

**MFSA**

**MALTA FINANCIAL SERVICES AUTHORITY**

## **CONSULTATION DOCUMENT**

### **CONSULTATION ON THE PROPOSED AMENDMENTS TO THE RETIREMENT PENSIONS ACT**

**[MFSA REF: 14-2018]**

**22nd October 2018**

**Closing Date: 16th November 2018**

**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 Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

## Note for Consultation

### **1. Purpose**

- 1.1 This Consultation Document highlights the main changes proposed to be carried out to the Retirement Pensions Act (Cap. 514), primarily as a consequence of transposing Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast), (the “IORP II Directive”). The IORP II Directive is a minimum harmonisation Directive and is a recast of Directive 2003/41/EC of the European Parliament and of the Council of 3rd June 2003 on the activities and supervision of institutions for occupational retirement provision. Member States are required to transpose the IORP II Directive by 13th January 2019.
- 1.2 The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of the following proposals:
  1. A draft Bill amending the Retirement Pensions Act;
  2. A consolidated draft version of the Retirement Pensions Act reflecting the changes being proposed.
- 1.3 These proposals are not binding and are subject to changes and revisions. It is important that persons involved in the consultation bear these considerations in mind.
- 1.4 Any comments and feedback in relation to the attached draft legislations are to be addressed to the Insurance and Pensions Supervision Unit and submitted in writing on [ipsu@mfsa.com.mt](mailto:ipsu@mfsa.com.mt), by not later than **16<sup>th</sup> November 2018**.

### **2. Introduction**

- 2.1 The MFSA is currently reviewing the provisions of the Retirement Pension Act (Cap. 514) primarily, to align it with the requirements of the IORP II Directive and also to align the said Act with other financial services legislation. It is pertinent to point out that a number of the provisions, including those relating to information to be given to members and beneficiaries, key functions and cross-borders transfers will be transposed in regulations and the Pension Rules issued under the said Act.

- 2.2 The IORP II Directive introduces a new regulatory framework for occupational retirement schemes, and its main objective is to provide for adequate protection of members and beneficiaries of retirement schemes. It aims to ensure higher standards of governance and a modern risk-based governance system to improve risk management and transparency of institutions for occupational retirement provision. These systems should be proportionate to the nature, scale and complexity of the activities of the IORP.
- 2.3 The said Directive also seeks to improve the information provision to pension scheme members and beneficiaries, in particular in the context of defined contribution pension schemes, where the investment risk is borne by the member. These new requirements provide clear and adequate information to prospective members, members and beneficiaries, and allow them to be able to decide about their retirement and ensure transparency throughout the various phases of a scheme.
- 2.4 Finally, the IORP II Directive also aims to increase and facilitate cross-border activities and cross-border transfer of pension schemes. It also contains provisions to make it easier for pension schemes to invest in long-term assets so as to ensure that European pension systems are adequate and sustainable.

### **3. The Salient Amendments to the Retirement Pensions Act (Cap. 514), (the “RPA”)**

- 3.1 Article 2: The MFSA is proposing to amend or introduce definitions in the said article, some of which are highlighted below:

Definition of “*key function*”: it is being proposed to introduce a new definition so as to transpose the definition of “*key function*” found in point 18 of Article 6 of the IORP II Directive.

Definition of “*occupational retirement scheme*”: it is proposed to amend the current definition of “occupational retirement scheme” in order to bring it in line with the definition “*institution for occupational retirement scheme*” found in point 1 of Article 6 of IORP II Directive.

Definition of “*officer*”: it is being proposed to introduce a new definition of “officer”. The term “officer” in relation to a licence holder, will include a director, manager or company secretary or any person effectively acting in such capacity whether formally appointed or not.

Definitions of “*recognition*” and “*recognised person*”: it is being proposed to delete these current definitions as proposed in the Consultation on Amendments to the Pension Rules issued under the Retirement Pensions Act issued on the 6th December 2017. In the said Consultation document, the MFSA raised concerns that some of the activities carried out by current back office administrators recognised, or otherwise exempted, in Malta went beyond back-office administrative activities, to the extent that, some back-office administrators were, in practice, carrying out functions compatible to those of a RSA. Consequently, references to “recognition” and “recognised person” are being removed throughout the said Act.

Definitions of “*service*” and “*service provider*”: it is proposed to amend these two definitions to remove the reference to back-office administrative activities, as proposed in the Consultation on Amendments to the Pension Rules issued under the Retirement Pensions Act dated 6<sup>th</sup> December 2017.

Definition of “*sponsoring undertaking*”: it is proposed to introduce a new definition so as to transpose the definition of “sponsoring undertaking” found in point 3 of Article 6 of the IORP II Directive.

### 3.2 Article 7: Recognition of Service Providers

It is being proposed to delete the current article 7 as proposed in the Consultation document issued dated 6<sup>th</sup> December 2017. In the said consultation, the MFSA proposed that the concept of back-office administration is to be removed from the RPA and any Pension Rules issued thereunder, since during on-sites carried out by MFSA officials, it emerged that some of the activities carried out by current back office administrators recognised, or otherwise exempted, in Malta (for instance, compliance reporting and member beneficiaries’ enquiries) went beyond back-office administrative activities, to the extent that, some back-office administrators are, in practice, carrying out functions compatible to those of a Retirement Scheme Administrator. Therefore, it is also being proposed that any provisions related to back office administration, and any reference to *recognition* and *recognised person* in the RPA be deleted.

### 3.3 Article 9: Power of the competent authority to refuse or grant a licence.

It is proposed to amend the current article 9 to introduce new grounds which need to be fulfilled for the competent authority to be able to grant a licence. It is proposed to add new sub-paragraphs in sub-article (2) in order to reflect various requirements of different articles of the IORP II Directive.

The new sub-paragraph (ii) of paragraph (a) of sub-article (2) of article 9 of the RPA partially transposes Article 7 of IORP II Directive, and requires the activities of the retirement scheme to be limited to retirement benefit related operations and activities arising therefrom. It is proposed to add a new paragraph (b) applicable to occupational retirement schemes. Article 9(2)(b)(i) transposes the requirement in Article 22 of IORP II Directive, requiring an occupational retirement scheme and a Retirement Scheme Administrator, as the case may be, to show evidence that it will be in a position to comply with the system of governance as required in the proposed new article 13A. A new article 9(2)(b)(ii) of the RPA which transposes Article 10(1)(b) of IORP II Directive requires an occupational retirement scheme, where the employer guarantees the payment of retirement benefits, to commit to regular financing.

#### 3.4 Article 10: Power of competent authority to cancel or suspend a licence

The MFSA is proposing to amend articles 10(2)(d) and 10(3)(d) of the RPA in order to clarify that the competent authority may cancel or suspend a licence of a retirement scheme or retirement fund, when such scheme or fund has not commenced to provide the activities it has been licensed to carry on within twelve months of its issue.

#### 3.5 Article 13: General duty for any person responsible for a retirement scheme or fund

It is proposed to amend sub-paragraph (1) of the current article 13 of the RPA in order to clarify that the duty of the Retirement Scheme Administrator is to act in the best interests of the members and beneficiaries, apart from the retirement scheme.

#### 3.6 New article 13A: System of Governance for occupational retirement schemes

Under “Part IV” entitled “Governance”, it is proposed to add a new article requiring the occupational retirement scheme to have in place an effective system of governance, which provides for sound and prudent management of its activities in connection with the overall operation and administration of such scheme.

The new sub-article (2) of article 13A of the RPA transposes the key requirements of Articles 21 (General Governance Requirements), 22 (Requirements of Fit and Proper), 25 (Risk Management), 26 (Internal Audit Function), 27 (Actuarial Function), 28 (Own-Risk Assessment) and 31 (Outsourcing) of the IORP II Directive. The details relating to the said requirements will be determined by means of Pension Rules for Occupational Retirement Schemes.

The new sub-article (4) of article 13A in the RPA transposes Article 21(2) of IORP II Directive, requiring the system of governance of the retirement scheme to be

proportionate to the nature scale and complexity of the operations of the occupational retirement scheme.

### 3.7 Article 16: Auditors

The MFSA is proposing to amend Article 16 of the Act to clarify that the requirement to appoint an auditor applies also to personal retirement schemes and retirement funds as is currently specified in the Pension Rules for Personal Retirement Schemes and the Pension Rules for Retirement Funds.

### 3.8 Article 20: Reporting requirements of retirement schemes

It is proposed to amend article 20 to specify the requirement for the submission of audited financial statements by a retirement scheme and a Retirement Scheme Administrator as well as any other reporting requirement which may be required by Pension Rules.

### 3.9 Article 26: Technical provisions for occupational retirement schemes

It is proposed to amend the current article 26 to mirror the requirements of Article 13(1) and (2) of the IORP II Directive so that, every occupational retirement scheme is required to establish at all times, an adequate amount of liabilities corresponding to the financial commitments which arise out of their portfolio of existing pension contracts. Further detail on technical provisions will be prescribed in regulations.

### 3.10 Article 32: Notification of new or increased control

The MFSA is proposing to include a new sub-article (12) to the article, clarifying that the provisions of article 32 of the Act also apply to retirement schemes set up as an investment company with variable share capital (“SICAV”) under the Companies Act (Chapter 386 of the Laws of Malta).

### 3.11 Article 35: Auditors’ and Actuaries’ duty to report

For the purposes of consistency with other financial services sectors, it is being proposed to amend article 35 of the RPA.

### 3.12 Article 37: Minister’s regulations

It is being proposed to add a new sub-paragraph (n) to article 37 of the RPA to provide for the application of specific provisions of the Occupational Pensions Directive, as specified in Article 4 of the IORP II Directive, to the occupational pensions provision

business carried out by insurance undertakings authorised under the Insurance Business Act carrying on long term business.

### 3.13 Article 39: Power of competent authority to obtain information

It is being proposed to add a new sub-article (9) to article 39 of the RPA to transpose the new Article 31(7) of IORP II Directive. The new sub-article provides the competent authority with the power to obtain information even when activities or key functions or any other activities of the service providers have been outsourced.

### 3.14 New article 41A: Supervisory Review Process

It is proposed to add a new article 41A in the RPA, which transposes Article 49 of the IORP II Directive, outlining the supervisory review process. This new article provides that the MFSA shall review the strategies, processes and reporting procedures which are established by an occupational retirement scheme, to ensure compliance with the RPA, regulations and Pension Rules issued thereunder. Such review and evaluation will include the assessment of the qualitative requirements relating to the system of governance, the assessment of the risks which the occupational retirement scheme concerned faces or may face and the assessment of the ability of those schemes to assess those risks. The new proposed article will also provide that where the MFSA identifies any weakness or deficiency as a consequence of the supervisory review process, it shall request the occupational retirement scheme concerned to remedy such weakness or deficiency.

### 3.15 New article 41B: Information to be provided for Supervisory Purposes

The MFSA is proposing to add a new article 41B to the Act for the purposes of transposing Article 50 of the IORP II Directive, wherein an occupational retirement scheme is to submit to the MFSA information which is necessary for supervision. The details relating to the said requirements will be found in Pension Rules.

### 3.16 Article 46: Administrative penalties and other measures

The MFSA is proposing to amend article 46 of the RPA on penalties and other measures to increase the administrative penalty to one hundred and fifty thousand euro (€150,000) in respect of each infringement, in line with other financial services legislation. It is also being proposed to add a specific sub-article on the publication of such administrative penalties to reflect the requirements of article 48(4) of the IORP II Directive.

### 3.17 Article 52: Confidentiality

It is proposed to substantially amend article 52 on confidentiality mainly to transpose Article 52 (Professional Secrecy) of the IORP II Directive. Furthermore, the amendments clarify the confidential requirements which the competent authority and its employees, agents, include former officers, employees or agents are required to comply with.

### 3.18 New article 52A: Use of confidential information

The MFSA is proposing to introduce a new article 52A to transpose Article 53 of the IORP II Directive in order to clarify in which instances the competent authority is allowed to disclose information in the course of its duties when receiving information.

### 3.19 New article 52B: Co-operation in supervisory duties and sharing of information

The MFSA is proposing to insert a new article 52B on co-operation in supervisory duties and sharing of information. This new article will transpose the requirements of Article 55 on exchange of information between authorities and Article 56 on the transmission of information to central banks, monetary authorities, European Supervisory Authorities and the European Systemic Risk Board.

### 3.20 New article 52C: Disclosure of information

It is being proposed to introduce a new article 52C on the disclosure of information in relation to occupational retirement schemes to government administrations responsible for financial services. This new article will transpose Article 57 of the IORP II Directive.

### 3.21 New article 52D: Conditions for the exchange of information

The MFSA is also proposing to add a new article 52D to the RPA to transpose article 58 of IORP II Directive on the conditions for the exchange of information. This new article regulates exchanges of information between Member States.

### 3.22 Article 56: Minister's power to make transitional arrangements on back-office administrators

The MFSA is proposing to introduce a new sub-article (4) to article 56 in order to give the Minister power to make transitional provisions in respect of persons who were granted a recognition in terms of the RPA. In this respect, the MFSA is minded to issue regulations to prescribe a period within which back office administrators are to surrender their recognition, subject to such conditions and requirements as may be prescribed

#### **4. The Way Forward**

- 4.1 The MFSA is currently reviewing the current regulations issued under the RPA to bring them in line with the requirements of the IORP II Directive. Furthermore, the MFSA is also reviewing the current Pension Rules for Occupational Retirement Schemes. The draft regulations as well as the Pension Rules will be issued for consultation shortly.

**Communications Unit**  
**Malta Financial Services Authority**  
**Date: 22<sup>nd</sup> October 2018**  
**MFSA Ref: 14-2018**