MFSA MALTA FINANCIAL SERVICES AUTHORITY

Feedback Document

Feedback Statement on the Consultation on the Proposed Amendments to the Insurance Rules and the Insurance Distribution Rules

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1.0 Introduction

On 5 March 2025, the MFSA issued a Consultation Document on the Proposed Amendments to the Insurance Rules and the Insurance Distribution Rules. The Consultation Document proposed to amend a number of Insurance Rules and Insurance Distribution Rules in line with findings observed during regulatory work as well as other findings observed by the market whilst carrying out their operations. The period to submit comments has elapsed on 26th March 2025.

Further to the said Consultation Document, the MFSA reviewed the comments received from interested parties and is now issuing a Feedback Statement.

2.0 Main Comments Received on the Proposed Amendments to Chapter 1 in Part A of the Insurance Rules

2.1 ***Industry Comment:*** *Market participants commented on the proposal to align the Insurance Business (Protection and Compensation Fund) Regulations, 2024, with the requirements in Chapter 1 of the Insurance Rules, citing concerns regarding the potential for double contributions by insurance undertakings. The said participants stated that undertakings may already contribute to the compensation funds of the Member States in which they operate. Therefore, requiring them to make an additional contribution to the PCF may result in a situation where the same entities are paying into two distinct funds for the same purpose, essentially leading to a double contribution creating an undue financial burden on insurers operating across borders. The said participants proposed a more equitable approach: to recognise the contributions already made by insurance undertakings to the compensation funds in the Member States concerned, ensuring that contributions to the PCF are either waived or offset accordingly, to avoid duplicating payments while still fulfilling the intended protective purpose of the fund.*

MFSA's Position: The MFSA would like to clarify that during the transposition of Directive 2021/2118 and the consequential re-issuing of the Insurance Business (Protection and Compensation Fund) Regulations, 2024, (hereinafter referred to as the Regulations), the MFSA held numerous meetings with the major affected stakeholders. A number of stakeholders mentioned the matter raised by the market participants referred to above. However it is to be noted that the said Directive only prescribes that *"Each Member State shall set up or authorise a body entrusted with the task of providing compensation to injured parties resident within its territory, at least up to the limits of the insurance obligation, for damage to property or personal injuries caused by a vehicle insured by an insurance undertaking."* Furthermore, the Directive also states that *"Each Member State shall take appropriate measures to ensure that the body referred to in paragraph 1 has sufficient funds available to compensate injured parties in accordance with the rules set out in paragraph 10 of Article 10a of the said Directive when compensation payments are due in situations provided for in paragraph 1, points (a) and (b) of the Article 10a of the said Directive. Those*

measures may include requirements to make financial contributions, provided that they are only imposed on insurance undertakings that have been authorised by the Member State imposing them." In order to comply with the requirements, the MFSA extended the scope of the said Regulations to cover third party motor insurance risks underwritten by insurers with head office in Malta, covering motor insurance risks situated in a Member State outside of Malta. The said Directive also stipulates the manner in which repayments will be made to other European compensation bodies where the said bodies have already paid a victim who is habitually resident in Malta. In order for this to occur, an agreement had to be signed between all the compensation bodies of the European Member States as required in the Directive. Nevertheless, the Directive does not make reference to previous compensation made by any undertakings, it does not refer to any waivers or offsetting of liabilities. The MFSA would understand that for this to happen, an agreement between the different Member States should be agreed upon and signed. It is also to be noted that once all Member States transpose the Directive, the possibility of duplicate payments as a way forward is minimized. Finally, it is also to be noted that the MFSA has made sure to draft provisions to mitigate the effect for authorised insurance undertakings with head office in Malta, underwriting third party motor risks in Malta. Should such an undertaking which have already contributed to the Protection and Compensation Fund go insolvent, and the claims which cannot be paid are made before the entry into force of the Regulations, the said undertaking may access the Fund in which it has already made contributions to.

3.0 Main Comments Received on the Proposed Amendments to Annex II of Chapter 6 in Part B of the Insurance Rules

3.1 ***Industry Comment:*** *A market participant noted that the proposed change to paragraph 1.2 of the Annex II of Chapter 6 which proposes that the term "independent" refers to the definition outlined in the MFSA Code on Corporate Governance. However, the said market participant queried whether the Authority intends to retain paragraph 1.3 in the said Annex which refers to the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board when determining whether a member or Chairman of the audit committee may be regarded as independent of the authorised undertaking.*

MFSA's Position: The MFSA discussed the comments raised and will be deleting the reference note proposed in the Consultation Document and amending paragraph 1.3 of Annex II of Chapter 6 to the Insurance Rules to refer the MFSA Code of Governance.

3.2 ***Industry Comment:*** *An industry participant also suggested captive insurance undertakings and captive reinsurance undertaking to be exempt from the mandatory requirement to establish an audit committee, due to their limited scope and size, existing oversight and cost considerations.*

MFSA's Position: The MFSA would like to clarify that Annex II of Chapter 6 of the Insurance Rules transposes the requirements of Directive 2014/56/EU which amends Directive

2006/43/EC ("the Statutory Audit Directive"). In this respect, reference should be made to the Consultation Document issued on the 31st of May 2016 which explains that Directive 2014/56/EU now removes the discretion which was previously available, to exempt non-listed public interest entities from the Audit Committee requirement. Therefore, authorised insurance and reinsurance undertakings (including non-listed) will now be subject to the requirements to set up an Audit Committee under the new Article 39 of the Statutory Audit Directive.

3.3 ***Industry Comment:*** *Market participants referred to the amendments where an insurance undertaking is a captive (re)insurance undertaking and the functions of the audit committee are assigned to the Board of Directors, the Chair of the audit committee may also be a non-executive director (NED). The said market participants suggested that in the light of the new proportionality regime under the revised Solvency II Directive, the approach be extended to undertakings which are classified as small and non-complex undertakings in terms of the new Article 29a of the Solvency II Directive.*

MFSA's Position: The MFSA would like to clarify that the amendments proposed in the Consultation were not aimed at transposing the requirements emanating from Directive (EU) 2025/2. The aim of the amendment was to facilitate the manner in which captive insurance undertakings operate in Malta. Nevertheless, the MFSA will keep the comments raised in mind, and once the amendments to the legislation related to the Solvency II Directive are being drafted, these will be issued for consultation.

4.0 Main Comments Received on the Proposed Amendments to Chapter 8 in Part B of the Insurance Rules

4.1 ***Industry Comment:*** *Market participants also suggested that the exemption from the requirement to audit the Solvency and Financial Condition Report be also extended to authorised insurance undertakings classified as small and non-complex undertakings under the new Article 29a of the Solvency II Directive.*

MFSA's Position: The MFSA would like to clarify that the amendments proposed in the Consultation were not aimed at transposing the requirements emanating from Directive (EU) 2025/2. The aim of the amendment was to facilitate the manner in which captive insurance undertakings operate in Malta. Nevertheless, the MFSA will keep the comments raised in mind, and once the amendments to the legislation related to the Solvency II Directive are being drafted, these will be issued for consultation.

4.2 ***Industry Comment:*** *A market participant stated that in the case of a Protected Cell Company, a single SFCR is prepared at the level of the Protected Cell Company. In this respect, clarification is sought as to whether in the case where one of the cells of the Protected Cell Company is a pure captive, can the requirement to audit of this captive cell be carved out. In such a case, the results can still be presented and consolidated into one SFCR report, but the cell could save significant audit costs if the solvency II technical provisions and the solvency*

capital requirement are not audited. The audit report by the auditors could likewise carve out the audit of the captive cell.

MFSA's Position: Following the feedback received, the MFSA held internal discussions, and will be including a new paragraph 8.10.5 to Chapter 8 of the Insurance Rules specifying that where the cell of a Protected Cell Company is a captive cell, as defined in regulation 15A of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, the said cell will be exempted from being required to draw up a report by the approved auditor of the Protected Cell Company. For the avoidance of doubt, in such an insurance, an authorised insurance undertaking will still be required to draw up a report by the approved auditor of the said undertaking of the specific templates of the SFCR specified in Annex V to this Chapter which will then be submitted to the competent authority, carving out the cell of the authorised insurance undertaking complying with the requirements of regulation 15A of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations.

5.0 Main Comments Received on the Proposed Amendments to Chapter 1 and 2 in Part A of the Insurance Distribution Rules

5.1 ***Industry Comment:*** *A market participant requested the introduction of a new definition to the term 'membership to a group insurance policy' to allow insurance undertakings to further understand whether such ruling and respective requirements are applicable.*

MFSA's Position: The MFSA would like to clarify that a group insurance contract is a contract where customers are offered to be enrolled on a voluntary basis, in return for a payment made by such customers where that membership entitles those customers to insurance benefits in the event of a claim. The MFSA is of the view that a new definition is not necessary.

5.2 ***Industry Comment:*** *Market participants referred to the MFSA's proposal to incorporate the main outcomes of the European Court of Justice (ECJ) ruling in Case C-633/20 ("ECJ ruling") into Chapters 1 and 2 of the Insurance Distribution Rules. The said participants claimed that simply outlining these three criteria in the Insurance Distribution Rules does not adequately capture the full complexity of the subject matter. The concept of voluntary versus automatic inclusion in group policies was mentioned. An individual has the option to choose whether or not to be included under a group policy, the coverage is typically viewed as voluntary. In contrast, when there is no such option available, adherence to the group policy is considered automatic or mandatory, thus rendering it non-voluntary. This perspective aligns with the position articulated by the Dutch Authority on Financial Markets (Autoriteit Financiële Markten, "the AFM"), which emphasises that a choice is only regarded as a "conscious choice" if the individual is not added to the policy automatically. For instance, an employee automatically included in their employer's liability insurance serves as a relevant instance of such automatic inclusion. Based on this interpretation, in situations where the coverage is*

automatic, the group policyholder should not be required to be licensed as an insurance distributor.

MFSA's Position: Primarily the MFSA would like to clarify that all three criteria need to be satisfied for an intermediary to be registered. The MFSA would also like to clarify that the requirement for "the membership is offered on a voluntary basis" means that if the employer is enrolling his employee as part of a package, to which the employee has no say (mandatory or automatic), that would not fall under insurance distribution activities, and would thus not require the insurance intermediary to be registered and enrolled.

5.3 ***Industry Comment:*** *Market participants referred to the MFSA's proposal to incorporate the main outcomes of the European Court of Justice (ECJ) ruling in Case C-633/20 ("ECJ ruling") into Chapters 1 and 2 of the Insurance Distribution Rules (IDRs). The said participants claimed that where the compensation received by the group policyholder is intended to cover administrative costs related to the conclusion and management of the insurance contract, this should not be classified as remuneration. Therefore, the criteria associated with remuneration would not apply in these situations.*

MFSA's Position: The MFSA would like to clarify that the term "remuneration" which is referred to in paragraph (c) of the obligation which states the "the individual is remunerated for the activity carried out" refers to any costs whether such costs are administrative costs or commissions. In this respect, "remuneration" should be interpreted in line with the definition of remuneration in the Insurance Distribution Act.

5.4 ***Industry Comment:*** *Market participants referred to the MFSA's proposal to incorporate the main outcomes of the European Court of Justice (ECJ) ruling in Case C-633/20 ("ECJ ruling") into Chapters 1 and 2 of the Insurance Distribution Rules. The said participants also claimed that the ECJ ruling involved a case where a legal entity that had subscribed to a collective insurance policy comprising coverage for sickness or accident and coverage for repatriation costs, offered membership to prospects by way of door-to-door sales, in return for a fee. The said market participant claimed that where the group policyholder is not actively promoting the group policy but merely presenting it as an added benefit, it is reasonable to conclude that the group policyholder should not be classified as an insurance distributor under the Insurance Distribution Directive.*

MFSA's Position: The MFSA would like to clarify that offering insurance benefits in return for a fee would also categorise the individual as an insurance intermediary in terms of the ECJ ruling, whether it is active selling or add-on benefits. This applies unless the ancillary insurance intermediary fulfils the criteria of regulation 3 of the Insurance Distribution (Exemption) Regulations, and is thus exempt.

5.5 ***Industry Comment:*** *A market participant also claimed that the ECJ ruling has also stressed the importance of ensuring a level playing field in insurance distribution. It has determined that entities providing insurance coverage should adhere to the same regulatory standards as other distribution channels to ensure comparable customer protection. In this respect, the said market participant claimed that the group policyholder's activities do not constitute insurance distribution activities, it is not necessary for it to be licensed as an*

insurance distributor to ensure that there is an adequate level of consumer protection. This particularly applies in those circumstances where a fully licensed insurance distributor, such as an insurance broker or an insurance agent, is involved in the chain of the transaction. The licensing requirements (including organisational requirements, (pre-contractual) information requirements and conduct of business rules) along with the associated consumer protection measures for the end customer should not be compromised and will be upheld through the involvement of the licensed insurance distributor.

MFSA's Position: The MFSA would like to clarify that embedded insurance (with automatic coverage) will fall outside the criteria of the ECJ ruling as the client will not have a say on the insurance being offered as part of a service or product.

5.6 ***Industry Comment:*** *Reference was also made to the approach adopted by other European Union Member States such as Belgium, the Netherlands, and Luxembourg, which have adopted a soft law approach by providing guidance or informational notes, rather than rules, on this matter. Furthermore the said market participant also noted that EIOPA had yet to issue any supervisory statement or opinion regarding this issue. In light of this, the said participant claimed that it would be more prudent to assess the legal status of a group policyholder offering embedded insurance (with automatic coverage) on a case-by-case basis.*

MFSA's Position: The MFSA would like to clarify that the majority of Member States have already reflected the ECJ Ruling in their national legislation. In this respect, reference should be made to Germany, Italy, France, Poland, Luxembourg, Netherlands and Romania. With respect to the query on embedded insurance, refer to the MFSA's position in point 5.5.

5.7 ***Industry Comment:*** *A market participant also referred the Insurance Distribution (Exemption) Regulations. The said participant suggested that the role of the group policyholder offering group insurance coverage should be assessed in light of the exemptions outlined in regulation 5 of the Insurance Distribution (Exemption) Regulations. Specifically, if the group policyholder's activities are limited to:*

- the provision of information on an incidental basis;
- the mere provision of data and information on potential policyholders;
- the mere provision of information about insurance products or an insurance intermediary or insurance undertaking to potential policyholders if the provider does not take any additional steps to assist in the conclusion of an insurance contract,

then clearly the group policyholder should not be required to obtain an insurance distributor license.

MFSA's Position: The MFSA discussed the matter internally and to avoid any misunderstandings, will be amending the new paragraph introduced in Chapter 2 of the Insurance Distribution Rules to state that these are without prejudice to the Insurance Distribution (Exemption) Regulations.

6.0 Main Comments Received on the Proposed Amendments to Chapter 8 in Part B of the Insurance Distribution Rules

6.1 ***Industry Comment:*** *A market participant referred to the proposal to extend the deposit timeframe from 2 to 5 days in Business of Insurance Intermediaries Bank Account for insurance agents, managers and brokers. In this respect, the market participant requested that the timeframe be aligned with that of TIIs and AIIs, which is 15 working days.*

MFSA's Position: The MFSA would like to clarify that the time frame of five days was introduced following discussions with the relevant association who agreed to the said time frame. Furthermore, it is to be noted that whilst the authorised undertaking shall be at all times responsible for any act or omission of tied insurance intermediaries and ancillary insurance intermediaries in line with the Insurance Distribution Act, the same cannot be said for insurance brokers. Tied Insurance Intermediaries and Ancillary Insurance Intermediaries act on behalf of the insurance undertaking which they are tied with, whilst insurance brokers act on behalf of their client.

7.0 Main Comments Received on the Proposed Amendments to Chapter 9 and 10 in Part B of the Insurance Distribution Rules

7.1 ***Industry Comment:*** *A market participant commented that insurance distributors are exempt from calculating 4% of Gross Written Premiums as Own Funds in a Risk Transfer arrangement. Similarly, Fidelity Bond requirements should not include premiums managed on a Risk Transfer basis, as these funds are considered Insurer's funds once they reach the Insurance Broker's BOIIBA. Therefore, the said market participant claimed that such premiums should be excluded from Fidelity Bond calculations.*

MFSA's Position: Primarily the MFSA would like to clarify that insurance distributors should still work to collect all the receivables notwithstanding whether there is a risk transfer arrangement or not. It is to be noted that the MFSA considers the risk transfer arrangement as a debt and should still be included in the Fidelity Bond Calculation.

7.2 ***Industry Comment:*** *A market participant requested clarification on the term "preceding" year, and whether the preceding year would be the year before the reporting year. Therefore if one is reporting for 31/12/2024 year end, the preceding year would be 31/12/2023. On the other hand, the calculation as per the Excel document provided under Chapter 10 of the Insurance Distribution Rules - Form 9 the "(1) Average amount of outstanding debts in respect of insurance intermediaries transactions (net of provision for doubtful debts) during the preceding year" figure is picked up from Form 6 Cell K12 which is the "Net Debtors in respect of insurance transactions at the end of the year" – hence these would relate to the actual reporting year not the preceding year.*

MFSA's Position: The MFSA discussed the comments further internally and will be amending the text to remove the word 'preceding' from Chapter 9 of the Insurance Distribution Rules and the Business of Insurance Intermediaries Statements attached to Chapter 10 of the Insurance Distribution Rules. It is to be noted that the term "year" should be interpreted as defined in paragraph 9.3.5 of Chapter 9 of the Insurance Distribution Rules.

8.0 Way Forward

A Circular informing market participants on the applicability of the proposed amendments to the Insurance Rules and the Insurance Distribution Rules will be issued together with this Feedback Statement.

9.0 Contacts

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