

L.N. 391 of 2005

**EUROPEAN UNION ACT
(CAP. 460)**

Implementation of Directive 2003/71/EC Order, 2005

IN virtue of the powers conferred under article 4(2) of the European Union Act, the Prime Minister and Minister of Finance has made the following Order:-

1. (1) This order may be cited as the Implementation of Directive 2003/71/EC Order, 2005. Citation and commencement.

(2) This Order shall come into force immediately upon publication, provided 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.

2. This order amends and shall be read and construed as one with the Companies Act, as hereinafter referred. Amendments to the Companies Act, Cap. 386.

3. Article 2 of the Companies Act shall be amended as follows: Amendment of article 2 of the Companies Act.

(a) in sub-article (1) thereof:

(1) immediately after the definition “appointed day” there shall be added the following new definition:

“ “approval” in relation to a prospectus means the positive act at the outcome of the scrutiny of the completeness of the prospectus by the Registrar or the regulatory authority of the Member State or EEA State, as the case may be, including the consistency of the information given and its comprehensibility, within the meaning of the Prospectus Directive;”;

(2) immediately after the definition “commercial partnership” there shall be added the following new definition:

“ “the Community” means the European Community established by the Treaty of Rome in 1957 and amended institutionally and otherwise in 1986 by the Single European Act, in 1993 by the Treaty on European Union, in 1997 by the Treaty of Amsterdam

and in 2001 by the Treaty of Nice, and as amended by accession agreements and as may be further amended from time to time;”;

(3) immediately after the definition “directors’ report” there shall be added the following new definitions:

““EEA State” means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on the 2nd May, 1992 as amended by the Protocol signed at Brussels on the 17th March, 1993 and as amended by any subsequent acts;

“equity securities” means shares and other securities which are equivalent to shares in companies or which are convertible to such shares, or securities which give such right of conversion, provided such securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer, and the term ‘non-equity securities’ shall be construed as referring to all securities that are not equity securities;” ;

(4) immediately after the definition “group company” there shall be added the following new definition:

“ home Member State” in relation to a prospectus means:

(i) for all Community issuers of securities which are not mentioned in paragraph (ii) hereof, the Member State where the issuer has its registered office;

(ii) for any issues of non-equity securities whose denomination per unit amounts to at least four hundred and thirty liri, and for any issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised, provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer, the Member State where the issuer has its registered office, or where the securities were offered to the

public, at the choice of the issuer or the offeror, as the case may be. The same regime shall be applicable to non-equity securities in a currency other than the lira, provided that the value of such minimum denomination is nearly equivalent to four hundred and thirty liri;

(iii) for all issuers of securities incorporated in a third country, which are not mentioned in paragraph (ii) hereof, the Member State where the securities are intended to be offered to the public for the first time after the date of entry into force of this provision, subject to a subsequent election by issuers incorporated in a third country if the home Member State was not determined by their choice.”;

(5) immediately after the definition “home Member State” there shall be added the following new definition shall be added:

“ “host Member State” in relation to a prospectus means the State where an offer to the public is made, when different from the home Member State;”;

(6) immediately after the definition “member” there shall be added the following new definition:

“ “Member State” means a member state of the European Community;”;

(7) immediately after the definition “Minister” there shall be added the following new definition:

“ “money market instruments” means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;”;

(8) immediately after the definition “investment company with variable share capital” there shall be added the following new definition:

“ “issuer” means an entity having a legal personality distinct from that of its members which issues or proposes to issue securities;”;

(9) immediately after the definition “notice” there shall be added the following new definition:

“ “offering programme” means a plan which would permit the issuance of non-equity securities, including warrants in any form, having a similar type and, or class, in a continuous or repeated manner during a specified issuing period;”;

(10) immediately after the definition “participating interest” there shall be added the following new definition:

“ “person making an offer”, or “offeror”, means a legal entity or individual which offers securities to the public;”;

(11) immediately after the definition “prospectus” there shall be added the following new definition:

“ “ the Prospectus Directive” means Directive 2003/71/EC of the European Parliament and of the Council of 4 November, 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as may be amended from time to time and includes any implementing measures that have been issued or may be issued thereunder;”;

(12) immediately after the definition “Registrar” there shall be added the following new definition:

“ regulatory authority” means a body or bodies designated by a Member State other than Malta or an EEA State to carry out duties provided for in the Prospectus Directive;”;

(13) in the definition “security”, for the words “commercial partnership;”, there shall be substituted the words “commercial partnership:

Provided that for the purpose of sub-article (3) of this article and of Chapter III of Part V and Part A of the Second Schedule of this Act, the definition of “security” does not include money market instruments having a maturity of less than 12 months;”;

(14) immediately after the definition “security”, there shall be added the following new definition:

“ “securities issued in a continuous or repeated manner” means issues on an ‘as required’ basis (on tap) or at least two separate issues of securities of a similar type and, or class over a period of 12 months;”; and

(15) immediately after the definition “shareholder”, there shall be added the following new definition:

“ “small and medium-sized enterprises” or “SMEs” means companies which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees, during the financial year, of less than 250, a total balance sheet not exceeding eighteen million and four hundred and fifty nine thousand and nine hundred liri and an annual net turnover not exceeding twenty one million and four hundred and sixty five thousand liri;”; and

(b) in sub-article (3) thereof:

(1) for paragraphs (a) and (b) thereof, there shall be substituted the following:

“ (a) For the purposes of this Act, “offer of securities to the public” means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries.

(b) The following shall not constitute offers made to the public:

(i) an offer of securities made only to qualified investors; or

(ii) an offer made to less than one hundred persons per Member State or EEA State, not including qualified investors; or

(iii) an offer where the minimum consideration which may be paid by any person for shares acquired pursuant to the offer is at least twenty one thousand four hundred and sixty five liri, for each separate offer; or

(iv) an offer of securities where the nominal value of each security amounts to at least twenty one thousand four hundred and sixty five liri, or the total consideration of which shall not exceed forty two thousand nine hundred and thirty liri, which limit shall be calculated over a period of twelve months; or

(v) an offer where the total consideration of the securities offered does not exceed one million seventy three thousand two hundred and fifty liri, which limit shall be calculated over a period of twelve months; or

(vi) an offer in respect of non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer over a period of twelve months is less than twenty one million four hundred and sixty five thousand liri, provided that these securities:

(a) are not subordinated, convertible or exchangeable; and

(b) do not give a right to subscribe to or acquire other types of securities and they are not linked to a derivative instrument:

Provided that any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in sub-paragraphs (i) to (iv) shall be regarded as a separate offer and the definition set out in sub-article (3)(a) of this article regarding an “offer of securities to the public” shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of shares through financial intermediaries shall be subject to publication of a prospectus if none of the conditions

mentioned in sub-paragraphs (i) to (iv) above are met for the final placement:

Provided further that in respect of offers mentioned in sub-paragraphs (v) and (vi), an offeror may draw up a prospectus in accordance with the provisions of Part A of the Second Schedule to this Act.”; and

(2) paragraphs (c) and (d) thereof shall be deleted and paragraphs (e) and (f) shall be renumbered as paragraphs (c) and (d) respectively; and

(3) immediately after paragraph (d) as renumbered there shall be inserted the following new paragraph (e):

“ (e) For the purposes of this Act “qualified investors” means:

i. legal entities which are authorised or regulated to operate in financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;

ii. national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;

iii. other legal entities which do not meet two of the three criteria set out in the definition of “small and medium-sized enterprises”;

iv. subject to mutual recognition, natural persons who are resident in Malta and who expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set

out below;

v. subject to mutual recognition, small and medium-sized enterprises which are registered in Malta and which expressly ask to be considered as qualified investors.

For the purposes of paragraph (iv), the criteria are as follows:

(i) the investor has carried out financial transactions of a significant size on securities markets at an average frequency of, at least, ten per quarter over the previous four quarters;

(ii) the size of the investor's securities portfolio exceeds two hundred and fourteen thousand six hundred and fifty liri;

(iii) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment.

For the purposes of paragraphs (iv) and (v), the Registrar shall keep a register of natural persons and small and medium-sized enterprises considered as qualified investors. The register shall be available to all issuers. Each natural person or small and medium-sized enterprises wishing to be considered as a qualified investor shall request to be included in such register and each registered investor may decide to opt out at any moment.”.

Amendment of
article 89 of the
Companies Act.

4. Article 89 of the Companies Act shall be amended as follows:

(a) sub-article (1) thereof shall be re-numbered as the whole article 89;

(b) in the proviso to article 89 as re-numbered, for the words “the provisions of this Chapter shall not apply to a form of application issued either-”, there shall be substituted the words “the provisions of this Chapter, including the obligation to draw up a prospectus, shall not apply to a form of application issued - ”;

(c) for paragraph (b) of the proviso, there shall be substituted the following:

“(b) in relation to securities which do not constitute an “offer of securities to the public” within the meaning of sub-article (3) of article 2;”;

(d) in paragraph (c) of the proviso, for the words “regulations made under that Act.” there shall be substituted the words “regulations made under that Act; or”;

(e) immediately after paragraph (c) of the proviso, the following new paragraphs shall be added:

“(d) an offer where the shares are offered for no consideration and is made exclusively to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; or

(e) an offer where shares are allotted to existing or former directors or employees by their employer which has shares already admitted to trading on a recognised investment exchange or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; or

(f) shares issued on the redemption or reduction of shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital; or

(g) an offer made in connection with a take-over bid, provided that a document is available containing information which is regarded by the Registrar as being equivalent to that of the prospectus; or

(h) an offer made in connection with or pursuant to a proposed merger, provided that a document is available containing information which is regarded by the Registrar as being equivalent to that of the prospectus.”; and

(f) sub-article (2) thereof shall be deleted.

Amendment of
article 90 of the
Companies Act.

5. In sub-article (1) of article 90 of the Companies Act, for the words “Part I of the Second Schedule and set out the reports specified in Part II of that Schedule” there shall be substituted the words “Part A of the Second Schedule”.

Amendment of
article 91 of the
Companies Act.

6. The second proviso in article 91 of the Companies Act shall be deleted.

Amendment of
article 93 of the
Companies Act.

7. For sub-article (1) of article 93 of the principal Act, there shall be substituted the following:

“(1) No prospectus shall be issued unless, on or before the date of its publication as specified in article 99, a copy thereof, signed by every person named therein as a director of the company or his agent authorised in writing, has been delivered to the Registrar. Upon being satisfied that the requirements of this Chapter and Part A of the Second Schedule have been complied with, the Registrar shall register it. Such prospectus must have endorsed thereon or attached thereto any consent to the issue of the prospectus required by article 92 from any person as an expert.”.

Amendment of
article 94 of the
Companies Act.

8. Immediately after sub-article (2) of article 94 of the Companies Act, there shall be added the following new sub-article:

“(3) No person shall be liable for statements made in the summary referred to in Part A of the Second Schedule to this Act, including the translation thereof, except when such statements are untrue when read together with the other parts of the prospectus.”.

Amendment of
article 96 of the
Companies Act.

9. In paragraph (a) of sub-article (1) of article 96 of the Companies Act, for the words “in which it is included” there shall be substituted the words “in which it is included or otherwise inaccurate or inconsistent”.

Amendment of
article 99 of the
Companies Act.

10. Article 99 of the Companies Act shall be amended as follows:

(a) in sub-article (1) thereof for the words “beginning of the third working day” there shall be substituted by the following “beginning of the sixth working day”, and for the words “prospectus has been issued” there shall be substituted the words “prospectus has been issued, indicating therein where the issuer or offeror has made available, free of charge, a paper copy of the full prospectus”; and

(b) in sub-article (2) thereof, for the words “said third working day” there shall be substituted the words “said sixth working day”.

11. In paragraph (a) of sub-article (1) of article 185 of the Companies Act for the words “shall in this Act” there shall be substituted the words “shall in this Chapter”. Amendment of article 185 of the Companies Act.

12. In the heading of Chapter II of Part XI of the Companies Act, for the words “incorporated outside Malta” there shall be substituted the words “incorporated outside Malta in a non-Member State or non-EEA State”. Amendment of heading of Part XI of the Companies Act.

13. Chapter II of Part XI of the principal Act shall be amended as follows: Amendment of Part XI of the Companies Act.

(a) for the words “incorporated outside Malta” wherever they occur there shall be substituted the words “incorporated outside Malta in a non-Member State or non-EEA State”; and

(b) for the words “Second Schedule” wherever they occur there shall be substituted the words “Part B of the Second Schedule”.

14. Sub-article (1) of article 425 of the Companies Act shall be amended as follows: Amendment of article 425 of the Companies Act.

(a) in paragraph (k) thereof for the words “regulating such overseas companies; and” there shall be substituted the words “regulating such overseas companies;”;

(b) paragraph (l) thereof shall be renumbered as paragraph (n); and

(c) immediately after paragraph (k) there shall be added the new paragraphs (l) and (m) as follows:

“(l) prescribe requirements in relation to the drawing-up, approval, publication and distribution of prospectuses relating to an offer to the public of securities and such requirements may stipulate any further conditions necessary to implement the Prospectus Directive;

(m) transpose and implement Community Company Law Directives; such regulations may provide for such

exemptions, modifications, adaptations and variations of any of the provisions of this Act and may introduce conditions or qualifications thereto as may be specified and as may be necessary for the transposition and implementation of such Directives; and”.