

1st International
OFEL Conference on Corporate Governance
- Organizational, Financial, Ethical and Legal Issues
of Corporate Governance -

On Bossing the Boss
Presentation to the Plenary Session

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What is the Board Doing?

- **Directing** includes **accountability, managing management, and formulating the strategic road**
- Good Corporate Governance (CG): an attempt to ensure the three – yet without neglecting the bottom line
- Are Boards doing enough of all three?
- Maltese experience and research suggest that this is rarely the case.

First: How Accountable?

- **Low Level of Explanations** to Shareholders:
Shareholders too weak to insist, AGM poorly attended and subject to possible manipulation.
- **Published Info:** *More voluminous yet often restricted and even less shareholder-friendly. More Quantity & Frequency does not necessarily result in better quality.*
- **Codes** of Good Corporate Governance observed even less where voluntary
- Little attention being given to **smaller/minority** interests

Second: Is Management being well managed?

- Some major Corporate Governance issues in managing this relationship are:
- **Structural:** To adopt a mixed board?
- **Power-sharing:** To do away with duality?
- **Regulatory:** To consider framework too risky?
- **Competence:** To close Board skill gaps?

Is Management being well managed? **STRUCTURAL** Issues

- The larger the company, the more difficult is monitoring if directors are all **non-executive**, and **rarely present**.
- This leads to the consideration of the **mixed** executive/non-executive board structure. A dilemma results: *Executive Co-responsibility vs. Manipulation*.
- *So should the CEO be a member of the Board or not?* Our experience shows that its better not. Yet, with the CEO excluded, the situation may become aggravated if the Board is weak.

Is Management well managed?

POWER-SHARING Issues

- In order to deter or detect abuse early requires the **prevention of unfettered powers of discretion** by one person – the CEO or Chairman.
- Yet splitting the Chairman/CEO powers may lead to conflicts, inflexibility and bureaucracy .
- *So is power-sharing beneficial?* Experience indicates – “yes with compatibility of character”. In addition, an Executive Committee without proper Board representation may seize Board powers. Board sub-committees with unclear terms may also lead to this.

Is Management being well managed? REGULATORY Issues

- LAWS: Directors may become **personally liable** as a result of management deficiencies. Third party litigation is increasingly turning directorships into nightmares. **Burden of proof** of “*innocence till proven guilty*” is often being reversed.
- CODES: CG codes often give **inadequate practical guidance**: may contain **incongruences** with the rest of CG regulatory framework. Also, **when voluntary**, as in the case of Malta, it may not be **adhered** to.
- So, **is it worth it to be a director**, given the risks?

Is Management well managed?

COMPETENCE Issues (1)

- Given the dangers, how are we to ensure that directors are **fit and proper** especially in public or public interest companies?
- *Should we require them to be professionally **qualified** or is this needlessly restrictive?*
- *Should their company first subject them to compulsory **training**, such as induction courses? Voluntary participation may not be enough.*

Is Management well managed?

COMPETENCE Issues (2)

- *Should the Company measure the Board's **performance**? If so, is self-evaluation sufficient?*
- *Should a **Nomination** Committee scrutinise candidates asking for member election? But such committee may be “politically” manoeuvred to exclude potential competitors*

Third: Timing the Strategist

- Effective strategy is long-term, yet not too long.
- Replacing directors too early may render the Board weak vis-à-vis management.
- Yet too-longstanding tenure, directors may risk complacency towards management, no new ideas, and a resistance to change.
- *Would say a seven-year contract with no renewal possibility be a possible solution?*

CONCLUSION

- So questions arise :
 - Who is the boss in the company – the Board or the CEO?
 - And who bosses whom?
 - THANK YOU FOR YOUR ATTENTION.