L.N. 390 of 2005

COMPANIES ACT
(CAP. 386)

Companies Act (Amendments to the Second Schedule) Regulations, 2005

IN exercise of the powers conferred by Article 425(1)(d) of the Companies Act, the Prime Minister and Minister of Finance, has made the following regulations:-

Title, commencement and scope.

1. (1) The title of these regulations is the Companies Act (Amendments to the Second Schedule) Regulations, 2005 and shall be read and construed as one with the Second Schedule to Companies Act, hereinafter referred to as "the Second Schedule."

(2) These regulations shall come into force immediately upon publication provided however that where any of the provisions thereof relate to offers of securities and to prospectuses delivered or given to or served on the Registrar on or after the 15th December, 2005, such provisions shall come into force on the 15th December, 2005.

(3) The objective of these regulations is partly to implement the relevant provisions of the Prospectus Directive, and these regulations shall be interpreted and applied accordingly.

(4) In the event that any part of these regulations conflict with the provisions of the Prospectus Directive, the latter shall prevail.

Amends the Second Schedule.

2. The Second Schedule shall be amended as follows:

(a) the words "(Article 90)", shall be deleted;

(b) immediately after the title "Second Schedule", there shall be inserted the following new Part A:

"Part A
(Article 90)

MATTERS TO BE SPECIFIED IN A PROSPECTUS OF A COMPANY CONSTITUTED IN A MEMBER STATE OR EEA STATE AND REQUIREMENTS FOR ITS APPROVAL AND PUBLICATION

(Chapter III of Title I of Part V of this Act)

General references

1. References herein to the issuing company are references to the company referred to in article 89.

References herein to the "base prospectus" are references to a prospectus containing all relevant information as specified in paragraphs 4, 5 and 26 in case there is a supplement, concerning the issuer and the securities to be offered to the public, and, at the choice of the issuer, the final terms of the offering.

References herein to the "securities note" are references to the document containing the information concerning the securities offered to the public.

References herein to the share registration document are to the document which contains the information relating to the issuer as laid down in Annex I of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive.

For the purposes of Part A of this Schedule, Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements shall also apply.

General principles

2. The issuer or offeror may draw up a prospectus as a single document or separate documents. A prospectus composed of separate documents shall divide the required information into:

(a) a registration document containing the information relating to the issuer as provided in paragraph 17;

(b) a securities note containing information relating to the securities offered to the public as provided in paragraph 18; and

(c) a summary note as provided in paragraph 19.

3. Certain information specified in this Schedule may be omitted from the prospectus if:

(a) disclosure of such information would be contrary to the public interest; or

(b) disclosure of such information would be seriously detrimental to the issuer, provided that the omission would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer, offeror or guarantor, if any, and of the rights attached to the securities to which the prospectus relates; or

(c) such information is of minor importance only for a specific offer and is not such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any; or

(d) disclosure of such information is found to be inappropriate to the issuer's sphere of activity or its legal form or to the securities being offered, in which case the prospectus shall contain equivalent information when available.

PART I – PROSPECTUS

4. Without prejudice to paragraph 3, the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

5. (1) The prospectus shall contain information concerning the issuer and the securities to be offered to the public. It shall also include a summary. The summary shall, in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. The summary shall also contain a warning that:

(a) it should be read as an introduction to the prospectus;

(b) any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor;

(c) where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, if the prospectus is not drawn up in the English language, have to bear the costs of translating the prospectus before the legal proceedings are initiated; and

(d) without prejudice to article 94 of this Act, civil liability attaches to those persons who have tabled the summary including any translation thereof, and applied for its notification.

(2) (a) The following types of securities may be issued, at the choice of the issuer or offeror, by means of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public:

(i) non-equity securities issued under an offering programme;

(ii) non-equity securities issued in a continuous or repeated manner by credit institutions where:

- the sums deriving from the issue of the said securities are placed in assets which guarantee the settlement of the liability deriving from securities until their maturity date;

- in the event of the insolvency of the related credit institution, the said sums are primarily intended to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

(b) The information given in the base prospectus shall be supplemented, in accordance with the provisions of paragraph 26, with updated information on the issuer and on the securities to be offered to the public.

(c) If the final terms of the offer are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the Registrar in the case of an offer to the public.

Summary

6. Without prejudice to paragraph 5, the summary shall briefly provide the most important information included in the prospectus, covering at least the following items:

(a) identity of directors, senior management, advisers and auditors;

(b) offer statistics and expected timetable;

(c) key information concerning selected financial data; capitalisation and indebtedness; reasons for the offer and use of proceeds; risk factors;

(d) information concerning the issuer -

- history and development of the issuer

- business overview;

(e) operating and financial review and prospects -

- research and development, patents and licences, etc.

- trends;

(f) directors, senior management and employees;

(g) major shareholders and related-party transactions;

(h) financial information -

- consolidated statement and other financial information

- significant changes;

(i) details of the offer -

- offer

- plan for distribution

- markets

- selling shareholders

- dilution (equity securities only)

- expenses of the issue;

(j) additional information -

- share capital

- memorandum and articles of association

- documents on display.

Identity of directors, senior management, advisers and auditors

7. Information shall be given regarding names, functions and other information necessary to identify the persons responsible for drawing up the prospectus and those responsible for auditing the financial statements.

Offer statistics and expected timetable

8. The following key information shall be provided regarding the conduct of any offer and the identification of important dates relating to that offer:

(a) offer statistics;

(b) method and expected timetable.

Key information

9. Summarised key information shall be provided about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or accounting policies, the selected financial data must also be restated. Information shall be given on the following:

(a) selected financial data;

(b) capitalisation and indebtedness;

(c) reasons for the offer and use of proceeds;

(d) risk factors.

Information on the company

10. Information shall be provided about the company's business operations, the products it makes or the services it provides, and the factors which affect the business. It is also intended to provide information regarding the adequacy and suitability of the company's properties, plant and equipment, as well as its plans for future capacity increases or decreases. Information shall be given on:

(a) history and development of the company;

(b) business overview;

(c) organisational structure;

(d) property, plant and equipment.

Operating and financial review and prospects

11. The management shall provide an explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements and management's assessment of factors and trends which are expected to have a material effect on the company's financial condition and results of operations in future periods. Information shall be given on:

(a) operating results;

(b) liquidity and capital resources;

(c) research and development, patents and licences, etc.;

(d) trends.

Directors, senior management and employees

12. Information on the following shall be provided concerning the company's directors and managers that will allow investors to assess their experience, qualifications and levels of remuneration, as well as their relationship with the company:

(a) directors and senior management;

(b) remuneration;

(c) board practices;

(d) employees;

(e) share ownership.

Major shareholders and related-party transactions

13. Information shall be provided regarding the major shareholders and others that may control or have an influence on the company as well as information regarding transactions the company

has entered into with persons affiliated with the company and whether the terms of such transactions are fair to the company, as follows:

(a) major shareholders;

(b) related-party transactions;

(c) interests of experts and advisers.

Financial Information

14. Information on the following shall be provided specifying which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature:

(a) consolidated statements and other financial information;

(b) significant changes.

The accounting and auditing principles that will be accepted for use in preparation and audit of the financial statements will be determined in accordance with international accounting and auditing standards.

Details of the offer

15. The following information shall be provided regarding the offer, the plan for distribution of the securities and related matters:

(a) offer;

(b) plan for distribution;

(c) markets;

(d) holders of securities who are selling;

(e) dilution (for equity securities only);

(f) expenses of the issue.

Additional information

16. Information concerning the following that is not covered elsewhere in the prospectus shall be provided:

(a) share capital;

(b) memorandum and articles of association;

(c) material contracts;

(d) exchange controls;

(e) taxation;

(f) dividends and paying agents;

(g) statement by experts;

(h) documents on display;

(i) subsidiary information.

PART II – REGISTRATION DOCUMENT

17. (1) The registration document shall contain the information laid down in the following sub-paragraphs.

Identity of directors, senior management, advisers and auditors

(2) Information shall be given regarding names, functions and other information necessary to identify the persons responsible for drawing up the prospectus and those responsible for auditing the financial statements.

Key information about the issuer

(3) Key information shall be provided about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or in accounting policies, the selected financial data must also be restated. Information shall be given on the following:

(a) selected financial data;

(b) capitalisation and indebtedness;

(c) risk factors.

Information on the company

(4) Information shall be provided about the company's business operations, the products it makes or the services it provides and the factors which affect the business. It is also intended to provide information regarding the adequacy and suitability of the company's properties, plants and equipment, as well as its plans for future capacity increases or decreases. Information shall be given on:

(a) history and development of the company;

(b) business overview;

(c) organisational structure;

(d) property, plants and equipment.

Operating and financial review and prospects

(5) The management shall provide an explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are expected to have a material effect on the company's financial condition and results of operations in future periods. Information shall be given on:

(a) operating results;

(b) liquidity and capital resources;

(c) research and development, patents and licences, etc.;

(d) trends.

Directors, senior management and employees

(6) Information on the following shall be provided concerning the company's directors and managers that will allow investors to assess their experience, qualifications and levels of remuneration, as well as their relationship with the company:

(a) directors and senior management;

(b) remuneration;

(c) board practices;

(d) employees;

(e) share ownership.

Major shareholders and related-party transactions

(7) Information shall be provided regarding the major shareholders and others that may control or have an influence on the company as well as information regarding transactions the company has entered into with persons affiliated with the company and whether the terms of such transactions are fair to the company, as follows:

(a) major shareholders;

(b) related-party transactions;

(c) interests of experts and advisers.

Financial information

(8) Information on the following shall be provided specifying which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature:

(a) consolidated statements and other financial information;

(b) significant changes.

The accounting and auditing principles that will be accepted for use in preparation and audit of the financial statements will be determined in accordance with international accounting and auditing standards.

Additional information

(9) Information concerning the following that is not covered elsewhere in the prospectus shall be provided:

(a) share capital;

(b) memorandum and articles of association;

(c) material contracts;

(d) statement by experts;

(e) documents on display;

(f) subsidiary information.

PART III – SECURITIES NOTE

18. (1) The securities note shall contain the information laid down in the following sub-paragraphs.

Identity of directors, senior management, advisers and auditors

(2) Information shall be given regarding names, functions and other information necessary to identify the persons responsible for drawing up the prospectus and those responsible for auditing the financial statements.

Offer statistics and expected timetable

(3) The following key information shall be provided regarding the conduct of any offer and the identification of important dates relating to that offer:

(a) offer statistics;

(b) method and expected timetable.

Key information about the issuer

(4) Summarised key information shall be provided about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or accounting policies, the selected financial data must also be restated. Information shall be given on the following:

(a) capitalisation and indebtedness;

(b) reasons for the offer and use of proceeds;

(c) risk factors.

Interests of experts

(5) Information shall be provided regarding transactions the company has entered into with experts or advisers employed on a contingent basis.

Details of the offer

(6) The following information shall be provided regarding the offer, the plan for distribution of the securities and related matters:

(a) offer;

(b) plan for distribution;

(c) markets;

(d) selling securities holders;

(e) dilution (for equity securities only);

(f) expenses of the issue.

Additional information

(7) Information concerning the following that is not covered elsewhere in the prospectus shall be provided:

(a) exchange controls;

(b) taxation;

(c) dividends and paying agents;

(d) statement by experts;

(e) documents on display.

PART IV – SUMMARY NOTE

19. The summary note shall provide in a few pages the most important information included in the prospectus, covering at least the items laid down in the following:

- identity of directors, senior management, advisers and auditors

- offer statistics and expected timetable

- key information concerning selected financial data; capitalisation and indebtedness; reasons for the offer and use of proceeds; risk factors

- information concerning the issuer

    - history and development of the issuer

    - business overview

- operating and financial review and prospects

    - research and development, patents and licences, etc.

    - trends

- directors, senior management and employees

- major shareholders and related-party transactions

- financial information

    - consolidated statements and other financial information

    - significant changes

- details on the offer

    - offer

    - plan for distribution

    - markets

    - selling shareholders

    - dilution (for equity securities only)

    - expenses of the issue

- additional information

- share capital

- memorandum and articles of incorporation

- documents available for inspection

PART V – VALIDITY OF A PROSPECTUS, ARRANGEMENTS FOR APPROVAL AND PUBLICATION OF A PROSPECTUS

Where final offer price and amount of securities offered cannot be included in prospectus

20. (1) Where the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus:

(a) the criteria, and/or the conditions in accordance with which the above elements will be determined or, in the case of price, the maximum price, shall be disclosed in the prospectus; or, where there is no such disclosure,

(b) the acceptance of the purchase or subscription of securities may be withdrawn at any time between the acceptance and the expiration of the third working day after the final offer price and amount of securities which will be offered to the public have been filed.

(2) The final offer price and amount of securities shall be filed with the Registrar and published.

Duration of validity of a prospectus

21. (1) A prospectus shall be valid for 12 months after its publication for offers to the public provided that the prospectus is completed by any supplements required pursuant to paragraph 26.

(2) In the case of an offering programme, the base prospectus, previously filed, shall be valid for a period of up to 12 months.

(3) In the case of non-equity securities referred to in paragraph 5(2)(a) of this Part, the prospectus shall be valid until such securities are no longer issued in a continuous or repeated manner.

(4) A registration document, previously registered, shall be valid for a maximum period of 12 months. The registration document accompanied by the securities note, updated, if applicable, in accordance with paragraph 22 of this Part, shall be considered to constitute a valid prospectus.

Previous issue of a registration document

22. (1) An issuer which already has a registration document approved by the Registrar shall be required to draw up only the securities note and the summary note when securities are offered to the public.

(2) In this case, the securities note shall provide information that would normally be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in paragraph 26 was approved. The securities and summary notes shall be subject to a separate approval.

(3) Where an issuer has only filed a registration document without approval, the entire documentation, including updated information, shall be subject to approval.

Approval by the Registrar

23. (1) The Registrar shall not approve a prospectus unless he is satisfied that:

(a) Malta is the home Member State in relation to the issuer of the securities to which it relates;

(b) the prospectus has been drawn up in accordance with the provisions of this Act and of Part A of this Schedule.

(2) The Registrar shall notify the issuer or the offeror, as the case may be, of his decision regarding the approval of the prospectus within ten working days of the submission of the draft prospectus.

(3) The time limit referred to in sub-paragraph (2) shall be extended to twenty working days if the public offer involves securities issued by an issuer who has not previously offered securities to the public.

(4) If the Registrar finds, on reasonable grounds, that the documents submitted to him are incomplete or that supplementary information is needed, the time limits referred to in sub-paragraphs (2)

and (3) shall apply only from the date on which such information is provided by the issuer or the offeror.

In the case referred to in sub-paragraphs (2) the Registrar should notify the issuer if the documents are incomplete within ten (10) working days of the submission of the application.

(5) If the Registrar fails to give a decision on the prospectus within the time limits mentioned in sub-paragraphs (2) and (3) this shall not be deemed to constitute approval of the prospectus.

Transfer by Registrar of application for approval

24. (1) The Registrar may transfer an application for the approval of a prospectus or a supplementary prospectus to the regulatory authority of another Member State or EEA state, subject to the prior agreement of the regulatory authority of the other State being obtained.

(2) The Registrar must inform the applicant of the transfer within three working days beginning with the first working day after the date of the decision taken by the Registrar.

(3) On making a transfer under sub-paragraph (1), the Registrar ceases to have functions under Part A of this Schedule in relation to the application transferred.

Transfer to Registrar of application for approval

25. Where the Registrar agrees to the transfer to him of an application for the approval of a prospectus made to the regulatory authority of another Member State or EEA state -

(a) Malta is to be treated for the purposes of this Act and of Part A of this Schedule as the home Member State in relation to the issuer of the securities to which the prospectus relates; and

(b) the time-limits referred to in paragraph 23 apply as if the date of the transfer were the date on which the application was received by the Registrar.

Significant new factors, material mistakes or inaccuracies

26. (1) Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public shall be mentioned in a supplement

to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.

(2) Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right to withdraw their acceptance before the expiration of the third working day after the publication of the supplement.

PART VI – EXERCISE OF PASSPORT RIGHTS

27. (1) (a) Where Malta is the home Member State and an offer to the public is provided for in one or more Member States, other than Malta or EEA States, the prospectus approved by the Registrar and any supplements thereto shall be valid for an offer to the public in any number of host Member States or EEA States, provided that the regulatory authority of each host Member State or EEA State is notified in accordance with sub-paragraph (1)(b).

(b) The Registrar shall provide the regulatory authority of the host Member State or EEA State, at the request of the issuer or the person responsible for drawing up the prospectus and within three working days following that request or, if the request is submitted together with the draft prospectus, within one working day after the approval of the prospectus, with a certificate of approval and a copy of the prospectus as approved. If applicable, this notification shall be accompanied by a translation of the summary of the prospectus produced under the responsibility of the issuer or person responsible for drawing up the prospectus. The same procedure shall be followed for any supplement to the prospectus.

(2) A prospectus in relation to an offer to the public which has been approved by the regulatory authority of another Member State, or an EEA State is not deemed to be an approved prospectus unless that authority has provided the Registrar with a certificate of approval and a copy of the prospectus as approved; together with, where requested by the Registrar, a translation into English or Maltese of the summary of the prospectus.

(3) For the purposes of this paragraph, the certificate of approval shall consist of a statement –

(a) that the prospectus has been drawn up in accordance with the Prospectus Directive;

(b) that the prospectus has been approved, in accordance with the Prospectus Directive, by the Registrar or the regulatory authority of the Member State or EEA state, as the case may be, providing the certificate; and where applicable

(c) of the reasons as to why the Registrar or the regulatory authority providing the certificate authorised, in accordance with the Prospectus Directive, the omission from the prospectus of information which would otherwise have been included.

Use of Languages

28. When an offer to the public is made in one or more Member States or EEA States excluding Malta, the prospectus shall be drawn up either in a language accepted by the regulatory authorities of those Member States or EEA States or in a language customary in the sphere of international finance, at the choice of the issuer or offeror:

Provided that for the purpose of scrutiny by the Registrar, the prospectus shall be drawn up in Maltese or English or in a language customary in the sphere of international finance, at the choice of the issuer or offeror.

29. Where an offer to the public is made in more than one Member States or EEA States, including Malta, the prospectus shall be drawn up in English or Maltese and shall also be made available either in a language accepted by the regulatory authorities of each host Member State or EEA State or in a language customary in the sphere of international finance, at the choice of issuer or offeror.”; and

(c) for the words -

“MATTERS TO BE SPECIFIED IN A PROSPECTUS AND REPORTS TO BE SET OUT THEREIN

(Chapter III of Title I of Part V and Chapter II of Part XI of this Act)”,

there shall be substituted the following:

" PART B

(Article 390)

"MATTERS TO BE SPECIFIED IN A PROSPECTUS OF AN OVERSEA COMPANY CONSTITUTED OTHER THAN IN A MEMBER STATE OR IN AN EEA STATE AND REPORTS TO BE SET OUT THEREIN

(Chapter II of Part XI of this Act)"; and

(d) in paragraph 1(a) of Part B as renumbered for the words "to the company referred to in article 89 or article 391 as the case may be", there shall be substituted the words "to the company referred to in article 391.".

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