Module 03 – Company Law Fundamentals

Lecture Title: Officers of the company (Part 1)

Lecturer: Maxine Gauci

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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

Who are the officers of the company?

Article 2 of the Companies Act (Cap. 386 of the laws of Malta) defines an 'officer' as follows:

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

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.

To recap: the basic relationships

Shareholders and directors have two completely different roles in a company.

THE SHAREHOLDERS OWN THE COMPANY

THE DIRECTORS MANAGE THE COMPANY

It is the segregation between the ownership and the management of the company, and the consequential need to align the two in the best interests of the company, which gives rise to **the need for good corporate governance**.

Good corporate governance

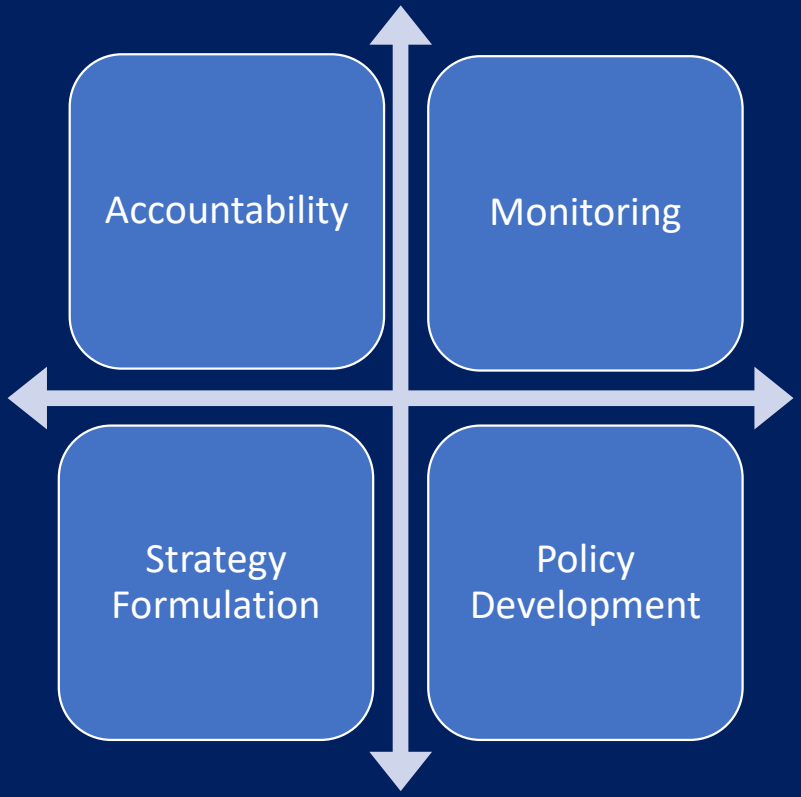
Corporate governance is **the system by which companies are directed and controlled**.

It involves a set of relationships between a company's management, its board, its shareholders and other stakeholders.

Corporate governance may be described as a system of inter-dependent elements, or checks and balances, that come together to support the best interests of the company.

Good corporate governance

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, will have extensive powers delegated to them by the Articles of Association 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 of Association, **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**.

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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 (2019)

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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.

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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

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'*

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**.

Form K

Company Reg. No. .....

COMPANIES ACT

Notification of changes among directors or company secretary or in the representation of the company and the directors' consent and declaration for appointment

pursuant to Articles 139(1), 139(5) and 146(1)

Name of Company .....

Delivered by .....

To the Registrar of Companies:

Section A - Change in directors or company secretary or legal representation of a company

(a) ..... hereby gives notice in accordance with article 146(1) of the Companies Act that:

.....

.....

.....

Effective date of change **(b)** .....

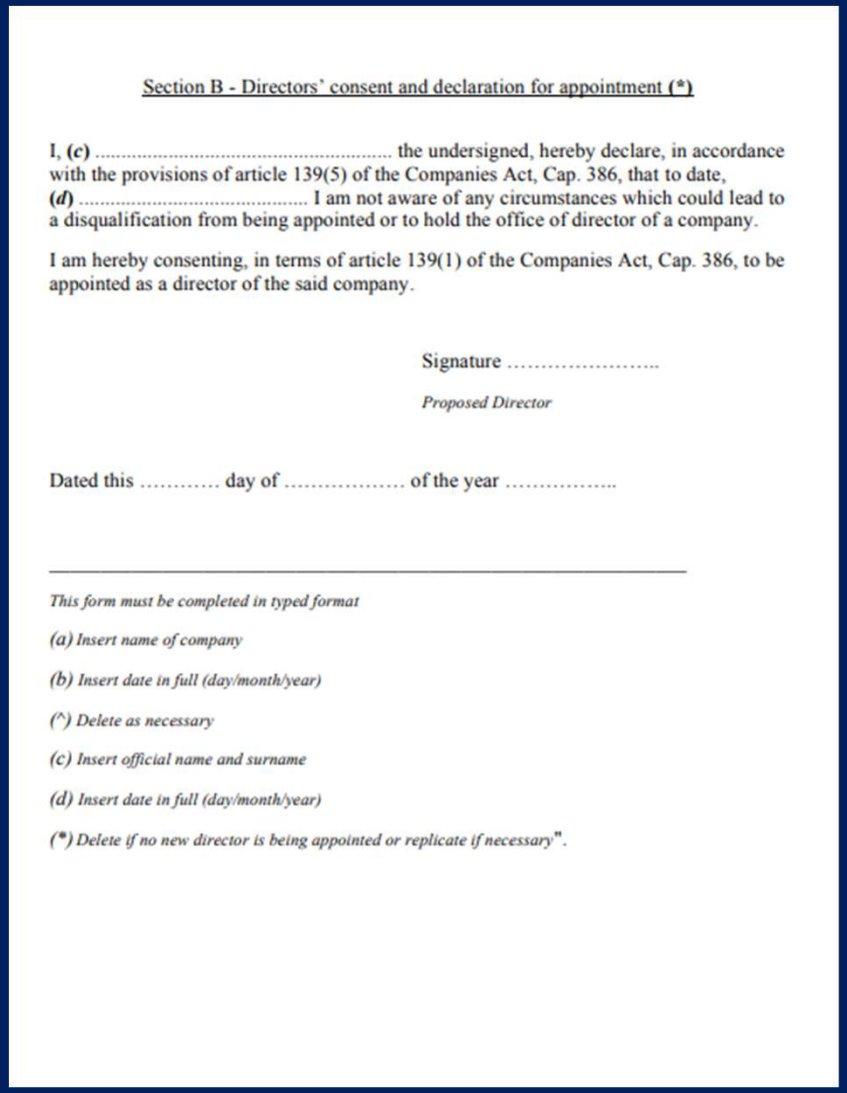
Signature.....

Director/Secretary/Manager ***(^)***

Dated this ..... day of ..... of the year .....

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.



Section B - Directors' consent and declaration for appointment (*)

I, (c) ..... the undersigned, hereby declare, in accordance with the provisions of article 139(5) of the Companies Act, Cap. 386, that to date, (d) ..... I am not aware of any circumstances which could lead to a disqualification from being appointed or to hold the office of director of a company.

I am hereby consenting, in terms of article 139(1) of the Companies Act, Cap. 386, to be appointed as a director of the said company.

Signature .....

Proposed Director

Dated this ..... day of ..... of the year .....

This form must be completed in typed format

(a) Insert name of company

(b) Insert date in full (day/month/year)

(^) Delete as necessary

(c) Insert official name and surname

(d) Insert date in full (day/month/year)

(*) Delete if no new director is being appointed or replicate if necessary".

Notifications to the MBR

This applies to directors only.

As mentioned previously, upon being appointed director of a company, such person shall be required to be submit this form to MBR.

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 meting 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 adequ 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.

Resignation of auditors

- An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's registered office. Such notice shall not be effective unless it is accompanied by an outgoing statement.
- The company shall within 14 days of the deposit of a notice of resignation give notice thereof to the Registrar for registration.
- Where an auditor's notice of resignation is accompanied by a statement of circumstances which he considers should be brought to the attention of members or creditors of the company, the resigning auditor may deposit with the notice a signed requisition calling on the directors of the company to convene an EGM for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting.

Auditors of public interest entities

- 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
- A PIE shall appoint an auditor for an initial engagement of at least one year, which engagement may be renewed
- Neither the initial engagement of a particular auditor by a PIE, nor this in combination with any renewed engagements therewith shall exceed a maximum duration of 10 years
- After the expiry of this 10 year period, such auditor shall not undertake the statutory audit of the same PIE within the following four-year period

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