

European Guide to Support Employers
Employment of Managing Directors



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MALTA

Status

The Maltese Companies Act (Chapter 386 of the Laws of Malta), provides no clear definition of the term "director" and, as a result, does not make a specific distinction between executive and non-executive directors. Typically, managing directors are viewed as executive directors, primarily because such directors tend to be involved in the day-to-day management of the company. It is common for companies in Malta to have a managing director who is the only executive director on the board. It is also common for companies to designate employees as "directors" without them being part of the company's board of directors and ultimately being recognized as directors in law.

The number of managing directors a company is required to have depends on the form of the company. Private limited companies are required to have one or more directors, while public limited companies must have at least two directors. The managing directors of a limited company are responsible for the management and day-to-day running of the company.

Any person may hold the position of a managing director, unless he or she is a minor who has not been emancipated,

is legally interdicted, incapacitated or an undischarged bankrupt, or 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.

Both executive and non-executive directors are equally responsible for maintaining the company in good order in accordance with the Companies Act. Any person holding the position of managing director will substantially carry out the same functions in relation to the management of the Company as those carried out by any Director and will be required to form part of the board of directors of the company.

Managing directors have a fiduciary relationship towards the company and are deemed to be mandatories and agents of the limited liability company. A director of a limited liability company may be either an individual or a corporation, unless the company is a listed or exempt corporation, in which case corporate directors are not permitted.

Managing directors must ensure that there is no conflict between their personal interests and the interests of the company. Furthermore, no property, information, or opportunity of the company may be used for



the benefit of the managing director or any other person, except with the company's express approval by resolution of the general meeting or as permitted by the company's articles of association.

Managing directors have various duties, which are generally categorized as "general" and "administrative". Such general duties arise from their juridical position under general principles of law and concern both their duties of loyalty and their duties of care and skill. The administrative duties, on the other hand, are created by specific provisions of the law, most of which concern the director's duty to keep suitable records, to account for and return on demand all property held in trust, and to keep the company's property separate from his/her personal property. In addition, managing directors have a duty to promote the interests of the company and to ensure its proper administration and management. There are also a number of other statutory duties arising under the Maltese Companies Act.

Finally, managing directors owe a duty of loyalty to the company for which they act and the duty to act in the best interests of the company. This duty also encompasses a requirement to treat shareholders equally, notwithstanding the existence of different classes of shares with different rights.

Employment

In Malta a company is not required to enter into an employment relationship with the managing directors or to pay any remuneration to their services. Managing directors may be remunerated for their office in the company and for additional services rendered to the company. The company's

articles of association may provide for specific arrangements for the appointment and term of office of managing directors.

That being said, managing directors are typically engaged via a contract of service.

Tax & Social Security

Maltese law provides certain deterrents for directors who act unlawfully and imposes a number of personal liabilities on directors. For example, the Income Tax Management Act provides that all persons involved in the management of a company must do their best to ensure the payment of income tax. The directors and managers of every company must pay tax out of the company's assets; however, they will be held personally liable for payment if it is found that they had in their possession assets belonging to the company that could have been used to pay the tax then due.

Similarly, the Maltese Social Security Act states that whenever something is required to be done by a company, such a duty is also required to be performed personally by the directors themselves.

Liability

The personal liability for damages of managing directors for breach of duty is joint and several, provided that where a specific duty has been delegated to one or more directors, only such director(s) shall be liable for damages. A managing director shall not be held liable for the actions of his/her co-directors if it is proved that he/she was not aware of the breach of duty before or at the time of its occurrence and where he became



aware of it after its occurrence, provided the managing director notified his/her co-directors in writing of his/her disagreement; or where he/she became aware that the co-directors intended to commit a breach of duty, provided the managing director took all reasonable steps to prevent it.

Any provision, whether included in the company's articles of association or in a contract with the company, exempting an officer from liability is considered null and void. Managing directors may be held personally liable for acts of the company, primarily in the context of wrongful and fraudulent trading.

Liability for wrongful trading arises where a liquidator presents evidence that a managing director knew or ought to have known, prior to the dissolution of the company, that there was no reasonable prospect of the company avoiding dissolution on the grounds of insolvency. On the other hand, fraudulent trading is defined as the carrying of any business of the company with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose. For fraudulent trading to be established, one of the prerequisites for liability to arise is the managing directors' knowledge that they participated in the conduct of the business with intent to defraud creditors. Such activity may expose directors to personal liability for all or any of the debts or other liabilities of the company if the court is satisfied that fraudulent trading indeed took place.

Managing directors may also be exposed to personal liability as a result of certain acts or omissions of an administrative nature,



including failure to notify the Malta Business Registry of a resolution the dissolution and voluntary winding up of a company, failure by the company to issue share certificates and failure to register members.

Companies are not required by law to take out D&O insurance to protect managing directors against claims for wrongful acts. However, an increasing number of Maltese companies are choosing to take out D&O insurance, particularly those engaged in licensable activities.

Termination

In order for a managing director to be removed from office, the shareholders must request the directors to call an Extraordinary General Meeting ("**EGM**"), the agenda of which must include a specific reference to the intention of removing that director. Notice of the EGM must be sent to all members and to the director whose removal will be discussed.

The managing director concerned has the right to attend the meeting and put forward his/her case, but if the EGM decides by a vote of more than 50% of the voting rights attached to the shares entitled to attend and vote at the meeting that the managing director should be removed, such removal will be effective.

A managing director appointed by a specific class of shares may be removed by an ordinary resolution of the members of the company, unless this is specifically restricted in the company's articles of association.

It is important to note that if a managing director is a party to a services agreement which is terminated as a result dismissal, he/she may be able to bring an action against the company for wrongful dismissal or breach of contract.

Finally, a managing director may be removed from office by a court order.



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