

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**FEEDBACK STATEMENT ISSUED
FURTHER TO INDUSTRY RESPONSES
TO THE
MFSA CIRCULAR DATED
30TH OCTOBER 2012
ON CROSS SUB-FUND INVESTMENTS**

1. INTRODUCTION

On 30th October 2012, the MFSA issued a circular regarding the possible introduction of a rule in the Investment Services Rules for Professional Investor Funds¹ on Cross Sub-Fund Investments.

The Authority circulated the proposed rule and requested that all Compliance Officers advise the Authority whether any cross sub-fund investments were currently being carried out in their respective fund structures.

The deadline for the submission of comments with respect to the Circular was the 16th November 2012.

The Authority received comments on the proposed rule from one member of Malta's financial services industry. On the other hand, the Authority received notification from two Compliance Officers that the PIFs for which they were responsible did not engage in cross sub-fund investments.

A summary of the main comments received and the Authority's position in relation thereto, is provided in Section 2. The Rule which is being proposed for inclusion in the Investment Services Rules for Professional Investor Funds is provided in Section 3.

The Authority's position has been determined after a careful and thorough consideration of the feedback received.

2. SUMMARY OF THE FEEDBACK RECEIVED

2.1. *Cross Sub-Fund Investments would require amendment to Article 84(6) of the Companies Act or the Companies Act (Investment Companies with Variable Share Capital) Regulations.*

The respondent maintained that "as currently drafted Article 84(6) of the Companies Act seems to mandate, the automatic cancellation of any shares purchased by the SICAV. Since the Companies Act does not make any distinctions, this automatic cancellation would appear to take place both where re-purchases are made following a request by investors and where the SICAV purchases such shares for the purpose of cross sub-fund investments. Accordingly, unless this provision is suitably amended, we feel that this provision creates significant doubt as to the legal permissibility and validity of cross sub-fund investments."

The respondent also cited the applicable provision in the Irish Companies Act and draws comparisons between same and the Maltese provision.

¹ Hereinafter referred to as "PIF Rulebook".

Authority's Comments: The Authority agreed with the comments raised and has accordingly proposed amendments to the Companies Act (Investment Companies with Variable Share Capital) Regulations² to disapply Article 84(6) of the Companies Act. The proposed amendment to the SICAV Regulations will be included in Regulation 7 of the said Regulations dealing with multi fund companies as follows:

“7. (1) A SICAV may be constituted as a multi fund company, where in terms of its memorandum of association, its share capital is, or is capable of being divided into different classes of shares where one class or a group of classes of shares constitute a distinct sub-fund of the company:

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

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

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

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

(5) A multi-fund company opting for the segregation of assets and liabilities in terms of regulation 9 of these Regulations, may, in specific circumstances as shall be prescribed by the Authority in the Investment Services Rules and subject to specific and appropriate disclosure in the constitutional documents and the Offering Memorandum or Prospectus of the said Scheme, on behalf of any of its sub-funds and whether by subscription or transfer, acquire for consideration any shares of any of its other sub-funds, and the provisions of article 84(6) of the Act shall not apply.

(6) Multi-fund companies performing the activities prescribed in subregulation (5) prior to the coming into force thereof shall take all necessary measures to comply with the requirements prescribed therein within 6 months from the date of publication thereof in the Government Gazette.

² Hereinafter referred to as "SICAV Regulations".

(7) For the better carrying out of sub-regulation (5), the Competent Authority may issue Investment Services Rules in terms of Article 6(2)(b) of the Investment Services Act.”

The amendments to the SICAV Regulations are currently awaiting publication in the Government Gazette.

2.2. Cross sub-fund investments should not be limited solely to Professional Investor Funds targeting Qualifying and Extraordinary Investors but also extended to UCITS and other types of CISs.

2.2.1. The respondent maintained that there was no legal rationale for limiting cross sub-fund investments solely to Professional Investors funds targeting Qualifying Investors and Extraordinary Investors.

Authority’s Comments: Whilst noting the respondent’s comments, the Authority confirms that for the time being the rule under discussion is being implemented in the PIF Rulebook regulating Qualifying and Extraordinary investors. Following this, the Authority will undertake an exercise on the possibility of introducing a similar rule on cross sub-fund investments for retail schemes and Experienced Investor Funds and a circular in that respect would be issued for the industry for comments in due course.

Furthermore, the Authority wishes to highlight the fact that the introduction of this rule in the PIF Rulebook is without prejudice to the possibility of introducing a different set of rules for Alternative Investment Funds as a result of the transposition process of the Alternative Investment Fund Managers Directive.

2.2.2. The respondent also noted that the distinct patrimony between sub-funds of a multi-fund SICAV that is possible due to the election described in Regulation 9(1) of the SICAV Regulations should afford a cross-investing sub-fund a similar legal and economic effect to an investment by that sub-fund in another fund altogether.

Authority’s Comments: The Authority agreed with the comment raised by the respondent and as a consequence is including in the proposed rule on cross sub-fund investments the requirement that the investment company should 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 SICAV Regulations.

2.3. For QIFs and ExIFs only: the percentage restriction on the maximum cross sub-fund investment should be removed

The respondent maintained that there is no legal rationale for restricting the percentage of cross sub-fund investments by QIFs and ExIFs. The respondent also provided detailed information about the position in Luxembourg and Ireland.

Authority's Comments: The Authority noted the information provided by the respondent on Luxembourg and Ireland.

The Authority also noted that initially, the percentage restriction was included with a view to securing an element of diversification and to prevent the sub-fund investing all or primarily all of its assets in one other sub-fund within the same scheme, resulting in a master-feeder structure.

The Authority maintained that it cannot totally remove the percentage restriction as is being proposed by the respondent. However the percentage threshold has been raised to 50%.

2.4. For QIFs and ExIFs only: the requirement that the constitutional documents (in addition to the offering documentation) make provision for cross sub-fund investment should be removed

The respondent considers that the requirement that both the constitutional document and the offering documentation expressly make provision for cross sub-fund investment to be unduly onerous particularly for existing funds.

Authority's comments: The Authority disagreed with this proposal and is keeping this requirement.

3. PROPOSED RULE

In view of the above, the Authority will be including the following Rule in Parts BII and BIII of the PIF Rulebook:

“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 Scheme and subject to the following:

- (a) the investment company should 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;

- (b) the sub-fund is allowed to invest up to 50% of its assets into another sub-fund or sub-funds within the same scheme;
- (c) the target sub-fund/s may not themselves invest in the sub-fund which is to invest in the target sub-fund/s;
- (d) in order to avoid duplication of fees, where the manager of the sub-fund and the manager of the target sub-fund is the same or (in the case of different managers) where one manager is an affiliate of the other, 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;
- (e) for the purposes of ensuring compliance with any applicable capital requirements, cross-investments will be counted once;
- (f) any voting rights acquired by the sub-fund from the acquisition of the units in the target sub-fund shall be disapplied as appropriate.”

The proposed Rule will come into force once the Companies Act (Investment Companies with Variable Share Capital) Amendment) Regulations have been published in the Government Gazette.

4. CONTACTS

Any queries or requests for clarifications in respect of the above should be addressed to: Dr. Isabelle Agius, Regulatory Development Unit, Tel: 25485359; e-mail: iagius@mfsa.com.mt

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