITION OF "SHIP"

The harbours Act (Northern Ireland) 1970 defines a ship as any vessel used in navigation, seaplanes on the surface of water and hovercraft. This clause calls for the omission of the words "used in navigation" And where it says "and hovercraft" this is to be expanded to hovercraft, sailboards, surfboards (whether powered or otherwise) and personal watercraft (for recreation). This means that the use of such craft will be subject to harbours legislation and thus to controls and regulatory framework on the same basis as any other ships or vessels⁸.

CLAUSE 17: SAFETY DIRECTIONS

This clause allow the relevant Department (Department for Regional Development, except in respect of fishery harbours where it is the Department of Agriculture and Rural Development), to issue directions in the interests of safety to a harbour authority when it is considered that the harbour authority has failed in its safety function. The authority is considered to have failed when there is an instance of death or injury to a person, damage to a ship or its cargo or when the environment has or is likely to be polluted.

Such a direction may require the harbour authority to either carry out a function or indeed cease to carry out a given function, but before this the Department must consult with the authority and anybody else it feels is appropriate. Any failure to comply with such a direction is considered an offence and the authority is liable for a fine up to £2,500⁹.

CLAUSE 18: HARBOUR MASTER: QUALIFICATIONS

This clause permits the relevant departments to specify qualifications for harbour masters by means of regulations in the interests of safety. The regulations would allow for the granting of a certificate based on the qualifications held, where a harbour authority wished to appoint a harbour master.

CLAUSE 19: SECTION 18 SUPPLEMENTAL

This clause sets out the detail of the qualification regulations provided for in clause 18. It also makes it an offence for any person to make a false statement for the purpose of obtaining a certificate and if convicted they would be subject to a fine of up to £5,000

CLAUSE 20: INTERPRETATION

This clause sets out the definitions relevant to this Bill and defines: "*Designated harbour authority*" as having the same definition as in the Harbours (Northern Ireland) Order 2002. This stated that "designated harbour authority" means any of the following harbour authorities -

⁷ Ibid

⁸ (DEFM) Draft Explanatory and Financial Memorandum

⁹ OPSI [online] <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2904760>
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- (a) the Belfast Harbour Commissioners;
- (b) the Coleraine Harbour Commissioners;
- (c) the Harbour of Carlingford Lough Improvement Commissioners;
- (d) the Londonderry Port and Harbour Commissioners;
- (e) the Warrenpoint Harbour Authority.

“Fishery harbour” has the meaning given in Article 1(2) of the Ministries (Transfer of Functions) Order (Northern Ireland) 1973. This defines “fishery harbour” as any harbour which is the Fishery Harbour Authority is responsible for.

“The Harbours Act” means the Harbours Act (Northern Ireland) 1970.

“Subsidiary” and *“wholly owned subsidiary”* has the meaning given by section 1159 of the Companies Act 2006:

A company is a “subsidiary” of another company, its “holding company”, if that other company—

- (a) holds a majority of the voting rights in it, or
- (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
- (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company that is itself a subsidiary of that other company.

A company is a *“wholly-owned subsidiary”* of another company if it has no members except that other and that other’s wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.

CLAUSE 21: REPEALS

This clause refers to the repeals and their extent. The detail and the extent of the repeals are set out in the schedule of the bill

CLAUSE 22: SHORT TITLE AND COMMENCEMENT

This clause states that this bill may be cited as the Harbours Act (Northern Ireland) 2008 and states that it will come into operation 2 months after it receives Royal Assent.

PROPOSED SUBORDINATE LEGISLATION

The Department for Regional Development consultation paper states that the individual Harbour Orders will be brought forward at a later stage at which time full consultation on the detailed provisions will take place. However, the consultation document does provide an outline of the proposed policy content. The Harbour Orders to be brought forward will provide a revised constitution for the Belfast Harbour Commissioners; for the Londonderry Port and Harbour Commissioners; and the Warrenpoint Harbour Authority.

It is proposed that Coleraine Harbour should become a municipal port with ownership being transferred from Coleraine Harbour Commissioners to Coleraine Borough Council. This change in status can be effected by means of a specific order in accordance with the provisions of Section 1 of, and Schedule 1 to the Harbours Act (Northern Ireland) 1970. This proposal is made by the Minister for Regional Development on consideration of the presentations provided by the Coleraine Harbour Commission and Coleraine Borough Council.

The Minister agreed with the view of Coleraine Borough Council who feel that a shift away from traditional port activity to a focus on the regeneration of the Harbour area would encourage private sector investment and be most beneficial to the port, while Coleraine Harbour Commissioners feel they would benefit from the extended commercial powers proposed to be given to trust ports.

THE REVISED CONSTITUTION

It is proposed that the Harbour Orders will contain the following stipulations with regards, the constitution of the three Harbour Authorities:

- The maximum and minimum members of each board shall be specified;
- The Minister shall appoint a Chairman of each board;
- The Chairman shall not be an officer of the Commissioners or the Authority;
- The Minister will appoint up to four serving district councillors to the board Belfast Harbour Commissioners;
- Three to the board of the Londonderry Port and Harbour Commissioners and Warrenpoint Harbour Authority;
- The remaining members will be appointed by the Commissioners or Authority in accordance with the procedural guidance set down in the revised Code of Practice this states that appointments must only be made when:
 - The person is deemed fit for purpose
 - The person should be appointed based on merit and the process must be transparent
 - Appointment processes and practices should be efficient, cost-effective and in line with best practice.
 - Appointments must result from an open and competitive selection process operated by a panel comprising the Chairman; the Deputy Chairman appointed from the remaining non-executive board member; an independent assessor; and a Departmental official.
 - Every stage of the appointments process must be capable of being objectively justified.
 - The appointment process must ensure that applicants demonstrate their commitment to *the Guiding Principles of Trust Port Board Members* (see annex 1).
- The Chief Executive and Finance Officer of each Commissioners or Authority will be appointed in ex-officio capacity and the commissioners or authority have the option of appointing one further officer to the board in the same way which essentially means they are appointed to the board by virtue of holding another office.
- One of the appointees who is not serving in an ex-officio capacity has to be designated as Deputy Chairman; and
- The Deputy Chairman in the case where there is no chairman will act as chairman until the Department appoints one.

Paragraph 4.3 states that in light of the constitutional changes provisions will be made in the Harbour Orders to ensure that the transition is a smooth one and causes minimum disruption to the ports' business.

The Department (Minister) must appoint board members based on the procedural guidance of the Commissioner for Public Appointments (OCPA (NI)). This does not apply to the appointments which are to be made by the Commissioners or the Authority however they must adhere to the procedural guidance for appointments in

the Code of Practice (as discussed). The Harbour Orders will, provide guidance on Disqualification and Remuneration of board members and these will be supplemented by the Code of Practice.

In terms of Port Business, the Harbour Orders will provide procedural guidance for board meetings.

In line with the primary aim of the Bill, the Harbour Orders will adjust the borrowing powers of the ports, making them more “commercially-orientated”. This means they can borrow more money to make themselves commercially viable but the maximum borrowings must reflect the previous years accounts i.e. they can borrow up to 70% of their net assets as detailed in the ports audited accounts.

CODE OF PRACTICE

The result of this bill will be to give ports the opportunity to operate more like a private company would in a highly competitive market, freeing it from much of the bureaucracy associated with being a Public Corporation. However, while removing a number of legislative controls through this Bill, the Minister has maintained the need for the ports to remain publicly accountable given the significance of the assets which they control on its behalf. This will be done through the provision of a code of practice which they must adhere to in accordance with Article 6 of the Harbours (Northern Ireland) Order 2002.

The code of best practice outlines elements of good governance and best practice in respect of public appointments, accountability and transparency.

ANNEX 1

RESPONSIBILITIES OF INDIVIDUAL BOARD MEMBERS

Individual board members should be aware of their wider responsibilities as members of the board. They should follow the Guiding Principles of Trust Port Members set out below. These are adapted from the Cabinet Office code of practice for board members of non-departmental public bodies. These are:

INDEPENDENCE

All board members are appointed to act independently in the best interests of the trust port and all of its stakeholders, both present and future.

SELFLESSNESS

Board members should take decisions solely in terms of the interest of the stakeholders of the trust port. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

INTEGRITY

Board members should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

OBJECTIVITY

In carrying out trust port business, including making appointments, awarding contracts, or recommending individuals for rewards and benefits, board members should make choices only on merit.

ACCOUNTABILITY

Board members are accountable for their decisions and actions to all stakeholders of the trust port and should submit themselves to whatever scrutiny is appropriate to their office.

OPENNESS

Board members should be as open as possible with all stakeholders about the decisions and actions that they take. They should publicise the reasons for their decisions and restrict information only to the extent that matters of commercial or personal confidentiality are involved.

HONESTY

Board members have a duty to declare any private interests which might influence their trust port duties and to take steps to resolve any conflict arising in a way that protects the interests of stakeholders of the trust port.

Leadership

Board members should promote and support these principles by leadership and example.

BOARD MEMBERS MUST:

- Undertake, as a condition of appointment, to comply at all times with this Code of Practice and with rules relating to the membership of public bodies;
- Act in good faith and in the best interests of the board;

- Not misuse information gained in the course of their public service for personal gain or for political purposes, nor seek to use the opportunity of public service to promote their private interests or those of connected persons, firms, businesses or other organisations;
- Ensure that they honour and support board decisions, both individually and collectively. (Should a board member fundamentally disagree with a decision of the board then that member should carefully consider their position).
- Ensure that they comply with any rules on the acceptance of gifts and hospitality which may be issued by the board.
- Members are free to engage in political activities but must exercise proper discretion in regard to the work of the board, recognising their corporate responsibilities as board members.

Source: DRD (2008) *“Draft – Code of Practice for Northern Ireland Trust Ports”*. 21st May 2008, DRD: Belfast