

# MFSA

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## MALTA FINANCIAL SERVICES AUTHORITY

### FEEDBACK STATEMENT FURTHER TO INDUSTRY RESPONSES TO MFSA CONSULTATION DOCUMENT DATED 18<sup>TH</sup> SEPTEMBER 2013 ON THE INTRODUCTION OF THE DEPOSITARY LITE PROVISIONS

#### 1. INTRODUCTION

On 18<sup>th</sup> September 2013, the MFSA issued a consultation document regarding the proposed transposition of certain requirements of the Alternative Investment Fund Managers Directive [‘AIFMD’] in relation to the introduction of the Depositary Lite provisions.

The deadline for the submission of comments with respect to the Consultation Document was 4<sup>th</sup> October 2013 and the Authority received comments from four members of Malta’s financial services industry.

The Authority has assessed all the feedback received and after careful consideration has incorporated most of the drafting suggestions which were proposed by the industry.

The Authority also took cognisance of the wide array of issues which were raised by the industry in response to this consultation exercise. The Authority’s position has been determined after a careful and thorough consideration of the submissions received.

#### 2. FEEDBACK RECEIVED IN RELATION TO THE PROPOSED INTRODUCTION OF THE DEPOSITARY LITE PROVISIONS

##### 2.1. Proposed amendments to Part BIII of the Investment Services Rules for Investment Services Providers

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| 2.1.1. <i>General Comments</i> |
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*[I] One respondent queried whether in the case where the administrator is entrusted with the cash monitoring and oversight but not the safekeeping function, can one interpret these two functions as an investment service in terms of the Investment Services Act and thus capable of being licenced in its own right.*

The Authority acknowledges that one or more entities can be appointed to carry out the functions prescribed in Article 21(7), (8) and (9) AIFMD. On the other hand, the Authority maintains that irrespective of whether one entity or more are appointed, where the entities are established in Malta, these must be in possession of a Category 4a or 4b Investment Services Licence<sup>1</sup>.

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<sup>1</sup> Reference is made to the Consultation Document [MFSA REF.: 16-2013] which was issued by the Authority on 18<sup>th</sup> November 2013 on the proposed amendments to the Investment Services Act (Licence and other Fees) Regulations and the accompanying proposed regulations.

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*[II] The Authority was queried on the reasons for its decision to limit the entities which will be authorised to provide depositary lite services to fund administrators and Category 2 Licence Holders (excluding management companies), notwithstanding the fact that the Directive refers to notaries, lawyers etc. A suggestion made to extend the option to provide activities of depositary lite to **all** the entities referred to in Article 21(3) 2<sup>nd</sup> paragraph, to financial institutions and to Category 3 Licence Holders and not just to Category 4 Licence Holders. A further suggestion was that of considering allowing fund management companies in particular de minimis fund managers to perform depositary lite services.*

The Authority acknowledges that Recital 34 AIFMD refers to the possibility of allowing a ‘notary, a lawyer, a registrar or other entity to be appointed to carry out depositary functions.’

On the other hand, given the extensive duties and role of the depositary, the Authority is of the view that only persons who have the competence to provide any investment service and to hold or control Clients’ Money or Customers’ Assets as applicable for a Category 2 Investment Services Licence, should be allowed to provide the services of depositary lite.

The Authority further disagrees with the proposal of allowing fund management companies to provide depositary lite services since this could give rise to conflicts of interest.

*[III] A suggestion was made to reflect the changes to the Rules concerning the introduction of depositary lite services in the Investment Services Rules for Alternative Investment Funds*

The Authority agrees with this suggestion and some minor changes will be made to the revised Investment Services Rules for Alternative Investment Funds.

### 2.1.2. Comments on SLC 5.01

*[I] A suggestion was made to delete SLC 5.01(v) given that this will be applicable only upon the introduction of the non-EU AIF passport in 2015.*

The Authority disagrees with this proposal given that in terms of Article 66(1), the Authority was bound to adopt, publish the law, regulation and administrative provisions necessary to comply with the provisions of the Directive. Furthermore, the Authority is bound also to communication to the Commission the text of the provisions and the correlation table between the provisions and the Directive.

*[III] A request was made to the Authority to clarify whether a Maltese AIFM managing a non-EU AIF in terms of SLC 5.01(iv) can appoint a Maltese Depositary or a non-EU Depositary. Furthermore, the Authority was requested to clarify whether or not a non-EU AIFs may appoint a Custodian established in the Union (excluding Malta) authorised to provide depositary services in that Member State.*

The Authority refers to Article 21(5)(b) AIFMD which provides that in the case of non-EU AIF, the depositary shall be established in the third country of the AIF, or in the home

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Member State of the AIFM managing the AIF or in the Member State of Reference of the AIFM managing the AIF.

Therefore in the scenario referred to above, the depositary can be established either in the third country of the AIF or in Malta. A clarification to that effect is being proposed in SLC 5.01(iv).

### 2.1.3. Comments on SLC 5.02

*[I] The Authority was queried on the applicability of the SLCs indicated in SLC 5.02 to non-Maltese entities providing depositary lite functions.*

The Authority notes the respondent's comments and confirms that the proviso to SLC 5.02 was revised to limit the applicability of the said SLC to Maltese Licence Holders.

*[III] The Authority was queried on the link between SLC 5.01(v) and SLC 5.02, particularly since SLC 5.01(v) should not apply in circumstances contemplated in SLC 5.02.*

The Authority notes that SLC 5.01(v) relates to the appointment of a custodian where required by the AIFM. On the other hand, SLC 5.02 transposes the provisions of Article 36 AIFMD which requires the appointment of an entity for purposes of carrying out the functions prescribed in Articles 21(7), (8) and (9) AIFMD.

### 2.1.4. Comments on SLC 5.04

*[I] An amendment was proposed to SLC 5.04 since it goes beyond what is prescribed in the AIFMD.*

The Authority disagrees with this proposal since the AIFM must in all instances notify the Authority as to the service provider who will be providing custody services.

## 2.2. Proposed amendments to Part BIV of the Investment Services Rules for Investment Services Providers

### 2.2.1. General Comments

*[I] Drafting suggestions were proposed with regards to SLCs 4.29 and 4.30 of Part BIV of the Investment Services Rules.*

These drafting suggestions were incorporated in revised text of Part BIV of the ISP Rules.

## 2.3. Other amendments to the Investment Services Rules for Investment Services Providers

For the purposes of the proposed amendments to the Investment Services Act (Licence and Other Fees) Regulations, the Authority has opted to distinguish between the different classes of Category 4 Licence Holders. Licence Holders are to note that a Category 4a Investment

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Services Licence Holder may act as custodian to all types of collective investment schemes. On the other hand, a Category 4b Licence Holder may only act as custodian to the following:

(i) AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with Article 21(8)(a) of the AIFM Directive and which generally invest in issuers or non-listed companies in order to acquire control of such companies in accordance with Article 26 of the AIFM Directive, and

(ii) Third country AIFs, which are marketed in the EU/EEA in terms of Article 36 of the AIFM Directive.

The Investment Services Rules for Investment Services Providers have been revised to reflect this new classification.

### 3. CONTACTS

Any queries or requests for clarifications in respect of the above should be addressed to: Dr. Isabelle Agius, Regulatory Development Unit, Tel: 25485359; e-mail: [iagius@mfsa.com.mt](mailto:iagius@mfsa.com.mt) or Mr. Jonathan Sammut, Securities and Markets Supervision Unit Tel: 25485452; e-mail: [jsammut@mfsa.com.mt](mailto:jsammut@mfsa.com.mt)

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