

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Listing Authority Feedback Statement further to Industry Responses to MFSA Consultation document on the proposed amendments to Listing Rule 4.55 and the introduction of other Listing Rules regarding Advertisements dated 26th July 2011

[1.0 Introduction]

On 26th July 2011, the MFSA issued a consultation document regarding the proposed amendments to Listing Rule 4.55 and the introduction of other Listing Rules regarding Advertisements. The purpose of the consultation document was to propose amendments to the existing Listing Rules and to introduce Listing Rules to regulate advertising material other than a prospectus, the contents of which, stimulate interest in the issuer and its' activities other than regular advertising or promotional activity which is done in the normal trading activities of the issuer and which is done by an Applicant/Issuer prior obtaining approval of admissibility to listing of securities.

The Authority received comments from six members of Malta's financial services industry. The main comments received and the Authority's position in relation thereto, is provided in Section 2.0. The Authority's position has been determined after a careful and thorough consideration of all the feedback and recommendations received.

Section 3.0 of this Feedback Statement provides a copy of the revised Listing Rules, which are applicable as from the date of this Feedback Statement.

[2.0] Main Comments Received and the Listing Authority's position

[2.1] Rationale behind the proposed Listing Rules

[a] *Comments received:* Clarification was requested regarding the rationale behind the Authority's decision to extend the scope of regulation from the existing framework. Some of the feedback received argued that the scope of the Listing Rules should be limited to advertisement related to a specific offer to the public of securities or to an admission to trading on a regulated market and aiming to specifically promote the potential subscription or acquisition of securities which is in line with the definition given in the Commission Regulation No 809/2044 of 29 April 2004. It was argued that the existing regulatory framework regarding Advertisement is sufficient and investor protection is adequately addressed by the present provisions found in the Listing Rules transposing the Prospectus Directive and in the provisions of the Investment Services Act.

Also some of the feedback stated that there is no evidence that there is co-relation between any pre-launch marketing campaigns and the subscription for investment instruments. Nor there is a co-relation between any pre-launch marketing campaigns and the investor's objectivity to evaluate the potential investment in the applicant/issuer and its securities.

[b] *Authority's position:* It is important to clarify that the intention of the Authority is to extend the scope of regulation beyond the existing legislative framework, that is, beyond the

existing Listing Rules and the provisions of the Investment Services Act. As indicated in the Consultation Document, the Authority would like to regulate advertising material which is not directly linked with the admissibility to listing of the securities but which create hype with respect to the Applicant/Issuer which could be misleading to the investing public.

The European Commission has published a proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (ESMA). In this draft Omnibus Directive one of the amendments being proposed is empowering ESMA to develop regulatory technical standards to specify the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription. The aforesaid proposed amendments by the European Commission show that the need to regulate advertisements before the publication of a prospectus is felt even at a European level. One may argue that such proposed amendments are evidence that there is concern on pre-launch marketing campaigns even at European level.

[2.2] Definition of Advertisements

[a] *Comments received:* A number of respondents pointed out that the proposed Listing Rules do not provide a definition of Advertisements. Some respondents proposed that this definition should reflect the definition of investment advertisement found in the Investment Services Act. Guidance is also being requested as to whether information meetings organised by the issuer/sponsoring stockbroker which usually take place before the prospectus is approved are considered as advertisement within the ambit of prohibited advertisement.

[b] *Authority's position:* The comments made by a number of respondents that the proposed rules do not incorporate a definition are not completely correct since Article 2 of Commission Regulation 809/2004, which EC Regulation is directly applicable, provides a definition. In fact Article 2 of Commission Regulation 809/2004 states that Advertisement means announcements (a) relating to a specific offer to the public of securities or to an admission to trading on a regulated market and (b) aiming to specifically promote the potential subscription or acquisition of securities. Furthermore Article 34 of Commission Regulation 809/2004 regulates "*Advertisements related to an offer to the public of securities or to an admission to trading on a regulated market*". The Authority also notes that the definition of Advertisements in Article 2 of the Investment Services Act being quoted by many feedback letters links advertisement directly to the offer of securities as follows "*investment advertisement*" means any form or medium of advertising or promotional activity, other than a prospectus, the contents of which, either invites persons, or contains material calculated to induce persons:

- (i) to become or offer to become participants in a collective investment scheme; or
- (ii) to subscribe for or otherwise acquire or underwrite an instrument; or
- (iii) to purchase or otherwise procure an investment service"

Since the Authority's objective is to also regulate advertisements which go beyond the direct promotion of the issue of securities a new definition of Advertisements is being included in the definition section of the Listing Rules.

The Authority has carefully considered whether the present market practice to hold information meetings organised by the issuer/sponsoring stockbroker which usually take place before the prospectus is approved, should be prohibited or not. The Authority is of the opinion that such meetings should only be made once the prospectus is approved by the Listing Authority.

[2.3] Interaction of the Investment Services Act and the Listing Rules

[a] *Comments received:* One of the respondents pointed out that in the present situation, promotional activity in the financial markets is already regulated by the Investment Services Act (ISA) and argued whether at law the Listing Authority can in effect re-define an advertisement and extend this definition to areas which are not regulated by the primary legislation. Also it is noted that the proposed listing rules may create a two-tiered structure of regulation which may give rise to inconsistencies. By way of example, the promotion of a bond that is to be admitted to listing on a regulated market would be subject to the listing rules model whilst the promotion of a collective investment scheme is not despite the audience for that promotional activity typically likely to be the same.

[b] *Authority's position:* The Authority does not agree with the comments made by this respondent. It is the Authority's opinion that the powers granted to the Listing Authority in terms of Articles 11 and 13 of the Financial Markets Act are wide in scope and allow the Listing Authority to issue such rules.

The Authority also considered the comment being made that the proposed Listing Rules may create a two-tiered structure of regulation which may give rise to inconsistencies. The Authority understands that collective investment schemes do not advertise in the same manner as other issuers. Also the Authority is not aware of instances where a collective investment schemes aggressively advertised the scheme before the approval of a prospectus.

[2.4] Negative effects on the issuer's business

[a] *Comments received:* Some of the respondents commented that the prohibition of advertising not related to the admission to listing of securities may have negative effects on the issuer from a business perspective, disadvantaging the issuer from unlisted companies. Prohibition may be more damaging when considering the length of period during which advertisement cannot be made.

[b] *Authority's position:* The Authority does not agree that the prohibition of Advertisements for the period indicated in the new Listing Rule 4.1A will have negative effects on the issuer from a business perspective which will disadvantage the issuer from unlisted companies.

[2.5] Guidance on the period contemplated in Listing Rule 4.55B

[a] *Comments received:* It was pointed out that the period contemplated in Listing Rule 4.55B should be clarified. The proposed Listing Rule 4.55B prohibits advertisements during the period starting from when an Applicant/Issuer intends to apply for Admissibility to Listing or has submitted its application to the date it receives the Listing Authority's approval of its Admissibility to Listing. Some of the respondents highlighted the fact that a person may have an intention well before action on the application process is actually taken and therefore if the term is restrictively applied it may be interpreted that advertisement is prohibited a long time before an application is considered or actually materialise.

[b] *Authority's position:* The Authority would like to clarify that it was never the intention of the Authority to prohibit advertising for an extensive period of time before the submission of an Application for Admissibility to Listing.

The Authority understands that at least one month before the actual submission of a draft prospectus to the Listing Authority, the Applicant/Issuer would have already appointed the relevant advisors to work on the draft prospectus and therefore it may be reasonable deduced that one month before the draft prospectus is submitted to the Authority the Applicant/Issuer's intention can be ascertained. Accordingly the Authority is proposing a new Listing Rule requiring the Applicant to notify the Listing Authority with its' intention to submit an Application for Admissibility to Listing at least one month before submitting the application and the first draft of the prospectus. The Authority is proposing to amend Listing Rule 4.55B to clarify that advertising is prohibited from when such notification is submitted to the Listing Authority till it is in receipt of final written notice of approval from the Listing Authority. This proposal will eliminate the subjectivity of the criteria of an intention envisaged by the original proposed Listing Rule.

[3.0] Amended Listing Rules

[3.1] *Amendments to the definitions section of the Listing Rules by inclusion of a new definition of Advertisements*

“Advertisement means announcements directly or indirectly relating to a specific offer to the public, or part thereof, of securities or to an admission to trading on a regulated market and aiming to specifically promote the potential subscription or acquisition of securities.”

[3.2] *Amendment to Chapter 4 by inserting New Listing Rule 4.1A*

“4.1A An Applicant shall notify the Listing Authority with its’ intention to submit an Application for Admissibility to Listing at least one month before submitting the application (Appendix 4.1) and the first draft of the prospectus.”

[3.3] *Amendments to certain provisions of Chapter 4 dealing with Advertisements*

Advertisements

“4.54 Where Malta is the Home Member State, the Listing Authority shall have the power to exercise control over compliance with the requirements of Listing Rules 4.55 to 4.57 relating to advertising activity involving the Admissibility to Listing of Securities.

4.55 Advertisements related to any Securities which have been authorised as Admissible to Listing or which are to be listed or traded on a Regulated Market shall be clearly recognisable as such, easily readable and comprehensible.

4.55A An Applicant or Issuer, as the case may be, is obliged to ensure that the content of any such advertising:

4.55A.1 is accurate, factual and not misleading;

4.55A.2 does not contain any unverifiable claims; and

4.55A.3 is consistent with the information contained in the Prospectus, if already published, or with the information required to be in the Prospectus if the Prospectus is published afterwards.

4.55B An Applicant shall refrain from advertising in any manner, whether directly or indirectly, from the date of the notification submitted in terms of Listing Rule 4.1A and until it is in receipt of final written notice of the approval of the Admissibility to Listing from the Listing Authority.

4.55C Hidden, surreptitious and other indirect forms of advertising which are not strictly compliant with these Rules are prohibited.

4.55D In the case of any doubt as to what constitutes an advertisement in terms of these Listing Rules, the Issuer shall contact the Listing Authority without delay, prior to any proposed publication, requesting a determination as to whether such material constitutes an advertisement. An Issuer shall refrain from publishing any such material in the absence of such a determination.

4.56 In any case, any advertisement issued for the purpose of announcing the Admissibility to Listing of Securities, shall contain a statement that a Prospectus has been or will be published and the addresses and times at which copies of the Prospectus are or will be available to the public.

4.57 Information concerning the Admission to Listing on a Regulated Market disclosed in an oral or written form, even if not for advertising purposes, shall be consistent with the information contained in the Prospectus.”