

NATIONAL-LEVEL CORPORATE ANTI-ABUSE MEASURES RELEVANT TO THE EU COMPANY LAW PACKAGE

Expert Questionnaire

Malta

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1) Anti-abuse mechanisms - do any of the following mechanisms exist in this country? If so, how do they work?

a. Disqualified Directors

i. Is there an official definition of “disqualified director”? If so, what are the grounds for disqualification? In which law can this be found? (link to legal text(s))

The Companies Act of 1995 is our principal legislation dealing with the formation and regulation of companies. The Act is administered by the Registrar of Companies (ROC), an office which today forms part of the Malta Business Register (MBR), which was recently re-established as a ‘public agency’ in 2018.

<https://legislation.mt/eli/cap/386/eng/pdf>

<https://mbr.mt/about-mbr/>

<https://legislation.mt/eli/sl/595.27/eng/pdf>

The notion of “disqualification of directors” arises from the Malta Companies Act 1995 and the relevant provisions are modelled largely on UK company law. However, in practice it largely remains on paper. The two most relevant articles are found in the Companies Act: articles 142 and 320, both introduced in 1995, but recently amended in 2020. A disqualification order may last from one to fifteen years. It is still an undeveloped concept in Maltese law and practice. It rarely happens – apparently no single case has arisen to date. Only a relatively restricted list of offences can trigger a disqualification under the Act.

Article 142 seems to envisage automatic disqualification but it is difficult to see how it can work in practice. Article 142 applies solely to crimes affecting public trust like theft and fraud and applies to interdicted and incapacitated persons.

Article 320 refers to disqualification resulting from company law breaches and insolvency related offences, but here a formal Court Order of disqualification would be required. Several serious crimes like money-laundering and insider dealing are not specifically included, and a criminal record by itself might not prevent a person from acting as director or shareholder. So, everything depends on the nature of the offence. New grounds for disqualification were added in 2020 by way of Act XXXI of 2020. These now include breaches of the Companies Act and important new discretionary powers have been assigned to the Registrar in this regard. These provisions remain largely untested.

<https://mbr.mt/2020/06/23/disqualified-directors-and-disqualification-of-directors/>

We are informed that an internal list is kept for internal verification purposes.

ii. Is there an official list of (current) disqualified directors? If so, where can this be found? (name of organization maintaining it and link)

Article 320 of the Companies requires the Registrar of Companies to keep a register of disqualified directors “which shall be open for public inspection.” It seems that no register is currently available as no disqualified director has been listed to date, but this may change soon.

iii. If there is an official list, who has access to this list (general public or restricted)?

The Register is legally available to the public, but a list is not yet set up.

b. Beneficial Owners

i. Where is the database of beneficial owners and which organisation maintains it (link)

The Registry of Companies is obliged to keep and maintain the Database of beneficial owners in terms of the recent AML Directive on the subject. The relevant legal provision is the Companies Act (Register of Beneficial Owners) Regulations. (Legal Notice (LN) 374 of 2017, as amended by Ln 184 of 2018, 158 of 2019 and 247 of 2020) These regulations transposed the relevant provisions of Directive (EU) 2015/849

Regulation 4 obliges the Registrar to maintain a Register of beneficial owners “which may be in electronic format only”. The regulations require companies to provide updated information on their beneficial owners. Fines are imposed for failure to do so in a timely fashion. <https://mbr.mt/wp-content/uploads/2020/10/Guidance-document-on-the-Register-of-Beneficial-Owners-of-Commercial-Partnerships.pdf>

According the Registry website, the following particulars would be required for each beneficial owner:

1. Company name
2. Company number
3. Name and surname
4. Date of birth
5. Nationality
6. Country of residence
7. Identification document number
8. Nature and extent of interest held
9. Nature and extent of control exercised
10. Date of entry as beneficial owner
11. Date of cessation as beneficial owner

The Register of Beneficial Owners can be accessed directly from the MBR’s portal <https://registry.mbr/ROC/>

It was set up in 2018.

ii. Are there any checks on the authenticity of beneficial owners, or does the organisation depend on a “statutory declaration” or “affidavit” from the company directors?

It seems that no such verification of authenticity is carried out. The Registrar accepts the documentation in reliance upon the declarations and under the responsibility of the directors or the relevant Corporate Services Provider. Nevertheless, regulation 12 does give

the Registrar the power to verify beneficial ownership by means of “physical on-site investigations”.

iii. How quickly must the company give notice when ownership has changed (updating of lists/databases)?

Regulation 6 requires changes in beneficial ownership to be notified to the Registrar within 14 using the official form set out for this purpose. Indeed, the Regulations set out the precise forms whereby beneficial ownerships, and changes therein, are to be officially notified to the Registrar.

iv. Who has access to the beneficial ownership database? Does the general public have unrestricted access, restricted access or no access?

The issue of access to the Register is governed by regulation 7, which defines three levels. In summary the position is as follows:

- (a) Regulation 7(1) (a) and (b) sets out the various public authorities which may have unlimited access to the Register. These include the competent authorities such as the FIAU and related agencies involved in AML, the MFSA (the financial services regulator), the national tax authorities, and other authorities listed in the main AML legislation.
- (b) The public has only limited access, and information is limited to “the name, the month and year of birth, the nationality, the country of residence and the extent and nature of the beneficial interest of the beneficial owners of a company”. (Regulation 7 (1)(c))
- (c) Regulation 7 (1) (b) also grants access to AML “subject persons” to have access to information about their own clients for the purpose of allowing them to carry out due diligence verifications.

In the latter two instances, further restrictions may apply on a number of grounds listed in the Regulation. The regulations have clearly intended not to allow the new Register to be available to the general public, and imposed various restrictions on such access. Indeed, the Registrar is assigned the power to refuse requests for information in certain designated circumstances, on a case-by-case basis, where such access “would expose the beneficial owner to the risk of fraud, kidnapping, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable.”

c. Electronic identity (eID) scheme – is there a scheme registered with the European Commission, and if so, what eIDAS level of assurance does it have?

The Registry website refers to a Notice on the use of electronic signatures in line with Regulation (EU) 910/2014 (‘eIDAS’). It is understood that a qualified electronic signature based on a qualified certificate issued in Malta shall be recognised as a qualified electronic signature in all other Member States. The Registry recognises electronic signatures schemes that are accepted in the EU.

Up till today, the authorised users are registered with Identity Malta (another public agency) since they need to have a Maltese Identification card; this enables them to have electronic signatures and submit documents online through MBR’s portal. Other potential users who are not authorised users, most probably because they would not have a Maltese

identification card, can submit electronic documents signed using a qualified electronic signature as issued by a qualified trust service provider and submit the said documents by email directly to desk officer or on esigning@mbr.mt.

One can find further information on <https://registry.mbr.mt/ROC/index.jsp> 'Notice of use of Electronic signatures' published on the 26 October 2020.

According to the official EU website, Malta does not as of this writing (March 2021) yet have a notified or pre-notified eID scheme under eIDAS:

<https://ec.europa.eu/cefdigital/wiki/display/EIDCOMMUNITY/Overview+of+pre-notified+and+notified+eID+schemes+under+eIDAS>

2) Company registry – transparency, access, cost

a. Which organization maintains the company registry? (name and link)

The Registrar of Companies maintains the company register as required by the Companies Act 1995. The Registrar forms part of the Malta Business Registry which has its premises in Zejtun, Malta. The Registry is open to the public (although currently severe physical restrictions are in place due to Covid-19 restrictions). Certain information may be downloaded against a small payment.

The Registry has been in operation since 1964 and contains all the registered information that has been filed in respect of any company or commercial company registered in Malta since that date. Previously, access was physical, but today that is no longer allowable to the public and access is strictly online.

b. To what extent is the registry digitalized? Can company foundations/registrations and reporting be carried out fully online/digitally?

The Registry is fully digitalised and has been so since around 1996. It contains all registered documents of companies and commercial partnerships, but not of other entities.

<https://mbr.mt/online-filing-information/>

Here the ROC explains how documents may be filed online, and includes a Software Download and Installation Guide. It lists what documents may be filed on line.

<https://registry.mbr.mt/static-resources/documents/docs/Online%20Filing%20Services%20Guide.pdf>

Here the ROC sets out a step-by-step guide to install all the components necessary in order to sign and submit documents on the Malta Business Registry Online System. This includes the installation of the Middleware Software 'Cryptovision – Classic Client Toolbox' and the Signing component 'E-Lock Super Signer Client'.

<https://registry.mbr.mt/static-resources/documents/docs/E-Signatures%20Notice.pdf>

Here the ROC explains in detail the use of the electronic signature.

c. Are bulk downloads of the entire list of registered companies possible?

No, bulk downloads are not allowed.

d. Does the registry have search features beyond the name of the company or person (e.g. by sector or employee size)

There is no access by reference to sector or business size, but only by reference to company number, shareholders, company secretary, directors, registered address, and similar.

e. What is the typical cost of downloading a document from the registry?

The Registry has a search engine and allows persons to access information electronically. When a person searches information through the Registry search engine, he will enjoy access to some basic information free of charge. Beyond such basic information, a small payment is charged that would allow the person to access the company's electronic file, which would include data and information from the company's formation up to the date of the search.

So, basic company particulars may be accessed for free, but for additional information there is a scale of payments.

See: <https://mbr.mt/promo/company-search/>

The Company Search functionality can be found here:

<https://registry.mbr.mt/ROC/index.jsp#companySearch.do?action=companyDetails>

A scale of fees for the different types of documents to be downloaded is established by a Legal Notice, namely the Companies Act (Fees) Regulations, LN 354 of 2008, as amended by LN 381 of 2015 and LN 194 of 2017. There is a fee of five euros to download a set of memorandum and articles of association or a copy of the annual accounts etc. Downloading a prospectus would cost ten euros, and two euros for an annual return. Any other document can be downloaded for a fee of one euro.

See Registry website:

<https://registry.mbr.mt/ROC/index.jsp#/ROC/viewUploadedDocs.jsp?pager.offset=20>

f. Is there information on employment levels beyond what is contained in annual accounts?

No. No such additional information is available.

g. Information on European company forms and EU reorganizations (CBM) - is a search possible for companies with the SE legal form or companies reorganized through a CBM?

Search features are allowed just like for any other company registered in Malta. European Companies are however listed separately and their prefix is "SE".

3) Firm foundations

a. What authority or organization is responsible for registering new companies (with link)?

The Registrar of Companies is the state authority which is authorised to register companies and other commercial partnerships. These powers arise under the Companies Act.

<https://legislation.mt/eli/cap/330/eng/pdf>

b. What are the steps needed to found and register a new company? To what extent can these happen digitally?

A company may be registered electronically.

The link below is to the Registry's "step-by-step guide to install all the components necessary in order to sign and submit documents on the Malta Business Registry Online System. This includes the installation of the Middleware Software 'Cryptovision – Classic Client Toolbox' and the Signing component 'E-Lock Super Signer Client'."

<https://registry.mbr.mt/static-resources/documents/docs/Online%20Filing%20Services%20Guide.pdf>

The Malta Business Registry website explains in a very comprehensive manner what documents and information are required: <https://mbr.mt/formation-and-registration-of-companies/>

These include:

- (a) the constituting statute referred to as the Memorandum and Articles of Association based on the British model.
- (b) a certified copy of the passport for each shareholder, beneficial owner and director;
- (c) in the case of corporate shareholders and directors, a copy of the constitutive documents (Memoranda and Articles of Association or other deed of partnership etc) together with a certificate of good standing and relevant extract from the relevant registry or any other document attesting the existence and registration number of the company or other commercial partnership.
- (d) Details for each beneficiary, shareholder and director.

A bank or professional reference is required for every non-EU or non-EEA shareholder or beneficial owner.

c. What checks (if any) are done on the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners

i. By registration authority

Traditionally, the verification was largely carried out on a pro forma basis and documents filed were accepted upon the responsibility of the persons filing them. However, more recently, the Registry has been introducing stricter vetting procedures. Documents are now being more thoroughly vetted and are sent back should corrections be needed.

ii. By notaries

No.

iii. By "facilitator" companies (foundation agents)

Yes. Lawyers, accountants and Corporate Services Providers engaged in the formation of companies have an obligation to carry out due diligence tests on their clients, shareholders and companies. They are subject to increasingly stringent obligations arise under anti-money

laundering and financial terrorism laws and regulations which fall under the responsibility of the Financial Intelligence Analysis Unit (FIAU).

Corporate Services Providers, which are regulated by special law, assist persons in setting up companies and often provide services as company secretaries and directors. They shall soon be subjected to a more rigorous licensing framework.

4) Cross-border Mergers (CBMs)

a. Which authority is responsible for the pre-merger certificate (outbound CBMs), which authority is responsible for approving the merger (inbound CBMs)? (name and link)

The Registrar of Companies is the administrative authority which oversees and registers domestic and cross-border mergers. His powers arise under the Companies Act.

<https://www.mfsa.mt/wp-content/uploads/2019/07/Cross-Border-Mergers-Regulations.pdf>
<https://mbr.mt/cross-border-mergers/>

[file:///C:/Users/User/Downloads/Malta Cross Border Merger final%20\(1\).pdf](file:///C:/Users/User/Downloads/Malta%20Cross%20Border%20Merger%20final%20(1).pdf)

The Cross-Border Mergers of Limited Liability Companies Regulations of 2007 came into force on the 15th of December 2007.

b. What personnel capacity/qualifications does the authority/ies listed above (organization(s) granting the pre-merger certificate + approving merger) have?

The Registry of Companies was originally set up by the Commercial Partnerships Ordinance and started operations in 1964. It was confirmed in 1995 by the new Companies Act Today it is manned by about 44 personnel, including experienced and skilled managers, lawyers and accountants, directly working for it. It benefits from other resources available at the Malta Business Registry, of which it forms part.

c. What (if any) anti-abuse checks are made?

- i. Purpose of reorganization**
- ii. Background check on directors**
- iii. Identity of beneficial owners**
- iv. Worker I/C/P arrangements**

It is understood that such checks are not carried out. The submitted documentation and information are checked for their formal validity and completeness and are registered on the responsibility of the person submitting them for registration. There is no separate register for cross border mergers.

During 2021, eight CBM's have been received, and four of them have been registered. This corresponds to a rate of about 36-40 CBMs in a single year, i.e. higher than the historical average, as data from the University of Maastricht indicates that there were 67 CBMs

involving Maltese companies between 2008 and 2019.¹ The Cross-Border Mergers of Limited Liability Companies Regulations, 2007 require that the the draft terms of merger show, among other things, (d) the likely repercussions of the cross-border merger on employment;

(j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined.

The report drawn up by the board of directors of the Maltese merging company or companies, is intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees. It shall be made available to the members and to the representatives of the employees, or to the employees themselves when there are no such representatives, at least one month before the date of the general meeting.

The Registrar reviews the documents submitted for their formal validity and to make sure they are complete.

See also: L.N. 165 of 2008 EMPLOYMENT AND INDUSTRIAL RELATIONS ACT, 2002 (CAP. 452) Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations 2008 IN exercise of the powers conferred by article 48 of the Employment and Industrial Relations Act, 2002, the Minister for Social Policy has made the following regulations – 1. (1) The title of these regulations is the Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations, 2008. (2) These regulations establish the arrangements for the involvement of employees in cross-border mergers of limited liability companies hereby giving effect to the relevant provisions of Directive 2005#56#EC of the European Parliament and of the Council of the 26th October 2005 on cross-border mergers of limited liability companies, hereinafter referred to as “the Directive”.

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674089