

# MFSA

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MALTA FINANCIAL SERVICES AUTHORITY

## CONSULTATION DOCUMENT

### CONSULTATION ON THE PROPOSED TRANSPOSITION OF THE UCITS V DIRECTIVE

[MFSA REF: 12-2015]

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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 not only from licence holders and other involved parties, but also following the necessary review and vetting by the relevant competent authorities and Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind.

## **1. Introduction**

Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions ('UCITS V') was published in the Official Journal of the European Union on 28 August 2014.

UCITS V introduces new rules applicable to custodians of UCITS, such as the entities eligible to assume this role, their tasks, delegation arrangement and liability. Furthermore, it also introduces general remuneration principles which will be applicable to UCITS management companies. Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the provisions of the Directive by the transposition deadline of 18 March 2016.

This Consultation Document explains the manner in which the Authority proposes to transpose the provisions of the UCITS V Directive. Proposed amendments to legislation and Investment Services Rules are also being circulated with the industry

## **2. Proposed Transposition of UCITS V in Maltese Law**

The Authority is proposing to transpose the provisions of the UCITS V Directive as follows:

- Minor amendments to the Investment Services Act in relation to the applicable sanctions together with the issue of 'ad hoc' regulations to deal with penalties and sanctions;
- 'Ad hoc' regulations to make provision for custodians of all collective investment schemes;
- Amending regulations to the Investment Services Act (Control of Assets) Regulations;
- Amending regulations to the Investment Services Act (UCITS Management Company Passport) Regulations;
- Specific amendments to the Investment Services Rules following the enactment of the regulations making provision for custodians as referred to above and transposing the provisions of UCITS V in relation to the remuneration of the manager.

All the legislative initiatives with the exception of the revised Investment Services Act and the regulations dealing with penalties and sanctions are being circulated with this Consultation Document.

### **3. Investment Services Act (Custodians of Collective Investment Schemes) Regulations and proposed amendments to the Investment Services Act (Control of Assets) Regulations**

The Authority is proposing significant changes to the current Investment Services Act (Control of Assets) Regulations ('COAR') primarily through the issue of a new legal notice which proposes to focus exclusively custodians of collective investment schemes.

Parts 1 to 3 of the COAR dealing with safekeeping services in relation to investment firms will remain in force for the time being. The Authority also proposes to undertake a review of the COAR as revised in view of the transposition of MIFID II/MiFIR.

#### *3.1. Investment Services Act (Custodians of Collective Investment Schemes) Regulations*

Following the transposition of the Alternative Investment Managers Directive ('AIFMD'), custodians of the different categories of collective investment schemes were regulated in different pieces of legislation/regulations/rules. For this reason, in view of the UCITS V transposition, the Authority took the opportunity to review all the Investment Services Rules as well as the COAR and is hereby proposing one set of regulations proposing to regulate custodians of all collective investment schemes.

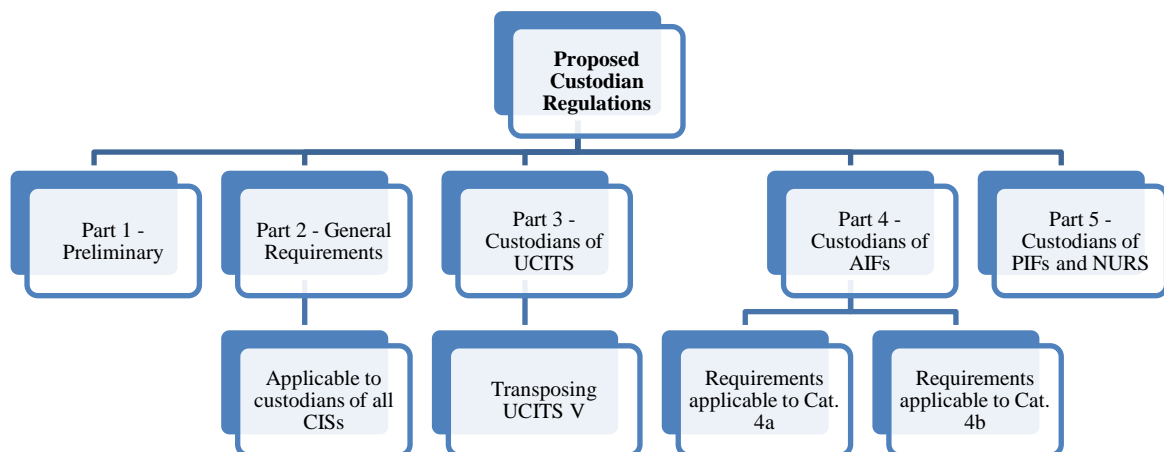
In view of the different categories of collective investment schemes for which provision is made in the different Investment Services Rules, it was felt that the Investment Services Act (Custodians of Collective Investment Schemes) Regulations ('proposed Regulations') should be structured as follows:

- [i] Parts 1 and 2 applicable to custodians of all collective investment schemes;
- [ii] Part 3 applicable to custodians of UCITS and transposing the provisions of UCITS V;
- [iii] Part 4 is applicable to custodians of AIFs. It is further sub-divided into
  - Part 4a applicable to custodians of AIFs in possession of a Category 4a Investment Services Licence and thus transposing the provisions of Article 21 of the AIFMD; and
  - Part 4b applicable to custodians of AIFs in possession of a Category 4b Investment Services Licence;
- [iv] Part 5 applicable to custodians of collective investment schemes other than UCITS and AIFs.

Part 2 includes the general requirements which would be applicable to custodians of all collective investment schemes. Thus provision is made for the requirement to have a written agreement, the regulation of the custodian’s fees and the termination of the custody agreement. In particular, regulations 7 and 8 propose to review regulations 12 and 21 of the COAR. Particularly regulation 21 created an open-ended situation wherein the termination of the control of assets was suspended until the fund appointed another custodian to replace the outgoing one. The proposed regulations 7 and 8 seek to propose an alternative to the aforementioned deadlock situation.

- Q1) Do you agree with the proposed restructuring of the current COAR?**
- Q2) Do you agree with the provisions included in Part 2 of the proposed Regulations?**
- Q3) Do you have any suggestions as to any other issues which are applicable to all custodians of collective investment schemes and which can be regulated in Part 2?**

Parts 3 and 4 of the proposed Regulations seek to transpose the provisions the UCITS V and the AIFMD in relation to custodians of UCITS and AIFs as indicated in the table below.



Part 5 of the proposed Regulations seeks to regulate custodians of PIFs and Non-UCITS Retail Schemes. In particular, the Authority is proposing to extend the applicability of specific sub-articles of Article 21 AIFMD to custodians of non-UCITS retail schemes and PIFs targeting Experienced Investors namely the provisions relating to conflicts of interest, the duties of the custodian, delegation, liability and discharge of liability. PIFs targeting Experienced Investors are being put on the same level with Non-UCITS retail schemes in view of their quasi-retail nature.

With regards to PIFs targeting Qualifying and Extraordinary Investors, the Authority has opted to maintain the flexibility which characterised this regime to date. No mandatory requirement to appoint a custodian has been introduced. On the other hand, should the scheme, or the manager on behalf of the scheme opt to appoint a custodian, it would have to comply with certain minimum requirements which are prescribed in Part 5 of the proposed Regulations.

The Authority is aware of the fact that currently a significant number of PIFs appoint a Maltese custodian and would require a period of time within which to comply with the requirements prescribed in the proposed Regulations. For this reason, provision is being made for a 1 year transitional period from the date of publication of the proposed regulations within which Non-UCITS retail schemes, Experienced Investor PIFs and PIFs targeting Qualifying and Extraordinary Investors are to comply with the requirements prescribed therein.

The Authority is hereby circulating for comments the Investment Services Act Custodians of Collective Investment Schemes) Regulations.

### *3.2. Investment Services Act (Control of Assets) (Amendment) Regulations.*

The Authority is hereby circulating for comments the Investment Services Act Custodians of Collective Investment Schemes) Regulations. The amending regulations propose to revoke Parts 4 to 6 of the COAR.

## **4. Investment Services Act (UCITS Management Company Passport) (Amendment) Regulations**

The Investment Services Act (UCITS Management Company Passport) Regulations are being amended in view of the amendments to Article 21 UCITS IV.

The Investment Services Act (UCITS Management Company Passport) (Amendment) Regulations are being circulated with this consultation.

## **5. Amendments to the Investment Services Rules**

Parts 3 and 4 of the Proposed Regulations seek to transpose the provisions the UCITS V and the AIFMD in relation to custodians of UCITS and AIFs by introducing provisions which were previously included in the Investment Services Rules as indicated in the table below.

### *5.1. Investment Services Rules for Investment Services Providers*

The following sections of the Investment Services Rules for Investment Services Providers are being reviewed:

- (a) Part BII: SLCs 3.52 to 3.60 are being included to transpose the requirements prescribed in Articles 14a and 14b of UCITS V;
- (b) Part BIII: SLCs 5.01 and 5.02 have been reviewed in view of the Proposed Regulations;
- (c) Part BIV: Part BIV will be reviewed as follows:
  - SLC 1.01 has been updated in view of the different classifications in the Category 4 Investment Services Licence.
  - SLCs 1.02 and 1.03 will be deleted in view of the Proposed Regulations;
  - SLCs 3.01, 3.04, 3.06 to 3.09, 3.11 to 3.12, 3.15 and 3.29 will be deleted in view of the transposition of UCITS V and the Proposed Regulations;
  - Section 4 will be deleted in its entirety.

### *5.2. Investment Services Rules for Retail Collective Investment Schemes*

The following sections of the Investment Services Rules for Retail Collective Investment Schemes are being reviewed:

- (a) Part BII will be reviewed as follows:
  - SLC 2.15, 2.16 and 2.18 are being deleted in view of the transposition of UCITS V and the Proposed Regulations;
  - SLCs 6.1.2, 6.2.3, 6.2.8 and 6.8 are being updated in view of the transposition of UCITS V;
- (b) Appendix I: Section 2 of Annex 2 is being updated in view of the transposition of UCITS V;
- (c) Appendix II: SLC 1.9 is being updated in view of the transposition of UCITS V;
- (d) Appendix VIII: SLCs 7.03 to 7.11 are being included to transpose the requirements prescribed in Articles 14a and 14b of UCITS V.

### *5.3. Investment Services Rules for Professional Investor Funds*

The following sections of the Investment Services Rules for Professional Investor Funds ('PIFs') are being reviewed:

- (a) Part A: Section 8.3 is being reviewed in view of the different classifications of the Category 4 Licence;
- (b) Part BI: SLC 1.14 is being reviewed in view of the Proposed Regulations. A new SLC 1.16 is being introduced.
- (c) Part BI: SLC 1.14 is being reviewed in view of the Proposed Regulations. A new SLC 1.17 is being introduced.

- (d) Part BIII: SLC 1.14 is being reviewed in view of the Proposed Regulations. A new SLC 1.16 is being introduced.

#### *5.4. Investment Services Rules for Alternative Investment Funds*

SLCs 3.15, 3.16 and 3.19 of Part B are being deleted in view of the Proposed Regulations.

## **6. Contacts**

The Authority invites comments on the proposed policy and technical changes identified in this consultation together with the specific questions outlined. Interested parties are to send their comments in writing by not later than **15 January 2016**. Any comments and feedback are to be addressed to Dr. Isabelle Agius – Regulatory Development Unit by e-mail on [iagius@mfsa.com.mt](mailto:iagius@mfsa.com.mt).

Any queries or requests for clarifications in respect of the above should be addressed to: Dr. Isabelle Agius, Regulatory Development Unit Tel: 25485359 or by email on [iagius@mfsa.com.mt](mailto:iagius@mfsa.com.mt), Mr. Jonathan Sammut, Securities and Markets Supervision Unit: Tel: 25485229 or by email on [jsammut@mfsa.com.mt](mailto:jsammut@mfsa.com.mt) or Dr. Petra Attard Montalto, Regulatory Development Unit Tel: 25485546 or by email on [pattardmontalto@mfsa.com.mt](mailto:pattardmontalto@mfsa.com.mt).

**Communications Unit**  
**Malta Financial Services Authority**  
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