

Module 03 – Company Law Fundamentals

Lecture Title: Officers of the company

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Diploma in Law (Malta)



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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. The 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.

The functions and responsibilities of the Board of Directors

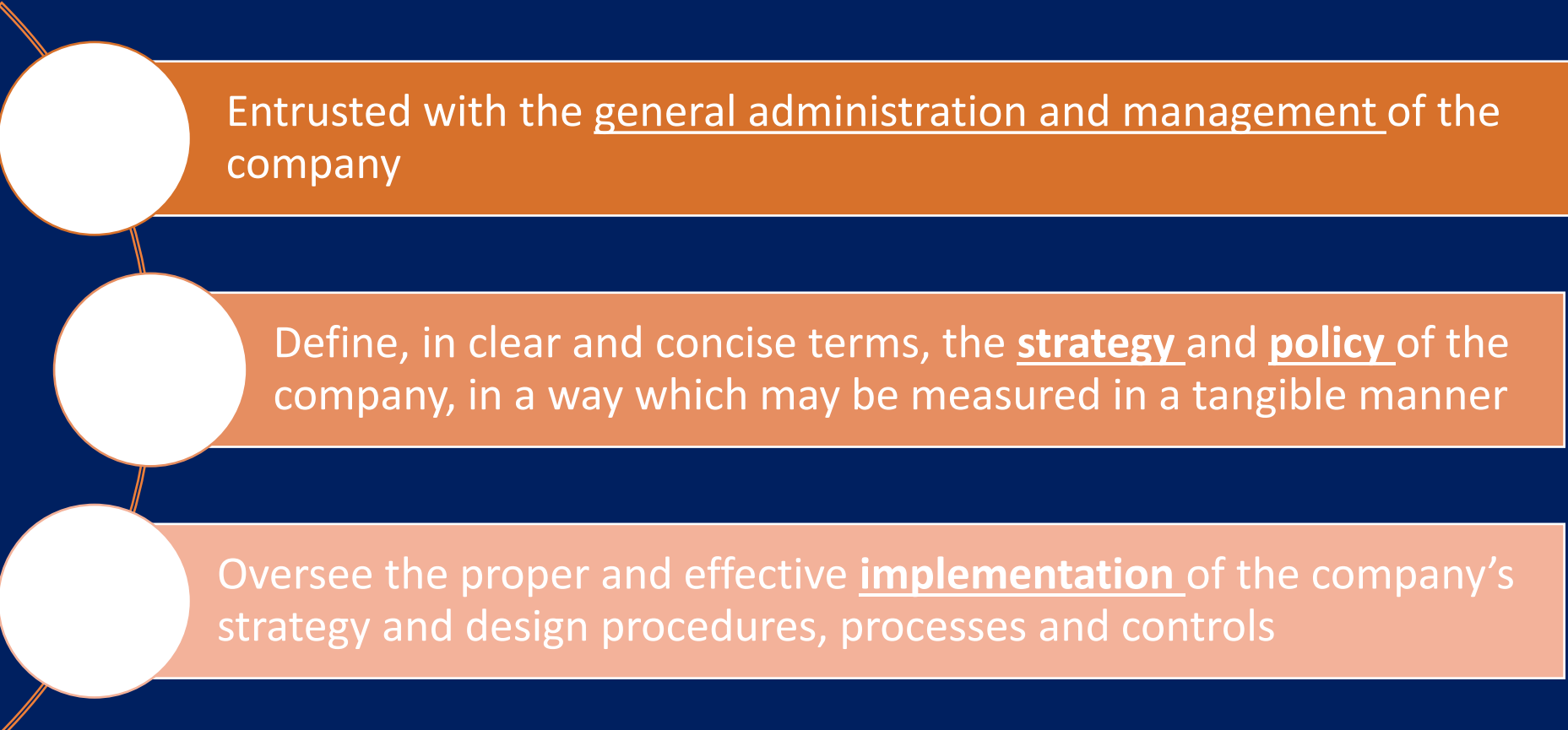


The main roles and responsibilities of the Board

- The directors are expected to act collectively as a board, although the M&A may also provide for delegation of powers to smaller committees or even to individual directors (eg remuneration committee, nomination committee).
- 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

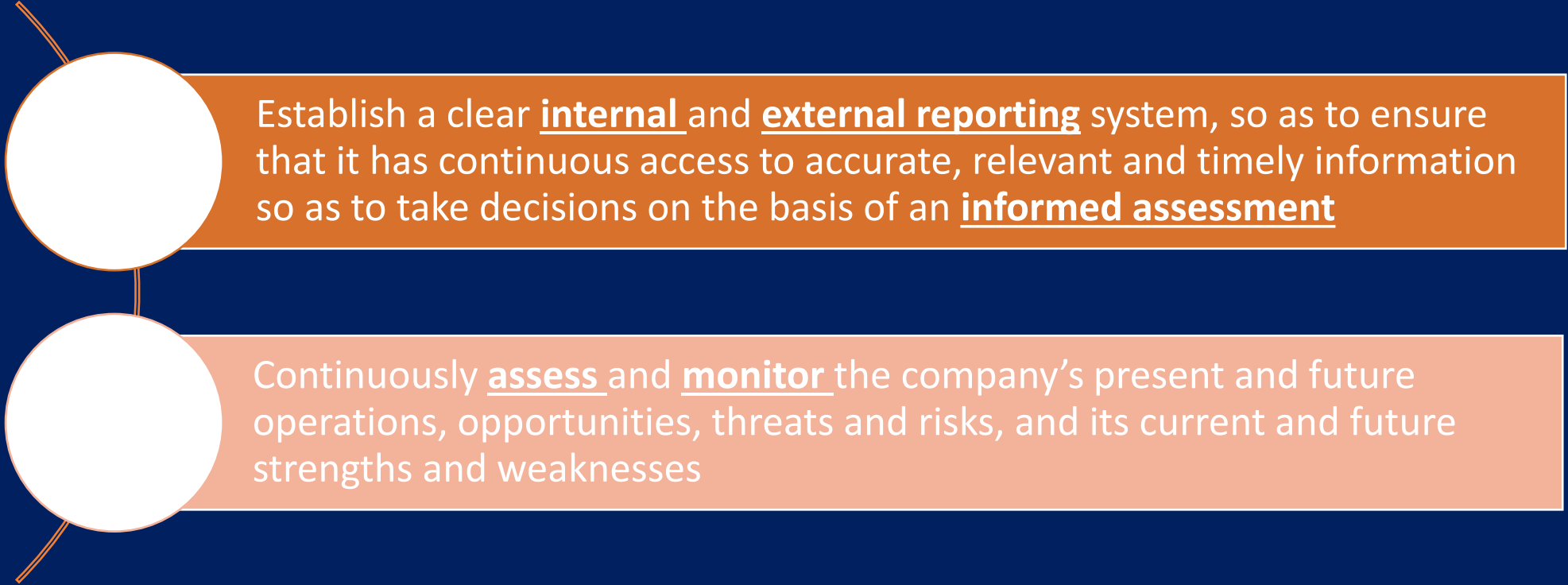


Entrusted with the general administration and management of the company

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

Role of directors vs. managers

Independently of any powers and functions that the Directors may from time to time validly delegate to management, it remains a fundamental responsibility of Directors to **monitor effectively the implementation of strategy and policy by management.**

One can be held to be a director even if described as a “manager”.

FUNCTION > TITLE



Types of directors



Types of directors

De jure and *de facto* directors

Individual and corporate
directors

Shadow directors

Executive and non-executive
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 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:

Assumption of role

Undertakes functions which could only be discharged by directors

Part of the corporate governance structure

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).
- In order for a body corporate to act as corporate director, it must hold a licence to act as a “company service provider” in terms of the CSP Act.

Individual and corporate directors



- However, listed companies are 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

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.**

Independent directors

The board should state its reasons if it determines that a director is independent despite the existence of circumstances which may appear relevant to its determination, including if the director:

- has been an executive officer or employee of the company or a subsidiary or parent of the company, within the last 3 years;
- has, or has had within the last 3 years, a significant business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;
- has received or receives significant additional remuneration from the company or any member of the group in addition to a director's fee;
- has close family ties with any of the company's executive directors or senior employees;
- has served on the board for more than 12 consecutive years;
- is or has been within the last 3 years an engagement partner or a member of the audit team of the present or former external auditor of the company or any member of the group of which the company forms part.

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

Shadow directors

Certain provisions of the Companies Act:

- *'...For the purposes of this article, "director" includes a person in accordance with whose directions or instructions the directors of the company are accustomed to act'*
- *'...For the purposes of this article, the expression "officer" shall include any person in accordance with whose directions or instructions the directors of a company have been accustomed to act...'*

Including but not limited to provisions on:

- **Wrongful trading**
- **Prohibition of loans**
- **Fraud in anticipation of dissolution**
- **Fraud by officers of companies being wound up**

De Facto vs. Shadow directors

Feature	De Facto Director	Shadow Director
Position	Acts as a director	Operates behind directors
Visibility	Usually open/visible	Usually hidden/covert
Decision-making	Makes decisions directly	Instructs others to make decisions
Board relationship	Part of governance structure	External to governance structure
Key test	Assumes directorial functions	Board accustomed to act on directions
Evidence needed	Personal exercise of directorial powers	Pattern of board following instructions
Typical scenario	Never formally appointed but acts as director	Controlling shareholder or external influencer

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.



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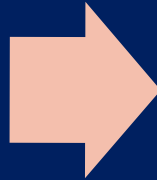
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Appointment and removal of directors

Appointment of directors: can anyone be a director?

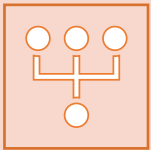
The default position is that there are **no formal qualifications** required to act as a director in Malta



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 continuing directors or by resolution in general meeting

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

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

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

Number of directors

A company may be **dissolved and wound up by the court** if:

the number of directors is reduced to below the minimum prescribed by the Companies Act and remains so reduced for more than **six months**.

Number of directors

If the number of directors of a company is **reduced below the minimum:**

...any member of the company may, after the lapse of 30 days, make an application to the court for the **court to appoint** a director or directors for the company in accordance with its memorandum, **without prejudice to the right of the continuing director to fill any vacancy** so created in accordance with article 140(6) within the 30 days specified or at any time thereafter for as long as a director is not appointed by the court.

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 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, 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 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.



Notifications to the MBR

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 _____

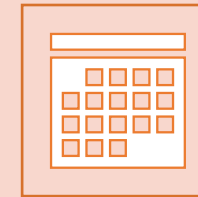
*Director/Secretary/Manager**

Dated this _____ day of _____ of the year _____

This form must be completed in typed form

(a) State company name.

* Delete as necessary.



Each appointment or removal of a director 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



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The Company Secretary



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

The term may be misleading as it does not refer to a 'secretary' in the normal sense.



Does not exercise managerial powers but ministerial and administrative ones.

Company Secretary



Company Secretary – who can act as co sec?



Individual

Necessary knowledge and experience

Body corporate

Licensed under CSP Act or otherwise exempt

Company Secretary - who can act as co sec?

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



Appointment of Co Sec

- 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.
- Notification of appointment to be made with MBR in the prescribed form (FORM K).

- It is the duty of the directors to ensure the company secretary
 - If an individual, has the required knowledge and experience to discharge the functions of company secretary.
 - If a body corporate, is licensed under the CSP Act or is otherwise exempt.
- Term “knowledge and experience” is not defined at law – common-sense approach.
- The required knowledge and experience is also dependant on the type of company, namely if it is public or private, and if it is public, whether its securities are listed or not. The size of the company also makes a difference.

Removal of Co Sec

- The company secretary is removed by the board of directors at any time (unlike removal of directors - ordinary resolution of the shareholders).
- To notify MBR of the removal of Co Sec in the prescribed form (FORM K).

Vacancy / inability to act

If the post of company secretary becomes **vacant**, the directors of the company shall, within **fourteen days from the date when the post becomes vacant**, appoint another individual/body corporate.

If default is made in respecting the 14 day timeframe, every director will be subject to a **penalty**.

Any duties or actions authorised to be done by or to the company secretary may,

if the office is vacant or if there is for any other reason no company secretary capable of acting,

be done by or to **any officer** of the company **authorised generally or specifically** in that behalf by the directors

Notifications to the MBR

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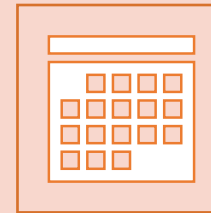
Director/Secretary/Manager*

Dated this _____ day of _____ of the year _____

This form must be completed in typed form

(a) State company name.

* Delete as necessary.



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

Auditors



Auditors

An auditor is **not** an officer of the company.

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

Appointment of auditors

- 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. If the directors fail to exercise this power, the powers may be exercised by the company in general meeting.
- 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.
- If no auditors are appointed → within 2 weeks of AGM, give notice to Registrar of power to apply to court to fill the vacancy. Officers in default, will be subject to penalties.



Appointment of auditors

- Contractual clauses restricting the choice by general meeting to certain auditors / audit firms shall be null and void.
- However, it is possible to appoint joint auditors.
- Casual vacancies shall be filled by the directors at any before the next general meeting at which annual accounts are laid, however they may also be filled by the company in general meeting.
- Remuneration of auditors is fixed by the body / person appointing them –general meeting re-confirms the appointment of the auditors and state that the directors have the power to fix their remuneration.



Auditors - rights

The auditors
shall be
entitled to:

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

Auditors – rights

- Right of access at all times to the company's accounting records, accounts and vouchers; and
- Right to require from the company's officers such information and explanations as they think necessary for the performance of their duties as auditors

*An officer of a company who knowingly or recklessly makes a statement to the company's auditors which:

- (a) conveys or purports to convey any information which the auditors require/entitled to require as auditors of the company; AND
- (b) is misleading, false or deceptive,

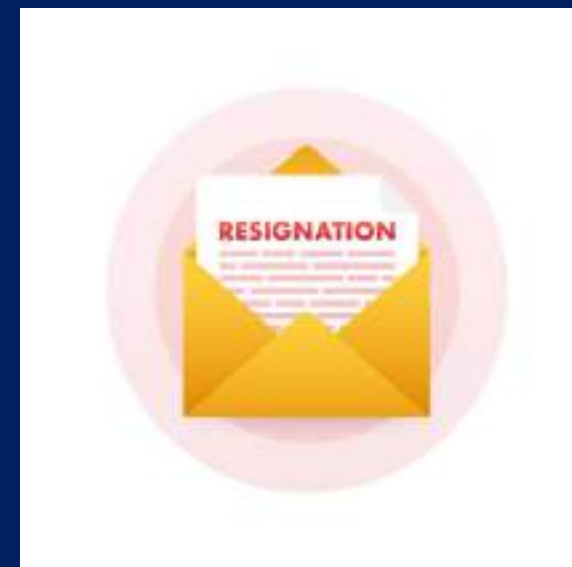
will be guilty of an offence and subject to a fine (multa).

Removal of auditors

- The company may, at any time, by shareholder resolution, 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 (FORM F1).
- 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.

Resignation of auditors

- 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 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

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



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Thank you



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