

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**Feedback statement issued further to Industry responses to
MFSA Consultation Documents with regards to a number of
Legal Notices transposing MiFID II**

MFSA Ref: 2-2017

8 June 2017

Introduction

On the 16 February 2017, the Malta Financial Services Authority ('MFSA' or 'the Authority') issued a Consultation with the financial services industry with regards to a number of Legal Notices transposing MiFID II. The Authority sought the financial industry's comments and suggestions with regards to a number of draft Legal Notices ('LNs') intended to be issued under the Financial Markets Act ('FMA') and the Investment Services Act ('ISA'). The Consultation period closed on the 16 March 2017.

Feedback Statement

Further to the consultation documents, the MFSA is now issuing a feedback statement on the comments received in relation to these Legal Notices. An outline of the main comments received and the MFSA's position in relation thereto is provided below.

1) Typographical errors

Typographical errors identified by participants to this consultation have been considered by the Authority and amendments have been made to the LNs where necessary.

2) Regulated Markets (Authorisation Requirements) (Amendment) Regulations

Industry Comment: A participant queried whether members of management bodies falling outside the definition of 'members of the management body of market operators which are significant' would be required to comply with such requirements or whether specific restrictions would apply to them as well.

MFSA Position: It is submitted that the Authority shall be considering each case separately and therefore consideration shall be made on a case by case basis.

3) European Rights for Investment Firms (Amendment) Regulations

Industry Comment: A participant highlighted that the proposed Regulations and the current Regulations do not contain a definition of a "European Credit Institution" and that such a definition should be added.

MFSA Position: The proposed amendment Regulations do indeed make use of the term "European Credit Institution". The Authority has therefore considered the suggestion being made and shall be adding the said definition to the draft LN.

4) Position Limits and Position Management Controls in Commodity Derivatives and Reporting Regulations

Industry Comments: A market participant highlighted that [i] with regards to positions held by or on behalf of a non-financial entity and which are objectively measurable as reducing risks related to the commercial activity of such an entity should be extended to financial entities; [ii] the proposed regulations provide that position limits should specify clearly quantitative thresholds for the maximum size of a position in commodity derivatives that a person can hold and questioned whether such disclosures shall also apply to ETFs which take similar positions in the underlying or in the other derivatives; and [iii] the setting of certain limits could be counter-productive and create volatility.

MFSA Position: The proposed LN transposes the provisions of MiFID II. In this light: [i] Regulation 3(3) transposes the final paragraph of Article 57(1) of MiFID II; [ii] Article 57(1) states that “*The limits shall be set on the basis of all positions held by a person and those held on its behalf at an aggregate group level...*” and therefore position limits shall apply to any person holding positions in commodity derivatives irrespective of whether the person holding the derivative is an ETF; and [iii] Regulation 3(16) transposes the provisions of Article 57(13) of MiFID.

5) Data Reporting Services Regulations

Industry Comments: A participant from the industry stated that it is not clear whether MFSA Rules will be issued to provide for the applicable deadlines and the information to be provided to the competent authority.

MFSA Position: It is submitted that the process will kick start with the MiFID Implementation date, i.e. 3 January 2018. The Authorisation process shall be in line with the RTSs issued by ESMA.

6) Algorithmic Trading Regulations

Industry Comments: A participant from the industry suggested that the requirement to have effective business continuity arrangements should not be limited to systems but extended to the operation itself.

MFSA Position: The Authority shall be closely mirroring ESMA’s RTSs in this regard.

7) European Passport Rights for Regulated Markets (Amendment) Regulations

Industry Comments: A market participant suggested additional text to Regulation 6, particularly text taken from Recital 154 of MiFID II.

MFSA Position: Regulation 6 transposes Article 79(2) of MiFID II. As far as was possible, the LNs replicate what is stated in the substantive provisions of the Directive. In this light, the Authority does not agree that this text should be added.

8) Investment Services Act (Control of Assets) (Amendment) Regulations

Industry Comments: A participant sought clarifications from the Authority with regards to: [i] the term ‘regular basis’ with regards to reconciliations between its records and accounts and those of any third parties with whom customer’s instruments and money have been deposited in accordance with regulations 8 and 9; and [ii] whether the designation and appointment of a person with the specific responsibility for matters relating to the compliance by the subject person with its obligations regarding the safeguarding of customer instruments and money, shall need to be approved by the MFSA.

MFSA Position: The Authority considers the term ‘regular basis’ to be linked to the size, nature and complexity of the business of the licence holder on a case by case basis. With regards to as to whether the person tasked with the specific responsibility for matters relating to the compliance by the subject person with its obligations regarding the safeguarding of customer instruments and money, needs to be approved by the MFSA, it is submitted that this is already a requirement at authorisation stage. The licence holder is also obliged to inform the Authority of any changes in line with SLC 1.06 of Part BI of the Investment Services Rules for Investment Services Providers.

9) Investment Services Act (Provision of Investment Services and Activities by Third Country Firms) Regulations

Industry Comments: A participant suggested changes to the wording in sub-Articles (1) and (2) of Regulation 3.

MFSA Position: The Authority shall be considering the amendments suggested.

10) Investment Services Act (Alternative Investment Fund Manager) (Passport) (Amendment) Regulations

Industry Comments: A participant suggested that the proposed changes are not correctly transposed in the proposed amendments.

MFSA Position: The Authority shall be considering the comment raised.

11) Investment Services Act (Tied Agents) Regulations

Industry Comments: A participant suggested that the Authority should reconsider its position with respect to tied agents which currently prohibits them from holding and controlling clients’ monies.

MFSA position: It is not the Authority’s intention to reconsider its current position.

Comments

Any comments with respect to the above and/or the attached drafts can be sent by e-mail on MiFIDConsultation@mfsa.com.mt.

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Malta Financial Services Authority
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