ICLG

The International Comparative Legal Guide to:

Corporate Governance 2018

11th Edition

A practical cross-border insight into corporate governance

Published by Global Legal Group, with contributions from:

Advokatfirman Lindahl
Aksac Law Office
Arnold Bloch Leibler
Ashurst Hong Kong
Astrea
Borenius Attorneys Ltd
bpv Hügel Rechtsanwälte GmbH
Čechová & Partners
CR Partners
Ferraiuoli LLC
Genesis Law Corporation
Georgiev, Todorov & Co.
Glatzová & Co.
GRATA International
Guevara & Gutiérrez S.C.
Houthoff
Lee & Ko
Lenz & Staehelin
McCann FitzGerald
Miyetti Law
Montel&Manciet Advocats
Nielsen Nørager Law Firm LLP
Nishimura & Asahi
Novotny Advogados
Ritch, Mueller, Heather y Nicolau, S.C.
Slaughter and May
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Szarvas and Partners Law Firm
Taylors in association with Walkers
Tian Yuan Law Firm
Trevisan & Associati
Trilegal
UGGC Law Firm
Villey Girard Grolleaud
Wachtell, Lipton, Rosen & Katz
Walalangi & Partners in association with Nishimura & Asahi
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners

glg
global legal group

Contributing Editor
Sabastian V. Niles, Wachtell, Lipton, Rosen & Katz

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Senior Editors
Suzie Levy
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
August 2018

Copyright © 2018
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-20-1
ISSN 1756-1035

Strategic Partners

General Chapter:

1	**Corporate Governance, Investor Stewardship and Engagement** – Sabastian V. Niles, Wachtell, Lipton, Rosen & Katz	1

Country Question and Answer Chapters:

2	**Albania**	CR Partners: Anisa Rrumbullaku & Tea Take	6
3	**Andorra**	Montel&Manciet Advocats: Maïtena Manciet Fouchier & Liliana Ranaldi González	12
4	**Australia**	Arnold Bloch Leibler: Jonathan Wenig & Jeremy Lanzer	16
5	**Austria**	bpv Hügel Rechtsanwälte GmbH: Dr. Christoph Nauer & Dr. Daniel Reiter	23
6	**Belgium**	Astrea: Steven De Schrijver	31
7	**Bermuda**	Taylors in association with Walkers: Natalie Neto	39
8	**Bolivia**	Guevara & Gutiérrez S.C.: Jorge Inchauste & José Bernal	46
9	**Brazil**	Novotny Advogados: Paulo Eduardo Penna	51
10	**Bulgaria**	Georgiev, Todorov & Co.: Georgi Georgiev & Monika Markova	59
11	**China**	Tian Yuan Law Firm: Raymond Shi (石磊)	65
12	**Czech Republic**	Glatzová & Co.: Jindřich Král & Pavol Černý	72
13	**Denmark**	Nielsen Nørager Law Firm LLP: Peter Lyck & Thomas Melchior Fischer	79
14	**Finland**	Borenius Attorneys Ltd: Andreas Doepel	87
15	**France**	Villey Girard Grolleaud: Pascale Girard & Léopold Cahen	93
16	**Germany**	SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH: Dr. Christoph Nolden & Dr. Michaela Balke	100
17	**Hong Kong**	Ashurst Hong Kong: Joshua Cole	107
18	**Hungary**	Szarvas and Partners Law Firm: Julia Szarvas	112
19	**India**	Trilegal: Kosturi Ghosh & Wiseroy Damodaran	119
20	**Indonesia**	Walalangi & Partners in association with Nishimura & Asahi: Fiesta Victoria & T. Anggra Syah Reza	126
21	**Ireland**	McCann FitzGerald: David Byers & Paul Heffernan	132
22	**Italy**	Trevisan & Associati: Dario Trevisan & Paolo Preda	139
23	**Japan**	Nishimura & Asahi: Nobuya Matsunami & Kaoru Tatsumi	146
24	**Kazakhstan**	GRATA International: Bolat Miyatov & Igor Lukin	153
25	**Korea**	Lee & Ko: Sungmin Kim & Jang Hyuk Yeo	159
26	**Malta**	WH Partners: James Scicluna & Gabriella Zammit	166
27	**Mexico**	Ritch, Mueller, Heather y Nicolau, S.C.: Luis Dantón Martínez Corres & Alejandra Lankenau Ramírez	174
28	**Morocco**	UGGC Law Firm: Ali Bougrine	181
29	**Netherlands**	Houthoff: Alexander J. Kaarls & Duco Poppema	188
30	**Nigeria**	Miyetti Law: Jennifer Douglas-Abubakar & Khadija Bala	194
31	**Poland**	WBW Weremczuk Bobeł & Partners Attorneys at Law: Łukasz Bobeł & Krzysztof Weremczuk	201

Continued Overleaf ➞

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Country Question and Answer Chapters:

32	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & Yarot Lafontaine-Torres	208
33	**Singapore**	Genesis Law Corporation: Benjamin Choo & Bernice Man	214
34	**Slovakia**	Čechová & Partners: Katarína Čechová & Ivan Kolenič	221
35	**Sweden**	Advokatfirman Lindahl: Carl-Olof Bouveng & Maria Arnoldsson	227
36	**Switzerland**	Lenz & Staehelin: Patrick Schleiffer & Andreas von Planta	233
37	**Turkey**	Aksac Law Office: Arzu Aksaç & Yaprak Derbentli	241
38	**United Kingdom**	Slaughter and May: William Underhill	248
39	**USA**	Wachtell, Lipton, Rosen & Katz: Sabastian V. Niles	253

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Corporate Governance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of corporate governance.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Corporate Governance, Investor Stewardship and Engagement, particularly from a US perspective.

The guide is divided into country question and answer chapters. These provide a broad overview of common issues in corporate governance laws and regulations in 38 jurisdictions.

All chapters are written by leading corporate governance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Sabastian V. Niles of Wachtell, Lipton, Rosen & Katz for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Malta

James Scicluna

WH Partners

Gabriella Zammit

1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Maltese law provides for several forms of corporate entities, but the most frequent form of business entity is by far the limited liability company, which may have the status of a public or private company. A limited liability company is a company in which the shareholders' liability is limited to the amount unpaid on their share capital. It is the most popular vehicle to carry out business and/or hold investments due to the security it offers to the shareholders in cases of bankruptcy.

A private company is one that, in its constitutive document, restricts the rights to transfer shares, limits the number of its members to 50 and prohibits any invitation to the public to subscribe for any shares or debentures of the company. A private company can further be established as a private exempt company or a single member private exempt company. By exclusion, a public company is defined as a company that is not a private company as defined. Limited liability companies may also be registered as investment companies with variable share capital (SICAV) or investment companies with fixed share capital (INVCO). Limited liability companies carrying out the business of insurance may also be registered as/or converted into a protected cell company (PCC).

Listed Companies are entities whose shares are listed on a regulated market for public trading. There are currently three regulated markets authorised under Chapter 345 of the Laws of Malta – The 'Financial Markets Act' which are the 'Malta Stock Exchange', the 'European Wholesales Securities Market' and the 'Institutional Financial Securities Market'. The Malta Financial Services Authority ('MFSA') solely regulates the financial services in Malta and it also acts as the Listing Authority in Malta.

Public Interest Companies are defined under the 'Corporate Governance Guidelines for Public Interest Companies' issued by the Malta Financial Services Authority as companies whose operations impact a substantial sector of society. A public interest company is any one of the following:

a) A regulated company meaning a company authorised to provide a financial or a utility service and which is either a large private company or a public company but excluding collective investment schemes, companies which do not hold or control clients' money and companies which already have an obligation to segregate clients' funds in separate accounts.

   A 'large private company' is a private company as defined under the Companies Act and which exceeds a certain minimum balance sheet and turnover thresholds.

b) A company that has issued debt securities to the public and whose securities are not admitted to listing on a recognised investment exchange.

c) A government-owned entity established as a limited liability company.

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

The principal Maltese legislation regulating corporate governance practices is the Companies Act 1995. The Maltese Companies Act defines the types of corporate entities or commercial partnerships that may be established and regulates the manner in which their affairs are to be conducted. It is the main source for the division of authority between the board of directors and the general meeting of shareholders. It also regulates the duties and accountability of the directors together with shareholder redress mechanisms and disclosure and transparency requirements.

Another important source of corporate governance for a company registered under Maltese Law is the memorandum and its articles of association. The articles of association define the internal relationship of a company with its members and sets out a company's powers, obligations and procedures. The memorandum and articles of association are the company's source of its own governance and bestow legitimacy on its own actions. The Companies Act provides specimen articles of association that apply by default unless an express exclusion is inserted in the constituting document of the company being established.

There is no major distinction in terms of corporate governance practices between public and private companies. Public companies listed on a regulated market are required to comply with the Listing Rules issued by the MFSA. Listed companies should also comply with the Code of Principles of Good Corporate Governance forming part of the Listing Rules. The Code is a fundamental set of guidelines to establish the corporate governance framework for listed companies. This is a non-binding Code designed to strengthen the legal, institutional and regulatory framework for good governance under the Maltese corporate sector. Although implementation of the Code is on a 'comply or explain' basis, a company that chooses not to comply with one or more of the Code provisions must clearly explain their rationale to its shareholders.

Similar guidelines were issued by the MFSA in 2006, this time targeting Public Interest Companies ('Corporate Governance Guidelines') having an impact on the public in general. These guidelines are similarly non-binding but public interest companies should highlight their adherence to such guidelines in their annual reports.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In September 2014, the MFSA also issued a Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes ('Corporate Governance Manual') with the aim of guiding directors of an investment company or of a collective investment scheme on how to implement good corporate governance practice.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

With the ever-increasing emphasis on corporate governance, boards of public companies, public interest companies and regulated entities are experiencing more awareness and greater pressure to become active and involved with their fiduciary responsibilities. Boards must adopt new frameworks, best practices and new attitudes about their decision-making roles and exhibit a sound governance culture.

There are increased pressures on the board members to make such a push for increased internal governance. Consequent EU Directives have pushed for increased governance around internal process. Apart from the Regulator, expectations of investors and other stakeholders on governance, especially on listed entities, are increasing. Stakeholders are more than ever holding the board accountable for the effectiveness of their overall governance process. This shift is significant and is likely to amount to an expectation of greater board involvement in the means by which governance is organised and effected.

These expectations sometimes go down to a product level. This is especially true with new Regulation drafted following the 2008 financial crisis. Both the Markets in Financial Instruments Directive II (MiFID II) and the Insurance Distribution Directive (IDD) have product governance requirements which factor in Board involvement.

Solvency II and Basel III have specific requirements for a 'fit and proper' board which conducts proper oversight throughout all the functions of the respective bank or insurance company. The expectation now is for the board is to ensure that a proper governance framework is in place.

One of the current challenges is how the EU's most sweeping law regarding data privacy, the General Data Protection Regulation (GDPR), will change the governance landscape. Nearly half of the articles in the regulation are related to business procedures associated with policies, controls, record-keeping, and the accountability of different roles and entities. Running a successful digital business requires governance excellence just as much as it requires information excellence. This requires a robust, consistent and holistic approach with defined policies and processes. Malta-based corporate entities will need to revisit their governance practices in line with the GDPR.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Companies are promoting sustainable value creation over the long-term more and more by investing time in building a more robust governance framework. Whilst direct board involvement may be realistic in smaller organisations, larger banks and insurance companies may find these requirements challenging. Such boards have generally responded by strengthening internal policies and establishing board-level committees with clear mandates. Roles such as the chief risk officers (CROs) are now common and head well-resourced units which can assist the board in their monitoring work.

It is now not uncommon, especially in larger organisation, to find individuals with a risk-related function such as enterprise risk management specialists, compliance officers, internal control specialists, and fraud investigators amongst others. Each would be looking at specific risk areas with the aim of helping the board to manage the different risks which the organisation may face.

Yet, the challenge for boards is how to transform the various risk management functions from simply being a corporate function to a discipline which is embedded across the enterprise and viewed as a strategic asset. With this, there also needs to be a shift from bolted-on, point-specific compliance 'solutions' that add costs and headcount to responses that integrate financial, operating, risk, and regulatory requirements. Only through such a transformation, can the full benefit of risk management be obtained and governance frameworks strengthened.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Under Maltese Law, the general principle is that the board of directors can exercise all the powers of the company saving those powers which are exclusively reserved for the shareholders by the law or by the memorandum and articles of the company. Therefore, in order to distinguish between the rights and powers of directors and those of shareholders, a good review of the company's memorandum and articles of association should be done in addition to an assessment of the provisions of the Companies Act.

There are, however, significant powers which are exclusively reserved for the general meeting of shareholders. These powers include:

- removal of directors;
- altering the memorandum and articles of association; and
- dissolving the company.

Other important powers reserved for shareholders are the power to: increase or reduce share capital; approve annual financial statements; convert the company into another form of commercial partnership; divide the company; and appoint or remove auditors.

The powers of the shareholders are exercised at a general meeting where they are asked to vote on matters requiring their consent. On the other hand, shareholders of a private company may exercise such powers by means of a unanimous written resolution without the need for a meeting provided that the decision does not relate to the removal of a director or auditor.

2.2 What responsibilities, if any, do shareholders have as regards to the corporate governance of the corporate entity/entities in which they are invested?

Whilst the Companies Act reserves certain powers to the general meeting of shareholders as explained above, it does not impose any obligations on them with regard to the exercise of such powers and any responsibilities connected therewith.

The only responsibilities emerge from the Corporate Governance Guidelines and the Listing rules. The former provides that shareholders are required to appreciate the significance of participation in the general meetings of the company and particularly in the election of directors. They should continue to hold Directors to account for their actions, their stewardship of the company's

© Published and reproduced with kind permission by Global Legal Group Ltd, London

assets and the performance of the company. The latter requires shareholders to make good use of their votes and to take an active role in achieving their voting objectives. They are also required to consider board composition and other governance arrangements carefully.

However, as previously mentioned, these guidelines are non-binding in nature but simply encourage shareholders to comply with them. Therefore, as a general rule, there are no obligations relating to shareholders under the main legislative act which is the Companies Act.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have as regards to such meetings?

There are two kinds of shareholder meetings that are commonly held. These are the: 1) Annual General Meeting; and 2) Extraordinary General Meeting. The Annual General Meeting must be held no later than 15 months from the previous meeting. The Companies Act does not list any business that must be transacted at the Annual General Meeting; however, the following are generally covered:

- approval of annual financial statements;
- declaration of dividend;
- (re)appointment of the members of the board of directors; and
- (re)appointment of the auditors.

Whatever is not discussed at the Annual General Meeting, may be discussed at an Extraordinary General Meeting.

The Companies Act gives several rights to shareholders regarding general meetings. These rights include in particular: the right to receive at least 14 days' written notice of the general meeting; the right to vote at such meetings; the right to appoint a proxy to attend and vote on their behalf; the right to move an ordinary resolution where the notice gives an indication of the business to which it relates; and the right to demand a poll.

Moreover, a member or members of a company which holds no less than 10 per cent of the issued paid-up share capital of the company, has the right to order an Extraordinary General Meeting. If the board of directors fail to conduct such meeting within 21 days from the order, then the requesting members shall have the right to conduct the meeting themselves within three months from the deposit of the request.

At the general meetings, shareholders take their decisions by means of an ordinary or extraordinary resolution. The nature of these resolutions is tied to voting thresholds which can be found under the Companies Act. These thresholds can be increased under the company's articles of association.

Certain corporate actions by shareholders are subject to specific voting majorities:

- Altering the company's constitution – a company can alter its memorandum and articles of association by extraordinary resolution. The votes required for an extraordinary resolution to pass vary from private and public companies.
- Appointing and removing directors – a director of a company other than the first directors must be appointed by ordinary resolution of the company in the general meeting. A company can remove a director before their time has expired by ordinary resolution.
- Increasing share capital – provided that not all authorised share capital has been issued, a company can increase its issued share capital by ordinary resolution adopted by the shareholders. An ordinary resolution is passed if it enjoys the consent of an aggregate of more than 50% of those members with the right to attend and vote at the meeting. If a company wishes to decrease its share capital or increase its authorised share capital, this requires an extraordinary resolution.

In terms of Article 132 of the Companies Act, the shareholders have the power to apply to courts to hold a meeting of the company. This power can be considered to be the last resort of the shareholders if the company is unable to hold a meeting.

On the other hand, there are increasing rules for Listed Companies under the Listing Rules. When it comes to the calling of a general meeting, there are further requirements including the contents of notice, the minimum notice period and the publication of information prior to the meeting. In addition, a shareholder or shareholders of a listed company holding no less than five per cent of the voting issued share capital, may request items to be included on the agenda of the general meeting provided that certain conditions are met.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities?

Whilst the Companies Act provides for several duties of directors, it does not mention any obligations of shareholders towards the entity or to other shareholders. Article 4 of the Companies Act provides for the principle of separate legal personality. This states that a company 'has a legal personality distinct from that of its member or members'. This means that a shareholder is not responsible for the actions or omission of the company, and thus the shareholder is only liable to the extent of any unpaid amount on his shares.

However, there may be situations where a member or members may be held liable for the actions of the company. This is because the law allows for the 'lifting of the corporate veil' in instances where: 1) there is a reduction in the number of members below the minimum statutory requirement of two members for more than six months; 2) the business of the company is carried on with the intent to defraud creditors of the company or of any other person or for any fraudulent purpose; or 3) a prospectus contains untrue statements and a person who relied on the same for subscribing to the shares of a company sustains damages.

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

As a rule, under Maltese law, directors owe their obligations to the company itself and not to the individual shareholders. However, the Maltese courts have broadly recognised an exception to the proper plaintiff principle in the form of derivative action. This means an action brought by a shareholder in respect of a wrong done to the company where the directors or the majority of the shareholders, who control the composition of the board, fail to take the necessary action to initiate legal proceedings against the wrong done to the company. It is good to note that the benefit of the action would not accrue to the benefit of the shareholder initiating the action but rather to the company itself.

The introduction of the unfair prejudice remedy available to shareholders (whether majority shareholder or otherwise) under the Companies Act diminished the use of the derivative action. This newly introduced action allows a shareholder who complains that the affairs of the company have been, are being, or are likely to be conducted in a manner that is oppressive, unfairly discriminatory against, or unfairly prejudicial, in relation to a shareholder(s) or in a manner that is contrary to the interests of the members as a whole to apply to court to make an order as the court thinks fit. A point duly

© Published and reproduced with kind permission by Global Legal Group Ltd, London

settled by the Maltese Courts is that in order for this action to be successful, the conduct complained of must be deemed by the Court to be oppressive, unfairly discriminatory and unfairly prejudicial, but not necessarily to the plaintiff. It is sufficient that the acts or omissions complained of are oppressive, discriminatory or unfairly prejudicial with respect to another member of the company, or to the interests of the shareholders. The Court has noted that it is not sufficient to simply complain that the conduct in question was contrary to the interests of the members as whole.

Furthermore, in relation to determining whether conduct as described above has occurred, the Court declared that one must first look at whether the affairs of the company were being conducted according to the statute of the company. However, in the application of this provision, which is inspired from principles of equity rather than rights which are strictly legal, the Court should take legitimate expectations into consideration.

In addition to this action, the Maltese Courts have also recognised the possibility for shareholders to enforce 'personal rights'. This provides that if a shareholder is able to show the existence of a right relating to him personally rather than the company, then he may sue in order to have the right enforced. This can be done either through the remedy of specific performance or that of an injunction.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Under the Companies Act, there is no limitation on the number of securities held by members.

However, under the Listing Rules published by the MFSA (Rule 5.176), any shareholder who acquires or disposes shares to which voting rights are attached is obliged to notify the Issuer and the Listing Authority of the proportion of voting rights which are held by such Shareholder as a result of the acquisition or disposal where the proportion reaches, exceeds or falls below certain thresholds.

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

There are no formal requirements under the Companies Act for shareholders to disclose their intentions or plans in the entity that they are invested in. The objects clause in the memorandum of association reflects the intention of the company to pursue a certain trading activity. The shareholders signify their approval for the board members/the company to pursue defined trading activities by signing the memorandum of association and therefore agreeing to the terms set out in the constitutive document of the company.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

A company is managed by two major organs: the General Meeting of Shareholders and the board of directors. The board of directors has very wide powers as it can exercise all the powers except for those which are strictly required to be exercised by the shareholders under law or under the memorandum and articles of association of the company. The memorandum and articles of association do not generally assign powers beyond those under the Companies Act granting the directors very wide powers.

A private company must have a minimum of one director at all times. Directors manage all the business of the company save for business that falls within the competence of general meetings. A public company must have at least two directors. Therefore, the powers of the directors shall be exercised by the directors acting collectively. Very often, the board can be empowered by the articles of association of a company to delegate its powers to committees of directors, or to individual directors or even to persons who are not members of the board such as CEOs, CFOs and other members of the senior management team. Moreover, a director can also be allowed to appoint a substitute director in his absence, to perform all the functions on his behalf.

3.2 How are members of the management body appointed and removed?

Directors are appointed during a general meeting for a period of time determined by the shareholders in accordance with the articles of the companies. The memorandum or articles of association may reserve this right to the board itself or to a particular person such as the managing director. However, in practice this rarely takes place as shareholders will want to exercise such a fundamental right. Individuals who are appointed as directors of a public company must accept the appointment in writing.

Under the Companies Act, the removal of a director is a power vested in the shareholders. The Act lays down a mandatory rule that a director may be removed from office 'before the expiration by a resolution taken at a general meeting of the company' and it must be passed by a member or members holding a simple majority of votes. However, the director in question must be informed of the intention of such resolution and must be given the opportunity to attend and be heard at the general meeting.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

The Model Regulations under the First Schedule of the Companies Act provide that the remuneration of the directors shall from time to time be determined by the company in a general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

Directors' remuneration must be disclosed during the general meeting. The directors' remuneration is determined by the company in the general meeting by ordinary resolution passed by the shareholders.

In the Code of Good Corporate Governance, the boards of directors of listed companies should establish a Remuneration Committee composed of non-executive directors with no personal financial interest other than as shareholders in the company, one of whom shall be independent and shall chair the Committee. A remuneration policy for directors and senior executives should also be established providing formal and transparent procedures for developing such policy and for establishing the remuneration packages of individual directors.

Transparency in relation to executive pay is also achieved via disclosure requirements under the Listing Rules, in terms of which listed companies are required to disclose the terms of service contracts between themselves and directors.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

There is no restriction or limitation on the number of shares a director may hold in a company in which he is a member of the management body. A director can buy and sell shares and other securities in the company without restriction. However, this is only permissible if carried out transparently without any inside information.

Directors of a company whose financial instruments are admitted to a regulated market must comply with the restrictions and obligations under the Prevention of Financial Markets Abuse Act 2005 (Chapter 476 of the Laws of Malta) when dealing in instruments issued by the company.

Under the Listing rules published by the MFSA, with regards to transactions carried out by directors and Office of Issuers, a director shall not deal directly or indirectly in any of the Securities of the Issuer at any time:

i. when he is in possession of unpublished price-sensitive information in relation to those Securities;

ii. when prior to the Announcement of matters of an exceptional nature involving unpublished price-sensitive information in relation to the market price of the Securities of the Issuer;

iii. on considerations of a short-term nature;

iv. without giving advance written notice to the Chairman, or one or more other directors designated for this purpose. In his own case, the Chairman, or such other designated director, shall not deal without giving advance notice to the board of directors of such company or any other designated director as appropriate; and

v. during such other period as may be established by the Listing Authority from time to time.

3.5 What is the process for meetings of members of the management body?

The procedure calling meetings of the board of directors is set out in articles of association which will provide that a director may at any time summon a meeting of the directors, include a notice period for the calling of meetings and the form of notice required, stipulate a quorum for board meetings and stipulate voting majorities for the adoption of resolutions. The articles will also include a provision which will allow the board to resolve on matters by virtue of a unanimous written resolution instead of at a meeting of the directors. Although the Companies Act does not specifically set out any statutory requirements with regards to the number of meetings that must be held, the Model Regulations under Schedule I of this Act provide that the directors may, whenever they deem fit, meet together for the despatch of business, and adjourn and otherwise regulate their meetings. There are no mandatory requirements regarding frequency or notice requirements.

The Listing Rules require that board meetings of listed companies should be held regularly to ensure that the management body carries out its duties effectively. The Listing Rules further require that the board sets out procedures to determine the frequency, purpose, conduct and duration of meetings and meet regularly, this depending upon the nature and demands of the company's business. In addition to this, notice of the dates of the forthcoming meetings together with the supporting material should be circulated well in advance to the directors so that they have ample opportunity to appropriately consider the information prior to the next scheduled board meeting.

After each board meeting and before the next meeting, minutes that faithfully record attendance and decisions should be prepared and should be circulated to all directors as soon as practicable after the meeting.

3.6 What are the principal general legal duties and liabilities of members of the management body?

Directors are bound to their companies by fiduciary duties. These duties may be broadly classified into two categories: duties of loyalty; and duties of care and skill. Directors must promote the well-being of the company and are responsible for the general governance and proper administration, management and general supervision of the company and its affairs.

The duty of loyalty covers the duties to act honestly and in good faith in the best interests of the company, not to make secret or personal profits, to exercise powers for the proper purposes and refrain from abusing of them and, to ensure that the personal interests of the directors do not conflict with the interests of the company. The directors must not use any company property, information or opportunity for their own or anyone else's benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with consent from the company in a general meeting or as permitted by the company's memorandum or articles of association. The directors must exercise the powers they have for the purposes for which they were conferred and not misuse them. The duties of care and skill establish both an objective and subjective test against which the competence of a director is measured. The Listing Rules, the Corporate Governance Manual and the Corporate Governance Guidelines all include provisions which mirror the statutory duties of directors.

The personal liability of the directors in damages for any breach of their duties is joint and several except in cases where directors breach a duty which was entrusted particularly to them. The actions of co-director/s shall not affect the rest of the co-director/s provided that the latter can prove either lack of knowledge or dissent in writing as to the breach of duty and that all reasonable steps were carried out to prevent it. Directors are also liable for any act which by law must be performed by a company.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

In terms of the Companies Act, the board is the organ of the company which is responsible for exercising all powers vested in the company as a separate juridical entity which are not reserved to the general meeting of shareholders.

The Code of Corporate Governance provides that the board has the first-level responsibility of executing four basic roles of corporate governance namely: accountability; monitoring; strategy formulation; and policy development.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Members of the management body and others shall not be exempted from or indemnified in respect of negligence, default or breach of duty or otherwise of which he may be guilty in relation to the company. Any provision, whether contained in the memorandum or articles of a company or in any contract with a company, or otherwise for exempting any officer of the company from, or indemnifying

© Published and reproduced with kind permission by Global Legal Group Ltd, London

him against, any liability which by virtue of any rule of law would in the absence thereof have been attached to him, shall be void.

However, this prohibition shall not extend to instances where such officer obtains a judgment in his/her favour or in which he is acquitted. In these cases, a company may indemnify such officer against liability incurred in defending such proceedings. The Companies Act also clarifies that nothing shall prevent companies or any officer of the company from purchasing directors' and officers' insurance to cover liabilities as aforesaid, and in practice it is very common for companies to do so (such D&O insurance would not, however, cover wilful or dishonest actions of the directors). The Corporate Governance Manual recommends that fund directors should be covered by D&O insurance.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Companies Act does not define what role the members of the board should take when setting the strategy; however, the directors have a duty towards the company and its shareholders to ensure that the company's strategy is in line with its objects of the company. Together with the company's senior executives, the management body is responsible for setting the vision and strategy of the company. The board of directors should discuss strategic matters at the board of directors meeting and promote an effective dialogue to address issues and implement best corporate governance practices.

4 Other Stakeholders

4.1 What, if any, is the role of employees in corporate governance?

Following an Anglo-Saxon corporate governance model, Maltese legislation does not cater for two-tier board structures under which employees are given a forum to exercise control over the management of the company, nor are employees given a right to representation on the unitary board.

As stated above, companies covered under the Listing Rules and the Corporate Governance Guidelines are expected to give due consideration to employees. In doing so, the board is expected to work closely with all groups of its stakeholders, including, suppliers, customers and the wider community in which the company operates, and work closely with such stakeholders.

4.2 What, if any, is the role of other stakeholders in corporate governance?

The stakeholders, including the employees, suppliers, customers and the wider community do not have a defined role in corporate governance. As provided in the Listing Rules, the board of directors should recognise that a company's success depends upon the relationship with all groups of its stakeholders. The board should maintain an effective dialogue with such groups in the best interests of the company.

4.3 What, if any, is the law, regulation and practice concerning corporate social responsibility?

The Companies Act provides that certain large undertakings (over 500 employees) must include in the director's report a non-financial statement containing information necessary to understand the undertaking's development, performance, position and the impact of its activity which relates to:

- Environmental, social and employee matters.
- Respect for human rights.
- Anti-corruption and bribery.

In accordance with the Companies Act, the directors' report which is to accompany the annual financial statements should, to the extent necessary for an understanding of the undertaking's development, performance or position, include an analysis of both financial and non-financial key performance indicators relevant to the particular business, including information relating to environmental matters.

Under the Code of Principles of Good Corporate Governance, directors of listed companies should seek to adhere to accepted principles of corporate social responsibility in their day to day management practices of their company. Listed companies should behave ethically and contribute to economic development while improving the quality of life of the work force and their families as well as of the local community and society at large; take up initiatives aimed at augmenting investment in human capital, health and safety issues and managing change, while adopting environmentally responsible practices related mainly to the management of natural resources used in the production process; act as corporate citizens and review material relating to the theme of corporate social responsibility and keep abreast with initiatives being taken both locally and internationally.

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

On the principle of joint and several liability of directors under the Companies Act, the board of directors as a whole is collectively responsible for complying with disclosure and transparency requirements. In fact, the board of directors have collective responsibility for ensuring that the annual accounts of a company, directors' report and, where provided, the corporate governance statements are drawn up. They are also responsible for ensuring the annual accounts are audited and tabled at a general meeting for approval together with a directors' report. The board is collectively responsible for ensuring that minutes of board meetings are properly kept in minute books and available for inspection by shareholders.

5.2 What corporate governance-related disclosures are required?

A company must prepare and publish annual financial statements in compliance with the requirements of the Companies Act. The accounts shall be accompanied by a directors' report and an auditors' report and must be approved by the shareholders.

The Listing Rule require the directors of listed companies to include in its annual financial report, a directors' report on the company's extent of compliance with the Code of Principles for Good Corporate Governance. It is also required to make certain additional disclosers such as an interim directors' report, half-yearly directors' reports and company announcements relating to specific matters.

5.3 What is the role of audit and auditors in such disclosures?

The annual financial statements of a company must be audited by a qualified auditor. Every company not qualifying as 'very small'

© Published and reproduced with kind permission by Global Legal Group Ltd, London

must appoint an auditor and prepare audited financial statements for every financial year. A private company is considered to be a small company if it does not exceed the limits of two of the following criteria:

- Balance sheet total: EUR 46,600.
- Turnover: EUR 93,000.
- Average number of employees during the accounting period: two.

The duty of the auditor is to examine and verify the original accounting records of the company, to discover any inaccuracies or omissions therein, to examine the company's annual balance sheet and profit and loss account so as to ensure that they agree with the company's original accounting records, and to subsequently report to the members of the company on the original accounting records and on the company's annual accounts. This latter function serves as a shareholders' safeguard against inaccurate, misleading or incomplete annual accounts being presented to them by the directors.

Under the Listing Rules the listed company's auditors are to include a report in the annual financial report to shareholders on the corporate governance statement issued by directors relating to the extent of compliance with the Code of Good Corporate Governance.

The Listing Rules also require listed companies to establish an audit committee consisting of a majority of non-executive directors. The members of the committee should meet at least four times a year and have several responsibilities including the monitoring of the financial reporting process, monitoring of the effectiveness of the company's internal control and risk management systems, and monitoring of the audit of the annual and consolidated accounts.

5.4 What corporate governance-related information should be published on websites?

A company is not required to publish any particular information on its website. However, under Article 6 of the Companies Act, a company shall mention in 'legible characters its name, kind of commercial partnership, registered office and registration number' in all its business letters and order form, whether they are in paper form or in any other medium, as well as on its internet website (if any). The Listing Rules allow listed companies to publish certain other information on their websites such as company announcements and general meeting notices.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

James Scicluna

WH Partners
Level 5 Quantum House
75 Abate Rigord Street
Ta' Xbiex XBX 1120
Malta

Tel: +356 209 251 00
Email: james.scicluna@whpartners.eu
URL: www.whpartners.eu

James Scicluna is a Malta Advocate and a Solicitor of the Senior Court of England and Wales. He has practised law in the UK and Malta, both in private practice and as in-house counsel.

James provides advice mainly to the Gaming, Financial Services, Real Estate and Hospitality industries. He is ranked as one of the top 50 Gaming and Gambling lawyers globally by *Chambers and Partners*. He is also listed by *Who's Who Legal* in the Sports & Entertainment category and is recommended by *The Legal 500* as a top Corporate and M&A lawyer, as well as a top Intellectual Property lawyer. The *International Financial Law Review* also lists James as a leading lawyer in the M&A and Risk & Insurance categories.

Gabriella Zammit

WH Partners
Level 5 Quantum House
75 Abate Rigord Street
Ta' Xbiex XBX 1120
Malta

Tel: +356 209 251 00
Email: gaby.zammit@whpartners.eu
URL: www.whpartners.eu

Gabriella Zammit is a Senior Associate at WH Partners. Gabriella is a corporate and financial services lawyer and is predominantly involved in the structuring and licensing of investment services, collective investment schemes, credit institutions and financial institutions in Malta. Prior to joining WH Partners in November 2017, she worked as a Senior Manager within the Risk Consulting Advisory Services team at one of the big four audit firms. She formed part of a multi-disciplinary team managing a number of advisory engagements concurrently with a focus on regulatory work.

Founded in 2006, WH Partners is amongst one of the leading law firms in Malta with a very strong reputation in the areas of Gaming and Gambling, Corporate and M&As, Financial Services, ICT and IP law as well as Taxation and Employment law. Both the firm and its individual lawyers are highly ranked by the foremost legal directories, including *Who's Who Legal*, *The Legal 500*, *Chambers & Partners* and the *International Financial Law Review*. WH Partners has also been recognised as a Top Tier Firm in several categories by *The Legal 500*. WH Partners has a tier 2 ranking in Banking, Finance and Capital Markets and Commercial, Corporate & M&A and a tier 3 ranking in Intellectual Property. WH Partners has recently won the Legal Firm of the Year Award in the 2nd Edition of the *Malta Gaming Awards*.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.co.uk