

## INVESTMENT SERVICES RULES FOR ALTERNATIVE INVESTMENT FUNDS

### PART B: RULES APPLICABLE TO ALTERNATIVE INVESTMENT FUNDS

#### APPLICABILITY OF PART B OF THE INVESTMENT SERVICES RULES

Part B of the Investment Services Rules for Alternative Investment Funds shall apply as follows:

- [I] Sections 1 to 5 shall apply to all AIFs whether these have appointed an external AIFM or are self-managed AIFs;
- [II] Section 6 shall apply **exclusively** to self-managed AIFs. Therefore, self-managed AIFs are expected to comply with **all** the sections prescribed in this Part B of the Rules.

#### 1. GENERAL REQUIREMENTS

- 1.01 An AIFM which intends to use the EuVECA or EuSEF designation for the purposes of managing and marketing the scheme as a European venture capital fund or a European social entrepreneurship fund in terms of Regulations (EU) No 345/2013 and 346/2013 respectively shall further refer to and comply with the applicable provisions of the aforementioned EU Regulations as well as with the Rules prescribed in this section of the Rulebook. In the case of conflict between the provisions of these Rules and the aforementioned EU Regulations, the provisions of the latter shall prevail.
- 1.02 An AIFM which intends to establish the AIF as a European long-term investment fund in terms of Regulation (EU) No 2015/760 shall further refer to and comply with the applicable provisions of the aforementioned EU Regulation as well as with the Rules prescribed in this section of the Rulebook. In the case of conflict between the provisions of these Rules and the aforementioned EU Regulations, the provisions of the latter shall prevail.
- 1.03 Every AIF (hereinafter referred to as 'the scheme') shall comply with the provisions of the Investment Services Act, the Regulations and the Investment Services Rules issued thereunder. An AIF may be managed in one of two ways :

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- a) by an external manager, which is the legal person appointed by the scheme or on behalf of the scheme and which through this appointment is responsible for managing the scheme also referred to as “external AIFM”; or
- b) where the legal form of the scheme permits an internal management, and where the scheme’s governing body chooses not to appoint an external AIFM, by the scheme itself, which shall be licenced as a self-managed AIF.

1.04 Apart from the conditions listed in this Part of the Rules, where the scheme adopts different structures it shall also be subject to the supplementary Rules applicable thereto as prescribed in Appendix I to these Rules.

1.05 Where the scheme is established as a money market fund, it shall comply with the provisions of Appendix II applicable to schemes established as money market funds.

1.06 The scheme shall commence its activities within 12 months of the date of issue of the collective investment scheme licence. If, for any reason the scheme is not in a position to comply with this condition, it shall notify the MFSA in writing setting out the reason(s) for such a delay indicating the proposed date of commencement of business. On the basis of the information provided and the circumstances of the case, the MFSA may decide to suspend or cancel the licence in accordance with the relevant provisions of the Act.

**Commented [IA1]:** A maximum period has been introduced within which a scheme is to commence operations.

1.07 The scheme shall co-operate in an open and honest manner with the MFSA and inform it promptly of any relevant information. It shall cooperate fully with any inspection or other enquiry carried out by or on behalf of the MFSA and provide promptly any relevant information. The scheme shall provide the MFSA with such information and returns as the MFSA may require, to monitor compliance with the conditions referred to in the Act and any rules and regulations issued thereunder.

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1.08 Where a Rule demands that the scheme notifies the MFSA of an event, such notification shall be made to the MFSA formally, in a durable medium. The request to notify the MFSA of an event shall not be satisfied merely by the fact that the information which ought to be notified to the MFSA is included in a standard regulatory return.

1.09 The scheme shall notify the MFSA in writing of:

- a) a change in the scheme’s name or business name (if different) at least one month in advance of the change being made;
- b) a change of address: at least one month in advance;
- c) any material changes to the conditions for initial authorisation, in particular material changes to the information provided during the application process at least one month in advance of the change being made:

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- d) the departure of a director or senior manager, portfolio manager, compliance officer, money laundering reporting officer and risk manager within 14 days of the departure.

In particular, the notification submitted by the scheme shall include the following information:

- (A) the name and role of the official departing;
- (B) the reason of departure i.e. resignation, dismissal, re-organisation etc.;
- (C) the effective date of resignation;
- (D) the proposed replacement.

The scheme shall also request the director or senior manager, portfolio manager, compliance officer, money laundering reporting officer and risk manager to confirm in writing to the MFSA:

- (i) whether the departure has any regulatory implications, or if otherwise, to provide any relevant details;
- (ii) the information required in terms of paragraphs (A) to (C) above.

A copy of the scheme's request to the departing official shall be provided to the MFSA together with the scheme's notification of departure.

An e-mail notification of resignation shall be sent to the MFSA on [ausecurities@mfsa.com.mt](mailto:ausecurities@mfsa.com.mt). This e-mail shall be followed up by the submission of original and hard copies to the MFSA.

The scheme shall ensure that the relevant forms related to the departure and approval of officials, where applicable, are filed with the Registry of Companies.

- e) any proposed material change to its business – at least one month before the change is to take effect and where a revision to the licence or a new collective investment scheme licence is required, the new business shall not begin until the new collective investment scheme licence has been granted or the amendment has been approved;
- f) a decision to make a material claim on any insurance policy held in relation to the scheme's business. The notification shall be provided as soon as the decision is taken;
- g) any actual or intended legal proceedings of a material nature by or against the scheme immediately after the decision has been taken or on becoming aware of the matter;

**Commented [IA2]:** Revised as per MFSA circular date 19<sup>th</sup> August 2016

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- h) the fact, where applicable, that it has not provided any investment activity for the preceding six months, setting out the reasons for such inactivity and providing a business plan for future activity;

i) any instances of incorrect pricing:

Provided that the notification to the MFSA of a valuation error/incorrect pricing shall *inter alia* include:

- (i) the manner in which the valuation occurred;
- (ii) the date of identification and the full details of the dealing day effected;
- (iii) details of the financial impact of the valuation error and/or the wrong prices/valuation in the case where subscriptions/redemptions were dealt with;
- (iv) details of any remedial measures which result from the valuation errors for the scheme and/or its investors; and
- (v) the communications to be made to the investors particularly if remedial measures are adopted.

- j) any other material information concerning the scheme, its business or its officials in Malta or abroad – immediately upon becoming aware of the matter.

1.10 The scheme shall obtain the written consent of the MFSA before:

- a) taking any steps to cease its operations;
- b) agreeing to sell or merge the whole or any part of its undertaking;
- c) the appointment of a director or senior manager<sup>1</sup>, compliance officer, money laundering reporting officer and where the AIF is self-managed, also of a risk manager, investment committee member, portfolio manager and investment advisor (where the investment advisor is an individual) in advance. The request for consent shall be accompanied by a Personal Questionnaire in the form set out in Schedule 2 to Part A of these Rules – duly completed by the person proposed. The individual proposed as investment advisor (to a self-managed AIF) need not complete the Personal Questionnaire.

Where the person proposed had within the previous five years submitted a PQ to the MFSA, the request for consent need not be accompanied by a new PQ. In such instances, it shall be accompanied by a confirmation by the proposed person as to whether the information included in the PQ previously submitted is still current, and indicating any changes or up-dates thereto. This confirmation is to be countersigned by an authorised official of the licence holder, confirming that he/she has seen the said PQ.

<sup>1</sup> For the purposes of this paragraph, ‘Senior Manager’ should be interpreted as the person occupying the most senior role following that of director, so that in the case where there are various management grades, it is the most senior manager who will require the MFSA’s authorisation.

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- d) the change in the responsibilities of a director or senior manager<sup>2</sup> in advance. The request for consent of the change in responsibilities of a director or senior manager shall be accompanied by a PQ unless the individual concerned had within the previous three years submitted a PQ to the MFSA in connection with another role occupied by such individual with the same scheme, in which case it shall be accompanied by a confirmation by the director or senior manager as to whether the information included in the PQ previously submitted is still current, and indicating any changes or updates thereto:

Provided that a change in the responsibilities of a director or senior manager should only be notified to the MFSA when such a change is material, which shall include a change in the status or seniority of the person concerned (upwards or downwards).

- 1.11 The scheme shall pay promptly all amounts due to the MFSA. The supervisory fee shall be payable by the scheme on the day the licence is first issued and, thereafter annually within one week from the anniversary of that date.

1.12 The scheme, or the AIFM on behalf of the scheme, shall ensure compliance with the Rules included in this Rulebook.

1.13 Without prejudice to Rule 1.12, the scheme, or the AIFM on behalf of the scheme may submit to the MFSA a request for a derogation from any specific Rule included in the Rulebook.

1.14 A request submitted in terms of Rule 1.13 shall include the following:

- (a) an indication of the specific Rule and the content thereof;
- (b) reasons why a derogation from this Rule is being requested;
- (c) a description of the risks to the scheme and the investor if the MFSA approves the derogation and the manner in which these risks can be mitigated;
- (d) the expected duration of the derogation; and
- (e) a resolution of the governing body of the scheme supporting the request for a derogation.

1.15 The MFSA will assess open-ended requests for derogations on a case-by-case basis.

1.16 The scheme, or the AIFM on behalf of the scheme will be expected to assess on a continuous basis and certainly prior to expiration whether the derogation is still required.

<sup>2</sup> For the purposes of this paragraph, 'Senior Manager' should be interpreted as the person occupying the most senior role following that of director, so that in the case where there are various management grades, it is the most senior manager who will require the MFSA's authorisation.

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- 1.17 In the case where prior to expiration, the scheme, or the AIFM on behalf of the scheme deems that the derogation is still appropriate and required, the scheme or the AIFM on behalf of the scheme shall submit to the MFSA an updated assessment prior to the expiration of such derogation.
- 1.18 The scheme, or the AIFM on behalf of the scheme shall notify the MFSA of any breach of the Rules or of any of the provisions of the offering document or instruments of incorporation of the scheme as soon as it becomes aware of the breach.
- 1.19 Any notification to the MFSA of a breach shall as a minimum include the following information:
- (a) an indication of the Rule or the investment restriction breached (in the case advertent breaches) and the contents thereof;
  - (b) the date/period when the breach occurred and when/by whom it was discovered;
  - (c) the nature of the breach and the manner in which it occurred;
  - (d) the impact of the breach on the scheme and the underlying investors. In the case where the scheme or the investors suffered a loss, this loss shall be quantified;
  - (e) the action taken to prevent the recurrence of the breach.
- 1.20 The scheme shall disclose the identity of the regulated entity and its regulator in all correspondence, advertisements and other documents. Wording similar to the following shall be used: "Licenced by the MFSA as an Alternative Investment Fund."
- 1.21 The MFSA shall 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.
- 1.22 The MFSA has the right from time to time, and following advance notification to the scheme, to vary or revoke any licence condition or impose new conditions.
- 1.23 The scheme shall not be required to make public the issue and redemption prices of its units or shares. However, these must be made available to unit-holders upon request.
- 1.24 If the dealings in the units or shares and /or the issue of NAV are suspended, the scheme, the AIFM or the Administrator on its behalf shall inform the MFSA forthwith stating the reason for this suspension.
- 1.25 The notification to the MFSA informing of the suspension of dealings and/or NAV publication and the determination of the NAV of the scheme shall *inter alia* include:
- (a) the reason for the suspension of dealings and determination of the NAV;

**Commented [IA4]:** Included as MFSA Circular date 19<sup>th</sup> August 2016

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- (b) a confirmation from the Administrator that the underlying investors of the scheme have been informed of the suspension;
- (c) a resolution from the governing body of the scheme confirming the approval of the suspension;
- (d) a confirmation from the scheme, the AIFM or the Administrator on behalf of the scheme that any provision relating to the suspension of dealings and determination of the NAV in the offering memorandum and instruments of incorporation of the scheme have been fully complied with;
- (e) the envisaged timeframe by when the suspension of dealings and NAV is expected to be lifted.

Provided that when the suspension of dealings is for two or three days as a result of closures of the main markets where the scheme invests or closures of the main exchanges where the assets of the scheme are traded, the documents requested in paragraphs (b) and (c) above need not be submitted.

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- 1.26 The scheme, its AIFM or Administrator on its behalf shall keep such accounting and other records as are necessary to enable it to comply with these conditions and to demonstrate that compliance has been achieved. Accounting records shall be retained for a minimum period of ten years. During the first two years, they shall be kept in a place from which they can be produced within two working days of their being requested. After the first two years, they shall be kept in a place from which they can be produced within five working days of their being requested.
- 1.27 In the event of a winding up, the scheme must give the MFSA at least two weeks' notice of this intention. The prior approval of the MFSA shall be obtained for the approach to be adopted. If requested to do so by the MFSA, the scheme or the manager shall do all in its power to delay the winding-up or to proceed with the winding up in accordance with the conditions imposed by the MFSA.
- 1.28 Any changes to the financial year-end of the scheme shall be notified to the MFSA and disclosed in the offering document.

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## 2. GOVERNING BODY OF THE SCHEME

2.01 The governing body of the scheme<sup>3</sup> shall be responsible for ensuring that the scheme complies with its obligations under these Rules.

2.02 The governing body of the scheme shall at all time have one or more members independent from the AIFM and the depositary. Furthermore, the governing body shall be composed of at least three members one of whom must be resident in Malta:

Provided that the governing body of the scheme could be required to have more than three members depending on the complexity and size of the scheme and the aggregate skill set desired.

**Commented [IA6]:** Amendment aimed at providing a minimum number of directors which schemes should have

2.03 The MFSA shall be satisfied on a continuing basis of the fitness and properness of the members of the governing body.

2.04 The members of the governing body shall act honestly and in good faith in what they consider to be the best interests of the scheme and its investors.

2.05 The members of the governing body shall exercise reasonable care, skill and diligence.

2.06 The members of the governing body have, both collectively and individually, an obligation to acquire and maintain sufficient knowledge and understanding of the scheme's business to enable them to discharge their functions as directors.

2.07 The governing body must not merely carry out a vetting function with regards to all the documents which are submitted for its attention. It is the duty of the governing body of a scheme to inform itself of its investment activities and have a proper understanding of its financial condition.

2.08 The members of the governing body shall exercise the powers they have for the purposes for which such powers were conferred and they shall not misuse such powers.

2.09 The governing body shall exercise its powers independently without subordinating such powers to the will of others.

2.10 Whilst the governing body of a scheme may be entitled under the memorandum and articles of association to delegate particular functions, the delegation of such functions shall not absolve the governing body from the duty to supervise the discharge of such delegated functions.

2.11 The members of the governing body shall carry out all the necessary checks to satisfy themselves that the overall structure of the scheme is consistent with the standards prescribed in the Act and in these Rules and that the terms agreed to in the

<sup>3</sup> which includes the Board of Directors, Trustee, or General Partners where applicable



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contracts with the service providers are reasonable and consistent with the standards adopted by the industry. Furthermore, the governing body must ensure that all the service providers appointed in relation to the scheme create an overall structure which will ensure an adequate division of responsibilities in relation to the fund.

- 2.12 The governing body shall continuously monitor the execution of the functions delegated to the service providers and shall be satisfied that they are performing their functions in accordance with their contractual obligations.
- 2.13 The members of the governing body shall hold regular board meetings and shall ensure that detailed minutes are taken to record accurately the matters discussed and considered. The agenda should be well structured and prepared, giving sufficient time to allow for the input of all the notice parties and service providers before the meeting.
- 2.14 Minutes of the meetings of the governing body must be held in Malta at the registered office of the scheme or at any other place as may be agreed with the MFSA.
- 2.15 The governing body shall also be guided by the provisions of the Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes which has been issued by the Authority.

**3. SERVICE PROVIDERS**

- 3.01 The scheme may appoint service providers as it deems necessary. The scheme is obliged to appoint an AIFM, a depositary, an auditor, a compliance officer and a money laundering reporting officer.
- 3.02 The MFSA shall be satisfied on a continuing basis of the fitness and properness of any service provider appointed by the scheme.
- 3.03 The scheme together with the service providers appointed shall comply with the applicable laws whether Maltese or EU-related to which they may respectively be subject.

**The AIFM**

- 3.04 The scheme may appoint a single external AIFM with responsibility for portfolio management and risk management of the scheme and other permitted services. The AIFM shall be duly authorised in terms of the AIFMD.
- 3.05 The AIFM may either have an established place of business in Malta or be a European AIFM. If established in Malta, the AIFM shall be in possession of a Category 2 Investment Services Licence issued in terms of Article 6 of the Act and authorised by the MFSA as an AIFM in terms of the AIFMD.
- 3.06 Where the scheme does not appoint an external AIFM, it shall be subject to all the Rules prescribed in this Part to the Rules, including the additional Rules applicable to Self-Managed AIFs prescribed in Section 8 of these Rules.
- 3.07 The AIFM shall have sufficient financial resources and liquidity at its disposal to enable it to conduct its business, and such organisation, systems, experience and expertise deemed necessary by the MFSA for it to act as AIFM. The scheme shall be required to satisfy the MFSA that the proposed AIFM meets the above requirements on a continuing basis.
- 3.08 The scheme may appoint a European AIFM in accordance with the Investment Services Act (Alternative Investment Fund Manager Passport) Regulations. A European AIFM may seek to establish a branch in Malta or provide services pursuant to regulations 6 and 7 of the said Regulations.
- 3.09 The appointment and/ or replacement of any party who is to be the AIFM of the scheme, the terms of that appointment and the contents of the agreement to which the appointment is subject, shall be agreed with the MFSA. The MFSA shall have the right to require the replacement of the AIFM.

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- 3.10 The scheme shall be subject to investment objectives, policies and restrictions outlined in its offering document. The AIFM shall take all reasonable steps to comply with the investment policies and restrictions of the scheme.

### Fund administrator

- 3.11 The scheme (whether self-managed or third party managed) or the AIFM may appoint a fund administrator. Where the fund administrator is not appointed, the AIFM shall be responsible for the administration function, subject to the AIFM being authorised to undertake fund administration activities.

- 3.12 Where the proposed fund administrator is established in Malta, it shall be in possession of a Fund Administration Recognition Certificate issued in terms of Article 9A of the Act.

- 3.13 The fund administrator shall have the business organisations, systems, experience and expertise deemed necessary by the MFSa for it to act as a fund administrator. The scheme shall satisfy the MFSa that the proposed fund administrator meets the above requirements.

- 3.14 The scheme shall obtain the written consent of the MFSa before the appointment or replacement of any party to act in the capacity of fund administrator of the scheme. The MFSa reserves the right to object to the proposed replacement or appointment and to require such additional information as it considers appropriate.

### Depository

- 3.15 The depository appointed by the scheme or by the AIFM on behalf of the scheme, shall ensure compliance with the applicable provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations.

- 3.16 The written consent of the MFSa shall be obtained before the appointment or replacement of any party to act in the capacity of depository to the scheme. The MFSa reserves the right to object to the proposed replacement or appointment and to require such additional information it considers appropriate.

### Prime broker and counterparties

- 3.17 The scheme may appoint one or more prime brokers or counter parties.

- 3.18 Upon selecting and appointing counterparties and prime brokers, the AIFM on behalf of the scheme, shall enter into a written contract outlining the applicable terms. The contract shall also provide that the depository be informed thereof. In particular any possibility of transfer and reuse of scheme's assets shall be provided for in the contract and shall comply with the scheme's instruments of incorporation and offering document.

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- 3.19 The scheme or the AIFM on behalf of the scheme shall exercise due skill, care and diligence before entering into an agreement and on an on-going basis thereafter taking into account the full range and quality of their services.
- 3.20 When selecting prime brokers or counterparties of an AIFM or a scheme in an OTC derivatives transaction, in a securities lending or in a repurchase agreement, the AIFM on behalf of the scheme shall ensure that those prime brokers and counterparties fulfil all of the following conditions:
- a) they are subject to on-going supervision by a public authority;
  - b) they are financially sound;
  - c) they have the necessary organisational structure and resources for performing the services which are to be provided by them to the scheme or AIFM.
- 3.21 When appraising the financial soundness referred to in Rule 3.20(b), the AIFM on behalf of the scheme shall take into account whether or not the prime broker or counterparty is subject to prudential supervision, including sufficient capital requirements and effective supervision.
- 3.22 The list of selected prime brokers shall be approved by the AIFM's senior management. In exceptional cases, prime brokers not included in the list may be appointed, provided they fulfil the requirements prescribed in Rule 3.20 and subject to approval by the AIFM. The AIFM shall be able to demonstrate the reasons for such choice and the due diligence that it exercised in selecting and monitoring the prime brokers which had not been listed.

### **Compliance officer**

- 3.23 Responsibility for the scheme's compliance with its licence conditions rests with the governing body of the scheme.
- 3.24 In order to enable the compliance functions to be properly carried out, the scheme shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the scheme to comply with its obligations under the Act, the regulations issued thereunder and these Rules, as well as with its obligations under other applicable legislation, in particular the Prevention of Money Laundering Act, the Prevention of Financial Markets Abuse Act, and regulations issued thereunder, as well as to detect the associated risks, and shall put in place adequate measures and procedures designed to minimize such risk and to enable the MFSA to exercise its powers effectively.
- 3.25 In order to enable the compliance function to discharge its responsibilities properly, the scheme shall ensure that a compliance officer is appointed to assume responsibility for the compliance function and for any reporting as to compliance required by these Rules.

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- 3.26 The scheme shall request its compliance officer to prepare a “Compliance Report” at least on a six monthly basis, which shall be presented to the governing body of the scheme.
- 3.27 The “Compliance Report” shall indicate any:
- a) breaches to the investment and borrowing restrictions;
  - b) **breaches to the Rules outlined in this Rulebook;**
  - c) complaints from unit or shareholders in the scheme and the manner in which these have been handled;
  - d) material valuation errors (higher than 0.5% of NAV) and the manner in which these have been handled; and
  - e) material compliance issues during the period covered by the Compliance Report.
- 3.28 The Compliance Report should also include a confirmation that all the local prevention of money laundering requirements have been satisfied. This confirmation shall be obtained from the money laundering reporting officer of the scheme.
- 3.29 A copy of the Compliance Report shall be held in Malta at the registered office of the scheme and shall be made available to the MFSA during compliance visits.

**Commented [IA7]:** The Compliance Report should not only report on breaches to the investment and borrowing restrictions but even on breaches to the Rules

#### Money laundering reporting officer

- 3.30 Responsibility for the scheme’s compliance with its prevention of money laundering obligations rests with the governing body of the scheme.
- 3.31 The scheme shall at all times have a money laundering reporting officer.

#### Auditor

- 3.32 The scheme shall appoint an auditor approved by the MFSA. The auditor shall be a person empowered to audit accounts in terms of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.
- 3.33 The scheme shall replace its auditor if requested to do so by the MFSA. The MFSA’s consent shall be sought prior to the appointment or replacement of an auditor.
- 3.34 The scheme shall make available to its auditor the information and explanations he/she needs to discharge his/her responsibilities as an auditor and in order to meet the MFSA’s requirements.
- 3.35 The scheme shall not appoint an individual as an auditor, nor appoint an audit firm where the individual directly responsible for the audit, or his/her firm is:

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- a) a director, partner, qualifying shareholder, officer, representative or employee of the scheme;
- b) a partner of, or in the employment of, any person in paragraph (a) above;
- c) a spouse, civil partner, parent, step-parent, child, step-child or other close relative of any person in paragraph (a) above;
- d) a person who is not otherwise independent of the scheme;
- e) a person disqualified by the MFSA from acting as an auditor of an scheme.

For this purpose, an auditor shall not be regarded as an officer or an employee of the scheme solely by reason of being an auditor of that scheme.

3.36 The scheme shall obtain from its auditor a signed letter of engagement defining clearly the extent of the auditor's responsibilities and the terms of his appointment. The scheme shall confirm in writing to its auditor its agreement to the terms in the letter of engagement.

3.37 The letter of engagement shall include terms requiring the auditor:

- a) to provide such information or verification to the MFSA as the MFSA may request;
- b) to vacate his/her office if he becomes disqualified to act as auditor for any reason;
- c) if he/ she resigns, or is removed or not reappointed, to advise the MFSA of that fact and of the reasons for his ceasing to hold office. The auditor shall also be required to advise the MFSA if there are matters he/ she considers should be brought to the attention of the MFSA;
- d) in accordance with article 18 of the Act, to report immediately to the MFSA any fact or decision of which he becomes aware in his capacity as auditor of the scheme which:
  - i. is likely to lead to a serious qualification or refusal of his/ her audit report on the accounts of the scheme; or
  - ii. constitutes or is likely to constitute a material breach of the legal and regulatory requirements applicable to the scheme in or under the Act; or
  - iii. gravely impairs the ability of the scheme to continue as a going concern; or
  - iv. relates to any other matter which has been prescribed.

3.38 If at any time the scheme fails to have an auditor in office for a period exceeding four weeks, the MFSA shall be entitled to appoint a person to fill the vacancy; the fees and charges so incurred being payable by the scheme.

3.39 In respect of each annual accounting period, the scheme shall require its auditor to prepare its management letter in accordance with International Standards on Auditing. The management letter shall be sent to MFSA.

**External valuer**

- 3.40 The valuation function shall be performed by:
- a) an external valuer, being a legal or natural person independent from the scheme, the AIFM and any other person with close links to the scheme or the AIFM; or
  - b) the AIFM, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon employees is prevented.
- 3.41 The external valuer shall be appointed by the AIFM or by the scheme where this is self-managed.

#### **4. INVESTMENT OBJECTIVES, POLICIES AND RESTRICTIONS**

##### **General**

4.01 The scheme shall be subject to the investment objectives, policies and restrictions outlined in its offering document.

4.02 The AIFM or the scheme, in the case of a self-managed scheme, shall take all reasonable steps to comply with the investment restrictions of the scheme within six months from the launch thereof or upon reaching a value equivalent to EUR 2,500,000. The depositary shall supervise the operation of the scheme to ensure that the scheme or the AIFM on behalf of the scheme complies with the investment policies and restrictions of the scheme:

Provided that the depositary shall proceed to notify the MFSA where, the scheme has not reached a value equivalent to EUR2,500,000 within six months from the launch thereof.

4.03 Changes to the investment policies and restrictions of the scheme shall be notified to the investors in advance of the change. The notice period should be sufficiently long to allow for redemption requests to be submitted by investors and processed prior to the change being effected. The change in the investment objectives should only become effective after all pending redemptions linked to the change in the investment objectives have been satisfied. Any applicable redemption fees would also need to be waived accordingly.

4.04 The following shall be the rules applicable in the event of an inadvertent breach of investment restrictions:

- i. if one or more of the scheme's investment restrictions are at any time contravened for reasons beyond the control of the AIFM or the scheme, the AIFM or the scheme must take such steps as are necessary to ensure a restoration of compliance with such restriction(s) as soon as is reasonably practicable having regard to the interests of the unit-holders and, in any event, within the period of six months beginning on the date of discovery of the contravention of such restriction(s):

Paragraph (i) above is aimed at addressing circumstances which may arise following acquisition of the scheme's assets and include market price movements of the scheme's underlying assets or market illiquidity.

Paragraph (i) above is without prejudice to the duty of the AIFM and the scheme to comply with the investment restrictions and to ensure that such



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restrictions are not contravened as a direct result of any acquisition of its underlying assets.

- ii. a contravention of an investment restriction which may arise due to the circumstances outlined in paragraph (i) above shall not be considered as a breach of a Rule and will therefore not be subject to MFSA's notification requirements. However, where the contravention is not remedied by the AIFM or the scheme within the maximum six month period stipulated in paragraph (i) above, a breach of this Rule is deemed to arise and the relevant notification requirements will apply.

### Distributions of income

- 4.05 A scheme shall effect any distributions of income in accordance with the provisions of its instruments of incorporation and/or offering document.

### Side letters

- 4.06 Side letters to be entered into by the scheme must be circulated to and approved by the governing body of the scheme prior to issue.
- 4.07 The fact that side letters detailing preferential treatment of certain investors may be issued shall be disclosed in the instruments of incorporation and/or offering document.
- 4.08 Side letters issued by the scheme shall be retained in Malta at the registered office of the scheme and shall be available for inspection by the MFSA during compliance visits.

### Side pockets

- 4.09 Side pockets to be entered into by the scheme must conform to the Guidance Note on the use of Side Pockets by Collective Investment Schemes issued by the MFSA<sup>4</sup>.
- 4.10 The possible side pockets may be used shall be disclosed in the instruments of incorporation and/or offering document.

### Rules on foreign currency lending

- 4.11 The scheme shall, in as far as these may be applicable to any foreign currency lending which it may carry out, abide by the high level principles on foreign currency lending as outlined in [MFSA Rule 1 of 2012](#) on foreign currency lending,

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<sup>4</sup> Guidance Note – The use of side pockets by Collective Investment Schemes – 31 May 2010

which is modelled on the Recommendation of the European Systemic Risk Board on lending in foreign currencies (ESRB/2011/1).

- 4.12 Foreign currency lending means lending in any currency other than the legal tender of the country in which the borrower is domiciled. This includes situations where the Euro is the foreign currency due to the borrower's domicile being outside the euro zone.
- 4.13 When the scheme has engaged in any form of foreign currency lending during the period under review, it shall submit a confirmation to this effect together with its annual report. Any foreign currency lending activity shall be indicated as a percentage of the scheme's total NAV. A scheme which has not carried out any foreign currency lending during the period under review is not required to submit a 'nil' return.

#### **Cross sub-fund investments**

- 4.14 A sub-fund may invest in units of one or more sub-funds within the same scheme, subject to this being permitted in the constitutional documents and the Offering Memorandum of the said AIF and subject to the following:
- the investment company shall in its memorandum of association elect to have the assets and liabilities of each sub-fund comprised in that company treated as a patrimony separate from the assets and liabilities of each other sub-fund of such company in terms of regulation 9 of the Companies Act (Investment Companies with Variable Share Capital) Regulations;
  - the sub-fund is allowed to invest up to 50% of its assets into another sub-fund within the same scheme;
  - the target sub-fund(s) may not themselves invest in the sub-fund which is to invest in the target sub-fund(s);
  - in order to avoid duplication of fees, where the AIFM of the sub-fund and the AIFM of the target sub-fund is the same or (in the case of different AIFMs) where one AIFM is an affiliate of the other, or in the case where a self-managed scheme invests in another self-managed scheme, where both schemes are linked to a great extent by common management and/or investment management personnel, only one set of management (excl. performance fees), subscription and/or redemption fees applies between the sub-fund and the target sub-fund, provided that this restriction shall apply only in respect of and to the extent (up to the portion) of the investment of the sub-fund in the target sub-fund;
  - for the purposes of ensuring compliance with any applicable capital requirements, cross-investments will be counted once;
  - any voting rights acquired by the sub-fund from the acquisition of the units in the target sub-fund shall be disappplied as appropriate.

**Commented [IA8]:** Proposed change to extend the removal of fees to include circumstances where a self-managed scheme invests in another self-managed scheme

#### **Minimum investment by qualifying investors**

- 4.15 The minimum investment which the scheme may accept is EUR 100,000 per investor. Once the minimum investment has been made, any additional amount may be invested but the total amount invested must not at any time be less than EUR 100,000 unless this is the result of a fall in the net asset value. In the case of an umbrella scheme, the EUR 100,000 may apply on a per scheme basis rather than on a per sub-fund basis.

**Additional Rules applicable to schemes effecting drawdowns on investors' committed funds**

- 4.16 Schemes established as investment companies (SICAVs) and which wish to effect draw-downs on investors' committed funds are required to comply with regulation 15 of the Companies Act (Investment Companies with Variable Share Capital) Regulations on issue of shares at a discount in addition to the following Rules.
- 4.17 The scheme shall retain at its registered office, a copy of its written agreements with investors who have committed to invest in the scheme. Such agreements shall be available for inspection by MFSA officials during compliance visits.
- 4.18 Any request on committed funds shall be effected pro-rata amongst all relevant investors of the scheme.
- 4.19 The scheme shall only make a fresh call for further commitments once all the outstanding commitments from existing investors have been requested.
- 4.20 In addition to the disclosure requirements applicable to the offering document of the scheme set out in regulation 15(3), the offering document shall comply with the applicable disclosure requirements set out in Appendix III of these Rules under the heading "Risk Warnings".

**Additional Rules applicable to acquisitions in specie**

- 4.21 The scheme shall issue units/shares for a consideration other than cash in accordance with the provisions of its instruments of incorporation and the provisions of the offering memorandum.
- 4.22 A report on any consideration other than cash shall be drawn up by a valuer which shall satisfy the following criteria:
- (a) the valuer needs to be independent of the scheme, its officials or any other service providers of the scheme;
  - (b) the valuer needs to be of good standing with recognised and relevant qualifications and an authorised member of a Recognised Professional Body in the jurisdiction of the assets;
  - (c) the valuer shall be appointed by the Directors of the scheme subject to the approval of the appointment by the auditors of the scheme.

**Commented [IA9]:** Updates the procedure outlined in the MFSA Circular of 2006 in relation to acquisitions in specie

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- 4.23 The report drawn up in accordance with Rule 4.22 shall include:
- (a) a description of each of the assets comprising the consideration;
  - (b) the value of each asset and a description of the method of valuation used;
  - (c) a confirmation that the value of the consideration is at least equal to the net asset value of the shares to be issued in return for such consideration.

4.24 The report shall be held in Malta at the registered office of the scheme and shall be made available to the MFSa for inspection during the compliance visits.

4.25 Shares on the scheme shall only be used (in favour of the investor) once the assets referred to in the valuer's report have been transferred in favour of the scheme to the satisfaction of the depositary and/or prime broker.

## **Additional rules applicable to financing of SPVs**

4.26 Where a sub-fund proposes to invest through the use of SPVs and thus the scheme will grant any form of financing to the SPV, the terms of the loan facility arrangements between the scheme and the SPV shall inter alia provide:

- (a) that the scheme should not be obliged to honour any request for lending made by the SPV in the case where the scheme does not have sufficient liquid assets (such as cash/ deposits) or if the Scheme deems it prudent to retain such assets to finance other investments of the fund or to keep such assets as reserves for any (current/ future) contingent liability;
- (b) that any amount borrowed by the SPV will be repayable on or within a short period of time following any request in this regard by the scheme in order to ensure the liquidity of the scheme and allow the scheme to satisfy redemption requests by shareholders in the case where these cannot be satisfied from liquid assets available to the scheme; and
- (c) that the proceeds of any loan made to the SPV shall be used by the SPV solely to finance the acquisition of the asset which shall always reflect and be in line with the objectives and policies of the fund; and
- (d) for any other safeguards deemed appropriate by the directors of the Scheme.

4.27 The scheme shall make available to the MFSa for inspection during compliance visits the following documentation:

- (a) registration certificates and other registration documents of any underlying SPV, including full details of the relevant shareholders and directors (where applicable); and
- (b) audited financial statements of any underlying SPV (where applicable).

## **Additional Rules applicable in the case of investments through joint ventures in the case of minority interests**

4.28 Where a scheme proposes to invest through joint ventures, it shall safeguard the interest of shareholders in the instances where it may not have majority control.

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Furthermore, the scheme shall ensure the suitability of investments undertaken by such joint ventures and ensure an on-going basis that they reflect the investments objectives and policies of the Scheme

4.29 The investment decisions and the scheme's participation in any particular project shall be undertaken in such a way which will enable the subfund to evaluate the proposed investment in each project to its satisfaction prior to commitment.

4.30 The objectives of such companies shall not change without the consent of the scheme.

4.31 The scheme shall ensure that it is represented on the board of directors of the joint venture entity (where this is a corporate entity) or on the investment decision-making organ or process of the joint venture (where this is not a corporate entity).

4.32 The scheme shall seek a contractual right under the joint venture agreement, to ensure that in the case of a proposed change in the investment objectives of the joint venture, the scheme shall either:  
(a) cease its participation in the joint venture; or  
(b) block such a change either through a requirement of the scheme's prior consent to such change or through a qualified majority voting requirement or otherwise.

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## **5. TRANSPARENCY REQUIREMENTS**

### **Instruments of incorporation**

- 5.01 The AIFM shall ensure that any changes to the instruments of incorporation of the scheme must be approved by the MFSA in advance of implementation.

### **Offering document**

- 5.02 The AIFM shall publish an offering document, which shall be dated and the essential elements of which shall be kept up to date. The offering document shall be offered to investors free of charge before they become committed to investing.
- 5.03 The offering document shall contain sufficient information for investors to make an informed judgement about the investment proposed to them and shall contain at least the information prescribed in Appendix III.
- 5.04 The scheme shall approve the offering document including any amendments thereto, and confirm its approval to the MFSA.
- 5.05 The offering document and any amendments thereto shall be sent to and agreed with the MFSA prior to publication. The AIFM must submit a copy of its approval of the offering document, when this is submitted for the MFSA's approval.

### **Annual report**

- 5.06 The scheme or the AIFM or administrator on behalf of the scheme, shall submit copies of the scheme's annual audited financial statements to the MFSA and such other information, as the MFSA may from time to time request.

Provided that in complying with the requirements prescribed in this section above, the AIFM shall also refer and comply with the applicable provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision outlining the content and format of the annual report. The content and format of the annual report shall be adapted to the type of AIF to which it applies.

- 5.07 The annual report shall be published and provided to investors of the scheme upon request. In addition, the annual report shall be submitted to the MFSA within six months respectively of the end of the period concerned.

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5.08 The financial statements shall not be submitted to the MFSA unless these are a full and complete set of the required documentation and signed by all the signatories as required.

5.09 In the case where the submission of the financial statements to the MFSA will be justifiably and exceptionally delayed, the scheme or the AIFM on behalf of the scheme shall at least one week prior to the deadline for the submission of the financial statements, submit a request with the MFSA to consider the possibility of such a delay. This request shall be accompanied by the following documents:

- (a) a resolution from the governing body of the scheme setting out clearly the reasons which justify the delay and requesting the MFSA to grant the proposed extension period which should be clearly stated in the resolution;
- (b) a written confirmation from the fund administrator of the scheme that the underlying investors of the scheme have been informed of the delay and the reasons for such delay;
- (c) a written confirmation from the external auditor of the scheme supporting the request for extension and confirming that the audit will be completed within the proposed extended deadline.

Provided that where the delay consists of two or three days, the documents requested in paragraphs (a) to (c) need not be submitted.

**Commented [IA10]:** As per MFSA Circular dated 19 August 2016

5.10 Where applicable, the scheme or the AIFM or administrator on behalf of the scheme shall also include with the annual report a confirmation in terms of Rule 4.12 of these Rules on the involvement of the scheme in foreign currency lending.

5.11 The annual report shall be accompanied by a report by the custodian on whether the scheme has been managed:

- a. in accordance with the limitations imposed on the investment and borrowing powers of the scheme by the instruments of incorporation; and
- b. in accordance with its instruments of incorporation and these Rules.

In the case of non-compliance with paragraphs (a) or (b) above, the Depositary's Report shall outline the steps taken to rectify the situation.

5.12 The accounting information given in the annual report shall be prepared in accordance with the IFRSs as adopted by the EU and with the accounting rules laid down in the instruments of incorporation.

**Deleted:** IFRS

**Deleted:** general acceptable accounting standards

5.13 The accounting information given in the annual report shall be audited by a certified auditor in accordance with Rule 3.36. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

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### Other reporting obligations

- 5.14 The scheme shall also submit to the MFSA, on the following e-mail address: [fundreporting@mfsa.com.mt](mailto:fundreporting@mfsa.com.mt), any statistical returns which may be required by the Central Bank of Malta to fulfil European and other relevant reporting obligations.
- 5.15 When requested to do so by the MFSA, a scheme shall also submit, on the following e-mail address: [statistics@mfsa.com.mt](mailto:statistics@mfsa.com.mt) any statistical returns that may be required under MFSA Rule 1 of 2012 on foreign currency lending.



**6. ADDITIONAL RULES APPLICABLE TO SELF-MANAGED SCHEMES****Introduction**

- 6.01 This section is applicable to schemes established as self-managed AIFs. This section applies over and above Sections 1 to 5 of Part B of this Rulebook. Thus for the purposes of this section, the term ‘scheme’ shall be understood as referring to a ‘self-managed AIF’.

**Permissible Activities**

- 6.02 A scheme may only be authorised to provide the licensable activities which consist in its internal management as provided hereunder:
- (a) investment management functions which the scheme shall at least perform include (i) portfolio management; (ii) risk management;
  - (b) other functions that the scheme may additionally perform in the course of the collective management thereof are:
    - [i] administration
      - legal and fund management accounting services;
      - customer inquiries;
      - valuation and pricing, including tax returns;
      - regulatory compliance monitoring;
      - maintenance of unit or shareholder register;
      - distribution of income;
      - unit/shares issues and redemptions;
      - contract settlements including certificate dispatch;
      - record keeping.
    - [ii] marketing;
    - [iii] activities related to the assets of the scheme, namely services necessary to meet the fiduciary duties of the scheme, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the scheme and the companies and other assets in which it has invested.
- 6.03 Without prejudice to the generality of Article 6(6) of the Act, in the case of an application for a collective investment scheme licence, the MFSA shall inform the applicant in writing within three months of the submission of a complete application, whether or not the licence has been granted. The MFSA may prolong this period for up to three additional months, where it considers necessary due to the specific circumstances of the case and after having notified the applicant accordingly:

- 6.04 The scheme shall commence its activities as soon as the licence has been granted.
- 6.05 The scheme may start providing an investment service in Malta with investment strategies described in the application form submitted to the MFSA as soon as the licence is granted, but not earlier than 1 month after having submitted any missing information referred to hereunder:
- (a) information on arrangements made for the delegation and sub-delegation to third parties of functions referred to in Rules 6.83 to 6.91 of this Part of the Rules;
  - (b) the instruments of incorporation of the scheme;
  - (c) information on the arrangements made for the appointment of the depositary in accordance with the applicable provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations and the Rules prescribed in Part BIV of the Investment Services Rules for Investment Services Providers;
  - (d) any additional information on disclosure to investors as referred to in Appendix V to Part B of the Rules.
- 6.06 The MFSA may restrict the scope of the authorisation in particular as regards the investment strategies the scheme is allowed to adopt.

**Financial resources requirements**

- 6.07 The scheme shall have sufficient financial resources at its disposal to enable it to conduct its business effectively, to meet its liabilities and to be prepared to cope with the risks to which it is exposed.
- 6.08 Without prejudice to the generality of Rule 6.07, the scheme must have own funds which are equivalent to an initial capital of at least EUR 300,000.
- 6.09 The financial resources of the scheme shall at all times exceed the level prescribed.
- 6.10 The scheme shall maintain own funds equal to or in excess of its capital resources requirement and these shall constitute the scheme's financial resources requirement.
- 6.11 Where the value of the portfolio of the scheme exceeds EUR 250 million, it 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 portfolio of the scheme exceeds EUR 250 million:
- Provided that the required total of the initial capital and the additional amount of own funds shall not exceed EUR 10 million.

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- 6.12 Without prejudice to the amounts prescribed in Rule 6.11 above, the own funds of the scheme shall never be less than one quarter of the preceding year's fixed overheads.
- 6.13 The MFSA may authorise a scheme not to provide up to 50% of the additional amount of own funds referred to in Rule 6.11 above, if it benefits from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in Malta, in another Member State or EEA State or in a third country where it is subject to prudential rules considered by the MFSA as equivalent to those prescribed by Union Law.
- 6.14 The scheme shall comply with any further financial resources requirements set by the MFSA. If the MFSA so determines, the scheme will be given due notice in writing of the additional financial resources requirements which shall be applied.
- 6.15 The scheme shall immediately advise the MFSA if at any time it is in breach of its financial resources requirement. In this case, the MFSA may, if the circumstances justify it, allow the scheme a limited period within which to restore its financial resources to the required level.

#### **Professional liability cover**

- 6.16 To cover professional liability risks resulting from activities which the scheme may carry out pursuant to these Rules, the scheme shall either:
- (a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
  - (b) hold professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- 6.17 The scheme shall purchase the Professional Indemnity Insurance from an EU or non-EU undertaking authorised to provide professional indemnity insurance in accordance with Union law or Maltese law. The Professional Indemnity Insurance can also be provided by a third party entity.
- 6.18 For the purposes of demonstrating to the satisfaction of the MFSA that the requirement prescribed in Rule 6.17 above is being complied with on an ongoing basis, the scheme shall submit a copy of the cover note or such other written evidence as the MFSA may require to establish compliance with these Rules.
- 6.19 The scheme shall, within two days from the date it becomes aware of any circumstances specified in paragraphs (a) to (g) below, inform the MFSA in writing where:
- a. during the term of the policy, the scheme has notified insurers of an incident which may give rise to a claim under the policy;
  - b. during the term of a policy, the insurer has cancelled the policy or has notified its intention of doing so;

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- c. the policy has not been renewed or has been cancelled and another policy satisfying the requirements prescribed in this section has not been taken out from the day on which the previous policy lapsed or was cancelled;
- d. during the term of a policy, the terms or conditions are altered in any manner so that the policy no longer satisfies the requirements prescribed in this section;
- e. the insurer has intimated that it intends to decline to indemnify the insured in respect of a claim under the policy;
- f. the insurer has given notice that the policy will not be renewed or will not be renewed in a form which will enable the policy to satisfy the requirements prescribed in this section;
- g. during the term of a policy, the risks covered by the policy or the conditions or terms relating thereto are altered in any manner.

6.20 Own funds including any additional own funds as referred to in Rule 6.16(a) shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.

6.21 In complying with the requirements outlined in Rule 6.16 above, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

### **Operational arrangements**

6.22 The scheme shall at all times use adequate and appropriate human and technical resources that are necessary for its proper management.

6.23 The scheme shall be required to have sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms, in particular, having regard also to the nature of the scheme itself.

6.24 In particular the procedures and arrangements referred to in Rule 6.23 above will include rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account and ensuring at least, that each transaction involving the scheme may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the scheme are invested according to the instruments of incorporation, the offering document and any other legal provisions in force.

6.25 In adhering with the requirements prescribed in Rules 6.22 to 6.24 above, the AIF shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive

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2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

#### Investment committee

6.26 The management of the assets of the scheme shall be entrusted to the board of directors, at least one member of whom must be resident in Malta.

6.27 The board of directors shall establish an in-house Investment Committee made up of at least three members, whose composition may include members of the Board of Directors. The Terms of Reference of the Investment Committee shall regulate the proceedings of the Committee. Any changes thereto shall be subject to the prior approval of the MFSA.

6.28 The majority of Investment Committee meetings – the required frequency of which should depend on the nature of the AIF's investment policy, but which should be at least quarterly are to be physically held in Malta:

Provided that the meetings of the Investment Committee shall be deemed to be physically held in Malta if the minimum number of members that form a quorum necessary for a meeting are physically present in Malta.

6.29 The minutes of meetings of the Investment Committee shall be available in Malta for review during MFSA's compliance visits.

6.30 The role of the Investment Committee will be to:

- monitor and review the investment policy of the scheme;
- establish and review guidelines for investments by the scheme;
- issue of rules for stock selection;
- set up the portfolio structure and asset allocation; and
- make recommendations to the board of directors of the scheme.

6.31 Where the scheme has not appointed an Investment Committee, the functions mentioned in Rule 6.30 shall be undertaken by the directors of the scheme and any reference to Investment Committee throughout this Section shall be construed as being a reference to the board of directors of the scheme.

6.32 The Investment Committee may delegate the day-to-day investment management of the assets of the scheme to one or more officials of the scheme referred to as "the portfolio manager/s".

6.33 The portfolio managers will effect day-to-day transactions within the investment guidelines set by the Investment Committee and in accordance with the investment objectives, policy and restrictions described in the scheme's offering document.

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- 6.34 The scheme shall obtain the written consent of the MFSA prior to the appointment or replacement a member of the Investment Committee or a portfolio manager. The MFSA reserves the right to object to the proposed replacement or appointment and to require such additional information it considers appropriate. The MFSA shall be entitled to be satisfied, on a continuing basis, of the fitness and properness, including competence, of the members of the Investment Committee and of the portfolio manager/s.
- 6.35 The request for consent of the appointment of a member of the Investment Committee or a portfolio manager shall be accompanied by a PQ in the forms set out in Schedule B to Part A of these Rules together with a detailed CV of the person proposed.
- 6.36 The scheme shall notify the MFSA in writing of the departure of a Member of the Investment Committee and/ or a Portfolio Manager within 14 days of the departure. The AIF shall also request the Investment Committee and/ or the Portfolio Manager, as applicable, to provide the MFSA with the relevant details concerning the individual's resignation, as appropriate. A copy of such request shall be provided to MFSA.
- 6.37 The scheme shall have adequate arrangements, in agreement with and subject to the approval of the MFSA, to ensure adequate monitoring of the activities of the portfolio manager/s and the Investment Committee.
- 6.38 The scheme shall on a continuing basis ensure that it has sufficient management resources to effectively conduct its business.

#### **Dealings by officials of the scheme**

- 6.39 Where the scheme allows its officials to deal for their own account, it is responsible for ensuring that such a practice does not lead to abuse. The standards and procedures to be adopted should include the following:
- a) the scheme must take appropriate steps to ensure that officials act in conformity with the statutory requirements concerning insider dealing and market abuse;
  - b) internal mechanisms shall be established to prompt the Compliance Officer's intervention if and when in respect of any staff member, abnormal behaviour or patterns concerning investment transactions are observed.
- 6.40 All transactions undertaken by officials on their own account should be at "arm's length" – but this does not preclude discounts being allowed to officials.

**Permanent risk management function**

- 6.41 The scheme shall functionally and hierarchically separate the functions of risk management from the operating units including from the functions of portfolio management.
- 6.42 The MFSA shall review the functional and hierarchical separation of the functions of risk management from the operating units including from portfolio management in accordance with the principle of proportionality, on the understanding that the scheme shall, in any event, be able to demonstrate that specific safeguards against conflicts of interest allow for the independent performance of risk management activities and that the risk management process satisfies the requirements of Rules 6.41 to 6.48 and is consistently effective.
- 6.43 The scheme shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to its investment strategy and to which it is or may be exposed.
- 6.44 The scheme shall review the risk management systems with appropriate frequency at least once a year and adapt them whenever necessary:

Provided that the frequency of the periodic review shall be decided by the senior management in accordance with the principle of proportionality given the nature, scale and complexity of the business of the scheme.

- 6.45 The scheme shall at least:
- implement an appropriate, documented and regularly updated due diligence process, according to the scheme's investment strategy, objectives and risk profile;
  - ensure that the risks associated with each investment position of the scheme and their overall effect on the scheme's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
  - ensure that the risk profile of the scheme shall correspond to the size, portfolio structure and investment strategies and objectives of the scheme as provided for in its instruments of incorporation and/or offering document.
- 6.46 In complying with Rule 6.45 above, the scheme shall submit to the MFSA the information prescribed in Annex 3 to Appendix VI to these Rules dealing with results of stress tests and shall further comply with the applicable provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

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- 6.47 The scheme shall set a maximum level of leverage which it may employ as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, *inter alia*:
- the type of scheme;
  - the investment strategy of the scheme;
  - the sources of leverage of the scheme;
  - any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
  - the need to limit the exposure to any single counterparty;
  - the extent to which the leverage is collateralised;
  - the asset-liability ratio;
  - the scale, nature and extent of the activity of the scheme on the markets concerned.
- 6.48 In complying with Rules 6.41 to 6.47 above, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

#### **Liquidity management policy**

- 6.49 A scheme which is not an unleveraged closed-ended scheme shall employ an appropriate liquidity management system and adopt procedures which enable it to monitor its liquidity risk and to ensure that the liquidity profile of its investment complies with the scheme's underlying obligations.
- 6.50 The scheme shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk and monitor it accordingly.
- 6.51 In complying with Rule 6.50 above, the scheme shall submit to the MFSA the information prescribed in Annex 3 to Appendix VI to these Rules dealing with results of stress tests and shall further comply with the applicable provisions of the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
- 6.52 The scheme shall ensure that the investment strategy, the liquidity profile and the redemption policy are consistent.
- 6.53 In complying with Rule 6.50 to 6.52, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European



Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

**Investment in securitisation positions**

- 6.54 The scheme shall comply with the requirements on securitisation as prescribed in the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

**Valuation**

- 6.55 The scheme shall ensure that appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the scheme can be performed in accordance with Rules 6.56 to 6.71, the instruments of incorporation and/or offering document.
- 6.56 The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the scheme shall be those prescribed in the Investment Services Rules, the instruments of incorporation and/or offering document.
- 6.57 The scheme shall also ensure that the net asset value per unit or share thereof is calculated and disclosed to investors in accordance with Rules 6.56 to 6.71, the instruments of incorporation and/or offering document.
- 6.58 The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year.
- 6.59 If the scheme is open-ended, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the scheme and its issuance and redemption frequency.
- 6.60 If the scheme is closed-ended, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the scheme.
- 6.61 The scheme shall inform the investors of the valuations and calculations as prescribed in the instruments of incorporation and/or offering document.
- 6.62 The scheme shall ensure that the valuation function is either performed by:
- (a) an external valuer, being a legal or natural person independent from the scheme and any other persons with close links to the scheme; or
  - (b) the scheme itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon employees is prevented.

- 6.63 The depositary appointed for the scheme shall not be appointed as external valuer thereof, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the scheme.
- 6.64 Where an external valuer performs the valuation function, the scheme shall demonstrate that:
- (a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provision or rules of professional conduct;
  - (b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with Rules 6.55 to 6.61; and
  - (c) the appointment of the external valuer complies with the requirements of Rules 6.83 to 6.85 and with the provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
- 6.65 The external valuer shall not delegate the valuation function to a third party.
- 6.66 The scheme shall notify the appointment of the external valuer to the MFSA. The MFSA may require that another external valuer be appointed instead, where the conditions prescribed in Rule 6.64 are not met.
- 6.67 The valuation shall be performed impartially and with all due skill, care and diligence.
- 6.68 Where the valuation function is not performed by an independent external valuer, the MFSA may require the scheme to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate by an auditor.
- 6.69 The scheme shall be responsible for the proper valuation of its assets, the calculation of the net asset value and the publication of that net asset value. The scheme's liability its investors shall, therefore not be affected by the fact that it has appointed an external valuer.
- 6.70 Notwithstanding the provisions of Rule 6.69 and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the scheme for any losses suffered thereby as a result of the external valuer's negligence or intentional failure to perform its tasks.
- 6.71 In complying with the provisions prescribed in Rules 6.56 to 6.70, the scheme shall comply with the applicable provisions of Commission Delegated Regulation (EU)

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### **Conduct of business**

- 6.72 The scheme shall comply with the conduct of business rules prescribed hereunder. In particular the scheme shall:
- act honestly, with due skill, care and diligence and fairly in conducting its activities;
  - act in the best interests of the investors and the integrity of the market;
  - have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities;
  - take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the scheme and the investors and to ensure that the scheme is fairly treated;
  - comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the investors and the integrity of the market;
  - treat all investors fairly.
- 6.73 No investor in the scheme shall obtain preferential treatment unless such preferential treatment is disclosed in the relevant instruments of incorporation and/or offering documents.
- 6.74 In complying with Rules 6.72 and 6.73 above, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

### **Remuneration**

- 6.75 The scheme shall have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profile of the scheme, that are consistent with and promote sound and effective risk management and do not encourage risk taking which is inconsistent with the risk profiles, the instruments of incorporation and/or offering documents of the scheme.

- 6.76 The scheme shall determine the remuneration policy and practice in accordance with the principles outlined in Appendix IV. It shall further comply with the guidelines on sound remuneration policies which are issued by ESMA.

**Conflicts of interest**

- 6.77 The scheme shall act honestly, fairly and with integrity – in the best interests of its investors/ shareholders and of the market. Such action shall include:
- i. avoiding conflicts of interest where this is possible and, where it is not, ensuring - by way of disclosure, internal procedures or otherwise – that investors are treated fairly.
  - ii. the following procedures should be followed during meetings (including but not limited to Investment Committee Meetings), where a member considers that s(he) has or may have a conflict of interest:
    - a. that person should declare that interest to the other members either at the meeting at which the issue in relation to which s(he) has an interest first arises, or if the member was not at the date of the meeting interested in the issue, at the next meeting held after s(he) became so interested;
    - b. unless otherwise agreed to by the other members, a member shall avoid entering into discussions in respect of any contract or arrangement in which s(he) is interested and should withdraw from the meeting while the matter in which s(he) has an interest is being discussed;
    - c. the interested member should not vote at a meeting in respect of any contract or arrangement in which s(he) is interested, and if s(he) shall do so, his/ her vote shall not be counted in the quorum present at the meeting;
    - d. the minutes of the meeting should accurately record the sequence of such events.
  - iii. abiding by all relevant laws and regulations, including in respect of prevention of money laundering;
  - iv. not making any claim of independence or impartiality which is untrue or misleading; and
  - v. not making misleading or deceptive representations to investors.
- 6.78 The scheme shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the investors.

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- 6.79 The scheme shall segregate within its operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest.
- 6.80 The scheme shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the investors.
- 6.81 Where organisational arrangements made by the scheme to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure with reasonable confidence, that risks of damage to investors' interests will be prevented, the scheme shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.
- 6.82 In complying with Rules 6.77 to 6.81, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

#### Delegation and sub-delegation

- 6.83 A scheme which intends delegating to third parties the task of carrying out functions on its behalf shall notify the MFSA before the delegation arrangements become effective. The scheme shall comply with the following requirements:
- the scheme must be able to justify its entire delegation structure on objective reasons;
  - the delegate must possess sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;
  - where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision, or where that condition cannot be met, only subject to prior approval by the MFSA;
  - where the delegation concerns portfolio management or risk management and is conferred on a Third Country undertaking, in addition to the requirements outlined in point (c) above, there must be a cooperation agreement in place between the MFSA and the supervisory authority of the Third Country;
  - the delegation must not prevent the effectiveness of supervision of the scheme, and in particular, must not prevent the scheme from being managed, in the best interests of its investors;
  - the scheme must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the scheme is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.

- 6.84 The scheme shall review the services provided by each delegate on an ongoing basis.
- 6.85 No delegation of portfolio management or risk management shall be conferred on:
- a. the depositary or a delegate of the depositary; or
  - b. any other entity whose interests may conflict with those of the scheme or the investors of the scheme, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the scheme.
- 6.86 The liability of the scheme towards the investors shall not be affected by the fact that it has delegated functions to a third party, or by any further sub-delegation, nor shall the scheme delegate its functions to the extent that in essence, it can no longer be considered to be the manager of the scheme and to the extent that it becomes a letter-box entity.
- 6.87 The delegate may sub-delegate any of the functions delegated to it provided that the following conditions are met:
- a. the scheme consented prior to the sub-delegation;
  - b. the scheme notified the MFSA before the sub-delegation arrangements became effective;
  - c. the conditions prescribed in Rules 6.83 and 6.84 are fulfilled on the understanding that all references to the 'delegate' are read and construed as referring to the 'sub-delegate'.
- 6.88 No sub-delegation of portfolio management or risk management shall be conferred on:
- a. the depositary or a delegate of the depositary; or
  - b. any other entity whose interests may conflict with those of the scheme or the investors of the scheme, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the scheme.
- 6.89 The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.
- 6.90 Where the sub-delegate further delegates any of the functions delegated to it, the conditions prescribed in Rule 6.87 shall apply *mutatis mutandis*.
- 6.91 In complying with Rules 6.83 to 6.90 above, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the

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European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

## **Additional transparency requirements applicable to self-managed schemes**

### ***Disclosure to investors***

- 6.92 The scheme shall make available to investors, in accordance with the instruments of incorporation and/or offering documents, the information prescribed in Appendix III dealing with the contents of the offering document before they invest in the scheme as well as any material changes thereto.
- 6.93 The scheme shall also make available an annual report as outlined in Appendix V. The annual report shall be provided to investors upon request.

### ***Disclosure to the MFSA***

- 6.94 The scheme shall regularly report to the MFSA on the principal markets and instruments in which it trades as outlined in Appendix V.
- 6.95 In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system or to promote long-term sustainable growth, the MFSA may impose additional reporting requirements following a specific request by ESMA to do so.

## ***Additional reporting obligations for leveraged schemes - Use of information by the MFSA, supervisory cooperation and limits to leverage***

- 6.96 The scheme shall demonstrate that the leverage limit set by it is reasonable and that it complies with that limit at all times. The MFSA shall assess the risks that the use of leverage by the scheme could entail, and, where deemed necessary in order to ensure the stability and integrity of the financial system, the MFSA, after having notified ESMA and the ESRB, shall impose limits to the level of leverage that the scheme is entitled to employ or other restrictions on the management of the scheme, to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets. The MFSA shall duly inform ESMA and the ESRB of actions taken in this respect, through the procedure stipulated in the MFSA Act and the Investment Services Act.
- 6.97 The notification referred to in Rule 6.96 shall be made not less than 10 working days before the proposed measure is intended to take effect or to be renewed.
- 6.98 The notification referred to in Rule 6.96 shall include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect.

- 6.99 In exceptional circumstances, the MFSA may decide that the proposed measure takes effect within the period of 10 working days referred to in Rule 6.96.
- 6.100 In complying with Rules 6.96 to 6.99 above, the scheme shall also refer and comply with the applicable provisions of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

**Additional rules applicable to schemes which acquire control of non-listed companies and issuers**

- 6.101 The Rules included in this Section shall apply to the following:
- (a) one or more schemes which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with Rule 6.102;
  - (b) schemes cooperating with each other on the basis of an agreement pursuant to which such schemes jointly, acquire control of a non-listed company in accordance with Rule 6.102.
- 6.102 For the purpose of this section, with regards to non-listed companies<sup>5</sup>, the term ‘control’ shall mean more than 50% of the voting rights of the companies.

When calculating the percentage of voting rights held by the relevant scheme, in addition to the voting rights held directly by the relevant scheme, the voting rights of the following entities shall be taken into account, subject to the control as referred to above being established:

- (a) an undertaking controlled by the scheme; and
- (b) a natural or legal person acting in its own name but on behalf of the scheme or on behalf of an undertaking controlled by the scheme.

The percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding the definition of ‘control’<sup>6</sup> as provided in the Glossary to these Rules, for the purpose of Rules 6.112 to 6.114 and Rules 6.118 to 6.120 in regard to

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<sup>5</sup> “Non-listed company” means a company which has its registered office in the Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of article 4(1) of Directive 2004/39/EC.

<sup>6</sup> ‘Control’ means control as defined in Article 1 of Directive 83/349/EEC, or a similar relationship between a natural or legal person and an undertaking; for this purpose a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.



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issuers, control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

- 6.103 The Rules included within this section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community as transposed and implemented in Malta through the prescribed in the Employee (Information and Consultation) Regulations.
- 6.104 This section shall not apply where the non-listed companies concerned are:
- (a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
  - (b) special purpose vehicles with the purpose of purchasing holding or administering real estate.
- 6.105 Without prejudice to Rules 6.101 and 6.104, Rule 6.107 shall also apply to schemes that acquire a non-controlling participation in a non-listed company.
- 6.106 Rules 6.112 to 6.114 and Rules 6.118 to 6.120 shall also apply to schemes that acquire control over issuers. For the purposes of those Rules, Rules 6.101 and 6.104 shall apply *mutatis mutandis*.

#### ***Notification of the acquisition of major holdings and control of non-listed companies***

- 6.107 When a scheme acquires, disposes of or holds shares of a non-listed company, such scheme shall notify the MFSA of the proportion of voting rights of the non-listed company held by the scheme any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.
- 6.108 When a scheme acquires, individually or jointly, control over a non-listed company pursuant to Rule 6.101, in conjunction with Rule 6.102, such a scheme shall notify the following of the acquisition of control by the scheme:
- (a) the non-listed company;
  - (b) the shareholders of which the identities and addresses are available to the scheme or can be made available by the non-listed company or through a register to which the scheme has or can obtain access; and
  - (c) the MFSA.
- 6.109 The notification required under Rule 6.108 shall contain the following additional information:
- (a) the resulting situation in terms of voting rights;
  - (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or

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legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;

- (c) the date on which control was acquired.

6.110 In its notification to the non-listed company, the scheme shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the scheme and of the information referred to in Rule 6.109. The scheme shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with Rules 6.107 to 6.111.

6.111 The notifications referred to in Rules 6.107 to 6.109 shall be made as soon as possible, but no later than 10 working days after the date on which the scheme has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

#### ***Disclosure in the case of acquisition of control***

6.112 When a scheme acquires, individually or jointly, control over a non-listed company or an issuer pursuant to Rule 6.101, in conjunction with Rule 6.102, such a scheme shall make the information referred to in Rule 6.113 available to:

- (a) the company concerned;
- (b) the shareholders of the company of which the identities and addresses are available to the scheme or can be made available by the company or through a register to which the scheme has or can obtain access; and
- (c) the MFSA.

The MFSA may require that the information referred to in Rule 6.113 is also made available to the competent authorities of the non-listed company which the MFSA may designate to that effect.

6.113 The scheme shall make available:

- (a) the identity of the schemes that have acquired control;
- (b) the policy for preventing and managing conflicts of interest, in particular between the scheme and the company, including information about the specific safeguards established to ensure that any agreement between the scheme and the company is concluded at arm's length; and
- (c) the policy for external and internal communication relating to the company in particular as regards employees.

6.114 In its notification to the company pursuant to Rule 6.112(a), the scheme shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in Rule 6.112. The scheme shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees

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themselves, are duly informed by the board of directors in accordance with Rules 6.112 to 6.117.

- 6.115 When a scheme acquires, individually or jointly, control of a non-listed company pursuant to Rule 6.101, in conjunction with Rule 6.102, the scheme shall ensure that it discloses its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment to:
- (a) the non-listed company;
  - (b) the shareholders of the non-listed company of which the identities and addresses are available to the scheme or can be made available by the non-listed company or through a register to which the scheme has or can obtain access.
- 6.116 In addition, the scheme shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in Rule 6.115 to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.
- 6.117 When a scheme acquires control of a non-listed company pursuant to Rule 6.101, in conjunction with Rule 6.102, such scheme shall provide the MFSA and the investors with information on the financing of the acquisition.

#### ***Asset Stripping***

- 6.118 When a scheme, individually or jointly, acquires control of a non-listed company or an issuer pursuant to Rule 6.101, in conjunction with Rule 6.102, such a scheme shall for a period of 24 months following the acquisition of control of the company by the scheme:
- (a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in Rule 6.119;
  - (b) in so far as the scheme is authorised to vote at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in Rule 6.119;
  - (c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in Rule 6.119.
- 6.119 The obligations imposed on schemes pursuant to Rule 6.118 shall relate to the following:
- (a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the

law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;

- (b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
- (c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in paragraph (a).

6.120 For the purposes of Rule 6.118:

- (a) the term 'distribution' referred to in Rule 6.119(a) and (b) shall include, in particular, the payment of dividends and of interest relating to shares;
- (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and
- (c) the restriction set out in Rule 8.19(c) shall be subject to points (b) to (h) of Article 20(1) of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

***Rules concerning the additional information to be included in the annual report of schemes exercising control of non-listed companies***

6.121 When a scheme acquires, individually or jointly, control of a non-listed company pursuant to Rule 6.101 in conjunction with Rule 6.102, the scheme shall include the additional information prescribed hereunder in the annual report.

6.122 When a scheme acquires individually or jointly, control of a non-listed company pursuant to Rule 6.101 in conjunction with Rule 6.102, the scheme shall either:

- (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with Rule 6.123 hereunder, is made available by the board of directors of the company to the employees' representatives, or, where there are none, to the employees themselves with the period such annual report has to be drawn up in accordance with the Investment Services Rules.

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- (b) For each such scheme include in the annual report the information referred to in Rule 6.123 hereunder relating to the relevant non-listed company.
- 6.123 The additional information to be included in the annual report of the company or the scheme in accordance with Rule 6.122 above shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:
- (a) any important events that have occurred since the end of the financial year;
  - (b) the company's likely future development;
  - (c) the information concerning acquisitions of own shares prescribed in Article 22(2) of Council Directive 77/91/EEC.
- 6.124 The scheme shall either:
- (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in Rule 6.122(b) relating to the company concerned to the employees' representative of the company concerned, or, where there are none, to the employees themselves by no later than 6 months following the end of the financial year; or
  - (b) make available the information referred to in Rule 6.122(a) to the investors of the scheme, in so far as already available, by no later than 6 months following the end of the financial year and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the applicable legal requirements.