

Consultation Procedure

Proposals for Legal Notices / Ministerial Regulations and for new laws and amendments to existing laws

Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly these proposals are not binding and are subject to changes and revisions following representations received not only from licence-holders and other involved parties, but also following the necessary review and vetting by the Office of the Attorney General and the relevant Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind.

In the case of primary legislation in particular, Bills may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance.

Note for Consultation

(Investment Services Act, 1994)

Background

The MFSA is currently considering a number of amendments to the provisions of the Investment Services Act, (Cap.370), hereinafter referred to as “the Act” or “the ISA”. These amendments primarily relate to:

- a. the transposition of Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (the “Acquisitions Directive”).
- b. new approval requirements relating to the mergers and reconstructions of investment services licence holders; and
- c. further clarification of the legal regime applicable to recognised fund administrators in terms of Article 9A.

Interested persons are kindly asked to submit any comments which they may have in relation to this draft legislation, in writing, to **the Director – Securities Unit, by not later than the 24th March 2009.**

A. Amendments relating to the transposition of the Acquisitions Directive.

The main aim of the Acquisitions Directive is to improve considerably the process leading to supervisory approval for the acquisition of a qualifying shareholding in licensed entities, including investment services licence holders. This Directive seeks to achieve this aim by clarifying the criteria and the process of prudential assessment in order to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof.

Essentially, the Acquisitions Directive, *inter alia*, amends article 10 of the Markets in Financial Instruments Directive (“the MIFID”), which relates to the process leading to the approval by the competent authority of shareholders and members having qualifying

holdings in investment firms. The relative MiFID provisions were transposed in article 10 of the Investment Services Act and hence this article is to be significantly revised to transpose the changes brought about by the Acquisitions Directive. In this regard, two additional articles, notably articles 10A and 10B also needed to be added.

Furthermore, since the Acquisitions Directive provides a new definition of “qualifying holding”, the MFSA is proposing to substitute the current corresponding definition in article 2 of the Act to transpose the amendments found in the said Directive and to provide a more faithful transposition of the term “qualifying holding” as found in the Directive.

The proposed new provisions in Article 10, 10A and 10B will only apply to investment services licence holders.

The New Article 10

Currently, the requirements of article 10 only apply to “any person”. In terms of the proposed amendments to article 10, “persons acting in concert” will also be subject to the requirements of article 10. An indication of what constitutes “persons acting in concert” will be provided in Investment Services Rules to be issued in due course.

Therefore, the provisions of article 10 will be triggered off when any person or persons acting in concert acquire a qualifying shareholding or further increase a qualifying shareholder in an investment services licence holder as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% (currently 33%) or 50% or so that the investment services licence holder would become its subsidiary.

The provisions of article 10 shall also apply in the case of a disposal or a reduction of a qualifying shareholding. Such disposals and reductions of qualifying shareholdings will need to be notified to MFSA. In contrast, the process for a proposed acquisition requires the MFSA’s approval to be sought and granted before an acquisition can proceed.

The information to be submitted in relation to the proposed acquisition will reflect the list of information found in the *Guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC* (the “Guidelines”) issued by the 3L3 Committees of European Financial Supervisors (CEBS, CESR and CEIOPS). This information will be set out in Investment Services Rules to be issued for consultation in due course.

New Article 10A

The new proposed article 10A sets out the period of time within which the MFSA is to carry out the assessment in relation to the proposed acquisition. In terms of the proposed amendments, the MFSA is bound to acknowledge receipt of a notification from a proposed acquirer within two working days. It will have 60 working days within which to make a decision following the said acknowledgment and may only interrupt this period,

for a maximum of 20 days to request further information. This period may be interrupted no later than the 50th working day of the assessment period.

The Acquisitions Directive provides for the possibility to extend the interruption period up to a maximum of 30 working days (rather than 20) periods for third country acquirers or persons not authorised in the European Union.

In terms of the proposed amendments, the MFSA may, on completion of the assessment, decide to refuse the proposed acquisition. This can only be done if there are reasonable grounds for doing so on the basis of the criteria set out in the Acquisitions Directive - and which will be transposed in the Investment Services Rules - or if the information provided by the proposed acquirer is incomplete. If the MFSA decides to refuse an acquisition, it must inform the acquirer in writing and provide its reasons, within two days of taking the decision. Where the MFSA does not refuse the proposed acquisition in writing within the assessment period, it shall be deemed to be approved.

New Article 10B

The Acquisitions Directive requires supervisory authorities in Member States to work in consultation with each other if the proposed acquirer is one of the persons listed in the draft article 10B.

B. New approval requirements relating to the mergers and reconstructions of investment services licence holders.

A new Article 10C is being proposed in terms of which all the directors and qualifying shareholders of an investment services licence holder shall apply for the Authority's consent before the investment services licence holder :

- a) sells or disposes of its business or any significant part thereof;
- b) merges with any other company;
- c) undergoes any reconstruction or division; or
- d) increases or reduces its nominal or issued share capital or effect any material change in voting rights.

C. Further clarification of the legal regime applicable to recognised fund administrators in terms of Article 9A.

The proposed amendments to Article 9A of the Investment Services Act, 1994 which refers to the regulation of persons providing fund administration services mainly serve to clarify the scope within which to which the MFSA may issue Investment Services rules to regulate such persons. Accordingly, in terms of the proposed amendments, MFSA also will be empowered to issue Investment Services Rules to:

- a. lay down the requirements and conditions for granting recognition to persons wishing to provide fund administration services and to provide for the refusal of such recognition and for the variation, cancellation and supervision thereof;
- b. provide for the imposition of administrative penalties up to a maximum of €45,000 or for other administrative sanctions in the case of any breach of the provision of Article 9A of the Act or of any of the applicable Investment Services Rules or of any of the conditions attached to a recognition certificate, where any.

In addition to the above, it is being proposed that a right of appeal to the Financial Services Tribunal be introduced from MFSA's decision to refuse, vary, cancel or suspend a recognition and from the imposition by MFSA of an administrative penalty in terms of the applicable Investment Services Rules.

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