

Consultation Document on the Establishment of a Settlement Policy

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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 practitioners. It is important that persons involved in the consultation bear these considerations in mind.

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Introduction

The Malta Financial Services Authority ('MFSA' or 'Authority') carries out investigations into alleged breaches of financial services laws and regulations on licence-holders and on persons authorised by it or falling under its regulatory or supervisory function. The Authority aims to resolve investigations in the shortest time possible to ensure efficiency and productivity. In order to achieve this aim, the MFSA is seeking to strengthen its powers through the implementation of a policy document on settlement, as a means of resolving investigations (the 'Settlement Policy').

The proposed Settlement Policy aims to set out a regime to be adopted by the MFSA in relation to settlement agreements. Resolving investigations by means of a settlement agreement will ensure that enforcement action is taken in a timely manner, resulting in safeguarding the general interests and legitimate expectations of consumers of financial services, which is a core function and objective of the MFSA. If an investigation is resolved by means of a settlement agreement, other benefits may be derived such as lower costs for defence and the clarity of the enforcement action. For the sake of clarity, any settlement agreement reached will always involve some type of enforcement action as settlement is a means of resolving investigations which will lead to an enforcement action.

Settlement agreements are used as a tool in other jurisdictions by regulators to solve investigations and have proved to be quite successful. One can make reference to jurisdictions such as Ireland, the UK, Germany, Belgium, Gibraltar and Jersey, all of which have an established settlement policy which is frequently and successfully used to resolve investigations.

Purpose of Consultation

The purpose of this Consultation Document is to highlight the main principles being proposed by the MFSA in relation to the settlement process it intends to adopt. Apart from establishing a formal Settlement Policy, the MFSA's intention is to also recommend the necessary legislative amendments to the Malta Financial Services Authority's Act (Chapter 330 of the laws of Malta) to include a legal provision empowering the MFSA to enter into settlement agreements.

Purpose and Applicability of the Settlement Policy

It is being proposed by the Authority that the Settlement Policy shall be applicable to settlement discussions entered into up to the moment when the MFSA issues its final decision.¹

Hence, the Settlement Policy will not apply to out-of-court settlements in a litigation context. The Authority may consider out-of-court settlements on a case-by-case basis, only if the terms of settlement do not trigger a change in the Authority's final decision.

Policy Principles

For the sake of clarity, the MFSA may enter into settlement discussions with legal entities as well as with physical persons who are either licensed by the MFSA or fall within its regulatory or supervisory function. In this respect, the MFSA is proposing to establish the below principles in relation to the settlement process which will apply to both legal entities as well as physical persons under investigation:

Principle 1 – Proactive Approach from the MFSA

Currently, the MFSA receives requests to enter into settlement agreements from an investigated person/entity, which are very often received when the investigation would either have been concluded or is almost concluded. This is not in line with the spirit of a settlement agreement given that, ideally, a settlement is reached at the early stages of investigation to reduce the use of resources and conclude the investigation in a timely manner.

For this reason, the MFSA is proposing to take a proactive approach by recommending that a settlement proposal letter be issued by the MFSA to the person/entity under investigation offering the initiation of settlement discussions. The settlement proposal letter will in all cases (unless specifically excluded as further detailed below) be sent to the investigated person/entity together with the minded letter of the MFSA.

The aim is for the MFSA to inform the investigated person/entity of the possibility to enter into a settlement agreement with the Authority as it could be the case that the investigated person/entity is not aware that such an option exists. The settlement proposal letter shall

¹ For the sake of clarity, please note that the MFSA first carries out an investigation into the alleged breaches of financial services laws and regulations, then if there are prima facie grounds, it will issue a minded letter explaining to the investigated person/entity the investigation carried out by the MFSA and the proposed enforcement action, while inviting the investigated person/entity to submit any representations to the Authority. The MFSA will only issue its final decision after thoroughly reviewing any representations received from the investigated person/entity.

include details of the process to be followed if the person/entity under investigation wishes to accept the Authority's proposal to enter into settlement discussions. For the sake of clarity, the investigated person/entity will have the possibility to reply to both the minded letter with the necessary representations, as well as to the settlement proposal letter.

Principle 2 – Exceptions

The MFSA may enter into settlement discussions in relation to any enforcement action which it is minded to impose. However, several exceptions are being proposed whereby the Authority will not offer and/or accept to enter into settlement discussions as per the following, always taking into account the seriousness of the alleged breach committed/being committed:

- (i) where the alleged breaches relate to possible unauthorised activity, possible criminal offences and/or possible serious, repeated and systematic breaches of the anti-money laundering and funding of terrorism laws and regulations;
- (ii) where settlement discussions already started, however, they were stalled and hence the investigation continued. Discussions on settlement are a one-time offer by the Authority and need to be taken seriously;
- (iii) where the breaches identified are such that the case could have an adverse impact on the financial sector or on the reputation of Malta or are otherwise of such a nature that it would not be in the public interest to enter into a settlement with the investigated person/entity;
- (iv) where an investigated person/entity has already entered into a settlement agreement with the Authority and two years have not yet elapsed from the execution of such agreement; and
- (v) where the MFSA finds that the investigated person/entity was found to have breached an obligation which was already subject to a settlement agreement, in a serious, repeated and systematic manner.

Principle 3 – Capping

The MFSA's power in relation to the imposition of administrative financial penalties varies depending on the applicable legislation. Certain laws provide for the imposition of administrative financial penalties which are usually not hefty penalties and are considered to be minor penalties due to the nature of the breach of the respective financial law or regulation.

In this respect, the MFSA believes that when it is minded to impose an administrative financial penalty of up to a certain threshold, the MFSA will not send out the settlement proposal letter but will instead go ahead and issue only the minded letter.

The MFSA proposes to set this capping at €5,000 and hence the MFSA would not send any settlement proposal letter to an investigated person/entity on whom it is minded imposing an aggregate administrative financial penalty of €5,000 or less.

However, in such cases, should the investigated person/entity itself wish to request the possibility to enter into settlement discussions, it can propose settlement discussions to the MFSA, who will decide on a case-by-case basis whether to entertain such request or otherwise.

Principle 4 – Time Limit

In order to ensure a timely and efficient process for the benefit of both the MFSA and the investigated person/entity, the MFSA is proposing a time limit of two weeks, which will start running as from when both parties initiate settlement discussions, for agreement to be reached on the settlement terms.

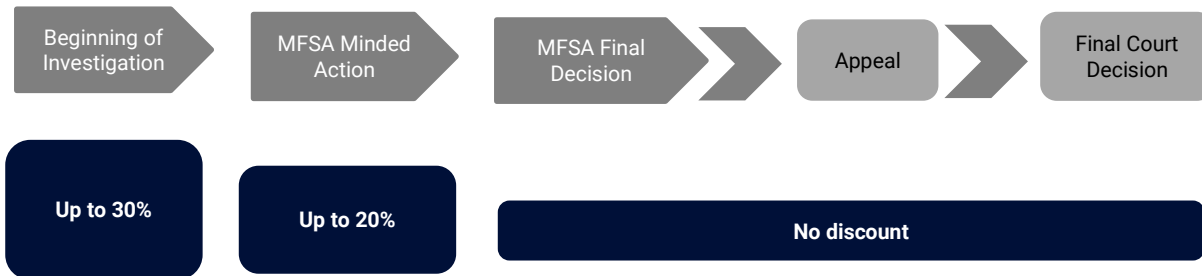
If agreement is not reached within the stipulated period of time, investigation will resume and it will be considered as if settlement discussions were not successful. This will ensure that settlement discussions are taken seriously and are concluded in the shortest time possible.

This being said, the Authority is proposing to have the power to extend this time limit, at its sole discretion and on a case-by-case basis, depending on the progress already made in the case in question. This will ensure that if discussions on settlement were progressing well, the work done will not be lost and hence the MFSA may decide to continue with settlement discussions to resolve the investigation at the earliest.

Principle 5 – Discounts

In order to encourage early settlement of investigations, the MFSA is proposing a system of reduced financial penalties in cases where the MFSA is minded imposing an administrative financial penalty. The discounts being proposed reflect how early in the decision-making process the settlement agreement is signed. This discount will be applied to the amount of administrative financial penalty which the Authority would otherwise be expected to impose.

The below diagram illustrates the proposed discounts, depending at which stage settlement discussions are entered into and finalised:



As clearly indicated in the above diagram, the Authority is proposing to give a discount of up to 30% if settlement is reached from the beginning of investigation up until the point that the minded letter is issued by the MFSA. If settlement is reached following the issue of the minded letter but before the final decision is issued by the MFSA, a discount of up to 20% is being proposed.

However, it is being suggested that no discount is given if settlement is entered into during appeal, hence after the final decision of the Authority, as such process will not be governed by the proposed Settlement Policy but will instead be governed by normal out-of-court settlement procedures.

This discount system encourages, as much as possible, the early settlement of investigations to make sure that the investigative process remains an efficient one.

Principle 6 – Termination of Settlement Discussions

It is also being proposed by the MFSA that either party to the settlement discussions will have the power to terminate settlement discussions at any time should they not be in agreement with the discussions being undertaken.

Moreover, the MFSA proposes to also have the power to unilaterally terminate settlement discussions if it is clear that the settlement discussions are not resulting in a timely conclusion of the investigation. This will ensure the proper allocation of resources to conclude the investigation in an efficient manner.

Principle 7 – Public Notice/Statement

Following the execution of a settlement agreement, the MFSA is recommending that a public statement or notice be issued on the MFSA website, accessible to the public, noting that the MFSA resolved an investigation by means of a settlement agreement.

Such public notice or statement would include, among other things, the identity of the person/entity with whom the Authority entered into a settlement agreement, the breaches committed by such person/entity and a summary of the terms of the settlement agreement. This is to ensure transparency in line with the financial rules and regulations under the remit of the MFSA.

Consultation Period

The MFSA is seeking feedback from licence-holders and practitioners prior to proceeding with a finalised Settlement Policy. Any comments or feedback in relation to this Consultation Document are to be addressed to the Enforcement Function within the MFSA by sending an email to enforcement@mfsa.mt, referring to this Consultation, by not later than 21 January 2022.

Following this consultation process, the Authority will review the feedback received and subsequently proceed to issue a feedback statement and finalise the Settlement Policy accordingly.