MFSA

MALTA FINANCIAL SERVICES AUTHORITY

# INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS

# PART A: THE APPLICATION PROCESS

## 1. Investment Services Act, 1994

### *1.1 Regulation of Investment Services*

The Investment Services Act, 1994 ("the Act") provides a statutory basis for regulating the provision of Investment Services. The following sections make reference to various parts of the Act but do not attempt to reproduce it, and therefore should not be treated as a substitute for reading the Act itself.

### *1.2 The Meaning of "Investment Services"*

Licensable activity takes place when an investment service is offered in respect of an instrument. It is an offence under the Act to conduct licensable activity without a licence.

An "Investment Service" is defined as "any Service falling within the First Schedule to the Act when provided in relation to an Instrument."

*Services covered by the Act*

The First Schedule to the Act lists the following Services:

1. Reception and Transmission of Orders in relation to one or more instruments.
   The reception from a person of an order to buy, sell or subscribe for instruments and the transmission of that order to a third party for execution.

2. Execution of orders on behalf of other persons.

   Acting to conclude agreements to buy, sell or subscribe for one or more instruments on behalf of other persons.

3. Dealing on own account.

   Trading against proprietary capital resulting in conclusion of transactions in one or more instruments.

~~2.~~4. Management of Investments
   Managing or agreeing to manage assets belonging to another person if those assets consist of or include one or more instruments or the arrangements for their

management are such that the person managing or agreeing to manage those assets has a discretion to invest any of those assets in one or more instruments.

Management of Investments may also constitute the selection or agreement to select, on a discretionary basis, instruments by reference to which benefits are wholly or partly payable under a contract of insurance falling within class III – linked long term, of the Second Schedule to the Insurance Business Act.

~~3.~~5. Trustee, Custodian or Nominee Services

a. Acting as trustee, custodian or nominee holder of an instrument, or of the assets represented by or otherwise connected with an instrument, where the person acting as trustee, custodian or nominee holder is so doing as part of his providing any investment service in paragraphs 1, 2, 3, 4 or 6:

Provided that for the purposes of this subparagraph any person who is authorised or otherwise exempt from authorisation in the terms of articles 43 or 43A of the Trusts and Trustees Act shall not by virtue of holding such assets be required to have a licence in terms of this subparagraph if such person does not provide an investment service and delegates all activities which are investment services in terms of this Act to a person who is licensed to provide such services; or

b. Holding an instrument or the assets represented by or otherwise connected with an instrument as nominee, where the person acting as nominee is so doing on behalf of another person who is providing any investment service referred to in the First Schedule to the Act or on behalf of a client of such person, and such nominee holding is carried out in relation to such investment service:

Provided that for the purposes of this paragraph any person who is authorised or otherwise exempt from authorisation in the terms of articles 43 or 43A of the Trusts and Trustees Act shall not by virtue of holding such assets be required to have a licence in terms of this Act; or~~.~~

c. Acting as trustee or custodian in relation to a collective investment scheme.

~~4.~~6. Investment Advice

Giving, offering or agreeing to give, to persons in their capacity as investors or potential investors or as agent for an investor or potential investor, a personal recommendation in respect of one or more transactions relating to one or more instruments.

For the purposes of this paragraph, a "personal recommendation" shall mean a recommendation presented as suitable for the person to whom it is addressed, or

which is based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following steps:

a. to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular instrument;

b. to exercise or not to exercise any right conferred by a particular instrument to buy, sell, subscribe for, exchange, or redeem an instrument;

c. to select one or more instruments by reference to which benefits are wholly or partly payable under a contract of insurance falling within the meaning of class III – ~~'~~linked long term~~'~~, of the Second Schedule to the Insurance Business Act.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.

~~5.~~7. Underwriting of Instruments and, or placing of Instruments on a firm commitment basis.
The underwriting or placing of instruments such that the person providing the service assumes the risk of bringing a new securities issue to the market by buying the issue from the issuer thereby guaranteeing the sale of a certain number of shares to investors.

~~6.~~8. Placing of Instruments without a firm commitment basis.
The marketing of newly-issued securities or of securities which are already in issue but not listed, to specified persons and which does not involve an offer to the public or to existing holders of the issuer's securities – without assuming the risk of guaranteeing the sale of a certain number of shares by buying the relative securities from the issuer.

~~7.~~9. Operation of a Multilateral Trading Facility.
The operation of a multilateral system which brings together multiple third party buying and selling interests in instruments – in the system and in accordance with non-discretionary requirements – in a way that results in a contract.

*Instruments covered by the Act*

An "Instrument" is defined as "any instrument, contract or right falling within the Second Schedule to this Act and whether or not issued in Malta".

The Second Schedule to the Act lists the following Instruments:

1. Transferable Securities.
Those classes of securities which are negotiable on the capital market and include:

a. shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depository receipts in respect of shares;
b. bonds or other forms of securitised debt, including depository receipts in respect of such securities; and
~~a.~~c. any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

~~1.~~2. Money Market Instruments.
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.

~~2.~~3. Units in collective investment schemes.

~~3.~~4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or financial measures which may be settled physically or in cash.

~~4.~~5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).

~~5.~~6. Options, futures, swaps, and any other derivative contracts relating to commodities, that can be physically settled provided that they are traded on a regulated market, within the meaning of the Financial Markets Act and, or a Multilateral Trading Facility within the meaning of the First Schedule to the Act.

~~6.~~7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled, are not for commercial purposes, are not included in article 6 of the Second Schedule to the Act, and, which have the characteristics of other derivative instruments, having regard to whether, inter alia, they are cleared and settled throughout recognized clearing houses or are subject to regular margin calls.

~~7.~~8. Derivative instruments for the transfer of credit risk.

~~8.~~9. Rights under a contract for differences or under any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price for property of any description or in an index or other factor designated for that purpose in the contract.

~~9.~~10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in the Second Schedule to the Act, which have the characteristics of other derivative instruments, having regard to whether, inter alia, they are traded on a regulated market within the meaning of the Financial Markets Act or a Multilateral Trading Facility within the meaning of the First Schedule to the Act, are cleared and settled through recognized clearing houses or are subject to regular margin calls.

~~10.~~11. Certificates or other instruments which confer property rights in respect of any instrument falling within the Second Schedule to the Act.

~~11.~~12. Foreign exchange acquired or held for investment purposes.

## 2. Requirement for an Investment Services Licence

Article 3 of the Act states that:

*"3 (1) No person shall provide, or hold himself out as providing, an investment service in or from within Malta unless he is in possession of a valid investment services licence.*

*(2) No body corporate, unincorporated body or association formed in accordance with or existing under the laws of Malta, shall provide or hold itself out as providing an investment service in or from within a country, territory or other place outside Malta unless it is in possession of a valid investment services licence."*

An Investment Services Licence is required whether the Investment Service is being provided in Malta or overseas. If the Investment Service is provided in Malta to overseas residents, a Licence is required whatever kind of "legal person" (including an individual) is involved. If the Investment Service is being provided overseas, from outside Malta, under article 3(2) an Investment Services Licence is required if the service is being provided by a body corporate, unincorporated body or association formed, established or constituted under the laws of Malta. The purpose of article 3(2) is to make it illegal to use Malta as a base for providing Investment Services overseas without having an Investment Services Licence. In practice, the MFSA is unlikely to grant an Investment Services Licence to an Applicant who wants to conduct licensable activities overseas unless the services will be offered in a territory which is adequately regulated. Otherwise Malta would be vulnerable to unscrupulous operators with no recourse through the Maltese courts.

In circumstances where the Applicant for an Investment Services Licence is already licensed under legislation other than the Investment Services Act, it is unlikely that the licensee will be granted a licence under the Investment Services Act unless a new company is formed for the purposes of conducting licensable activity under the Act.

Under article 12(1)(i) of the Act, certain exemptions are available from the requirement to have an Investment Services Licence. For further details, reference should be made to the Investment Services Act (Exemption) Regulations, 2007, the European Passport Rights for Investment Firms Regulations, 2007, and the Investment Services Act (UCITS Management Company Passport) Regulations, 2011~~Undertakings for the Collective Investment in Transferable Securities and Management Companies Regulations 2004 (as amended)~~.

## 3. Criteria which MFSA will apply in considering an application for a Licence

Article 6 of the Act prohibits the MFSA from granting an Investment Services Licence unless it is satisfied that the Applicant is a fit and proper person to provide the relevant Investment Services and that the Applicant will comply with and observe the appropriate rules and regulations.

When considering whether to grant or refuse an Investment Services Licence, the MFSA must take account of:

a. the degree of protection to the investors;

b. the protection of the reputation of Malta taking into account Malta's international commitments; and

c. the promotion of competition and choice.

The scope of the Act is wide, since it covers many different kinds of business. However, in all cases the MFSA applies the same standards relating to the "fit and proper" status of the Applicant, the track record of the Applicant (and those associated with it), and the nature of the business.

The "fit and proper" test is one which an Applicant and a Licence Holder must satisfy on a continuing basis. Each case is assessed on the basis of the relevant circumstances. The onus of proving that it meets the required standards is on the Applicant and Licence Holder. It is not the task of the MFSA to prove that an Applicant is "fit and proper" either on licensing or thereafter. The MFSA's approach is cumulative that is to say the Authority may conclude that a Licence Holder has failed the test on the basis of considering several situations, each of which on its own would not lead to that conclusion. An open and honest relationship with the MFSA is essential. When arriving at its decision as to whether a Licence Holder is "fit and proper" the MFSA will take account both of what is said and of what is not said (for example in respect of a Director's criminal record). It should be noted that it is an offence to provide inaccurate, false or misleading information to the MFSA.

In general terms, there are three criteria which must be met, to satisfy the "fit and proper" test:

a. integrity;

b. competence; and

c. solvency.

Integrity involves the Licence Holder and its employees being of good repute and acting honestly and in a trustworthy fashion in relation to its clients and other parties.

Competence means that those people carrying on the business of the Licence Holder must be able to demonstrate an acceptable amount of knowledge, professional expertise and experience. The degree of competence required will depend upon the job being performed. The MFSA will take into account the qualifications, experience and skills of those involved. Sound and prudent management, adequate resources, and a scrupulous attitude towards clients are essential. The business should be well organised, it should have adequate controls, and it should maintain sufficient records to demonstrate these attributes. Individuals should have a sufficient understanding of the business, and of the Investment Services and Instruments (including the related markets) with which they are dealing.

Solvency means ensuring that proper financial control and management of liquidity and capital is applied. The business should have sufficient Financial Resources to meet not only the financial demands on the business but also the Financial Resources Requirement established by the MFSA.

## 4. Categories of Licences

There are four categories of Investment Services Licences as follows:

*Category 1a:*
Licence Holders authorised to receive and transmit orders in relation to one or more instruments and, or provide investment advice and, or place instruments without a firm commitment basis but not to hold or control Clients' Money or Customers' Assets. (This Category does not include managers of Collective Investment Schemes.)

*Category 1b:*
Licence Holders authorised to receive and transmit orders, and, or provide investment advice in relation to one or more instrument and, or place instruments without a firm commitment basis solely for professional clients and, or eligible counterparties but not to hold or control Clients' Money or Customers' Assets. (This Category does not include managers of Collective Investment Schemes.)

*Category 2:*
Licence Holders authorised to provide any Investment Service and to hold or control Clients' Money or Customers' assets, but not to operate a multilateral trading facility or deal for their own account or underwrite or place instruments on a firm commitment basis.

*Category 3:*
Licence Holders authorised to provide any investment service and to hold and control Clients' Money or Customers' Assets.

*Category 4:*
Licence Holders authorised to act as trustees or custodians of Collective Investment Schemes.

Notes

1. Licence Holders' Financial Resources Requirements and the fees they must pay depend on the Category of the Investment Services Licence. The nature of the activities an Investment Services Licence Holder can offer will be described in the Licence. Some of the categories of Investment Services Licences are cumulative, but this is not the case with Category 4 Licences. Therefore, it may be necessary, for example, to apply for both a Category 2 and a Category 4 licence.

2. A Licence Holder will be considered to be "holding or controlling" Clients' Money or Customers' Assets where, for example, the Licence Holder holds a mandate over the client's bank account or holds a power of attorney by which he can control a customer's assets. For the purposes of categorisation, a Licence Holder will not be considered to be holding or controlling Clients' Money or Customers' Assets if it does not handle Clients' Money and if:

a. the Licence Holder does not handle customers' cheques, certificates or other documents constituting or evidencing title, and a recommendation by the Licence Holder can be effected only by the customer or a third party, such as a bank, acting on the customer's behalf; or

b. where the Licence Holder handles customers' cheques, certificates or other documents constituting or evidencing title, it has ensured that all customers have instructed all third parties with which the Licence Holder will carry out business on behalf of customers, that all cheques, certificates and other documents constituting or evidencing title to assets or money are to be issued only in the names of the customers or the names of persons specified by the customers, and all such third parties have confirmed their agreement in writing.

In either case (a) or (b), the Licence Holder's involvement with Clients' Money and assets must be limited entirely to situations governed by these arrangements. In addition, the Licence Holder must not handle bearer securities on behalf of customers. A Licence Holder which meets these criteria will remain subject to the relevant requirements concerning the safeguarding of Customers' assets.

The MFSA will determine into which category each Licence Holder falls.

## 5. Compliance and Prevention of Money Laundering

### *5.1 Role of Compliance Officer*

As the Regulator of Investment Services in Malta, the MFSA requires licensees to adhere strictly to the requirements imposed under the law, the regulations and other rules in force. Every Applicant will be asked (as part of the licensing process) to identify one individual who will be responsible for ensuring the Licence Holder's adherence to the Licence Conditions listed in Part B of these Rules.

The role of a Compliance Officer is onerous – not least because of the extent of responsibility and the possibility of censure by the Regulator if problems arise. No individual should accept this responsibility lightly – and certainly not without due consideration of the information that follows. Compliance Officers are advised to ensure they are clear about the extent of responsibilities. Compliance Officers should also be clear whether they could be held personally responsible in the event of a problem. Some specific points that Compliance Officers should consider are:

a. As the person made responsible for all aspects of compliance, the Compliance Officer will be expected to demonstrate independence of judgement and to exercise proper day-to-day supervision and control over the activity of the Company as a Licence Holder under the Investment Services Act.

b. In order to be able to satisfy these requirements, the Compliance Officer must familiarise him/herself thoroughly with the Licence Conditions that attach to the Licence Holder's licence as well as any relevant Guidance issued by MFSA – and take steps to ensure that the Licence Holder's staff are familiar with those Licence Conditions that are relevant to their role within the Company.

c. In particular, the Compliance Officer must pay particular attention to Licence Condition 1.20 of Part BI and to Licence Condition 2.17 of Part BII of these Rules which requires the Licence Holder to establish, implement and maintain adequate polices and procurers to identify breaches by the Licence Holder of the applicable regulatory requirements, and to minimise the risk of such breaches.

d. The MFSA also expects the Compliance Officer not to breach, or to permit breaches by others, of internal control procedures and systems or Licence Conditions imposed upon the Licence Holder's business by the MFSA. If the Compliance Officer becomes aware of such breaches, (s)he is expected to draw them to the attention of the person concerned and, where appropriate, to the attention of the Partners/ Board of Directors (as appropriate). All such breaches and action taken as a result should be recorded in writing.

e. The MFSA also expects the Compliance Officer to ensure, so far as is possible, that incorrect or misleading information is not provided deliberately or recklessly to the MFSA either in supervisory returns or in any other way.

f. The MFSA requires very high standards of conduct and compliance from all its Licence Holders. Consequently, a breach of any Licence Condition, and in particular, evidence of bad faith, lack of care and concern for the interests of customers, deceptive acts and behaviour, and incompetence, are all considered to be serious matters.

g. The Authority considers it important to ensure that Compliance Officers understand the requirements placed upon them and always stands prepared to discuss any doubts, worries, suspicions or queries that may arise from time to time in respect of their role.

Before a Compliance Officer is appointed, the Licence Holder must formally propose appointment to MFSA – after having conducted its own due diligence checks. MFSA will then write to the person proposed reminding that person of the nature of the role and asking that person to confirm (in writing) his/ her understanding of the requirements and their acceptance of the responsibilities attached to the Compliance role.

### *5.2 Role of Money Laundering Reporting Officer*

Investment Services Licence Holders carry on "relevant financial business" for the purposes of the Prevention of Money Laundering and Funding of Terrorism Regulations, 2003 (LN 199 of 2003] as amended. Accordingly, besides adhering to the Prevention of Money Laundering Act, 1994, Licence Holders are required to adhere to the Regulations and any relevant Guidance Notes.

Regulation 10 of the Prevention of Money Laundering Regulations and the Funding of Terrorism Regulations, 2003 requires the appointment of a Money Laundering Reporting Officer. The person assuming this role may or may not act as Compliance Officer having the duties outlined in section 5.1 above. The role of a Money Laundering Reporting Officer is an onerous one and should only be accepted by individuals who fully understand the extent of responsibilities attached to the role.

In this regard, particular attention should be given to the following:

a. The Money Laundering Reporting Officer should familiarise himself/herself thoroughly with the Prevention of Money Laundering Act, 1994, the Regulations and any relevant Guidance Notes.

b. The Money Laundering Reporting Officer should also ensure that all staff are familiar with the relevant provisions of the Prevention of Money Laundering Act, 1994, the Regulations and any relevant Guidance Notes, and that regular training is

being given in this regard. Note is to be taken of training that has been carried out and records retained of the persons trained and when. Care should also be taken when new ~~staff are~~staff is recruited to ensure that they obtain the necessary training.

c. Any suspicious transactions are to be reported directly to the Financial Intelligence Analysis Unit and copied to the Malta Financial Services Authority, even if the transaction is not carried out.

d. An internal reporting procedure should be set up to ensure that staff can report any such transactions without hindrance and that clear reporting lines are in place. Senior management is to be made aware of such reports and should not be in a position to suppress them.

e. The Money Laundering Reporting Officer should ensure that proper Know Your Customer procedures are in place. In this regard, it would be pertinent to point out that copies of identification documents are to be retained of all customers and these should invariably be authenticated.

f. Particular care is to be taken as to identification procedures and records of corporate entities with authenticated copies of identification records being retained for all directors of such entities.

Before a Money Laundering Reporting Officer is appointed, the Licence Holder must formally propose appointment to the MFSA – after having conducted its own due diligence checks. MFSA will then write to the person proposed reminding that person of the nature of the role and asking that person to confirm (in writing) his/ her understanding of the requirements and their acceptance of the responsibilities attached to the role of Money Laundering Reporting Officer.

## 6. The Application Process

When a "Service" (as defined by the First Schedule to the Act) is carried out in respect of an "Instrument" (as defined by the Second Schedule to the Act), an Investment Services activity takes place. Article 3 of the Act provides that: *"No person shall provide, or hold himself out as providing, an investment service in or from Malta unless he is in possession of a valid investment services licence"*.

The Application process and the ongoing requirements, to which licences issued under the Act are subject, are summarised below.

There are three phases –as follows:-

*Phase One - Preparatory*

a. MFSA recommends that the promoters arrange to meet representatives of the MFSA to describe their proposal. –This preliminary meeting should take place well in advance of submitting an Application for an Investment Services Licence. Although guidance will be given on the applicable regulatory requirements and on the completion of the Application documents, responsibility for the formulation of the proposal and the completion of the Application documents will remain with the Applicant. –It is essential that the Applicant submits a comprehensive (written) description of the proposed activity before the meeting.

i. The next stage is that the promoters submit a draft (rather than a Final) Application Form, together with supporting documents as specified in the Application Form itself.

b. The draft Application and the supporting documentation will be reviewed and comments provided to the Applicant. The MFSA may ask for more information and may make such further enquiries as it considers necessary. –The "fit and proper" checks – which entail following up the information which has been provided in the Application documents begin at this stage.

c. The MFSA will consider the nature of the proposed activity and the type of investors to whom and the markets to which the investment services are to be provided. –On the basis of this analysis, a decision will be made regarding which "Licence Conditions" should apply. –Some of these Licence Conditions may be disapplied or amended (where the circumstances justify such treatment, as long as investors are adequately protected) and supplementary conditions (if any) may be applied. _The Licence Conditions are very important since they represent the ongoing requirements to which the Applicant will be subject, if and when licensed. The Applicant will have the opportunity to consider the conditions before they are finalised.

*Phase Two – Pre-Licensing*

a. Once the review of the draft Application and supporting documents has been completed and the draft Licence Conditions have been agreed, the Authority will issue (all other things equal) its "in principle" approval for the issue of a licence.

b. At this stage, the Applicant will be required to finalise any outstanding matters, such as incorporation of Company (or registration of partnership), submission of signed copies of the revised Application form together with supporting documents in their final format, and any other issues raised during the Application process.

c. An Investment Services Licence will be issued as soon as all pre-licensing issues are resolved.

*Phase Three – Post-Licensing/ Pre-Commencement of Business*

a. The Applicant may also be required to satisfy a number of post-licensing matters prior to formal commencement of business.

The Licence Holder acknowledges that the MFSA will not be liable in damages for anything done or omitted to be done unless the act or omission is shown to have been done or omitted to be done in bad faith.

The Licence Holder acknowledges that the MFSA has the right, from time to time, to vary or revoke any condition of a Licence or to impose new conditions.

## 7. Fees

The Application Fee is payable on submission of the Application for an Investment Services Licence (or the draft Application Form if this is submitted initially) or upon notification of the proposed establishment of a branch by a European Investment Firm or a European Management Company and is not refundable. Investment Services Licence Holders are required to pay a Licence Issue Fee on the date the Licence is granted and annually, (upon submission of the annual audited financial statements), the Supervisory Fee as per the schedule hereunder. European Investment Firms and European Management Companies providing services in Malta through the establishment of a branch are required to pay a supervisory fee on the date they are authorised to providing services in Malta and then annually upon the anniversary of the date on which they commence business in Malta.

The applicable fees are currently as follows:

| INVESTMENT SERVICES LICENCES | | | | |
|---|---|---|---|---|
| | **Application Fee** | **Licence Issue Fee** | **Supervisory Fee** | |
| Category 1A: | € 750 | € 1,300 | For revenue up to € 50,000.<br><br>Further tranches of € 50,000 up to a maximum of € 1,000,000. | € 1,300<br><br>€ 250 per tranche or part thereof. |
| Category 1B: | € 750 | € 1,800 | For revenue up to € 50,000.<br><br>Further tranches of € 50,000 up to a maximum of € 1,000,000. | € 1,800<br><br>€ 250 per tranche or part thereof. |
| Category 2: | € 1,500 | € 3,000 | For revenue up to € 250,000.<br><br>Further tranches of € 250,000 up to a maximum of € 5,000,000. | € 3,000<br><br>€ 350 per tranche or part thereof. |
| Category 3: | € 2,000 | € 4,000 | For revenue up to € 250,000.<br><br>Further tranches of € 250,000 up to a maximum of € 5,000,000. | € 4,000<br><br>€ 350 per tranche or part thereof |
| Category 4: | € 4,000 | € 10,000 | € 10,000 | |

| TIED AGENTS | | |
|---|---|---|
| | **Application Fee** | **Registration / Supervisory Fee** |
| Individuals: | € 100 | € 300 |
| Not Individuals: | € 150 | € 350 and € 200 per individual employed by such Tied Agent and who is directly involved in the provision of Tied Agent activities. |

| EUROPEAN MANAGEMENT COMPANIES PROVIDING SERVICES THROUGH THE ESTABLISHMENT OF A BRANCH | | |
|---|---|---|
| | **Application Fee** | **Annual Supervisory Fee** |
| European Management Companies | € 1,250 | € 4,000 |

| EUROPEAN INVESTMENT FIRMS ESTABLISHING A BRANCH IN MALTA | | |
|---|---|---|
| | **Application Fee** | **Annual Supervisory Fee** |
| European Investment Firms authorised to receive and transmit orders in relation to one or more instruments and, or provide investment advice and, or place instrument without a firm commitment basis, in terms of the Directive but are not authorized to hold and control Clients Money or Customers' Assets. | € 750 | € 1,200 |
| European Investment Firms authorized to provide any investment services in terms of the Directive and to hold and control Clients' Money or Customers' Assets but not to operate a multilateral trading facility or to deal for their own account or underwrite or place instruments on a firm commitment basis. | € 1,000 | € 3,000 |
| European Investment Firms authorized to provide any investment services in terms of the Directive, and to hold and control Clients' Money or Customers' Assets. | € 1,650 | € 3,600 |

The Fees are subject to alteration by Regulations.

## 8. Variation of an Investment Services Licence

Requests for a variation of a Licence should be submitted to the MFSA in writing. This request should be supported by relevant arguments and supporting documentation as appropriate.

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MALTA FINANCIAL SERVICES AUTHORITY

## 9. Cessation of Investment Service Business

Investment Services Licence Holders should inform the Authority at an early stage of their intentions to surrender their licence. The MFSA may require a Licence Holder to delay the surrender of its Investment Service Licence, or to wind-up such business in accordance with conditions imposed by the MFSA, in order to protect the interests of customers and investors. The general procedure for surrendering a licence is described below, although the MFSA reserves the right to impose additional requirements.

Once a Licence Holder informs the MFSA of its intention to surrender its Investment Services Licence, the following confirmations/ action/ documentation ~~is~~ should be submitted to the MFSA:

a. A formal request to the MFSA asking for approval to surrender the licence;

b. A certified true copy of the Directors'/ General Partners' Resolution confirming the Licence Holder's intention to surrender its Investment Services Licence, subject to the Authority's approval and once the necessary formalities are finalised;

c. The Licence Holder must give due notice to its clients of its intention to surrender its licence (once the necessary formalities are finalised). Confirmation to this effect should be submitted to MFSA;

d. A confirmation (where appropriate) that each client has specifically consented to the transfer of that client's business to another appropriately licensed firm;

e. A confirmation that no litigation is pending which arises out of any event that occurred whilst the Licence Holder was licensed;

f. A confirmation that the Licence Holder will remove from all letterheads, and any other stationery, any reference to being licensed by the Authority;

~~g.~~ A confirmation that the Licence Holder has informed its auditor and insurer (in respect of its money policy and/ or professional indemnity insurance, if any) of the its intention to surrender its Licence; and

~~g.~~

h. A confirmation from the auditors of the Licence Holder specifying the date by when all business and obligations arising from the Licence Holder's activities related to its Investment Services Licence have been settled.~~;~~

This list may not be exhaustive and it is the Licence Holder's responsibility to ensure all its responsibilities have been satisfied.

Once all the requirements listed above are satisfied, an internal process will be set in motion for approval of the surrender of the Investment Services Licence. Once a decision is taken, this will be conveyed to the Licence Holder which will cease to be licensed thereafter. The Licence Holder should then return its original licence to the MFSA. Moreover, following the Authority's approval of the surrender, unless arrangements are made for the winding up of the Licence Holder, a certified true copy of the Constitutional Document of the Licence Holder duly amended to remove all references to Investment Services activity from its Objects Clause and, (where appropriate) to change the name of the Licence Holder should be submitted to the Authority.

The MFSA will ordinarily issue a public notice regarding the surrender of the Licence. The wording of the public notice will be provided to the Licence Holder for its comments prior to being published.

## 10. Standard Licence Conditions/ Ongoing Regulatory Requirements

The MFSA aims to provide a regulatory framework which is both robust and simultaneously adaptable. The Standard Licence Conditions for Investment Services Licence Holders are set out in Part B of these Rules.

The Licence Conditions included in Part BI ~~–~~of these Rules transpose part of the requirements of:

- the Markets in Financial Instruments Directive (Directive 2004/39/EC) and the relevant Implementing Directive (Commission Directive 2006/73/EC) as applicable to Investment Firms; ~~and~~

- Directive 2009/65/EC of the European Parliament and of the Council of 13th July, 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);~~the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive (Directive 85/611/EEC as amended) as applicable to Maltese Management Companies~~

- Commission Directive 2010/42/EU of 1st July, 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedures; and

- Commission Directive 2010/43 of 1st July, 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

The Licence Conditions included in Part BII of these Rules transpose the requirements of:

- Directive 2009/65/EC of the European Parliament and of the Council of 13th July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS); and

- Commission Directive 2010/43 of 1st July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

Parts C-I of the Rules includes the ongoing regulatory requirements applicable to European Investment Firms providing Investment Services in Malta through the establishment of a branch in terms of the European Passport Rights for Investment Firms Regulations, 2007.

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Part C-II of the Rules includes the ongoing regulatory requirements applicable to European Management Companies providing services in Malta on a cross border basis or through the establishment of a branch in terms of the ~~Undertakings for the Collective Investment in Transferable Securities and Management Companies Regulations 2004 (as amended)~~Investment Services Act (UCITS Management Company Passport) Regulations, 2011.

### *10.1 Standard Licence Conditions*

The following sections provide an introduction to the Standard Licence Conditions which apply to an Investment Services Licence. Licence Holders should also refer to MFSA's Guidance Notes which aim to clarify certain Standard Licence Conditions and provide interpretative guidance in this regard.

Part BI which is applicable to Licence Holders (excluding UCITS Management Companies) ~~Each Licence will~~ specifies ~~specify~~ the Investment Services which the Licence Holder may provide.

*Section 1: General Sundry Requirements/ General Organisational Requirements*

The Standard Licence Conditions set out in this section establish the general requirements with which Licence Holders shall comply, including notification requirements and the circumstances which warrant MFSA's consent.

*Section 2: Conduct of Business*

Each Licence Holder will be expected to maintain certain standards when conducting its Investment Services business, and particularly when dealing with, or on behalf of customers. There is a distinction between Retail Clients, Professional Clients and Eligible Counterparties. Retail Clients deserve a higher degree of care and protection than Professional Clients and Eligible Counterparties. ~~-~~Where no distinction is made, the same degree of care and protection should apply to all types of customers.

The Standard Licence Conditions set out in this section establish ~~The conditions establish~~ the requirements for the conduct of Investment Services business and address some important aspects of the Licence Holder's business such as:

- Client classification;
- Client profile requirements;
- Retail client agreement;
- Client reporting;

- Best execution requirements;
- Client order handling rules;
- Transactions executed with eligible counterparties;
- Record keeping;
- Safeguarding of clients' assets;
- Conflicts of interest;
- Staff dealing;
- Provisions of services through the medium of another investment firm;
- Conditions applicable to the provision of information;
- Complaints handling;
- Provisions applicable to Licence Holders whose staff promote and sell investment products;
- Provisions applicable to Licence Holders appointing tied agents; and
- Provisions applicable to Licence Holders appointing introducers.

*Section 3: Disclosure Requirements for Information to Clients, including Marketing Communications*

The Standard Licence Conditions set out in this section establish the requirements in respect of advertisements and promotional material and with other disclosures which the Licence Holder should make to clients in the course of providing an Investment and/ or Ancillary Service and to potential clients before providing such services.

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*Section 4: Outsourcing*

The Standard Licence Conditions ~~contained~~ set out in this section establish the requirements which are to be observed by Licence Holders outsourcing certain activities to third parties.

*Section 5: Supplementary Conditions for Operators of Multilateral Trading Facilities (MTFs)*

The Standard Licence Conditions set out in this section establish the requirements ~~set out in this section, establish the requirements~~ which must be satisfied by operators of a Multilateral Trading Facility.

*Section 6: Supplementary Licence Conditions for Investment Services Licence Holders which Qualify as Systematic Internalisers and for those which execute Off-Market Deals.*

The Standard Licence Conditions set out in this section establish the ~~in this section, stipulate the~~ transparency requirements for Licence Holders which qualify as Systematic Internalisers and for those which execute off-market deals.

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*Section 7: Financial Reporting Requirements, Accounting and Record Keeping*

The Standard Licence Conditions set out in this section~~,~~ establish the requirements for the maintenance and reporting of financial resources and other record keeping requirements. They also set out supplementary conditions for Licence Holders falling within the scope of the Investor Compensation Scheme Regulations.

*Section 8: Transaction Reporting*

The Standard Licence Conditions set out in this section establish the requirements ~~which are set out in this section, establish the requirements~~ of Licence Holders to report certain transactions to MFSA.

*Section 9: Supplementary Conditions for a Custodian of a Collective Investment Scheme*

The Standard Licence Conditions~~, which are set out in this section~~ set out in this section~~,~~ establish supplementary conditions which apply to Licence Holders which act as Custodians of Collective Investment Schemes. This section also includes additional conditions which are applicable to custodians of Maltese UCITS.

*Section 10: Supplementary Conditions for a Manager of a Collective Investment Scheme*

The Standard Licence Conditions ~~which are~~ set out in this section~~,~~ establish ~~the~~ supplementary conditions ~~requirements~~ which apply to management companies of ~~UCITS and non~~Non-UCITS Collective Investment Schemes.

Part BII which is applicable to UCITS Management Companies specifies the Investment Services which the Licence Holder may provide.

*Section 1: General Requirements*

The Standard Licence Conditions set out in this section establish the activities which the Licence Holder can be licenced to provide including notification requirements and the circumstances which warrant MFSA's consent.

*Section 2: Administrative Procedures and Internal Control Mechanisms*

The Standard Licence Conditions set out in this section establish the requirements with which the Licence Holder is expected to comply with regards to administrative procedures such as electronic data processing requirements and accounting procedures. In particular, the conditions address some important aspects of the internal control mechanisms which the Licence Holder is expected to implement such as:

- Control by senior management and supervisory function;
- Permanent compliance function;
- Permanent internal audit function;
- Permanent risk management function;
- Risk management policy;
- Assessment, monitoring and review of risk management policy;

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– Personal transactions;
– Recording of portfolio transactions;
– Recording of redemption and subscription orders; and
– Record-keeping requirements.

*Section 3: Conduct of Business Rules*

This section outlines the Standard Licence Conditions inherent to conduct of business and conflicts of interest. In particular this section provides as follows:

– Criteria for the identification of conflicts of interest;
– Conflicts of interest policy;
– Independence in conflicts management;
– Management of activities giving rise to detrimental conflict of interest;
– Strategies for the exercise of voting rights;
– Duty to act in the best interests of UCITS and their unit-holders;
– Due diligence requirements;
– Handling of subscription and redemption orders – reporting obligations in respect of execution of subscription and redemption orders;
– Best execution – executions of decisions to deal on behalf of the managed UCITS;
– Placing orders to deal on behalf of UCITS with other entities;
– General principles on the handling of orders;
– Aggregation and allocation of trading orders; and
– Safeguarding the best interests of UCITS in inducements.

*Section 4: Outsourcing*

The Standard Licence Conditions set out in this section establish ~~The Standard Licence Conditions contained in this section establish~~ the requirements which are to be observed by Licence Holders outsourcing certain activities to third parties.

*Section 5: Financial Resources Requirements*

The Standard Licence Conditions set out in this section establish the requirements for the maintenance and reporting of financial resources and other record keeping requirements.

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## *10.2 Financial Resources Requirements*

In terms of SLC 7.01 of Part BI and SLC 5.01 of Part BII of the Investment Services Rules, Licence Holders are required at all times to maintain own funds which are equal to or in excess of their Capital Resources Requirement. This shall constitute the Licence Holder's Financial Resources Requirement.

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*Capital Resources Requirement*

The components of the Capital Resources Requirement vary depending on the Category of Licence held by the Licence Holder. The following tables summarise the components of the capital resources requirement with the exception of Licence Holders licenced as UCITS Management Companies:

*Category 1a, 1b, Category 2, and Category 4*

The Capital Resources Requirement shall be the higher of (a) and (b) below:

a. Initial Capital; and

b. The higher of the following:

i. The sum of the non-trading book business risk components, the trading book business risk components, the commodities instruments - risk component~~, the large exposures risk component,~~ and the foreign exchange risk component; and

ii. The Fixed Overheads Requirement.

*Category 3*

The Capital Resources Requirement shall be the higher of (a) and (b) below:

a. Initial Capital; and

b. The sum of the Non-Trading Book business risk components, the Trading Book risk components, the Commodities Instruments risk component, the Large Exposures risk component, the Foreign Exchange risk component, and the Operational risk component.

*General Outline of the Initial Capital*

For the purpose of these Rules, "Initial Capital" shall be comprised of:

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a. equity capital; meaning share capital subscribed by shareholders or other proprietors, in so far as it has been paid up, plus share premium accounts but excluding cumulative preferential shares; and

b. reserves; meaning revenue reserves, interim net profits/retained profits for the year, unrealised fair value movements in held for trading financial instruments and other reserves.

Minimum Initial Capital for the different categories of Investment Services Licence Holders shall be as follows:

| | ***Minimum Initial Capital*** |
|---|---|
| Category 1A: | EUR50,000 |
| Category 1B – with PII: | EUR20,000 |
| Category 1B – without PII: | EUR50,000 |
| Category 2: | EUR125,000 |
| Category 3: | EUR730,000 |
| Category 4: | EUR125,000 |

The meaning of Own Funds and the Capital Resources Requirement applicable to the different categories of Licences, as well as the methodology for calculating a Licence Holder's Financial Resources Requirement, are set out in Appendix 1.

Provided that Licence Holders falling under any of the following categories, are exempt from the Financial Resources Requirements referred to above:

a. A credit institution constituted and licensed under the laws of Malta;

b. A branch (established in Malta) of a credit institution authorised in a EU Member State or EEA State; and

c. A branch (established in Malta) of an overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions.

The Standard Licence Conditions contained in section 7 of Part BI of these Rules, describe the financial reporting and record keeping requirements applicable to Investment Services Licence Holders with the exception of Licence Holders licensed as UCITS Management Companies.

Standard Licence Conditions 7.36 to 7.38 included in Part BI of these Rules stipulate the supplementary conditions applicable to Licence Holders falling within the scope of the Investor Compensation Scheme Regulations~~, ("the Regulations")~~.

*Financial Resources Requirements for UCITS Management Companies*

A Licence Holder must have own funds which are equivalent to an initial capital of at least EUR 125,000 taking into account the following:

a. when the value of the portfolios of a Licence Holder exceeds EUR 250,000,000, the Licence Holder will be required to provide an additional amount of own funds which is equal to 0.02% of the amount by which the value of the portfolios of a Licence Holder exceeds EUR 250,000,000.

Provided that the total initial capital and the additional amount shall not exceed EUR 10,000,000.

b. For the purposes of paragraph (a) above, the following portfolios shall be deemed to be the portfolios of a Licence Holder:

i. unit trusts/ common funds managed by a Licence Holder including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation;

ii. investment companies for which a Licence Holder is the designated management company;

iii. other collective investment undertakings managed by a Licence Holder including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation;

c. Without prejudice to the amounts prescribed in paragraphs (a) and (b) above, the own funds of a Licence Holder must at no times be less than one quarter of their preceding year's fixed overheads.

For the purposes of paragraphs (a), (b) and (c) above, the MFSA may authorise a Licence Holder not to provide up to 50% of the additional amount of own funds referred to in paragraph (a) if a Licence Holder benefits from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in Malta, or in any other recognised jurisdiction where it is subject to prudential rules considered by the MFSA to be equivalent to those in force.

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## 11. Appointment of Tied Agents

In terms of the Investment Services (Tied Agents) Regulations, 2007 (hereinafter referred to as ""the Tied Agents Regulations""), Tied Agents established in Malta may be appointed by:

a. Investment Services Licence Holders (excluding UCITS Management Companies); and/ or

b. European Investment Firms.

Investment Services Licence Holders may also appoint Tied Agents established in another EU or EEA Member State provided that such Tied Agent is registered in the appropriate register maintained by the EU or EEA Member State in which such Tied Agent is established. However, where such EU or EEA Member State does not provide for the appointment of Tied Agents, the Licence Holder shall be obliged to apply to MFSA for the registration of such Tied Agents.

A Tied Agent is a natural or a legal person who, under the full and unconditional responsibility of only one Investment Services Licence Holder or a European Investment Firm on whose behalf it acts, carries out one or more of the following services:

a. Promoting of investment and/or ancillary services to clients or prospective clients;

b. Receiving and transmitting instructions or orders from the client in respect of investment services or instruments;

c. Placing of financial instruments; and/or

d. Providing investment advice to clients in respect of investment services or instruments.

Tied Agents shall act only on behalf of one Licence Holder or European Investment Firm. Tied Agents appointed in terms of the Tied Agents Regulations would nonetheless still be able to undertake activities covered by other legislation (e.g. insurance) provided such other activities do not give rise to any conflicts of interests which may be detrimental to the Licence Holder's clients.

These Rules, pertaining to the appointment of Tied Agents have been issued pursuant to MFSA's powers under the Tied Agents Regulations. .

### *11.1 Process for Registration of Tied Agents*

In terms of the Tied Agents Regulations, a Licence Holder or a European Investment Firm may appoint a Tied Agent for the purposes of promoting its services, soliciting business or receiving orders from clients or potential clients and transmitting them, placing instruments

and providing investment advice in respect of such instruments and services offered by the Investment Services Licence Holder or European Investment Firm.

For this purpose, an Investment Services Licence Holder wishing to appoint a Tied Agent established in Malta or in another Member State which does not permit its own Investment Firms to appoint Tied Agents, must apply to the MFSA by means of the relevant application form set out in Schedule B to these Rules together with the appropriate application fee – with respect to each proposed Tied Agent. Likewise, a European Investment Firm wishing to appoint a Tied Agent established in Malta must also apply to the MFSA for the registration of such Tied Agents. The European Investment Firm will be required to follow the notification procedure relating to the establishment of a branch prior to the registration of its Tied Agent(s).

In the case of a legal person, such as a Company, being proposed as a Tied Agent, such person's constitutional documents (e.g. Memorandum and Articles of Association, in the case of a company) – a copy of which would need to be submitted to the MFSA – should also include a reference to tied agency activities in the object clause.

The Licence Holder or European Investment Firm should take reasonable care to ensure that a person it proposes to appoint as Tied Agent ("the Proposed Person"), satisfies the requirements set out in the Tied Agents Regulations and where applicable, -*prima facie*, the competence required by MFSA to enable such Tied Agent to provide investment advice. For this purpose, the Licence Holder or European Investment Firm shall carry out all the relevant due diligence checks it deems necessary in respect of the Proposed Person. As part of the application to MFSA for the registration of a Tied Agent, the Licence Holder or European Investment Firm shall submit to the MFSA, a declaration that in its opinion, the Proposed Person is of sufficiently good repute and possesses appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client.- MFSA however, reserves the right to carry out further checks in this regard.

On receipt of all the necessary application documents and fees, and after carrying out any further checks as to the Proposed Person's fitness and properness, MFSA will register the Proposed Person in the public register established in terms of the Tied Agents Regulations. Such registration will be confirmed by the issue of a Registration Certificate to the Proposed Person.

### *11.2 Eligibility Criteria for Tied Agents*

MFSA will only consider admitting individuals to the register of Tied Agents established in terms of the Tied Agents Regulations, provided that the Licence Holder or European Investment Firm seeking to appoint such individuals as its Tied Agents confirms to the MFSA that the persons concerned:

a. are established in Malta or, in the case of appointments by Licence Holders, in another EU or EEA Member State which does not allow its own investment firms to appoint Tied Agents;

b. are aged 18 years or over;

c. have attained, to the satisfaction of the Licence Holder, secondary school level education;

d. have a clean conduct certificate issued in their regard by the Malta Police or the equivalent authority in an EU or EEA Member State, as applicable; and ~~.~~

e. where applicable, *prima facie* satisfy the MFSA's standard competence requirements applicable to investment advisors.

Where the person considered to be appointed as Tied Agent is a legal person, the above criteria would need to be satisfied by the individuals to be acting on behalf of such legal person, in carrying out the activities of a Tied Agent.

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

## 12. Exercise of Passport Rights

### *12.1 Maltese Investment Firms*

Licence Holders which are entitled to exercise passport rights in terms of the European Passport Rights for Investment Firms Regulations, 2007 and/ or under the European Passport Rights for Persons Operating Multilateral Trading Facilities Regulations, 2007 are required to follow the procedure indicated therein before they can commence to provide services in another EU/ EEA Member State whether by means of the establishment of a branch or on a remote basis under the freedom of services.

For this purpose, Licence Holders should refer to Schedules DI~~.~~ and EI of these Rules which contain~~s~~ a specimen notification letter to be sent to MFSA indicating their intention to provide services on a remote basis or establish a branch in another EU/ EEA Member State.

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### *12.2 Maltese UCITS Management Companies*

Licence Holders which are entitled to exercise passport rights in terms of the ~~Undertakings for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 as amended~~Investment Services Act (UCITS Management Company Passport) Regulations, 2011 are required to follow the procedure indicated therein before they can commence to provide services in another EU/ EEA Member State whether by means of the establishment of a branch or on a remote basis under the freedom of services.

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For this purpose, Licence Holders should refer to Schedules DII and EII of these Rules which contain a specimen notification letter to be sent to the MFSA indicating their intention to provide services on a remote basis or establish a branch in another EU/ EEA Member State.

## 13. Prudential Assessment of Acquisitions and Increase of Holdings in Investment Services Licence Holders

This section 13 applies to any person, or persons acting in concert, desirous of acquiring directly or indirectly a qualifying shareholding in a company licensed to carry on investment services business or increasing the existing qualifying shareholding in the company concerned.

The scope of this section 13 is:

- to transpose the relevant provisions of the Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector;
- to determine the criteria to be applied by the MFSA in the assessment process of a proposed acquirer; and
- to ensure that the proposed acquirer knows what information is required to be provided in order to allow the MFSA to assess the proposed acquisition in a complete and timely manner.

In drafting the Rules, the MFSA has been guided by the 3L3 Committees of European Financial Supervisors (~~CEBS, CESR, CEIOPS~~EIOPA, ESMA, EBA) Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC which can be accessed through the following link http://www.esma.europa.eu/~~http://www.cesr-eu.org/~~.

### *13. 1– Notification Requirements*

In terms of article 10(1) of the Act, a proposed acquirer is required to provide notification of a proposed acquisition to the MFSA as soon as a decision is made to acquire or increase a qualifying shareholding in an investment services licence holder.

Notification is also required:

a. if the shareholding held by the acquirer in the licence holder involuntarily reaches or exceeds 10%, 20%, 30% or 50% of the shares or voting rights in the licence holder. This may occur as a result of the repurchase by the licence holder of shares held by other shareholders, or in the event of an increase in capital in which existing shareholders do not participate. In such cases, notification to the MFSA is still

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necessary upon becoming aware that a shareholding reaches or exceeds one of the thresholds referred to in this paragraph, even if the acquirer intends to reduce its level of shareholding so that it once again falls below the said thresholds;

b. when a number of persons are "acting in concert" such that each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made between them. In such a case, notification of the voting rights held collectively by these persons will have to be made to the MFSA by each of the parties concerned or by one of these parties on behalf of the group of persons so acting in concert; and

c. in the case of indirect qualifying shareholdings. Where the licence holder directly concerned by the proposed acquisition, in turn, directly or indirectly, controls subsidiaries that are regulated entities subject to the supervision of their overseas regulatory authorities, the proposed acquirer is required to provide notification of its proposed acquisition to each of these authorities. However, the responsibility for the final decision regarding the prudential assessment remains with the MFSA, if the proposed acquisition relates to a licensed company.

If qualifying shareholdings are held indirectly through one or more third parties, all persons in the chain of holdings are subject to assessment by the Authority against the five assessment criteria, described in section 13.2 below, where a threshold mentioned in sub-paragraph (a) of paragraph (1) of this Section is reached or exceeded. These requirements may be satisfied through an assessment of the person at the top of the chain and those who hold shares in the investment services licence holder directly, unless the MFSA has doubts about intermediate holders.

In some cases, such as when the proposed transaction presents some complexity (linked, for instance, to the transaction itself, to the complex group structure of the proposed acquirer, to the structure of the licensed company, etc.) the proposed acquirer should in anticipation of the formal notification contact the MFSA.

Formal notification is to be accompanied by:

a. a Personal Questionnaire as set out in Schedule F in the case of a proposed acquirer who is an individual; and
b. the Questionnaire for Qualifying Shareholders other than Individuals as set out in Schedule G in the case of a proposed acquirer who is not an individual;

together with the information requested in Schedule H.

In order to avoid undue delays in the assessment process, laid down in article 10A of the Act, it is essential that the proposed acquirer promptly transmits all required information, together with the notification of its decision to the MFSA. The assessment period will only

commence when all required information is transmitted to the MFSA. Without prejudice to the paragraphs hereunder, the list of information necessary to carry out the assessment as per Schedule F or G and H as appropriate shall be considered to be an exhaustive list of required information.

The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. In some cases the MFSA may not require the proposed acquirer to provide all of the information that appears in Schedule F or G and H as appropriate (for example, if the MFSA already possesses some information or can obtain it from another overseas regulatory authority).

In other cases, notwithstanding the exhaustive list of information referred to in the preceding paragraphs, the MFSA may consider, on the basis of its analysis of the information submitted in accordance with this Section, by the proposed acquirer, that some additional information is necessary for the assessment of the proposed acquisition. In that case, the MFSA may request, in writing, that the proposed acquirer provides the additional information. Such a request shall initiate the beginning of the interruption period referred to in article 10A of the Act. –This additional information clarifies and completes the information submitted in accordance with Schedule F or G and H as appropriate.

In the event that any of the information submitted is false or forged, rendering the conclusions of the MFSA liable to be erroneous, the MFSA shall refuse the approval of the proposed acquisition.

*Determination of Voting Rights*

The voting rights held by certain entities and which are to be taken into account for the purposes of article 10 of the Investment Services Act are described below:

*A. -Voting -Rights held by UCITS Management Companies:*

A UCITS management company within the meaning of article ~~1A~~2(1)(b)~~, point 2~~ of Directive ~~85/611/EEC~~2009/65/EC authorised in another Member State or EEA State or in a sector other than that in which the acquisition is proposed (the management company) and its parent undertaking:

a. need not aggregate their holdings, provided that they exercise their voting power independently of each other; but

b. must aggregate their holdings if the management company:

i. manages holdings for its parent undertaking or an undertaking in respect of which the parent undertaking is a controller; and

~~i.~~ii. has no discretion to exercise the voting rights attached to such holdings and may only exercise the voting rights attached to the holdings under direct or indirect instructions from its parent undertaking or an undertaking in respect of which the parent undertaking is a controller

*B.* -*Voting Rights held by European Investment Firms or Investment Services Licence Holders:*

A European Investment firm or an Investment Services Licence Holder and its parent undertaking need not aggregate holdings of the parent undertaking with holdings managed by the investment firm or Licence Holder on a client by client basis, provided that the investment firm or Licence Holder:

a. has permission to provide portfolio management services; and

b. exercises its voting power independently from the parent; and

~~a.~~c. may only exercise the voting rights attached to such shares under instructions given in writing or by electronic means and has appropriate mechanisms in place for ensuring that individual portfolio management services are conducted independently of any other services.

*C.* –*Voting Rights held by Market Makers*

Shares reaching or exceeding a 5% threshold of the total voting rights of an Investment Services Licence Holder held by a market maker, acting in its capacity of a market maker need not be aggregated provided that the person acting as market maker:

a. is duly authorised by its home Member State as such in terms of the Markets in Financial Instruments Directive; and

b. neither intervenes in the management of the Investment Services Licence Holder concerned nor exerts any influence on the Investment Services Licence Holder to buy such shares or back the share price.

*D.* –*Voting Rights held by virtue of Trading Book Entries*

Shares held by a credit institution or a European Investment Firm or an Investment Services Licence Holder in its trading book need not be aggregated provided that:

a. voting rights held in the trading book do not exceed 5%, and

b. the credit institution, the European Investment Firm or the Investment Services Licence Holder ensures that the voting rights attaching to shares held in the trading book are not exercised nor otherwise used to intervene in the management of the Investment Services Licence Holder in which the voting rights are being acquired.

*E. -Voting Rights Attaching to Shares Held for Clearing and Settlement Purposes*

Shares held for the sole purpose of clearing and settlement within a short settlement cycle shall not be taken into account.

*F. Voting Rights Attaching to Shares Held by Custodians*

Shares held by a custodian in its capacity as custodian, shall not be taken into account provided that the custodian can only exercise the voting rights attached to the shares under instructions given in writing or by electronic means.

*G. Voting Rights or Other Shares held by Credit Institutions or Investment Firms.*

Voting Rights attached to shares held by a credit institution, a European Investment Firm or an Investment Services Licence Holder as a result of:

a. providing the underwriting of financial instruments; and, or

b. placing financial instruments on a firm commitment basis

in terms of point 6 of Section A of Annex I to the Directive, shall not be taken into account provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

***13.2 -The Five Assessment Criteria***

In assessing the notification provided for in article 10 of the Act and the information referred to in article 10A of the Act, the MFSA shall in order to ensure the sound and prudent management of the investment services licence holder in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment services licence holder, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

a. Tthe reputation of the proposed acquirer;

b. The reputation and experience of any person who will direct the business of the investment services licence holder as a result of the proposed acquisition;

c. The financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the investment services licence holder in which the acquisition is proposed;

d. Whether the investment services licence holder will be able to comply and continue to comply with the prudential requirements emanating from the Act any regulations issued thereunder as well as these Rules, and where applicable from the Financial Conglomerates Regulations, 2004 and Directive 2006/49/EC in particular, whether the group of which it will become a part of has a structure that makes it possible to exercise effective supervision and effectively exchange information among the MFSA and overseas regulatory authorities and determine the allocation of responsibilities amongst the MFSA and overseas regulatory authorities; and

e. Whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of article 1 of Directive 2005/60/EC is being or has been committed or attempted or that the proposed acquisition could increase the risk thereof.

*13.2. 1 The First Assessment Criterion - The reputation of the proposed acquirer.*

This criterion concerns the determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether these doubts are founded. Such doubts may arise, for instance, from past business conduct. The assessment of the reputation is of particular relevance if the proposed acquirer is an unregulated entity but should be facilitated if the proposed acquirer is authorised and supervised within the European Union.

Without prejudice to the requirements of section 3 of this Part A, the assessment of the reputation of the proposed acquirer covers two elements:

a. Integrity; and

~~a.~~b. Professional competence.

Integrity

*Situations Subject to Assessment*

In general, the proposed acquirer is assumed to be of "good repute" (trustworthy) if there is no evidence to the contrary. –Integrity requirements imply the absence of "negative records". In this regard, the MFSA retains discretionary power to determine which other

situations cast doubts on the trustworthiness of the proposed acquirer. For this purpose, the following situations shall be taken into account:

a. Conviction of a relevant criminal offence. Special consideration shall be given to any offence under the laws governing banking, financial, securities or insurance activity or concerning securities markets or securities or payment instruments, including laws on money laundering, market manipulation, or insider dealing and usury; to any offence of dishonesty, fraud, or financial crime; and to other offences under legislation relating to companies, bankruptcy, insolvency or consumer protection.

b. Any relevant criminal offences currently being tried or having been tried in the past and may also be relevant, as they can cast doubt on the integrity of the proposed acquirer and may mean that the integrity requirements are not met.

The integrity of the proposed acquirer is not only affected by court decisions and ongoing judicial proceedings. The following situations shall also be taken into account, since they may cast doubts on the integrity of the proposed acquirer:

- Current or past investigations and/or enforcement actions related to the proposed acquirer, or the imposition of administrative sanctions for non-compliance with provisions governing banking, financial, securities or insurance activity, or those concerning securities markets, securities or payment instruments, or any financial services legislation; or

- Current or past investigations and/or enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions.

In addition to considering judicial or administrative decisions or procedures, the assessment of the integrity of the proposed acquirer shall examine its correctness in past business dealings, the lack of which may undermine the integrity and trustworthiness of the proposed acquirer at the time of the proposed acquisition. The MFSA shall pay attention to:

i. Any evidence that the proposed acquirer has not been transparent, open and cooperative in its dealings with the MFSA or any overseas regulatory authority, including any evidence that the proposed acquirer knowingly ignored its notification obligation according to the Act or attempted to evade the prudential assessment that such person is required to undergo as a proposed qualifying shareholder;

ii. Refusal of a registration, authorisation, membership or licence to carry out a trade, business or profession or revocation, withdrawal, or termination of such registration, authorisation, membership, or licence; or expulsion by a regulatory or government body;

iii. Dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position

iv. Disqualification from acting as a person who directs the business.

The MFSA shall assess the relevance of such situations on a case by case basis, recognising that the characteristics of each situation may be more or less severe and that some situations may be significant when considered together, even though each of them in isolation may not be significant.

The MFSA may judge the relevance of criminal records differently according to the type of conviction, the finality of the judgment (i.e. whether it is subject to appeal), the type of punishment, the length of any imprisonment imposed, the stage of judicial proceedings reached (conviction, trial or indictment) and the effect of rehabilitation.

In cases involving the acquisition of a new qualifying shareholding the information requirements on which the assessment of integrity is based, may vary according to the nature of the proposed acquirer (i.e. individual vs legal person, regulated or supervised entity vs unregulated entity).

However, in all cases, the proposed acquirer himself should attest in a statement that none of the situations described in points (a) to (b) and (i) to (iv) above occurs or has to the best of its knowledge occurred in the past. A delayed, incomplete or undelivered declaration will call into question the approval of the proposed acquisition.

In all cases, the MFSA should be able to verify the statement submitted by the proposed acquirer by asking such persons to provide documents evidencing that the statement is true (e.g. police conduct certificates) and, if needed, by requesting confirmation from other authorities (e.g. judicial authorities or other regulators), domestic or otherwise.

In the case of an increase in an existing qualifying shareholding, and to the extent that the integrity of the proposed acquirer has previously been assessed by the MFSA, the relevant information shall be updated as appropriate.

When assessing the integrity of the proposed acquirer, the MFSA may take into consideration any person linked to the proposed acquirer, i.e. any person who has, or appears to have, a relevant family or business relationship with the proposed acquirer.

In this context, and by way of example, (where A is the proposed acquirer and B is a connected person) a relevant business relationship could be where:

a. A is the controlling shareholder of a company and B is a board member of that company appointed by A, or vice versa;

b. A and B jointly control a company;

c. A and B are board members of a company appointed by the same shareholder;

~~a.~~d. A and B participate in a shareholder agreement regarding the exercise of voting rights which have a significant influence in a company.

Professional competence

The professional competence of the proposed acquirer covers competence in management ("management competence") and in the area of the financial activities carried out by the licence holder ("technical competence").

The management competence may be based on the proposed acquirer's previous experience in acquiring and managing holdings in companies, and should demonstrate due skill, care, diligence, and compliance with the relevant standards.

The technical competence may be based on the acquirer's previous experience in operating and managing financial firms as a controlling shareholder or as a person who effectively directs the business of a financial firm. In this case, the experience should demonstrate due skill, care, diligence and compliance with the relevant standards.

*Where the proposed acquirer is a legal person*

If the proposed acquirer is a legal person, the integrity requirements must be satisfied by the legal person as well as by all of the persons who effectively direct the business.

When assessing professional competence, the technical aspect should relate primarily to the financial activities currently performed by the proposed acquirer and/or by companies in the group to which such person belongs.

In the light of the above, all the persons who effectively direct the business of a proposed acquirer which is not regulated in a Member State/ EEA State or an approved jurisdiction, will be required to submit to the MFSA a completed Personal Questionnaire as per **Schedule F** to these Rules.

*13.2.2 The Second Assessment Criterion - The Reputation and Experience of those who will direct the business*

This criterion addresses circumstances when the proposed acquirer:

a. is in a position to appoint new persons who will direct the business of the investment services licence holder, and
b. has already identified these new persons who will direct the business and that the proposed acquirer intends to appoint.

In contrast, and without prejudice to the on-going fit and proper requirements that apply to persons who currently direct the business of the investment services licence holder under the Act, this criterion does not apply to a proposed acquisition that does not involve the appointment of new persons who will direct the business.

If the proposed acquirer intends to appoint a person who is not fit and proper, then the MFSA shall oppose the proposed acquisition.

*13.2.3 The Third Assessment Criterion - The Financial Soundness of the Proposed Acquirer*

The financial soundness of the proposed acquirer can be understood as the capacity of the proposed acquirer to finance the proposed acquisition and to maintain a sound financial structure for the foreseeable future. This capacity should be reflected in the overall aim of the acquisition and the policy of the proposed acquirer regarding the acquisition, but also, – in the case of a change in control, in the forecast financial objectives, consistent with the strategy identified in the business plan.

The information required for the assessment of the financial soundness of the proposed acquirer will depend on the legal status of the proposed acquirer: for example, whether it is:

– an entity subject to prudential supervision;
– an entity which is not so subject; or
– an individual.

In the case of a change in control, in particular in relation to the type of business pursued and envisaged in the investment services licence holder in which the acquisition is proposed, the extent of the proposed acquirer's compliance with prudential requirements should also be taken into account. While the objective of this criterion is to assess the financial soundness of the proposed acquirer, the objective of the fourth assessment criterion as described in section 13.2.4 below, is to assess the prospective soundness of the investment services licence holder in which the acquisition is proposed, which presupposes the financial soundness of the proposed acquirer (i.e. its ability to implement the business plan).

The MFSA shall also analyse whether the financial mechanisms, put in place by the proposed acquirer to finance the acquisition, or existing financial relationships between the proposed acquirer and the investment services licence holder concerned, could give rise to conflicts of interest that could destabilise the financial structure of the said investment services licence holder.

The MFSA shall oppose the proposed acquisition if it concludes, on the basis of its analysis of the information received, that the proposed acquirer is likely to face financial difficulties during the acquisition process or in the foreseeable future.

*13.2.4 The Fourth Assessment Criterion – Compliance with prudential requirements*

Whereas the Third Assessment Criterion aims basically at clarifying whether the financial situation of the proposed acquirer is sound enough to support the proposed acquisition of the investment services licence holder, this criterion requires that the proposed acquisition does not adversely affect the licence holder's compliance with prudential requirements. In particular, effective supervision, information exchange and the clear allocation of responsibilities should not be hindered as a result of the proposed acquisition.

In assessing this criterion, the MFSA shall take into consideration not only the objective facts, such as the intended share in the investment services licence holder, the reputation of the proposed acquirer, its financial soundness, and its group structure; but will also look at the proposed acquirer's declared intentions towards the investment services licence holder concerned as expressed in its strategy (business plan). This could be backed by appropriate commitments made by the proposed acquirer to meet prudential requirements under the assessment criteria laid down in this section, provided that the rights of the proposed acquirer under the Act and any regulations and rules issued thereunder are not affected. These commitments could concern, for example, the financial support provided in case of liquidity or solvency problems, corporate governance issues, the proposed acquirer's future intended shareholding in the licence holder, directions and goals for development etc.

The MFSA shall take into account the ability of the licence holder in which the acquisition is being proposed to comply at the time of the acquisition, and to continue to comply thereafter, with all prudential requirements, including capital requirements, liquidity requirements, requirements related to governance arrangements, internal control, risk management, compliance, etc.

If the licence holder in which the acquisition is being proposed is part of a group, the group structure shall make it possible to exercise effective supervision, effectively exchange information with different overseas regulatory authorities, and determine the allocation of responsibilities among the MFSA and overseas regulatory authorities.

The prudential assessment of the proposed acquirer shall also cover its capacity to support adequate organisation of the investment services licence holder within its new group. Both the investment services licence holder concerned as well as the group should have clear and transparent corporate governance arrangements and adequate organisation, including an effective internal control system and independent control functions (risk management, compliance and internal audit).

The group of which the investment services licence holder will become a part of shall be adequately capitalised, and its own funds shall be distributed appropriately within the group according to the level of risk in each part and the requirements of any applicable law.

The MFSA shall also consider whether the proposed acquirer will be able to provide the investment services licence holder concerned with the financial support it may need for the type of business pursued by and/or envisaged for it; to provide any new capital that the investment services licence holder may require for future growth in its activities or to implement any other appropriate solution to accommodate the investment services licence holder's needs for additional own funds.

This criterion is mainly relevant in cases of change in control at the time of acquisition and on a continuous basis for the foreseeable future. The business plan provided by the proposed acquirer to the MFSA should cover at least a period of three years. On the other hand, in cases of qualifying shareholdings of less than 20%, the applicable information requirements are those set out in Part~~s~~ B1 of Part II of Schedule H.

The business plan shall clarify the plans of the proposed acquirer concerning the future activities and organisation of the investment services licence holder in which the acquisition is proposed. This shall also include a description of the proposed group structure. The plan shall also evaluate the financial consequences of the proposed acquisition and include a medium-term forecast.

For the purposes of this section:

– "group structure" shall cover the members of the group, including their parent entities and subsidiaries, and intra-group corporate governance procedures (decision-making mechanisms, level of independence~~-~~, capital management); and

– "to exercise effective supervision" shall mean that the MFSA is not prevented from fulfilling its supervisory duties by the investment services licence holder's close links to other persons. It also means that the MFSA shall not be prevented from fulfilling its monitoring duties by the laws, regulations, or administrative provisions of another country governing a person with close links to the investment services licence holder, or by difficulties in the enforcement of those laws, regulations or administrative provisions.

*13.2.5 Fifth Assessment Criterion - Suspicion of Money Laundering or Terrorist Financing*

In terms of the Prevention of Money Laundering and Funding of Terrorism Regulations, 2008, investment services licence holders are required to report transactions to the Financial Intelligence Analysis Unit and to the MFSA, whenever they suspect or have reasonable grounds to suspect that the funds involved may have been or are the proceeds of criminal activity or are linked to terrorism. Transactions should be reported whenever the

circumstances surrounding them would lead a reasonable person to be suspicious. These concepts shall also be used for the prudential assessment of proposed acquirers.

If the proposed acquirer is suspected or known to be involved in money laundering operations or attempts, whether or not this is linked directly or indirectly to the proposed acquisition, the "integrity" aspect referred to in the First Assessment Criterion shall be sufficient for the MFSA to oppose the proposed acquisition.

Similarly, if the proposed acquirer is "listed" as being a terrorist or if he is suspected or known to finance terrorism, the said "integrity" aspect shall also be sufficient to allow the MFSA to oppose the proposed acquisition.

The MFSA can also oppose the acquisition even when there are no criminal records, or where there are no reasonable grounds to doubt the integrity of the proposed acquirer, if the context of the acquisition would increase the risk of money laundering or terrorist financing. This could be the case, for example, if the proposed acquirer is established in a country or territory considered by the FATF (Financial Action Task Force) to be "non-cooperative", or, more broadly, in a country or territory that has not taken sufficient measures to comply with the FATF-GAFI 40 and 9 recommendations.

In addition to information relating to the proposed acquirer collated during the assessment process, the MFSA shall collect information from (for example) court decisions, public prosecutor's files, FATF-GAFI country assessment or typology reports which may offer a comprehensive overview of the most recurrent money laundering or terrorist financing typologies, etc.

The money laundering or terrorist financing assessment complements the integrity assessments referred to in the First Assessment Criterion and shall be carried out regardless of the value and other characteristics of the proposed acquisition.

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