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Law for Directors & Managers

# Lecture 7

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## Officers of the Company

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### Part 1

CAMILLERI PREZIOSI  
— ADVOCATES —

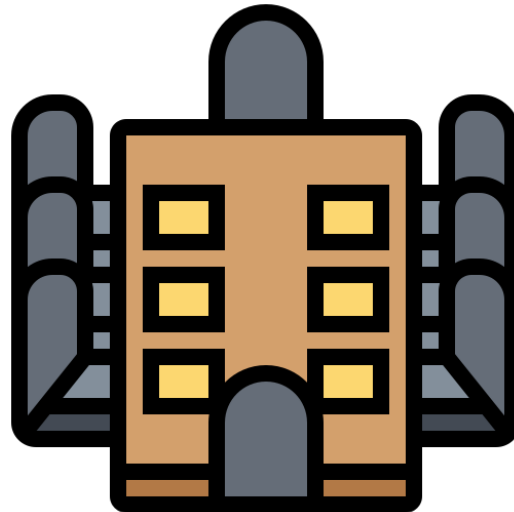


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# Introduction

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The **business of a company** is managed by the **directors**. The directors are expected to act collectively as a board, although the memorandum or articles of association may also provide for delegation of extensive powers to smaller committees or even to individual directors.



# Article 136A of the CA

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*“A director of a company shall be bound to act honestly and in good faith in the best interests of the company.”*

In addition, the directors of a company shall promote the well-being of the company and shall be responsible for:

- (A) The general governance of the company and its proper administration and management; and**
- (B) The general supervision of its affairs.**



The term “**director**” is not defined in the CA – it simply provides that “**director**” includes:

*“any person occupying the position of director of a company by whatever name he may be called carrying out substantially the same functions in relation to the director of the company as those carried out by a director”.*

Almost invariably, directors are **individuals** (physical persons). The CA however recognises the notion of a “**corporate director**” and occasionally companies do have bodies corporate as directors. A “**body corporate**” is defined as an entity having a legal personality distinct from that of its members, and includes a foreign corporation.

*A company whose securities are listed on the Malta Stock Exchange may however, only have individuals as directors.*



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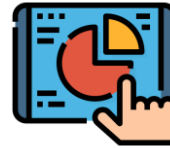
# Function and Composition of the Board



# Functions of the Board

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1. Define the strategy and policy of the company



2. Establish an internal and external reporting system



3. Assess and monitor the company's operations, opportunities, threats and risk





# Composition of the Board

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1. **The Board of Directors should be of sufficient size to meet the requirements of the business**
2. **Should be composed of members who have the required knowledge**
3. **Listed companies should have a minimum number of non-executive directors**
4. **It is recommended that at least 1/3 of the board members are non-executive and the majority of these should be independent**

# Responsibilities of the Board

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The **Code of Principles of Good Corporate Governance for Listed Entities** states that **all directors should:**

- i. exercise prudent and effective controls enabling risk to be assessed and managed;
- ii. be accountable for all actions or non-actions arising from discussion and actions taken by them or their delegates;
- iii. determine the company's strategic aims and organisational structure;
- iv. regularly review management performance and ensure that the company has the right mix of financial and human resources to meet its objectives and improve the economic and commercial prosperity of the company;

# Responsibilities of the Board

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The **Code of Principles of Good Corporate Governance for Listed Entities** states that **all directors should:**

- v. acquire a broad knowledge of the business of the company;
- vi. be aware of and be conversant with the statutory and regulatory requirements connected to the business of the company;
- vii. allocate sufficient time to perform their responsibilities; and
- viii. regularly attend meetings of the Board.

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# Types of Directors

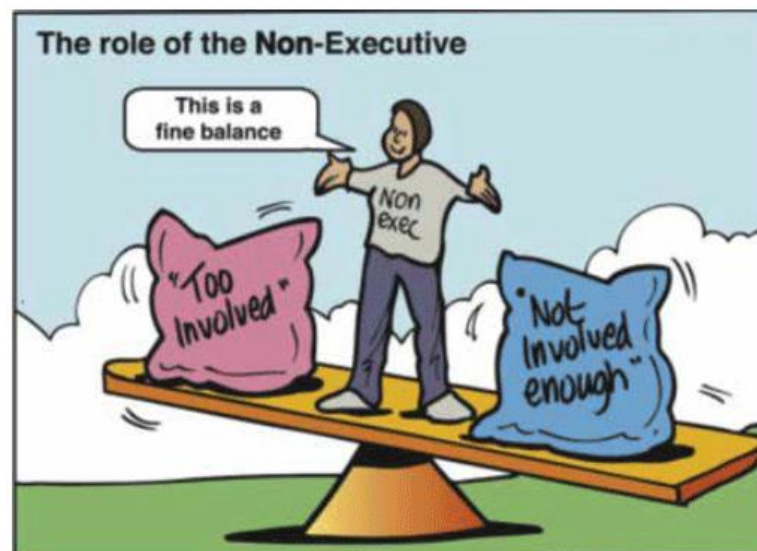


# Executive and non-executive directors

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**Executive directors** → those concerned with the actual day-to-day management of the company. They carry out executive functions in addition to their board duties.

**Non-executive directors** → those who are not involved in the actual day-to-day management of the company and who do not therefore devote their full time to the company.



# De jure and de facto directors

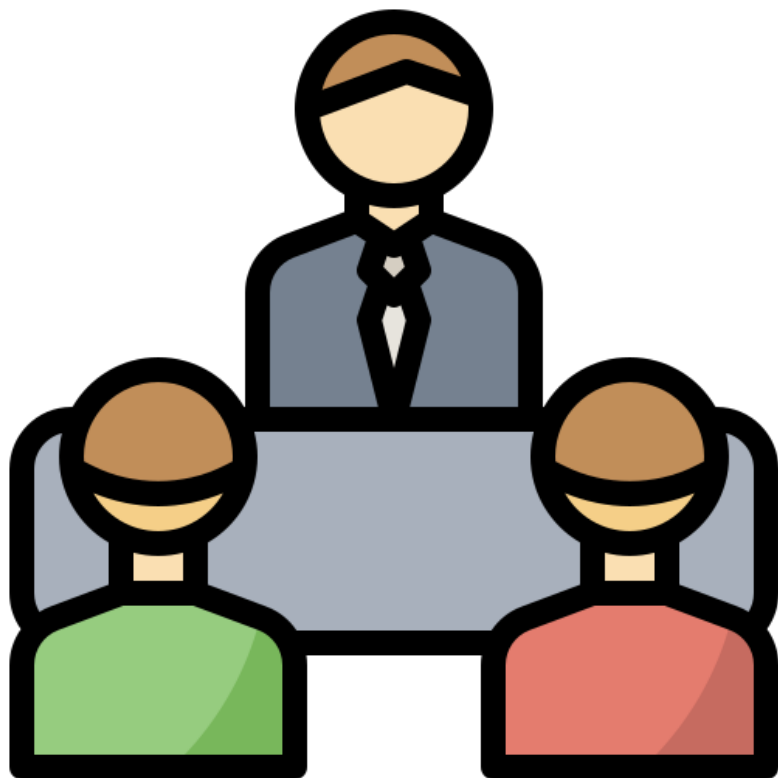
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The CA recognises that a director can either be a person who is formally appointed as such to the board (a **de jure director**) or a person who is not so formally appointed but who in practice assumes to act as director (a **de facto director**).

In **Re Hydrodam (Corby) Ltd.**, the Court suggested the following definition of a **de facto director**:  
*“[a] de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only be a director. It is not sufficient to show that he was concerned in the management of the company’s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.”*

# Shadow and alternate directors

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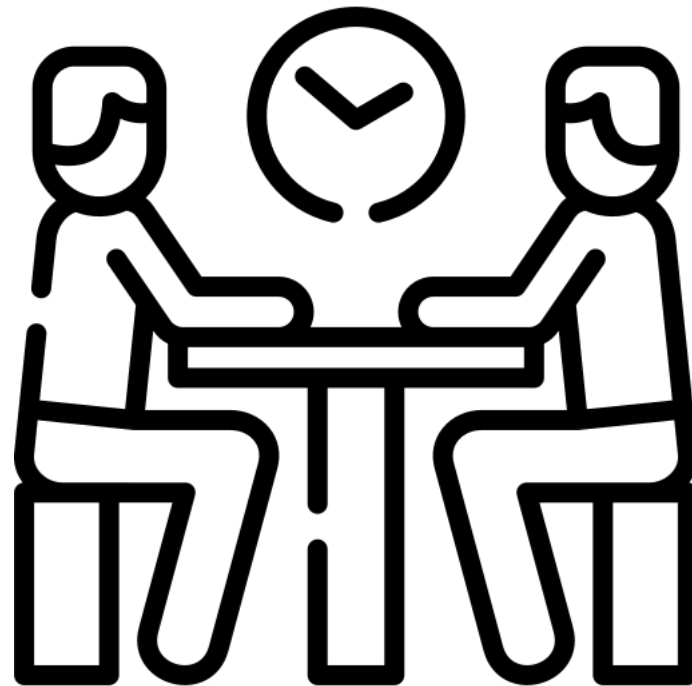


**Shadow Directors** → Such persons do not acquire any right or powers in connection with the management of the company.

**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.

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# Appointment of Directors





# Appointment of Directors

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- The first directors of the company are identified in the **original memorandum of association** delivered for registration.
- After incorporation, **changes in the directors may occur**. The rule is that the shareholders appoint and remove directors which right is normally exercised in the Annual General Meeting of a Company.
- There may be articles which hold that directors **are in office for a fixed term, or else there may be a rotating system**.
- If the Articles are **silent**, directors **hold office from one General Meeting to another** and if not removed, they are automatically reappointed.

# Appointment of Directors

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- In the meantime, a director **may resign, or pass away in which case there is a casual vacancy** (article 140 (6) of the CA). This is not filled by the shareholders, but by the other remaining directors. This is therefore an exception to the rule. The person who has been appointed to fill in a casual vacancy will remain in office until the next General Meeting and at that meeting the shareholders will decide whether they will be keeping such a persons or not.
- Articles of the company sometimes contain a ‘Share Qualification Clause’; for a person to be appointed as a director, such person must also be a shareholder of the company. If an individual is appointed to a board of directors which has a share qualification clause, he is given 2 months to acquire shares in that company. If he does not do so, he cannot stay on as a director of the company (article 139(2) & (3)).

# Disqualifications

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## *Any person who:*

- Is interdicted or incapacitated;
- Is an undischarged bankrupt;
- Is convicted of any crimes affecting public trust or theft or of fraud or of knowingly receiving property obtained by effect of fraud; and
- Is an unemancipated minor or a person who is subject to a disqualification order in terms of article 320 of the CA

*may not be appointed as a director of a company.*

# Dr Kevin Dingli noe vs. Dr Joseph Bonnici noe et. (Commercial Court – 1995, Court of Appeal – 2002, Court of Appeal – 2003)



## Facts:

- The Commercial Court and Court of Appeal examined a number of issues relating to the disqualification of directors.
- The plaintiff (one of the two directors of a company) had discovered that the defendant Prokidis (the other director) had been convicted of fraud by the Greek courts.
- As a consequence, the banks were refusing to provide services to the company as long as Prokidis continued to be a director.
- The plaintiff, relying on art.125(b) of the Commercial Partnerships Ordinance, asked the Court to declare that Prokidis was disqualified from exercising powers of a director and to order the Registrar of Partnerships (the second defendant) to register the disqualification and removal of Prokidis as director.
- Prokidis pleaded that the Court had no jurisdiction to entertain the claim and that the plaintiff had no juridical interest in filing the proceedings.

# Dr Kevin Dingli noe vs. Dr Joseph Bonnici noe et. (Commercial Court – 1995, Court of Appeal – 2002, Court of Appeal – 2003)

## Decision:

- Both the Commercial Court and Court of Appeal delivered elaborate judgements on the issues involved and essentially reached the same conclusions.
- **On the question of juridical interest of the plaintiff**, it was held that although in the normal course it would be the board or the general meeting which would take action, in the name of the company, to obtain a declaration that a director is disqualified, in the particular case, a third party had an interest in filing such proceedings if he could establish the potentiality of harm.
- Both the Commercial Court and the Court of Appeal had no doubt that the plaintiff was so affected and therefore had every right to sue to have his co-director removed to avoid further prejudice.



# Dr Kevin Dingli noe vs. Dr Joseph Bonnici noe et. (Commercial Court – 1995, Court of Appeal – 2002, Court of Appeal – 2003)

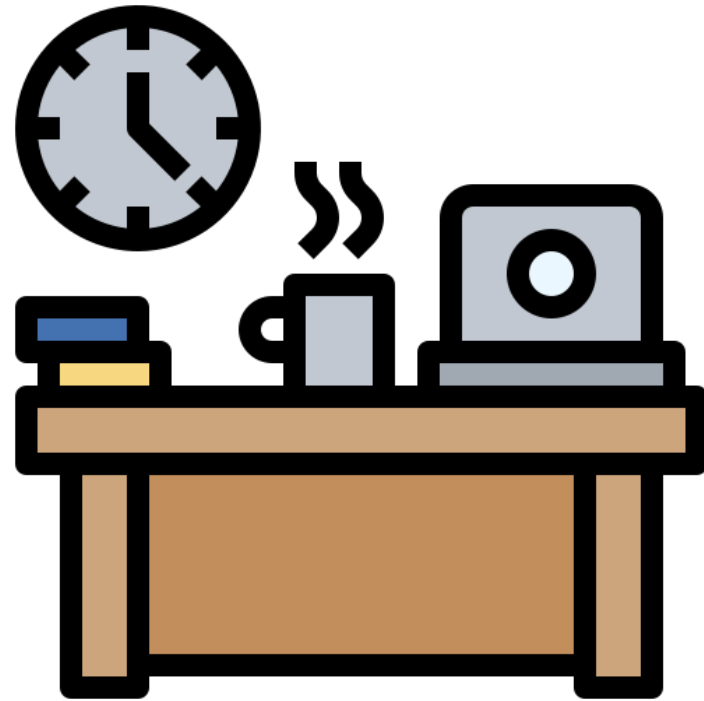
## Decision:

- The Commercial Court also noted that while a number of provisions in the Commercial Partnerships Ordinance identified the persons entitled to take action, the provision dealing with the disqualification of directors was silent on the matter.
- The Court also held that the fact that the Greek judgements had been delivered were held to be sufficient for the purposes of the disqualification provisions in the Commercial Partnerships Ordinance.
- Finally, it should be noted that the Commercial Court further declared that its judgement was not to have retroactive effect as otherwise the rights of third parties would be violated, especially the rights of those persons who had previously contracted with Prokidis as a director of the company. The Court of Appeal, while noting that no appeal had been filed on this issue by the plaintiff and that therefore this issue had become *res judicata*, agreed with the reasoning of the Commercial Court on the question of retroactivity.



# Vacation of office of Directors

1. Expiration of period of office
2. Disqualification
3. Resignation
4. Death
5. Removal
6. By a court order



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# Company Secretary





# Company Secretary characteristics

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As a **general rule**, a co-sec must be **an individual** – that is, a physical person. Maltese law only allows **natural persons** to hold the Office of company secretary.

However, in the cases of an investment company with variable share capital, and an investment company with fixed share capital, the company secretary could also be a body corporate.

A body corporate may also be a director if it is licensed as a corporate service provider.



In the majority of companies, the co-sec needs to dedicate an average of only a few hours a month to his task – indeed, it is only in the case of listed companies that full-time company secretaries are found.

***His functions and responsibilities can broadly be categorised under 3 headings:***

- \_ Functions and responsibilities imposed by statutory provision;
- \_ Functions and duties relating to board and general meetings; and
- \_ Miscellaneous functions and duties

# Appointment and removal of the Company Secretary

**The first co-sec** is effectively **appointed by the subscribers to the M&As** – meaning the name, residence and identity card or passport number of the first co-sec should be stated in the memorandum of association.

**Subsequent co. secs are appointed by the directors.** In fact, the directors are bound to appoint a co-sec within 14 days from the date when the post becomes vacant or the co-sec is removed from office.

# Co Sec's qualifications

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The CA **does not** require a co-sec to have **any academic or professional qualification**.

It does however require the directors to take all reasonable steps to ensure that the co-sec is someone who appears to them to have the requisite knowledge and experience to discharge the functions of the co-sec.

The Co Sec must also have **knowledge** and **experience**.



# Disqualifications

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As a general rule, a company cannot have as its co-sec its sole director. Nor can a company have as its sole director a body corporate whose sole director is co-sec to the company.

By way of exception however, a sole director of an exempt company is entitled to hold office as a co-sec thereof during his directorship.

- ***Moreover, a person will not be qualified for appointment or to hold office as co-sec 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 made under the CA.



# Changes to be notified to the MBR

In the event of any change involving the co-sec – such as where the co-sec has resigned, passed away or been removed from office or where the new co-sec is appointed – the company is obliged to send to the Registrar of Companies for registration, a return of such change

This is done through the submission of a **Form K**.



# Irregularity in appointment of Company Secretary

The appointment of a co-sec may be irregular if, for example, someone other than the directors make the appointment or if the appointee is disqualified from holding the office of the co-sec.

## *What are the legal repercussions in the event of an irregular appointment?*

- Notwithstanding any provision of the CA or of the M&As relating to the formalities of the appointment of any officer and to his qualification, any irregularity concerning the appointment of an officer raised after the completion of the publication of his appointment cannot be relied upon by the company as against third parties unless the company proves that such parties were aware of the irregularity at the relevant time. However, third parties who were not aware of the irregularities at the relevant time may rely on that irregularity as against the company. In practice, even if an irregularity in the appointment of a co-sec were to occur, the practical consequences should not normally be very serious unless the co-sec was also vested with the legal representation of the company and had concluded transactions on behalf of the company.

# Functions and responsibilities of the Company Secretary





# Duties of the Company Secretary

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*In the First Schedule of the CA, the legislator sets out a number of duties assigned to a co-sec, and these include:*

- Ensuring that proper notice of the meeting and agenda are circulated within the notice period (as specified in the articles of association);
- Ensuring that proxy forms and/or appointment of alternative director forms, if required, are sent to be received in original by the company or any other person up to forty-eight hours (or as stipulated in the Memorandum and Articles of Association) before the meeting for the appointment to be effective and to be tabled at the meeting;
- Informing the chairman (of a meeting) whether a quorum for the meeting is present and ensures that the meeting proceeds in accordance with the agenda of the meeting;
- Taking minutes of proceedings of the board and any general or extraordinary meetings held, which are then kept in the company's minute book; and
- Recording any resolutions put to vote.

# Functions and responsibilities of the Company Secretary

1. Statutory registers and minute books
2. The register of members
3. Returns and filings
4. Authentication of documents
5. Recording of transfers on register of members
6. Issue of share certificates
7. Limited powers, if any, during liquidation
8. Information to auditors
9. Right to accounting records
10. Statement of company's affairs to Official Receiver
11. Company investigations
12. Production of documents to Registrar

# Next week – Part 2: Directors duties and liability





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