

# MFSA

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## MALTA FINANCIAL SERVICES AUTHORITY

15<sup>th</sup> September, 2006

**Securities Unit**

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Dear Sir or Madam,

**Re: Proposed Review of the Criteria for Licensing of Overseas Based Collective Investment Schemes**

The Malta Financial Services Authority ("MFSA") is currently reviewing the criteria for the licensing of overseas-based collective investment schemes that carry on an activity in or from Malta in terms of Article 4 of the Investment Services Act, 1994. The proposed amendments mainly relate to the licensing criteria for overseas-based non UCITS collective investment schemes.

Enclosed please find an Explanatory Note summarising the proposed changes.

We look forward to receipt of any comments you would like to make in relation to the above-mentioned changes, which should be submitted in writing by **Friday, October 13, 2006** to:

The Director  
Securities Unit  
Malta Financial Services Authority  
Notabile Road  
Attard BKR 14

E-mail address: [su@mfsa.com.mt](mailto:su@mfsa.com.mt)

Please feel free to contact Mr. James Farrugia should you have any queries or require any clarifications regarding the above.

Yours sincerely,



**Cristina Parlato Trigona**  
Director

*Encls.*

## Explanatory Note

15<sup>th</sup> September, 2006

### Proposed Review of the Criteria for Licensing of Overseas Based Collective Investment Schemes

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#### 1.0 Background

1.1 Article 4 of the Investment Services Act, 1994 (“ISA”) provides that:

*“4. (1) ... no collective investment scheme shall issue or create any units or carry on any activity in or from within Malta unless there is in respect of it a valid collective investment scheme licence.”.*

1.2 The licensing requirement in terms of this article has been applied in the following scenarios:

- i. foreign based schemes which seek a listing on the Malta Stock Exchange (“MSE”);
- ii. foreign based schemes which market their units in Malta directly without the intermediation of investment services licence holders; and
- iii. foreign based schemes which market their units in Malta directly without the intermediation of European investment firms passporting into Malta.

1.3 When UCITS were introduced in the local legislative and regulatory framework in 2004 following the transposition of the EU UCITS Directive, an exemption from the licensing requirement of article 4 of the ISA was granted to UCITS schemes which “market their units” in Malta in terms of the passporting provisions of the Undertaking for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 (regulation 8 of LN 207 of 2004 as amended, hereinafter referred to as “the UCITS Regulations”). In view of such exemption, UCITS schemes were also able to seek a listing on the MSE without the need for licensing.

## 2.0 Proposed approach applicable to the licensing of foreign based collective investment schemes

### A. Promotion/ marketing<sup>1</sup> of foreign based collective investment schemes (both European UCITS and non UCITS) via investment services licence holders/ European investment firms passporting into Malta.

- 2.1 Foreign based schemes whose units are promoted/ marketed into Malta via investment services licence holders/ European investment firms passporting into Malta and which have not sought a listing on the MSE, are currently not deemed to be “*carrying on an activity in Malta*” and are thus not required to hold a collective investment scheme licence in terms of the ISA.
- 2.2 It is being proposed that when foreign based schemes are marketed via investment services licence holders/ European investment firms passporting into Malta, the foreign based schemes shall be deemed to be “*carrying on an activity in Malta*” on the basis that such investment services licence holders/ European investment firms passporting into Malta are carrying out the marketing function on behalf of the schemes. In this instance, the foreign based schemes will be required to seek a collective investment scheme licence in terms of article 4 of the ISA prior to the commencement of the marketing/ promotion of their units in Malta. Certain licensing eligibility criteria will apply – primarily that the scheme and the principal service providers are based and regulated in a recognized jurisdiction. Such schemes will be subject to tailored conditions to be included in a new Part C IV of the Investment Services Guidelines. The new section will also provide for the possible appointment of multiple distributors by the foreign scheme. The licence conditions to be applied will take into account the fact that the scheme is already regulated by its Primary Regulator and reliance will be placed on this, with the MFSA licence conditions being focused on notification requirements rather than approval requirements.
- 2.3 European UCITS schemes may continue to market their units in Malta via investment services licence holders/ European investment firms passporting into Malta – without the need to hold a collective investment scheme licence in terms of article 4<sup>2</sup> – provided that the European UCITS has satisfactorily completed the notification procedure outlined in regulation 8 of the UCITS Regulations.

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<sup>1</sup> The proposed interpretation of “*marketing in Malta*” which will be used for determining whether a foreign based scheme is “*carrying on an activity in Malta*” and which will also be the interpretation of “*marketing*” for the purposes of Regulation 8 of the UCITS Regulations, is dealt with in detail at the end of this Explanatory Note.

<sup>2</sup> Regulation 8 exempts the European UCITS from the requirement to hold a collective investment scheme licence in terms of article 4 of the ISA provided that the notification procedure stipulated in the Regulations has been completed to the satisfaction of the MFSA.

B. Direct promotion/ marketing of foreign based collective investment schemes (both European UCITS and non UCITS), i.e. other than through investment services licence holders/ European investment firms passporting into Malta.

- 2.4 Foreign based schemes which would like to market/ promote their units in Malta – directly – without the intermediation of investment services licence holders/ European investment firms passporting into Malta (e.g. by means of seminars, mailshots etc.) are currently deemed to be “*carrying on an activity in Malta*” in terms of the ISA and are required to hold a collective investment scheme licence prior to marketing/ promoting their units (directly) in Malta. Such licence would only be granted subject to the foreign scheme establishing a local presence. This route has to date never been adopted by any foreign scheme.
- 2.5 A European UCITS scheme may market its units in Malta directly – without the need to hold a collective investment scheme licence in terms of article 4<sup>2</sup>– provided that the European UCITS scheme has satisfactorily completed the notification procedure outlined in regulation 8 of the UCITS Regulations.
- 2.6 MFSA’s position on the direct marketing of foreign based schemes as indicated above will not be affected by the proposed changes.

C. Listing (on the MSE) of foreign based collective investment schemes (both European UCITS and non UCITS) – no marketing/ promotion of units in Malta (either direct or through investment services licence holders/ European investment firms passporting into Malta).

- 2.7 As indicated under point 1.1 above, under the current regulations, the seeking of a listing on the MSE by a foreign based scheme presently amounts to “*carrying on an activity in Malta*” by such scheme and triggers the licensing requirement in terms of article 4 of the ISA. It is proposed that the activity of “*marketing in Malta*”, rather than “*listing on the MSE*” will be the determining concept as to whether or not a licensable activity in terms of article 4 of the ISA is being carried out. Consequently foreign based schemes that are just listed on the MSE (meaning that the units of these schemes are not being marketed/ promoted in Malta – either directly by the scheme or via investment services licence holders/ European investment firms passporting into Malta) will henceforth no longer be deemed to be “*carrying on an activity in Malta*” and will thus no longer be required to hold a collective investment scheme licence in terms of article 4 of the ISA.
- 2.8 European UCITS schemes wishing to list on the MSE will not be required to follow the notification procedures outlined in regulation 8 of the UCITS Regulations – provided that their units are not marketed/ promoted in Malta (either direct or via investment services licence holders/ European investment firms passporting into Malta).

2.9 In summary, whilst the position for European UCITS schemes will not change, the licensing criteria for foreign based non UCITS schemes will change as outlined in Appendix 1.

### 3.0 Marketing/ Promotion in Malta

3.1 It is being proposed that the term “*marketing*” shall capture at least the following scenarios:

Scenario 1: an investment advertisement (as defined by article 2 of the ISA) is issued in Malta marketing/ promoting the foreign based scheme;

Scenario 2: seminars or other meetings are organized in Malta aimed at the general public or at a class or classes of investors with a view to promote the foreign based scheme; and

Scenario 3: a circular/mail-shot or other medium of communication is used with a view to promote the foreign based scheme to persons in Malta.

3.2 For the avoidance of doubt:

- whenever a foreign based scheme is sold exclusively on a one to one basis, by investment services licence holders/ European investment firms passporting into Malta, the foreign based scheme is not deemed to be “*carrying on an activity in Malta*” provided there is no “*marketing*” in Malta as described above.
- whenever an investor in Malta requests and is provided with information (including marketing material) on a foreign based scheme, the foreign based scheme is not deemed to be “*carrying on an activity in Malta*” on the basis that the communication was initiated by the investor.

3.3 It is also being proposed that the IS Guidelines include reference to the fact that investment services licence holders may not market/ promote (within the above-mentioned definition of “*marketing*”) a foreign based scheme unless:

- for European UCITS schemes: The scheme has followed the notification procedure outlined in regulation 8 of the UCITS Regulations (which provides an exemption from the ISA licensing requirement to UCITS marketing their units in Malta);
- for Foreign based non UCITS schemes: The scheme has been granted a collective investment scheme licence in terms of article 4 of the ISA.

#### 4.0 How may the foreign based scheme carry out its marketing activity in Malta?

##### A. For European UCITS:

The marketing conditions are stipulated in the UCITS Regulations which transpose the EU UCITS Directive. Such schemes must satisfy the MFSA that adequate measures have been taken to ensure that facilities are available in Malta for making payments to unit holders, repurchasing or redeeming units and making available the information which European UCITS schemes are obliged to provide. UCITS may satisfy these requirements by appointing one or more investment services licence holders/ European investment firms passporting into Malta (via the establishment of a branch) as distributors.

##### B. For Foreign based non-UCITS:

It is being proposed that such schemes shall henceforth be required to ensure they have a local point of contact both for investors as well as for MFSA (for regulatory/ compliance purposes) which could be satisfied:

- through the appointment of an investment services licence holder as local representative; or
- through the appointment of an EEA investment firm providing services in Malta through the establishment of a branch as local representative; or
- directly by the scheme itself through the opening of an office in Malta to be manned by officials / employees of the scheme (in this case however, the activity undertaken is to be limited to promotion and execution-only sales of the schemes' units without the provision of investment advice which would need to be provided by an investment services licence holder or appropriately authorized European investment firm passporting into Malta).

#### 5.0 Proposed Amendments to the Investment Services Act (Licence and Other Fees) Regulations, 1995 as amended

- 5.1 Whilst the present level of fees will not change, it is proposed that these Regulations be expanded to include an interpretation of term “*carry on an activity*” – to ensure the necessary consistency with the proposed approach referred to above. The term “*carry[ing] on an activity*” shall be deemed to include – but shall not be limited to – marketing, advertising or otherwise promoting as may be further stipulated in Guidelines issued by the MFSA in terms of Article 6 of the ISA. Part B of the current Investment Services Guidelines will be expanded in this regard.

Foreign based schemes which *market, advertise or promote their units in Malta*, will in terms of the proposed revisions to these Regulations be deemed to be *carrying on an activity* in Malta and will thus be subject to the applicable fees stipulated in the First Schedule to this Regulation.

5.2 The First Schedule will also be updated by removing paragraphs (c) and (g). Para (c) outlines the fees applicable to foreign based schemes which do not market, advertise or promote their units in Malta but whose activities are limited to seeking a listing on the MSE. These schemes will no longer be deemed to be carrying on an activity in Malta (Section 2C above refers) and will thus not be required to pay any application/supervisory fees. Similarly, para (g) which applies to foreign based schemes which are authorised by the MFSA for active marketing will be deleted as these schemes will in terms of the proposed amendments be deemed to be carrying on an activity in Malta and will thus be subject to the fee structure stipulated in para (b) of the First Schedule.

## **6.0 Required Amendments**

6.1 Implementation of the above proposals, will require:

- i. amendments to the Investment Services Act (Licence and Other Fees) Regulations – main changes outlined above;
- ii. amendments to the Investment Services Guidelines – details of which will be forwarded in due course; and
- iii. amendments to Chapter 15 of the Listing Rules – details of which will be forwarded in due course.

**APPENDIX 1  
Comparative Table**

Scenario	Present Requirement	Proposed New Position
<p>Foreign based non UCITS scheme marketing its units in Malta directly without the intermediation of Investment Services Licence Holders/ European Investment Firms passporting into Malta.</p>	<p>The Foreign based non UCITS scheme is deemed to be “<i>carrying on an activity in Malta</i>” in terms of article 4 of the ISA and is required to hold a collective investment scheme licence in terms of the ISA before marketing its units in Malta.</p>	<p>No change.</p>
<p>Foreign based non UCITS scheme marketing its units in Malta through Investment Services Licence Holders/ European Investment Firms passporting into Malta.</p>	<p>The Foreign based non UCITS scheme is not deemed to be “<i>carrying on an activity in Malta</i>” in terms of article 4. In such instance, the regulatory requirements set out in Standard Licence Condition 5.32 of the Investment Services Guidelines would nevertheless need to be satisfied.</p>	<p>It is proposed that when foreign based schemes are marketed via investment services licence holders/ European investment firms passporting into Malta, the foreign based schemes shall be deemed to be “<i>carrying on an activity in Malta</i>” on the basis that such investment services licence holders/ European investment firms passporting into Malta are carrying out the marketing function on behalf of the schemes.</p>
<p>Foreign based non UCITS scheme seeking a listing on the Malta Stock Exchange (units of these schemes are not marketed in Malta)</p>	<p>The Foreign based non UCITS scheme is deemed to be “<i>carrying on an activity in Malta</i>” in terms of article 4 of the ISA and is required to hold a collective investment scheme licence in terms of the ISA before marketing its units in Malta.</p>	<p>Foreign based schemes seeking a listing on the MSE (provided that the units of these schemes are not being marketed/ promoted in Malta) will no longer be deemed to be “<i>carrying on an activity in Malta</i>” and will thus no longer be required to hold a collective investment scheme licence in terms of article 4 of the ISA.</p>