

## **Consultation Procedure**

### **Proposals for Legal Notices / Ministerial Regulations and for new laws and amendments to existing laws**

#### *Explanatory 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 not only from licence-holders and other involved parties, but also following the necessary review and vetting by the Office of the Attorney General and the relevant Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind.

In the case of primary legislation in particular, Bills may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance.

## **Note for Consultation**

### ***DRAFT REGULATIONS ON CONTRACTUAL FUNDS IN TERMS OF THE INVESTMENT SERVICES ACT 1994***

Reference is made to the subject in caption and to the *draft Investment Services Act (Contractual Funds) Regulations, 2009*, as attached herewith.

Contractual Funds, (often referred to as Mutual funds, or Fondi Comuni), are collective investment schemes set up by agreement which do not enjoy legal personality.

There had been interest in establishing these funds in Malta in the early days when the Investment Services Act was published, but this interest was subsequently not followed up and practical interest in establishing this type of funds waned.

Recently, the MFSA has been re-visiting the question of these funds, and has been engaged in drawing up a set of regulations with the aim of setting out a proper workable framework for this type of funds. A copy of the draft regulations is attached to this note.

This communication is intended to bring this development to the attention of members of the FSCC for the purpose of consultation with relevant and interested parties.

Interested parties are kindly asked to submit any comments which they may have in relation to this draft legislation, in writing, to **the Director – Securities Unit, by not later than the 14<sup>th</sup> August, 2009.**

**Securities Unit  
24<sup>th</sup> July 2004**

**Chairman**  
**Malta Financial Services Authority**

**Minister of Finance, Economy  
and Investment**

**L.N. of 2009**

**INVESTMENT SERVICES ACT  
(CAP. 370)**

**Investment Services Act (Contractual Funds) Regulations, 2009.**

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister of Finance, Economy and Investment after consultation with the Malta Financial Services Authority as the competent authority for the purposes of the Act, has made the following regulations:

Title and  
commencement.

**1.** (1) The title of these regulations is the Investment Services Act (Contractual Funds) Regulations, 2009.

Definitions

**2.** In these regulations, unless the context otherwise requires:

Cap. 370

“Act” means the Investment Services Act.

“contractual fund” shall have the meaning assigned to it in regulation 3;

“deed of constitution” means the deed under which a contractual fund is constituted;

Cap. 386

“currency” means, in addition to the Euro, any convertible currency in terms of Article 186 of the Companies Act”;

“fractional unit” means a fraction of a whole unit in any class of units issued by the contractual fund;

“management company” or “manager” means the person responsible for the management and the day to day administration of the property of the contractual fund;

“multi class scheme” means a scheme falling within the terms of regulation 9;

“multi fund scheme” means a scheme falling within the terms of regulation 11;

“sub-fund” means a separate portfolio of assets and liabilities maintained by a contractual fund in accordance with its deed of constitution;

“unit-holder” means the holder of one or more units of a contractual fund and references to a unit holder in such a contractual fund shall be construed accordingly.

Establishment of  
a Contractual  
Fund

3. (1) A contractual fund is a collective investment scheme within the meaning of Article 2 of the Act, established by means of a contract entered into for such purpose by the manager and the custodian of such a collective investment scheme, under which the participants participate and share in the property of the collective investment scheme as evidenced by units issued by the manager in terms of regulation 7 of these Regulations.

(2) A contractual fund shall not have legal personality and its property shall be represented by freely transferable units.

(3) A contractual fund may be established either as an open ended collective investment scheme or as a closed ended collective investment scheme.

Contents of Deed  
of Constitution

4. The deed of constitution of a contractual fund should specify whether the fund is being established as a closed ended or open ended collective investment scheme and shall provide for the following:

- (i) the name of the contractual fund;
- (ii) the duration , if any, of the contractual fund;
- (iii) name of the management company and of the custodian;
- (iv) the investment policy of the contractual fund;
- (v) the distribution policy, if any, of the income of the contractual fund;
- (vi) the remuneration and expenditure which the management company is empowered to charge the fund and the method of calculation of such remuneration;
- (vii) the date of the closing of the accounts of the fund;
- (viii) the dissolution of the contractual fund without prejudice to the requirements set out in regulation 18;
- (ix) the procedure for the amendment to the deed of constitution;
- (x) the procedure for the issue of units to participants;
- (xi) the procedure for the redemption of units and the conditions under which redemptions may be carried out or suspended;
- (xii) the method of valuation of the contractual fund’s assets;
- (xiii) any other matter which the competent authority, may by Investment Services Rules published for this purpose, require.

The deed of

5. (1) The deed of constitution shall comply with the requirements of

constitution

these regulations and any applicable Investment Services Rules, and shall be submitted to the competent authority for approval prior to its signature.

(2) Upon approval of the terms of the deed of constitution by the competent authority, a certified true copy thereof shall be submitted to the competent authority.

(3) The aforesaid submission shall be made by the manager or the custodian or their authorised agents.

(4) The competent authority shall publish a copy of the deed of constitution of a contractual fund licensed in terms of the Act on its website.

Prospectus of a Contractual Fund

6. (1) Where a contractual fund is required to issue a prospectus, it shall submit a draft copy thereof to the competent authority for its approval prior to the issue of the form of application for the subscription of units in the contractual fund.

(2) Upon approval, a signed copy of the prospectus of the contractual fund shall be submitted to the competent authority. Such copy shall be signed by at least two persons duly authorised in writing by the Board of Directors of the management company of the contractual fund.

(3) A certified true copy of the contractual fund's prospectus may be submitted to the competent authority in lieu of the signed copy indicated in subregulation (2).

(4) The competent authority shall publish a copy of the prospectus of a contractual fund licensed in terms of the Act, on its website.

Issue of units in a contractual fund.

7. (1) The management company of a contractual fund shall issue registered certificates confirming entry in the registry of units of the fund and representing one or more portions of the contractual fund which it manages.

(2) Certificates issued in accordance with sub regulation (1) shall be signed by the management company and by the custodian of the contractual fund. Such signatures may be reproduced electronically.

Fractional Units

8. (1) A contractual fund, may, if so authorised by its deed of constitution issue fractional units up to such number of decimal places, not being less than three, as shall be specified in the said deed and under such terms and conditions as may be specified therein.

(2) Fractional Units shall be automatically consolidated into a whole unit when the fractional units held by one unit holder become equal to a whole unit.

Multi class

9. (1) A contractual fund may be constituted as a multi class scheme, if

schemes

in terms of its deed of constitution; the units which are issued by its management company are capable of being divided into different classes of units not constituting a distinct sub-fund.

(2) A multi class contractual fund may, with the written approval of the competent authority, issue a new class or classes of units. Such class or classes of units shall not constitute a distinct sub-fund or sub-funds of the contractual fund.

(3) Each class of shares in a multi class contractual fund may be denominated in a different currency provided that a class of units may be denominated only in one currency.

(4) A multi class contractual fund may not elect for the segregation of any of its assets and liabilities.

Accounts of multi class schemes

**10.** (1) A multi class scheme having its units denominated in different currencies shall draw up its annual accounts in any one of such currencies.

(2) The provision of subregulation (1) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required by the competent authority.

(3) For the purposes of subregulations (1) and (2), the conversion from the base currency of a class of units into the currency in which the annual accounts of the multi class scheme are to be drawn up shall be in accordance with generally accepted accounting principles.

Multi fund Schemes

**11.** (1) A contractual fund may be constituted as an multi fund scheme where, in terms of its deed of constitution, its property is or is capable of being divided into different groups of units where one group would constitute a distinct sub-fund of the contractual fund

(2) A multi fund scheme may, with the written approval of the competent authority, create and issue a new group of units which may constitute a new sub-fund or be comprised in an existing sub-fund or sub-funds of the contractual fund.

(3) A group of units constituting a sub-fund in a multi class scheme fund may be denominated in a different currency provided that a group of units may be denominated in only one currency.

(4) For the purposes of this regulation, “a sub-fund” means the distinct group of units constituting that sub-fund in a multi class scheme to which are allocated assets and liabilities distinct from other assets and liabilities allocated to the other sub-funds in the same contractual fund.

Accounts of multi fund schemes

**12.** (1) A contractual fund having its units denominated in different currencies shall draw up its annual accounts in any one of such currencies.

(2) The manager of a contractual fund shall maintain proper accounting records of the assets and liabilities of each sub-fund in the base currency of any group of units constituting that sub-fund.

(3) The provisions of subregulation (1) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required by the competent authority in terms of Investment Services Rules issued for this purpose.

(4) For the purposes of subregulations (1) and (3), the conversion from the base currency of a group of units into the currency in which the annual accounts of the umbrella fund are to be drawn up shall be in accordance with generally accepted accounting principles.

Segregation of assets and liabilities of multi fund schemes

**13.** (1) A multi fund scheme may in terms of its deed of constitution, have the assets and liabilities of each sub-fund treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of each other sub-fund of the multi fund scheme. Where a multi fund scheme is so constituted, the assets and liabilities of each sub-fund shall, for all intents and purposes of law be deemed to constitute a patrimony separate from the assets and liabilities of each other sub-fund of such a multi fund scheme.

(2) Subregulation (1) shall not apply to such proportion of the liabilities of a multi fund scheme which by virtue of the deed of constitution of such a scheme, or by virtue of the terms of issue of the units constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein.

(3) The liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of actions against the other assets belonging to the multi fund scheme, and proceedings against the management company or the custodian in relation to the multi fund scheme shall respect the legal status of each sub-fund as a patrimony separate from the assets and liabilities of each other sub-fund of the multi fund scheme, in terms of this regulation.

(4) The management company of a contractual fund shall hold or cause to be held such separate records, accounts, statements and other documents as may be necessary to evidence the liabilities and assets of each sub-fund as distinct and separate from the assets and liabilities of other sub-funds in the same multi fund scheme.

(5) The liabilities of a unit holder in a contractual fund shall be limited to the amount agreed to be contributed by the unit holder for the subscription of units therein.

Application of Rules and Regulations to contractual funds and their service providers

**14.** Unless the context otherwise requires, any rules and regulations applicable in general to collective investment schemes and their managers and custodians, shall also apply to contractual funds, their managers and custodians.

Accounting requirements

**15.** A contractual fund shall keep proper books of accounts and shall be required to submit its annual accounts and any other financial statements and any other regulatory returns in terms of the Investment Services Rules.

Cessation of Duties

**16.** The duties of the management company or of the custodian in respect of a contractual fund shall cease:

(a) upon the voluntary withdrawal of the management company, provided that the competent authority has approved such withdrawal;

(b) upon the voluntary withdrawal of the custodian or of its removal by the management company provided that:

(i) the custodian must be replaced within two months of its removal

(ii) during the intervening period, the custodian shall take all necessary steps for safeguarding the interests of unit holders;

(c) where the competent authority cancels the licence issued to the management company or to the custodian ;

(d) where the competent authority removes the management company or the custodian or suspends their appointment.

(e) where the overseas regulator withdraws its authorisation of the management company or of the custodian;

(f) where the management company or the custodian has been declared bankrupt, has entered into a compromise with creditors, has obtained a suspension of payment, or has been dissolved;

(g) in other cases provided for in the deed of constitution.

Decisions

**17.** The manager of the contractual fund, in consultation with the custodian, shall take decisions which are binding on the unit holders in the contractual fund.

Meetings of unit holders

**18.** Unit holders in a contractual fund may request, in writing, the management company to convene a meeting for unit holders to vote on certain issues as may be determined by the deed of constitution of such fund.

Dissolution of a

**19.** (1) The causes of dissolution of a contractual fund shall be the



contractual Fund. following:

(a) the expiry of the period, if any, fixed by the deed of constitution of the said contractual fund;

(b) in the event of bankruptcy or cessation of duties by the management company or by the custodian, if these are not replaced within two months;

(c) with the consent of the unit holders in the contractual fund as may be specified in the deed of constitution;

(d) in other circumstances as indicated in the deed of constitution.

(2) Notice of the dissolution shall be published without delay, and in any event within seven working days from the event giving rise to the dissolution, by the management company or the custodian, in a newspaper in circulation in Malta. In default, such notice shall be published by the competent authority at the expense of the contractual fund.

(3) As soon as the event giving rise to the dissolution of the contractual fund occurs, the issue of units shall be prohibited, on penalty of nullity. The redemption of units where applicable, remains possible provided the equal treatment of unit holders is ensured.

Disapplication of  
Civil Code  
(Cap.16)

**20.** The provisions of Title V of Part I of Book Second of the Civil Code shall not apply to property held in a contractual fund.

