

The Case for a TRANSPARENT ENFORCEMENT PROCEDURE

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INTRODUCTION

- Powers of MFSA
- The Enforcement Process
- MFSA Approach to Enforcement
- Due Process and Fair Hearing
- Way Forward
- Concluding Remarks

POWERS OF MFSA

Malta Financial Services Authority Act:

- Right of access and entry to any business premises and access to any relevant documentation and records
- Right to issue freezing orders
- Issue directives requiring a person to do or to refrain from doing any act
- Appoint a qualified person to carry out such tasks under such terms and conditions as the Authority may direct
- Impose administrative penalties, may not exceed €150,000 for each breach (subject to exceptions)
- Publish administrative or disciplinary sanctions or measure, including reprimands or warnings
- Pass on information to the Attorney General for issue of Attachment Orders by Criminal Court
- Impose administrative penalties higher than €150,000 for non-compliance with any EU Directive

POWERS OF MFSA

- In case of Banking activities the fine can be twice amount of benefit derived from breach or euro5 million in case of natural person or 10% of total annual net turnover in case of legal person
- In case of UCITS funds and managers the penalties could be like in banking activities. Also in case of breaches of CRR and CRD, and in case of the rules/regulations transposing MiFID and MiFIR.
- In case of Insurance Business there could be one off penalties not exceeding euro150k and daily penalties not exceeding euro116 depending on level of three levels of breaches as set out in Fourth Schedule to regulations issued under the Insurance Business Act.
- In case of financial institutions there is a detailed schedule of acts or omissions with the corresponding penalty in the Second Schedule to regulations issued under FIA but instances are limited so catch all for any other breaches liable to one off penalty not exceeding euro23,293 per breach or euro232.94 per week that the contravention continues. In any case not more than euro150k.
- General rule is that penalties must be effective, proportionate and dissuasive.

THE ENFORCEMENT PROCESS

The Enforcement Decisions Committee (EDC)

- EDC decide/act as it considers appropriate, promptly and without delay, on recommendation of Enforcement Directorate (an internal organ of MFSA)
- MFSA Executive Committee may take enforcement action itself if: (a) it considers that, in the particular case, the action proposed should occur before it is practicable or possible to convene the EDC; or (b) it considers that, in the particular case, an urgent decision on the proposed action is necessary to protect the interests of consumers.
- Members of EDC appointed by MFSA Board of Governors for a period of not more than 3 years, eligible for reappointment and MFSA decides on their remuneration
- MFSA Executive Committee may, after seeking the approval of the Board of Governors, establish a detailed remit for the EDC and may also establish that certain enforcement action, which it does not deem to be material, may be taken by the Chief Officer Enforcement.
- EDC may decide to hear any person in relation to any matter being considered by it
- The Executive Committee, with the approval of the Board of Governors, may make rules governing the procedure for conducting any hearings that may take place before EDC.
- EDC independent of the Executive Committee and the Board of Governors, and shall act independently of them

MFSA APPROACH TO ENFORCEMENT

- MFSA Strategic Plan (2019-2021): *“the Enforcement Decisions Committee is being established in order to provide a clear line of demarcation between authorizations, supervision and enforcement within the financial services industry taking on board the recommendations provided by the IMF. This committee shall be comprised of competent individuals from outside the authority who are experienced in financial services and who shall act independently from the executive committee. Acting separately from the enforcement decisions committee is the enforcement directorate strengthening enforcement within the authority. This directorate will be tasked with enforcement decisions, investigations and making recommendations for the enforcement decision committee’s consideration. The implementation of these amendments will ensure that administrative decisions are based on logical proof or material evidence.”*
- MFSA Strategic Update (2021): *“While the Authority seeks to foster a more positive compliance culture in the industry and will continue to facilitate the shift to such higher levels of governance and compliance, it has continued to show its willingness to act when entities fail and breach regulatory requirements. With effect from April 2020, the Authority is publishing a monthly Supervisory and Enforcement Effectiveness Dashboard. This is apart from the publication of the regulatory measures on our website. the enforcement action taken by the MFSA in 2020 has more than doubled when compared to previous years with strong dissuasive action taken for the more serious breaches to serve as a strong future deterrent not only for the person against whom action was taken but for others as well. The Authority is issuing a number of publications relating to enforcement including the Authority’s approach to Enforcement as well as a publication targeted at consumers. These publications will also include a series of anonymised past investigations from which it is believed that the industry can extract some benefit and lessons learnt. This will also assist supervised entities, together with other initiatives being taken under the Compliance key area and increased positive compliance culture, to make it possible for them or their advisers to self-assess their level of compliance.*

DUE PROCESS AND FAIR HEARING

- FEDERATION OF ESTATE AGENTS VS DIRECTOR GENERAL (COMPETITION) ET - Judgement of the Constitutional Court of the 3 May 2016
- Concerned another authority not a financial services regulator with similar powers to the MFSA
- Related to the right to a fair hearing in terms of article 39 of the Constitution of Malta and article 6 of the Convention (Council of Europe) for the Protection of Fundamental Human Rights
- Independent and impartial court to decide cases of a criminal nature
- Power of MFSA to impose substantial penalties could be punitive to the extent that such penalty could be considered of a criminal nature?
- Discussed also the valid composition of an appeals tribunal

WAY FORWARD

- FCA Approach – The Decision Procedure and Penalties Manual
- Set out approach and strategy towards enforcement and penalization
- FCA Process: Warning Notice outlining action FCA is INTENDED to take and asking recipient to make submissions; Decision Notice outlining action FCA has DECIDED to take; Final Notice outlining action the FCA IS TAKING
- FCA can also issue a Supervisory notice outlining the action the FCA has already taken or is proposing to take;
- FCA decides on who should be the decision maker on a particular decision and this assessment will be guided by the law and will depend upon the nature of the decision, including its complexity, importance and urgency. The 'decision maker' can be: (1) the Regulatory Decisions Committee (RDC); or (2) FCA staff under executive procedures; or (3) FCA staff under the settlement decision procedure
- The RDC is a committee of the FCA Board. It is part of the FCA and exercises certain regulatory powers on behalf of the FCA and is accountable to the FCA Board for its decisions generally. The RDC is separate from the FCA's executive management structure. Apart from its Chairman, none of the members of the RDC is an FCA employee. All members of the RDC are appointed for fixed periods by the FCA Board. The FCA Board may remove a member of the RDC, but only in the event of that member's misconduct or incapacity. The RDC has its own legal advisers and support staff. The RDC staff are separate from the FCA staff involved in conducting investigations and making recommendations to the RDC

WAY FORWARD

- The RDC may meet as a full committee, but will ordinarily meet in panels. Each meeting of the RDC will generally include: (1) its Chairman or a Deputy Chairman (who will chair the meeting); and (2) at least two other members. The composition and size of panels of the RDC may vary depending on the nature of the particular matter under consideration. It will be usual for the panel that is to consider the representations and decide whether to give a decision notice to comprise the same members of the RDC who previously considered the matter. In particularly complex cases, or those raising novel points of law or practice, it might be appropriate for a larger panel to consider the case at both the warning notice and representations stage, and there may still be cases where it is appropriate that the panel is enlarged to include additional RDC members at the decision notice stage. If a recipient of a notice wishes to make oral representations then the RDC would have to hear him.
- A person subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by the FCA. Alternatively, they may enter into a focused resolution agreement and in this way partly contest the proposed action.
- Further, even if the person subject to enforcement action wishes to fully contest the proposed enforcement action, they may choose to do so by (i) agreeing to the FCA issuing the required statutory notices and (ii) then making an expedited reference of the matter to the Tribunal
- At least one of the settlement decision makers will not be from the Enforcement and Financial Crime Division. The other settlement decision maker will usually be, but need not be, from the Enforcement and Financial Crime Division. A settlement decision maker will not have been directly involved in establishing the evidence on which the decision is based.
- The FCA and other parties may agree to mediation as a way of facilitating settlement in appropriate cases.

CONCLUSION

- So close yet so far?
- Issue of culture change towards settlement
- Mediation an option
- Independence and impartiality

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Thank You

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