

Publication Policy

Feedback Statement issued further to the responses to MFSA Consultation Document on the Establishment of a Publication Policy

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Introduction

On 1 December 2022, the Malta Financial Services Authority ('MFSA' or 'Authority') issued a Consultation Document on the Establishment of a New Publication Policy ('Consultation Document'). The purpose of this Consultation Document was to highlight the main principles proposed by the MFSA in relation to the publication process which it intends to adopt, following the issuing of a decision by the Authority in line with the MFSA's power to conduct investigations.

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 publication, as well as revise the principles which were currently in place.

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.

Comments

1.1 Feedback Received: The MFSA is to consider making the new Publication Policy applicable retrospectively as from 1 January 2023 to recently decided cases, especially in relation to the Anonymisation Principle.

MFSA's Position: The MFSA does not agree with this proposal and hence is clarifying that the Publication Policy will be applicable as from the date of its approval, that is from 1 June 2023. The MFSA believes that for the sake of providing a fair treatment to all Investigated Persons, it is best if the Publication Policy is not made applicable retrospectively from 1 January 2023 and instead starts to apply from the moment it has been approved, that is from 1 June 2023.

1.2 Feedback Received: Kindly provide clarification as to the definition which is being applied by the MFSA to the term "non-material breach", as outlined in Principle 3 of the Consultation Document.

MFSA's Position: The MFSA would like to inform the public that a list of non-material breaches is now attached to the Publication Policy. The Publication Policy is being made public on the MFSA website and hence the public will be able to refer to such annex accordingly. In a nutshell, as at the date of this Consultation Document, non-material breaches are considered to be breaches in relation to regulatory reporting and failures to pay the supervisory fees (as will be further detailed in the Annex to the Publication Policy). This being said, the MFSA may, from time to time, decide to update such list accordingly.

1.3 Feedback Received: The proposed administrative penalty threshold of €10,000 should be extended to €50,000 to be in line with the threshold established by the FIAU.

MFSA's Position: The MFSA notes this comment which was quite popular from the feedback received and wishes to clarify that this threshold needs to be taken into consideration together with the other condition in relation to the materiality of the breach. Hence, if the breach is material, the amount of the penalty is irrelevant as the anonymisation principle as detailed in Principle 3 of the Publication Policy (Scenario 1) will not apply. Moreover, the Authority wishes to emphasise that the reason why this threshold is being proposed is to make sure that for cases which are considered as material, the transparency principle is maintained in the interest of the public to be kept informed. Furthermore, comparing the penalties issued by the MFSA with those issued by the FIAU (which have a higher threshold to the anonymity principle), one can easily deduce that those issued by the MFSA are far less than those issued by the FIAU and hence the threshold for the anonymity principle to apply cannot be compared to the one of the FIAU.

This being said, the MFSA still considered this feedback and has decided that the threshold established under *Scenario 1* of the Anonymity Principle as proposed in the Consultation Document is increased from €10,000 to €30,000 and hence when an administrative measure is in relation to a non-material breach and the administrative measure imposed is that of an administrative penalty which does not exceed €30,000, the MFSA will issue the public notice on an anonymous basis.

1.4 Feedback Received: The publication of the name should take place when the prescriptive period to lodge an appeal has expired, or if an appeal has been filed, then once the appeal is decided in favour of the decision of the MFSA.

MFSA's Position: The MFSA notes this comment however, in establishing the Publication Policy, the MFSA needs to keep in mind the ongoing obligation it has vis-à-vis the public, that is to keep the public informed to avoid any damage being suffered by the public. Moreover, it is important to keep in mind that the MFSA keeps the public notices updated with the status on whether an appeal has been lodged and how it was decided and hence anyone conducting a search on a particular licence holder/individual authorised or supervised by the MFSA will know whether the decision of the MFSA has been reversed or otherwise at appeal stage and can surely use such information as a basis for conducting the necessary due diligence.

1.5 *Feedback Received: Kindly provide clarification as to the definition which is being applied by the MFSA to the term "other media" when it comes to the MFSA publishing a decision.*

MFSA's Position: Whilst it is not practice for the Authority to publish its decisions on any other media apart from the MFSA's website, the MFSA wishes to retain such discretion to publish the decisions on other media such as newspapers.

1.6 *Feedback Received: Kindly provide clarification as to whether or not it would constitute a material breach if a non-material breach was repeated.*

MFSA's Position: When a non-material breach is repeated, it is taken into consideration in the computation of the penalty for a breach of the same regulatory provision. Hence, the repetition of a non-material breach in respect of the same regulatory provision, does not necessarily constitute a breach of a material nature however it is taken into consideration in the computation of the penalty for a breach of the same regulatory provision.

1.7 *Feedback Received: The Authority should consider not penalising a non-material breach when it is first breached and instead issue a warning or reprimand.*

MFSA's Position: The MFSA does not agree with this feedback given that when a non-material breach is first committed, it is still a breach of the respective law, rule or regulation and hence the Authority is to proceed with imposing a regulatory action.

1.8 *Feedback Received: The MFSA should consider amending the threshold of € 10,000 to € 25,000 so that when it comes to Principle 4 of the Publication Policy relating to the duration of the publication, a publication which falls under points (a) and (b) of Section 4 of the Publication Policy would be published on an anonymous basis.*

MFSA's Position: The MFSA does not see the relationship between the threshold of € 30,000 (increased from the initial proposal of €10,000) and the criteria established for the duration of the publication. The Authority is of the view that the criteria for the duration of the publication can remain as is given that there will always be publication on the MFSA website, be it on an anonymous basis or otherwise and hence the time periods established for the publication will still be applicable as those depend on the penalty amount/type of regulatory action and not on whether the publication was made on an anonymous basis or otherwise. Moreover, the criteria for the duration of publication applies to all cases and not only to those cases in relation to a non-material breach.

1.9 Feedback Received: The MFSA should consider starting to agree on a remediation plan after the issuing of the Minded Letter but before the issuing of the Decision Letter.

MFSA's Position: The Authority would like to explain that once a case is referred for investigation and potential regulatory action, this is only done as a last resort. The Supervisory Function within the Authority only refers a case for further investigation when all the supervisory measures, including possible remediation plans, would have failed. Hence, allowing another possibility to the licence holder/individual authorized or supervised by the MFSA to remediate the matter, is not something which is acceptable by the Authority when it has arrived at the stage of investigation. The licence holder/individual authorized or supervised by the MFSA needs to understand that the supervisory aspect is very important and if given the possibility to remediate, it needs to be taken seriously so that the possibility of an investigation being carried out is reduced and hence also the possibility of issuing a regulatory action. Moreover, it is also important to keep in mind that once a Minded Letter is issued, the licence holder/individual authorized or supervised by the MFSA is given ample time to provide its representations for the Authority to consider before arriving at a decision and hence it is important for representations to be submitted and be given in as much detail as possible.

1.10 Feedback Received: If anonymisation is to be applied then this will lead to lack of transparency and create an ambiguous and possibly arbitrary situation when it comes to its application. This will lead to wide discretions being used by the MFSA and hence the Authority is to retain the current position of always publishing the names of the licence holder/individual authorised or supervised by the MFSA.

MFSA's Position: The MFSA would like to explain that the proposal to publish decisions on an anonymous basis, under specific circumstances, is not something new and this emanates from various EU laws and regulations which provide the power to the competent authority to publish on an anonymous basis, upon the satisfaction of certain criteria. Moreover, it is also important to keep in mind that other Member States already have a similar policy in place whereby they assess each case and see whether anonymization can be afforded or otherwise. Finally, the MFSA also aims at striking a balance between its license holders/individuals authorized or supervised by the MFSA and the public interest - where it seeks to avoid doing disproportionate reputational damage to the license holders/individuals authorized or supervised by the MFSA over what is considered a non-material breach.

Additional Information

The MFSA would like to point out that whilst Scenario 1 of the Anonymity Principle as envisaged in the Publication Policy is automatic, when it comes to Scenario 2 of the Anonymity Principle a licence holder/individual supervised or licensed by the MFSA needs to make its case as to why they believe anonymization is to be granted. The onus is on the

licence holder/individual to prove that the case satisfies one of the conditions under Scenario 2 and hence merits the case to be published on an anonymous basis because publication on an anonymous basis (specifically under Scenario 2) is the exception and not the rule. The Authority is to be provided with detailed arguments, quantifiable, if possible, as to the reasons why anonymization is to be granted under Scenario 2. Only if provided with such information will the MFSA be able to analyse and decide accordingly.

Way Forward

Following the analysis of the feedback received as detailed above, the Authority finalised the Publication Policy accordingly. The final Publication Policy will be published on the MFSA website.

Contacts

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