

L.N. of 2010

**COMPANIES ACT
(CAP. 386)**

Companies Act (Tenth Schedule) Regulations, 2010

IN exercise of the powers conferred by article 425 (1)(d) of the Companies Act, the Minister of Finance, the Economy and Investment has made the following regulations:

Title and commencement.

1. (1) The title of these regulations is the Companies Act (Tenth Schedule) Regulations, 2010.

(2) These regulations shall come into force on the 1st July, 2010.

Interpretation.

2. (1) In these regulations unless the context otherwise requires, “the Act” means the Companies Act.

(2) Words and expressions used in these regulations shall have the same meaning as is assigned to them in the Act.

Amends paragraph 25 of the Tenth Schedule to the Act.

3. Paragraph 25 of the Tenth Schedule to the Act shall be amended as follows:

(1) In sub-paragraph (1) thereof, for the words “limited partnership may be divided into shares.”, there shall be substituted the words “limited partnership shall be divided into shares.”.

Substitutes sub-paragraph (8).

(2) For sub-paragraph (8) thereof, there shall be substituted the following:

“(8) (a) The provisions of this paragraph shall only apply to a partnership *en commandite* or limited partnership which qualifies as a collective investment scheme duly licensed in terms of the Investment Services Act.

(b) For the purposes of this paragraph and unless the context otherwise requires:

"base currency" means the currency in which a sub-class is denominated;

"competent authority" means the competent authority under the Investment Services Act;

"currency" means, in addition to the euro, any convertible currency in terms of article 186 of this Act;

"fractional share" means a fraction of a whole share in any class of shares issued by a partnership *en commandite* or limited partnership with variable share capital;

"multi class partnership" means a partnership *en commandite* or limited partnership with variable share capital falling within the terms of paragraph d;

"multi fund partnership" means a partnership *en commandite* or limited partnership with variable share capital falling within the terms of paragraph m and such a partnership may also be referred to as an umbrella partnership.

(c) A deed of partnership of a partnership *en commandite* or limited partnership the capital of which is divided into shares may provide for the constitution of the partnership as a partnership *en commandite* or limited partnership with variable share capital and the provisions of article 84(2) to (7) and (9) of this Act shall, in so far as applicable, apply *mutatis mutandis* and reference to the term "memorandum or articles" shall be deemed to be a reference to a "deed of partnership" and reference to the terms "company" and "investment company" shall be deemed to be references to a "partnership *en commandite* or limited partnership" and reference to paragraph (f) of article 69 of this Act shall be deemed to be a reference to paragraph (e) of article 14(1) of this Act.

Multi class Partnership

(d) A partnership *en commandite* or limited partnership may be constituted as a multi class partnership where in terms of its deed of partnership its share capital is, or is being capable of being divided into different classes of shares, and the aforementioned deed provides for the constitution of

different classes of shares that may be issued by such partnership not constituting any distinct sub-fund.

(e) A partnership *en commandite* or limited partnership may only be validly constituted as a multi class partnership if it is so licensed by the competent authority.

(f) A partnership *en commandite* or limited partnership duly licensed to be constituted as a multi class partnership may, with the approval of the competent authority, issue a new class or classes of shares. Such class or classes of shares shall not constitute a distinct sub-fund or sub-funds of the partnership.

(g) Each class of shares in a multi class partnership may be denominated in a different currency provided that a class of shares may be denominated only in one currency.

(h) A multi class partnership may not elect for the segregation of any of its assets and liabilities.

Accounts of a multi class partnership

(i) A multi class partnership having its share capital denominated in different currencies shall draw up its annual accounts in any one of such currencies, as may be approved by the competent authority.

(j) The general partner of a multi class partnership shall maintain proper accounting records of the assets and liabilities of each class in the base currency of that class.

(k) The provisions of sub-paragraph (i) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required under this Act or by the competent authority.

(l) For the purposes of sub-paragraphs (i) and (k) the conversion from the base currency of a class of shares into the currency in which the annual accounts of the multi class partnership are to be drawn up shall be in accordance with generally accepted accounting principles and practice. This note shall be disclosed in the notes to the accounts.

Multi fund Partnership

(m) A partnership *en commandite* or limited partnership may be constituted as a multi fund partnership, where in

terms of its deed of partnership, its share capital is, or is capable of being divided into different classes of shares where one class or a group of classes of shares constitute a distinct sub-fund of the partnership:

Provided that the initial share capital may or may not be organized in one or more sub-funds in terms of this paragraph.

(n) A multi fund partnership may, with the written approval of the competent authority, create and issue a new class or classes of shares which may constitute a new sub-fund or be comprised in an existing sub-fund or sub-funds of the partnership.

(o) A class or classes of shares constituting a sub-fund in a multi fund partnership may be denominated in a different currency provided that a class of shares may be denominated only in one currency.

(p) For the purposes of this paragraph, a "sub-fund" means the distinct class or classes of shares constituting that sub-fund in a multi fund partnership to which are allocated assets and liabilities distinct from other assets and liabilities allocated to other sub-funds in the same partnership.

Accounts of multi fund partnerships

(q) A multi fund partnership having its share capital denominated in different currencies shall draw up its annual accounts in any one of such currencies.

(r) The general partner of a multi fund partnership shall maintain proper accounting records of the assets and liabilities of each sub-fund in the base currency of any class of shares constituting that sub-fund.

(s) The provisions of sub-paragraph (q) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required under the Act or by the competent authority.

(t) For the purposes of sub-paragraphs (q) and (s), the conversion from the base currency of a class of shares into the currency in which the annual accounts of the multi fund partnership are to be drawn up shall be in accordance with generally accepted accounting principles.

Segregation of assets and liabilities of multi fund partnerships

(u) A multi fund partnership may in its deed of partnership elect to have the assets and liabilities of each sub-fund comprised in that partnership treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of each other sub-fund of such partnership. Where a multi fund partnership makes the election aforementioned the assets and liabilities of each sub-fund of that multi fund partnership shall, for all intents and purposes of law be deemed to constitute a patrimony separate from the assets and liabilities of each other sub-fund of such a partnership.

(v) (a) Save for such proportion of the liabilities of a multi fund partnership which by virtue of the deed of partnership or by virtue of the terms of issue of the shares constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein, the liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of action against the other assets of the partnership, and the following rules shall apply:

(i) proceedings in relation to the partnership shall respect the legal status of each sub-fund as a patrimony separate from the assets and liabilities of each other sub-fund of the partnership in terms of this Schedule;

(ii) proceedings under the Act shall apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a partnership; and any proceedings in relation to one sub-fund shall not have any effect on the assets of any other sub-fund of the partnership or of the partnership itself; and

(iii) where, for the avoidance of doubt, a sub-fund which comprises a separate patrimony in terms of this Schedule is being wound up, the liquidator of such sub-fund shall carry out his functions in accordance with the provisions of the Act; and accordingly all the powers of the general partners in respect solely of that sub-fund shall cease.

(b) "Proceedings" in indent (v) of this sub-paragraph refers to any proceedings in terms of paragraphs 20 to 24 of this Schedule and Part VI of the Act.

(w) When a partnership is established as a multi fund partnership and elects to have the assets and liabilities of its sub-funds treated as distinct patrimonies, the deed of partnership shall provide that the actual value of the paid up share capital of any sub-fund shall be at all times equal to the value of the assets of any kind of the particular sub-fund after the deduction of such sub-fund's liabilities and this in lieu of what is stated in article 84(2)(c)(i) of the Act.

(x) The general partner of a multi fund partnership shall hold or cause to be held such separate records, accounts, statements and other documents as may be necessary to evidence the liabilities and assets of each sub-fund as distinct and separate from the assets and liabilities of other sub-funds in the same partnership.

(y) The provisions of the Fifth Schedule to the Act shall apply *mutatis mutandis* to a partnership *en commandite* or limited partnership with variable share capital.

(z) (i) A partnership *en commandite* or limited partnership may, if so authorised by its deed of partnership, issue fractional shares up to such number of decimal places, not being less than three, as shall be specified in the deed of partnership, and under such terms and conditions as may be stipulated therein.

(ii) Fractional shares shall be automatically consolidated into a whole share of the same class when the fractional shares held by one shareholder become equal to a whole share.”

Inserts new sub-paragraphs.

(3) Immediately after sub-paragraph (8) thereof, there shall be inserted the following new sub-paragraphs:

“Applicability of article 73 to partnerships *en commandite* or limited partnerships

(9) (a) The provisions of article 73 of the Act shall apply to a partnership *en commandite* or limited partnership which qualifies as a collective investment scheme duly licensed in terms of the Investment Services Act, other than a partnership *en commandite* or a limited partnership licensed by the competent authority as Professional Investor Funds, subject to the following variations, conditions and modifications:

(i) subarticles (1), (4) and (7) shall continue to apply thereto;

(ii) subarticle (2) shall apply thereto and be read as if for the words therein "transferred to the company within five years from the date the company is authorized to commence

business.", there were substituted the words "transferred to the partnership *en commandite* or limited partnership before the partnership is authorized to commence business.";

(iii) subarticle (3) shall apply thereto and be read as if for the words therein "transferred within five years from the date of the decision to issue shares.", there were substituted the words "transferred to the partnership *en commandite* or limited partnership not later than the date of the issue of the shares.";

(iv) subarticle (5) shall apply thereto and be read as if for the words therein "correspond at least to the number and nominal value, and, where applicable, to the premium on the shares to be issued for them.", there were substituted the words "at least correspond to the net asset value of the shares to be issued for them."; and

(v) subarticle (6) shall apply and be read as if for the words therein "and in default, the Registrar shall accordingly refuse to register the company or the return of the allotments of the shares so issued, and, in the latter case, the issue shall be considered null and void.", there were substituted the words "and in default, the Registrar shall accordingly refuse to register the partnership *en commandite* or limited partnership and, in the case of a new issue, the issue shall be considered null and void.

(b) The provisions of article 73 of the Act shall apply to a partnership *en commandite* or limited partnership licensed by the competent authority as a Professional Investor Fund with the following variations, conditions and modifications:

(i) subarticles (1), (2), (3) and (7) shall continue to apply thereto;

(ii) subarticle (4) shall apply thereto and be read as if for the words "by one or more experts who are independent of the company and approved by the Registrar.", there were substituted the words "in accordance with Investment Services Rules issued for that purpose by the competent authority from time to time."; and

(iii) subarticles (5) and (6) shall not apply thereto provided that the "report" mentioned therein and in subarticle (4) shall be drawn up in such manner and shall contain such particulars as may be required by Investment Services Rules issued for that purpose by the competent authority."

Non-applicability of articles 186 and 187(1)

(10) The provisions of articles 186 and 187(1) of the Act shall not apply to a partnership *en commandite* or limited partnership constituted as a multi fund or multi class partnership.

Investment Services Rules

(11) For the better carrying out of the provisions of this Schedule, the competent authority may issue Investment Services Rules in terms of article 6(2)(b) of the Investment Services Act.

Non-applicability of article 120 of the Act

(12) The provisions of article 120 of the Act shall not apply to a partnership *en commandite* or limited partnership which qualifies as a collective investment scheme duly licensed in terms of the Investment Services Act and all notices of transfers or transmissions of securities issued by a partnership shall be given to the partnership.

Non-applicability of article 122 of the Act

(13) (a) The provisions of article 122 of the Act shall not apply to a partnership *en commandite* or limited partnership which qualifies as a collective investment scheme duly licensed in terms of the Investment Services Act and the pledge of securities in a partnership shall be subject to the provisions of this sub-paragraph.

(b) Securities may, unless otherwise provided in the deed of partnership of the partnership *en commandite* or limited partnership or under the conditions of issue of those securities, be pledged by their holder in favour of any person as security for an obligation. The pledge of securities shall be constituted by means of an instrument in writing entered into between the pledgor and the pledgee.

(c) Notice of the pledge shall be delivered by the pledgor or the pledgee to the partnership within fourteen days of the granting of the pledge. The pledge of securities shall be recorded in the register of the holders of the respective securities.

(d) The pledge of securities shall be effective in relation to a third party only from the date of the recording of the pledge in the register of the holders of the respective securities referred to in sub-paragraph (c):

Provided that the partnership shall, upon a request in writing made by a third party who may show an interest therein, disclose whether a pledge of securities has been recorded in the register of the holders of the respective securities, including the name of the pledgor and the pledgee, the amount of securities pledged and the date of the recording of the pledge.

(e) Saving the provisions of sub-paragraph (d), during the existence of a pledge of securities, any transfer or other assignment of the pledged securities made by the pledgor, whether by onerous or gratuitous title, shall be null and void:

Provided that any such transfer or other assignment made with the consent of the pledgee shall be valid and the securities to be transferred or assigned shall continue to be subject to the pledge.

(f) Notwithstanding the provisions of the Civil Code or of the deed of partnership of the partnership *en commandite* or limited partnership, in the event of a default under the agreement of pledge and upon giving notice by judicial act to the pledgor and the partnership, the pledgee shall be entitled to –

(i) dispose of the securities which are pledged in his favour; or

(ii) appropriate and acquire the securities himself; or

(iii) request the partnership to purchase the pledged securities in settlement of the debt due to him or of part thereof; and for this purpose, the value of the securities which are pledged shall be their current net asset value.

(g) In the exercise of his rights under this regulation, the pledgee shall only dispose of, appropriate and acquire or request the purchase of such number of securities as are needed to raise sufficient proceeds to repay the debt due. All remaining securities shall be released to the pledgor.

(h) It shall be lawful for the parties to an agreement of pledge of securities to agree on the person or persons who shall exercise all the rights belonging to the holder of

securities including voting rights and the right to receive income, dividends, interest or any other payments due on such securities:

Provided that, should the agreement between the parties not make provision for such matters, all rights belonging to a holder of securities shall, for the duration of the pledge, be exercised by the pledgor until such time as he defaults under the agreement of pledge or until the pledgee enforces his security; and in any such case, upon giving notice by a judicial act to the pledgor and the partnership, all the rights belonging to the pledgor shall immediately become exercisable by the pledgee;

Provided further that, unless the pledgor and the pledgee have otherwise agreed in the pledge agreement and notice thereof has been given to the partnership, income, dividends, interests or any other payments due on securities which are pledged shall, during such time as the pledge is registered in the register of the holders of the respective securities, be paid by the partnership to the pledgee who shall appropriate any such amounts received to the interest due on the debt secured by the pledge, and, if there is an excess, to the capital.

(i) Notice of termination of the pledge shall be delivered by the pledgee to the partnership within fourteen days of the termination of the pledge. The termination of the pledge shall be recorded in the register of the holders of the respective securities.

Issue of shares at a discount

(14) (a) It shall be lawful for a partnership *en commandite* or limited partnership which qualifies as a collective investment scheme duly licensed in terms of the Investment Services Act, to make a discount to an existing member who has committed by written agreement with the partnership to subscribe for any shares in the partnership, which discount shall be in consideration for such commitment, provided that –

(i) such discount shall apply exclusively to any outstanding commitment arising under the above mentioned agreement;

(ii) authority therefor is given by the deed of partnership;

(iii) the nature of the discount shall be disclosed in

the manner required by sub-paragraph (c); and

(iv) in no event shall the value of such shares issued at a discount, be reduced to below the net asset value at the time the member, to whom the discount is being granted, first subscribed for the shares in terms of the aforementioned agreement.

(b) If shares are issued at a discount which is in excess of that permitted by this regulation, the holder thereof shall be bound to pay the partnership an amount equal to such excess, with annual interest at the rate of two percentage points over the minimum bid rate set by the European Central Bank for the main re-financing operations of the Eurosystem.

(c) The conditions specified in sub-paragraph (a) shall be clearly disclosed in the prospectus and any other offering document issued by the partnership.

(d) To the extent that the provisions of this Schedule are inconsistent with the provisions of article 84(9) of the Act, the provisions of this Schedule shall prevail.”

Transitional
arrangements.

4. The competent authority may issue Investment Services Rules in terms of article 6(2)(b) of the Investment Services Act, to establish transitional arrangements in relation to partnerships already set up prior to the coming into force of these regulations and in this regard to impose any relevant conditions and regulate any related documents, as it may deem appropriate.