

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

**CONSULTATION ON THE RULEBOOK
APPLICABLE TO
DE MINIMIS LICENCE HOLDERS**

[MFSA REF.: 4/2013]

22nd March 2013

Closing Date: 5th April 2013

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.

1. Introduction

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 also known as the [Alternative Investment Fund Managers Directive](#) ('AIFMD') was published in the Official Journal of the European Union on 1st July 2011.

The AIFMD regulates the activity of alternative investment fund managers ('AIFM') and aims at creating a comprehensive and effective regulatory and supervisory framework for fund managers in the European Union. By 22nd July, 2013 Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the provisions of the Directive.

2. *De minimis* AIFMs

Article 3 of the AIFMD provides for exemptions and lays the foundations for the *de minimis* regime. Whilst the AIFMD details the minimum conditions and reporting obligations which must be fulfilled by a *de minimis* AIFM, Member States are given the option to apply stricter rules to this type of AIFM.

The MFSA has opted to apply a minimum licencing regime rather than registration to *de minimis* AIFMs as it considers that it is in the best interest of fund managers to be licensed particularly when dealing with potential investors. It is the policy of the MFSA that only persons who are *fit and proper* should be allowed to establish a financial activity and operate on an on-going basis in and from Malta.

The *de minimis* Licence Holder will only be allowed to provide collective portfolio management to collective investment schemes which are not retail schemes. In this regard, it is proposed that *de minimis* Licence Holders should be subject to specific conditions which are being issued for consultation by way of this document.

In addition to the transposition of the requirements applicable to *de minimis* fund managers in terms of article 3 of the AIFMD, the proposed MFSA framework applicable to *de minimis* Licence Holders, also contains high-level principles which stipulate organisational requirements, conduct of business requirements and financial resources requirements.

The proposed rules applicable to *de minimis* Licence Holders are divided into the following sections:

- [a] General Requirements: This section transposes the requirements applicable to *de minimis* fund managers in terms of Article 3 of the AIFMD. It also establishes notification and authorisation requirements for the purpose of allowing the MFSA to monitor compliance with the *fit and proper* test.

- [b] Organisation Requirements: This section establishes organisational requirements including general requirements on delegation. This section further prescribes the requirement to appoint a compliance officer.
- [c] Conduct of Business Requirements: This section establishes high-level conduct of business requirements, including rules on conflicts of interest.
- [d] Financial Resources and Reporting Requirements: This section establishes the requirements for the maintenance and reporting of financial resources and other record keeping requirements. The rules also include a requirement to submit an audit opinion to the MFSA confirming that the methodology for calculating the assets under management complies with the requirements prescribed in the AIFMD.

It is proposed that as long as the *de minimis* Licence Holder restricts its activity to collective portfolio management of non-retail schemes, these licensed entities should only be subject to the proposed specific conditions of the attached rulebook.

Where on the other hand, the *de minimis* Licence Holder wishes to provide additional services, for example MiFID type services [such as investment advice or individual portfolio management], in addition to the specific requirements applicable to the *de minimis* Licence, it is proposed that such firm should also be subject to the rulebook applicable to MiFID firms i.e. Part BI of the Investment Services Rules for Investment Services Providers.

Similarly if the relevant *de minimis* Licence Holder wishes to provide collective portfolio management to UCITS schemes, it is proposed that Part B II of the Investment Services Rules for Investment Services Providers should apply.

The specific rules proposed for *de minimis* Licence Holders will form part of the new Part BIII of the Investment Services Rules for Investment Services Providers, which was issued for consultation on 30th November 2012.

3. Contacts

Interested parties are to send their comments in writing by not later than 5th April 2013. Any comments and feedback are to be addressed to Mr Christopher P. Buttigieg – Deputy Director - Securities and Markets Supervision Unit by e-mail on su@mfsa.com.mt and rdu@mfsa.com.mt .

Any queries or requests for clarifications in respect of the above should be addressed to: Dr Isabelle Agius, Regulatory Development Unit Tel: 25485359 or by e-mail on iagius@mfsa.com.mt .

**Communications Unit
Malta Financial Services Authority
MFSA Ref: 4/2013**

22nd March 2013

PROPOSED RULES APPLICABLE TO *DE MINIMIS* LICENCE HOLDERS

PART B III: INVESTMENT SERVICES LICENCE HOLDERS – SECTION *DE MINIMIS* LICENCE HOLDERS

GENERAL REQUIREMENTS

1. Licence Holders authorised to provide portfolio management to collective investment schemes that are not retail collective investment schemes and which satisfy one of the following conditions (hereinafter referred to as '*De minimis* Licence Holders') shall only be subject to the Rules in this section of Part BIII of the Investment Services Rules for Investment Services Providers and shall comply with the requirements contained herein:
 - (a) Either directly or indirectly, through a company with which the Licence Holder is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
 - (b) Either directly or indirectly, through a company with which the Licence Holder is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

Where the conditions prescribed above are no longer met, the *de minimis* Licence Holder concerned shall inform the MFSA thereof and shall apply for an extension to its Category 2 Licence within 30 days from the date of notification to the MFSA.

2. The activities of the Licence Holder shall ordinarily be limited to the management of collective investment schemes which are marketed to professional investors. However, the Licence Holder may also, with the approval of the Authority, be allowed to provide other Investment Services.

When the *de minimis* Licence Holder is also authorised to provide investment advice and/or portfolio management services to retail and/or Professional Clients and/or Eligible Counterparties it shall:

- [a] disclose its interest in any collective investment scheme(s) in respect of which it provides investment advice;
- [b] not be permitted in the course of the provision of portfolio management services, to invest all or part of the investor's portfolio in units of collective investment schemes it manages or in which it has an interest, unless it receives prior general written consent from the client following disclosure of its interest; and

- [c] not be permitted to provide portfolio management services to any Custodian which performs custodial duties for collective investment schemes in respect of which it acts as Manager.

The *de minimis* Licence Holder shall not use the Scheme's assets for its own purposes.

3. The *de minimis* Licence Holder shall not benefit from any rights granted in terms of the Alternative Investment Fund Managers Directive unless it chooses to apply for a full AIFM Category 2 licence, subject to all the conditions of Part B III of this Rule Book.
4. The *de minimis* Licence Holder shall comply with the following requirements:
 - [i] The Licence Holder shall provide information to the MFSA on the AIFs that it manages including their investment strategies;
 - [ii] The Licence Holders shall regularly, provide the MFSA with information on the main instruments in which it is trading and on the principal exposures and most important concentrations of the AIFs that it manages, in order to enable the MFSA to monitor systemic risk effectively; and
 - [iii] The Licence Holder shall notify the MFSA in the event it no longer meets the conditions referred to in SLC 1.

Provided that in complying with the requirements prescribed in paragraph [iii] above, the Licence Holder shall submit to the MFSA the information prescribed in Annexes I and III to these Rules and shall further comply with the applicable provisions of the Commission Delegated Regulation supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

- [iv] The Licence Holder shall provide the MFSA with any additional information required from time to time. In particular, in respect of each annual accounting period, the Licence Holder shall require its auditor to prepare a management letter in accordance with International Standards on Auditing, which shall be submitted to the MFSA. The auditor must also confirm to the MFSA that the audit has been conducted in accordance with International Standards on Auditing and whether, in the auditor's opinion the methodology used by the Licence Holder to calculate its assets under management complies with the requirements of the Alternative Investment Fund Management Directive.
5. The *de minimis* Licence Holder shall commence its Investment Services business within twelve months of the date of issue of the Investment Services Licence.

If, for any reason the *de minimis* Licence Holder is not in a position to comply with this condition, it shall notify the MFSA in writing setting out the reason/s for such a delay together with an updated business plan indicating the proposed date of commencement of business. On the basis of the information provided and the circumstances of the case, the MFSA may decide to suspend or cancel the Licence in accordance with the relevant provisions of the Act.

6. The *de minimis* Licence Holder shall co-operate in an open, honest and transparent manner with the MFSA and inform it promptly of any relevant information. The *de minimis* Licence Holder shall supply the MFSA with such information and returns as the MFSA may request.
7. Where a Standard Licence Condition requires that a *de minimis* Licence Holder notifies the MFSA of any particular event, such notification shall be made to the MFSA formally, in a durable medium. The request to notify the MFSA of an event shall not be satisfied merely by the fact that the information which ought to be notified to the MFSA is included in a standard regulatory return:
8. The *de minimis* Licence Holder shall notify the MFSA in writing of:
 - (a) a change in the Licence Holder's name or business name (if different) at least one month in advance of the change being made;
 - (b) a change of address: at least one month in advance;
 - (c) any material changes to the conditions for initial authorisation, in particular material changes to the information provided during the application process at least one month in advance of the change being made;
 - (d) the ultimate beneficial ownership of any party directly or indirectly controlling 10 per cent or more of the Licence Holder's share capital on becoming aware of the situation;
 - (e) any acquisitions or disposals of shares which fall within the disclosure provisions of Article 10 of the Act – immediately upon becoming aware of the proposed acquisition or disposal. It should be noted that MFSA has the right to object to such an acquisition;
 - (f) the departure of a Director or Senior Manager; within 14 days of the departure. The Licence Holder shall also request the Director or Senior Manager to confirm to MFSA that their departure had no regulatory implications or to provide relevant details as appropriate. A copy of such request shall be provided to MFSA together with the Licence Holder's notification of departure;
 - (g) any evidence of fraud, dishonesty or irregular behaviour by a member of the Licence Holder's staff immediately upon becoming aware of the matter;
 - (h) a decision to make a material claim on any insurance policy held in relation to the Licence Holder's Investment Services business. Notification should be provided as soon as the decision is taken;
 - (i) any actual or intended legal proceedings of a material nature by or against the Licence Holder immediately after the decision has been taken or on becoming aware of the matter;
 - (j) any material changes in the information supplied to the MFSA – immediately upon becoming aware of the matter. This shall include the obligation to notify the MFSA on a continuous basis of any changes or circumstances which give

rise to the existence of close links, as defined in Appendix 9, between the Licence Holder and any other person;

- (k) establishing a branch abroad;
- (l) making application to an overseas Regulator to undertake any form of licensable activity outside Malta;
- (m) the fact, where applicable, that it has not provided any Investment Service or carried out any investment activity for the preceding six months, setting out the reasons for such inactivity and providing a business plan for future activity.

9. The *de minimis* Licence Holder shall obtain the written consent of the MFSA before:

- (a) making any change to its share capital or the rights of its shareholders;
- (b) acquiring 10 per cent or more of the voting share capital of another company;
- (c) taking any steps to cease its investment services business;
- (d) agreeing to sell or merge the whole or any part of its undertaking;
- (e) the appointment of a Director or Senior Manager responsible for the Investment Services business of the Licence Holder or of the Licence Holder's Compliance Officer and/ or Money Laundering Reporting Officer, at least twenty one business days in advance. The request for consent of the appointment shall be accompanied by a Personal Questionnaire ("PQ"), in the form set out in Schedule F of these Rules – duly completed by the person proposed. In the case of a proposed Compliance Officer and/ or Money Laundering Reporting Officer and Risk Manager, the request shall be accompanied by the Competency Form set out in Schedule 3 of Part A of these Rules duly completed by the proposed person. Where the person proposed had within the previous three years submitted a PQ to the MFSA in connection with some other role with the same Licence Holder, the request for consent need not be accompanied by a new PQ. In such instances, it shall be accompanied by a confirmation by the proposed person as to whether the information included in the PQ previously submitted is still current, and indicating any changes or up-dates thereto;

For the purposes of the above and (f) below, 'Senior Manager' should be interpreted as the person occupying the most senior role following that of Director, so that in the case where there are various management grades, it is the most senior manager who will require the MFSA's authorisation.

- (f) the change in the responsibilities of a Director or Senior Manager at least twenty one business days in advance. The request for consent of the change in responsibilities of a Director or Senior Manager shall be accompanied by a PQ unless the individual concerned had within the previous three years submitted a PQ to the MFSA in connection with another role occupied by such individual with the same Licence Holder, in which case it shall be accompanied by a confirmation by the Director or Senior Manager as to whether the information

included in the PQ previously submitted is still current, and indicating any changes or up-dates thereto;

A change in the responsibilities of a *Director or Senior Manager* should only be notified to the MFSA when such a change is material, which shall include a change in the status or seniority of the person concerned (upwards or downwards).

10. The *de minimis* Licence Holder shall maintain sufficient records to be able to demonstrate compliance with the conditions of its Investment Services Licence. The records shall be maintained for a minimum period of five years and shall be available to the MFSA upon request.

Additionally records which set out the respective rights and obligations of the *de minimis* Licence Holder and the client under an agreement to provide services, or the terms on which the Licence Holder provides services to the client shall be retained for at least the duration of the relationship with the client.

However, the MFSA may in exceptional circumstances require the Licence Holder to retain for such longer periods any or all of those records as is justified by the nature of the instrument or transaction, if it is considered necessary for MFSA to exercise its supervisory functions.

11. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the MFSA and in such a form and manner that the following conditions are met:
 - (a) MFSA must be able to readily access the records readily and to reconstitute each key stage of the processing of each transaction;
 - (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
 - (c) it must not be possible for the records otherwise to be manipulated or altered.
12. The *de minimis* Licence Holder shall co-operate fully with any inspection or other enquiry, or compliance testing carried out by the MFSA, or an inspector acting on its behalf.
13. The *de minimis* Licence Holder shall pay promptly all amounts due to the MFSA.
14. The Licence Fee shall be payable by the *de minimis* Licence Holder on the day the Licence is first issued, and thereafter a supervisory fee will become due annually within one week from the anniversary of that date.
15. The *de minimis* Licence Holder shall notify the MFSA of any breach of the conditions of the Licence as soon as the Licence Holder becomes aware of the breach.
16. If so required by the MFSA, the *de minimis* Licence Holder shall use all its powers to delay the cessation of its Investment Services business or the winding-up of such

business so as to comply with conditions imposed by the MFSA, in order to protect the interests of customers.

ORGANISATIONAL REQUIREMENTS

- 17.** The *de minimis* Licence Holder shall comply with any substance requirements which the Authority may issue from time to time in the form of guidance to the industry.
- 18.** The *de minimis* Licence Holder shall have an established place of business in Malta and shall:
 - a. establish, implement and maintain decision-making procedures and an organisational structure which clearly and in a documented manner specifies reporting lines and allocates functions and responsibilities;
 - b. ensure that its officials are aware of the procedures which must be followed for the proper discharge of their responsibilities;
 - c. establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the Licence Holder;
 - d. employ personnel with the skills, knowledge and expertise necessary for the discharge of responsibilities allocated to them;
 - e. establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the Licence Holder;
 - f. maintain adequate and orderly records of its business and internal organisation;
 - g. ensure that the performance of multiple functions by its relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly and professionally.

For these purposes, the *de minimis* Licence Holder shall take into account the nature, scale and complexity of its business, and the nature and range of Investment and Ancillary Services undertaken in the course of that business.

- 19.** The *de minimis* Licence Holder shall establish, implement and maintain:
 - a. systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question;
 - b. an adequate business continuity policy aimed at ensuring, in the case of an interruption to its systems and procedures, the preservation of essential data and functions and the maintenance of Investment Services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of its Investment Services and related activities;
 - c. accounting policies and procedures that enable it to deliver in a timely manner to the MFSA upon request, financial reports which reflect a true and fair view of its

financial position and which comply with all applicable accounting standards and rules.

20. The *de minimis* Licence Holder shall be a separate person from the Custodian of a Scheme for which it acts as Manager and shall act independently of each other and solely in the interests of the Unit holders. Since independence may be compromised in various ways, any facts, relationships, arrangements or circumstances which arise which may at any stage bring that independence into question shall be declared to the MFSA as soon as the *de minimis* Licence Holder becomes aware of any such matter.
21. The *de minimis* Licence Holder shall monitor and, on a regular basis evaluate, the adequacy and effectiveness of its systems, internal control mechanisms and arrangements and take appropriate measures to address any deficiencies.
22. The *de minimis* Licence Holder shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure to comply with its obligations under the Act, the Regulations issued thereunder and these Rules, as well as with its obligations under other applicable legislation, in particular the Prevention of Money Laundering Act, 1994, the Prevention of Financial Markets Abuse Act, 2005, and Regulations issued thereunder, as well as to detect the associated risks, and shall put in place adequate measures and procedures designed to minimize such risk and to enable the MFSA to exercise its powers effectively. The *de minimis* Licence Holder shall, for this purpose, appoint a Compliance Officer who shall be responsible for monitoring compliance with the applicable requirements.
23. The *de minimis* Licence Holder shall establish, implement and maintain adequate risk management policies and procedures, which identify the risks relating to the *de minimis* Licence Holder's activities, processes and systems, and where appropriate, set the level of risk tolerated by the *de minimis* Licence Holder. The *de minimis* Licence Holder shall also adopt effective arrangements, processes and mechanisms to manage the risks relating to the *de minimis* Licence Holder's activities, processes and systems, in light of that level of risk tolerance.
24. In the event that the *de minimis* Licence Holder wishes to delegate to third parties the carrying out on its behalf of one or more of its functions, it shall first notify MFSA. Such notification shall include details of the nature of functions to be delegated and of the entity or entities to which the *de minimis* Licence Holder proposes to delegate such functions.
25. A *de minimis* Licence Holder shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the MFSA to monitor the *de minimis* Licence Holder's compliance with all obligations.
26. An operational function of a *de minimis* Licence Holder shall be regarded as critical or important if a defect or failure in its performance would materially impair the

continuing compliance of a *de minimis* Licence Holder with the conditions and obligations of its authorisation or its other obligations under these Rules, or its financial performance, or the soundness or the continuity of its Investment Services and activities.

27. Without prejudice to the status of any other function, the following functions shall not be considered as critical or important:
 - (a) the provision to the *de minimis* Licence Holder of advisory services, and other services which do not form part of the investment business of the Licence Holder, including the provision of legal advice to the Licence Holder, the training of personnel, billing services and the security of the premises and personnel; and
 - (b) the purchase of standardised services, including market information services and the provision of price feeds.
28. When the *de minimis* Licence Holder outsources portfolio management, risk management or other important operational functions, the *de minimis* Licence Holder shall remain fully responsible for discharging all of its obligations notwithstanding the delegation of these functions.

CONDUCT OF BUSINESS

29. When providing Investment Services, a *de minimis* Licence Holder shall act honestly, fairly and professionally in accordance with the best interests of its clients and shall comply with the relevant provisions of the Act, the Regulations issued thereunder, these Rules as well as with other relevant legal and regulatory requirements, in particular those set out in the Prevention of Money Laundering Act, 1994, and the Prevention of Financial Markets Abuse Act, 2005 and Regulations issued thereunder. The *de minimis* Licence Holder is also expected to take due account of any relevant Guidance Notes which may be issued by the MFSA or other relevant body to assist the *de minimis* Licence Holder in complying with its legal and regulatory obligations.
30. The *de minimis* Licence Holder shall establish a record that includes the document or documents agreed between it and the client and which set out the rights and obligations of the parties, and the other terms on which the *de minimis* Licence Holder will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.
31. The *de minimis* Licence Holder shall provide appropriate information, in a comprehensible form to its clients or potential clients such that they are reasonably able to understand the nature and risks of the Investment Service to be provided. All information, including marketing communications addressed by the *de minimis* Licence Holder to clients or potential clients shall be fair, clear and not misleading and shall contain a statement to the effect that the licence holder qualifies as a *de minimis* Licence Holder under Maltese law and that its licence is restricted to portfolio management to collective investment schemes which may only be marketed to professional investors.

32. The *de minimis* Licence Holder shall provide its clients with adequate reports on the service provided. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.
33. The *de minimis* Licence Holder shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients. These shall include staff dealing arrangements applicable to persons who are involved in activities that may give rise to a conflict of interest.
34. Neither the *de minimis* Licence Holder nor any of its associates shall deal with the client as a Principal unless the terms of the transaction or arrangement are on an arm's length basis.

FINANCIAL RESOURCES AND REPORTING

35. The *de minimis* Licence Holder shall maintain financial resources sufficient for the proper performance of its functions. It shall have sufficient financial resources at its disposal to enable it to conduct its business effectively and to meet its liabilities.

Without prejudice to the generality of the foregoing, the *de minimis* Licence Holder shall have an initial capital of €125,000 which shall be maintained on an on-going basis.

36. The *de minimis* Licence Holder shall maintain proper accounting records to show and explain the *de minimis* Licence Holder's own transactions, assets and liabilities.
37. The accounting records shall:
 - a. disclose with reasonable accuracy, at all times, the financial position of the *de minimis* Licence Holder; and
 - b. enable the financial statements required by the MFSA to be prepared within the time limits specified in the conditions of the Investment Services Licence.
 - c. be retained for a minimum period of ten years. During the first two years they shall be kept in a place from which they can be produced within 24 hours of their being requested.
38. The *de minimis* Licence Holder shall appoint an auditor approved by the MFSA. The *de minimis* Licence Holder shall replace its auditor if requested to do so by the MFSA. The MFSA's consent shall be sought prior to the appointment or replacement of an auditor.
39. The *de minimis* Licence Holder shall make available to its auditor the information and explanations needed to discharge his responsibilities as an auditor and in order to meet the MFSA's requirements.
40. The *de minimis* Licence Holder shall submit to the MFSA within four months of the accounting reference date, the audited annual financial statements prepared in

accordance with International Financial Reporting Standards, together with a copy of the auditors' management letter and the auditors' report required by SLC 4 [iv] above.

ADDITIONAL CONDITIONS

- 41.** The *de minimis* Licence Holders referred to in SLC 1 above shall further comply with the relevant requirements prescribed in the following Regulations of the European Commission namely:
- i. EU Commission Implementing Regulation establishing the procedure for AIFMs which choose to opt-in under Directive 2011/61/EU of the European Parliament and of the Council; and
 - ii. EU Commission Delegated Regulation supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.