MFSA MALTA FINANCIAL SERVICES AUTHORITY

Consultation Document

Consultation on the Proposed Amendments to the Pension Rules issued under the Retirement Pensions Act

Ref: 06-2021

Date: 1 December 2021

Closing Date: 21 December 2021

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.

1.0 Introduction

1.1 The MFSA is proposing to amend the Pension Rules for Personal Retirement Schemes, the Pension Rules for Occupational Retirement Schemes, the Pension Rules for Service Providers and the Pension Rules for Retirement Funds in line with findings observed during regulatory work as well as other findings observed by the market.

1.2 The amended documents circulated by the MFSA for the purpose of this Consultation consist of the following:

Pension Rules for Occupational Retirement Schemes

- Pension Rules for Occupational Retirement Schemes
- Glossary
- Part C Appendix 1, 3, 4, 5 and 12
- Part C Appendix 14 Annex I, II, III, and IV

Pension Rules for Personal Retirement Schemes

- Pension Rules for Personal Retirement Schemes
- Part C Appendix 1, 3, 4, and 5

Pension Rules for Service Providers

- Pension Rules for Service Providers

Pension Rules for Retirement Funds

- Pension Rules for Retirement Funds

1.3 The purpose of this Consultation is to highlight the changes proposed to be carried out. As a result of this, these proposals are not binding and are subject to changes and revisions.

2.0 Proposed amendments to the Glossary

2.1 The glossary to the Pension Rules does not define the term ‘Tangible Movable Assets’. It is being proposed to include a new definition of ‘Tangible Movable Assets’ to provide further clarification to the market. The new definition in the glossary will read as follows: “*A tangible movable asset means a physical asset, whether animate or inanimate, that can be touched and that, without any alteration of their substance, can move themselves or be moved from one place to another, are moveable by nature, even though such things form a collection or a stock in trade. These include, but are not limited to, art, antiques, classic cars, plant and machinery.*”

Triq l-Imdina, Zone 1 Central Business District, Birkirkara CBD 1010
+356 2144 1155
communications@mfsa.mt
www.mfsa.mt

3.0 Proposed amendments to the Pension Rules for Personal Retirement Schemes and the Pension Rules for Occupational Retirement Schemes

3.1 Removal of the Concept of a Retirement Scheme established as an investment company with variable share capital ("SICAV")

3.1.1 Currently, a retirement scheme can be set up:

(a) as a SICAV under the Companies Act (Chapter 386 of the Laws of Malta);
(b) as a trust by trust deed under the Trusts and Trustees Act (Chapter 331 of the Laws of Malta);
(c) by contract in terms of the Civil Code (Chapter 16 of the Laws of Malta); or
(d) in any other legal form as may be approved by the MFSA.

3.1.2 The MFSA is concerned that where a retirement scheme is set up as a SICAV under the Companies Act, the Board of Directors of the Retirement Scheme would be similar, if not identical, to the Board of Directors of the Retirement Scheme Administrator. This could prove to be problematic due to the fact that there would be a company which has to administer another company. Furthermore, a member-directed occupational retirement scheme that is established as a SICAV requires the opening of individual sub-accounts (sub-funds) for each member. This would function in a manner which is very similar to a Retirement Scheme established as a trust, which is ultimately not in line with the intended use of a SICAV in the realm of pensions.

3.1.3 As a result, the MFSA is proposing the removal of the possibility of establishing a retirement scheme as a SICAV under the Companies Act and of having a retirement scheme constituted as a multi-fund company (Umbrella Fund) from the Pension Rules for Personal Retirement Schemes, and the Pension Rules for Occupational Retirement Schemes.

3.1.4 In light of this, the MFSA is proposing to remove standard licence conditions 5.1.5 – 5.1.10, Parts B.8 and B.9 of the Pension Rules for Occupational Retirement Schemes. The MFSA is also proposing to effect other amendments to the same Rules and to the appendices thereto where reference is currently made to SICAVs and umbrella funds. The MFSA is also proposing to remove standard licence conditions 4.1.5 – 4.1.10 and Part B.7 of the Pension Rules for Personal Retirement Schemes, among other amendments. The appendices to the Pension Rules for Personal Retirement Schemes thereto will also be amended and reference currently made to SICAVs and umbrella funds will be removed.

3.1.5 Furthermore, the MFSA is proposing to amend standard licence condition B.2.3.2 (a) of the Pension Rules for Personal Retirement Schemes and of the Pension Rules for Occupational Retirement Schemes by removing the reference made to sub-funds.

Triq l-Imdina, Zone 1 Central Business District, Birkirkara CBD 1010
+356 2144 1155
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www.mfsa.mt

3.2 Removal of the concept of Sufficient Retirement Income

3.2.1 In accordance with standard licence condition 5.6.1 of the Pension Rules for Occupational Retirement Schemes and the standard licence condition 4.6.1 of Pension Rules for Personal Retirement Schemes, retirement benefits for a defined contribution retirement scheme, other than any benefits paid on death or permanent invalidity of the Member, shall be paid in the following forms:

(a) Initial cash lump sum (optional);
(b) Programmed withdrawals and/or life annuity (mandatory);
(c) Additional cash lump sum (optional).

3.2.2 Currently the proviso to standard licence condition 5.6.2 of the Pension Rules for Occupational Retirement Schemes and standard licence condition 4.6.2 of the Pension Rules for Personal Retirement Schemes states that a person may only elect to take up 30% of the assets of a Member in a Retirement Scheme as a cash lump sum where the remaining assets of a Member, which are not paid in the form of a cash lump sum, generate sufficient retirement income.

3.2.3 The MFSA is proposing the removal of the concept of the sufficient retirement income from the Pension Rules for Occupational Retirement Schemes and the Pension Rules for Personal Retirement Schemes, by removing the provisos referred to in paragraph 3.2.2 of this consultation, in view of the concerns that have been raised by the market.

3.3 Proposed amendment to clarify the age when retirement benefits can commence to be paid

3.3.1 The Voluntary Occupational Pension Scheme Rules (S.L. 123.175), published in 2017, and the Personal Retirement Scheme Rules (S.L. 123.163), which were published in 2014, under the Income Tax Act, provide tax incentives for any member who contributes to qualifying schemes. When originally published, the Regulations stated that retirement benefits will commence to be paid at an age not later than 50 or not later than the date when the individual attains the age of 70 or any other age specified in the Pension Rules. This was in line with the requirements of the Pension Rules for Occupational Retirement Schemes and the Pension Rules for Personal Retirement Schemes. In 2019, the Regulations were amended to state that the commencement of payment of benefits to a qualifying individual shall be on a date that is not earlier than the date on which the individual attains the age of 61 and not later than the date when the individual attains the age of 70.

Triq l-Imdina, Zone 1 Central Business District, Birkirkara CBD 1010
+356 2144 1155
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3.3.2 In light of such a change, the MFSA is proposing to amend the Pension Rules for Occupational Retirement Schemes and the Pension Rules for Personal Retirement Schemes to also cater for situations where the scheme is a qualifying scheme as defined under the Voluntary Occupational Pension Scheme Rules and the Personal Retirement Scheme Rules, respectively. The proposed amendments will clarify that in such scenarios the commencement of payment of retirement benefits shall be made on a date stipulated in the said Regulations (S.L. 123.175 and S.L. 123.163).

4.0 Proposed amendments to the Pension Rules for Personal Retirement Schemes

4.1 Amendment to current standard licence condition 9.6 (b) (i) (bb) (now renumbered to 8.6 (b) (i) (bb)) of the Pension Rules for Personal Retirement Schemes

4.1.1 Currently, standard licence condition 9.6 (now renumbered to 8.6) of the Pension Rules for Personal Retirement Schemes states that, where a member-directed scheme allows a member to appoint an investment advisor in accordance with standard licence condition 9.2 (a) (now renumbered to 8.6 (a)), the retirement scheme administrator shall carry out due diligence on such advisor, through which it shall be ensured that the investment advisor satisfies one of the three scenarios laid down under the current standard licence condition 9.6 (b) (i) (aa) – (cc) (now renumbered to 8.6 (b) (i) (aa) – (cc)).

4.1.2 In paragraph 2.1.12 of the Feedback Statement issued on 4 January 2019 further to industry responses to the Consultation on amendments to the Pension Rules for Personal Retirement Schemes, the MFSA clarified that where an investment advisor is registered under the Directive 2016/97 (Insurance Distribution Directive), a discretionary fund manager licensed under Directive 2014/65/EU would need to be appointed in order to manage the underlying funds, unless the investment advisor is authorised under the Directive 2016/97(Insurance Distribution Directive) and also authorised under Directive 2014/65/EU.

4.1.3 In this respect, and in order to provide further clarifications to the market, the MFSA is proposing that standard licence condition 9.6 (b) (i) (bb) (now renumbered to 8.6 (b) (i) (bb)) is amended to align it with the Feedback Statement issued on 4 January 2019.

5.0 Proposed amendments to the Pension Rules for Occupational Retirement Schemes

5.1 Amendment to the Pension Rules for Occupational Retirement Schemes on the custody function

5.1.1 The MFSA is proposing to amend standard licence condition 1.4.8 of the Pension Rules for Occupational Retirement Schemes, which deals with the function relating to the custody of assets. The amendment will clarify that the role of a custodian is not solely limited to the safekeeping of assets but also includes oversight duties. The said amendment is being proposed to align standard licence condition 1.4.8 of the Pension Rules for Occupational Retirement Schemes with Article 33 of the Directive 2016/2341(EU) (IORP II Directive).

Triq l-Imdina, Zone 1 Central Business District, Birkirkara CBD 1010
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5.2 Amendments to Appendix 12 of the Pension Rules for Occupational Retirement Schemes

5.2.1 Amendment to the definition of "waiting period"

5.2.1.1 Currently, Appendix 12 of the Pension Rules for Occupational Retirement Schemes only allows the retirement scheme to decide the waiting period. The MFSA is proposing to amend the definition of "waiting period" to give the option to the retirement scheme or the employer to make such a decision and align the definition with the definition of "waiting period" in Directive 2014/50/EU (the Mobility Directive). This will allow different employers in an open scheme to establish different waiting periods, in line with the requirements of the Mobility Directive.

5.2.2 Amendments to the Conditions governing the acquisition of rights under Occupational Retirement Schemes

5.2.2.1 Article 4 (c) of the Mobility Directive states that "*where an outgoing worker has not yet acquired vested pension rights when the employment relationship is terminated, the supplementary pension scheme shall reimburse the contributions paid by the outgoing worker, or paid on behalf of the outgoing worker*". Paragraph 1.5 (c) (ii) of Part C Appendix 12 of the Pension Rules for Occupational Retirement Schemes, which transposes Article 4 (c) of the Mobility Directive states that, when there is an outgoing employee and the vested pension rights have not been acquired, in case of Defined Contribution Schemes, the scheme has to provide the sum of contributions made by the employee or the investment value arising from the said contributions.

5.2.2.2 In this respect, the MFSA is proposing to amend paragraph 1.5 (c) (ii) of Part C Appendix 12 of the Pension Rules for Occupational Retirement Schemes since as currently drafted, paragraph 1.5 (c) (ii) does not allow the scheme to choose which type of contributions can be paid to the outgoing worker.

5.2.2.3 Paragraph 1.5 (c) (ii) of Part C Appendix 12 of the Pension Rules for Occupational Retirement Schemes also states that *"upon joining the scheme, the Retirement Scheme Administrator shall inform the Member as to whether such Member would be entitled to receive either the sum of contributions or the investment value, in the case where the employment relationship is terminated"*. In this respect, the MFSA is also proposing to introduce new paragraphs 3.20 and 3.21 in Part C Appendix 3 of the Pension Rules for Occupational Retirement Schemes entitled Contents of the Scheme Particulars, with the aim of requiring retirement scheme administrators to include this information in the scheme particulars of a retirement scheme.

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www.mfsa.mt

5.2.3 Amendment to the provision of information

5.2.3.1 Article 6 of the Mobility Directive states that Member States shall ensure that active scheme members can obtain, on request, information on how a termination of employment would affect their supplementary pension rights, **within a reasonable period of time**. The current paragraph 1.9 (now renumbered to paragraph 1.10) of Appendix 12 of the Pension Rules for Occupational Retirement Schemes on Provision of information, which transposes Article 6 of the Mobility Directive states that a Retirement Scheme Administrator is required to provide active scheme members with information on the consequences which a termination of employment would have on their pension rights **on an annual basis**.

5.2.3.2 The MFSA is proposing to amend the current paragraph 1.9 (now renumbered to paragraph 1.10) of Appendix 12 of the Pension Rules for Occupational Retirement Schemes so that information can be provided upon request, whenever a Member needs such information and as a minimum on an annual basis. Such proposed amendment is being put forward to cater for situations where information is required to be provided on a more frequent basis than simply once a year and to ensure that a Retirement Scheme Administrator of an Occupational Retirement Scheme provides active scheme members with the necessary information at least annually.

5.2.3.3 The MFSA is also proposing to introduce a new paragraph 1.13 to clarify that the conditions and charges of dormant pension right and survivors' dormant pension rights are in line with those of active scheme members and active survivors' pension rights.

5.2.4 Introduction of a capital sum threshold

5.2.4.1 Article 5 (3) of the Mobility Directive, which deals with the preservation of dormant pension rights, states the that "*Member States may allow supplementary pension schemes not to retain the vested rights of an outgoing worker but to pay, with the worker's informed consent, including as regards applicable charges, a capital sum equivalent to the value of the vested pension rights to the outgoing worker, as long as the value of the vested pension rights does not exceed a threshold established by the Member State concerned. The Member State shall inform the Commission of the threshold applied*". In the Consultation Document on Pension Rules implementing Minimum Requirements on the Acquisition and Preservation of Pension Rights issued in 2018, the MFSA had stated that the threshold limits were being discussed with the relevant authorities.

5.2.4.2 Following lengthy discussions with the relevant authorities, the MFSA is proposing to commence allowing retirement schemes not to retain the rights of an outgoing worker, but to pay with the worker's informed consent, including applicable charges, a capital sum. The capital sum which the MFSA is proposing is an amount of €3,000. In this respect, the MFSA is introducing a new paragraph 1.9 to Appendix 12 to the Pension Rules for Occupational Retirement Schemes to include this requirement.

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5.2.4.3 Furthermore, the MFSA is also proposing to introduce a new paragraph 1.11 to Appendix 12 to transpose the last paragraph of Article 6 (1) of Directive 2014/50 on the information which needs to be provided to the outgoing worker when early access to pension rights are allowed.

6.0 Proposed amendments to the Pension Rules for Service Providers

6.1 Amendment to the Complaints Procedure Requirements in the Pension Rules for Service Providers

6.1.1 Currently, the Pension Rules for Service Providers contain an Appendix II on Complaints Procedure in the Pension Rules themselves, as well as a separate document entitled 'Appendix II – Complaints Procedure', which is not part of the Pension Rules, but a separate document entirely.

6.1.2 The MFSA is proposing to amend standard licence condition 1.4.4 to refer to Part E on Appendices to the Pension Rules for Service Providers.

6.1.3 Furthermore, Appendix II which is incorporated under the Pension Rules for Service Providers shall be removed, and the separate document entitled 'Appendix II – Complaints Procedure' – which is more up to date, and which can be found on the MFSA website – shall be retained.

6.2 Amendments to clarify audited and annual financial statements requirements in the Pension Rules for Service Providers

6.2.1 The current standard licence condition 4.3.18 of the Pension Rules for Service Providers reads "*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 shall be submitted to the MFSA within four months of the Accounting Reference Date*". The MFSA is proposing to delete standard licence condition 4.3.18 and introduce a new standard licence condition 4.3.14 to clarify which information needs to be submitted within four months of the Account Reference Date.

6.2.2 Furthermore, the MFSA also noted that standard licence condition 4.3.28 of the Pension Rules for Service Providers is unclear as to what requirements should form part of the management letter and what requirements should be included in the auditor's report. For clarification purposes, the MFSA is proposing to amend standard licence condition 4.3.28 of the Pension Rules for Service Providers by splitting up what is currently standard licence condition 4.3.28 into two paragraphs and introducing a new standard licence condition 4.3.29, to clearly indicate what should form part of the management letter and what should be included in the auditor's report.

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6.3 Introduction of Professional Indemnity Cover in the Pension Rules for Service Providers

6.3.1 The current Pension Rules for Service Providers state that the service provider in question "*shall take out and maintain adequate insurance cover*". The MFSA is proposing the introduction of a new framework on professional indemnity cover that establishes clear quantitative and qualitative threshold requirements. The MFSA aims at regulating the adequate insurance cover that is required to be taken out and maintained by service providers, namely by introducing new standard licence conditions under Part B.4.8.

6.3.2 In this respect, the MFSA is proposing the introduction of definitions for the terms 'Assets Held Under Administration', 'Assets Held Under Administration and Custody', 'Assets Held Under Custody', and 'Relevant Income' in the Glossary to the Pension Rules for the purpose of clarification.

6.3.3 Among the requirements that are being proposed by the MFSA in the framework on professional indemnity cover, the most important requirements are the following:

(a) where the policy is subject to an excess;
(b) the governing law;
(c) the territorial competence;
(d) where the service provider forms part of a group;
(e) documentation to be submitted to the Competent Authority;
(f) information to be forwarded to the Competent Authority; and,
(g) extension of the professional indemnity insurance policy.

6.3.4 In addition to such requirements, the MFSA is also proposing minimum limits of indemnity, which vary depending on whether the service provider concerned is a retirement scheme administrator, an investment manager, or a custodian.

6.3.5 It is to be noted that the minimum limit of indemnity will vary depending on whether or not the service provider in question performs more than one role. In fact, in instances where the service provider performs more than one role, (such as where a retirement scheme administrator carries on the investment function or where a retirement scheme administrator also carries on the custody function), the MFSA is proposing that the required minimum limit of indemnity is increased, with the aim of reflecting the service provider's functions. The MFSA also drew a distinction between the minimum limits of indemnity applicable in respect of each and every claim and those applicable in the aggregate.

Triq l-Imdina, Zone 1 Central Business District, Birkirkara CBD 1010
+356 2144 1155

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www.mfsa.mt

7.0 Proposed amendments to the Pension Rules for Retirement Funds

7.1 Amendment to the Pension Rules for Retirement Funds on half-yearly reports

7.1.1 Standard licence condition 2.3.4 of the Pension Rules for Retirement Funds currently states that the half-yearly report prepared by the Retirement Funds in accordance with standard licence condition 2.3.3 of the same Rules is to be submitted to the MFSA within two months from the period stipulated in the same paragraph. In this respect, the MFSA is proposing that the period of two months for the purpose of submitting the aforementioned half-yearly report is amended to read three months. This amendment is being proposed to bring the requirements of the submission of the half-yearly reports for Retirement Funds in line with the requirements of the Pension Rules for Personal Retirement Schemes and the Pension Rules for Occupational Retirement Schemes.

8.0 Conclusion

8.1 Any comments and feedback in relation to the attached draft legislations are to be addressed to the Insurance and Pensions Supervision Unit and submitted in writing on ips_legal@mfsa.mt, by not later than **21 December 2021.** Following this, the MFSA will review the comments of the market and, depending on the feedback provided, issue the amended documentation into force.

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