

# **MFSA**

**MALTA FINANCIAL SERVICES AUTHORITY**

## **CONSULTATION DOCUMENT**

### **REQUEST FOR CONTRIBUTIONS TO A PROPOSED REVIEW OF CHAPTER 11 OF THE LISTING RULES - TAKEOVER BIDS**

**[MFSA REF 11/2017]**

**22<sup>nd</sup> December 2017**

**Closing Date: 22<sup>nd</sup> January 2018**

## **1. Introduction**

On 1<sup>st</sup> February 2017 the Malta Financial Services Authority (the “**Authority**”) issued a Consultation Document requesting interested parties to contribute to the revision process of Chapter 11 by suggesting amendments thereto which they believe are required or would be beneficial, keeping in mind the provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21<sup>st</sup> April 2004 on takeover bids (the “**Directive**”).

The original consultation period was extended by a month up to the 28<sup>th</sup> February 2017 following which six contributions were received by the Authority, three of which were from legal firms involved in one or more recent bids, and three received from financial intermediaries also involved in such bids.

The Authority initially held a number of informal discussions with interested parties in order to obtain first-hand feedback on the amendments required to Chapter 11 and such discussions were then followed up by written contributions to the Authority. Informal discussions were also held with those who had commented on the provisions in Chapter 11 but had not responded to the published Consultation Paper.

A feedback statement was published by the Authority on 31 July 2017 outlining the main comments received by the Authority by stakeholders. On 20<sup>th</sup> October 2017 the Authority held a meeting with the stakeholders which were involved in the abovementioned process to informally discuss the proposed amendments to Chapter 11 prepared on the basis of their respective contributions in the consultation process. Unfortunately the Authority was very disappointed by the stakeholder turnout at such meeting as many stakeholders failed to attend the meeting.

On the basis of the consultation process set out above the Authority has prepared the clarifications and draft amendments to Chapter 11 set out below.

## **2. Clarifications**

### **2.1. The Role of the Authority in a Bid**

The role of the Authority is clearly spelt out in both the Directive and in the Listing Rules (“**LRs**”). LR11.4 states that the Listing Authority shall supervise a bid while LR11.7.1 and LR11.7.2 refer specifically to what matters ‘the Authority is competent to supervise’ namely, listing consideration for a bid, procedures

applicable to the bid and matters relating to information to be provided to employees of the Offeror Company as well as any issues relating to the percentage of voting rights required to confer control.

The Authority should as such only become involved in supervising the structure or the workings of the bid and ensure that the offer document complies with the principles and procedures transposed into the Listing Rules.

## **2.2. Structure of Chapter 11 – Takeover Bids**

Following the consultation process the Authority is of the view that a better understanding of the LRs would be achieved if, where appropriate, explanatory notes, or annexes, were drafted and added to the chapter. The annexes would not form part of the LRs but would aim to be of assistance in guiding users on topics raised during the consultation process.

## **3. Proposed Amendments**

The following amendments, tracked for ease of reference, are being proposed to the undermentioned sections of Chapter 11.

### **3.1. Definitions and the use of defined terms – LR11.3:**

#### **3.1.1. “Acting in Concert”**

“ ‘Person(s) Acting In Concert’ means any natural or legal person(s) who cooperates with the Offeror or the Offeree Company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring Control of the Offeree Company or at frustrating the successful outcome of a Bid. Subsidiary undertakings of any person cooperating with the Offeror or the Offeree Company shall be deemed to be persons Acting In Concert with that other person and with each other.”

#### **3.1.2. “Controlling Interest”**

“ ‘Control’ or ‘Controlling Interest’ means the acquisition-holding by a person or the acquisition-holding by persons Acting In Concert with him which, when added to any existing holdings of those Securities of the person and/or to holdings of those Securities of persons Acting In Concert

with him, directly or indirectly give him fifty percent plus one of the voting rights of a Company.”

### **3.2. Discretionary Exemptions - Article 4(5)(ii) of the Directive**

Subsequent to stakeholder feedback the Authority is suggesting the inclusion of a LR granting the Authority the power to provide for derogations from the requirements of the Directive, provided the general principles laid down in Article 3(1) thereof are respected, and is proposing that a new LR11.1.3 be included as follows:

“In order to give effect to Article 4(5)(ii) of Directive 2004/25/EC, the Authority may dispense with, vary or not require compliance with the terms of any particular Listing Rule in this Chapter, provided that the General Principles set out in Article 3(1) of Directive 2005/25/EC are respected and that where this discretion is exercised a statement explaining the Authority’s decision shall be included in the Offer Document.”

### **3.3.LR11.8 – Mandatory Bid**

“Where a person acquires a Controlling Interest as a result of his own acquisition or the acquisition by ~~persons~~ Persons Acting In Concert with him, such a person shall make a Mandatory Bid as a means of protecting the minority Shareholders of that Company. Such a Mandatory Bid shall be addressed at the earliest opportunity to all the holders of those Securities for all their holdings at the equitable price as determined in accordance with the provisions of Listing Rule 11.39:

Provided that where Control has been acquired following a voluntary Bid made to all the holders of Securities for all their holdings the obligation to launch a Mandatory Bid shall not apply.”

### **3.4.LR11.11 – Voluntary and Mandatory Bids**

The Authority is considering removing the proviso to LR11.11 as this was a transitory provision and Mandatory bids are triggered solely by the act of gaining control.

“The obligation to make a Bid to all the holders of Securities shall not apply to those Controlling holdings already in existence on ~~the date on which this Chapter enters into force~~ 19<sup>th</sup> June 2006:

~~Provided that any further acquisitions after this date shall trigger off the obligation to launch a Mandatory Bid.”~~

### **3.5.LR11.12 – Regulated Companies**

The Authority is considering replacing current listing rules on Regulated Companies contained in LR11.12 to 11.14 with the following new LR11.12:

“Anything contained in Chapter 11 of the Listing Rules shall be without prejudice to any rules and regulations applicable to a company which is authorised, licensed or otherwise supervised in terms of the Banking Act, the Financial Institutions Act, the Investment Services Act, the Insurance Business Act and the Insurance Brokers and Other Intermediaries Act, the Trusts and Trustees Act or any other law, rule or regulation which would require regulatory consent prior to the acquisition or disposal of its equity shares in a company where those securities are listed on a regulated market.”

### **3.6.LR11.17 – Cash Consideration**

The Authority is of the view that the term ‘cash consideration’ implies an immediate settlement in cash. Any settlement at a future date should as such be considered as a ‘promissory payment’, even if eventual settlement was in cash, accordingly the below amendments are being proposed to LR11.17.

“By way of consideration the Offeror may offer securities, cash or a combination of both:

Provided that a cash consideration must be offered as an alternative in all cases.

“The Offeror must provide confirmation that the element of cash offered as consideration will be paid to shareholders accepting the cash offer not later than 30 days from the closing of the acceptance period.”

### **3.7.LR11.23 – Consideration for a Bid**

The below amendments to LR11.23 serve to amplify on the purpose of the independent expert’s report prepared under this LR.

“A report on the consideration offered, drawn up by one or more experts who are independent of the Offeror or the Offeree Company, shall be appended to

the offer document. The expert's report should include an opinion on the merits of the consideration being offered with this opinion explained against the background of the offer being made.

The information provided should include, but not necessarily be limited to, whether the bid price can be defined as 'an equitable price' or a 'fair price' in terms of the Listing Rules and where securities are being offered as part of the consideration, the market performance and liquidity of the Securities being offered. More detailed guidance on the requirements of an Independent Experts Report is given in Appendix 2 at the end of the document."

### **3.8.LR11.25 – The use of conditional agreements in a bid**

Member states must ensure compliance with the General Principles set out in Article 3(1) of the Directive, the first three of which relate to a) equal treatment of shareholders b) sufficient time and information to enable shareholders to reach a properly informed decision on the bid c) the Board of the Offeree Company acting in the interests of the Company as a whole. It should be noted that LR11.25 gives the Authority the right to request the parties to a bid to provide 'all the information in their possession concerning the bid'.

Accordingly the Authority may as such if it deems necessary request a copy of any agreement signed by the parties and the names of those who the bidder has concluded the agreements with, at the time the Offer Document is published.

### **3.9.LR 11.27**

"The time allowed for the acceptance of a Bid shall be determined in the offer document and shall be not less than ~~four~~three weeks nor more than ten weeks from when the offer document is made available to the public."

### **3.10. LR11.39 – Equitable Price**

"The equitable price to be paid for Securities is the highest price determined by the following criteria during the reference period calculated from the date of the announcement of the Bid:

- 11.39.1 the price offered for the security should not be below the weighted average price of the security or the security

transactions made on a Regulated Market during the previous six (6) months;

- 11.39.2 the price offered for the security should not be below the highest price paid for the security by the Offeror or persons Acting In Concert with the Offeror during the previous six (6) months;
- 11.39.3 the price offered for the security should not be below the weighted average price paid for the security by the Offeror or persons Acting In Concert with the Offeror during the previous six (6) months;
- 11.39.4 the price of the security should not be lower than ten percent (10%) below the weighted average price of the security within the previous ten trading days.”

### **3.11. LR11.42 to 11.45 – Squeeze Out**

“11.42 Where the Offeror holds Securities representing not less than ninety percent of the capital carrying voting rights and ninety per cent of the voting rights in the Offeree Company, or where, following acceptance of the Bid, the Offeror has acquired or has firmly contracted to acquire Securities representing not less than ninety percent of the Offeree Company’s capital carrying voting rights and ninety per cent of the voting rights comprised in the Bid, the Offeror has the right to require all the holders of the remaining Securities to sell him those Securities at a fair price ~~and shall take the same form as the consideration offered in the Bid or, alternatively, infor~~ cash.

Any cash consideration payable for any shares to be acquired under this Listing Rule shall be transferred to an account with a credit institution within 30 days of the closing of the acceptance period where it shall be held for this purpose until such time as payment is made.

11.43 ~~In order to establish a fair price the Offeror must appoint an independent Expert to draw up a report determining the price considered to be a fair and reasonable value of those Securities, which price must however be equivalent to or higher than the equitable price. Following a Voluntary Bid the consideration offered in the bid shall be presumed as fair where, through acceptance of the~~

bid, the Offeror has acquired Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights. Following a Mandatory Bid, the consideration offered shall be presumed to be fair.

11.44 To calculate the threshold referred to in Listing Rule 11.42, the voting rights indicated in Listing Rules 11.9.1 to 11.9.3 shall be included and added to the voting rights of the Offeror.

11.44.1 Where the Securities of the Offeree Company are divided into different Classes, the Offeror shall exercise the right of squeeze-out only in the Class in which the threshold laid down in Listing Rule 11.42 has been reached.

11.45 If the Offeror wishes to exercise the right of squeeze-out following a successful bid, a statement to this effect must be included in the Offer document.~~he shall do so within three months at the end of the time allowed for acceptance of the Bid.~~

11.45.1 An Offeror after having successfully acquired, or having firmly contracted to acquire, Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights, shall at the time of making the results of the takeover public in terms of Listing Rule 11.75, confirm that it will be exercising its Squeeze-out rights.

11.45.2 The Offeror shall exercise the right of squeeze-out within three months of the end of the time allowed for acceptance of the Bid."

### **3.12. LR11.46 to 11.48 – Sell Out**

“11.46 Following a Bid made to all the holders of the Offeree Company's Securities for all of their Securities, Listing Rules 11.47 to 11.49 shall apply.

11.47 Where following a bid the Offeror has not confirmed that it will be exercising its right of Squeeze-out in terms of Listing Rule 11.45.1, A-holders of remaining Securities may require the Offeror to buy ~~his~~ their Securities from ~~him–them~~ at a fair price under the same circumstances as provided for in Listing Rule 11.42.



11.48 ~~*Omissis. In order to establish a fair price the holders of the remaining Securities must appoint an independent expert to draw up a report determining the price considered to be a fair and reasonable value of those Securities, which price must however be equivalent to or more than the equitable price.*~~”

### **3.13. LR11.53 to 11.55 – Opting in and Opting out**

“11.53 Restrictions on voting rights provided for in the articles of association of the Offeree Company shall not have effect at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Listing Rule 11.372.

11.54 Restrictions on voting rights provided for in contractual agreements between the Offeree Company and holders of its Securities, or in contractual agreements between holders of the Offeree Company’s Securities entered into after the coming into force of this Chapter, shall not have effect at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Listing Rule 11.372.

11.55 Multiple-vote Securities shall carry only one vote each at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Listing Rule 11.372.”

## **4. Introduction of Annexes to Chapter 11**

Certain issues raised during the consultation process did not directly affect specific issues and accordingly no amendments thereto could be made. However, the Authority was of the view that a better understanding of the Rules would be achieved if, where appropriate, explanatory notes, or annexes, were drafted and added to the Chapter. The annexes would not form part of the Listing Rules but would aim to be of assistance in guiding users on topics raised during the consultation process. The inclusion of the following Annexes is being suggested:

QUOTE

## **ANNEXES TO CHAPTER 11**

These Annexes are not intended to be a substitute for any particular Listing Rule, or part of the Listing Rules. They have been drawn up to provide guidance on particular aspects of the Listing Rules in Chapter 11.

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### **Annexe 1 to Chapter 11 of the Listing Rules**

#### **VOLUNTARY AND MANDATORY BIDS**

The provisions of Chapter 11 of the Listing rules apply to both Voluntary and Mandatory Bids, but with only a specific set of the Listing Rules relating to Mandatory Bids.

While the meaning of a Voluntary bid defined in the Listing Rules is that of ‘a bid made to all the holders of Securities of a Company for all their holdings when a person making such a bid does not have a Controlling Interest in the Company’ (LR 11.3), a Mandatory Bid on the other hand is triggered by the acquisition of a ‘Controlling Interest’, (50% plus 1 share) An exception to the rule arises in circumstances where Control has been acquired following a Voluntary Bid made to the shareholders of Securities for all their holdings (LR 11.8) Listing Rules 1.21.1 – 11.21.5 set out a number of circumstances under which exemptions from the rule to make a mandatory bid would apply and can be applied for.

The aim of the Mandatory Bid rule is to protect minority shareholders against controlling shareholders extracting private benefits from the company by preventing any shareholder from being able to obtain control over the company and start extracting private benefits without first offering the minority shareholders an exit opportunity at a fair or equitable price. A Mandatory Bid thus prevents the offeror from obtaining control by acquiring shares on the open market or a block trade without paying an Equitable Price (LR 11.39) to all shareholders. The Mandatory Bid rule additionally prevents an offeror obtaining ‘creeping’ control by acquiring shares without extending the offer to all shareholders equally.

#### **Consideration Offered for a Bid**

While the consideration offered for a Voluntary Bid may be freely determined by the Offeror, and while this normally would be related to the price at which the Offeree Company security has been traded at, Consideration for Securities purchased under a Mandatory Bid must be ‘equitable’ and determined by the criteria set out in Listing Rule 11.39.

Consideration offered by the Offeror may be in Securities, cash, or a combination of both. The Listing Rules mandate that cash consideration must offered as an alternative in all cases (LR 11.17.)

Listing Rule 11.23 mandates that a report on the consideration offered is drawn up by one or more experts who are independent of the Offeror or the Offeree Company. The expert's report is to contain an evaluation of the consideration being offered in the bid, normally in relation to the market price currently traded. The Listing Rule covers the consideration offered for both a Voluntary Bid and a Mandatory Bid and, as such, any analysis of consideration offered will, out of necessity, compare the consideration being offered to the market price, the 'equitable price' or the 'fair price' of the Security subject of the bid.

### **Squeeze-out and Sell-out rights**

A Offeror may invoke his Squeeze-out rights (LR 11.41-45) where following a Bid made to all holders of the Offeree Company's Securities for all their Securities the Offeror holds Securities representing not less than ninety per cent in the Offeree Company and at which point the Offeror has the right to require all the holders of the remaining Securities to sell these to him at a fair price, in the same form as consideration offered in the Bid, or alternatively, in cash. If the Offeror wishes to exercise the right of squeeze-out he must do so within three months at the end of time allowed for acceptance of the bid.

A remaining shareholder's Sell-out right may be considered as being the counterpart of the Squeeze-out right and invoked following a bid where a Offeror holding Securities representing not less than ninety per cent in the Offeree Company, a right which would become available to the remaining shareholders once this threshold has been reached and the Offeror has not confirmed that he will be exercising his squeeze-out rights.

Listing Rule 11.42.1 states that 'the consideration offered in the bid shall be presumed as fair where, through acceptance of the bid the Offeror has acquired Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights'.

Squeeze-out and Sell out rights are seen as a protection measure available to residual shareholders and which may be invoked subsequent to both a Voluntary and a Mandatory Bid.

## **Annexe 2 to Chapter 11 of the Listing Rules**

### **GUIDANCE ON THE INDEPENDENT ADVISOR'S REPORT (LR 11.23)**

Listing Rule 11.23 requires that a report be drawn up by an independent advisor on the consideration offered in the event of a takeover bid being made that is regulated by Chapter 11 of the Listing Rules.

Shareholders decide on the merits of a bid on the basis of the information provided in the offer document and with the benefit of advice from the company's directors and an independent advisor appointed by the company's directors. It is not the role of the Listing Authority to decide what is best for the shareholders, and as such the Authority is not required to, and does not, consider the merits of the independent advisors opinion or on the conclusions reached by the directors or the independent advisor.

#### **Contents of the Report**

The advice given by an independent advisor should contain information which is useful to shareholders of Offeree companies in making an informed decision as to the merits of the takeover offer or proposal in light of the consideration offered. In order to make a holistic analysis of the consideration being offered, the concepts of being 'fair' or 'reasonable' should be analysed as two distinct criteria.

#### **Valuation**

The advisor should assess whether the offer price or value of consideration is equal to or greater than the value of the securities that are the subject of the take-over offer, based on whether the offer price (or value of consideration) is equal to or higher than the market value of the securities of the Offeree. If it is, then the take-over offer could be considered as a 'fair' offer. If not then the fact that the consideration offered is less than the market price should be commented on in terms of whether the price to be paid for the securities is an 'equitable' price determined in terms of LR11.39. Where the bid is a Mandatory bid, the Listing Rules provide that the price offered must be 'equitable' and the advisor should confirm that this is the case.

In considering whether a takeover offer is 'reasonable', the independent advisor should take into consideration matters other than the valuation of the securities that are the subject of the take-over offer. Generally, a takeover offer would be considered 'reasonable' if it is 'fair'. Nevertheless, an independent advisor may also assess the offer as being 'reasonable' despite the consideration of the securities bid for being lower than their market value, this if the independent advisor is of the view that there are sufficiently strong reasons to accept the offer. Such reasons should be clearly explained, as for example, should the level of liquidity of the market in the Offeree's securities not being sufficient to properly determine a fair price, or the advisor's own valuation is significantly different from market price.

In the event that the independent advisor concludes that a takeover offer may not be ‘fair’ but ‘reasonable’, the independent advisor must clearly explain why the independent advisor reached this conclusion.

### **Exemptions from mandatory offer obligations under Listing Rule 11.21**

The independent advisor should explain why an exemption may have been given from the obligation not to make a Mandatory bid and the effect of the exemption being granted to the Offeror in the circumstances listed in listing rules 11.21.1-11.21.5

### **Consideration other than cash**

If the offeror is offering listed or non-listed securities as consideration for the takeover, the independent advisor should examine the value of that consideration and compare it to the valuation of the offeree’s securities.

Such a comparison should be based on the value of the Securities being offered as consideration by the Offeror and the fact that the Offeror will be obtaining or increasing control of the Offeree. The effect of a share exchange offer should be explained to accepting shareholders as should be the resultant position of accepting shareholders in the Offeror Company.

If the independent advisor uses market price as a measure of the value of the consideration offered the independent advisor must justify the use of market price and comment on:

- The depth of the market for those securities;
- The volatility of the market price; and
- The effect of the take-over offer on the price.

In assessing the consideration offered in a takeover bid, the independent advisor should assess which valuation methodology or methodologies it would be most appropriate to use in its analysis, explaining the reason for the choice it eventually makes.

### **Position of shareholders who decide not to accept the offer**

The advisor should comment on the position of shareholders in the Offeree should they opt not to accept the offer, including any squeeze-out provisions the bid is subject to, and this with reference to any conditions set by the Offeror for the bid, including where any acceptance threshold has been set by the Offeror. The position of shareholders should also be commented on should the bid fall short of the acceptance threshold set

The provisions of Listing Rule 11.40, which provides for a possible increase in the price of an offer, if the Offeror or persons Acting in Concert purchases securities at a price higher than the offer price should be explained, as should the fact that the offer price would be considered as ‘fair’ if a threshold of 90% acceptances is reached.

### **Company Directors and Dealings in the Target Company’s Securities**

The Independent Advisor 's Report should include information on the individual Directors' shareholdings in both the Offeree and Offeror Company and whether any dealings in Securities have taken place by Directors, the Offeror or persons Acting in Concert with the Offeror during the six months preceding the bid, and how this may have affected or influenced the consideration offered.

The advisor should include information on any disclosure that may have been made on commitments to Directors of the Offeree Company by the Offeror prior to making the bid public and whether they have endorsed, or made recommendations on, the Bid.

### **Conditional Irrevocable Undertakings**

An Offeror would normally seek to conclude conditional irrevocable undertakings with key shareholders of the Offeree Company, and from any of the Offeree's board of directors who hold shares in it, to accept the offer if certain pre-determined conditions are met.

Irrevocable undertakings will usually provide for the shareholder, or director, to accept the offer within a certain time period of it being made once certain conditions are met and to refrain from doing anything which might frustrate the bid.

Where the presence of such undertakings has been announced, the independent Advisor should indicate the names of these key holders and the percentage holding that each holds, this for the other shareholders to be able to assess the probable outcome of the offer being made.

### **Assumptions made by the Independent Advisor**

Where an independent advisor's valuations have been based on assumptions, such assumptions should be explained in a manner which enables shareholders to understand the conclusions reached. The independent advisor should explain the reasons for adopting such assumptions with generic statements on these, or statements on assumptions that are not relevant to the subject of the valuation, being excluded. Assumptions relating to specific present or future economic conditions (e.g. inflation rates, exchange rates, commodity prices) that may be relevant to the consideration being offered should be backed up with references to the source from which that information was drawn.

Where changes in any of the key assumptions are likely to materially impact the valuation (e.g. changes in the exchange rate or interest rate assumptions), the independent advisor should consider including a sensitivity analysis which sets out the impact of such changes.

### **Reasonable basis for relying on information**

The independent advisor should form his opinion based on the analysis undertaken and should make reference to the source of the information it has used in arriving at its conclusions. The independent advisor should ensure that material information quoted or used in the analysis is not irrelevant or misleading.

Where the independent advisor intends to rely on the work of another expert in forming its opinion, the independent advisor should be comfortable with the level of expertise, experience and credibility of the expert, evaluate the relevance of the methodologies and key assumptions adopted by the expert and where possible, review the reasonableness of the results derived by that expert.

### **Forecasts of financial information**

The independent advisor may rely on forecasts of financial information provided in the Company's Annual Financial Summary provided the source is disclosed. However the independent advisor should satisfy himself of the reasonableness of any forecast financial information used and ensure that adequate disclosure is made in relation to the limitations of the financial forecasts used.

### **Disclaimers**

The independent advisor should include a paragraph stating the purpose of the Report and the terms under which it was prepared.

A statement should be included which limits the purpose of the Report as being that required by Listing Rule 11.23, namely 'on the consideration offered' by the Offeree and, as such, to assist shareholders of the Offeree company in forming their own opinion as to whether to accept the terms being offered or not.

Disclaimers as to the accuracy of the information, including on the reliance on forecasts of future profits, cash flows or the financial position may be included in the Report.

The advisor may also include a disclaimer on the accuracy of information used in the Report provided that the source of the information is quoted and that the source is generally considered reliable. The advisor would all the same be expected to carry out reasonableness checks on any such information that has been used in compiling the Report.

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## **Annexe 3 to Chapter 11 of the Listing Rules**

### **OBLIGATION TO ANNOUNCE UNDER CHAPTER 11 OF THE LISTING RULES**

An announcement to make a Bid will in all circumstances be communicated to the Target Company's Board, even if this is announced to the Board at the same time as a public announcement is made.

Where a friendly bid is concerned, discussions will have taken place over a period of time and once the conditions listed in LR 11.16 can be fulfilled a public announcement would then be made. LR 11.15 places an obligation on any person who gains control of a company to inform the Listing Authority within seven days of acquiring control. In the case of a hostile bid, however, any pre-bid conditions, including those of LR11.16 will have been tackled without the target board having even been consulted and a public announcement will, in most circumstances, be made at the same time as the announcement to the Board.

Prior to the announcement of an offer or possible offer, all persons privy to confidential information, and particularly price-sensitive information, concerning the offer or possible offer must treat that information as secret and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves so as to minimise the chances of any leak of information.

The requirement for a public announcement will be triggered immediately should the target company's share price be subject to undue price movements due to rumour or possible speculation, the suspicion of a leak in confidential information or where it is desirable to make an announcement in order to prevent possible market abuse. It is the potential offeror who is, in the first place, responsible for making such an announcement.

An announcement of a bid by the offeror triggers a period of twenty one calendar days mentioned in LR 11.19 during which he must prepare an offer document to be made available to both the Listing Authority and the public.

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## **Annexe 4 to Chapter 11 of the Listing Rules**

### **TAKEOVER BIDS - RESPONSIBILITIES OF COMPANY DIRECTORS**

The provisions relating to directors in Section 136A of the Companies Act (CAP. 386) should be borne in mind when Directors make recommendations in relation to takeover bids, in particular that a director of a company is bound to act honestly and in good faith in the best interests of the company and that it the directors of a company who shall promote the well-being of the company they represent. Directors must, as fiduciaries, take into account the collective interests of their shareholders prior to and during any bid process.

Shareholders of a company are entitled to look to directors for information and guidance in order to help them decide whether or not to accept a bid, especially where a share exchange offer is made as part of the compensation package, or where competing bids are involved in the takeover process. Directors must be able to justify the reasons when and why recommendations are made to accept the lower of two competing bids.

Directors should ensure that sufficient information and advice is contained in the offer document to enable shareholders to reach an informed decision and avoid giving misleading advice which could prevent shareholders from making an uninhibited choice. In this context while most bids involve a friendly approach to takeovers where the bidding company is involved in negotiations prior to a takeover, target company directors have an important role to play where a hostile bid is concerned.

Directors of the target company should give careful consideration to any decisions they intend taking before entering into any commitment with an offeror (or anyone else) which would restrict their freedom to advise their shareholders in the future. Such commitments may give rise to conflicts of interest or result in a breach of a directors' fiduciary duties.

The importance of Listing Rule 11.23 and the mandating that a report on the consideration offered is drawn up by one or more experts who are independent of the Offeror or Offeree Company becomes clear in this context. Appendix 2 to Chapter 11 sets out what should be expected of such a report.

Listing Rule 11.24 requires that the independent expert assesses and confirms 'that the Offeror has sufficient resources to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer'. This is normally seen as being in the best interests of both the shareholders and the Directors of both the Offeror and Offeree companies. Directors of an Offeree Company are obliged to circulate their views on the offer and make known to the shareholders the substance of advice given by any independent advisor.

Listing Rules 11.28 to 11.31 cover important aspects of the responsibilities of the directors of a company that has become the subject of a takeover bid and provide an understanding of the obligations of the Board of Directors of an Offeree Company in relation to the advice and views they are required to give to Offeree Shareholders as well as to the company's employees upon the announcement of a Bid.

An Offeree company that receives notice of a takeover, or the Board of that Company has reason to believe that an offer is imminent may not permit any action to be taken that may

frustrate a Bid, unless their Shareholders have given approval to do so as provided for in Listing Rule 11.37

Listing Rules 11.32 to 11.36 provide guidance on procedures that have to be followed by the Board of Directors of an Offeree Company when calling a general meeting for the purpose of obtaining authorisation of their Shareholders prior taking any action which may result in a lasting impediment to the Offeror acquiring control of the Offeree Company.

Directors should bear in mind the provisions of Section 136a of the Companies Act prior to, during and after the bid process. This states that ‘directors shall be obliged to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person having both the knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by or entrusted to that director in relation to the company’. The Act further adds that a director shall:

- (b) not make secret or personal profits from their position without the consent of the company, nor make personal gain from confidential company information;
- (c) ensure that their personal interests do not conflict with the interests of the company;
- (d) not use any property, information or opportunity of the company for their own or anyone else’s benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with the consent of the company in general meeting or except as permitted by the company’s memorandum or articles of association;
- (e) exercise the powers they have for the purposes for which the powers were conferred and shall not misuse such powers.

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## **Annexe 5 to Chapter 11 of the Listing Rules**

### **TAKEOVER BIDS – PRE-TAKEOVER AGREEMENTS**

Most takeover bids are of consequence to the parties involved and the disclosure that a deal is in the offing can have unexpected effects on a company's operations, be these disruptions in trading, loss of confidence by the suppliers or customer base of either party or even a negative reaction by employees. Disclosing sensitive non-public information may impact a listed company's trading and as a result its value and ultimately the disclosure could prejudice the bid itself. Where listed companies are concerned, any discussions related to a prospective bid may require the disclosure of inside information, and as such be subject to the provisions of the Market Abuse Regulation (EU) No 596/2014 including the provisions relating to Market Soundings in Article 11 of the Regulation.

#### **Non-Disclosure Agreements**

Parties considering making a bid under the Listing Rules, more often than not, begin discussions with negotiation of a confidentiality or non-disclosure agreement (NDA). This would restrict one or both parties from disclosing the fact that discussions are taking place as well as the terms and conditions of any potential deal and information about one or both parties' businesses.

The fact that information may be discussed or disclosed under the terms of a confidential agreement or any other agreement made between the parties should not in itself cause the information to cease to qualify as 'inside information'.

#### **Conditional Agreements**

At some stage during discussions between the potential acquirer and the Major shareholders of a Target company consideration will be given to the formulation of a Conditional Agreement setting out the conditions that need to be fulfilled before the Offeror commits to making an offer to all Shareholders of the Target Company for 100% of its shares.

This Agreement would normally set out the terms agreed in anticipation of the Offer, agreement to the structure of the transaction, the commitment of the board of directors of the Target Company to recommend the acquisition, representations and warranties and covenants restricting the operation of the business of the Target Company until the end of the Offer and the Target Company on such matters as the successful completion of a due diligence exercise, restrictions on the ability of the Target Company to solicit competing proposals and possibly agreement to a termination fee should the acquisition not be completed should a third party make a competing offer. The Agreement may not under any circumstances contain clauses which imply that a transfer of shares has been agreed to or has taken place, nor may it contain details of the proposed bid, including details of any consideration that may be offered.

A condition for an Offer to be considered 'unconditional' may include that a level of acceptances is received for the bid to be considered 'unconditional', implying that should this

condition not be fulfilled the Offeror may consider the Offer as lapsed and return to shareholders any shares which may have been tendered in acceptance of the offer. The offer would be declared “unconditional” only after all the conditions have been met.

### **Equal Treatment of Shareholders**

The provisions of Article 3 (General Principles) of Directive 2004/25/EC on Takeover Bids make it clear that all shareholders of an Offeree Company must be afforded equal treatment and that as a rule information disclosed to any single or group of shareholders must be made available to all shareholders. Particular attention is drawn to the first three Principles of Article 3 which relate to all the holders of Securities in Offeree Companies, and as such, include those who are not signatories to any pre-takeover agreement that may be signed between the Major Shareholders of an Offeree company and a Prospective Offeror.

The parties to a Bid are reminded of the provisions of Listing Rule 11.25 under which the Listing Authority may requests for the filing of a copy of any confidential agreements made between the parties. Listing Rule 11.25 reads ‘The Listing Authority may request that the parties to a Bid shall provide the Authority with all the information in their possession concerning the Bid at any time on request.’

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## **Annexe 6 to Chapter 11 of the Listing Rules**

### **TAKEOVER BIDS – DEFENSIVE TACTICS AND THE BREAK THROUGH RULES**

A Bid could be termed as ‘friendly’ when following discussions two interested parties’ agree that the potential of their two combined businesses offers both the potential for greater synergies and as efficiencies and consequently greater growth and ultimately profits.

The result of such discussions normally results in the potential Offeror and the major shareholders of the Target Company formulating a ‘conditional agreement’, a form of memorandum of understanding, on what conditions need to be further discussed between both parties before the Offeror can make a firm offer for the securities of the Target Company.

A Bid is considered ‘hostile, the other hand, when an offer is rejected by the Target Company's board and where the bidder continues to pursue it. In a hostile bid a bidder could make the offer directly to the Target Company’s shareholders after having announced its firm intention to make an offer.

#### **Non Frustration Rule**

The Takeover Directive 2004/25/EC, in Article 9(3), provides that it is the general meeting of a Company that shall ‘approve and confirm’ any decisions which do not form part of the normal course of a company’s business and the implantation of which may result in the frustration of a bid. Listing Rule 11.37 entitled ‘*Defensive tactics*’ transcribes the provisions of the Directive Article 9(3).

Defensive tactics may take many different forms and may, for example, include the Board entering into a material transaction which is not part of the Target company’s normal course of business, effect a transaction which may materially affect the financial position of the company, as for example through a buy-back of shares or the undertaking of any action which is designed to influence the holding of a future shareholder. Such actions may of course be agreed with the Offeror as part of the Bid conditions.

Listing Rule 11.37 does not rule out board of Directors of a Target Company taking action which may result in an offer being frustrated if the action is approved by an ordinary resolution of the Company; if the action was taken or permitted under a contractual obligation entered into before the Company became aware that the offer was imminent; or if the action is taken or permitted for reasons unrelated to the offer with the approval of the listing Authority. This would possibly include pre-emptive action which directors may take in the absence of an offer but which is all the same designed to protect against a possible future change of control (‘poison-pill’).

Article 9(3) makes it clear that decisions on the control and ownership of a company should be the preserve of the shareholders. Accordingly, directors of a Target Company should proceed with caution when considering action that has the potential to frustrate an offer and obtain independent legal and financial advice on such actions.

## **Breakthrough**

Article 11 of Directive 2004/25/EC sets out the provisions relating to ‘Breakthrough’, provisions which apply to any Bid which has been made public. The provisions of Article 11 are transcribed in Listing Rules 11.50 -11.56 headed ‘*Opting in and Opting Out*’.

Holders of Securities of a Target Company may, at a General Meeting following the announcement of a Bid, choose to either apply the restrictions on transfers of Securities provided for in Listing Rules 11.51 – 11.54 (*opting-in resolution*) or to opt out of these (*opting-out resolution*). Additionally Listing Rules 11.55 and 11.56, and their possible effect on Securities holders voting rights, need to be taken into consideration when considering any decisions that need to be taken in this regard at a General Meeting.

UNQUOTE

## **5. Invitation for Feedback & Contacts**

These proposals are not binding and are subject to changes and revisions following receipt of feedback from the industry. The industry is also invited to submit, for the consideration of the MFSA, any additional changes/improvements to the Listing Rules intended to enhance said Listing Rules.

Interested parties are to send their feedback in writing by not later than **22<sup>nd</sup> January 2018**. Any comments and feedback are to be addressed to the Capital Markets Team within the Securities and Markets Supervision Unit on [capitalmarkets@mfsa.com.mt](mailto:capitalmarkets@mfsa.com.mt).

22<sup>nd</sup> December 2018