Navigating Through the Process of a Members Voluntary Winding Up

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In this article, **Saman Bugeja** provides an in-depth overview of the Members Voluntary Winding up process under Maltese law as regulated by the Companies Act. The article outlines the preparatory steps required before dissolution, including the settlement of administrative, contractual, and fiscal obligations, and explains the procedural requirements for initiating and conducting such process. Key statutory filings are detailed, along with the roles of directors and the appointed liquidator. It highlights the liquidator's duties in verifying solvency, realising assets, settling liabilities, preparing audited liquidation accounts, and managing final shareholder meetings. It also discusses the publication and cooling-off period preceding the company's formal strike-off. Emphasising the importance of coordination among legal, financial, and tax advisors, the article concludes that while this process offers a clear and orderly mechanism for winding up solvent companies, professional guidance is crucial to ensure compliance and mitigate potential risks throughout the process.

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Introduction

Dissolution and consequential winding up is a critical process in the life cycle of a company, marking its transition from active business operations into a state of liquidation, which is eventually sealed by complete closure. Under Maltese law, the dissolution of companies is governed by the Companies Act (the Act),[1] which provides a structured framework to ensure that the process is conducted fairly and efficiently.

When preparing for the dissolution and winding up of a company, directors and shareholders should recognise that simply following the legislative process is not enough. It is not simply a matter of adopting the necessary resolutions and filing the required forms. Depending on the activities of the company, there may be a number of pre-liquidation steps to be taken. As a result, meticulous coordination amongst all parties involved, including legal, tax, and financial advisors, the liquidator and the relevant regulatory authorities, is critical to ensure that the dissolution and winding up process runs smoothly until the company is ultimately struck off.

Under Maltese law, a company may be wound up in various ways. we will consider the two primary modes available under the Act for voluntary closure.[2]

The Members Voluntary Winding Up

As the name implies, a members voluntary winding up (MVWU) is a process which is voluntarily initiated by the shareholders of a company, by way of extraordinary resolution, who are desirous of wrapping up the company's activities. A fundamental element of a MVWU is that the company is in a solvent position prior to dissolution and able to pay its debts in full, including any contingent and prospective liabilities.[3]

Prior to the initiation of a MVWU, companies should take certain pre-dissolution preparatory steps to facilitate the work of the liquidator when preparing the liquidation accounts and the final scheme of distribution. These steps also help ensure that the company can be wound up and is able

[1] The Companies Act, Chapter 386 of the Laws of Malta.

[2] The Companies Act, Chapter 386 of the Laws of Malta also provides for compulsory modes of winding up which require judicial action.

[3] Companies Act (n 1) Article 214(5):

"*...a company shall be deemed to be unable to pay its debts -*

(a) if a debt due by the company has remained unsatisfied in whole or in part after twenty-four weeks from the enforcement of an executive title against the company by any of the executive acts specified in article 273 of the Code of Organization and Civil Procedure; or

(b) if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company."

to do so smoothly. It is important to note that some of these preparatory actions may extend into the post-dissolution period, in which case the liquidator's involvement would be significant.

These pre-liquidation steps include but are not limited to:

- Ensuring that all annual filings with the Malta Business Registry (MBR) including annual returns, annual beneficial ownership confirmations and annual financial statements are up to date and that no penalties for late filing are left outstanding;
- Deactivating the VAT number, if the company is VAT registered, and paying any outstanding VAT dues to the Commissioner for Tax and Customs;
- Providing due notice of the company's expected liquidation to employees and taking appropriate measures to make such employees redundant;
- Checking whether any former employees of the company are still registered with JobsPlus in the name of the company and if so, filing the necessary termination forms with JobsPlus;
- Terminating existing contracts with clients and vendors and settling and/or collecting any outstanding dues;
- Closing of any office spaces, including proper termination of lease agreements;
- Closing of the company's bank accounts; and
- Settling of any intercompany balances which may exist between the company and its shareholders and/or any other company forming part of the same group.

The above list is merely indicative and varies on a case-by-case basis, depending on the particular business activities of the company throughout its existence.

The process outlined below is applicable to companies incorporated under the Act and may differ slightly from that applicable to those companies registered as shipping organisations under the Merchant Shipping (Shipping Organisations – Private Companies) Regulations, being the *lex specialis* which regulates shipping companies.[4] Particularly, all types of statutory forms for a MVWU under the Act differ from the statutory forms applicable to a MVWU under the Merchant Shipping (Shipping Organisations – Private Companies) Regulations.[5]

[4] Merchant Shipping (Shipping Organisations – Private Companies) Regulations, S.L. 234.42.
[5] ibid.

Once all pre-liquidation steps are taken and the company is ready to be placed into dissolution, the shareholders will resolve, by way of extraordinary resolution, that the company be dissolved and consequently, voluntarily wound up.

The date of this extraordinary resolution is the effective date of dissolution unless a later date is specified in the resolution itself. A company is to cease business from the date of dissolution unless the continued business is beneficial for winding up.[6] Within fourteen days of the effective date of dissolution, the company is to file the extraordinary resolution of the company, together with a statutory form B1, at the MBR.[7] The statutory form B1 serves to notify the MBR with the resolution for dissolution and consequential voluntary winding up of a company.

The next step would be the filing of the statutory form B2 which serves to inform the MBR that the directors have made a full inquiry into the affairs of the company. The form also notifies that they formed the view that the company is solvent, and it would be able to pay its debts in full within twelve months from the date of dissolution.[8] This statutory form B2 is to be made within the month immediately preceding the date of the extraordinary resolution and be accompanied by a statement which describes the company's assets and liabilities. This statement of affairs may not be dated earlier than three months from the date of the statutory form B2.[9]

Typically, the same extraordinary resolution as the one approving the MVWU would also approve the appointment of a liquidator, in which case, the appointed liquidator would have fourteen days to file the statutory form L at the MBR, which serves to notify the appointment of the liquidator.[10] If a liquidator is not appointed through the same extraordinary resolution, the directors are to convene a general meeting of the company within thirty days from the date of the extraordinary resolution in order to appoint a liquidator.[11]

The effective date of the liquidator's appointment is critical in the life cycle of the company because at that point, all powers and authority of the Board of Directors will cease and the liquidator will assume control of the company's affairs. Nevertheless, in terms of the Act, the previous directors of the company would remain responsible for transactions entered into by the company antecedent to the dissolution and winding up of a company.

Upon taking office, it is the liquidator's responsibility to examine the company's state of affairs. Indeed, if in the liquidator's view, the company is

[6] Companies Act (n 1) Article 267(1).
[7] ibid Article 265(1).
[8] ibid Article 268(1).
[9] ibid Article 268(2).
[10] ibid Article 290(1).
[11] ibid Article 270(2).

in fact in an insolvent position and unable to pay off its debts (contrary to the declaration made by the directors in the statutory form B2), the liquidator is obliged to convene a meeting with the creditors in which a statement of the company's assets and liabilities is presented.[12] Following this initial assessment, if the liquidator has no concerns about the company's solvency, he would then proceed to liquidate any assets remaining on the company's books and settle any outstanding claims.

As soon as the affairs of the company are fully wound up, the liquidator is to make an account of the winding up, showing how the process was conducted and how the property of the company has been disposed of. Additionally, the liquidator shall draw up a scheme of distribution, indicating the amount due in respect of each share from the assets, if any. The liquidator's accounts would then be independently audited by a so-called 'liquidation auditor', whose appointment would also be approved in the extraordinary resolution of the shareholders. Once these accounts are audited, the liquidator is to convene a final general meeting with the shareholders to approve the liquidator's audited accounts as well as the scheme of distribution.[13]

Once approved, the liquidator has seven days from the date of the final general meeting at the MBR to file the liquidation accounts, the scheme of distribution and the 'liquidator's return' confirming that the final general meeting of the company was held.[14] Upon receipt of the above documents, the MBR would publish a notice on its online portal as well as in a local newspaper, informing the general public that the relevant company will be struck off the register on the lapse of three months from the date of publication of the notice.[15] This three-month period serves as a 'cooling off' period during which any potential creditors may object to the striking off of the company in the event where their rights would be prejudiced should the company be struck off. Post strike off, the liquidator is to keep all accounts, accounting records and documents pertaining to the company for a period of ten years from the date of strike off.[16]

In a scenario where the winding up process continues for more than twelve months, the liquidator is obliged to convene a general meeting of the company at the end of that twelve-month period, where he is to present an account of both his dealings and also of the conduct of the winding up during the preceding twelve months, including a summary of receipts and expenditure. The liquidator is to convene such a general meeting at the end of each twelve-month period, depending on how long the winding up process takes.

[12] ibid Article 272(1).
[13] ibid Article 274(1).
[14] ibid Article 274(2).
[15] ibid Article 275(1).
[16] ibid Article 324(2).

Conclusion

In conclusion, while a MVWU offers a pathway for companies to take a structured approach to resolving their affairs and concluding their business ventures, navigating the legal and financial intricacies involved can be complex, particularly due to the number of pre-liquidation steps which may need to be undertaken. Therefore, it is essential for companies to ensure that their legal and fiscal and financial affairs are all in order to ensure a smooth winding up process.

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