ISSUES IN MALTESE REGULATION: ON THE MOVE AND UNDER STRESS

INTRODUCTION

Regulation is a fascinating subject which affects many areas of commercial activities and which often plays a significant role in determining how these activities are carried out and by whom.

Regulation in Malta is evolving but it also appears to be under stress. New regulatory structures are being set up as old structures find themselves questioned and re-drawn, often with ambiguous results and uncertain benefits. Some regulators are not as autonomous as some imagine them to be or indeed as the legislation itself would have envisaged them to be. Several politically appointed persons in leading regulatory positions are really occasional or accidental regulators rather than professional regulators. A few unlikely regulators still try too hard to please and to remain close to their political masters. This mindset inevitably distracts them from the higher mission of protecting the general interests of the community and the legitimate expectations of consumers. Governing boards are filled by political appointees, a method which does not guarantee competence or diligence. Several people occupy senior regulatory positions without enjoying adequate background or sufficient knowledge and competence. Like politicians, including ministers, they are not subjected to a fit and proper due diligence test, either upon their appointment or on an ongoing basis. A number of recent interesting developments in the local regulatory field are considered below.

THE ACCOUNTANCY PROFESSION

The newly designed framework for the future regulation of the accounting profession was recently in the news. This follows an EU directive on the subject which seeks to ensure greater independence and autonomy of the national regulatory agency from the actual operators. On 27 May 2016, Prof. Edward Scicluna, Minister for Finance, and former Chairman of the Malta Financial Services Authority, delivered an interesting speech to a joint gathering of members of the Malta Institute of Accountants and the Association of Chartered Certified Accountants where he raised significant regulatory issues such as regulatory capture and conflicting interests. The newly constituted Accountancy Board – the profession's regulatory board – was described by the minister as a first for Malta as it is now composed solely of non-practitioners.

"Can you imagine that happening to the medical or legal professions?" he asked.

Minister Scicluna also highlighted that the regulatory landscape had shifted in the past years and today, following various well-known mishaps, much higher standards were being expected from this profession.

Minister Scicluna stated that the recent amendments to the Accountancy Profession Act strengthened the principles of free movement of personnel across EU member states and have increased competition, whereby small audit firms will have more opportunities to compete through a system of regulated rotation. Minister Scicluna also remarked that:

"The hardest pending option for Malta was the removing of the obligation by micro-enterprises to carry out the annual audit of small enterprises. So far, the Government is not convinced that it is in the interest of these enterprises to remove this obligation since both the banks and the tax authorities rely on this independent assessment in dealing with these enterprises."

THE ARBITER FOR FINANCIAL SERVICES

The first arbiter for Financial Services has now been appointed following the entry into force of the Arbiter for Financial Services Act, 2016. This new office enhances the framework for the settlement of consumer complaints in the investments services, insurance and banking sectors. It introduces a new instrument for Maltese investors and depositors which almost exclusively deals with private law claims against licence-holders, typically claims for refunds and compensation for loss. The new law on the subject came into force a few weeks ago and it is still a work in progress as the necessary logistics are still being set up. At the time of writing, the Office of the Arbiter had just published a call for applications for various posts. Another advert, strangely in my view, insisted that complaints should be submitted in Maltese.

It still too early to judge the performance of this special grievance mechanism which had (at the time of writing) only just started to deal with actual complaints. An early hurdle that the arbiter may have to face refers to the lingering claims from the BOV Property Fund debacles and possible issues with acquired rights and prescription. Adverts in the press over the past weeks have shown that BOV property fund claimants are being mobilised to submit their claims before the arbiter. The law allows the arbiter to hear cases which involve disputes and claims that may have arisen after 1 May 2004. Luckily, the appointee is a member of the legal profession with experience in handling these delicate issues and is able to make judicious resort to equity in the appropriate cases.

The arbiter is appointed for seven years after which he would not be eligible for re-appointment. He can award compensation to aggrieved consumers up to EUR 250,000 plus additional costs. The parties have a right to at last one sitting and cases are generally to be decided within ninety days. Both parties may appeal the arbiter's decisions.

One now waits to see how this new consumer mechanism will operate in the coming months and years and whether it will prove as consumer-friendly as had been promised. It is certainly a novel feature in the extensive and complex framework under which financial services shall henceforth be carried out and regulated.

ESTATE AGENTS

A few months ago, a draft bill accompanied by a very meagre and unsatisfactory explanatory note (jointly badly described as a White Paper and a Property Code) was presented by the relevant minister (who has since been replaced) and by representatives from the building and estate agency sectors. Representatives of these two sectors of industry had been raising expectations for weeks regarding the impending publication, and were clearly sending a signal that they were directly involved in the process. This was very noticeable when the policy document was presented and discussed in public fora. What was also clearly noticeable was the complete absence of consumers and consumer agencies from the discussions and the consultations involving this recent White Paper. An unusual and unacceptable rule found in the new draft law is the possibility for those with known and declared conflicts of interest to be allowed to sit on the new regulatory agency being proposed for authorising and monitoring estate agents. This rule does not benefit consumers or even estate agents generally, but rather it seems to

safeguard the position of particular persons involved in property transactions and who actively assisted and participated in drawing up the new policy and draft legislation. We have to wait and see how this White Paper and draft law will proceed and whether the draft law will be improved both stylistically and to ensure a more consumer-friendly regulatory mechanism. The full title of the document, published earlier this year, is 'White Paper: Malta's Property Code and Regulations 2016'.

Under UK law, the regulation of estate agents does not follow the traditional approach of creating a positive obligation to apply for a licence. Instead, under the Estate Agents Act 1979, anybody can act as an estate agent unless the relevant authority (The Director General of Fair Trading) decides that the person is unfit to provide such services. Fraud or violence are typical reasons for rendering a person unfit. So in brief, every person may act as an estate agent until when he is shown to be unfit as determined by the Director General who may for this reason issue a prohibition order. This is not a model I would support but it is an interesting alternative as to how regulation can take place.

THE ECB, THE CBM AND THE MFSA

Banking is a sector which clearly shows the impact that EU membership has had and is having on the way regulation happens. The way local banks and their senior officials are appointed and regulated has undergone various drastic changes during these past few years with the European Central Bank (ECB) now playing a direct supervisory role over Maltese banks and in particular those considered 'significant'. Previously, all local banks were authorised and supervised by the Malta Financial Services Authority from the cradle to the grave, and before it, by the Central Bank of Malta (CBM). This institution was established by the Central Bank of Malta Act of 1967. Today, certain important decisions relating to Maltese banks are taken by the ECB. The local banks deemed 'significant' are today supervised directly by the ECB. This represents a huge new development and the implications are only now being understood.

The role of the ECB was recently part of a rather heated but interesting debate concerning one of the deputy governors of the CBM who was poised to take over the governorship following the end of the incumbent's term. The discussion focussed significantly on who appoints whom and how appointments may be terminated.

The CBM is run by a board of directors, which include a governor and two deputy governors. The governor and the two deputy governors are appointed by the President who has to act on the advice of the Prime Minister. The other directors are appointed directly by the Prime Minister. This is a clear result of the Central Bank of Malta Act. Such senior appointments need to be made after careful study and attention. Ideally candidates should undergo a full due diligence process, a requirement that does not arise under the Act. Contrary to what was claimed by various persons in important posts, the ECB dos not appoint the governor or the deputy governors; and it has no legal power to approve, accept and reject nominees or even to question their appointment as these are matters reserved and pertaining solely to the national authorities. Nor is there any justification for suggesting that the behaviour of the deputy governor was a matter for discussion and determination by the board of directors, of which he forms part. The law does not give the board this power which cannot be burdened with the responsibility of judging or dismissing one of its own members.

There was also some talk and references to the need to safeguard the 'autonomy' of the CBM in this context. This discussion was rather unsatisfactory and shallow. It is incorrect to suggest that the CBM is fully or unlimitedly autonomous. It is an institution whose performance may be questioned by the courts and is subject to the provisions of the law which regulates its very existence, its functions and operations, as well as other legislation. The law is passed by Parliament on the direction of the government, and not by the CBM. The entire board of directors, including the governor, is appointed by a purely political decision and no internal mechanism exists within the CBM which would allow these appointments to be executed and determined internally without outside political intervention.

The same applies to other entities such as the Malta Financial Services Authority where the board of governors, including the chairman, are all appointed by the Prime Minister (not the Minister for Finance) at his discretion. The Malta Financial Services Authority Act assigns to this politically appointed board the legal authority to appoint all the directors and deputy directors (and they are indeed many) of the agency. Both these entities and others remain subject to a number of oversight mechanisms, including the CBM Act and the general law of the land, the courts and other relevant administrative tribunals, whistleblowing legislation, the Ombudsman, the Public Accounts Committee, and the National Audit Office. These may all in some way serve to question their behaviour and performance, and rightly so. They create a system of checks and balances needed and justified in a democratic society so as to prevent or detect abuse, acts of maladministration and other wrongdoing.

The laws which set up public corporations give specific attention and contain clear provisions as to how the senior posts are to be appointed, usually by politicians, a minister or the Prime Minister. However, insufficient attention is often given as to how they can be removed and by whom. The removal of heads and senior staff of public agencies is without doubt a highly sensitive subject fraught with controversy. Nevertheless, as was the case with the possibly needless controversy as to who at law could remove (or suspend) a deputy governor of the (CBM), it appears axiomatic that in the lack of a specific provision on removal, the persons or organs specifically empowered to appoint in the first place would also be considered to have the added responsibility of exercising the power of dismissal or suspension. Naturally, the powers imply a heavy responsibility and should only be used sparingly where the proper circumstances legally subsist.

A long over-due discussion has also been witnessed in the media on whether and how far regulators should be permitted to place themselves in conflicts of interest and for how long heads of regulatory agencies should be allowed to stay in their post. A strong suggestion doing the rounds is that members appointed to the board of regulatory agencies should not serve for more than two terms or for ten years as a maximum. President Obama will soon be leaving his post after serving the maximum two terms. Prof. Juanito Camilleri, Rector of the University of Malta, has recently done the same. This rule would prevent certain people from becoming too accustomed to their proverbial 'poltrona' with related perks and privileges and would hopefully serve as a guarantee against apathy, possible abuse and a undue sense of one's indispensability. The recent FIFA debacle with the abusive Mr Blatter expressing an indefinite and insatiable desire and determination to remain in his important and lucrative post has highlighted why definite durations should be imposed on positions of regulatory agencies and other public sector boards.

CONCLUSION

This article has briefly reflected on a number of regulatory developments in Malta. It follows a talk I delivered last April on 'Issues in Local Regulation' to the second Banking and Finance Conference organised by the Faculty of Economics, Marketing and Accountancy of the University of Malta. I ended my talk by listing ten inter-related observations from my various regulatory experiences which started in 1992. These were my ten propositions drawn from my long experiences in and with different regulatory agencies covering 24 years. They have not yet been published elsewhere and can hopefully provide a useful conclusion:

- Regulation in Malta has not yet reached a state of maturity and is still largely a work in progress.
- Regulators in Malta need to become more professional and need to train themselves better to become true specialists in their craft.
- Regulators can only legitimately set and require high standards from their licence-holders if they themselves adhere to even higher standards of ethical conduct and corporate governance, in deeds not just words. Regulators should accordingly lead by example.

- Regulators should realise that public expectations are on the rise and they may expect greater public scrutiny and criticism in the future. They are bound to face higher demands for decisive action, for transparency and accountability and for ethical coherence.
- Regulators are there to regulate; they are not set up to sell, or to be popular or to please politicians or vested interests; rather than describe themselves as friendly, approachable and accommodating, they need to be more assertive, effective, reliable, competent, sensible and fair.
- Regulators should only do what the law allows them to do and they should not take any liberties with their statutory powers and functions.
- Regulators in Malta have so far failed to show coherence, leadership and determination in the implementation and enforcement of the rules of fair competition and of high levels of consumer protection in their respective sectors.
- Regulators in Malta still have much to do to command and inspire public confidence.
- Regulators should make themselves more aware of the challenges of regulatory capture and other forms of influence and they should be particularly wary of undue familiarity with the economically powerful and the politically connected. And finally…
- Regulators and Regulation in Malta, as elsewhere, remains a complex, challenging, fascinating and often controversial field of study. Whereas Regulators and Regulation are on the increase, local academic material on the subject has failed to catch up and remains generally incomplete. In any event, academic literature needs to move away from descriptive narrative and engage more in critical analysis.

RELEVANT MATERIAL:

Robert Baldwin, Martin Cave and Martin Lodge, Understanding Regulation – Theory, Strategy, and Practice, Oxford, 2012

Robert Baldwin, Martin Cave and Martin Lodge, The Oxford Handbook of Regulation, Oxford University Press, 2010

Inad Moosa, Good Regulation Bad Regulation – the anatomy of financial regulation, Palgrave Macmillan, 2015

D. Fabri, A Study in Maltese Regulation: Estate Agency Services – a suitable case for treatment? The Accountant, April 2004, pp29-31

ABOUT DAVID FABRI

David Fabri heads the Department of Commercial Law at the University of Malta. His main areas of interest and research are regulation, financial services legislation, consumer policy and protection, corporate law, whistle-blowing and business ethics.