MBB
MALTA BUSINESS BUREAU

EU LISTING ACT

Position Paper **May 2023**

A position paper drafted in collaboration between the Malta Business Bureau and The Malta Institute of Financial Services Practitioners.

Background

The Listing Act includes a package of proposals that are part of a list of measures introduced to further develop the EU's Capital Markets Union (CMU).

The Listing Act package aims to provide European companies with a variety of financing options that can be claimed against reasonable terms. Presently, the EU market is dominated by debt finance from banks as opposed to capital market financing. The reinforcement of the EU's Capital Markets Union aims to rectify this by providing companies with simplified access to different funding streams.

The Listing package includes:

- a Regulation amending the Prospectus Regulation, Market Abuse Regulation, and the Markets in Financial Instruments Regulation;
- a Directive amending the Markets in Financial Instruments Directive and repealing the Listing Directive; and
- a Directive on multiple-vote shares.

Making capital markets more accessible and competitive, without prejudice to the investor's protection, is strategically relevant. This is of particular importance for EU SMEs, for which access to capital markets is costly. The MBB remains supportive of having a competitive and efficient capital markets and looks forward to such an initiative that improves the EU's capital markets whilst ensuring that there is sufficient investor protection.

The Maltese Context

The vast majority of companies in Malta, including listed entities, can be considered to fall within the SME category.

Malta has three regulated markets:

1. the Official List (retail market)
2. The Junior Market (also known as the Alternative Companies List, which is being phased out) and
3. The Institutional Financial Securities Market (IFSM) (wholesale market)

In Malta, start-ups and SMEs are also able to utilise Prospects. Prospects is a multilateral trading facility (MTF) operated by the Malta Stock Exchange (MSE) and serves as a trading platform for debt and equity securities issued by companies. Malta does not currently have an EU growth market. Offers to the public made to more than 150 persons would trigger the obligation to publish a prospectus, which authorisation would fall under the remit of the Malta Financial Services Authority (MFSA), which is also the NCA in terms of all the Regulations/Directives affected by the listing package.

Annex A includes article by article comments and positions on the Listing Act proposals.

The Malta Business Bureau is the EU business advisory organization of The Malta Chamber and the Malta Hotels and Restaurants Association. It is also a partner of the Enterprise Europe Network.

The Malta Institute of Financial Services Practitioners is a forum for the continuous exchange of ideas between various professions, including bankers, insurers, stockbrokers, lawyers, accountants and trustees.

For questions or more detailed information please contact EU Affairs Manager Daniel Debono and Policy Executive Christine Said on infobrussels@mbb.org.mt

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and a partner of the Enterprise Europe Network;

Annex A:

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises.

The Maltese market is predominantly a retail market and the presence of institutional investors is very low in comparison to other European regulated markets, accordingly the investor protection element proposed through the listing package is a favourable recommendation. Whilst it is important to consider possible simplifications of the prospectus and listing requirements, such as limiting the number of pages of an IPO prospectus for SMEs issuers to 300 (including the summary), allowing issuers to draw up the prospectus in English independently from the official language accepted by the national competent authority or abolishing the requirement to print a prospectus and incentivizing the use of electronic forms, their relevance in the local context is minor.

Comments on amendments to Regulation (EU) 2017/1129 - Prospectus Regulation

Article 1

Article 1 Amended Paragraph 4 : New Art 4(***da***) - The requirement to publish a prospectus is being removed for fungible issues consisting of up to 40% of the number of securities already admitted to trading on the ***same*** market. This could possibly make fund raising more efficient for companies seeking to do so via a new share issue (eg through a rights issue) where the amount being offered falls within the 40% threshold, and as such is supported.

New Article 4(***db)*** – The requirement to publish a prospectus is removed for secondary issuers, subject to continuous listings of at least 18 months, not in relation to a takeover / merger / division or in cases of insolvency / restructuring procedures. When this exemption is availed of, a document in terms of new Annex IX is to be produced. Secondary issuers are expected to already be transparent with the market and as such, when such companies tap the capital markets on subsequent occasions with fungible securities to those already listed, a lot of the information that is typically disclosed in a prospectus is already available in the public domain, both on the issuer as well as on the securities (given the fungibility). Such process of putting together a prospectus which includes information which is already found in the public domain can be lengthy and costly, and as such, this proposal is welcome.

This proposal may be supplemented by more disclosure requirements on a continuous basis on issuers' websites, possibly in a more structured manner, in order to ensure that there would not be information which would have otherwise be available in a prospectus not available in the public domain.

Similarly, the amendments proposed to Article 5 are welcome for the reasons mentioned above in relation to Article 4, as and where applicable.

Proposal to remove the requirement to make the prospectus available in 'durable medium' – this proposal is welcome as it reflects the current reality that most stakeholders seek to read or refer to the prospectus document online and very few, if any these days request a physical copy of the prospectus. Furthermore, this would also fit well within the 'E' of ESG sustainability initiatives in terms of reducing the unnecessary printing of documents.

Article 3(2) Amendment- The proposed wording in this article is welcome as it will allow issuers for amounts less than €12 million to make an offer to the public without the need to publish a prospectus, as the option for NCAs to exempt issuers has been converted to an obligation.

Article 6 (2) Amendment – The proposed wording expects standardisation of prospectuses. In our view, this will also imply that any additional information that is being requested by the local national authority to be appended to prospectuses (such as the Financial Analysis Summary in terms of the MFSA Listing Policies and the property valuation reports in terms of Chapter 7 of the Capital Markets Rules) would no longer be possible. This ties in to the supplementing of transparency and continuing obligations mentioned earlier, whereby it ought to be expected of issuers to make available more information to the public, including forward-looking statements / figures, and any such information which would enable investors to make an informed decision. This would alleviate the need to produce one-off documents to support an issue, while at the same time ensures consistent disclosure of information by issuers.

Article 9(2) Amendment – We note and welcome the proposal to reduce the timeframe until annual Universal Registration Documents become issuable without the need to submit to the NCA for approval. We believe that this ties in nicely with the exemption for secondary issuers that have securities already issued on a capital market and which seek to issue fungible securities from issuing a prospectus (Article 4(db)) as well as the new prospectus format, the EU Follow-On Prospectus (in terms of Article 14b).

Article 16 (1) Amendment – The proposal with regards to the risk factors omits an important element which is currently in the Prospectus Regulation, being the order of risk factors in each category. As such, it is being recommended the re-introduction of the idea behind the latter part of the fourth sub-paragraph in Article 16(1), as follows "In each category, the most material risk factors shall be mentioned first, in accordance with the assessment provided for in the second subparagraph".

Amendments to Regulation (EU) 2017/1129

Article 1

Insertion of Article 15a – EU Growth Issuance Document

Article 17(1)(a) amendments – The proposed extension from two to three working days ought to allow investment firms to manage any such withdrawals comfortably, particularly in larger issues. On the other hand, from an investor perspective, it is imperative to allow investors sufficient time to assess the impact of the final price on their investment and seek investment advice if and when necessary. As such, this additional day is welcome. From an issuer perspective, the additional day until listing, and thus when funds are passed on to the issuer, should not disrupt any of the issuers' plans if they are aware of such possibility a priori.

Article 17(1)(b) – The proposal to add wording whereby a supplement is required if the final price is 20% (or more) than the maximum price disclosed is considered a steep percentage, particularly since this is 20% over the maximum, which implies that from the minimum, such percentage would be even much higher. The suggested proposal is for this percentage to be lowered to 10% over the maximum price, beyond which, issuers are expected to issue a supplement.

Article 21 (1) amendment– The proposed reduction in time for the availability of the prospectus before the end of the offer is not recommended. Investors need to have sufficient time in order to assess the contents of a prospectus and take appropriate action from an investment perspective, including seeking investment and other professional advice. Furthermore, this may also be an issue for institutional investors that may need to liquidate some of their positions in order to access new IPOs, where three days before the closing of the offer period could prove to be quite short until the processes related thereto are carried out (which would typically include, assessment of the contents of a prospectus, proposal to investment committee, access to funding which may include liquidation of existing positions on the market, and the lodging of an application before the offer closes). It is recommended that the current six working days are retained.

Article 23 amendment - The Investors' Right of Withdrawal - It is not deemed as ideal to further facilitate the investors' right of withdrawal within the Capital Markets Recovery Package. As the current Capital Market Rules state; ''Investors who have already agreed to purchase or subscribe for the Securities before the supplement is published shall have the right to withdraw their acceptances within two working days after the publication of the supplement, provided that the new factor, mistake or inaccuracy referred to above arose before the final closing of the Public Offer and the delivery of the securities. That period may be extended by the Issuer. The final date of the right of withdrawal shall be stated in the supplement.'' In this case, if there was an extension to the investors' right of withdrawal, this might disproportionately increase the burdens for the issuer as this would increase uncertainty and lengthen the timeframe before an issuance can be concluded.

Article 2
Amendments to Regulation (EU) No 596/2014 – Market Abuse Regulation

Article 19 - Paragraphs 8 and 9 will be replaced by: Article 8 – The proposed increase in the minimum reportable amount in relation to transactions by PDMRs should be retained at the current €5,000. This is particularly important for a small market like Malta where at €20,000

this may be a significant portion of the trading volumes of some illiquid securities. Such limit can then be increased up to €50,000 in terms of the proposed Article 9, taking into account market conditions, as applicable, by national competent authorities.

Amendments to article 17: *(1) Narrow down the scope of the obligation to disclose inside information, and (2) enhance legal clarity by giving a non-exhaustive list of what information needs to be disclosed and when; (3) include a specific obligation to keep inside information confidential; (4) clarify the conditions under which issuers may delay disclosure of inside information; and (5) modify the timing of the notification of the delay to the NCA:*

Narrowing the scope of the disclosure obligation to exclude public disclosure in the context of intermediate steps in a protracted process is most welcome as this will (a) reduce the administrative burden imposed on issuers, especially those engaged in large, complex transactions, and (b) avoid excessive disclosure to the market which may mislead investors due to an information overload.

The proposed introduction of an obligation for issuers to ensure the confidentiality of inside information (subject to the ban on insider dealing) until the moment of disclosure. While the market has thus far always understood the importance of keeping inside information confidential (not least due to article 10 and article 17(7) of the existing Regulation), having a black-on-white article clarifying the requirement will be helpful. That said, the introduction of an obligation to immediately disclose inside information to the public in the case of a leakage may be a bit problematic due to its similarity to the existing obligation in article 17(7) which requires public disclosure to be made as soon as possible once the confidentiality of inside information, the publication of which is being delayed, is no longer ensured. For example, if the publication of inside information is being delayed, and the confidentiality of that information is compromised, should public disclosure be made "immediately" under the proposed new article 17(1b) or should it be made "as soon as possible" under the existing article 17(7)? Furthermore, the proposed new article 17(1b) also seems to imply that an issuer may not publish inside information, as long as it keeps it confidential, without adopting the delay of disclosure rules and procedures set out in article 17(4).

Article 17(4)(b) - Furthermore, the amendment to article 17(4)(b) (i.e. replacing the requirement that a delay of disclosure would only be permitted if it is not likely to mislead the public with a list of conditions which must be met to permit a delay of disclosure) also provides more clarity and is therefore welcome. That being said, given that the new conditions introduced in the proposed amendment to article 17(4)(b) effectively replicate ESMA's guidelines on situations in which the delay of disclosure is likely to mislead the public (the "ESMA Guidelines"), should the proposed amendment be made, the status of the existing ESMA Guidelines will also need to be updated since the introduction of the amendment would, in essence, make the ESMA Guidelines legally binding.

The proposal to require issuers to inform the NCA of their *intention* to delay the disclosure of inside information is, in our view, is unnecessary and will in all likelihood have the effect of dissuading issuers from utilising the delay of disclosure mechanism, since issuers may be inclined to receive NCA approval / go-ahead (even if informal) before proceeding to delay the disclosure of inside information, thereby making the entire delay of disclosure procedure subject to a *de facto* approval requirement. Furthermore, the proposed amendment could in some instances be burdensome to issuers if circumstances change following the initial notification to the NCA which would then require further follow-up disclosures / notifications to be made, such as a situation where a deal falls through or requires extension and modification etc.

Article 18 Amendments: *Simplify the insider lists regime for all issuers:*

The proposed amendments to article 18 are agreed with. Given the amendment to article 18(9) which effectively waters down ESMA's mandate to develop implementing standards relating to insider lists, guidance or clarification ought to be obtained on the format of the permanent insider list referred to in the amended article 18, specifically whether this permanent list would need to be kept in the form set out in Commission Implementing Regulation (EU) 2016/347.

Article 19(12) Amendments: *Raise the threshold above which managers shall notify their transactions and expand the scope of exempted transactions during the closed period:*

Given the particularities of the local market, we would recommend retaining the current threshold of €5000 in respect of manager transaction notifications.

Moreover, with reference to the amendments to article 19(12) in particular, the introduction of the phrase "or to make transactions" in the context of exemptions to the prohibition against trading during a closed period makes for a helpful clarification given that it clearly captures activities other than mere trading. The amendment to article 19(12)(b) widens the extent of the financial instruments which can avail of the exemption, whereas the amendment to article 19(12)(c) effectively eases the burden of structuring pre-agreed trading plans in such a way that the execution of a trade by a PDMR does not fall within a closed period. In other words, it would seem that the execution of a trade by a PDMR during a closed period would be allowed subject to the requirement of submitting a PDMR notification to the MFSA and the issuer.

Article 30 (j) – The proposed new administrative penalties, which are already very high, can be even more taxing on small undertakings operating as investment services firms (or other persons responsible in terms of Article 30(2) (e) to (g)).

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2014/65/EU to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC.

Amendments to Directive 2014/65/EU

Article 1

Article 4(1)(12): Changes to Article 4(1)(12) - SME growth market to read as follows:

'SME growth market' means a MTF, or a segment of a MTF, that is registered as an SME growth market in accordance with Article 33;';

This change allows for a segment of the MTF to be registered as an SME growth market (not necessarily all the MTF be registered / allows for SME Growth Market.

From a Maltese perspective, this means that Prospects (and any similar MTFs if and when registered) can allow a specific segment to be considered as an SME Growth Market for the purposes of MiFID. This could allow the utilisation of the same market to cater for the benefits envisaged by the SME Growth Market, and as such, would be welcome.

Amendments to Article 24 - The objective of these changes relate to investment research which is made available for SME listings. The fact that the majority of the listings on the regulated market in Malta are of an SME nature has not restricted or dissuaded local investment firms from producing research related to the primary issue. It is a fact that some investment firms may opt to not cover a specific issuer, however, it is rarely the case that an issuer is not covered by any of the investment services firms, if any. The changes proposed aim to promote research on SMEs, which, in our view, will not result in any change to the way investment services firms cover the local capital markets.

Amendments to Article 33 - The changes proposed to Article 33 (which deals with SME Growth Markets) reflect the changes made to the definition of the term SME Growth Market. These are supported once and if Malta opts to create an SME Growth Market.

New – Article 51a - This article deals with proposed specific conditions for admission of shares to trading. From a local perspective, the equivalent of these provisions is included in the Capital Markets Rules (CMR) of the MFSA, specifically Chapter 3. A51a(1) is similar to CMR 3.11, which requires that an applicant's market capitalisation should be at least €1 million (or total equity, if market value cannot be assessed). The proposed wording in A51a(1) is more adequate as it takes into consideration as well forward-looking aspects of a company and allows for different currencies, and as such is supported.

A51a(4) and (5) - also delve into free float, which the Union is proposing to reduce from 25% to 10%. This is welcome, especially with a market which is not as deep as the local capital markets, where 25% of a group of companies is seemingly impossible in most instances as the local market cannot absorb eg €100m share offer for a group with a valuation of €400m. This point has always been discussed with the national competent authority where the law of

numbers should overcome the law of percentages – having a listing of 10% of a large group listed is probably more liquid than 25% of a very small IPO, as was also demonstrated through submissions supplemented by statistics from local secondary market trading.

The articles are also making it mandatory for national competent authorities to ensure that the 10% free-float is applicable at all times, and where this is not the case, 'a sufficient number of shares is distributed to the public to fulfil the requirement' of 10%. While this is recommended, in order to contribute to liquidity and depth of secondary markets, it, however, may be construed as not be aligned to the spirit of 'pre-emption rights' afforded to shareholders of a company, especially when these do not form part of the free-float in terms of national laws / rules. Further discussions need to take place in respect of this proposal to ensure that founding members or shareholders that have supported the company with their significant shareholding are not put in a disadvantageous position because of this rule.

Article 51a - Specific conditions for the admission of shares to trading -The newly introduced Article 51a *inter alios* provides that "*Member States shall require that regulated markets ensure that at any time at least 10% of the subscribed capital represented by the class of shares concerned by the application for admission to trading is held by the public.*" This reduces the current requirement (which is quite strictly upheld by the MFSA at the point in time that the admissibility to listing of shares is being sought) of 25% of the listed shares being in the hands of the general public down to 10%. This would be an extremely welcome change since this requirement is one of the main stumbling blocks for local IPOs where family run SMEs are usually unwilling to give up control of a minimum of 25% of their company. The 10% threshold would allow the current shareholders of the Company to retain the level of control acceptable to them whilst still permitting them to seek financing through the capital markets. This would also encourage local SMEs to test the waters as listed entities in preparation for a future exit strategy/succession planning of the original owners. This suggested amendment is likely to result in significant increase in IPO activity on the local market.

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market.

Preamble 3 - Multiple-vote share structures are an effective mechanism to enable controlling shareholders to retain decision-making power in a company, while raising funds from the public. Multiple-vote share structures are a form of a control enhancement mechanism involving at least two distinct classes of shares with a different number of voting rights. Under such structures, at least one of the classes of shares has a lower voting value than another class (or classes) of shares with voting rights. The share carrying the superior amount of votes is a multiple-vote share.

This concept is already possible in terms of the local Capital Markets Rules (CMR) – vide CMR 3.15 which refers to a class to be listed – this refers to the regulated market, where most of

the companies listed thereon are SMEs. Furthermore, the Companies Act also allows for different classes of shares. There are some companies listed on the Official List that already apply this concept, and which has recently been used by some group of companies in order to circumvent the issue with the 25% free3-float rule which is applied rigorously in Malta, without exceptions, as it allows for groups to list a different class of shares and ensure that the offering in that share class is in line with the free-float requirements of the national Capital Markets Rules.