

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

Consultation on Proposed Amendments to the Financial Institutions Act (Cap. 376) and the Banking Act (Cap. 371)

[MFSA REF: 01-2018]

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Note: The documents circulated by the MFSA for the purpose of consultation are in draft form and comprise proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

1. Purpose

- 1.1 The aim of this consultation document is to present to the industry and other relevant stakeholders the amendments which are being proposed to, *inter alia*, the Financial Institutions Act (Cap. 376) and the Banking Act (Cap. 371) in order to transpose Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (hereinafter referred to as the “PSD2”).
- 1.2 In this regard, the amendments which are being proposed in this consultation complement the revised Directive No. 1 of the Central Bank of Malta on the Provision and Use of Payment Services, issued on the 9th of January 2018.
- 1.3 The MFSA is also proposing some minor amendments to both the Financial Institutions Act and to the Banking Act in order to provide the Minister responsible for Financial Services with the possibility to implement, at any future point in time, certain options provided to Member States by Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (hereinafter referred to as the “PAD”).
- 1.4 In addition, the MFSA is also proposing additional amendments in order to clarify and improve the text of the Financial Institutions Act and of the Banking Act, and bearing the proportionality principle in mind, to align to the extent possible and necessary the provisions of the Financial Institutions Act with the provisions of the Banking Act.
- 1.5 Besides the amendment of the Financial Institutions Act and the Banking Act, the MFSA is also envisaging changes to subsidiary legislation and to Financial Institutions Rules issued under the Financial Institutions Act. The proposed amendments to such subsidiary legislation and Rules are however not being covered in this consultation.
- 1.6 The proposed amendments to the Financial Institutions Act and the Banking Act are being issued for consultation together with this Consultation Document. The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of the following proposals:
 - A consolidated version of the Financial Institutions Act indicating in tracked changes the proposed amendments; and
 - A consolidated version of the Banking Act indicating in tracked changes the proposed amendments.
- 1.7 These proposals are not binding and are subject to further changes and revisions. Accordingly, it is important that persons involved in the consultation bear these considerations in mind.

2. Introduction

- 2.1 The PSD2 brings within its scope two new payment services, namely payment initiation services and account information services, which were previously not licensable under Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC,

2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (hereinafter referred to as the “PSD1”). With respect to the provision of account information services however, the PSD2 envisages a lighter supervisory regime, referring to it as a registration.¹

2.2 The introduction of these new services in the Annex to the PSD2 means that:

- a) entities which are currently providing payment initiation services or account information services and which are currently not licensed under the Financial Institutions Act, or which would like to start providing these services, will now require a licence or registration, respectively as applicable under the PSD2; and
- b) entities which are currently licensed under the Financial Institutions Act and which are either currently providing payment initiation services or account information services or which wish to start providing payment initiation services or account information services, will need to apply for an extension of their licence in accordance with the PSD2.

2.3 In addition, Articles 5(2) and (3) of the PSD2 also require providers of these new services to hold a professional indemnity insurance or some other comparable guarantee against their liability, covering the territories in which they offer or intend to offer services. In practice this will mean that:

- a) entities providing solely account information services will need to hold a professional indemnity insurance or other comparable guarantee in accordance with Article 5(3) of the PSD2;
- b) entities providing solely payment initiation services will need to hold initial capital in accordance with Article 7(b) of the PSD2 and a professional indemnity insurance or other comparable guarantee in accordance with Article 5(2) of the PSD2;
- c) payment institutions which together with the provision of account information services, payment initiation services, or both, provide any of the other payment services listed in points (1) to (6) of Annex I to the PSD2, will, in addition to the requirement to hold initial capital and own funds in accordance with Articles 7, 9 and 10 of the PSD2, also need to hold a professional indemnity insurance or other comparable guarantee in accordance with Article 5(2) and (3) of the PSD2;
- d) electronic money institutions as well as financial institutions providing services other than those referred to in paragraphs 4 and 10 of the First Schedule to the Financial Institutions Act wishing to provide account information services, payment initiation services, or both, will, in addition to the initial capital and own funds requirements laid out in the Financial Institutions Act and any Rules issued thereunder, also need to hold a professional indemnity insurance or other comparable guarantee in relation to the provision of account information services and/or payment initiation services as required in terms of the PSD2.

2.4 In contrast, credit institutions licensed under the Banking Act wishing to provide payment initiation services and/or account information services will not be required to hold a professional indemnity insurance or other comparable guarantee in terms of the PSD2. The provision of any such services will however be taken into consideration by the competent authority in order to ensure that credit institutions have sufficient capital to cover the risks to which they are exposed.

¹ This is not to be confused with the registration required by Articles 14 and 15 of the PSD2 in the national public register and the EBA register respectively.

- 2.5 Besides introducing two new services to the list of payment services, the PSD2 also introduces additional requirements which will need to be complied with when submitting an application for a licence. These new requirements apply not only to new applicants but also to financial institutions which are already licensed to provide payment services under the Second Schedule to the Financial Institutions Act, which, in accordance with the third subparagraph of Article 109(1) will need to be re-licensed under the PSD2. In this regard and in accordance with the said PSD2 Article, financial institutions which are already licensed under the Financial Institutions Act to provide payment services, are required to submit to the MFSA all relevant information in order to allow the MFSA to assess whether those financial institutions comply with the new requirements laid down in Title II of the PSD2, and, if not, which measures need to be taken in order to ensure compliance. Alternatively, the MFSA may, in accordance with Article 109(2) of the PSD2, automatically re-licence financial institutions under the PSD2 in cases where the MFSA is already in possession of evidence that the requirements laid down in Articles 5 and 11 of the PSD2 are complied with.
- 2.6 In addition, in accordance with the second subparagraph of Article 109(1) of the PSD2, the MFSA could also consider withdrawing a licence, should the financial institution concerned not be compliant with the new requirements. This is also in line with the provisions of Article 13(1)(c) of the PSD2 which allow competent authorities to withdraw an authorisation in cases where a payment institution no longer meets the conditions for the granting of an authorisation.
- 2.7 Furthermore, the PSD2 also removes point (7) from the Annex to the PSD1. In this regard, and in accordance with Article 109(5) of the PSD2, financial institutions licensed to provide payment services as referred to in point (7) of the Annex to the PSD shall retain their licence for the provision of those payment services which are considered to be payment services as referred to in point (3) of the Annex to the PSD2 where by the 13th of January 2020, the MFSA has evidence that the requirements laid down in point (c) of Article 7 and in Article 9 of the PSD2 are complied with.
- 2.8 In this regard, and for further information, all relevant stakeholders may refer to the Opinion issued by the European Banking Authority on the 19th of December 2017, on the transition from PSD1 to PSD2.

3. Proposed Amendments to the Financial Institutions Act (Cap. 376)

3.1 *Article 2: The MFSA is proposing to amend or introduce definitions*

The MFSA is proposing to introduce terms which were previously not defined and which will be included in the text of the Financial Institutions Act, as well as to amend the definitions of the terms which are defined in the PSD2 in accordance with Article 4 of the said Directive.

In addition, the MFSA is proposing to move the definitions which are currently found in the Second and Third Schedules to the Financial Institutions Act to article 2 of the said Act.

3.2 *Article 3(1) and (1A): Introduction of registration requirement for account information service providers*

The MFSA is proposing the insertion of a new sub-article (1A) requiring account information service providers, defined as payment service providers providing solely account information services, to obtain a registration under the Financial Institutions Act. A proviso is also being added to this new sub-article (1A) to clarify that financial institutions which are already in possession of a licence granted under the Financial Institutions Act wishing to provide account

information services, will not require an additional registration, but may provide such services under their existing licence.

Similarly sub-article (1) is also being amended to exclude account information service providers from the requirement of obtaining a licence given that, as explained above, account information service providers will, in accordance with the new sub-article (1A) be required to obtain a registration, not a licence, under the Financial Institutions Act. In this regard, Financial Institutions Rule FIR/01/2011 on the '*Application Procedures and Requirements for Authorisation of Licences under the Financial Institutions Act 1994*' will also be amended in order to include the registration requirements.

In addition, provisos to sub-articles (1) and (1A) are also being added in order to clarify that persons having obtained an authorisation or a registration under the PSD2 from another Member State (defined as including an EEA State) do not need to be in possession of a licence or a registration granted under the Financial Institutions Act in order to provide their services in or from Malta, but may do so through the right of establishment and/or the freedom to provide services.

3.3 *Article 3(2) and (2A): Amendment to the exclusions from the requirement of obtaining a licence*

Article 3 of the PSD2 provides a list of exclusions for which a licence is not required. In view of the maximum harmonisation nature of the PSD2, the Financial Institutions Act cannot include additional exemptions to those listed under Article 3 of the PSD2 for those services falling within the scope of the PSD2. Accordingly, the proposed amendments to sub-article (2) seek to clarify that the exemptions listed therein are only applicable to the provision of services which are not covered by the PSD2 or by Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (hereinafter referred to as the "Electronic Money Directive").

Consequently, a new sub-article (2A) is being added in order to transpose Article 3 of the PSD2. In this regard, Financial Institutions Rule FIR/01/2011 on the '*Application Procedures and Requirements for Authorisation of Licences under the Financial Institutions Act 1994*' will also be amended in line with this new sub-article (2A).

In addition, the provisos to paragraphs (k) and (l) of the new sub-article (2A), which transpose Articles 37(2) and (3) of the PSD2 respectively, seek to clarify that entities providing the services described in paragraphs (k) and (l) of the new sub-article (2A) will, despite being excluded from the requirement to obtain a licence, be subject to the notification requirements stipulated therein. Similarly, a proviso is also being added to paragraph (o) of the new sub-article (2A), clarifying that entities providing the services described in paragraph (o) of the new sub-article (2A) will, despite being excluded from the requirement to obtain a licence, and in accordance with Article 3(o) of the PSD2, be subject to the relevant requirements specified in the revised Directive No. 1 of the Central Bank of Malta on the Provision and Use of Payment Services.

3.4 *Article 3(3A): Insertion of new sub-article*

A new sub-article (3A) is being inserted in order to transpose Articles 37(1), (4) and (5) of the PSD2.

3.5 *Article 3(4), (5) and (6): Inclusion of the concept of registration*

Sub-articles (4), (5) and (6) are being amended in order to cater for the newly introduced concept of registration under the Financial Institutions Act.

3.6 *Article 3(7) to (12): Deletion of the provisions related to the possibility for the MFSA to grant a waiver to small electronic money institutions*

Article 32 of the PSD2 allows Member States to exempt or to allow their competent authorities to exempt payment institutions providing payment services referred to in points (1) to (6) of Annex I to the PSD2, with some exceptions and providing that certain conditions are met, from the application of all or part of the procedure and conditions set out in Sections 1, 2 and 3 of Chapter 1 of Title II of the PSD2.

The MFSA decided not to take this option and will therefore not be transposing Article 32 of the PSD2.

Sub-articles (7) to (12) of article 3 of the Financial Institutions Act, provide the MFSA with the possibility to exempt electronic money institutions from the application of all or part of the provisions relating to general prudential requirements, initial capital, own funds and safeguarding requirements, as set out in the Financial Institutions Act and in any Financial Institutions Rules applying to financial institutions authorised to issue electronic money. In line with its decision not to take the option provided by Article 32 of the PSD2 however, the MFSA is proposing the deletion of sub-articles (7) to (12) of article 3 of the Financial Institutions Act, thereby removing the MFSA's power to grant a waiver to small electronic money institutions.

3.7 *Article 4: Requirement to apply for a licence or a registration*

The MFSA is proposing the insertion of a new sub-article (1A) requiring natural persons or companies wishing to commence the business of an account information service provider, to apply in writing to the MFSA for a registration under the Financial Institutions Act.

Similarly sub-article (1) is also being amended to exclude companies wishing to commence the business of an account information service provider from the requirement of applying in writing to the MFSA for a licence under the Financial Institutions Act.

Sub-articles (2) and (3) are being amended in order to cater for the newly introduced concept of registration, whereas the new sub-articles (4) and (5) are being inserted in order to transpose Article 11(2) of the PSD2.

In addition, in line with the proposed amendments to article 3(1) and (1A) of the Financial Institutions Act, the MFSA is also proposing to add provisos to sub-articles (1) and (1A) of article 4 in order to clarify that persons who are in possession of an authorisation or a registration granted under the PSD2 by another Member State, do not need to apply in writing to the competent authority for a licence or a registration, but may provide such services in Malta in exercise of their European rights in accordance with the provisions of the Payment Services Directive.

3.8 *Article 5: Granting of a licence or registration*

A new sub-article (1A) is being inserted specifying the conditions which need to be satisfied in order for a registration to be granted.

In addition, sub-article (1B) is being inserted in order to transpose Articles 5(2), (3) and (7) of the PSD2, thereby adding the requirement for undertakings applying for a licence or a registration to provide payment initiation services or account information services, respectively,

to hold a professional indemnity insurance covering the territories in which they offer services, or some other comparable guarantee against liability, as a condition of their licence or registration.

Other sub-articles of article 5 are also being amended in order to include the newly introduced concept of legislation, to further clarify the text and to transpose Article 11 of the PSD2.

3.9 *Article 5A: Own funds.*

The provisions of this article are being amended in order to transpose Article 8 of the PSD2. In addition, although the prohibition of the multiple use of elements eligible for own funds is currently already found in Financial Institutions Rule FIR/02/2011 on the ‘*Supervisory and Regulatory Requirements of Institutions Authorised under the Financial Institutions Act 1994*’ and Financial Institutions Rule FIR/03/2011 on the ‘*Taking Up, Pursuit of and Prudential Supervision of the Business of Financial Institutions Authorised to Issue Electronic Money under the Financial Institutions Act 1994*’, the MFSA is proposing to also include this prohibition in a new sub-article (2A).

Furthermore, sub-articles (1), (2) and (3) are also being amended to clarify that in accordance with Article 9(1) of the PSD2, the requirement to hold own funds at all times does not apply to those offering only services as referred to in points (7) or (8), or both, of Annex I to the PSD2.

3.10 *Article 5B: Insertion of a new article on the requirement to hold a professional indemnity insurance or other comparable guarantee*

This article is being inserted in order to clarify the requirement for financial institutions providing payment initiation services and, or, account information service, other than electronic money institutions, to hold a professional indemnity insurance or other comparable guarantee.

In addition, further to the Guidelines issued by the European Banking Authority on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of the PSD2 (EBA/GL/2017/08), the MFSA is also introducing a requirement for financial institutions required to hold a professional indemnity insurance or other comparable guarantee in accordance with article 5B(1) of the Financial Institutions Act, to review, and if necessary recalculate, the minimum monetary amount of their professional indemnity insurance or other comparable guarantee at least on an annual basis.

3.11 *Article 6: Restriction, suspension or withdrawal of a licence or registration*

The MFSA is proposing to amend article 6 in order to clarify the text, include the newly introduced concept of registration, and, in accordance with Article 23(1)(d) of the PSD2, introduce the possibility for the competent authority to suspend a licence or a registration granted under the Financial Institutions Act.

In addition, in accordance with Article 13(1) of the PSD2, the MFSA is proposing to change the mandatory obligation under sub-article (1) of article 6 of the current Financial Institutions Act to an option. This will allow the MFSA to make the determinations contemplated in article 6(1) of the Financial Institutions Act on a case-by-case basis, taking into consideration, *inter alia*, the particular circumstances of the case and the level of cooperation of the financial institution concerned. Furthermore, sub-article (1) as re-drafted, will also provide the competent authority with the possibility to either restrict, suspend or withdraw a licence or a registration where a financial institution satisfies one of the conditions listed under sub-article (1), whereas under sub-article (1) of the current

Financial Institutions Act, upon such an occurrence the MFSA is obliged to withdraw the licence.

The MFSA is also proposing to repeal sub-article (3) and include the grounds listed therein under sub-article (1). In this regard, the MFSA is proposing to move paragraphs (c) and (d) of sub-article (3) of the current Financial Institutions Act to paragraphs (j) and (k) of sub-article (1). In addition, the MFSA is also proposing the repeal of paragraphs (a) and (b) of sub-article (3) of the current Financial Institutions Act since such grounds are deemed to be captured under the new proposed ground in paragraph (i) of sub-article (1).

The MFSA is also proposing to repeal paragraph (c) of sub-article (4). This repeal should however be viewed together with the MFSA's proposal to insert a new article 7B on the power to issue directives.

In addition, in accordance with Article 13(3) of the PSD2, the MFSA is adding a new sub-article (9) requiring the MFSA to publish any withdrawal or suspension of a licence or registration.

3.12 *Article 7: Notification of proposed variation, restriction, suspension or withdrawal of a licence or registration*

The MFSA is proposing to amend this article in order to clarify the procedure to be followed in relation to a proposed variation, restriction, suspension or withdrawal of a licence or registration.

In particular, in sub-article (2), also in line with the provisions of other primary legislation falling under the MFSA's administration, the MFSA is proposing to specify that the period for representations to be granted thereunder to financial institutions shall be of not less than forty-eight hours and not longer than thirty days.

3.13 *Article 7B: Insertion of the power to issue directives*

The MFSA is proposing to insert this article in order to allow the MFSA to issue directives also under the Financial Institutions Act.

Paragraph (c) of article 6(4) of the current Financial Institutions Act already provides the MFSA with the power to require a financial institution to take or to refrain from taking any action. The MFSA considers such a power to be tantamount to the power to issue directives.

This change would imply that when the MFSA intends to issue a directive which is not tantamount to the restriction, suspension or withdrawal of a licence or registration, the MFSA would not need to follow the procedure laid out in article 7 of the Financial Institutions Act as amended. This approach is also in line with the approach taken in the Banking Act.

3.14 *Article 7C: Insertion of a new article requiring financial institutions to inform their customers or potential customers of the fact that they are licensed by the MFSA*

The MFSA is proposing the insertion of this new requirement in order for the public not to be misled by persons who are not licensed or registered under the Financial Institutions Act or by persons who, in terms of sub-article (2) and the new sub-article (2A) of article 3 of the Financial Institutions Act are exempted from obtaining a licence or a registration under the Financial Institutions Act.

The MFSA considered the possibility of inserting an article in the Financial Institutions Act similar to article 12 of the Banking Act, which prohibits the use of the word "bank" by a person other than a credit institution in possession of a valid licence. In view of the various permutations of words and/or phrases that could be associated with the provision

of the services listed in the Schedules to the Financial Institutions Act however, this was not deemed to be a feasible option.

The MFSA is therefore proposing the insertion of a requirement on licensed and registered financial institutions requiring such financial institutions to provide their customers or potential customers with a statement of the fact that they are licensed or registered by the MFSA as applicable, and to also provide their customers or potential customers with the address of the competent authority. This approach is also in line with the approach taken by the MFSA in relation to the provision of investment services.

3.15 *Article 8: Clarifications to the applicable procedures for the setting up of branches*

Article 8(2) of the current Financial Institutions Act refers to branches, agencies, offices and subsidiaries. In this regard, the MFSA is proposing to clarify this provision by introducing separate provisions for each of the different scenarios. Accordingly, the MFSA is proposing to cover the relevant procedures relating to the opening of branches in article 8, and the relevant procedures relating to the appointment of agents in article 8A.

Similarly, sub-article (2) is also being amended in order to clarify that the said requirement does not apply in relation to instances falling under the freedom of establishment or the right to provide services under the PSD2. This proposal is also being complemented by the proposal to delete the current sub-articles (3) and (4), with the aim of removing any potentially inconsistent provisions.

In this regard, a new sub-article (2A) is also being inserted to clarify the instances falling under the freedom of establishment or the right to provide services under the PSD2 are to be regulated by sub-article (5) as amended, and the new sub-articles (7) to (16), which transpose Article 28 of the PSD2 on the ‘Application to exercise the right of establishment and freedom to provide services’. Accordingly, sub-articles (5) to (16) do not only cover the right to open branches under the freedom of establishment, but provide the procedure to be followed both in instances where an institution wishes to make use of the freedom of establishment, as well as when an institution wishes to provide services in another Member State.

In this regard, the MFSA is also proposing to add marginal notes to sub-articles in order to create a distinction between the different scenarios being catered for under article 8.

The new sub-article (2B) provides a requirement specifically for financial institutions wishing to set up or acquire a subsidiary, whereas the new sub-article (17) transposes Article 19(7) of the PSD2 in relation to branches.

Changes are also envisaged to the European Passport Rights for Financial Institutions Regulations (S.L. 376.05), however, as stated in paragraph 1.5 of this Consultation Document, the proposed amendments to any such subsidiary legislation are not being covered in this consultation. In this regard, the MFSA might also consider transposing Articles 28 of the PSD2 in S.L. 376.05.

3.16 *Article 8A: Agency arrangements*

Article 8A is being amended in order to align the provisions thereof with Article 19 of the PSD2.

3.17 *Article 8B: Outsourcing of operational functions*

The MFSA is proposing to amend sub-article (1) in order to remove the concept of recognition. In practice, this will mean that a financial institution will no longer be required to seek the MFSA’s approval prior to outsourcing operational functions of its

services. Financial institutions will however need to notify the MFSA in this regard. This is also in line with Article 19(6) of the PSD2. Financial institutions will however still be required to comply with the requirements laid down in article 8B of the Financial Institutions Act as well as with any requirements in relation to the outsourcing of operational functions which may be laid out in a Financial Institutions Rule.

3.18 *Article 8D: Public register*

The MFSA is proposing to amend this article in order to transpose Article 14, as well as Article 15(2) and (3) of the PSD2. In addition, the amendments which are being proposed to sub-article (1) also take into consideration the categories which are currently included under the MFSA's Financial Services Register in relation to activities carried out under the Financial Institutions Act, as well as Article 1 of the EBA's Draft Implementing Technical Standards on the details and structure of the information entered by competent authorities in their public register as notified to the EBA under Article 15(5) of Directive (EU) 2015/2366.

3.19 *Article 8G: Record-keeping*

The MFSA is proposing to insert this new article in order to transpose Article 21 of the PSD2. In this regard, the MFSA is also proposing to extend the application of this requirement to financial institutions providing services other than those referred to in paragraphs 4 and 10 of the First Schedule to the Financial Institutions Act.

3.20 *Article 9: Notification of new or variation in participation or control*

The MFSA is proposing to clarify sub-article (1) and to list the non-exhaustive list of measures which competent authority may take in the instance referred to in sub-article (1), in a new sub-article (1A). In addition, the MFSA is also proposing to supplement article 9 of the Financial Institutions Act in accordance with Article 6 of the PSD2.

3.21 *Article 9A: Insertion of an article on the assessment procedure required pursuant to article 9 of the Financial Institutions Act*

The MFSA is proposing to insert a new article 9A in order to clarify the procedure that is to be followed pursuant to the notification required under article 9(4)(a) of the Financial Institutions Act. The proposed procedure is also in line with the procedure provided for in the Banking Act for the assessment of holdings in credit institutions.

3.22 *Article 10B: Safeguarding of funds*

The principle outlined in article 10B for the safeguarding of funds is being amended in line with Article 10 of the PSD2. In this regard the MFSA is also envisaging changes to Financial Institutions Rule FIR/02/2011 on the '*Supervisory and Regulatory Requirements of Institutions Authorised under the Financial Institutions Act 1994*' and Financial Institutions Rule FIR/03/2011 on the '*Taking Up, Pursuit of and Prudential Supervision of the Business of Financial Institutions Authorised to Issue Electronic Money under the Financial Institutions Act 1994*'. In addition, changes to the Financial Institutions Act (Safeguarding of Funds) Regulations (S.L. 376.04) are also being envisaged.

As stipulated in paragraph 1.5 of this Consultation Document however, the proposed amendments to any such subsidiary legislation and Financial Institutions Rules are however not being covered in this consultation.

3.23 *Articles 11A and 11B: Management of operational and security risks and Incident reporting*

The MFSA is proposing the insertion of two new articles in order to transpose Articles 95 and 96 of the PSD2.

3.24 *Article 12: Powers and duties of the Minister*

The MFSA is proposing to add enabling powers for the Minister in sub-article (1) in order to allow for the implementation of Articles 10(2) and 25 of the PAD. In addition, the MFSA is also proposing to add a general enabling power in order to allow for the implementation of Directives, Regulations and any other legislative measures of the European Union which may not otherwise be covered by any specific enabling power.

In addition, amendments are also being proposed to paragraphs (b) and (c) of sub-article (1) in order to take into account the maximum harmonisation nature of the PSD 2.

3.25 *Article 13: Powers of the competent authority*

The MFSA is proposing to amend this article in order to, *inter alia*, transpose Articles 23, 22(2), 22(4), 22(5), 100(5), 107(2) and 107(3) of the PSD2.

In addition, the MFSA is also proposing the insertion of a new sub-article (2A) in order to provide a specific enabling power for the competent authority to issue, amend or revoke Financial Institutions Rules as may be required for the purpose of implementing any guidelines, recommendations, decisions, opinions and any other instrument issued by the EBA. This is also in line with the approach taken under the Banking Act.

3.26 *Articles 13A to 13E: Insertion of new articles to transpose Articles 29 to 31 of the PSD2*

The MFSA is proposing the insertion of articles 13A to 13E in order to transpose Articles 29 to 31 of the PSD2. In this regard the MFSA is proposing to distinguish between the procedures to be followed by the MFSA where Malta is the home Member State and the procedures to be followed by the MFSA where Malta is the host Member State.

Changes are also envisaged to the European Passport Rights for Financial Institutions Regulations (S.L. 376.05), however, as stated in paragraph 1.5 of this Consultation Document, the proposed amendments to any such subsidiary legislation are not being covered in this consultation. In this regard, the MFSA might also consider transposing Articles 29 to 31 of the PSD2 in S.L. 376.05.

3.27 *Article 14: Power of competent authority to require information*

The MFSA is proposing to amend sub-articles (1) and (2) and to insert a new sub-article (2A) in order to clarify the MFSA's powers to require information and the manner in which such information may be requested.

In addition, the MFSA is also proposing to delete sub-article (3) in view of the new article 17A(3) which the MFSA is proposing to insert in order to transpose Article 17(3) of the PSD2. Accordingly, the proposal to delete sub-article (3) of article 14 of the Financial Institutions Act should be viewed in conjunction with the proposal to insert a new article 17A on 'Accounting and statutory audit', which, *inter alia*, requires payment institutions and electronic money institutions to provide separate accounting information for payment services and for the activities referred to in paragraph 3(a) of the Second Schedule to the Financial Institutions Act.

3.28 *Article 15: Appointment of inspectors*

The MFSA is proposing to amplify article 15 of the Financial Institutions Act in line with the provisions of the Banking Act.

3.29 *Articles 16A and 16B: Insertion of new articles on Suspected Breaches and Obstruction*

The MFSA is proposing to insert these two new articles in line with the provisions of the Banking Act.

3.30 *Article 17: Power of the competent authority to take control of financial institutions*

The MFSA is proposing to amplify article 17 of the Financial Institutions Act in line with the provisions of the Banking Act.

3.31 *Article 17A: Accounting and statutory audit*

The MFSA is proposing to insert this new article in order to transpose Article 17 of the PSD2. In addition, the MFSA is also proposing to extend the obligations under Article 17(1) and (2) of the PSD2 to all financial institutions licensed under the Financial Institutions Act

3.32 *Article 17B: Insertion of a new article on the Publication of audited financial statements*

The MFSA is proposing the insertion of a new article on the publication of audited financial statements in order to clearly establish a financial institution's obligations to submit to the MFSA its audited financial statements, or consolidated financial statements as may be applicable, by not later than four months from the closing of its financial year or at any other time as may be authorised in writing by the MFSA. In addition, in line with the approach taken under the Banking Act, the MFSA is also proposing to add a requirement on financial institutions to also submit such audited financial statements to the Central Bank of Malta.

3.33 *Article 18: Appointment and duties of auditors*

The MFSA is proposing to amend paragraph (a) of sub-article (1) in line with Article 17(2) and (4) of the PSD2. In addition, further to Article 17(4) of the PSD2, the MFSA is also proposing the insertion of two new sub-articles (6A) and (6B) in order to transpose Article 63 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

3.34 *Article 20: Co-operation and sharing of information*

This article has been amended in order to transpose Article 26 of the PSD2.

3.35 *Article 20A: Insertion of a new article on the settlement of disagreements between the MFSA and European regulatory authorities*

This article has been added in order to transpose Article 27 of the PSD2.

3.36 *Article 20B: Insertion of a new article on the MFSA's requirement to collaborate with*

other authorities responsible for ensuring and monitoring effective compliance with the provisions of the PSD2 as transposed in local legislation

This new article has been inserted further to Article 100(2) of the PSD2, which requires the different authorities which under national law have been empowered to ensure and monitor effective compliance with the provisions of the PSD2, to collaborate closely so that they can discharge their respective duties effectively.

3.37 *Article 21: Appeals*

This article has been amended in line with the provisions of Article 25 of the PSD2.

3.38 *Article 22: Offences*

This article is being amended in order to limit the breaches which constitute an offence. In particular, it was deemed that the breaches referred to in paragraphs (a) and (b) of article 22(1) of the current Financial Institutions Act are too wide to be deemed to constitute an offence. A new paragraph (g) is however being added to the said sub-article in order to list the specific breaches which are deemed to constitute an offence.

3.39 *Article 23: Administrative penalties and their publication*

This article is being amended in order to transpose Article 103 of the PSD2. In addition, a new sub-article (1A) is also being added requiring any administrative penalty imposed by the MFSA under article 23(1) to be effective, proportionate and dissuasive. This approach is in line with that taken in the Administrative Penalties, Measures and Investigatory Powers Regulations (S.L. 371.05) issued under the Banking Act.

3.40 *Article 24A: Insertion of a new article of the duties of officers of a financial institution*

The MFSA is proposing to insert this new article in line with the provisions of the Banking Act.

3.41 *Article 25: Confidentiality*

This article is being amended in order to transpose Article 24 of the PSD2.

3.42 *Article 26A: Insertion of a new article on data protection*

This article is being inserted in order to transpose Article 94 of the PSD2 with respect to the obligations imposed therein on payment institutions, electronic money institutions and account information service providers. In this regard the MFSA is also proposing to extend the obligations in Article 94 of the PSD2 to all financial institutions licenced under the Financial Institutions Act.

3.43 *Article 28: Insertion of a new article on transitional provisions*

This article is being inserted in order to transpose the transitional provisions found in Articles 109(1), 109(2), 109(5), 115(5), 115(6) and 111(2). It should be noted that in view of the fact that the MFSA had decided not to take up the option under Article 26 of the PSD1, Articles 109(3) and 109(4) of the PSD2 are not being transposed since they are not applicable to the local scenario.

3.44 *Second Schedule: Financial institutions carrying out payment services*

As stated in paragraph 3.1 of this Consultation Document, the MFSA is proposing to move the definitions found in paragraph 1 of the Second Schedule to article 2 of the Financial Institutions Act. Accordingly, the said definitions are being deleted from paragraph 1 of the Second Schedule.

In addition, the Second Schedule is also being amended in order to amend the list of activities found in paragraph 2 in accordance with Annex I to the PSD2 and to transpose Article 18 of the PSD2.

3.45 *Third Schedule: Financial institutions issuing electronic money*

As stated in paragraph 3.1 of this Consultation Document, the MFSA is proposing to move the definitions found in paragraph 1 of the Third Schedule to article 2 of the Financial Institutions Act. Accordingly, the said definitions are being deleted from paragraph 1 of the Third Schedule.

4. Proposed Amendments to the Banking Act (Cap. 371)

4.1 *Article 2: Insertion of new definitions*

Definitions are being added in order to define terms which are being introduced in the Banking Act for the first time for the purposes of the PSD2.

4.2 *Article 3: Powers and duties of the Minister*

The MFSA is proposing to add enabling powers for the Minister in sub-article (1) in order to allow for the implementation of Articles 10(2) and 25 of the PAD.

4.3 *Article 4: Powers and duties of the competent authority*

The MFSA is proposing to amend sub-article (7) and (8) in order to provide the MFSA with the necessary enabling powers to implement practically any form of decision, instruction, recommendation, opinion and/or guideline which may be issued by the EBA and the ECB irrespective of the legal instrument used by such entities.

4.4 *Article 9: Withdrawal and restriction of a licence*

The MFSA is proposing to amend sub-article (5) in order to specify the minimum and maximum period for representations which may be provided by the competent authority to a credit institution upon notifying its intention to the credit institution concerned of its intention to restrict or withdraw a licence. This proposed amendment is also in line with the amendments which are being proposed to article 7(2) of the Financial Institutions Act further to this consultation.

4.5 *Article 19A: Outsourcing service providers*

The MFSA is proposing to amend sub-article (1) in order to remove the concept of recognition. In practice, this will mean that a credit institution will no longer be required to seek the MFSA's approval prior to outsourcing operational functions of its services. Financial institutions will however need to notify the MFSA in this regard and will still be required to comply with the requirements laid down in Banking Rule BR/14/2009 on

‘Outsourcing by Credit Institutions Authorised under the Banking Act 1994’. This proposed amendment is also in line with the amendments which are being proposed to article 8B(1) of the Financial Institutions Act further to this consultation.

4.6 *Articles 19B, 19C and 19D: Insertion of new articles on access to accounts maintained with a credit institution, management of operational and security risks and incident reporting*

The MFSA is proposing to insert new articles 19B, 19C and 19D in order to transpose Articles 36, 95 and 96 of the PSD2 respectively.

4.7 *Article 34A: Insertion of a new article on data protection*

The MFSA is proposing to insert a new article in order to transpose Article 94 of the PSD2 in relation to the obligations imposed therein on credit institutions.

4.8 *Article 38: Insertion of a new article on transitional provisions relating to the Payment Services Directive*

The MFSA is proposing to insert this new article to transpose the provisions of Article 115 of the PSD2 falling within the remit of the MFSA which are also applicable to credit institutions.

5. Way Forward

Any feedback on the proposed amendments should reach the MFSA by not later than the 7th of February of 2018. Please send your responses by e-mail to the policy team within the Banking Supervision Unit at MFSA on bsupolicy@mfsa.com.mt. Any queries for clarification in respect of the draft amendments should also be addressed to the provided email address.

Communications Unit
Malta Financial Services Authority
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