

Consultation Document on the New Publication 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 the public. 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 of 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 ('Investigated Person'). As a result of such investigations, the MFSA, through the various laws and regulations falling under its remit, is empowered to impose administrative or disciplinary sanctions or measures on Investigated Persons ('Administrative Measures'). In view of this, Article 16(8) of the Malta Financial Services Authority Act (Chapter 330 of the laws of Malta) specifically obliges the Authority to publish, in such medium and in such manner and for such duration as may be deemed warranted by the circumstances and the nature and seriousness of the breach or wrongdoing, the Administrative Measure imposed on the Investigated Person. The reason behind making public any Administrative Measure imposed is to ensure that the public is kept informed, while at the same time, acting as a deterrent to others.

Currently, the MFSA's Publication Policy in relation to Administrative Measures is found on the MFSA website. This holds that after an Investigated Person is notified of the MFSA's decision to impose an Administrative Measure, the MFSA shall publish a notice of the sanction on its website and in such other media deemed appropriate in the circumstances. The current Publication Policy also lists the duration of the publication, depending on the nature and seriousness of the breach committed.

Recently, following internal discussions, the MFSA embarked on a review of the current Publication Policy with the aim of having a formalised policy which includes both the current principles and new principles. Following extensive research carried out on other regulators, both foreign and local, the MFSA is hereby proposing to include the following principles in the new Publication Policy (to be further detailed below):

- a) The medium used for the publishing of Administrative Measures;
- b) The manner for publishing the imposed Administrative Measures;
- c) The anonymity principle;
- d) The duration of the published Administrative Measure; and
- e) The monitoring programme.

Purpose of the Consultation

The purpose of this Consultation Document is to highlight the principles being proposed by the MFSA with the intention of adopting them in the new Publication Policy which will supersede the current one *in toto*.

Applicability of the Publication Policy

The Publication Policy is being established to refine the process adopted by the MFSA when publishing any Administrative Measures imposed on an Investigated Person. The Publication Policy will start to apply from the moment that it is published on the MFSA's website and will be applicable to all Administrative Measures imposed.

For the sake of clarity, the Publication Policy shall not be applicable to cases where a settlement agreement has been entered into between the MFSA and the Investigated Person. Publication following the execution of a settlement agreement is governed by the MFSA's Settlement Policy which regulates the publication of the public statement in relation to settlement agreements. In this respect, kindly refer to the Settlement Policy recently published on the MFSA website, via this link: <https://www.mfsa.mt/wp-content/uploads/2022/11/MFSA-Settlement-Policy.pdf>.

Policy Principles

The MFSA is proposing to establish the below principles in relation to the publication of Administrative Measures which will be imposed on Investigated Persons following the formal notification of the MFSA's decision to the Investigated Person:

Principle 1 – The Medium Used for Publishing an Administrative Measure

Currently, the MFSA mainly communicates with the public via the MFSA's website (<https://www.mfsa.mt/>). It is through this medium that the MFSA issues Notices, Guidelines, Circulars etc. which are transmitted to the public for these to be kept informed of business practices and the Authority's expectations.

Hence, the Authority is proposing to retain this medium for the publication of Administrative Measures imposed. Nonetheless, the Authority is also proposing to maintain the discretion to publish such Administrative Measures on any other media in which it deems appropriate according to the circumstances present at hand. For the sake of clarity, the MFSA must always publish the public statement following the formal notification of the MFSA's decision to the Investigated Person.

Principle 2 – The Manner Used for Publishing the Imposed Administrative Measure

As upheld in the current Publication Policy, following the decision of the MFSA to impose an Administrative Measure and consequently, the Investigated Person is notified of such decision, a public statement must be issued by the MFSA to the public.

The MFSA is proposing to publish details in the public statement relating to the findings of the Authority and the identity of the person, unless the case falls under the anonymity principle, which is further discussed hereunder (Principle 3). The public statement issued by the MFSA is always intended to serve as a summary of the Authority's decision and, accordingly, is not the actual decision itself.

Moreover, if applicable, in the public statement the MFSA is also proposing to indicate clearly whether the imposed Administrative Measure is subject to appeal and consequently, whether it has been appealed or otherwise. As currently happens, the intention is to update the public statement when an appealed case has been decided to always provide the full and most accurate information to the public.

Principle 3 – The Anonymity Principle

As a norm, the MFSA believes that the naming of persons, including licence-holders, that have been sanctioned for breaching provisions of law, will lead to greater awareness of the standards which should guide the activities and the conduct of operators in the financial services industry.

However, in the new Publication Policy, the MFSA is proposing to have the possibility to issue the public statement in relation to an imposed Administrative Measure on an anonymous basis in line with the following conditions:

Scenario 1: Satisfaction of the non-materiality principle and the established threshold

In this instance, if the below criteria are both satisfied, then the MFSA is proposing to issue the public statement on an anonymous basis and hence solely referring to the sector within which the Investigated Person, subject to the Administrative Measure, operates. The conditions being proposed to be satisfied are:

- (a) The Administrative Measure imposed is in relation to a non-material breach;
and
- (b) The Administrative Measure imposed is that of an administrative penalty which does not exceed ten thousand Euro (€10,000).

Scenario 2: Exceptional Circumstances

The MFSA is proposing that should the conditions mentioned under scenario 1 above not be satisfied, the Authority may exceptionally also consider publishing on an anonymous basis, based on a case-by-case assessment and in line with the proportionality principles, in the below circumstances:

- (a) In the case where the publication would jeopardise the stability of the financial market or an ongoing investigation; **or**
- (b) In the case where the publication would cause, insofar as it can be determined, disproportionate damage to the Person involved.

For the sake of clarity, the publication is deemed to jeopardise the stability of the financial market when it may negatively impact the financial system, creating financial imbalances such as loss of confidence in the banking systems and capital markets.

It is important to point out that whilst anonymous publication would be automatic once the conditions have been satisfied under scenario 1, in cases falling under scenario 2 anonymous publication will only be granted in exceptional circumstances which truly merit the publication to be anonymous. Such assessment will be conducted by the MFSA after careful analysis of the circumstances of the case and the consequences which the publication of the Administrative Measure would have if the name of the Investigated Person is published.

The Authority wishes to make it clear that despite the anonymity principle, if the Authority receives a request for information from any other regulatory authority (both local and foreign) in relation to a particular Administrative Measure which would have been published on an anonymous basis and the request for information would be in relation to the identity of the Investigated Person, the MFSA will disclose such details accordingly.

Principle 4 – The Duration of the Published Administrative Measure

The current Publication Policy establishes certain criteria which are considered for the determination of duration of such publication. The new Publication Policy will keep such criteria, with minor amendments which are being proposed hereunder:

- (a) A notice to the public in respect of a fine not exceeding € 3,000, a warning, a reprimand or other minor infringement shall remain posted on the website for a period of two (2) years;

- (b) A notice to the public in respect of a fine exceeding € 3,000 but not exceeding € 25,000, or of more serious infringements shall remain posted on the website for a period of five (5) years;
- (c) A notice to the public in respect of serious infringements, including suspension or restriction of an authorisation issued by the MFSA for regulatory purposes (not a voluntary request for suspension or restriction) and fines exceeding € 25,000 shall remain posted on the website for a period of ten (10) years;
- (d) A notice to the public in respect of a cancellation of a licence or any other authorisation, registration, recognition issued by the MFSA for regulatory purposes (not a voluntary surrender) shall not be removed from the website; and
- (e) A warning of a general nature shall be removed from the website only when it is established that there is no further threat to the public. The removal of such warnings is not tied to a pre-determined number of years.

The MFSA has carried out an assessment on the above criteria and is proposing to retain them. Moreover, the MFSA understands that there can be other types of enforcement action (as per the powers granted to the MFSA in various laws) which are not included in the above list. In this respect, the MFSA is proposing to assess the matter on a case-by-case basis and determine what is the proper duration of the publication. The Investigated Person will be informed of such when they are notified about the enforcement action taken against them.

Principle 5 – The Monitoring Programme

To monitor public statements issued on the MFSA's website, it is proposed that a yearly assessment would be carried out to monitor and update all the published Administrative Measures. This would ensure that all the published Administrative Measures remain so published in line with the above-mentioned policy principles and that they are removed from the MFSA's website when the period for the duration of such publication elapses. This would ensure that the information shared with the public is always up-to-date and accurate.

Consultation Period

The MFSA is seeking feedback from the public prior to proceeding with a finalised Publication Policy. Any comments or feedback in relation to this Consultation Document are to be sent by email to the Enforcement Function within the MFSA on enforcement@mfsa.mt referring to this Consultation by not later than **15 January 2023**.

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