UFFIĊĊJU TAT-TRIBUNAL GĦAL
SERVIZZI FINANZJARJI
ĊENTRU MALTI TA' L-ARBITRAĠĠ
33, TRIQ NOFSINHAR,
VALLETTA VLT 11

MALTA

OFFICE OF THE FINANCIAL
SERVICES TRIBUNAL
MALTA ARBITRATION CENTRE
33, SOUTH STREET,
VALLETTA VLT 11

Dr Ian Stafrace LL.D. Chairman

Dr. Nicholas Valenzia LL.D Membru

Mr. Robert Ducker B.Sc. (Hons) Financial Services (UMIST), ACIB, Membru

FST 06/20

JD Capital p.l.c

vs.

MFSA

Illum, 30 ta' Gunju, 2021

It- Tribunal

Ra l-appell interpost mill-Appellanta liema appell gie intavolat fis- 16 ta' Ottubru 2020 li fih l-appellant sostna:

A. THE MFSA DECISION

1.1 *In its Decision, the MFSA imposed an administrative penalty of five thousand Euro (€5,000) in terms of Article 221(1) of the Prevention of Financial Market Abuse Act ("PFMA") since it considered the Company to be in breach of Article 18(1)(c) of the Market Abuse Regulation ("MAR").*

2.2 *For reasons explained below, and as will be explained in further detail during the proceedings before this Tribunal, MFSA's Decision constitutes an abuse of MFSA's discretion, and is manifestly unfair.*

B. PRELIINARY PLEAS

2. *Lack of Fair Hearing and Impartiality - Manifest Unfairness*

And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause . . . .[1]

2.1 *On a preliminary basis the Appellant is raising a serious breach of its fundamental right to a fair hearing in the determination of its own civil rights and obligations as protected by Article 39 (2) of the Constitution of Malta and Article 6 (Right to a Fair Trial) of the European Convention on Human Rights* ***("ECHR").***

2.2 *It is submitted that the manifest breach of Appellant's fundamental right to a fair trial constitutes "manifest unfairness" thereby giving a right of Appeal before this Tribunal under Article 21 (9)(b) of the Act on the basis of which this Tribunal has the power to reverse the Decision under Article 21(13)(a) of the Act.*

[1] THOMAS HOBBES, LEVIATHAN 102 (Michael Oakeshott ed., 1962) (describing "the law of Nature")

2.3 *MFSA's "minded letters" are in themselves strong evidence of the Authority's prejudice. The terminology itself clearly indicates MFSA's prejudice placing the receiving party in a position where it has to defend itself before a biased and partial Authority given that the Authority's "mind" is essentially conditioned to decide in the manner communicated in its "minded letter", This is in clear breach of the principles of Natural Justice and constitutes a manifest unfairness.*

2.4 *One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest.*

2.5 *The Appellant respectfully submits that the whole process impinges on its right to a fair hearing because it has been found guilty as charged by the MFSA acting as judge and prosecutor only being given the opportunity to defend itself against an already declared pre-determined minded position by its adjudicator that brought the charges against it! The limited grounds of appeal before this Tribunal under Article 29(9) of the Act which is then further aggravated by an even more limited right of appeal to the Court of Appeal from any decision of this Tribunal under Article 21 (14) of the Act "on a question of law only", makes matters worse.*

2.6 *This was also the situation in the UK which was subsequently reformed to bring it in line with the European Convention on Human Rights and the 1998 UK Human Rights Act so as to ensure a fair hearing. Prior to the reform in 2000, the Joint Parliamentary Committee on Financial Services and Markets concluded that 'there has been a perception that the Financial Services Authority's internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and also that the FSA will be able to act as prosecutor, judge and jury' . Due to the strong belief that the design of the decision-making process (which did not provide for a division of the said functions) lacked fairness, the legislator sought*

to separate these functions thereby creating a separate Regulatory Decisions Committee responsible for reaching decisions on disciplinary matters referred to it by the investigators. Although still forming part of the Financial Conduct Authority (following reforms to the UK Financial Services Act 2012) by deciding on its behalf, the members of the Regulatory Decision Committee are independent and are not involved in other matters of regulation.

2.7 *In Dubus SA vs France*[2]*, the European Court of Human Rights found a violation of Article 6(1) due to the apparent bias created by the lack of a clear division of functions within the French Banking Committee (FBC). The applicant, an investment company registered in France was reprimanded by the FBC on violations of French regulatory law. The FBC had carried out the relevant investigation procedures and issued an inspection report followed by disciplinary proceedings against the applicant. The applicant raised the anomaly that the FBC is not only investigating and prosecuting but it is also acting as a judicial authority by hearing and adjudicating whether the applicant was in fact in breach, thus acting as a judge in its own case and in turn breaching the principle of nemo judex in causa propia, Here the Applicant claimed that disciplinary proceedings undertaken by the FBC lacked independence and impartiality which are essential to a fair hearing and thus was in breach of Article 6(1) of the ECHR. The Strasbourg Court remarked that the lack of any clear distinction between the functions of prosecution, investigation and adjudication in the exercise of the FBC's judicial power, was not compatible with the requirement of an "independent and impartial tribunal" under Article 6(1). It added that while these fused functions may not necessarily render the proceedings unfair of themselves, it created an appearance of "prejudgment" by the said Authority. The Court held that despite the French government's defence that different arms of the institution undertook the functions of prosecuting and adjudication, in practice it gave the impression that one is prosecuted and tried by the same entity.*

[2] Dubus SA vs France, Application no: 5242/04 (ECHR, 11 June 2009)

2.8 *The very same can be said of the way MFSA is handling such cases. The appearance of "prejudgment" is so manifestly evident that it beggars belief. The investigatory and decision-making powers within the Authority are not sufficiently separate. In line with the Dubus case, such sanctions should be imposed by an independent and impartial tribunal. Justice must not only be done but must appear to be done. It follows that the mere appearance of a breach of Appellant's right to a fair trial gives rise to the manifest unfairness required to vitiate MFSA's Decision which ought to be struck down by this Tribunal.*

3. *<u>Abuse of Discretion</u>*

3.1 *The Appellant respectfully submits that the Decision constitutes an abuse of discretion in that, even if one were to consider, for argument's sake, that the Authority was right in imposing a penalty, the penalty imposed is not commensurate with the alleged failure of the Appellant.*

3.2 *The imposition of a penalty of €5,000 is excessive especially in the light of the facultative wording of the Market Abuse Regulation as shall be explained below. The Appellant respectfully submits that the Authority's Decision constitutes an error of judgement is clearly unreasonable, arbitrary and not justified by the facts and the law applicable to this case.*

4. PLEAS ON THE MERITS

FURTHER ABUSE OF DISCRETION AND MANIFEST UNFAIRNESS

BY THE MFSA

3. *The Market Abuse Regulation ("MAR")*

3.1 *As pointed out by the Authority in its Decision the MFSA "is responsible for preventing and detecting market abuse as stipulated under the MAR ... an important obligation in fulfilling the Authority's statutory objectives of protecting consumers". The Appellant is totally in agreement with the Authority's statement and recognizes the Authority's important role. The Appellant, however, humbly submits that no breach was committed which could in any way impinge on the consumers protection. The Appellant was well aware that none of the persons on the Insider List held any holdings in relation to the Company. Therefore, in short there was an impossibility of an insider trading breach.*

3.2 *Furthermore, the wording of the MAR is clear and unequivocal. As stated by the Company in reply to the Authority's minded letter, the MAR state that the insider list should be provided to the competent authority "as soon as possible upon its request"*[3]*. The term "as soon as possible" does not require a huge interpretative effort. It means what it says – as soon as possible. The appellant humbly submits that it would be fair to state that term could be paraphrased "as soon as whoever is required to do something is in position of doing it". In both instances i.e. in 2018 and in 2020 this is what happened. Although the Appellant does not consider that there is any issue with the 2018 remittance of the insider list since the Company ultimately met the deadline albeit upon being given a number of extensions, in 2020 the list was sent the moment the Company secretary was in a position of sending it. This will be further elaborated upon during the hearing of this appeal, however, the Company in its reply to the Authority's minded letter made it amply clear as to what lead to the "delay" (not breach) in the sending of the insiders list. When one considers that all this was happening in the midst of the COVID-19 pandemic lockdown and that no repercussions whatsoever*

[3] Article 18 (1) (c) of REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (market abuse regulation)

resulted from the purported delay then, it is humbly submitted that the Authority's response was exaggerated, draconian and constitutes a huge abuse of discretion.

4. *Letter sent to Company secretary's personal email address*

4.1 *By its own admission the Authority acknowledged "the fact that the MFSA letters were not physically sent to the Company's registered address" but instead "soft copies of the letters were sent to the personal email address of the Company Secretary". The Appellant humbly submits that the email address of the company secretary is not the proper channel through which such communications should be sent. Communications to a company should be addressed to its registered address. Prof Andrew Muscat in his Principles of Maltese Company Law states the following: "The reason for requiring a company to have a registered office is that since the company has a legal but not a physical existence, it is necessary to know where the company can be found, where communications and notices may be addressed and where documents may be served on it. ... The registered office is one of the places where written pleadings may be served on the company"[4]. Although Prof. Muscat goes on to mention that certain acts may be served upon the company secretary in terms of the Code of Organizational and Civil Procedure – Chapter 12 of the laws of Malta, the code does not contemplate the serving of such documents or communications via the personal email of a company's company secretary. While such a development would be welcome, provided that a proper official register of emails of the various company secretaries is kept, it would be utterly unfair that a company secretary is held responsible for the company's communications in the lack of proper legislation to this effect.*

5. *Conclusion*

[4] Muscat Andrew, Principles of Maltese Company Law, Second Edition, Malta University Press

In view of the above, the Appellant respectfully requests this Tribunal to reverse, revoke and set aside the Decision in its entirety.

Ra r-risposta imressqa mill-Awtorita Appellata li fiha, rrispondiet ghall-appell interpost u sostniet:

Preliminary

In the first place, the Authority submits that the appeal has been filed late and should be dismissed.

The decision of the Authority was dated 11th September 2020 and on the same day it was notified to the appellant by means of an email.

As results from the annexed Dok. A by means of an email sent on Friday 11th September 2020 at 10:24 Alistair Cuschieri from the MFSA communicated the decision, now being appealed, to appellant company and its officials.

As results from the annexed Dok. B the same email results as having been delivered almost instantly.

As results from the annexed Dok. C, the MFSA had on the 24th March 2020 formally issued a "Notification about Interim Measures for the Processing of Physical Documentation". This was notified to MFSA's licensees, including the appellant. In terms of this notification, also issued in view of the Covid-19 pandemic, the Authority had laid down that:

"Outgoing Documentation

The MFSA shall be submitting all documentation including, but not limited to, documents related to authorisation, supervision and enforcement in pdf format or through the relevant MFSA portals where applicable. Original signed documents will be dispatched at a future date.

Documentation sent by email should be treated as official MFSA communications. Recipients are therefore expected to act on such communications upon receipt by email rather than waiting for the receipt of the signed true copy.

This procedure will remain applicable until the MFSA issues further communications. The MFSA encourages all persons and entities that are licensed, registered, enrolled, recognised or authorised in any other form by the MFSA, as well as applicants and prospective applicants to cooperate fully with these measures."

Thus effectively on the 11th September 2020, the Appellant's were duly, validly and legally notified with the Authority's decision which they are now appealing.

In terms of article 21(8) of Chapter 330, an appeal needs to be filed within thirty (30) days from the date of the decision. This sub article is very clear and categorical, and states:

"(8) An appeal within the terms of sub-article (9) to the Tribunal shall be made in writing explaining clearly the grounds for the appeal by not later than thirty days from the date the decision or act in question has been notified to the aggrieved person, and the Tribunal shall proceed to deal with any matter before it with utmost urgency and shall give its decision without delay."

The appeal was filed on the 16th October 2020, well after the expiry of the thirty day period established by law.

It is worth noting that in the case Hermione Bugeja vs Malta Financial Services Authority, decided by this same Tribunal, it was held stated that "kull notifika li ghandha ssir ghal finijiet ta' l-Artikolu 21(8) tal-Kap. 330 ghandha ssir b'mezzi li huma idonji biex jippruvaw is-success tan-notifika, u d-data preciza meta twettqet tali notifika."

Other observations made in this decision state: "in-notifika hija ndispensabbli sabiex ... it-terminu [ta' tletin jum] jibda ghaddej" and that "l-obbligu tan-notifika ... jimplika wkoll li d-decizjoni tigi notifikata bil-miktub, billi guridikament, "notifika" tfisser proprju il-konsenja formali ta' att miktub lill-persuna destinata li tercevih, jew lill-persuni awtorizzati jircievu l-att ghaliha"

These statements do not distinguish between physical or electronic delivery and as long as these conditions are satisfied an email cannot be deemed not to constitute a notification, more so when the MFSA formally notified appellants regarding the new mode of service. The condition for a valid service are satisfied in this case because (i) the email is a notification; (ii) it is a notification in writing; (iii) it was received by the person destined to receive it (as seen by Dok. A and Dok. B); (iv) the email addresses to which it was sent are a generic email address of the company and two email addresses of the company secretary – all email addresses used by the MFSA to communicate with the company in the past. In addition, the two email address of the company secretary are both email addresses used by the company itself to formally communicate with the MFSA.

In view of the above the appeal was filed late and should be summarily dismissed with costs against same appellants, who out of their own actions forfeited their right of appeal.

On the Merits

The submissions being made on the merits of this case are without prejudice to the preliminary plea being raised and sustained.

In virtue of its decision, the MFSA imposed an administrative penalty of five thousand Euros (Eur5,000) in terms of Article 22(1) of the Prevention of Financial Market Abuse Act (hereinafter the "PFMA"), since it considered the appellant to be in breach of article 18(1) (c) of the Market Abuse Regulations (hereinafter the "MAR").

The Authority humbly submits that this decision is just and deserves to be confirmed.

The Authority shall undertake to reply to the grievances raised by Appellants in the same chronological order in which they are raised. The headings used are the same ones used by the Appellant and in no way do they denote any acquiescence by the Authority.

Lack of fair hearing and Impartiality – Manifest Unfairness

The appellant states that the decision of the appellant constitutes a serious breach of its fundamental rights to a fair hearing and is in breach of Article 39(2) of the Constitution of Malta and article 6 of the European Convention on Human Rights (ECHR).

Appellant goes on to say that in view of this fact, the decision is manifestly unfair, and hence there is the element of manifest unfairness that is required under article 21(9) of Chapter 330 to quash the decision of the MFSA.

This argument on the part of the Appellant is legally flawed on the following grounds:

(i) Let us for a moment, absolutely without prejudice, go along with the argument being made by the Appellant and dato ma non concesso, just for this brief moment accept the reasoning being made by Appellant that:

- The decision of the Authority is in breach of the Constitution and the ECHR as there was a lack of fair hearing and impartiality; ERGO

- The decision is manifestly unfair.

If one were to accept this reasoning, then all decisions given by the MFSA would be automatically manifestly unfair, and the content of article 21(9) (b) would be a hollow piece of legislation that could be translated into: if you appeal the decision of the MFSA will be automatically overturned. Evidently this was not the intention of the legislator, and the reasoning being raised by appellant cannot be accepted, as it would lead to this unreasonable and illogical fallacious conclusion.

(ii) *The determination of whether there is any breach of article 39(2) of the Constitution or of article 6 of the ECHR, is not something that this Tribunal can determine. This Tribunal has no vires to make such a consideration. It is the Constitutional Court that has the power to make this determination. This Tribunal cannot presume, as it is being requested to do, that there is a breach of Constitutional rights of the Appellant.*

(iii) *The Authority when giving its decision, performed its duties in strict adherence to the way the law presently stands. If the appellant feels that the manner in which the law is drafted, namely the PFMA and the MFSA Act, then the Appellant should attack the law and not the Authority, who acted strictly in compliance with the law. If the Authority were to abdicate its responsibilities and assign its decision making powers to another entity, as is being suggested by the Appellant, then the Authority would be in breach of the law, and it would only be done that the decision given would be illegal and consequently null. It is evident that the grievance being raised by appellant in this respect, is not aimed at the Authority but it is, rightly or wrongly, aimed at the legislation in virtue of which the Authority Acts – and this Tribunal cannot and should not determine such a grievance.*

(iv) *Without prejudice t the above the Authority also rebuts that there was no fair hearing by the Authority in arriving at the decision whereby the Appellant was filed. As will be proved in the case, should the need arise, the Authority has in built safeguards and structures specifically designed to ensure that there will be a fair hearing, and that the persons deciding on the imposition of the penalty are different from those who would have investigated the case in question.*

Abuse of Discretion

The appellant argues that the MFSA abused its discretion in view of the fact that the penalty of €5,000 was too high and not commensurate with the Appellant's failure

It is important to note that in terms of article 22 (1) of the PFMA, The Authority could have imposed a penalty of up to €1,000,000. This in view of the seriousness of shortcomings in complying with the PFMA obligations.

An imposition of €5,000 when the law allowed the Authority to impose a penalty of up to €1,000,000 certainly cannot be said to be an abuse of discretion!

Appellant refers to his failure as an alleged failure. This is misleading. The Appellant actually failed and not allegedly failed. The Appellant actually did not submit what he was legally bound to submit.

<u>Further abuse of discretion and manifest unfairness by the MFSA</u>

A rebuttal of the arguments raised under this heading in the appeal necessitates a discussion into what the actual shortcomings of the appellants was.

In terms of article 18 of Regulation (EU) No. 596/2014 of the European Parliament and the Council on market abuse, also known as the Market Abuse regulations, (hereinafter "MAR"), entities such as the appellant have a strict and ongoing duty of furnishing the regulator with a list of persons who are insiders. This is the most important tool that a Regulator, such as the MFSA, has to ensure that there is no insider dealing going on, and effectively no market abuse. A regulated entity who is requested to submit a list of insiders, must submit this list of insiders as soon as possible. The MFSA is also the competent authority mentioned in the same MAR.

It resulted that the Appellant was repeatedly and consistently late in the submission of the list of insiders requested by the Authority, notwithstanding the fact that remiders were sent.

Appellants have securities listed on the Malta Stock Exchange (MSE) namely Eur5,000,000 JD Capital plc 5% Unsecured Bonds 2028. Trading in these securities on the MSE commenced on the 25th May 2020.

In view of the fact that appellants has financial instruments admitted to trading , it is required to draw up and keep an updated list of insiders in terms of the MAR.

Although the appellant was supposed to have an updated list of insiders, the MFSA twice requested this list, and on both occasions the list were not handed in a reasonable time, in breach of article 18(1)(c) of the MAR. In terms of article 18(1)(b) of the same regulations, appellants had a duty to keep their list of insiders updated at all times. In view of this ongoing duty, there should not have been any hesitation on the part of the appellant to furnish this list when requested.

The delays of the appellant were the following:

The first delay arose on 9 August 2018 when the Authority requested the appellants to submit their list of insiders (hereinafter "LOI") by not later than the 31 August 2018. On 6 September 2018, the Company was sent a reminder where the deadline was extended to 14 September 2018. A further reminder was sent to the appellant on 27 September 2018, as the appellant had once again failed to submit its updated LOIs within the stipulated deadline, extending the deadline to 28 September 2018. The updated list was eventually submitted to the Authority on 28 September 2018.

The second delay occurred on 27 April 2020 where the Authority sent a letter requesting JDC to submit its updated LOIs by not later than 30 April 2020. On 4 May 2020, the Appellant was sent a reminder by the Authority where the deadline was extended to 6 May 2020. The Appellant once again failed to submit the LOIs on time and MFSA officials decided to follow up with a phone call. In this regard, the Appellant explained that both the Authority's emails (dated 27 April and 4 May respectively) had been received in the 'Junk Folder' and hence, was not aware of the Authority's request and subsequent reminder. Following the phone call, on the same date, the Appellant sent an email to the Authority explaining that it should be able to revert back by close of business 11 May 2020 (latest 12 May 2020). By 13 May 2020, the Authority was still not in receipt of the Appellant's updated LOIs and hence, the Authority issued a formal letter whereby the Appellant was given a final warning, requesting the Appellant to submit its updated LOIs by not later than close of business 14 May 2020. The Appellant only submitted the updated LOIs to the Authority on the 20th May 2020

The Authority as the Competent Authority cannot allow such returns to be handed in so late without taking action against the licensed entity. The information requested is one of the most important tools that the Authority has in controlling market abuse, and the absence of the

appellant to furnish such lists, was hindering the MFSA from exercising its obligations of preventing market abuse.

It is important to keep in mind that insider trading (which this tool is designed to prevent) is a most serious offence carrying a penalty of up to Euro 15 million.

In so far as the arguments of appellants that the words "as soon as possible" mean that appellant could have furnished the documentation whenever it was convenient from them, cannot and should not be interpreted in the loose manner being suggested by appellants, particularly in view of the fact that appellant should have at all times kept an updated list of interested persons available.

It is also humbly submitted that the argument raised by Appellants that non of the persons in the Insiders List had any holdings in relation to the Appellant Company is hardly an argument that can be made since an insider may choose to purchase, or choose not to purchase.

Letter sent to Company Secretary's Personal Email Address

The last limb of the appellant's appeal has already been discussed above in discussing the regulation issued by the MFSA as to how notification was to be effected by electronic means, and in this respect as well the grievance raised is unfounded.

In view of the above it is humbly submitted that the decision of the Authority, should be confirmed in toto and that this appeal should be rejected with costs against the Appellants.

Ra is-sentenza tat-Tribunal tad- 19 ta' Mejju 2021 permezz ta' liema giet michuda l-eccezzjoni preliminari imressqa mill-Awtorita;

Ra id-dokumenti u l-provi sottomessi mill-partijiet;

Sema it-trattazzjoni tal-partijiet u ra li l-appell gie differit ghall-lum sabiex jigi deciz;

Ra' l-atti kollha tal-kaz

Kunsiderazzjonijiet tat-Tribunal:

1. Illi l-appellant qeghdha tilmenta mill-multa ta' hamest elef Euro (€ 5000) fuqha imposta mill-Awtorita permezz tad-decizjoni tal- 11 ta' Settembru 2020.

2. Illi l-istess multa giet imposta a bazi ta' l-Artikolu 22(1) tal- Prevention of Financial Market Abuse Act [5]. Dan, skond, l-istess Awtorita appellata, peress illi l-appellata kisret il-provvedimenti ta' l-artikolu 18(1)(c) tar-Regolament (EU) numru 596/2014 [6].

3. Illi skond l-istess Artikolu 22(1) tal- Kap. 476:

> *"22(1) Mingħajr preġudizzju għas-setgħat, funzjonijiet udmirijiet mogħtija lill-awtorità kompetenti kif hawn f'dan l-Att, ir-Regolament dwar l-Abbuż tas-Suq jew kull liġi oħra li tapplika,meta l-awtorità kompetenti tkun sodisfatta li l-komportament ta' xipersuna jkun jammonta għal ksur ta' xi wieħed mill-Artikoli 14 u15, l-Artikolu 16(1) u (2), l-Artikolu 17(1), (2), (4), (5) u (8), l-Artikolu 18(1) sa (6), l-Artikolu 19(1), (2), (3), (5), (6), (7) u (11) ul-Artikolu 20(1) tar-Regolament dwar l-Abbuż tas-Suq, l-awtoritàkompetenti tista' b'avviż li jingħata bil-miktub u mingħajr il-ħtieġata' smigħ fil-qorti, tieħu dawn is-sanzjonijiet u miżuriamministrattivi li ġejjin: .....*
>
> *(j) dwar persuni ġuridiċi, sanzjoni pekunjarjaamministrattiva li ma tkunx ta' iżjed minn: ....*
> *(iii) miljun euro (€1,000,000) għal kull ksur tal-Artikoli 18, 19 u 20 tar-Regolament dwar l-Abbuż tas-Suq."*

4. Illi l-episodju illi wassal ghall-vertenza odjerna kien il-fatt illi l-appellanta resqet il-lista tal-persuni kkunsidrati bhala "insiders" tardivament, u cioe mhux fit-terminu lilha moghti mill-Awtorita.

5. L-Appellanta resqet numru ta' aggravvji li fil-qosor huma:

   a. Lack of Fair Hearing and Impartiality – Manifest Unfairness;
   b. Abuse of Discretion;
   c. L-applikazzjoni zbaljata tar-Regolament dwar l-Abbuz tas-Suq; u
   d. Il-mod li bih l-Awtorita ikkomunikat ma' l-Appellanta;

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[5] Kap. 476 tal-Ligijiet ta' Malta

[6] Dawn ir-Regolamenti huma identifikati bhala il-"Market Abuse Regulation" ("Regolament dwar l-Abbuz tas-Suq) fl-artikolu 2 tal- Kap. 476

L-Ewwel Aggravvju:

6. Illi l-Appellanta targumenta illi l-Awtorita ma agixxietx skond il-parametri tas-smiegh xieraq u imparzjalita. In sostenn ta' dan l-Appellanta taghmel referenza ghall-artikolu 39(2) tal- Kostituzzjoni u l-artikolu 6 tal- Konvenzjoni. L-Appellanta targumenta illi tal-ksur tad-drittijiet taghha jikkostitwixxi "manifest unfairness" u b' hekk hemm dritt ta' appell quddiem dan it-Tribunal 21(9)(b) tal- Kap. 330.

7. Illi certament dan it-Tribunal m' ghandu l-ebda gurisdizzjoni li jevalwa lanjanza a bazi ta' dak li tipprovdi il-Kostituzzjoni jew il-Konvenzjoni u dan in kwantu tali lanjanza titratta il-harsien tad-drittijiet tal-bniedem. Il-gurisdizzjoni ta' dan it-Tribunal hija marbuta ma dak li jipprovdi l-artikolu 21 tal- Kap. 330. Illi tant huwa hekk, illi fl-aggravvju taghha, l-appellanta targumenta u tipprova tinkwarda l-operat ta' l-Awtorita appellata taht decizjoni li tkun "manifest unfairness" skond l-artikolu 21(9)(b) tal- Kap. 330.

8. Illi l-Artikolu 21(9)(b) tal-Kap. 330 jipprovdi illi:

21 (9) talba għad-deċiżjoni tat-Tribunal għandha tkun, għar-raġunijiet miġjuba mill-appellant – .....
(b) jekk id-deċiżjoni tal-awtorità kompetenti tikkostitwixabbuż ta' diskrezzjoni jew tkunx inġusta manifestament

9. Illi kif diga inghad, it-Tribunal huwa marbut bil-gurisdizzjoni moghtija minnu skond il-Ligi, u ghaldaqstant certament ma jistax janalizza l-ilment ta' l-appellant taht l-ottika ta' l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni.

10. Illi l-appellanta [7] kienet mitluba [8], tramite numru ta' talbiet, sabiex taghti lista ta' persuni ikkunsidrati bhala "insiders". Din it-talba saret a bazi ta' dak li jipprovdu ir-

[7] Skond il-paragrafu 1(21) ta' l-Artikolu 3 tar-Regolament l-Appellanta tikkwalifika bhala "issuer" li huw definit bhala: *'issuer' means a legal entity governed by private or public law, which issues or proposes to issue financial instruments, the issuer being, in case of depository receipts representing financial instruments, the issuer of the financial instrument represented.*

[8] L-ilment dwar kif giet ikkomunikata t-talba se jigi trattat taht ir-raba aggravvju.

Regolament dwar l-Abbuz tas-Suq u dan stante li l-Appellanta hiaj kkwotata fuq il-Borza ta' Malta wara il-hrug da parti taghha ta' € 5,000,000 f' 5% Unsecured Bonds 2028. In-negozju f' dawn il-Bonds beda f' Mejju 2018 [9].

11. Illi l-ewwel talba ghal tali lista saret fid- 9 ta' Awissu 2018 b' terminu sal- 31 ta' Awissu 2018. Tali sottomissjoni ma saritx u intbghatet "reminder" b' estenzjoni sal- 14 ta' Settembru 2018. Tali terminu jidher li ma giex osservat u inghatat estenzjoni ohra sat- 28 ta' Settembru 2018, f' liema gurnata fil-fatt saret is-sottomissjoni.

12. Ftit taz-zmien qabel ma kien se jibda in-negozju tal-Bond fuq is-Suq, l-istess Appellanta intalbet tissottometti lista riveduta ta' l-"insiders". It-talba saret permezz ta' ittra tas- 27 ta' April 2020, b' terminu al- 31 ta' April 2020. Stante li tali terminu ma giex osservat intbghat reminder fl- 4 ta' Mejju 2020 b' terminu sas- 6 ta' Mejju 2020. L-Awtorita cemplet lis-Segretarju ta' l-Appellanta u dan infurma lill-Awtorita illi t-talbiet permezz ta' email kienu dahlu fil-junk mail tieghu. F' kull kaz l-Appellanta infurmat lill-Awtorita li kienet ser tissottometti tali lista sat- 12 ta' Mejju 2020. Jidher li tali terminu ukoll inqabez minnghajr ma gie osservat u fit-13 ta' Mejju 2020 l-Awtorita harget avviz formali fejn l-Appellanta inghatat terminu sal- 14 ta' Mejju 2020 sabiex issir tali sottomissjoni. Jirrizulta illi tali sottomissjoni fil-fatt saret fl- 20 ta' Mejju 2020.

13. Illi dan it-Tribunal mhux se joqghod jidhol fid-dettal dwar l-importanza tar-Regolament dwar l-Abbuz fuq is-Suq. L-importanza ta' dan hija ben maghrufa specjalment minn socjeta, bhal ma hija is-socjeta Appellanta, li tersaq sabiex tqieghed prodott finanzjarju, bhal ma huwa "bond", fuq il-Borza.

14. L-identifikazzjoni ta' minn huma jew jistghu ikunu l-"insiders" hija necessita kemm ghar-regolatur, bhal ma hija l-Awtorita Appellata, kif ukoll ghall-istess socjeta Appellanta [10]. Minkejja kull problema sabiex wiehed jikkomunika, certament li d-

[9] Ara korrezzjoni mitluba mill-Awtorita fis-seduta tas- 16 ta' Gunju 2021, liema korrezzjoni giet milqugha.

[10] Ara l-Artikolu 18 tar-Regolament li jaghmilha cara illi:

1. Issuers or any person acting on their behalf or on their account, shall:

(a) draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies (insider list);
(b) promptly update the insider list in accordance with paragraph 4; and
(c) provide the insider list to the competent authority as soon as possible upon its request.

dewmien kontinwu sabiex issir tali sottomissjoni specjalment it-tieni darba meta intalbet lista aggornata, mhux gustifikat, u it-Tribunal ma jara xejn straordinarju jew ingust fil-mod li bih agixxiet l-awtorita Appellata, u ghaldaqstant, dan l-aggravvju, in kwantu huwa relatat ma dak li jipprovdi l-artikolu 21(9)(b) huwa michud;

It-Tieni Aggravvju:

15. L-Appellanta targumenta illi l-penali imposta tikkostitwixxi abbiz ta' poter stante li tali penali m' ghandiex relazzjoni ma' l-allegat nuqqas tas-socjeta Appellanta. L-Appellanta targumenta illi l-ammont impost ta' € 5,000 huwa eccessiv.

16. Illi l-Awtorita tiggustifika id-decizjoni taghha f' dan ir-rigward billi tirreferi ghal fatt illi skond il-Ligi il-massimu tal-multa li tista timponi huwa ta' € 1,000,000. Tghid ukoll illi minkejja li r-Regolament ma jaghtix terminu fiss f' liema trid issir tali sottomissjoni, il-fatt li l-istess Regolament jitkellem fuq "as soon as possible" tinsida bic-car illi hawn si tratta ta' materja serjissima u li wiehed ma jistax jaqdaq u jiddeciedi hu meta ssir tali sottomissjoni.

17. Illi it-Tribunal jaghmel referenza ghall-artikolu 22(1)(j) tal- Kap. 476 fejn il-massimu tal-multa li tista tigi imposta huwa ta' € 1,000,000. Jidher ukoll illi n-nuqqas ta' l-Appellanta kien wiehed ripetut, oltre il-fatt illi fl-ahhar sottomissjoni, l-Appellanta lanqas biss osservat it-terminu li hija stess intrabtet mieghu. Multa fl-ammont ta' € 5,000, tenut kont tac-cirkostanzi, hija, fl-opinjoni tat-Tribunal multa ragjonevoli u proporzjonata, u ghaldaqstant dan l-aggravvju qed jigi michud.

It-Tielet Aggravvju:

18. L-Appellanta targumenta illi ir-Regolament dwar l-Abbuz fuq is-Suq gie applikat hazin. Dan ghaliex l-Appellanta kienet ben konsapevoli illi hadd mill-ufficjali taghha ma kien akkwista prodott imqieghed fuq is-suq mill-Appellanta u allura qatt ma seta kien hemm il-kaz ta' Insider Trading. L-Appellanta terga targumenta illi hija ottemprat ruhha mat-talba lilha maghmula "as soon as possible" stante li ir-Regolament jitkellem fuq li s-sottomissjoni kellha issir "as soon as possible".

19. Illi l-Awtorita targumenta illi hija iffisat termini ragonevoli lill-Appellanta, u dan skond dak li jipprovdi l-istess Regolament.

20. Illi huwa car illi it-termini moghtija ill-Awtorita kienu mhux biss ragonevoli, izda kienu termini li jinkwadraw ruhhom f' dak li jipprovdi ir-Regolament dwar l-Abbuz fuq is-Suq. L-Awtorita ma hadietx decizjoni mghaggla, u harget numru ta' reminders u estenzjonijiet, anke minkejja li uhud mit-talbiet minnha maghmula kienu fil-fatt thallew bla risposta. Id-dewmien fis-sottomissjoni ma kiex okkazjoni ta' darba, izda grat kemm fis-sena 2018 kif ukoll fis-sena 2020. Bosta termini moghtija, liema termini kienu ragonevoli, inqabzu u gew estizi. Certament li t-Tribunal ma jara xejn sproporzjonat jew zbaljat fil-mod li bih agixxiet l-Awtorita f' dan ir-rigward.

21. Illi lanqas ma jreggi l-argument illi l-Appellanta kienet taf li hadd mill-ufficjali taghha ma seta qatt ikun responsabbli ta' "Insider Trading" stante li hija kienet taf li hadd minnhom ma kien akkwista xi prodott ta' l-istess Appellanta. Illi it-Tribunal ma jifhimx dan l-argument fil-kuntest tal-kaz odjern, stante li jekk l-Appellanta kienet daqshekk certa minn dan, allura wiehed ma jistax jifhem ghalfejn damet daqshekk biex tghaddi il-lista mitluba lill-Awtorita.

22. Illi ghandaqstant, f' dan ir-rigward, dan l-aggravvju qieghed jigi michud.

Ir-Raba' Aggravvju:

23. Illi l-appellant jargumenta illi l-mod li bih l-Awtorita ikkomunikat ma kienx mod legittimu, u dan ghaliex hiaj ikkomunikat fuq email tas-segretarju tal-Appellanta, u mhux tramite korrispondenza ufficjali fl-indirizz registrat tal-Appellanta.

24. Illi l-Awtorita wiegbet illi hija harget tali notifiki skond il-Ligi.

25. Illi tajjeb illi hawn wiehed jaghmel referenza ghall-vertenza li kienet suggetta ghad-decizjoni preliminari li diga ta dan it-Tribunal fuq il-punt ta' kif giet notifikata id-decizjoni li minnha sar l-appell odjern. It-Tribunal mhux se joqghod jirrepeti dak li intqal f' dik id-decizjoni, izda jerga itenni li wiehed ma jistax jiccensura lill-Awtorita li tikkomunika mas-Segretarju tal-Appellanta permezz ta' email. Certament li jirrizulta

illi l-email address li intuza huwa l- email tas-Segretaju tal-Appellanta. Minkejja li kien hemm okkazzjoni fejn l-istess Segretarju ilmenta li zewg emails marru fil-"junk mail" tieghu, allura huwa ma setax ikun jaf bihom, jirrizulta car illi l-emails l-ohra kollha wasslu fejn kellhom jasslu. L-Awtorita ma agixxietx mill-ewwel u accetta l-ispjega ta' l-Appellanta u ikkoncediet estenzjoni ohra (f' dan il-kaz terminu impost mill-istess Appellanta). It-tribunal ihoss illi l-Awtorita agixxiet b' mod korrett u accettat illi fuq materja bhal din tikkomunika mas-Segretarju tal-Appellanta u certament ma jara l-ebda htiega li fuq materji bhal dawn wiehed juza formalita ta' posta registrata. Jerga jigi imtenni illi it-talba kienet sabiex tigi sottomessa lista li suppost il-kumpannija Appellata izzomm b' mod kontinwu u b' mod aggornat [11], u xejn izjed. Illi ghaldaqstant, anke dan l-aggravvju qieghed jigi michud.

F'dan ir-rigward it-Tribunal ihoss illi ghandhu jiccara punt partikolari dwar il-metodologija ta' notifka ta' L-Awtorita' u dan fl-isfond tad-decizjoni preliminari diga' mghotija mit-Tribunal. F'dan il-kuntest, it-Tribunal ihoss illi kwalunkwe decizjonijiet ta' l-Awtorita' li minghom hemm dritt ta' appell b'terminu preskritt f'ligi ghandhom dejjem jigu innotifikati formalment b'ittri irregistrari fir-registered office ta' l-entita' regolata. Dan ghandhu isir hekk biex ma jigux pregudikati d-drittijiet procedurali ta' tali entita'. Kien dan ir-ragunar li immotiva id-decizjoni tat-tribunal fis-sentenza preliminary taghha f'dan il-kaz.
Huma biss komunikazzjonijiet jew talbiet ta' natura amministrattiva bhal ma hi dik li hi is-sugett ta' din il vertenza li ghandhom jigu ikkomunikata permezz ta' email jew metodi ohra bhal 'facsimile'. Minghajr pregudizzju ghad-decizjoni taghha f'dan l – appell, It-Tribunal ihoss li l-Awtorita' ghandha tadotta protokol car ta' kumunikazzjoni generali jew inkella ma' kull entita' regolata fejn ikun miftiehem fost ohrajn illli (per ezempju) email ha jintuza ghal-notifiki ta' certi talbiet.

Ili in vista tal-premess, it-Tribunal qieghed jichad l-appell interpost mis-socjeta Appellanta.

Bl-ispejjez kollha kontra l-istess socjeta Appellanta.

[11] Ara l-Artikolu 18 tar-Regolament supra