

**MFSA**

---

MALTA FINANCIAL SERVICES AUTHORITY

# **Feedback Statement**

April 2011

# Contents

Introduction and Disclaimer.....3

Feedback Statement.....4

Appendix I - Draft FIR/03

Appendix II - Draft amendments to the Financial Institutions Act

Appendix III - Draft FIR/02 with consequential amendments

Appendix IV – Draft FIR/01 with consequential amendments

This Feedback Statement reports on the main issues arising from MFSA's Consultation Document entitled: **Proposal for amendments to the Financial Institutions Act and Financial Institutions Rule FIR/03**. On 25 March 2011, the MFSA issued a consultation document on this topic to stimulate debate and receive views by 11<sup>th</sup> April 2011.

This Feedback Statement summarises the comments on issues raised in the Consultation Document. MFSA's Consultation Documents proposed a number of amendments to the Financial Institutions Act, and purposed the issuance of a new Financial Institutions Rule 3 of 2011 [FIR/03/2011]. All respondents were in agreement with the MFSA's decision to regulate electronic money institutions under the lighter and more flexible regime of the Financial Institutions Act. All respondents were also in agreement with the main proposals and recommendations made in the Consultation Document save with some considerations. Some respondents also raised a number of considerations which go beyond the recommendations referred to in the Consultation Documents.

This Feedback statement is written in the form of a question and answer with every comment by the particular respondent followed by a statement by the MFSA.

*An updated draft of New Rule FIR/03 and proposed draft amendments to the Financial Institutions Act, as well as consequential amendments to Rules FIR/02 and FIR/01 are attached as Appendices I, II, III and IV respectively. Since the Bill amending the Financial Institutions Act is still before Parliament, it is not excluded that further changes may be carried out during the parliamentary process. These changes may in turn also require changes in Draft Rules FIR/01, FIR/02 and the new FIR/03. Subject to any such changes, Rule FIR/03 and the consequential amendments to other Rules will come into effect upon the coming into force of the abovementioned Amendment Act once this is passed by Parliament.*

## **Comments made on the Financial Institutions Act**

### **Article 3(d) of the Act - Definitions**

*It was suggested that the phrase ‘the definition of “the Directive” shall be deleted’ should be replaced by the phrase ‘the definition “the Directive” shall be deleted’.*

The MFSA has decided to make the proposed change.

### **Article 3(10) of the Act - The Waiver; notification of changes**

*An amendment was suggested in relation to the 1<sup>st</sup> proviso to article 3(10) to specify that ‘where the conditions laid down in sub-article (7) are no longer met, the company shall apply for a licence under this Act to the competent authority within 30 days of the notification referred to in (a)’ or ‘to be reckoned from the effective date of change.*

The MFSA agrees that Article 3(10) of the Act in its current form may cause uncertainty as to the time limit within which the small issuer is to apply for a licence in terms of article 3(1).

In view of this uncertainty the MFSA has decided to reformulate the first proviso to Rule 33 of the FIR/03 Rules as follows: ‘Provided that, where the conditions laid down in paragraph 26 are no longer met, a company authorised under article 3(7) of the Act shall, within thirty calendar days of the notification referred to in paragraph (a), be required to apply in writing for licencing in terms of article 3(1) of the Act’.

The corresponding article of the Act will be amended accordingly.

### **Article 3(12) of the Act - Licence Holders granted a waiver**

*An Amendment to Article 3(12) was suggested to refer explicitly to ‘person/s in whose favour any such waiver/s are granted by the competent authority as opposed to licence holders.*

The Directive speaks of a change in circumstances that may impact on the applicability or otherwise of the waiver. Article 3(7) of the Act consequently provides for a waiver of certain conditions and not for a full exemption from licensing.

Small issuers are therefore still considered as financial institutions authorised to issue electronic money. The MFSA has, in line with this principle decided not to amend this article however, the Rules will be further clarified in this respect.

### **Article 4(b) of the Act - Average Outstanding electronic money**

*The Upper limit should be increased from Euro 1,000,000 to at least 4,000,000 based on the maximum threshold set by the Directive of 5,000,000.*

#### **Reasons:**

*1) The provisions of the Act are too onerous for a start-up business which generates average outstanding money of less than 4,000,000.*

*2) Threshold of 1,000,000 will have an impact with regard to mobile network activities that may not be exempt under Rule 7B – for example, whilst pre-paid mobile telephony cards are certainly subject to a maximum storage amount of not more than two hundred and fifty Euro (€250), yet they are not likely to qualify for an exemption under Article 3(7) of the Act, due to the fact that the total business activities of a mobile network operator may easily generate an average outstanding electronic money which exceeds the amount of one million Euro (€1,000,000). The exemption may be possible if this threshold were increased.*

The MFSA considers that based on local circumstances it would be prudent to adopt a more proportionate threshold than the maximum allowed by the Directive, however in light of this feedback, it has decided to raise the threshold to EUR 2,000,000. This threshold may be reviewed at a future date to take new developments into account.

### **Article 5(2) of the Act – time period to determine a request**

*It was suggested that we specify the time period within which the MFSA shall determine a request for the issuance of an authorisation to an applicant for registration as a small electronic money issuer.*

Requests for the issuance of authorisation as a small electronic money issuer shall be determined within the overall parameters given in the Directive as transposed in the Draft Rules and according to the nature of the authorisation.

The MFSA will ensure that the processing time allotted is proportionate to the amount of work required by an application submitted by a small electronic money issuer. The time allotted must be sufficient to carry out the due diligence and other verifications required.

### **Article 5A of the Act Own Funds**

*Licence granted to electronic money institutions, it was suggested, should be extended to cover certain payment services listed in 2<sup>nd</sup> schedule so that article 6 of the Bill would read: “listed in the second and/or third schedule” instead of ‘or’ only.*

An institution can either provide payment services listed in 2<sup>nd</sup> schedule without issuing electronic money or provide payment services in the 3<sup>rd</sup> schedule along with electronic money issuing. Therefore ‘or’ is the correct word to use.

### **Article 13(5) (i) of the Act - Powers and Duties of the Competent Authority**

*According to Article 13(5)(i) the competent authority must notify the Commission of any subsequent change but there is no requirement to notify Commission of waiver 3(7).*

The Commission has already been notified of Malta’s decision to exercise the option available to it under article 9(9) of the Directive.

### **Article 26(2) (b) of the Act - Consumer Complaints**

*It was suggested that Article 26(2)(b) of the Act should be amended to the effect that the facility to refer a dispute to arbitration in accordance with paragraph (a) shall be one of the conditions of a licence of persons licensed under the Act.*

The wording of article 26(2)(b) appears to be clear enough in its current form. However, the wording of the licence conditions applicable to electronic money issuers will further emphasise this point.

## **Comments made on the Financial Institutions Rules FIR3**

### **FIR/03/2011, Rule 7(a) – Limited Network Exemption**

*In order to ensure more certainty, more detail should be included as to what constitutes a Limited Network Exemption by including the list of product examples given in Recital 5 of the Directive.*

The parameters as to what constitutes a “limited network” are clearly defined in the Draft Rule. However, since the list of product examples given by the Directive is not exhaustive, including this list in the Rule would not eliminate doubt. The MFSA will be using the list in Recital 5 as an internal guideline for interpreting the term “limited network” to ensure consistency without arbitrarily excluding other similar instruments covering a limited range of products and services.

In any event users can and should refer to the Directive for any clarifications required, as the Rules are modelled on the Directive.

### **FIR/03/2011, Rule 7(b) Exemption from the Rule**

*The exemption in Rule 7(b) would appear not to apply to a situation where a customer uses his pre-paid mobile phone subscription to make payment to a third party, which payment is then deducted from the credit on the mobile telephony card.*

The exemptions under Rule 7(b) are exactly in line with the Directive and cannot be widened.

*The application of the licensing requirement to the use of pre-paid mobile telephony cards creates a problem due to the necessary redeemability of electronic money. In the telecommunications industry, unused credit on pre-paid telephony cards is generally not refundable to subscribers. Enforcing this rule upon mobile network operators (particularly if they opt to operate as small electronic money issuers) would mean an overhaul in the operation of the mobile network operators, as well as a strain on their liquidity reserves.*

Article 11 of the Directive is not one of the obligations that may be waived under Article 9 of the same Directive.

*An additional issue in applying the Directive to mobile network operators is the resulting divergence between the rules applicable to pre-paid subscribers and those applicable to post-paid subscribers.*

This divergence is an inevitable consequence of the hybrid services a mobile operator offers. It is important that a level playing field exists between e-money issuers already regulated under the E-Money Directive and other service providers who may be issuing e-money as a non-core part of their business.

### **FIR/03/2011, Rule 11 Waiver of article 9 of the Act**

*The second paragraph of the proposed Rule 11 speaks of a “high percentage of the total business activities of the company”. Although we appreciate and agree with the need for flexibility, there is room for a very wide range of interpretations on what may constitute a high percentage in differing circumstances. Greater clarity could be achieved by providing an indicative percentage figure, or range of figures, above which the issuance of electronic money shall be considered a high percentage of total business activities;*

The MFSA may revisit this Rule following further monitoring of the discussion on the subject at EU level and the developments of the European and local markets.

### **FIR/03/2011, Rule 28 – Capital Requirements**

*Small e-money issuers should have a minimum of 10% cover of business liabilities that a small issuer may accept.*

The on-going capital requirements for small issuers in terms of Draft Rules 21 and 28 shall be 2% of the average outstanding electronic money calculated utilising ‘Method D’ of the Directive. In order to create a level playing field between small and other issuers the MFSA Consultation Document has called for views on the inclusion of an initial and minimum on-going capital requirement for small issuers. This requirement must however be proportionate the size of activity carried out by small issuers.

Based on this principle and feedback obtained in the course of the consultations, the MFSA has decided that small issuers shall have a two tiered initial and minimum on-going capital requirement according to the amount of average outstanding electronic money.

Where the business activities of the applicant small electronic money issuer generate average outstanding electronic money of less than one million (1,000,000) euro, it shall be required to hold an amount of initial capital equal to fifty thousand euro (€50,000).



Where an applicant small electronic money issuer generates average outstanding electronic money between one million euro (€1,000,000) and two million euro (€2,000,000), it shall be required to hold initial capital amounting to one hundred thousand euro (€100,000).

### **FIR/03/2011, Rule 44 fol.**

*A prescription period for redeemability rights should be established. It is suggested that a prescription period of 6 years shall apply to redeemability rights, similar to that envisaged in the UK. Such period shall run from the moment the e-money is no longer available for payment transactions. The same prescription period should apply to all emoney issuers whether they are credit institutions or independent issuers.*

The Directive requires the issuer to redeem e money upon request. (Recital 18 and Art 11.2 – entitled to redeem “at any time”, “at any moment”). The Directive does not prescribe any specific prescription period. After considering all the circumstances the MFSA is of the opinion that no specific prescription period should be included and that the general provisions of the Civil Code regarding prescription should apply.

### **PMLFT Regulations**

*Attention has been drawn to the absence of any provision in the Draft Bill and Draft Rule to transpose the provisions of Article 19.2 of the Directive.*

The MFSA is in discussion with the Financial Intelligence and Analysis Unit (FIAU) regarding the changes required to Article 10(3)(e) of the Prevention of Money Laundering and Funding of Terrorism (PMLFT) Regulations. This sub-regulation needs to be amended in order to make reference to the definition of electronic money under the Financial Institutions Act and to raise the limit in respect of electronic money devices that cannot be recharged from EUR150 to EUR250. The MFSA is also consulting with the FIAU on the possibility of extending this limit to EUR500 with respect to national payment transactions.

### **FIR/03/2011, Rule 22**

*The proposed Rule 22 appears to erroneously make reference to the issuance of payment services and should therefore be amended to read as follows: “where an electronic money institution carries out any payment services not linked to the issuance of electronic money”;*

The MFSA agrees with this proposed change.

*The second paragraph of the proposed Rule 22 should read “on the basis of the projected outstanding electronic money evidenced by its business plan”; in this context, the use of the phrase “sufficient period of business” may be too vague. It is not unreasonable to assume that businesses which have set their own funds levels in accordance with projections contained in a business plan will want more clarity as to when they may be required to revise those levels. Businesses may want to have comfort that any projections which they produce will be deemed to be satisfactory for a minimum period post-launch. Perhaps MFSA can provide minimum and maximum time periods for which the projections will be deemed to be satisfactory.*

The term used in rule 22 is identical to that used in the Directive. The MFSA is of the opinion that, for reasons already stated above, in relation to rule 7(a), the authority cannot *a priori* be too specific about a provision that needs to be interpreted according to circumstances. Prospective applicants are always required to provide the MFSA with a business plan containing the relevant projections and to inform the MFSA with information on any material developments thereafter.

### **FIR/03/2011, Rule 28 Initial Capital**

*Insofar as the initial capital required by a small electronic money issuer is concerned, this could be calculated on the basis of an objectively pre-established percentage of the projected average outstanding electronic money of the applicant and/or such other amount as may be determined by the competent authority on a case by case basis provided that, howsoever calculated, the initial capital requirement shall in no case exceed three hundred and fifty thousand Euro (€350,000);*

After taking into consideration all feedback received in this respect, the MFSA has decided that small issuers shall have a two tiered initial and minimum on-going capital requirement according to the amount of average outstanding electronic money.

Where the business activities of the applicant small electronic money issuer generate average outstanding electronic money of less than one million (1,000,000) euro, it shall be required to hold an amount of initial capital equal to fifty thousand euro (€50,000).

Where an applicant small electronic money issuer generates average outstanding electronic money between one million euro (€1,000,000) and two million euro (€2,000,000), it shall be required to hold initial capital amounting to one hundred thousand euro (€100,000).

### **FIR/03/2011, Rule 29 Authorisation**

*It was suggested that clear parameters are pre-set in the proposed Rules so as to establish the level of due diligence that will be undertaken by the Authority in respect of qualifying shareholders and other person/s occupying certain offices/ posts within the applicant, including whether such person/s will be required to submit „Personal Questionnaires“ and supporting documentation. As a general observation, and in view of the requirement that an applicant for registration as a small electronic money issuer must submit the applicable official application forms together with the information listed in paragraph 28 of FIR/01 and in view of the applicability of, inter alia, Article 5 of the Act, it was noted that should the Authority proceed with the full “fit and proper” test prior to issuing authorisation, then the raison d’être of the „waiver“ facility would appear to be called into question.*

The fit and proper test will still be carried out in the case of small money issuers and the obligation of the Authority to carry out diligence will not be one of the conditions which may be waived.

*It was suggested that the proposed Rule 29 be amended to read as follows:*

*“The issuance of an authorisation by the Authority to an applicant for registration as a small electronic money issuer shall be subject to the provisions of Article 5 of the Act”.*

The MFSA is not of the opinion that any changes are required in this respect.

Rule 29 has been amended to read ‘authorisation’

### **FIR/03/2011, Rule 35(a)**

*The proposed Rule 35(a) appears to contain a clerical error in that it should read “the name and the head office address”;*

The MFSA agrees with this proposed change.

### **FIR/03/2011, Rule 39 - Agents and Distribution Networks**

*Whilst the proposed Rule 39 makes reference to “the procedures and rules laid down in paragraph 38 of FIR/01” we note that the said paragraph 38 merely makes reference to Article 8A of the Act and does not in itself set out any procedures and/or rules.*

The MFSA agrees that Rule 39 needs to be revised to remove the reference to FIR/01.

### **Application Forms for a licence under FIA**

*amend/update the application form/s for a licence under the Financial Institutions Act (Form 1 and Form 2) as well as the MFSA's Internet and Electronic Banking Questionnaire to bring the format of the same in line with other MFSA forms (Investment Services, CIS etc) which may be completed electronically.*

The application forms 1 and 2 are not available in excel format however they may still be completed electronically in their current word format.

### **Typographical Errors**

*Article 14(c) (i) refer to paragraph (b) as opposed to paragraph (b)(i).*

*Page 12 clerical error in no. XX of last para.*

*Page 11 sequence skips from 17 to 21 on page 31*

*Article 24 should refer to 'article 1 of the 2<sup>nd</sup> schedule' as opposed to 'article 2'*

*Title on the cover page of the Financial Institution Rules should read rules not rule*

*Page 5 appears to contain a clerical error in the heading "General Prudential And Compliance Requirements For Electronic Money Institutions";*

The MFSA agrees with these changes.