

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

**CONSULTATION ON THE EMISSIONS ALLOWANCES
AUCTIONING REGULATION
APPLICABLE TO
INVESTMENT FIRMS AND CREDIT INSTITUTIONS**

[MFSA REF : 5 /2013]

22nd March 2013

Closing Date: 22nd April 2013

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 Office of the Attorney General and the relevant 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

On the 12 November 2010 the European Commission formally adopted **Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration, and other aspects of auctioning greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community** (the [Auctioning Regulation](#)).

The purpose of this consultation is to: [i] outline the manner in which the MFSA intends to implement articles 18 (2), (3) and 59 of the Auctioning Regulation; and [ii] propose the MFSA as the competent authority in Malta for authorising and supervising certain bidders operating under the Auctioning Regulation.

2. Persons eligible to bid directly in auctions

Articles 18 (1) (a) to (e) of the Auctioning Regulation define the persons that are eligible to apply for admission to bid directly in auctions without needing the authorisation of the competent authority, subject to the requirements of article 19 being satisfied. These persons include:

- [i] **Article 18 (1) (a)** - An operator or an aircraft operator having an operator holding account, bidding on its own account, including any parent undertaking, subsidiary undertaking or affiliate undertaking forming part of the same group of undertakings as the operator or the aircraft operator. In Malta, this would include entities such as *Enemalta Corporation* and *Air Malta p.l.c.*
- [ii] **Articles 18 (1) (b) and (c)** - Investment firms authorised under Directive 2004/39/EC (the Markets in Financial Instruments Directive) and credit institutions authorised under Directive 2006/48/EC (the Capital Requirements Directive), bidding on their own account or on behalf of their clients for auction products which are financial instruments [e.g.. auction allowances which are in the form of five-day futures within the meaning of the Auctioning Regulation].
- [iii] **Article 18 (1) (d)** - Business groupings of persons listed at [i] above bidding on their own account and acting as an agent on behalf of their members.
- [iv] **Article 18 (1) (e)** - Public bodies or state owned entities of the Member States, that control any of the persons listed at [i] above.

2.1 Persons requiring an investment services licence

For investment firms and credit institutions to be eligible to bid directly on own account or on behalf of clients for auction products which are financial instruments in terms of articles 18 (1) (b) and (c) of the Auctioning Regulation, it is a prerequisite for these institutions to have an investment services licence.

The term “*financial instrument*” is defined in the Auctioning Regulation by making specific reference to the corresponding definition under the Markets in Financial Instruments Directive, which definition is in turn, transposed into Maltese Law by virtue of the Second Schedule to the Investment Services Act, 1994 (ISA). Under Maltese Law, the term “*financial instrument*” therefore means an instrument which is included in the aforementioned Schedule.

In terms of the ISA, an investment services licence is required when an investment service falling within the First Schedule to the ISA, is provided in relation to a financial instrument listed in the Second Schedule of the ISA. Currently the First Schedule to the ISA does not refer to the service of bidding at an emissions allowance auction.

Accordingly, it is being proposed that an amendment to the First Schedule of the ISA is made to reflect this new investment service, by way of a Legal Notice amending the ISA [Refer to Section 4 [i] below]. An amendment of the Second Schedule to the ISA listing financial instruments, is not required since paragraph 10 thereof already refers to “*options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variable, freight rates, emission allowances...*”

Further to the above, it will be necessary for existing investment services licence holders that wish to bid on own account or on behalf of their clients, for auction products which are financial instruments to apply to the MFSA to extend their current investment services licence to include the proposed new investment service of “*the reception, transmission and submission of a bid relating to emission allowances*”. Once this extension is granted, no further authorisation to bid at the auction platforms will be required.

Similarly, persons that are not in possession of an investment services licence but which would like to engage in bidding on their own account or on behalf of clients for auction products which are financial instruments within the meaning of the ISA, should apply for an investment services licence in this regard.

3. Persons requiring authorisation to bid in auctions

Pursuant to articles 18 (2) and (3) of the Auctioning Regulation, the persons who must obtain prior authorisation from the MFSA for the purpose of bidding directly in auctions are:

- [i] Persons that are exempt from the requirement to hold an investment services licence in terms of regulation 3 (1) (n) of the Investment Services Act (Exemption) Regulations 2007, who intend to bid on their own account or on behalf of their clients for auction products which may or may not qualify as financial instruments within the meaning of the ISA; and
- [ii] Holders of an investment services licence and credit institutions (who do not hold an investment services licence) and that intend to bid on behalf of clients for auction products which are not financial instruments within the meaning of the ISA (e.g.. auction allowances which are in the form of two-day spots within the meaning of the Auctioning Regulation].

In terms of the proposed Legal Notices referred to in points [ii] and [iii] of Section 4 below, the persons concerned will need to submit to MFSA an application for **authorisation** to bid at the emissions allowance auction, on behalf of clients, and not an application for an investment services licence pursuant to the ISA.

It should be noted that authorisation or licencing, as the case may be, by the MFSA does not create an entitlement to bid on an auction platform but rather an entitlement to apply to bid on an auction platform. The auction platform will apply its requirements which are set out in article 19 of the Auctioning Regulation.

4. Legislative Framework

Further to the above, the MFSA is proposing to implement articles 18 (2) and (3) of the Auctioning Regulation by issuing three new Legal Notices, namely:

[i] *Investment Services Act (Amendment of the First Schedule) Regulations, 2013*

This amends the First Schedule of the ISA to include the new investment service of bidding at the EU emissions allowance auctions.

[ii] *Investment Services Act (Access to Emissions Allowance Auction) Regulations, 2013*

This establishes the authorisation requirements for the persons indicated at Section 3 above (except credit institutions that do not have an investment services licence, which are subject to the Banking Act, 1994 as explained below)

[iii] *Banking Act (Access to Emissions Allowance Auction) Regulations, 2013*

This establishes the authorisation requirements for credit institutions that do not hold an investment services licence, referred to in Section 3 [ii] above. There will be a delay in the implementation of this proposed Legal Notice, pending the enactment of the relative enabling clause in the Banking Act, 1994.

5. Rules Act

The rules of conduct set out in article 59 of the Auctioning Regulation will be incorporated into the Investment Services Rules for Investment Services Providers and the Banking Rules, as applicable. The MFSA reserves the right to introduce further rules in the future as it deems necessary.

These rules will be applied by the MFSA on an on-going basis to persons referred to in Section 3 [i] and [ii] above, which are authorised by the MFSA to engage in auction bidding in accordance with the Investment Services Act (Access to Emissions Allowance Auction) Regulations.

6. Contacts

Interested parties are invited to send their comments to us in writing by not later than Monday April 22nd 2013.

Any comments and feedback are to be addressed to Mr. Christopher P. Buttigieg, Deputy Director, Securities and Markets Supervision Unit by email on su@mfsa.com.mt.

Any queries or requests for clarifications in respect of the above should be addressed to: Dr Sarah Pulis, Securities and Markets Supervision Unit, Tel: 2548 5232 or by email on spulis@mfsa.com.mt or to Dr Monica Nally Hennessy, Securities and Markets Supervision Unit by email on mnallyhennessy@mfsa.com.mt or to Ms. Mellyora Grech, Securities and Markets Supervision Unit, Tel: 2548 5193 or by email on mgrech@mfsa.com.mt.

Communications Unit
Malta Financial Services Authority
MFSA Ref: 5/2013
22nd March 2013

APPENDIX 1

Chairman
Malta Financial Services Authority

**Minister of Finance, the Economy and
Investment**

L.N. of 2013

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (Amendment of the First Schedule) Regulations, 2013

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister of Finance, the Economy and Investment acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Title and scope.

1. (1) The title of these regulations is the Investment Services Act (Amendment of the First Schedule) Regulations, 2013 and they shall be read and construed as one with the Investment Services Act, hereinafter referred to as “the Act”..

Cap. 370.

(2) The purpose of these regulations is to amend the First Schedule to the Act, in order to better implement the provisions of Commission Regulation (EU) No. 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, as may be amended from time to time.

Amends the First
Schedule to the Act.

2. In the First Schedule to the Act, immediately after paragraph 9 thereof, there shall be added the following new paragraph:

“10. The reception, transmission, and submission of a bid relating to emission allowances

The reception, transmission, and submission of a bid by a person on any auction platform which auctions emission allowances within the meaning of Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects

of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowances trading within the Community, as may be amended from time to time.”

APPENDIX 2

Chairman
Malta Financial Services Authority

**Minister of Finance, the Economy and
Investment**

L.N. of 2013

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (Access to Emissions Allowance Auction) Regulations, 2013

IN exercise of the powers conferred by article 12(1)(n) of the Investment Services Act, the Minister of Finance, the Economy and Investment, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Title and scope.

1. (1) The title of these regulations is the Investment Services Act (Access to Emissions Allowance Auction) Regulations, 2013.

(2) The purpose of these regulations is to implement articles 18 (2), 18 (3) and 59 of Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, as may be amended from time to time.

Interpretation.

2. (1) In these regulations, unless the context otherwise requires:

Cap. 370.

“Act” means the Investment Services Act;

“Auctioning Regulation” means Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, as may be amended from time to time;

“auctions” means the auctioning of emission allowances held in accordance with the Auctioning

Regulation;

“exempt person” means a person dealing on own account in financial instruments in terms of paragraph 3 of the First Schedule to the Act or providing investment services in the commodity derivatives or derivative contracts included in Schedule 2 of the Act to the clients of its main business, where such activity is ancillary to its main business, when considered on a group basis; and

L.N. 329 of
2007.

(i) that main business is not the provision of investment services within the meaning of the Act or the provision of banking services under the Banking Act, and

(ii) the person is exempt from the requirement of an investment services licence in terms of the Investment Services Act (Exemption) Regulations, 2007.

(2) Words and expressions used in the Act shall, in these regulations, have the same meaning as is assigned to them in the Act.

Competent
authority.

Cap. 330.

3. The Malta Financial Services Authority established by the Malta Financial Services Authority Act shall be the designated competent authority in Malta for the purposes of implementing the relevant provisions of the Auctioning Regulation, and any reference in these regulations to the competent authority shall be read and construed accordingly.

Applicability of the EU Regulation to the competent authority.

4. (1) The competent authority shall exercise all the functions, obligations and powers and shall satisfy all the requirements imposed on competent authorities by the Auctioning Regulation.

(2) Without prejudice to sub-regulation (1), the competent authority may, for the better implementation of the Auctioning Regulation, exercise any of the powers assigned to it under the Act in relation to persons engaged in bidding in emission allowance auctions.

Investment Services Rules.

5. For the better carrying out of the provisions of the Auctioning Regulation and of these regulations, the competent authority may, from time to time, issue and publish Investment Services Rules which shall be binding on all holders of an investment services licence and exempt persons authorised pursuant to these regulations, which are engaged in bidding in auctions. Such rules may lay down additional requirements and conditions, and any other matters as the competent authority may consider appropriate including:

a) the operation of the Auctioning Regulation or of these regulations;

b) any matter relating to the functions, obligations and powers of the competent authority under the Auctioning Regulation; and

c) any other matter arising in connection with the Auctioning Regulation or these regulations.

Authorisation requirements for investment services licence holders

6. A holder of an investment services licence shall be eligible to apply for admission to bid directly in emission allowance auctions on behalf of its clients when such bidding is for products that are not financial instruments, on the condition that it is authorised by the competent authority in terms of these regulations.

Authorisation requirements for persons exempt from an investment services licence.

7. An exempt person shall be eligible to apply for admission to bid directly in emission allowance auctions either on its own account or on behalf of clients when such bidding is both for products that are financial instruments within the meaning of the Second Schedule to the Act and for products that are not financial instruments, on the condition that it is authorised by the competent authority.

Application for
Authorisation

8. An application for authorisation in terms of regulations 6 and 7 shall be made to the competent authority in writing and shall be accompanied by such documents as the competent authority may specify.

Power to refuse
authorisation

9. The competent authority shall not grant authorisation in terms of these regulations unless the applicant:

a) is of sufficient good repute and sufficiently experienced as to ensure proper respect of the conduct rules provided for in the Investment Services Rules issued by the competent authority for this purpose;

b) has in place the necessary processes and checks to manage conflicts of interest and serve the best interests of its clients;

c) complies with the requirements of the Prevention of Money Laundering and Funding of Terrorism Regulations, 1998 and any regulations and guidance notes issued thereunder; and

d) complies with any other measures deemed necessary having regard to the nature of the bidding services being offered and the level of sophistication of the clients in terms of its investor or trading profile as well as any risk-based assessment of the likelihood of money laundering, terrorist financing or criminal activity.

Power to
withdraw
authorization

10. The competent authority may withdraw an authorisation granted in terms of these regulations where:

a) the holder thereof no longer fulfills the conditions of authorisation or has contravened any of the conditions of authorisation;

b) the holder thereof, or a person acting on its behalf, has furnished the competent authority with information which is false, inaccurate or misleading;

c) authorisation has been obtained through false statements or by other irregular means; or

d) the holder thereof has seriously and systematically infringed any Investment Services Rules issued in

terms of regulation 5.

Administrative penalties.

11. Where a person contravenes any of the provisions of these regulations, the competent authority may, by notice in writing and without recourse to a court hearing, impose on such person an administrative penalty not exceeding one hundred and fifty thousand (€150,000) euro.

Appeals.

12. A right of appeal to the Financial Services Tribunal shall lie from a decision of the competent authority to:

(a) reject an application for authorisation made in terms of these regulations;

(b) withdraw an authorisation in terms of regulation 10; or

(c) impose a penalty in terms of regulation 11.

APPENDIX 3

Chairman
Malta Financial Services Authority

Minister of Finance, the Economy and
Investment

L.N. of 2013

BANKING ACT (CAP. 371)

Banking Act (Access to Emissions Allowance Auction) Regulations, 2013

IN exercise of the powers conferred by article 3(2) of the Banking Act, the Minister of Finance, the Economy and Investment, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Title and scope.

1. (1) The title of these regulations is the Banking Act (Access to Emissions Allowance Auction) Regulations, 2013.

(2) The purpose of these regulations is to implement articles 18(1) (c), 18(3) and 59 of the Auctioning Regulation.

Interpretation.

2. (1) In these regulations, unless the context otherwise requires:

Cap. 371.

“Act” means the “Banking Act”;

“Auctioning Regulation” means Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, as may be amended from time to time;

“auctions” means the auctioning of emission allowances held in accordance with the Auctioning Regulation;

“credit institution” shall have the same meaning as is assigned to it under the Banking Act and shall only include an institution which is not a holder of an Investment Services Licence issued under the Investment Services Act;

Cap. 370.

“financial instruments” means the instruments listed in the Second Schedule to the Investment Services Act.

(2) Words and expressions used in the Act shall, in these regulations, have the same meaning as that assigned to them in the Act.

Competent authority.

Cap. 330.

3. The Malta Financial Services Authority established by the Malta Financial Services Authority Act shall be the designated competent authority in Malta for the purposes of implementing the relevant provisions of the Auctioning Regulation, and any reference in these regulations to the competent authority shall be read and construed accordingly.

Applicability of the EU Regulation to the competent authority.

4. (1) The competent authority shall exercise all the functions, obligations and powers and shall satisfy all the requirements imposed on competent authorities by the Auctioning Regulation.

(2) Without prejudice to sub-regulation (1), the competent authority may, for the better implementation of the Auctioning Regulation, exercise any of the powers assigned to it under the Act in relation to persons engaged in bidding in emission allowance auctions.

Rules.

5. For the better carrying out of the provisions of the Auctioning Regulation and of these regulations, the competent authority may, from time to time, issue and publish Rules which shall be binding on all credit institutions which are engaged in bidding in auctions. Such rules may lay down additional requirements and conditions, and any other matters as the competent authority may consider appropriate including:

(a) the operation of the Auctioning Regulation or of these regulations;

(b) any matter relating to the functions, obligations and powers of the competent authority under the Auctioning Regulation; and

(c) any other matter arising in connection with the Auctioning Regulation or these regulations.

Admission to bid by credit institutions for products that are not financial instruments.

6. A credit institution shall be eligible to apply for admission to bid directly in emission allowance auctions on behalf of its clients when such bidding is for products that are not financial instruments, on the condition that it is authorised by the competent authority in terms of these Regulations.

Application for authorization.

7. An application for authorisation in terms of regulation 6 shall be made to the competent authority in writing and shall be accompanied by such documents as the competent authority may specify.

Conditions of authorisation.

8. (1) The competent authority shall not grant authorisation in terms of these regulations unless the applicant:

(a) is of sufficient good repute and sufficiently experienced as to ensure proper respect of the conduct rules provided for in the Rules issued by the competent authority for this purpose;

(b) has in place the necessary processes and checks to manage conflicts of interest and serve the best interests of its clients;

(c) complies with the requirements of the Prevention of Money Laundering and Funding of Terrorism Regulations, 1998 and any regulations and guidance notes issued thereunder; and

L.N. 180 of 2008.

(d) complies with any other measures deemed necessary having regard to the nature of the bidding services being offered and the level of sophistication of the clients in terms of its investor or trading profile as well as any risk-based assessment of the likelihood of money laundering, terrorist financing or criminal activity.

Withdrawal of authorisation.

9. The competent authority may withdraw an authorisation granted in terms of these regulations where:

(a) the holder thereof no longer fulfills the conditions of authorisation or has contravened any of the conditions of authorisation;

(b) the holder thereof, or a person acting on its behalf, has furnished the competent authority with information which is false, inaccurate or misleading;

(c) authorisation has been obtained through false statements or by other irregular means; or

(d) the holder thereof has seriously and systematically infringed any Rules issued in terms of regulation 5.

Administrative penalties.

10. Where a person contravenes any of the provisions of these regulations, the competent authority may, by notice in writing and without recourse to a court hearing, impose on such person an administrative penalty not exceeding one hundred and fifty thousand (€150,000) euro.

Appeals.

11. A right of appeal to the Financial Services Tribunal shall lie from a decision of the competent authority to:

(a) reject an application for authorisation made in terms of these Regulations;

(b) withdraw an authorisation in terms of regulation 9;

or

(c) impose a penalty in terms of regulation 10.