

Settlement Policy

Feedback Statement issued further to the Industry Responses to MFSA
Consultation Document on the Establishment of a Settlement Policy

Ref: 07-2021

Date: 01 June 2022

Contents

Introduction	3
General Comments	3
Specific Comments.....	5
Way Forward.....	8
Contacts.....	8

Introduction

On 14 December 2021, the Malta Financial Services Authority ('MFSA' or 'Authority') issued a Consultation Document on the Establishment of a Settlement Policy. The purpose of this Consultation Document was to highlight the main principles proposed by the MFSA in relation to the settlement process which it intends to adopt.

The Consultation Document mainly focused on the principles which the MFSA proposed to include in a formal regime it plans to adopt in relation to settlement agreements.

Further to the said Consultation Document, the MFSA is hereby issuing a Feedback Statement on the main comments received in relation to such consultation. An outline of the main comments received and the MFSA's position in relation thereto is provided below.

General Comments

1.1 Industry Comment: The industry expressed their opinion on the fact that it is important for the MFSA to notify an investigated person, at an early stage, that they are being investigated to allow the investigated person sufficient time to assess and consider whether they intend to initiate settlement discussions or otherwise.

MFSA's Position: Currently, as part of the investigation carried out by the MFSA, the Authority reaches out to the investigated person requesting information or clarifications and hence, the investigated person would be aware that an investigation is ongoing by the MFSA. However, going forward, unless the circumstances of the case merit otherwise – such as when the Authority suspects a possible criminal offence – the MFSA will send out a formal notification to the investigated person to inform them that an investigation has commenced.

This formal notification will also provide general information to the investigated person on the subject matter of the investigation. Following the receipt of such notification, the investigated person may itself request the initiation of settlement discussions with the MFSA. It is true that the MFSA would issue this formal notification when the investigation would still be at a preliminary stage, however, the MFSA would have already had time to assess the case in question and hence would be able to conduct settlement discussions even at that stage.

1.2 Industry Comment: The industry is concerned that the proposed settlement process seems to be built on a presumption of guilt/admission of liability before the investigation would have been concluded.

MFSA's Position: The MFSA would like to emphasise the fact that it is entirely voluntary for the person under investigation to reach out to the Authority to try and settle, and that any discussions relating to a possible settlement will not in any way prejudice the process relating to the MFSA's proposed enforcement action.

This being said, any settlement agreement entered into with the MFSA will always indicate the breaches that the investigated person would be deemed to have committed. This is a core aspect in a settlement agreement and this is also the position adopted in other jurisdictions. It is to be kept in mind that a settlement agreement will always involve an administrative measure and hence the breaches committed, which led to the administrative measure, would need to be laid out in the settlement agreement.

On the other hand, the MFSA would like to clarify that the public notice, which is to be issued on the MFSA website following the execution of a settlement agreement, will provide a high-level indication of the breaches identified and the measures imposed by the Authority.

1.3 *Industry Comment: The industry sought clarification as to the applicability of the Settlement Policy in view of the fact that no discount is to be provided in cases where a settlement agreement is reached after the MFSA issues its decision.*

MFSA's Position: The MFSA wishes to clarify that the principles envisaged in the Settlement Policy will only apply to those cases where a settlement agreement has been reached before the MFSA's decision is issued. However, there can be cases where the MFSA's decision is issued, the investigated person appeals the decision and – during the hearing of the appeal – the MFSA receives a request from the investigated person to enter into an out-of-court settlement. In such cases, the MFSA will assess whether it is ideal to enter into an out-of-court settlement at that stage and, if it deems so, it can enter into such agreement. However, such agreement will not be governed by the principles set out in the Settlement Policy and hence the principles of discounts, time limit etc will not apply to such cases and instead the process will be governed by the normal out-of-court settlement processes.

Moreover, the MFSA wishes to clarify the feedback received in relation to whether the Settlement Policy will only apply to cases where the MFSA is minded imposing an administrative financial penalty. This is not the case, given that a settlement can be reached even in those instances where the MFSA is minded imposing any other enforcement action – such as the issuance of a directive, a suspension or cancellation of a licence. However, the principles in relation to discounts and capping will obviously not be applicable to such cases.

1.4 *Industry Comment: The industry noted that Chapter 330 of the laws of Malta, the MFSA Act will be amended to include a specific power of the MFSA to enter into settlement agreements and hence the industry requested clarifications as to whether the principles envisaged in the Settlement Policy will also be entrenched in the new legislative provision under the MFSA Act.*

MFSA's Position: The MFSA would like to inform the industry that the policy principles detailed in the Settlement Policy will not be included in the legislative provision. The Settlement Policy will be made public on the MFSA website and any changes carried out thereto will also be made public.

Specific Comments

2.1 *Industry Comments: Principle 1 Proactive Approach – The industry commented on the fact that they are of the opinion that issuing the settlement proposal letter together with the minded letter is too late in the process and that settlement should be made available at an earlier stage.*

MFSA's Position: The MFSA will take the initiative of sending out a settlement proposal letter simultaneously with the minded letter. Nevertheless, the MFSA wishes to clarify that the possibility to enter into settlement discussions can be availed of from the moment that the investigated person becomes aware that the MFSA has commenced an investigation. The investigated person may approach the MFSA and request such discussions, as long as the potential breaches do not fall under one of the exceptions set out in the Settlement Policy.

2.2 *Industry Comments: Principle 2 Exceptions – The industry requested some clarity in relation to a number of exceptions.*

MFSA's Position: Specific clarity is hereby being given in relation to a number of exceptions as requested by the industry:

Exception (ii) which states that the MFSA will not offer and/or accept to enter into settlement discussion where settlement discussions already started, however, they were stalled and hence the investigation continued.

The industry suggested to clarify the word 'stalled' by inserting wording such as 'unreasonably stalled'. The MFSA is of the view that settlement discussions need to be taken seriously and the MFSA will categorically not enter into settlement discussions, in respect of the same subject matter, if previous discussions were stalled for any reason. This is because the MFSA would have already used its resources the first time when it initiated discussions and hence cannot afford to re-initiate discussion on the same subject matter, which discussions might possibly not lead to an agreement. Hence, while understanding the view of the industry, the MFSA believes that the wording of this exception should be left as is.

Exception (iv) which states that the MFSA will not offer and/or accept to enter into settlement discussion where an investigated person has already entered into a settlement agreement with the MFSA and two years have not yet elapsed from the execution of such agreement.

This exception caters for cases whereby an investigated person enters into a settlement agreement for a specific breach and after two years, requests to enter into another settlement agreement for a different breach. This will be considered by the MFSA only if the breach subject of a settlement agreement is not the same and the 2-year period would have elapsed. The purpose of this is to make it clear that it is not ideal for an investigated person to commit another breach in such a short span of time. Moreover, the Authority does not agree with the recommendation of the industry to remove this exception because the MFSA believes that if an investigated person commits another breach in such a

short span of time, this indirectly depicts a low compliance culture on the part of the investigated person and the MFSA cannot enter into another settlement agreement as the latter still needs to have a deterrent effect on the investigated person.

Exception (v) which states that the MFSA will not offer and/or accept to enter into settlement discussion where the MFSA finds that the investigated person was found to have breached an obligation which was already subject to a settlement agreement, in a serious, repeated and systematic manner.

This exception caters for situations where an investigated person has already entered into a settlement agreement because of a specific breach and the MFSA finds that, despite the execution of a settlement agreement in this respect, the investigated person continued to act in breach of the obligation subject of the settlement agreement in a serious, systematic and repeated manner. In such case, the MFSA will not entertain another request for settlement on the same breach given that the investigated person continued to breach the same obligation – irrelevant of the 2-year period. Therefore, even if more than two years would have passed from the execution of the settlement agreement, if the MFSA finds that the investigated person breached the obligation subject of settlement in a serious, repeated and systematic manner, the MFSA will refrain from entering into another settlement agreement in relation to the same obligation.

2.3 Industry Comment: Principle 3 Capping – The industry suggested that the capping applicable to those cases where the MFSA will not be issuing a settlement proposal letter is increased from €5,000 to €15,000. Moreover, some further clarity on this principle was requested by the industry, in general.

MFSA's Position: For the sake of clarity, the MFSA would like to inform the industry that it can still consider a request for settlement when the amount of any administrative penalty is less than €5,000. Should the investigated person wish to request settlement discussions – even if the proposed administrative penalty is below €5,000 – there is nothing stopping them from reaching out to the MFSA which will assess the request on a case-by-case basis. This means that for administrative penalties which are below €5,000, although the MFSA will not be sending out the settlement proposal letter, should the MFSA receive a request for settlement from the investigated person, the MFSA can still consider the request accordingly.

2.4 Industry Comment: Principle 4 Time Limit – The industry suggested an extension of the time limit of two weeks for settlement terms to be agreed.

MFSA's Position: The MFSA has taken into consideration the comments raised by the industry and wishes to inform the industry that the proposed time limit for settlement terms to be agreed has been extended to one month. For the sake of clarity, it is hereby further being explained that the time limit of one month will start to run from the moment that settlement discussions start and not from the moment that the MFSA receives a request for settlement or is informed of the intention of the investigated person to agree to initiate settlement discussions.

Nonetheless, the MFSA would like to inform the industry that it may, in its sole discretion, extend this time limit of one month within which agreement to settlement terms need to be achieved, when it is evident that progress in the settlement discussions is being made and there is goodwill on the part of the investigated person to conclude investigations by means of a settlement agreement.

2.5 *Industry Comment: Principle 5 Discount Scheme – The industry commented on the fact that the highest discount available when entering a settlement is 30% and that this amount is quite low, keeping in mind that the investigated person would need to agree to the findings of the MFSA before the investigation of the MFSA would have been concluded. Moreover, the industry also suggested that the 30% discount be applied across the board up until the MFSA issues its decision – given that, most probably, the investigated person will only consider the possibility of entering into settlement discussions, once the minded letter is received and the investigated person would have more visibility as to whether it is beneficial or otherwise to settle the investigation.*

MFSA's Position: The MFSA wishes to contend that the discount scheme has been devised based on the average penalties which the MFSA imposes. When compared to other regulators, the penalties of the MFSA cannot be considered as being 'hefty' and hence the reason for providing for such discount levels. Moreover, the investigated person will have the possibility of providing additional information to the Authority to help in its analysis – in line with the approach adopted by the FCA in its 'FCA stage 1 letter'. Essentially, in the formal notification informing the investigated person that an investigation has commenced, the investigated person will be invited to furnish any information in its possession which can help the Authority in its investigation and hence this will ensure that the Authority has all information at hand before proceeding with settlement discussions or enforcement action.

Moreover, while it is true that the MFSA will only be providing in-depth details of the investigation and the proposed administrative measure in the minded letter, it is important to note that in the formal notification of investigation, which will be sent to an investigated person once an investigation has commenced, the investigated person will be made aware that he is under investigation and the grounds for such investigation. Hence, the Authority believes that, at that point in time, an investigated person will have sufficient information to be able to consider whether or not to initiate settlement discussions with the Authority.

Finally, the MFSA would like to confirm that while the discount scheme being proposed in the Settlement Policy provides for different discounts depending on which stage the settlement agreement is entered into, the Authority might during settlement discussions consider affording a different discount depending on the circumstances of the case, such as the quantum of the penalty and the level of co-operation and goodwill shown by the investigated person.

2.6 *Industry Comment: Principle 6 Termination – The industry suggested that the MFSA notifies, in advance, the investigated person when it intends to terminate settlement discussions and give a formal notice⁷ that if agreement on the settlement terms is*

not reached within a specific number of days, the MFSA will terminate discussions and will resume its investigation.

MFSA's Position: The MFSA has considered this proposal and will be taking on board this suggestion and hence the MFSA will be issuing a 7-day notice letter to the investigated person as a final notice/warning before terminating settlement discussions. Hence, the investigated person would be advised that settlement discussions will be considered as terminated within seven days from the date of the letter if no final response on settlement is received.

2.7 *Industry Comment: Principle 7 Public Notice/Statement – The industry is concerned that once a settlement agreement is executed, the identity of the person with whom the MFSA entered into a settlement will be disclosed to the public and this is being regarded as not being a sufficient incentive for an investigated person to enter into a settlement agreement. The industry suggested for the MFSA to have discretion as to whether to publish the identity of the person or otherwise, depending on the case.*

MFSA's Position: The MFSA wishes to clarify that when a settlement agreement is entered into, the terms of the actual settlement agreement will not be made public. What the MFSA will be including in the public notice is the fact that a settlement agreement has been reached together with details of the findings of the Authority and the relevant legal provisions breached. This being said, the Authority is required to abide with statutory obligations, emanating also from the EU regulatory framework, where the Authority as a public authority needs to be transparent with the general public. For this reason, the MFSA would like to inform the industry that in general, the public notice to be issued following the execution of a settlement agreement will include the identity of the investigated person with whom a settlement agreement has been reached. However, the MFSA will retain discretion not to publish the identity of the investigated person where, following a case-by-case assessment, the MFSA believes that publication would jeopardise the stability of financial markets or an ongoing investigation or where publication would cause, insofar as it can be determined, disproportionate damage to the person involved.

Way Forward

Following the analysis of the feedback received as detailed above, the Authority will finalise the Settlement Policy and get it approved accordingly. Following the approval, the final Settlement Policy will be uploaded on the MFSA's website and made available to the public.

Contacts

Any queries or requests for clarifications in respect of the above should be addressed by email on enforcement@mfsa.mt.