

# MFSA

## MALTA FINANCIAL SERVICES AUTHORITY

### FEEDBACK STATEMENT FURTHER TO INDUSTRY RESPONSES TO MFSA CONSULTATION DOCUMENT DATED 22<sup>ND</sup> MARCH 2013 ON THE RULEBOOK APPLICABLE TO DE MINIMIS LICENCE HOLDERS

#### 1. INTRODUCTION

On 22<sup>nd</sup> March 2013, the MFSA issued a consultation document regarding the proposed transposition of certain requirements of the Alternative Investment Fund Managers Directive ['AIFMD'].

Licence holders were circulated with the Standard Licence Conditions applicable to de minimis fund managers.

The deadline for the submission of comments with respect to the Consultation document was 5<sup>th</sup> April 2013 and the Authority received comments from six 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 DE MINIMIS CONSULTATION

##### 2.1. APPLICABILITY OF THE DE MINIMIS STANDARD LICENCE CONDITIONS TO DE MINIMIS SELF-MANAGED FUNDS

**Q1) *The Authority was requested to clarify whether these rules are intended to also cover self-managed funds that fall below the de minimis requirements.***

**A1)** Self-managed funds that fall below the *de minimis* requirements will be regulated by the Standard Licence Conditions prescribed for self-managed PIFs in the Investment Services Rules for Professional Investor Funds. The Authority is planning to issue the amendments to the Investment Services Rules for Professional Investor Funds<sup>1</sup> in the coming weeks.

##### 2.2. APPLICABILITY OF PART BI OF THE INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS<sup>2</sup> TO THE DE MINIMIS LICENCE HOLDERS.

<sup>1</sup> Hereinafter referred to as 'PIF Rulebook'

<sup>2</sup> Hereinafter referred to as 'ISP Rulebook'

**Q2) *The Authority was requested to clarify the instances where Part BI of the ISP Rulebook would be applicable to de minimis Licence Holders.***

**A2)** The Authority notes that in so far as management of AIFs is concerned, a *de minimis* fund manager is bound to comply with the Standard Licence Conditions prescribed in Part BIII applicable to *de minimis* fund managers. Should the *de minimis* fund manager provide other MiFID Services, apart from the applicable SLCs prescribed in Part BIII of the ISP Rulebook, the Licence Holder would **also be subject** to the Standard Licence Conditions prescribed in Part BI of the ISP Rulebook applicable to MiFID Firms.

### **2.3. CLARITY ON CATEGORY 2 INVESTMENT SERVICES LICENCE**

**Q3) *The Authority was requested to clarify and further explain the modification of the current licences of current Category 2 Investment Managers.***

**A3)** The Category 2 Licence will be divided into four further sub-categories namely:

- [I] Category 2 – Investment Services Firms – regulated by Part BI of the ISP Rulebook;
- [II] Category 2 – UCITS Fund Managers – regulated by Part BII of the ISP Rulebook;
- [III] Category 2 – AIFMs – Regulated by Part BIII of the ISP Rulebook; and
- [IV] Category 2 – de minimis Fund Managers – regulated by Part BIII of the ISP Rulebook.

For ease of reference, enclosed below is a table as to the type of licence required per activity provided. The following table illustrates the different activities which a Category 2 Licence Holder may provide together with the interplay of the different Licences required in terms of the Investment Services Act.



## 2.4. CALCULATION OF ASSETS UNDER MANAGEMENT

**Q4)** *The Authority was requested to clarify the method to be used by the Manager for calculating the total assets under management and the criteria to be taken into consideration in assessing whether a change is temporary or not. Furthermore, additional clarification was requested on the meaning of the term ‘regularly’ as used throughout SLC 4 of the Rules, prescribing the reporting obligations to be complied with by the de minimis fund manager.*

**A4)** Article 3 AIFMD refers to the *de minimis* thresholds together with the information which must be provided to the Authority in relation to the AIFs under management and the total value of assets under management. Article 3 AIFMD is further supplemented by Articles 2 to 5 of the Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012 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<sup>3</sup>. In particular Article 2 of the Regulation deals with the methodology to be used in the calculation of assets under management whereas Articles 3 and 4 deal with ongoing monitoring of assets under management and occasional breaches of the thresholds.

Article 5 of the Regulation deals with the information to be provided as part of the registration required in terms of Article 3(3) AIFMD. Articles 5 and 110 of the Regulation provide for the reporting timeframes which must be adhered to by the Licence Holder.

## 2.5. FINANCIAL RESOURCES REQUIREMENT

**Q5)** *The attention of the Authority was drawn to the fact that unlike for other Licence Holders, in the case of de minimis fund managers there are no specific detailed rules outlining the exact financial resources requirement apart from SLC 35 which requires the de minimis fund manager to have an initial capital of EUR 125,000.*

**A5)** It is proposed that SLC 35, which prescribes the initial capital of EUR 125,000 shall be further supplemented by Section 1.2(c) of Appendix 1 of the ISP Rulebook. Reference to Appendix 1 has also been included in the *de minimis* Standard Licence Conditions.

## 2.6. STATUS OF NON-UCITS RETAIL SCHEMES

**Q6)** *The Authority was asked to provide guidance on the stance it would adopt with regards to collective portfolio management in relation to retail non-UCITS Schemes. Some respondents have also expressed reservations on the exclusion of non-UCITS Retail Schemes from the de minimis licencing regime. It was suggested that de minimis fund managers should be able to manage PIFs and Non-UCITS in terms of the thresholds reported in SLC 1. It was argued that this would ensure that small management companies would not be forced to choose between three regimes.*

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<sup>3</sup> Hereinafter referred to as ‘the Regulation’.

- A6)** The Authority is bound by the definition of ‘AIF’ provided in the Directive, which states that an AIF is a ‘collective investment undertaking, including investment compartments thereof, which:
- (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
  - (ii) does not require authorisation pursuant to Article 5 of Directive 2009/65/EC (the UCITS Directive).

Therefore any fund which is **not** a UCITS Scheme automatically falls within the classification of an AIF. This would include non-UCITS Retail Schemes and PIFs.

Since non-UCITS Retail Schemes fall within the definition of AIFs, the fund manager will be treated as an AIFM for the purposes of the Directive and therefore will be bound to comply with the Part BIII of the ISP Rules. Fund Managers who currently manage both non-UCITS Retail Schemes and PIFs, must take into consideration the combined assets of both the non-UCITS Retail Schemes and the PIFs under management when calculating the assets under management for threshold purposes.

Fund managers which currently manage non-UCITS Retail Schemes and which fall below the thresholds prescribed in Article 3 AIFMD and therefore qualify as *de minimis* fund managers will be required to comply with the Standard Licence Conditions prescribed in Part BIII for *de minimis* licence holders including the additional conditions on marketing to retail investors prescribed in the aforementioned section.

## 2.7. COMPETENCY FORM

**Q7)** *The Authority was requested to clarify which appointments necessitated the filing of a Competency Form and whether upon application both the Personal Questionnaire and the Competency Form were required in specific circumstances.*

- A7)** The Competency Form is a new form which is being proposed by the Authority following a review it undertook of the process for the approval of prospective Compliance Officers, Money Laundering Reporting Officers, Portfolio Managers, Risk Managers and Investment Advisors with existing Investment Service Providers. These appointments, amongst others, require MFSA’s prior approval in terms of the ISP Rules.

Currently the approval process entails the submission of a notification by the Licence Holder to the MFSA together with a Personal Questionnaire duly completed by the individual in question. However, often such submissions are not as comprehensive and in the form required by the Authority thus leading to a lengthening of the approval process unnecessarily.

The Authority is proposing to introduce the Competency Form which is to be used by existing Licence Holders when submitting a request for the approval of a prospective Compliance Officer or Money Laundering Reporting Officer or Risk Manager or Portfolio Manager or Investment Advisor. The Form should be completed and submitted together with the Personal Questionnaire duly completed by the individual in question.

	Personal Questionnaire	Competency Form
Risk Manager	√	√

Portfolio Manager	√	√
Money Laundering Reporting Officer	√	√
Compliance Officer	√	√
Investment Adviser		√

### 3. CONTACTS

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