

**FIRST SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,034 of 2nd April, 1998

**COMPANIES (SHARE ALLOTMENT AND CAPITAL
MAINTENANCE) ORDINANCE 1998**

ARRANGEMENT OF SECTIONS

Section

1. Title, commencement and interpretation.
2. Amendment of section 4 of the Ordinance.
3. Amendment of section 42A of the Ordinance.
4. Rules as to payment for shares on allotment.
5. Amendment of section 45 of the Ordinance.
6. Holding of shares in public company by another company.
7. Amendment of section 47 of the Ordinance.
8. The authorised minimum.
9. Variation of class rights.
10. Amendment of section 90A of the Ordinance.
11. Amendment of section 91 of the Ordinance.
12. New Part IVA of the Ordinance.
13. New Schedule 15 to the Ordinance.

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]



I ASSENT,
RICHARD LUCE,
GOVERNOR.
2nd April, 1998.



GIBRALTAR

No. 20 of 1998

AN ORDINANCE to transpose into the law of Gibraltar Council Directives 77/91 and 92/101 on the formation of public limited liability companies and the maintenance and alteration of their capital.

ENACTED by the Legislature of Gibraltar.

Title, commencement and interpretation.

1.(1) This Ordinance may be cited as the Companies (Share Allotment and Capital Maintenance) Ordinance 1998 and shall come into operation on a day to be appointed by the Government by notice in the Gazette.

(2) In this Ordinance,

“the Ordinance” means the Companies Ordinance;

“Minister” means the Minister with responsibility for trade and industry.

Amendment of section 4 of the Ordinance.

2. The following subsection is inserted after section 4 (4) of the Ordinance-

“(4A) If the memorandum states that the company is to be a public company, the amount of the share capital stated in the memorandum shall be not less than the authorised minimum.”.

Amendment of section 42A of the Ordinance.

3. The following subsections are inserted after section 42A (8) of the Ordinance -

“(9) Where the directors of a company are authorised by the company in general meeting, the company may by special resolution resolve that either -

- (a) sub-section (1) will not apply to the allotment; or
- (b) the sub-section will apply to the allotment with such modifications as may be specified in the resolution.

(10) A special resolution under sub-section (9) may not be proposed unless it is recommended by the directors and there has been circulated, with the notice of the meeting at which the resolution is proposed, to the members entitled to have that notice a written statement by the directors setting out -

- (a) their reasons for making the recommendation;
- (b) the amount to be paid to the company in respect of the equity securities to be allotted; and
- (c) the directors' justification of that amount.

(11) A person who knowingly or recklessly authorises or permits the inclusion in a statement circulated under subsection (10) of any matter which is misleading, false or deceptive in a material particular is guilty of an offence and liable on summary conviction to imprisonment for a term of six months or to a fine at level 5 on the standard scale or both.”.

Rules as to payment for shares on allotment.

4. The following sections are inserted after section 42A of the Ordinance -

“Payment for allotted shares.

42B(1) Subject to the following provisions, shares allotted by any company and any premium payable on them may be paid up in money or money's worth (including goodwill and know-how).

(2) A public company may not at any time accept, in payment up of its shares or any premium on them, an undertaking given by any person that he or another should do work or perform services for the company or any other person.

(3) Where a public company accepts such an undertaking in payment up of its shares or any premium payable on them, the holder of the shares when they or the premium are treated as paid up, in whole or in part, by the undertaking is liable to pay the company in respect of those shares an amount equal to their nominal value, together with the whole of any premium or, if the case so requires, such proportion of that amount as is treated as paid up by the undertaking, with interest at the appropriate rate.

(4) This section does not prevent a company from allotting bonus shares to its members or from paying up, with sums available for the purpose, any amount for the time being unpaid on any of its shares (whether on their nominal value or any premium).

(5) The reference in subsection (3) to the holder of shares includes any person who has an unconditional right to be included in the company's register of members in respect of those shares or to have an instrument of transfer of them executed in his favour.

Shares to be allotted as at least one quarter paid up.

42C(1) A public company may not allot a share except as paid up at least as to one-quarter of its nominal value and the whole of any premium on it.

(2) If a company allots a share in contravention of subsection (1), the share shall be treated as if one-quarter of its nominal value, together with the whole of any premium on it, had been received.

(3) In the circumstances of subsection (2), the allottee is liable to pay the company the minimum amount which should have been received in respect of the share under subsection (1) (less the value of any consideration actually applied in payment up, to any extent, of the share and any premium on it) with interest at the appropriate rate.

(4) Subsections (2) and (3) do not apply to the allotment of bonus shares, unless the allottee knew or ought to have known that the shares were allotted in contravention of subsection (1).

Restrictions on payment by long-term undertaking.

42D.(1) A public company may not allot shares as fully or partly paid up (as to their nominal value or any premium on them) except in cash if the consideration for the allotment is or includes an undertaking which is to be, or may be, performed more than 5 years after the date of allotment.

(2) If a company allots shares in contravention of subsection (1), the allottee is liable to pay the company an amount equal to the total of their nominal value and the whole of any premium (or, if the case so requires, so much of that total as is

treated as paid up by the undertaking), with interest at the appropriate rate.

(3) Where a contract for the allotment of shares does not contravene subsection (1), any variation of the contract which has that effect is void.

(4) Subsection (3) applies also to the variation by a public company of the terms of a contract entered into before the company was re-registered as a public company.

(5) Where a public company allots shares for a consideration which consists of or includes (in accordance with subsection (1)) an undertaking which is to be performed within 5 years of the allotment, but the undertaking is not performed within the period allowed by the contract for the allotment of the shares, the allottee is then liable to pay the company, at the end of the period so allowed, an amount equal to the total of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that total as is treated as paid up by the undertaking), with interest at the appropriate rate.

(6) A reference in this section to a contract for the allotment of shares includes an ancillary contract relating to payment in respect of them.

Non-cash consideration to be valued before allotment.

42E.(1) A public company shall not allot shares as fully or partly paid up (as to their nominal value or any premium on them) except in cash unless -

- (a) the consideration for the allotment has been independently valued under Part I of Schedule 15;
- (b) a report with respect to its value has been made to the company by a person appointed by the company during the 6 months immediately preceding the allotment of the shares; and

(c) a copy of the report has been sent to the proposed allottee.

(2) Subsection (1) does not apply where an amount standing to the credit of any of the company's reserve accounts, or of its profit and loss account, is applied in paying up (to any extent) any shares allotted to members of the company or any premiums on shares so allotted.

(3) Subsection (1) does not apply to the allotment of shares by a company in connection with an arrangement providing for the allotment of shares in that company on terms that -

- (a) the whole or part of the consideration for the shares allotted is to be provided by the transfer to that company (or cancellation) of all or some of the shares, or all or some of the shares of a particular class, in another company (with or without the issue to that company of shares, or of shares of any particular class, in that other company); and
- (b) the arrangement is open to all shareholders in the other company (or all shareholders of the particular class, if the arrangement is limited to a particular class of shares).

In determining whether that is the case, shares held by or by a nominee of the company proposing to allot the shares in connection with the arrangement, or held by or by a nominee of a company which is that company's holding company or subsidiary or a company which is a subsidiary of its holding company, shall be disregarded.

(4) Subsection (1) does not apply to the allotment of shares by a company in connection with its proposed merger with another company; that is, where one of the companies proposes to acquire all the assets and liabilities of the other in exchange for the issue of shares or other securities in the first company to shareholders of the other, with or without any cash payment to those shareholders.

(5) If a company allots shares in contravention of subsection (1) and either -

- (a) the allottee has not received the valuer's report required by that subsection to be sent to him; or
- (b) there has been some other contravention of this section or Part I of Schedule 15 which the allottee knew or ought to have known amounted to a contravention,

the allottee is liable to pay the company an amount equal to the total of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that total as is treated as paid up by the consideration), with interest at the appropriate rate.

(6) A public company shall deliver to the Registrar for registration a copy of the report mentioned in sub-section (1) at the same time as a return of the documents is filed under section 42.

(7) If subsection (6) is not complied with, every officer of the company who is in default is guilty of an offence and liable on summary conviction to a fine at level 5 on the standard scale, and for continued contravention to a daily default fine of £500.

Transfer to public company of non-cash asset in initial period.

42F(1) A public company shall not, unless the conditions of this section have been complied with, enter into an agreement with a person for the transfer by him during the initial period of one or more non-cash assets to the company or another if -

- (a) that person is a subscriber to the company's memorandum; and
- (b) the consideration for the transfer to be given by the company is equal in value at the time of the

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

agreement to one-tenth or more of the nominal value of the company's share capital issued at the time.

(2) In sub-section (1) the "initial period" is the period of 2 years beginning with the date on which the company was issued with a certificate by the Registrar under section 91(3) that it was entitled to commence business.

(3) This section applies to a company re-registered as a public company, but in that case -

- (a) subsection (1)(a) shall be read as if it referred to a person who is a member of the company on the date of re-registration; and
- (b) the initial period is 2 years beginning with the date of re-registration.

(4) The conditions referred to in subsection (1) are that -

- (a) the consideration to be received by the company (that is to say, the asset to be transferred to the company or the advantage to the company of its transfer to another person) and any consideration other than cash to be given by the company have been independently valued under Part II of Schedule 15;
- (b) a report with respect to the consideration to be so received and given has been made to the company during the six months immediately preceding the date of the agreement;
- (c) the terms of the agreement have been approved by an ordinary resolution of the company; and
- (d) not later than the giving of the notice of the meeting at which the resolution is proposed, copies of the resolution and report have been circulated to the members of the company entitled to receive that notice and, if the person with whom the agreement in

question is proposed to be made is not then a member of the company so entitled, to that person.

(5) A company which has passed a resolution under this section with respect to the transfer of an asset shall, within 15 days of so doing, deliver to the Registrar a copy of that resolution together with the report required by this section.

(6) If subsection (5) is not complied with, the company and every officer of it who is in default is guilty of an offence and liable on summary conviction to a fine at level 3 on the standard scale and for continued contravention to a daily default fine of £100.

Authority of company required for certain allotments.

42G.(1) The directors of a public company may not use any power of the company to allot relevant securities, unless they are, in accordance with this section authorised to do so by —

- (a) the company in general meeting; or
- (b) the company's articles.

(2) In this section “relevant securities” means —

- (a) shares in the company other than shares shown in the memorandum to have been taken by the subscribers to it; and
- (b) any right to subscribe for, or to convert any security into, shares in the company (other than shares so allotted);

and a reference to the allotment of relevant securities includes the grant of such a right but (subject to subsection (6) below) not the allotment of shares under such a right.

(3) Authority under this section may be given for a general or particular exercise of the power and may be subject to conditions.

(4) The authority shall state the maximum amount of relevant securities that may be allotted under it and the date on which it will expire, which shall be not more than 5 years from whichever is relevant of the following dates -

- (a) in the case of an authority contained in the company's articles at the time of its original incorporation, the date of that incorporation; and
- (b) in any other case, the date on which the resolution is passed by virtue of which the authority is given;

but such an authority (including an authority contained in the articles) may be previously revoked or varied by the company in general meeting.

(5) The authority may be renewed or further renewed by the company in general meeting for a period not exceeding 5 years, but the resolution shall state (or restate) the amount of relevant securities which may be allotted under the authority or, as the case may be, the amount remaining to be allotted under it, and shall specify the date on which the renewed authority will expire.

(6) In relation to authority under this section for the grant of such rights as are mentioned in subsection (2)(b), the reference in subsection (4) (and the corresponding reference in subsection (5)), to the maximum amount of relevant securities that may be allotted under the authority is to the maximum amount of shares which may be allotted under the rights.

(7) The directors may allot relevant securities, even if authority under this section has expired, if they are allotted under an offer or agreement made by the company before the authority expired and the authority allowed it to make an offer or agreement which would or might require relevant securities to be allotted after the authority expired.

(8) A resolution of a company to give, vary, revoke or renew an authority shall be forwarded to the Registrar within 15 days of the passing of that resolution.

(9) A director who knowingly and deliberately contravenes, or permits or authorises a contravention of this section is guilty of an offence and liable on summary conviction to a fine at level 5 on the standard scale.

(10) Nothing in this section affects the validity of any allotment.

Allotment where issue not fully subscribed.

42H.(1) No allotment may be made of any share capital of a public company offered for subscription unless —

- (a) that capital is subscribed for in full; or
- (b) the offer states that, even if the capital is not subscribed for in full, the amount of that capital subscribed for may be allotted in any event or in the event of the conditions specified in the offer being satisfied;

and, where conditions are so specified, no allotment of the capital may be made by virtue of paragraph (b) unless those conditions are satisfied.

(2) If shares may not be allotted under subsection (1) and 40 days have passed after the first issue of the prospectus, all money received from applicants for shares shall be immediately repaid to them without interest.

(3) If any of the money is not repaid within 48 days after the issue of the prospectus, the directors of the company are jointly and severally liable to repay it with interest at the rate of 5 per cent per annum from the expiration of the 48th day, except that a director is not so liable if he proves that the default in repayment was not due to any misconduct or negligence on his part.

(4) This section applies in the case of shares offered as wholly or partly payable otherwise than in cash as it applies in the case of shares offered for subscription (the word "subscribed" in subsection (1) being construed accordingly).

(5) In subsections (2) and (3), as they apply to the case of shares offered as wholly or partly payable otherwise than in cash, references to the repayment of money received from applicants for shares include -

- (a) the return of any other consideration so received (including, if the case so requires, the release of the applicant from any undertaking); or
- (b) if it is not reasonably practicable to return the consideration, the payment of money equal to its value at the time it was so received.

(6) Any condition requiring or binding an applicant for shares to waive compliance with any requirement of this section is void.

Application to certain private companies of conditions as to share capital.

42I. The provisions of sections 42B to 42F, 47(4) and (5), 54A(5) and 91 and Schedule 15 apply where a private company ceases to be a private company in accordance with section 27 in the same way as those provisions apply to a public company.”.

Amendment of section 45 of the Ordinance.

5. After section 45(2) of the Ordinance the following subsections are inserted -

“(2A) The acceptance of the company's own shares as security, either by the company itself or through a person acting in his own name but on the company's behalf, shall be treated as falling within the scope of the prohibition set out in subsection (1).

(2B) Subsection (2A) does not apply to transactions concluded by banks and other financial institutions in the normal course of business.”.

Holding of shares in public company by another company.

6. After section 45 of the Ordinance the following section is inserted -

“Holding of shares in public company by another company.

45A (1) The subscription, acquisition or holding of shares in a public company by another company within the meaning of Article 1 of Council Directive 68/151/EEC of 9 March 1968 on the co-ordination of safeguards for the protection of the interests of members of companies in which that public company directly or indirectly holds a majority of the voting rights or on which it can directly or indirectly exercise a dominant influence will be regarded as having been effected by that public company itself.

(2) Subsection (1) applies where the other company is governed by the law of a country outside the European Economic Area and has a legal form comparable to those listed in Article 1 of Directive 68/151/EEC.

(3) Subsections (1) and (2) do not apply where the subscription, acquisition or holding is effected by the other company in its capacity or in the context of its activities as a professional dealer in securities, provided that it is a member of a stock exchange situated or operating within the European Economic Area or is approved or supervised by an authority of a member State competent to supervise professional dealers in securities.”.

Amendment of section 47 of the Ordinance.

7. Section 47(4) of the Ordinance is substituted by -

“(4) Notwithstanding sub-section (1), shares in a public company may not be issued at a discount.”.

The authorised minimum.

8. After section 54 of the Ordinance the following section is inserted -

“Authorised minimum.

54A(1) In this Ordinance “the authorised minimum” in relation to the paid up share capital of a public company means £20,500 or such other sum as the Minister may specify by order published in the Gazette.

(2) An order under this section which increases the authorised minimum may -

- (a) require any public company having an allotted share capital of which the nominal value is less than the amount specified in the order as the authorised

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

minimum to increase that value to not less than that amount or to apply to be re-registered as a private company;

- (b) make, in connection with any such requirement, provision for -
 - (i) any matters relating to the company's registration, re-registration or change of name, to payment for any share comprised in a company's capital and to offers of shares in or debentures of a company to the public; and
 - (ii) the consequences (whether in criminal law or otherwise) of a failure to comply;

and

- (c) contain such additional provisions as are appropriate, make different provisions for different cases and provide for any provision of the order to come into force on different days for different purposes.

(3) Where the court makes an order confirming a reduction of a public company's capital which has the effect of bringing the nominal value of the company's allotted share capital below the authorised minimum, the Registrar shall not register the order under section 58 unless the court otherwise directs or the company is first re-registered as a private company.

(4) The court making any such order in respect of a company may authorise the company to be re-registered as a private company without its having passed a special resolution and, where the court so authorises a company, the court shall specify in the order the alterations in the company's memorandum and articles to be made in connection with that re-registration.

(5) A public limited company may not commence business unless the nominal value of the company's allotted share capital is not less than the authorised minimum.”.

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

Variation of class rights.

9. After section 61 of the Ordinance the following section is inserted -

“Variation of rights attached to any class of shares.

61A.(1) This section applies in relation to the variation of the rights attached to any class of shares in a company whose share capital is divided into shares of different classes.

(2) Where the rights are attached to a class of shares otherwise than by the company's memorandum, and the company's articles do not contain provisions with respect to the variation of the rights, those rights may only be varied if —

- (a) the holders of three-quarters in nominal value of the issued shares of that class agree in writing to the variation; or
- (b) an extraordinary resolution passed at a separate general meeting of the holders of that class approves the variation;

and any requirement (however imposed) in relation to the variation of those rights is complied with to the extent that it is not comprised in subparagraphs (a) and (b).

(3) Where the variation of such rights is connected with the giving, variation, revocation, or renewal of an authority for allotment or with a reduction of capital those rights shall not be valid unless -

- (i) the condition mentioned in sub-section (2)(a) or (b) is satisfied; and
- (ii) any requirement of the memorandum or articles in relation to the variation of rights of that class is complied with to the extent that it is not comprised in that condition.”.

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

Amendment of section 90A of the Ordinance.

10. The following paragraph is inserted after section 90A (1) (c) of Ordinance -

“(d) in the case of an investment company (as defined in section 147B) the fact that it is such a company.”.

Amendment of section 91 of the Ordinance.

11. Section 91 (4) of the Ordinance is substituted by -

“(4) Nothing in this section affects the validity of any transaction entered into by a company; but if a company enters into a transaction in contravention of this section and fails to comply with its obligations within 21 days from being called upon to do so, the directors of the company are jointly and severally liable to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with those obligations.”.

New Part IVA of the Ordinance.

12. After Part IV of the Ordinance the following Part is inserted -

“PART IVA

DISTRIBUTION OF PROFITS AND ASSETS

Certain distributions prohibited.

147A(1) A public company may not make a distribution except out of funds available for the purpose.

(2) In this Part “distribution” means every description of distribution of a company's assets to its members, whether by cash or otherwise, except distribution by way of -

- (a) an issue of shares as fully or partly paid bonus shares;
- (b) the redemption of any of the company's own shares out of capital (including the proceeds of any issue of shares) or out of unrealised profits;
- (c) the reduction of share capital by extinguishing or reducing the liability of any of the members of any of the company's shares in respect of share capital not paid up, or by paying off paid-up share capital; and
- (d) a distribution of assets to members of the company on its winding up.

(3) For the purposes of this Part, a public company's profits available for distribution are its accumulated realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.

Further provisions as to distributions.

147B(1) A public company may only make a distribution at any time —

- (a) if at that time the amount of its net assets is not less than the total of its called-up share capital and its undistributable reserves; and
- (b) if, and to the extent that, the distribution does not reduce the amount of those assets to less than that total.

(2) A public company may not include any uncalled share capital as an asset in any accounts relevant for the purposes of this section.

- (3)
 - (a) Subject to the following provisions of this section, an investment company may also make a distribution at any time out of its accumulated realised revenue profits, so far as not previously utilised by distribution or capitalisation, less its accumulated revenue losses (whether realised or unrealised),

so far as not previously written off in a reduction or reorganisation of capital duly made -

- (i) if at that time the amount of its assets is at least equal to one and a half times the total of its liabilities; and
 - (ii) if, and to the extent that, the distribution does not reduce that amount to less than one and a half times that total.
- (b) In subsection (3)(a) “liabilities” includes any provision except to the extent that it is taken into account for the purposes of that subsection in calculating the value of any assets of the company in question.
- (c) In this section “investment company” means a public company which has given notice (which has not been revoked) to the Registrar of its intention to carry on business as an investment company (the “requisite notice”) and has since the date of that notice complied with the following requirements -
- (i) that the business of the company consists of investing its funds mainly in securities, with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds;
 - (ii) that none of the company's holdings in companies (other than companies which are for the time being investment companies) represents more than 15 per cent by value of the investing company's investment;
 - (iii) that the distribution of the company's capital profits is prohibited by its memorandum or articles of association; and
 - (iv) that the company has not retained, otherwise than in compliance with this Part, in respect of any accounting reference period more than 15 per cent of the income it derives from securities.

- (d) An investment company may not make a distribution by virtue of subsection (3)(a) unless during the period beginning with the first day of the accounting reference period immediately preceding the accounting reference period in which the proposed distribution is to be made or, where the distribution is proposed to be made during the company's first accounting reference period, the first day of that period and ending with the date of the distribution, it has not -
 - (i) distributed any of its capital profits; or
 - (ii) applied any unrealised profits or any capital profits (realised or unrealised) in paying up debentures or any amounts unpaid on any of its issued shares.
 - (e) An investment company may not make a distribution by virtue of subsection (3)(a) unless the company gave the requisite notice before the beginning of the period referred to in subsection (3)(d).
 - (f) A notice by a company to the Registrar under subsection (3)(c) may be revoked at any time by the company on giving notice to the Registrar that it no longer wishes to be an investment company within the meaning of this section, and, on giving that notice, the company shall cease to be such an investment company.
- (4)
- (a) Where an insurance company carries on a long term business, any amount included in the relevant part of the balance sheet is to that part of the balance sheet which represents a surplus in the fund or funds maintained by it in respect of that business and which has not been allocated to policy holders in accordance with section 86 of the Insurance Companies Ordinance and any deficit in that fund or those funds shall be respectively treated for the purposes of this Part as a realised profit and a realised loss, and, subject to this, any profits or loss arising in that business will be left out of account for those purposes.
 - (b) In paragraph (a) -

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

- (i) the reference to a surplus in any fund of an insurance company is a reference to an excess of the assets representing that fund or those funds over the liabilities of the company attributable to its long term business, as shown by an actuarial investigation;
- (ii) the reference to the relevant part of the balance sheet is to that part of the balance sheet which represents Liabilities item A.V (profit and loss account) in the balance sheet format set out in section B of Chapter 1 of Schedule 1 to the Insurance Companies (Accounts Directive) Regulations 1997; and
- (iii) the reference to a deficit in any such fund or funds is a reference to the excess of those liabilities over those assets, as so shown.

(5) In this Part -

“actuarial investigation” means an investigation to which section 78 of the Insurance Companies Ordinance 1987 (periodic actuarial investigation of insurer with long term business) applies or which is made in pursuance of a requirement imposed by section 82 of that Ordinance (power for Commissioner to order actuarial investigation);

“insurance company” means an insurance company to which that Ordinance applies;

“long term business” has the same meaning as in that Ordinance;

“relevant capitalisation” is any capitalisation except a transfer of profits of the company to its capital redemption reserve; and

“undistributable reserves” means -

- (a) the share premium account;
- (b) the capital redemption reserve;

- (c) the amount by which the company's unrealised profits, so far as not previously utilised by a relevant capitalisation exceed its accumulated unrealised losses (so far as not previously written off in a reduction or reorganisation of capital duly made); and
- (d) any other reserve which the company is prohibited from distributing by any provision of this Ordinance, or by its memorandum or articles.

Consequences of unlawful distribution.

147C. (1) Where a distribution, or part of one, made by a public company to one of its members is made in contravention of this Part and, at the time of the distribution, that member knows or has reasonable grounds to believe that it is so made, he is liable to repay it (or that part of it as the case may be) to the company or (in the case of a distribution made otherwise than in cash) to pay the company a sum equal to the value of the distribution or part at that time.

(2) Subsection (1) is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him but this section does not apply in relation to -

- (a) financial assistance given by a company in contravention of section 45; or
- (b) any payment made by the company in respect of the redemption by the company of shares in itself.

Amount of distribution which may be made.

147D.(1) The amount of a distribution which may be made without contravening section 147A or 147B shall be determined by reference to the following items as stated in the company's last annual accounts or interim accounts —

- (a) profits, losses, assets and liabilities;
- (b) provisions for depreciation, diminution in value of assets and any amounts written off by way of such provisions; and

(c) share capital and reserves (including undistributable reserves).

(2) In relation to a proposed distribution by a public company the interim accounts must have been properly prepared or have been so prepared subject only to matters which are not material, for determining, by reference to items mentioned in subsection (1), whether the distribution would contravene section 147A or 147B.

(3) In this section -

“interim accounts” means those accounts necessary to enable a reasonable judgement to be made as to the amounts mentioned in paragraphs (a) to (c) of sub-section (1) where a distribution would contravene section 147A or 147B if reference were made only to the company's last annual accounts;

“properly prepared” in relation to interim accounts means that the accounts must comply with any requirements imposed by or under this Ordinance and any balance sheet comprised in the accounts must have been signed in accordance with section 121.”

New Schedule 15 of the Ordinance.

13. After Schedule 14 to the Ordinance the following Schedule is inserted -

“SCHEDULE 15

Section 42E

VALUATION PROVISIONS

PART I

1. The valuation and report required by section 42E shall be made by an independent person, that is to say a person qualified at the time of the report to be appointed, or continue to be, an auditor of the company.

2. However, where it appears to the independent person (in this Schedule referred to as “the valuer”) to be reasonable for the valuation of the

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

consideration, or part of it, to be made (or for him to accept such a valuation) by another person who -

- (a) appears to him to have the requisite knowledge and experience to value the consideration or that part of it; and
- (b) is not an officer or employee of the company or any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company or a partner or employee of such an officer or employee;

he may arrange for or accept such a valuation, together with a report which will enable him to make his own report under this Part and provide the note required by paragraph 6.

3. The reference in paragraph 2(b) to an officer or employee does not include an auditor.

4. The valuer's report shall state -

- (a) the nominal value of the shares to be wholly or partly paid for by the consideration in question;
- (b) the amount of any premium payable on the shares;
- (c) the description of the consideration and, as respects so much of the consideration as he himself has valued, a description of that part of the consideration, the method used to value it and the date of the valuation; and
- (d) the extent to which the nominal value of the shares and any premium are to be treated as paid up -
 - (i) by the consideration; and
 - (ii) in cash.

5. Where the consideration or part of it is valued by a person other than the valuer himself, the latter's report shall state that fact and also -

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

- (a) state the former's name and what knowledge and experience he has to carry out the valuation; and
 - (b) describe so much of the consideration as was valued by the other person, and the method used to value it, and specify the date of the valuation.
6. The valuer's report shall contain or be accompanied by a note by him -
- (a) in the case of a valuation made by a person other than himself, that it appeared to himself reasonable to arrange for it to be so made or to accept a valuation so made;
 - (b) whoever made the valuation, that the method of valuation was reasonable in all the circumstances;
 - (c) that it appears to the valuer that there has been no material change in the value of the consideration in question since the valuation; and
 - (d) that on the basis of the valuation the value of the consideration, together with any cash by which the nominal value of the shares or any premium payable on them is to be paid up, is not less than so much of the total of the nominal value and the whole of any such premium as is treated as paid up by the consideration and any such cash.
7. Where the consideration to be valued is accepted partly in payment up of the nominal value of the shares and any premium and partly for some other consideration given by the company, section 42E and the foregoing provisions of this Part apply as if references to the consideration accepted by the company included the proportion of that consideration, which is properly attributable to the payment up of that value and any premium and -
- (a) the valuer shall carry out, or arrange for, such other valuations as will enable him to determine that proportion; and
 - (b) his report shall state what valuations have been made under this paragraph and also the reason for, and method and date of any such valuation and any other matters which may be relevant to that determination.

PART II

1. Paragraphs 1 to 3 and 5 of Part I apply to the valuation and report for the purposes of section 42F.
2. The valuer's report for those purposes shall -
 - (a) state the consideration to be received by the company, describing the asset in question (specifying the amount to be received in cash) and the consideration to be given by the company (specifying the amount to be given in cash);
 - (b) state the method and date of valuation;
 - (c) contain or be accompanied by a note as to the matters mentioned in paragraph 6(a) to (c) of Part I; and
 - (d) contain or be accompanied by a note that on the basis of the valuation the value of the consideration to be received by the company is not less than the value of the consideration to be given by it.
3. A reference in section 42F or this Part to consideration given for the transfer of an asset includes consideration given partly for its transfer; but -
 - (a) the value of any consideration partly so given shall be taken as the proportion of the consideration properly attributable to its transfer;
 - (b) the valuer shall carry out or arrange for such valuations of anything else as will enable him to determine that proportion; and
 - (c) his report for the purposes of section 42F shall state what valuation has been made under this paragraph and also the reason for, and method and date of, any such valuation and any other matters which may be relevant to that determination.

PART III

ENTITLEMENT OF VALUER TO FULL DISCLOSURE

1. A person carrying out a valuation or making a report under section 42E or 42F, with respect to any consideration proposed to be accepted or given by a company, is entitled to require from the officers of the company such information and explanation as he thinks necessary to enable him to carry out the valuation or make the report and provide a note under paragraph 6 of Part I or (as the case may be) paragraph 2(c) of Part II.

2. A person who knowingly or recklessly makes a statement which -

- (a) is misleading, false or deceptive in a material particular; and
- (b) is a statement to which this paragraph applies,

is guilty of an offence and liable on summary conviction to imprisonment for a term of six months or to a fine up to a maximum of level 5 on the standard scale or both.

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

3. Paragraph 2 applies to any statement made (whether orally or in writing) to a person carrying out a valuation or making a report under Part I or II, being a statement which conveys or purports to convey any information or explanation which that person requires, or may require, under paragraph 1.”

Passed by the Gibraltar House of Assembly on the 23rd day of March, 1998.

D J REYES,
Clerk to the Assembly.

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]

Companies (Share Allotment and Capital Maintenance) Ordinance, 1998
[No. 20 of 1998]
