

**Feedback statement issued further to Industry responses to
MFSA Consultation on the Proposed Amendments to Chapter 11
of the Listing Rules**

MFSA Ref: 1-2017

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Introduction

On 1st February 2017 the Malta Financial Services Authority (the “Authority”) issued a Consultation Document after receiving comments from stakeholders on practical difficulties encountered in relation to takeover bids (herein after referred to as a “bid”) which had taken place in Malta over the past few years. As the comments received by the Authority had covered a spectrum of topics in Chapter 11 of the Listing Rules, it was decided to request interested parties to put forward suggestions on how Chapter 11 of the Listing Rules could be improved and to address the difficulties that had been encountered, keeping in mind of course the provisions of Directive 2004/25/EC.

Three of the contributions received by the Authority in response to the consultation paper were from legal firms that had been involved in one or more recent bids, and three more were received from financial intermediaries also involved in such bids.

The Authority initially held a number of informal discussions with interested parties in order to obtain first-hand feedback on what areas of the Chapter were seen as requiring amendment and to better understand issues that may have been faced before, during or after the bid process. Discussions were then followed up with written contributions to the Authority. Informal discussions were also held with those who had commented on the provisions in Chapter 11 but had not responded to the published Consultation Paper. Unfortunately the follow up to the consultation paper has taken longer than had originally planned.

The Authority would like to thank all those who showed an interest in the consultation for their frank discussions and for the valuable insight given. All contributions will undoubtedly aid towards the improvement of Chapter 11.

Feedback Statement

Further to the consultation document, the MFSA is now issuing a feedback statement on the comments received. An outline of the main comments received is provided below.

1. The Role of the Authority in a bid

The role of the Listing Authority during a bid, it was felt, needed clarification. It was remarked that with Listing Rule 11.4 speaking of ‘supervising a bid’ and Rule 11.19 mentioning that an ‘offer document shall be communicated to the Authority before it is made available to the public’ there was the possibility of some ambiguity arising as to the Authority’s role in the process.

The Takeover Bids Directive 2004/25/EC aims to ensure equal treatment in Europe for all companies launching takeover bids and equally to ensure protection and fair treatment of investors in companies that have securities admitted to trading in a Member State are subject to a takeover bid. The Directive make it clear that each Member State should designate an authority to supervise those aspects that are governed by the Directive, safeguard and protect the interests of holders of securities of companies governed by the law of Member State and to ensure that parties to takeover bids comply with the rules made pursuant to the Directive, thus defining the designated authority's supervisory role

Recital 6 to the Directive makes it clear that to be effective takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should provide for the possibility of exceptions and derogations implying that a supervisory authority should be open to dialogue within the bid process while however respecting the general principles set out in Article 3.1 of the Directive.

2. Structure of Chapter 11 – Takeover Bids

Comments were received on the structure of Chapter 11, which was seen by some contributors as a simple transposition of Directive 2004/25/EC into the Listing Rules. The comments received suggested that a redrafting of a number of the rules would greatly help improve the usability of the Chapter from a practical perspective.

The comments reflected the feeling that the transposition of certain aspects of the Directive into the Listing Rules should have been more holistic and that consideration should be given to expanding the takeover rules into a 'Takeover Code' which would embody more than just a 'rule book'.

The inclusion in Chapter 11 of Listing Rules on Regulated Companies, contained in Listing Rules 11.12 to 11.14, was seen as being unnecessary as Regulated Companies were regulated by specific acts and it was suggested that consideration should be given to removing the Listing Rules referring to Regulated Companies from the Chapter.

Other comments related to providing greater detail on some areas covered by the Rules and the repositioning and renumbering some of the Rules to make the Chapter more coherent.

3. Definitions and use of Defined Terms – Listing Rule 11.3

Difficulties were also being encountered, it was reported, in the interpretation of some sections of Chapter 11, with practitioners feeling that guidance had to be sought from the Authority from time to time on a number of Listing Rules which they felt lacked clarity.

Suggestions were made on the terminology used in the Chapter defining the parties to a bid, namely the terms 'Offeror Company' and the 'Offeree Company'. It was suggested that

consideration should be given to substituting these terms with the more easily understood terms ‘Bidder’ and ‘Target Company’.

The Authority’s attention was also drawn to the definition of the term ‘Persons Acting in Concert’ in the Listing Rules as this had, as defined in the Chapter, raised a number of issues of interpretation. A more comprehensive redrafting of the definition was suggested.

Definition of the term ‘control’ in the Chapter, it was felt, deserved more clarity, especially when used in the context of Listing Rules 11.8-11.14.

4. Voluntary and Mandatory Bids

The Listing Rules as drafted in Chapter 11, apply to both voluntary and mandatory bids with only certain Rules applying to mandatory bids, as for example, Listing Rules 11.21 and 11.38-11.40. Respondents suggested it would be helpful if a section referring to the conduct of voluntary bids were included in the Chapter and this is being considered.

5. The use of Conditional Agreements in a bid

The Authority has been questioned more than once on the extent of the use of conditional agreements in a voluntary bid especially when it is perceived that the agreement may have included shareholders that extend beyond the body of majority shareholders and as such include shareholders in the public float.

In the normal course of events a party contemplating the takeover of another company initiates discussions with the major shareholders of the intended target, discussions which, if fruitful, could lead to the concluding of a conditional agreement on the acceptance of the terms of a voluntary bid, subject to certain conditions being fulfilled. These agreements, accepted as being conditional, are not considered to trigger a mandatory bid as they do not in themselves imply a transfer of voting rights of the target shareholders to the bidder.

While the use of such agreements with major shareholders of a target company is normal in the run up to a bid process, they become questionable where conditional agreements are concluded with a percentage of shareholders that effectively remove the choice of remaining shareholders to either accept or refuse a voluntary bid before these become subject to ‘squeeze out’ provisions.

The Listing Rules, it is felt, may need reviewing to ensure that the rights of the remaining shareholders are protected and their choice as to whether to accept or reject a voluntary bid remains effective.

6. Consideration for a Bid

The need for Listing Rules 11.23 and 11.24 to be amplified on was raised, as was the need for the independent expert's report required by LR 11.23 to be meaningful. The manner in which the two Listing Rules have been drafted has led these two rules to be interpreted in a manner which requires nothing more than the submission of a confirmation by an independent expert that the bidder has the funds necessary to complete the bid.

It has been proposed that such a report should be a meaningful document to which shareholders to whom the offer is being made can usefully refer to fully understand the nature and value of the consideration being offered. An outline of what should be contained in the independent expert's report could, it has been suggested, be annexed to Chapter 11.

7. Cash Consideration

The question was asked whether the need to have a cash alternative offered as consideration for a voluntary bid was necessary. The Listing Committee has reviewed the need for cash consideration as an alternative to any other consideration offered, including Securities, and considers that, given the nature of the domestic market, and the fact that activity on the market is limited, the requirement for a cash alternative should be maintained, even when a voluntary bid is made.

The need or otherwise for the term 'cash' to be defined was also indicated in this context. This point was raised as in a recent bid the cash alternative offered was in the form of an agreement for part of the consideration to be made at a future date. The term 'cash consideration', it was felt implied an immediate payment in cash. Any settlement at a future date should be considered as a promissory payment, even if this was a settlement in the form of cash.

8. 'Squeeze-out' and 'Sell-out' rights

Almost all respondents raised issues related to Listing Rules 11.46 to 11.49 relating to 'Squeeze-out' and 'Sell-out' rights and the use of these rights in a bid, the 'fair price' in a 'Squeeze-out' and the requirement for an independent expert to be appointed to determine a price to be 'fair and reasonable' when the 'Sell-out' right is invoked.

Article 15 of Directive 2004/25/EC states that the right of 'Sell-out', the other side of the coin to 'Squeeze-out' rights, may be invoked after the bidder reaches the acceptance threshold of 90% of the voting rights of the target shareholders. The right of 'Sell-out' becomes available to those shareholders who have not accepted the offer in situations where the bidder has not, subsequent to reaching the 90% threshold, exercised the right of 'Squeeze-out' for the remaining shares. Article 15.5 of the Directive, states that 'consideration offered in the bid shall be presumed to be fair where, through the acceptance of the bid, the offeror has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the bid'.

9. Fair Price after reaching the 90% threshold

The Listing Rules should, for clarity's sake, be amended to incorporate the text of Article 15.5 of Directive 2004/25/EC, which states that, following a voluntary bid, the consideration shall be deemed to be fair when, through acceptance of a bid, the bidder has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the bid.

The inclusion of the text of Article 15.5 would be preferable to relying on Listing Rule 11.1.2 for the interpretation of a 'fair price' in these situations. Listing Rule 11.1.2 states that 'In the event that any of these Listing Rules are in conflict with the provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, the Directive shall prevail.'

10. Timing Issues

10.1 Obligation to Announce – Listing Rule 11.15

The Listing Rule states that a decision to launch a bid is to be made within '*seven days*' of the acquisition of a controlling interest. The wording of this rule would confusingly appear to apply to all bids when in practice it covers only mandatory bids. Contributors feel that this needs to be made clearer.

10.2 Acceptance Period–Listing Rule 11.27

The Listing Rule states that target company's shareholders must be given sufficient time to reach a properly informed decision on the acceptance or otherwise of the bid. Suggestions were received that the minimum acceptance period should be reduced from four weeks to twenty one days as this was deemed to be sufficient. This would be in line with Article 7 of the Directive which states that the period should be not less than two weeks and not more than ten weeks. It is felt that shortening this time period to twenty one days should be acceptable.

11. The Role of the Board of Directors

A valid contribution was made as to the need for the Listing Rules to amplify on the role a target Board of Directors should play in the bid process with regard to advice given to shareholders when a bid is made. The role of the directors and the Board as a whole is a topic that merits further discussion and clarity, especially when considering that many of the directors of the companies listed in Malta are also the major shareholders of their companies. The role of Directors in a bid could be usefully defined in an appendix to Chapter 11.

12. Confidentiality

A final remark was made that the Listing Rules at present lack any confidentiality provisions and it has been suggested that a redrafted Chapter should reflect the principles embodied in the

Market Abuse Regulation 594/2014. This, it was suggested, could take the form of an appendix to Chapter 11.

Article 10 of the Regulation covers the ‘unlawful disclosure of inside information’ which it defines as information arising where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties while market abuse encompasses unlawful behaviour in the financial markets and, for the purposes of the Regulation, should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation.

The Regulation as such addresses both issuers intending to approach the market under the Listing Rules and, in relation to Chapter 11 of the Listing Rules, with regard to market soundings of ‘a person intending to make a takeover bid for the securities of a company or a merger with a company’.

13. The Way Forward

The MFSA has examined the Feedback statements and will be now be working on the redrafting of the Chapter 11 following which the amended draft rules will be issued for consultation.

14. Contacts

Any queries or requests for clarifications in respect of the above should be addressed by email on capitalmarkets@mfsa.com.mt.

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