

# MFSA

---

MALTA FINANCIAL SERVICES AUTHORITY

## CONSULTATION DOCUMENT

**CONSULTATION ON THE PROPOSED CHANGES TO PART A AND PART BI OF THE  
INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS**

**[MFSA REF.: 03-2017]**

**Closing Date: 17 April 2017**

## **1. Introduction**

Member States of the European Union have until 3 July 2017 to bring their laws and regulations in line with the requirements of the Market in Financial Instruments Directive, which will apply from 3 January 2018 (“MiFID” or “The Directive”). It introduces new processes for authorising investment firms and expands on the scope of regulated services and activities.

This consultation does not make any qualified amendments or rules and it is a guidance, which is purely a help for firms to decide what MiFID-related notifications and applications they should make. Please note that it is not an exhaustive document and it is the firms’ responsibility to take the necessary action to ensure that their authorisation is appropriate and in accordance with MiFID II for the business that they plan or currently carry out.

The purpose of this consultation is to assess the industry feedback on the proposed changes before the rules are finalised and published. The consultation consists of two main parts:

- 1) Consultation on changes being proposed to Part A of the Investment Services Rules for Investment Services Providers (‘ISRISPs’ or ‘the Rules’); and
- 2) Consultation on changes being proposed to Part BI of the Investment Services Rules for Investment Services Providers

## **2. Proposals which are subject to change**

Prior to highlighting the salient amendments being proposed, it is emphasised that 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 financial services industry. It is important that those involved in the consultation bear these considerations in mind.

## **SECTION A - CONSULTATION ON CHANGES BEING PROPOSED TO PART A OF THE INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS**

### **1. Overview**

The draft document being issued for consultation amends Part A of the ISRISPs. For purposes of clarity, the proposed Part A shall no longer make reference to ‘Standard Licence Conditions’ (‘SLCs’) but to ‘Rules’. As a result, it is being proposed that the style adopted for referencing and numbering is changed in order to: [i] provide a unique identifier to each and every rule; [ii] facilitate any amendments which may be made in the future; and [iii] better reflect the structure being proposed.

### **2. Who is affected by those changes?**

The Directive defines investment firms in article 4(1) (1).

The definition, covers all persons who perform investment services and activities using financial instruments.

The MiFID “investment firm” expanded the range of participants in the financial services industry, certain asset managers, private wealth managers and financial advisers. In the collective investment services context, MiFID will apply to firms which provide portfolio management services to their clients, including firms which act as the sub-investment manager to another firm which is an AIFM or UCITS ManCo. Where a person meets these criteria and is not otherwise exempt it will require authorisation as an investment firm.

### **3. Summary of proposals**

The Authority in lined with the Directive requirements is revising the rulebooks and forms and now is seeking an industry feedback in this regard. These Rulebooks are also being reviewed internally and at the end of the whole process all feedback will be collated. This consultation

exercise will run till the end of April 2017. The new Rulebooks will come into force at the same time as the MiFID II.

The below will provide an outline of the changes imposed by the Directive. In particular, the following will be revised/introduced in the Rulebooks:

- New requirements imposed directly by the Directive in relation to the Management bodies of an investment firm, market operator or data reporting services provider; (article 9 onwards) Schedule A (Application Form) will be revised to comply with the MiFID II requirements for new applicants, however the finalised form will come into force upon receipt of feedback and implementation of the Directive.
- New stricter approach to the remuneration regime.
- New category of licence for the new entities wishing to become Data Reporting Services Providers. The authorisation process will encounter the requirements introduced by the Directive (Title V article 59 and the technical standards published by the Commission).
- New rules in relation to the algorithmic trading activities.
- Amendments in relation to the Tied Agent regime in accordance with the article 29;
- An application process for the Regulated Market, MTF or OTF;

#### **4. The Application Process**

The Application Form- in order to comply with the stricter requirements imposed by the Directive will cater the following changes:

#### **Management body of an investment firm under the Investment Services Act as amended by the Directive –**

In accordance with the current regime Malta exercise discretion on the type of information required from prospective investment firms to provide in order to demonstrate that they meet the conditions for authorisation under MiFID and the format for the collection of the information. The MiFID II imposed the same standards across the EU, therefore all investment firms must adhere to the rules listed in the Regulatory Technical Standard (RTS) adopted by the European Commission on 14 July 2016 [http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/160714-rts-authorisation\\_en.pdf](http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/160714-rts-authorisation_en.pdf) and

the authorisation implementing standard Implementing Technical Standard (ITS) currently in the draft form available in the ESMA Final Report on “MiFID II/MiFIR draft Technical Standards on authorisation, passporting, registration of third country firms and cooperation between competent authorities” of 29 June 2015 –ESMA/2015/1006 [https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1006 -  
\\_mifid\\_ii\\_final\\_report\\_on\\_mifid\\_ip\\_technical\\_standards.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1006_-_mifid_ii_final_report_on_mifid_ip_technical_standards.pdf)

The particular attention of the market participants is drawn to the article 9 of the Directive and its reference to the article 88 and 91 of Directive 2013/36/EU. For new applications submitted after the 3<sup>rd</sup> of January 2018 the Authority will apply new requirement of the limited amount of directorships hold by an individual, however the MFSA will take on the account size, internal organisation and the nature, the scope and the complexity of activities of an applicant.

Furthermore it is being proposed that two new instances where the Authority shall not grant a licence are added to Article 6(1) of the Investment Services Act, particularly [i] where there are objective and demonstrable grounds for believing that the management body of the applicant may pose a threat to its effective, sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market; and [ii] where the Authority is not satisfied that the members of the management body of the applicant are of sufficient good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions with the applicant.

*Criteria which the MFSA will apply in considering an application for a licence and ongoing regulatory requirements will be based on prescribed requirements imposed in article 9(3) and the technical standard supplementing the Directive on information and requirements for the authorisation of investment firms.*

In this regard the application form in Section 5 will add an additional table for the existing appointments of an individual proposed as a director/partner.

### **Introduction of a new category of licence holders to cater for Data Reporting Services Providers (‘DRSPs’)**

Title V of the MiFID II introduced the concept of DRSPs. Any new entities wishing to provide the services defined under this title will need to obtain a licence. An existing DRSP seeking to extend its business to additional data reporting services will need to submit a request for an extension of its authorisation. The MFSA released for consultation Investment Services Act (CAP 370) and Financial Markets Act (CAP 345) Data Reporting Services Regulation, 2017 which will transpose the Directive requirements.

Given that the activity is newly introduced within the Authorisation regime and has never been subject to a licence, the MFSA is creating a new category of licence holders.

The requirements for becoming a licence holder have been explicitly established under [RTS 13](#): COMMISSION DELEGATED REGULATION (EU) .../... of 2.6.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the authorization, organisational requirements and the publication of transactions for data reporting services providers.

An applicant should comply with the criteria prescribed in the RTS.

The Authorisation requires inter alia the following:

- A programme of operations including:
  - (a) information on the organisational structure of the applicant,
  - (b) an organisational chart and a description of the human, technical and legal resources allocated to its business activities;
  - (c) information on the compliance policies and procedures of the data reporting services provider,
  - (d) a list of all outsourced functions and resources allocated to the control of the outsourced functions;
- Information on the internal corporate governance policies and the procedures which govern management body, senior management, and, where established, committees of the DPRS.
- Policies and procedures for identifying, managing and disclosing existing and potential conflicts of interest.
- Effective business continuity arrangements to address disruptive incidents which may occur.

- Procedures and arrangements for physical and electronic security designed to protect IT system, minimise the risk of attacks/hacking, prevent unauthorised disclosure and ensure integrity.

With regards to granting or refusing requests for authorisation, the Authority will apply the timeframes imposed in Article 7 and 61 of the Directive.

### **Algorithmic traders and High Frequency Traders**

The Algorithmic trading regime is being proposed to be introduced by virtue of a Legal Notice under Investment Services Act (CAP.370) Financial Markets Act (CAP.345) Algorithmic Trading Regulations, 2017 (currently under the consultation).

As already indicated by the Authority in Circular to the financial services industry on the changes being proposed to the Investment Services Act (ISA) as a result of the transposition of MiFID II and the implementation of MiFIR issued 3<sup>rd</sup> of May 2016, the MFSA will require that investment firms that engage in algorithmic trading shall have in place appropriate systems and controls for this activity.

The Authority in accordance with article 17 of the Directive and COMMISSION DELEGATED REGULATION (EU) .../... of 19.7.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (RTS 6 and Annex to RTS 6) is required to keep the record and register of investment firms that engage in algorithmic trading. Given specificity of the business and potential risks involved the Authority will require the Maltese investment firm that engages in algorithmic trading in Malta or in another Member State or EEA State to notify this to the competent authority and to the European regulatory authority of the trading venue. The notification pack shall include *inter alia*:

- the regulatory status of the firm;
- the firm's ownership and governance structure;

- the firm's risk management, compliance, audit structure and organisation and level of experience of individuals carrying those roles;
- detailed Risk Policy Management;
- the firm's roles in the market, including whether it is a market maker and whether it executes orders for clients or rather only trades on its own account;
- the level of automation of trading;
- the extent to which the firm relies on third parties for the development and maintenance of its algorithms;
- the type of instruments;
- the number of countries and regions in which the firm is undertaking trading activities;
- the firm's annual earnings and profits
- an independently carried IT systems assessment, which provides the Authority with assurance that all systems and procedures are in line with the MiFID II requirements;

Please note that the above list is not exhaustive and the Authority shall be considering each application separately. When reviewing a notification pack the MFSA may request an additional information as deemed suitable.

### **Tied Agent regime**

Under the Directive Member States shall introduce registration process for tied agents. The Authority already has a registration process for appointing tied agents in place. The MFSA shall be proposing to add the new requirements set out in article 29 (6) for the registration of tied agents.

The Authority only admits a tied agent to the register established if is satisfied that the tied agent is of sufficiently good repute and possesses appropriate knowledge and competence. The applicant will be required to provide a declaration to that extend. The Authority reserves rights to request more onerous information if the tied agent application relates to the activities carrying significant risk or targeting retail market.



The full scope of changes is reflected in Section 11 Part A of the Investment Services Rules for Investment Services Providers.

### **An application process for the Regulated Market, MTF or OTF**

The Regulated Markets and Market Operators (Authorisation Requirements) Regulations 2017 (currently under consultation) transpose and implement new criteria for applicants under Title III.

In line with the Directive, it is being proposed that the “operation of an organised trading facility” is added as an investment service.

## **SECTION B - CONSULTATION ON CHANGES BEING PROPOSED TO PART BI OF THE INVESTMENT SERVICES RULES FOR INVESTMENT SERVICES PROVIDERS**

### **1. Introduction**

The Malta Financial Services Authority, (the ‘MFSA’ or the ‘Authority’) is proposing a number of amendments to Part BI of the Investment Services Rules for Investment Services Providers in order to:

- i) ensure that there is no overlap with the new Conduct of Business Rulebook; and
- ii) transpose and implement a number of MiFID II and MiFIR provisions.

The proposed amendments also seek to improve the structure of Part BI of the ISRISPs (‘Part BI’) to enhance user-friendliness and ease of reference.

It should be noted that to date, the MFSA has already issued a number of circulars and consultation documents, particularly with regards to the proposed Conduct of Business Rulebook and a number of draft legal notices transposing MiFID II into Maltese Law.

## 2. Overview

The draft document being issued for consultation is being proposed to replace the current Part BI of the ISRISPs. That said, the large majority of the existent Part BI, bar those provisions covered by the Conduct of Business Rulebook, have been replicated in the draft document being issued for consultation. As aforesaid, the layout of Part BI has been revisited in order to provide a holistic rulebook which is more flowing and better structured. Also, for purposes of clarity, the proposed new Part BI shall no longer make reference to ‘Standard Licence Conditions’ (‘SLCs’) but to ‘Rules’. As a result, it is being proposed that the style adopted for referencing and numbering is changed in order to: [i] provide a unique identifier to each and every rule; [ii] facilitate any amendments which may be made in the future; and [iii] better reflect the structure being proposed.

Whilst a number of rules have been added to transpose MiFID II, certain pre-existing SLCs (now Rules) have been amended to provide the necessary clarifications which the Authority has deemed necessary. Furthermore, certain appendices to Part B, applicable to Licence Holders falling within the scope of Part BI have also been included in Part BI itself in order to minimise cross-referencing and provide the industry with a comprehensive document to refer to.

### **SECTION C: REPLIES**

Comments and replies with respect to the above and/or the attached drafts can be sent by e-mail on [ISRConsultation@mfsa.com.mt](mailto:ISRConsultation@mfsa.com.mt) by not later than **17 April 2017**.

**Communications Unit**  
**Malta Financial Services Authority**  
**MFSA Ref: 03-2017**  
**16 March, 2017**