

Module 03 – Company Law Fundamentals

Lecture Title: Officers of the company (Part 1)



Lecturer: Nicola Jaccarini

Date: Monday 15th November 2021

Diploma in Law (Malta)



CAMILLERI PREZIOSI
ADVOCATES

MAMO TCV
ADVOCATES

Overview

1. The functions and responsibilities of the Board of Directors
2. The various types of directors
3. The appointment and removal of directors
4. Other officers of the company: company secretary
5. Auditors



To recap: the basic relationships

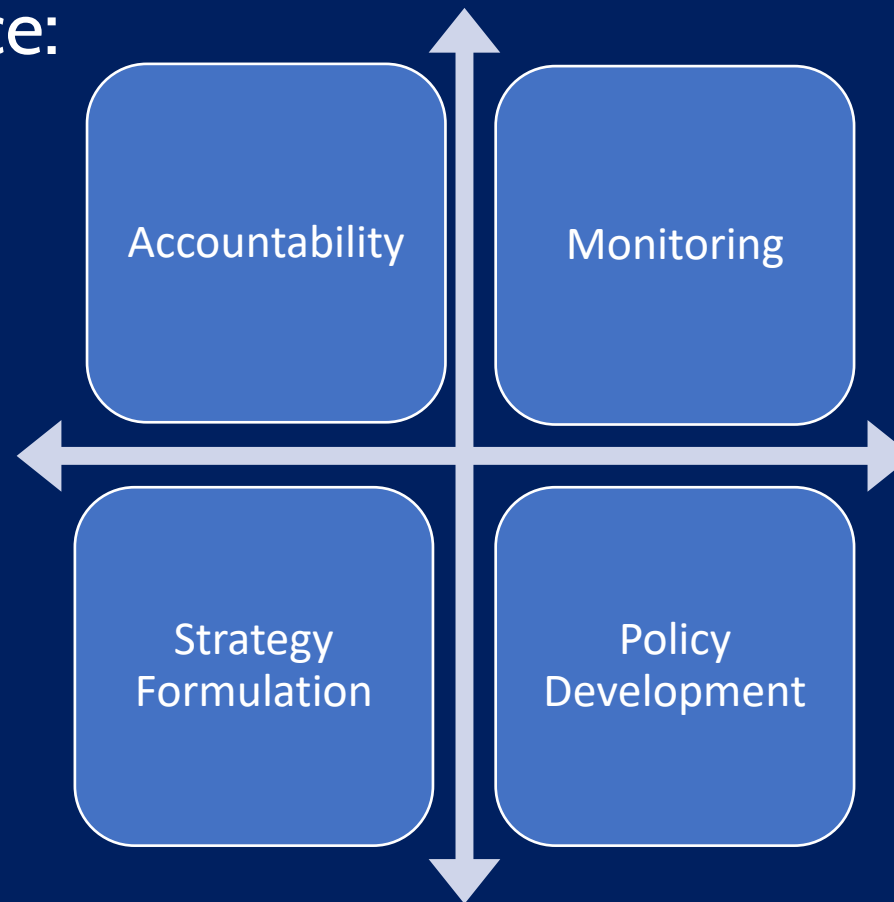
At this stage, we should recall the basic relationships of a company - where shareholders inject their capital; set out a number of objects that are to be attained by the use of that capital; and then entrust that capital to the directors with a view to attaining those objects.

Keeping this in mind, there can be no doubt that the directors ought to exercise their skills to achieve the objects set out in their mandate – the primacy of creating and adding shareholder value is inherent in the very underlying fabric of the company and its incorporation.



The main roles and responsibilities of the Board

- The Code of Principles of Good Corporate Governance provides that the Board has the first level of responsibility of executing four basic roles of corporate governance:



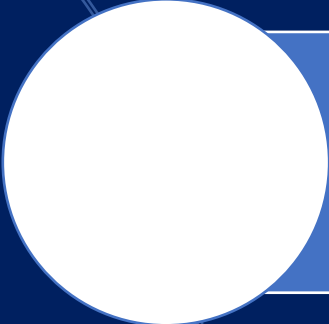
The main roles and responsibilities of the Board

Entrusted with the general administration and management of the company

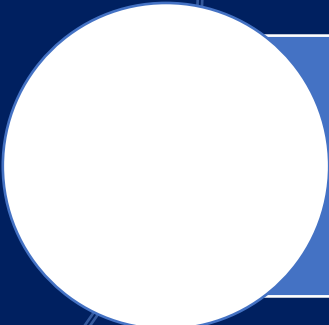
Define, in clear and concise terms, the strategy and policy of the company, in a way which may be measured in a tangible manner

Oversee the proper and effective implementation of the company's strategy and design procedures, processes and controls

The main roles and responsibilities of the Board



Establish a clear internal and external reporting system, so as to ensure that it has continuous access to accurate, relevant and timely information so as to take decisions on the basis of an informed assessment



Continuously assess and monitor the company's present and future operations, opportunities, threats and risks, and its current and future strengths and weaknesses

Types of directors

De jure and *de facto* directors

Individual and corporate directors

Executive and non-executive directors

Shadow directors

Alternate directors



De jure and *de facto* directors

Article 2(1) of the Companies Act states that the term 'director' incorporates: 'any person occupying the position of director of a company by whatever name he may be called carrying out the substantially the same functions in relation to the direction of the company as those carried out by a director.'

The Companies Act therefore recognises that a director may either be:

- ✓ Formally appointed to the Board ('*de jure* director')
- ✓ Not formally appointed but who in practice assumes the functions of a director ('*de facto* director')



De facto directors

Re Hydrodam (Corby) Ltd (1994) set out the test to determine whether an individual is a *de facto* director:

- ✓ The person undertook functions in relation to the company
- ✓ Which could be properly discharged only by a director
- ✓ He is a person who holds out, claims or purports to be a director
- ✓ Although never actually appointed as such



Individual and corporate directors

Almost invariably, directors are individuals. An attractive feature of our law however is that the Companies Act recognises the possibility of having corporate directors (that is, a director which is a body corporate).

However, a company whose securities are admitted to listing on the Malta Stock Exchange is not permitted to have corporate directors, and may only have individual directors. Similarly, companies having the status of private exempt companies are precluded from the Companies Act from having any corporate directors.



Executive and non-executive directors

Executive directors

- Concerned with the actual *day-to-day* management of the company
- Carry out executive functions in addition to their board duties
- Generally, they will have extensive powers delegated to them by the Articles or by the board

Non-executive directors

- Not involved in the actual *day-to-day* running of the company
- Do not devote their full time to the company
- More commonly found in larger companies, in which they perform an advisory and supervisory role

Shadow directors

- De facto directors should be distinguished from shadow directors
- Shadow directors are those individuals who are in the habit of giving directives, directions or instructions to the directors of a company, and in accordance with whose directions or instructions the directors of the company are accustomed to act



Alternate directors

- An alternate director is appointed by a director and is usually entitled, under the Articles, to perform all the functions of his appointer as a director in his absence
- It should be emphasised that the power to appoint alternate directors must be expressly catered for in the Articles of Association. A director, being a mandatary of the company cannot, on the principle of *delegatus non potest delegare*, delegate his authority and powers to another person unless expressly empowered to do so



Independent directors

- The Companies Act does not require companies to have independent directors sitting on their boards BUT listed companies are required to have a minimum number of independent directors in terms of the Capital Markets Rules
- Capital Markets Rules state that a director shall be considered independent only if he is free of any business, family, or other relationship with the issuer, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement.





Diploma in Law (Malta)



CAMILLERI PREZIOSI

ADVOCATES

MAMO TCV

ADVOCATES

Appointment of directors: can anyone be a director?

- The default position is that there are no formal qualifications required to act as a director in Malta
- However, as certain industries are subject to industry-specific risks, and thus require industry-specific skills, knowledge and experience, there are instances in which in order to be deemed qualified to be appointed as a director, an individual is required to possess the appropriate and adequate knowledge and experience in line with the concept of 'fit and proper assessments' and the need for prior approval of the relevant competent authority



Manner of appointment

- The first directors of the company are appointed by the subscribers to the initial share capital of the company, by their identification in the original M&A delivered for registration to the Malta Business Registry
- The subsequent directors of the company are typically appointed by ordinary resolution of the shareholders in general meeting
- Any casual vacancies are appointed by the board of directors itself



Term of appointment

- The Articles of Association may hold that directors are in office for a fixed term, or they may provide for a rotating system for the retirement of directors
- If the Articles of Association are silent, directors hold office from the end of one annual general meeting to the next and if not removed / if they do not resign, they are automatically reappointed



Appointment of directors (new requirements)

- Act LX of 2021 introduced new requirements in connection with the appointment of directors:
 - ✓ In the case of the first directors, such directors must have personally signed the M&A indicating their consent to act as directors or have otherwise signed and delivered to the Registrar for registration a consent in writing to so act;
 - ✓ In the case of subsequent directors, such directors must have personally, signed and delivered to the Registrar for registration a consent to the same effect



Appointment of directors (new requirements)

- Act LX of 2021 introduced new requirements in connection with the appointment of directors:
 - ✓ Upon being appointed director of a company, such person is to declare in the prescribed form, whether he is aware of any circumstances which could lead to a disqualification from appointment or to hold office as a director of a company



Number of directors

The number of directors may be stated either as a fixed number or as a range

It is also permissible to simply state the maximum number of directors. In this case, the minimum number is automatically determined by the Companies Act:

Private Companies

1 director

Public Companies

2 directors



Removal of directors

1. Ordinary Resolution: The power granted to the shareholders of the company to remove a director by way of ordinary resolution is non-negotiable – notwithstanding any term in the M&As of the company, or any agreement between it and the director, the shareholders may exercise their right to remove a director by way of ordinary resolution
2. Expiration of Term
3. Rotation
4. Retirement
5. Resignation
6. Disqualification
7. Court order – Av. Jonathan Abela Fiorentino v Vroon Containers (2015)





Diploma in Law (Malta)



CAMILLERI PREZIOSI
ADVOCATES

MAMO TCV
ADVOCATES

Disqualifications: mandatory disqualifications

Article 142(1) of the Companies Act provides that a person shall not be qualified for appointment or to hold office as a director or company secretary if:

- ❖ He is interdicted or incapacitated or is an undischarged bankrupt;
- ❖ He has been convicted of any of the crimes affecting public trust or of theft or of fraud or of knowingly receiving property obtained by theft or fraud;
- ❖ He is a minor who has not been emancipated; or
- ❖ He is subject to a disqualification order under Article 320 of the Companies Act

Disqualifications: mandatory disqualifications

Act LX of 2021 introduced the following new ground for mandatory disqualification of a director or company secretary:

- ❖ If such person is holding such office as a company service provider in terms of the Company Service Providers Act without having obtained the necessary authorisation by the MFSA to provide such service



Disqualifications: discretionary disqualifications

In 2020, a new sub-article 142(4) was added to the Companies Act, which states that the Registrar may restrict a person from being appointed as director or company secretary of a proposed commercial partnership or an existing company if he is or has been a director or secretary of an existing Maltese company in relation to which he has breached the provisions of this Act for three times within a period of two years, that shall be reckoned from the first breach and he is still in default as to one or more breaches.



Disqualifications: discretionary disqualifications

Act LX of 2021 also introduced a new sub-article 142(6) which states that any disqualification which is in force or information relevant for disqualification in another Member State shall be taken into account and the Registrar of Companies may refuse the appointment of a person as a director of a company where such person would be disqualified from acting as a director in another Member State.





Diploma in Law (Malta)



CAMILLERI PREZIOSI

ADVOCATES

MAMO TCV

ADVOCATES

Company Secretary

Article 2(1) of the Companies Act states that an ‘officer’ of the company:

‘in relation to a company, includes a director, manager or company secretary, but does not include an auditor’



Company Secretary

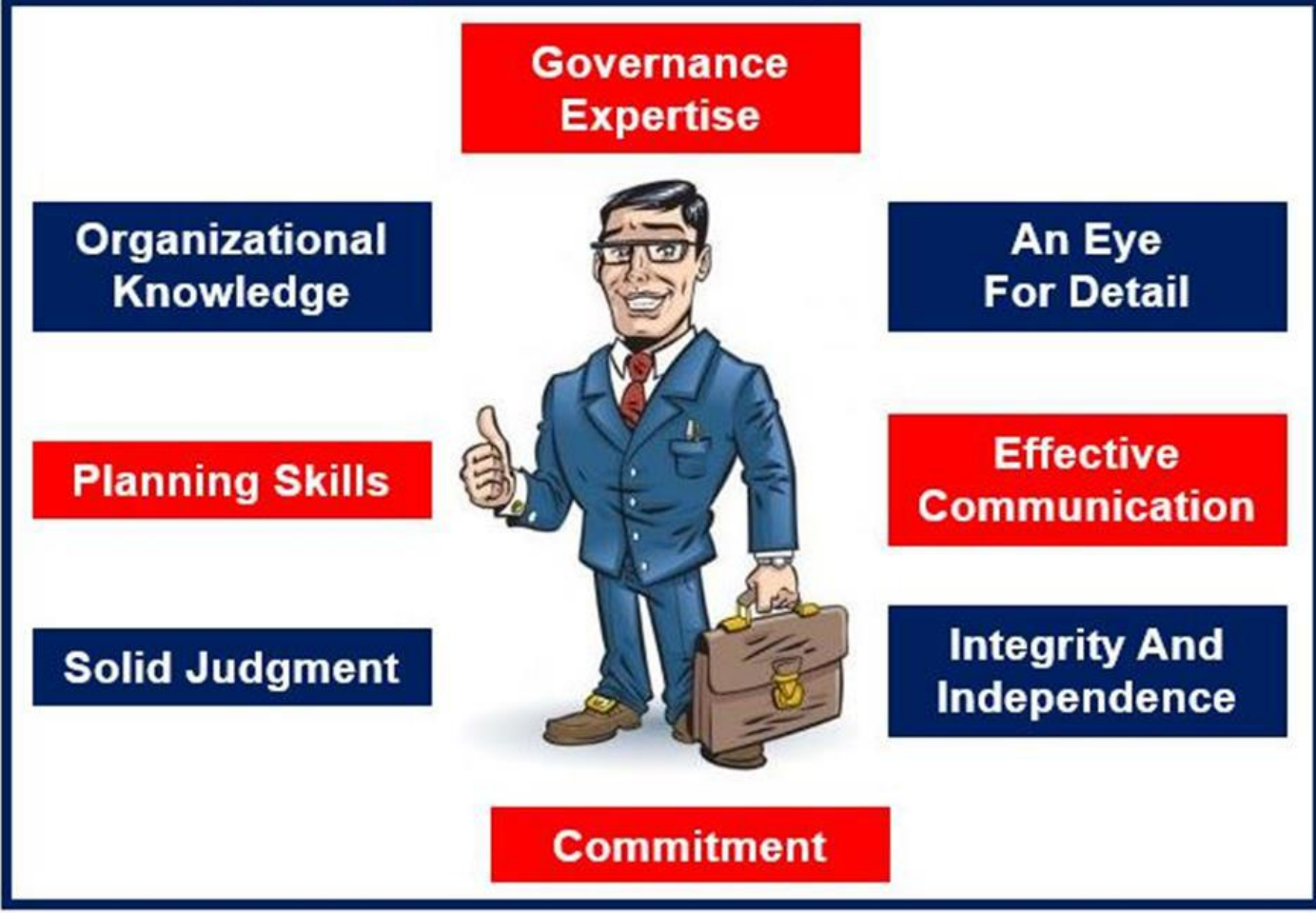
Article 138(1) of the Companies Act provides that: 'Every company shall have a company secretary' *but* no company shall:

- (1) Have as company secretary its sole director (*unless the company is a private exempt company*);
- (2) Have as sole director of the company a body corporate, the sole director of which is company secretary of the company;
- (3) Have as company secretary a body corporate, unless that body corporate is registered as a company service provider or does not require registration as such



Company Secretary

Company Secretary Attributes



Appointment and removal

The first company secretary is appointed by the subscribers to the M&As.

Subsequent company secretaries are appointed by the directors, which appointment shall be effected within 14 days from when the post becomes vacant.

The company secretary is removed by the board of directors.



Notifications to the MBR

- Each appointment or removal of a director or company secretary shall need to be notified to the MBR within 14 days from the effective date of appointment / removal
- KYC documentation would also need to be submitted

Form K

No. of Company _____

COMPANIES ACT, 1995

Notification of changes among directors or company secretary or in the representation of a company

Pursuant to Section 146 (1)

Name of Company _____

Delivered by _____

To the Registrar of Companies:

(a) _____

hereby gives notice in accordance with Section 146(1) of the Companies Act, 1995 that:-

Effective Date of Change _____

Signature _____

Director/Secretary/Manager*

Dated this _____ day of _____ of the year _____

This form must be completed in typed form

(a) State company name.

* Delete as necessary.



Auditors

- At each annual general meeting at which the annual accounts are laid, the company shall appoint an auditor/s to hold office from the end of that annual general meeting until the end of the next annual general meeting
- The first auditors of the company may be appointed by the directors at any time before the first annual general meeting at which the annual accounts are laid, and they shall hold office until the end of that meeting
- Casual vacancies shall be filled by the directors, however they may also be filled by the company in general meeting



Auditors

- An auditor is not an officer of the company, and in fact, an auditor must at all times adhere to the rules on independence and professional ethics set out in the Code of Ethics and any other regulations, directives or guidelines issued in terms of the Accountancy Profession Act
- The auditors of a company shall have a right of access at all times to the company's accounting records, accounts and vouchers and shall be entitled to require from the company's officers such information and explanations as they think necessary for the performance of their duties as auditors



Auditors

- The auditors of a company shall be entitled:
 - ✓ To receive all notices of, and other communications relating to, any general meeting which a member of the company is entitled to receive;
 - ✓ To attend any general meeting of the company; and
 - ✓ To be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors



Removal of auditors

- The company may, at any time, remove an auditor from office but a proper ground for dismissal must be shown
- Auditors who shall be removed / not re-appointed at a general meeting are to be provided with notice of the general meeting and the reasons for their dismissal. They may make representations to the company and to the shareholders
- Once a resolution removing an auditor is passed at a general meeting, the company shall be obliged to give notice to the MBR within 14 days. The company shall also be obliged to, within the same period, notify the Accountancy Board and give an adequate explanation of the reasons for removal of the auditor



Outgoing auditors' statement

- Any outgoing auditor shall deposit at the company's registered office a statement of any circumstances connected with his ceasing to hold office, which he considers should be brought to the attention of the members or creditors of the company, or if considers that there are no such circumstances, a statement that there are none.



Auditors

- Certain specific rules apply in relation to the appointment of auditors of public interest entities ('PIEs')
- PIEs include listed companies, credit institutions and insurance undertakings
- For example, the general rule is that an auditor of a PIE cannot act as such for more than 10 years, and after the expiry of this 10 year period, such auditor cannot be reappointed as auditor of that PIE before the lapse of four years





Diploma in Law (Malta)



CAMILLERI PREZIOSI

ADVOCATES

MAMO TCV

ADVOCATES