

MEMORANDUM FOR CABINET BY THE MINISTER OF
INDUSTRIAL DEVELOPMENT AND TOURISM

Amendments to the Commercial Partnership Ordinance, 1962

The Commercial Partnerships Ordinance was enacted on the 9th February, 1962, and will come into force on a date fixed by the Minister of Industrial Development and Tourism by a Notice published in the Government Gazette.

2. In connection with the setting up and staffing of a Division of the Department of Trade to administer this admirable piece of legislation which - I would like to affirm - enhances the Maltese Statute Book and the prestige of Maltese Commerce, Government had secured on loan from the British Government the services of an official of the Board of Trade (Mr. H. Osborne).

3. In his report, this official discussed various amendments which he thought would contribute to the smoother working of the Ordinance in practice. The amendments proposed were carefully studied by my Ministry and as a result the Deputy Attorney General has prepared the attached Bill, embodying the amendments which are non-controversial and which, it is considered, should be included in the Ordinance before it comes into force. It will be seen that most of the amendments are of a purely administrative nature. The purport of each amendment is explained below, item by item:-

Clauses 2 and 3 are intended to ensure that the registered office of a partnership registered in these Islands is actually in Malta and its Dependencies.

Clause 4 (i) At present the law prohibits the Directors of a company from changing the premises of their office without the sanction of an extraordinary resolution taken during a general meeting. This is considered too cumbersome and the proposed amendment will authorise directors to change the address of their office as they deem fit.

(ii) This subclause incorporates in the Ordinance a desirable provision regarding conversion of shares into stock or reconversion of stock into shares.

Clause 5. This merely amplifies the existing provision by making it applicable not only to a "form of application" but also to a "prospectus."

Clause 6. deals with the amplification of the word "person" to read "person responsible for the issue, circulation or distribution of a prospectus or a form of application" in order to embrace any person responsible as stated above.

Clause 7. Sub-para (i) has been deleted as its provisions are covered by sub para (iii). Control of a company can only be effected if more than half its voting powers are held.

Clause 8. This question of auditors of company accounts is a rather thorny matter. It is felt that as a matter of prestige the two locally constituted bodies of ac-

accountants should be given official recognition as against recognition only of foreign bodies. The two local bodies, however, are made up of highly qualified members as well as others who are merely book-keepers. The solution lies in recognising the two bodies but to grant personal authorisation only to qualified members of the two bodies. It is pointed out that this provision applies only to public limited liability companies and non-exempt private companies which will constitute a minute fraction of the companies registering under the law.

Clause 9. provides for the cancellation of the name of the partnership which has ceased to exist in view of its conversion or amalgamation. Under the Ordinance as it stands at present such names would remain on the register. In addition the Registrar is now being empowered to strike off the name of a partnership which has been declared ineffective by a decision of the Court.

Clause 10. empowers the Registrar to accept from any overseas company a balance sheet or profit and loss account which is drawn up in the form required under the law of the place of the company's registration if, in his opinion, such accounts give substantially the same or greater information as that required under the Ordinance as well as giving the Registrar discretionary powers, in cases where the above provision does not apply, provided that such accounts are accompanied by statements drawn up in accordance with the form laid down in the Ordinance respecting the company's operation in Malta. It also empowers the Registrar to waive this latter proviso if impracticable.

Clause 11. ensures that the Registrar publishes in the Government Gazette any alteration necessitated by the conversion or amalgamation of partnerships.

Clause 12. vests the Minister with discretionary powers in matters of administrative details.

Clause 13. defines the word "Minister."

4. An outstanding matter which is not dealt with in the attached Bill is the retention or deletion of the proviso to section 117 of the Ordinance, which lays down that no director or officer of a company may be appointed as a proxy to attend or vote at a company meeting on behalf of members.

Various companies in Malta have very strong views about this matter and have submitted representations for the deletion of section 117.

5. The following statements and extracts from renowned authorities will perhaps be useful in considering this point.

Pennington in his "Principles of Company Law" states:-

"It is permissible for the Board of directors to circulate proxy forms to members but if the Board sends out proxy forms with the names of proxies already filled in or accompanied by an invitation to appoint a person named, the same invitation must be sent to all members entitled to attend the meeting. The purpose of this provision is to prevent directors soliciting members, who are unlikely to oppose the board, to appoint one or more of the directors as their proxy without disclosing this tactic to other members."

The principle of having directors appointed as proxies is therefore admitted, the crux of the matter being how to prevent abuses.

The Report of the Company Law Committee (Lord Jenkins) brought forth only this recommendation:

Para 468 (h) Proxy forms issued by a board of directors should be required to be so framed that the member may instruct his proxy to vote for or against (or to exercise his discretion in respect of) each resolution dealing with any special business to be transacted at the meeting which the proxy is to attend.

This implies that, whilst recognising the danger of abuses by directors acting as proxies for shareholders, the Committee did not feel justified in excluding officers and directors from being so appointed.

Lord Gower in his "Modern Company Law" had this to say:-

"Even if the proxies are in the two-way form, many members will complete them after hearing but one side of the case, and only the most intelligent or obstinate are likely to withstand the impact of the, as yet, uncontradicted assertion of the director. It is, of course, true that, once opposition is aroused, members may be persuaded to cancel their proxies. But in practice this rarely happens."

"In practice the company may be controlled by the majority but the majority are in turn controlled by the management which can, nearly always, persuade the majority to follow their lead."

"It may be desirable that management, which supplies the brains and initiative, should prevail and that in so far as its power needs curtailing, it should be in favour of the public as a whole and of the employees, rather than in favour of a small section who happen to have invested in the company - after all we do not give a man more votes in parliamentary elections because he happens to have invested in government securities. This however is a political rather than a legal question."

Mr Osborne had this to say:-

"There is no corresponding provision in U.K. Law. Its continuance or abandonment is a matter of indifference. The reason for its inclusion is, no doubt, to prevent directors exercising an undue or unfair influence by the exercise of proxies in their own interest."

"English company law has not adopted this regulation not because it is not a good one but because it is so easy to evade - if easily evaded, it is not likely, in practice, to prove very onerous."

Mr Osborne continued - and this, perhaps, is the crux of the matter -

"Whether or not you yourselves wish to encourage the formation of Maltese companies with a preponderance of non-resident shareholders is for you to decide. If however you do want to do away with it (or even in any case) I would recommend introducing an amendment on the lines recommended in para 468 (h) of the Jenkins report."

6. It would appear that the primary consideration is the actual formation of Maltese companies, the nationality of members being of secondary importance. Mr Osborne's statement, however, implies that the provision under review militates against foreign shareholders. As this would directly influence the forming of companies, perhaps the section should be deleted.

7. Moreover, to-day the purchase of shares is considered as an investment and the ordinary man in the street is influenced in his choice mostly by the names of the directors. It is therefore reasonable that shareholders who know nothing about the business and who cannot attend a meeting should be in a position to back the unfettered judgement of a director whose ability and "know-how" was instrumental (directly or indirectly) in persuading them to invest in a particular company.

8. As this particular point is rather controversial, I am leaving it for decision by Hon. Ministers.

9. Hon. Ministers are accordingly invited:-

- (a) to agree that the attached Bill be submitted to the House of Representatives for approval; and
- (b) to decide whether the Bill should:
 - (i) repeal the proviso to section 117 of the Ordinance; or
 - (ii) amend the proviso on the lines of Para ~~117~~⁴⁶⁵ (h) of the Jenkins Report; or
 - (iii) leave the proviso as it stands.

The exact wording of the proviso at present is: "No director or other officer of the company may be appointed as a proxy."

10. As soon as the Bill is agreed to by the House of Representatives I shall be in a position to issue a Notice in the Government Gazette fixing the date of the coming into force of the Commercial Partnerships Ordinance, 1962. The amending Bill will of course come into force on the same date.

4th October, 1964.