

Consultation Document on the Proposed Settlement Procedure under the Malta Financial Services Authority Act

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Closing Date: 14 March 2022

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 from the public. It is important that persons involved in the consultation bear these considerations in mind.

Contents

| | |
|---|----------|
| Introduction | 3 |
| Purpose of the Public Consultation | 3 |
| The Proposed Legislative Provision | 3 |
| Way Forward..... | 5 |
| Proposed Legislative Procedure | 6 |

Introduction

The Malta Financial Services Authority (“MFSA” or “Authority”), by virtue of the powers conferred to it under the Malta Financial Services Authority Act (Chapter 330 of the laws of Malta) (“MFSA Act”), *inter alia* carries out investigations of alleged breaches of financial services laws, regulations and MFSA Rules on licence holders and on persons authorised by it or falling under its regulatory or supervisory functions. The Authority aims to resolve investigations in the shortest time possible to ensure efficiency and productivity. One method of achieving the foregoing is by entering into a settlement agreement with investigated persons or entities.

Resolving investigations by means of a settlement agreement will ensure that investigations are concluded in a timely manner, safeguarding the general interests and legitimate expectations of consumers of financial services, which is a core function and objective of the MFSA. If an investigation is resolved by means of a settlement agreement, other benefits may be derived - such as lower costs for defence and a clear outcome of the investigation. For the sake of clarity and reassurance, any settlement agreement reached will always involve the imposition of an administrative measure.

In this regard, it should be noted that the current MFSA Act does not explicitly provide for the Authority entering into settlement discussions.

As a result, the MFSA is seeking to further strengthen its position by having the specific power to enter into settlement discussions and agreements, as is being proposed in the attached draft legislative provision. In parallel with this ongoing process, the Authority is also working on establishing a Settlement Policy, which would need to be followed in cases where the MFSA enters into settlement discussions and agreements with an investigated person or entity.

Purpose of the Public Consultation

The purpose of this Consultation Document is to highlight the changes proposed to be made to the MFSA Act to include a specific provision empowering the Authority to enter into settlement agreements. The proposed legislative provision shall cater for instances where the Authority and the person concerned agree on the terms of settlement.

The Proposed Legislative Provision

As can be seen from the proposed legislative provision, hereby attached, the aim of such provision is for the Authority to be given the power to enter into settlement discussions where:

1. a person is breaching or has breached any provision of the MFSA Act, or any other Act administered by the Authority, any regulations or Rules issued thereunder, any conditions imposed in relation to a licence issued by the Authority, any directives issued by the Authority or any European Union law as applicable; or
2. a person concerned in the ownership and, or management of a licence holder is participating or has participated in such a breach.

It is pertinent to note that if the Authority and the person concerned agree on the terms of settlement, any agreement in this regard shall be made in writing and shall be binding on the Authority as well as the person concerned. If the settlement agreement terms are complied with, this will extinguish any further measure which the Authority is empowered to take by law relative to the breach which is subject of the agreement.

Furthermore, if the relevant person fails to comply with the terms of the settlement agreement, it is being proposed that any one or more of the below measures may be taken by the Authority against the person concerned:

1. impose an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each failure to comply, in line with the existing article 16(3) of the MFSA Act; and, or
2. issue directives in writing requiring the said person to do or to refrain from doing any act, including such prohibitions, restrictions and conditions as may be specified in the directive; and any person to whom or to which the notice is given shall obey, comply with, and otherwise give effect to any such directive within the time and in the manner stated in the directive.

The above-mentioned measures shall be without prejudice to any other measures that the MFSA may be empowered by law to take in respect of the original breach that led to the settlement agreement.

Moreover, the proposed legislative provision seeks to empower the MFSA to establish policies and procedures, which would set out further detail in relation to the settlement process and related requirements. Such policies and procedures may also limit the circumstances in which the MFSA may enter into such settlement discussions. In fact, reference is hereby being made to the current process being undertaken by the Authority to establish a Settlement Policy detailing the policy to be followed when entering into settlement discussions.

Finally, it is also important to note that the proposed legislative provision shall be without prejudice to any other powers that may be exercised by the Authority in terms of the MFSA Act or any other law.

Way Forward

The MFSA is seeking feedback from the public in relation to the attached proposed legislative provision to be included in the MFSA Act.

Any comments or feedback in relation to this legislative provision are to be addressed to the Enforcement Function within the MFSA by sending an email to enforcement@mfsa.mt, referring to this Consultation, by not later than 14 March 2022.

Proposed Legislative Procedure

Marginal note: (*Settlement*)

- (1) Notwithstanding any other provision of this Act or any other law administered by the Authority, if it appears to the Authority that:
 - (a) a person is breaching or has breached any provision of this Act, or any other Act administered by the Authority, any regulations or Rules issued thereunder, any conditions imposed in a licence issued by the Authority, any directives issued by the Authority or any European Union law as applicable; or
 - (b) a person concerned in the ownership and, or management of a licence holder is participating or has participated in such a breach,it may enter into settlement discussions with the person concerned to resolve the matter.
- (2) If the Authority and the person concerned agree on the terms of settlement, any such agreement shall be in writing, on such terms as are specified in the agreement and shall be binding on the Authority and the person concerned. Such terms may include terms under which the person concerned accepts the imposition of an administrative penalty and, or the imposition of other measures by the Authority which terms, if complied with, extinguish any further measure which the Authority is empowered to take by law relative to the breach which is subject of the agreement.
- (3) Where a person fails to comply with the terms of any such agreement, the Authority **may**, by notice in writing, take such measures as are specified below in respect of the failure to comply with the terms of the agreement, as well as such measures as the Authority is empowered by law to take in respect of the original breach that led to the agreement.
- (4) Without prejudice to any measures which the Authority may be empowered by law to take in respect of the original breach that led to the agreement, where a person fails to comply with the terms of an agreement, the Authority may take any one or more of the measures below:

- (a) impose an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each failure to comply; and, or
 - (b) issue directives in writing requiring a person to do or to refrain from doing any act, including such prohibitions, restrictions and conditions as may be specified in the directive; and any person to whom or to which the notice is given shall obey, comply with, and otherwise give effect to any such directive within the time and in the manner stated in the directive.
- (5) The Authority may establish policies and procedures setting out further detail in relation to the settlement process and related requirements including the establishment of set timeframes for the completion of discussions to ensure that they result in a prompt and clear outcome which does not delay the discharge of the Authority's functions. Such policies and procedures may also limit the circumstances in which the Authority may enter into settlement discussions. Such policies and procedures shall be published on the Authority's website.
- (6) The provisions of this article shall be without prejudice to any other powers that may be exercised by the Authority in terms of this Act or of any other law.