The Companies Act – one year later

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THE Companies Act is one year old. Approved by Parliament in 1995, it was brought into force with effect from January 1, 1996. The new Act was designed to replace the Commercial Partnerships Ordinance of 1962 which is in the course of being phased out. The Ordinance had introduced modern company law principles into Maltese law.

The Act built on the existing rules and structures, developing and updating them to meet the needs of the more sophisticated and complex financial and commercial environment of the Nineties. As far as possible the Act followed the framework adopted in the Ordinance, a feature which should have made it easier for practitioners to absorb the new rules and requirements introduced by the new Act. Nevertheless, there is no doubt that the Act is substantially more extensive than the 1962 Ordinance.

By means of elaborately designed transitional stages, the Companies Act has since January 1, 1996, been gradually superseding the Commercial Partnerships Ordinance. This process shall be completed by the end of 1997, so that on the first day of January 1998, the Ordinance shall be effectively repealed, subject to its continued restricted application to two special categories of companies, namely private shipping companies and offshore companies.

The new Act has not only modernised and upgraded Maltese company law, but it has also introduced the principles and standards established in the Company Law harmonisation directives of the European Union. The adoption of these often demanding requirements was certainly prompted as a preparatory step anticipating Malta's entry into the European Union.

Indeed, at the time the Act was being drafted, the highest political target of the administration was to secure membership in the Union at the earliest possible date. The preparation of new company legislation could not remain immune from such a specific policy objective.

With the change of direction or emphasis ushered in by the new administration in relation to the closeness of political ties with the Union, it remains a moot point whether Malta could have done without a number of regulations incorporated in the Act, some of which appear rather unduly strict or complicated, which were drafted more in response to the EU requirements than in response to local practical requirements and circumstances.

However, EU considerations apart, it is generally accepted that our company law was due for reappraisal after remaining virtually unchanged for 30 years. This need was felt more keenly in view of the country's move to consolidate its development into a serious and credible international financial and business centre. This objective was not pursued by what is often colourfully described as "a race to the bottom", meaning the setting up of an unduly accommodating legal framework offering unduly light regulation, in the fashion of a number of offshore tax havens.

The Companies Act must therefore be placed within the context of the sophisticated and extensive legislation introduced during 1994 which have totally altered the legal landscape for the provision of investment and other financial services in or from Malta. It appears no longer sufficient to consider the new law in isolation, but one would need to take into account the impact that a number of other laws have had on the development of our company legislation. This refers especially to three laws which have introduced new principles and structures for the promotion of shareholder and investor protection in Maltese law and whose relevance to company legislation may be briefly sketched as follows:

- The *Malta Stock Exchange Act, 1990*, which regulates the profession of stockbrokers who are the authorised intermediaries with regard to listed securities, establishes the listing requirements for public companies wishing to seek finance from the general public, and prohibits insider dealing on the basis of confidential information concerning listed shares and other securities, and sets up the Council of the Malta Stock Exchange as a regulator enjoying statutory powers to administer and to oversee the workings of the Act.
- The *Investment Services Act, 1994*, which regulates the providers of investment advice and other services in relation to shares and other corporate instruments, requires a licence for corporate collective investment schemes, controls the advertising and promotion of shares and securities, and provides for the appointment of a competent authority to oversee and administer the Act.
- The *Insider Dealing Act, 1994*, which supplements and develops the original rules contained in the 1990 Act for the prohibition and punishment of insider trading in corporate securities by directors and other officials of a company.

The Act has also introduced the principles and standards established in the EU's Company Law harmonisation directives

If not inevitable, it was certainly logical to expect a modernisation of company legislation to allow it to provide suitable and acceptable infrastructure for the establishment of companies, consistent with the lofty aims enshrined in the new financial services legislation. Had company legislation failed to keep up with the relentless pace of the reforms taking place all around it, it would sooner or later have been exposed as an outdated and quaint relic from the Sixties. It may be suggested with some justification that the new financial services legislation enacted in late 1994 served to instigate and hasten the modernisation of company legislation.

As had been the case with the Commercial Partnerships Ordinance before it, the Act may claim to contain the bulk of the law governing companies and other commercial partnerships, including rules regulating their dissolution and winding up. On this point, the 1995 Act has departed from the position in the United Kingdom, where company law is now mainly comprised in two separate acts, namely the Companies Act, 1985 (which consolidated UK company law up to that date) and the Insolvency Act, 1986.

Despite the extensive changes and innovations it has introduced, the structure of the new Act follows more or less faithfully the layout which we were accustomed to find in the Commercial Partnerships Ordinance. This approach has guaranteed a reasonably smooth transition and continuity.

One important link with the past is the retention of the three existing 'classical' categories of commercial partnerships recognised by our law. Once established in a recognised form, a partnership is attributed an autonomous legal personality, separate from that of its partners or members. The three forms of partnership which are specifically recognised by our company legislation were and are still the following:

- the limited liability company;
- the partnership *en nom collectif*, where the partners are unlimitedly liable for the debts of the partnership;
- the partnership *en commandite*, where at least one partner is unlimitedly liable for the debts of the partnership. This category is similar to the limited partnership found in some foreign jurisdictions.

Under the new law, the partnerships *en nom collectif* and *en commandite* may still only be formed for the exercise of one or more acts of trade, whereas a company may now be formed for what is described as any lawful purpose. In other words, the scope for company registration under the new Companies Act has been considerably widened beyond the confines of the former law which expressly restricted commercial partnerships to enterprises pursuing acts of trade.

The act of trade is a concept which arises and is regulated by the Commercial Code; it is an essential element in the definition of trader, which is fundamental to the Code. The Ordinance had, correctly, adopted the concept of act of trade in order to define the parameters of permissible activities of all kinds of registrable partnerships. The new Act has retained it solely for the two recognised partnership forms, permitting companies to develop in novel areas which extend beyond trade and business.

The Act now also recognises and regulates new corporate investment vehicles, such as the SICAV, which is a limited liability company with variable share capital and the INVCO, which is an investment company with fixed share capital. Both these corporate structures are targeted for collective investment purposes in line with the new financial services legislation enacted during 1994, especially the Investment Services Act.

The Companies Act has retained as much of the Ordinance as possible. For this reason, the Ordinance should be considered as a primary source of the provisions of the Act. It is also immediately apparent that another major debt is owed to English company law. Any attempt to trace the principal sources of the Companies Act, 1995 should at least include the following:

- The Commercial Partnerships Ordinance, 1962 and the Commercial Partnerships (Special Provisions) Act, 1994;
- The Companies Act, 1985 and the Insolvency Act, 1986 of the United Kingdom;
- A number of relevant European Union company law harmonisation directives already adopted by member states, in particular the First, Second, Third, Fourth, Sixth, Seventh and Twelfth Directives;
- The Companies Act, 1990 of the Republic of Ireland limitedly for the provisions governing SICAVs. Most of these rules had originally been introduced into Maltese law by the Commercial Partnerships Ordinance (Special Provisions) Act, 1994.

The Companies Act, 1995 is one of the most extensive and lengthy pieces of legislation ever enacted in the Maltese Islands. It has brought our company law into a new phase of its development. It would not appear correct to see in the Act a radical break with the previous law, but the Act may probably be better described as an exercise in elaboration, updating and continuation of the existing structures and rules arising from the Ordinance. In fact, it is amply clear that the new Act seeks to build on the old as regards both form and content, using the existing foundations to put into place a more sophisticated framework for the administration and regulation of companies.

1962 signalled the beginning of modern Maltese company law. That year witnessed the adoption of the Ordinance, which was however only brought into force three years later, in 1965, just a few months after Malta achieved independence from Britain in September, 1964.

The Ordinance was the product of some of the leading legal minds then available locally, who acting under the official name of Commercial Partnerships Law Reform Commission, completed a report on their proposals for new company legislation for Malta. This report which was presented to Government in 1956 remains important and relevant to this day, and will remain so even after the Ordinance shall have been laid to rest.

Since the first day of the year that has just ended, Malta has had a new Companies Act. As with all important pieces of legislation, this Act represents both a point of arrival as well as a new point of departure for our company law. 1997 finds company law in Malta in an exciting and interesting state of transition and development.