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ĊENTRU MALTI TA' L-ARBITRAĠĠ
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MALTA

OFFICE OF THE FINANCIAL
SERVICES TRIBUNAL
MALTA ARBITRATION CENTRE
33, SOUTH STREET,
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Dr Ian Stafrace LL.D. Chairman

Dr. Nicholas Valenzia LL.D Membru

Mr. Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) Membru

FST 1/19

Novium AG

vs.

MFSA

Today 13th July 2022,

The Tribunal

Having seen the appeal application [1] lodged by Novium AG (the Appellant) in January 2019 wherein the Appellant contested the "Decision" of the Authority of the 12th December 2018, attached to the same appeal as Doc. App1;

A. THE MFSA DECISION

1. In its Decision, the MFSA prohibited the Appellant from:

   a. Undertaking any investment services activity in terms of the Investment Services Act for a period of four (4) years applicable from 12 December 2018;
   b. Operating under any exemption permitted in terms of the Investment Services Act (Exemption) Regulations for a period of four (4) years applicable from 12 December 2018.

2. The MFSA published the above administrative sanction imposed on its website in terms of Article 16(8) of the Malta Financial Services Authority Act

For reasons explained below, and as will be explained in further detail during the proceedings before this Tribunal, MFSA's Decision constitutes an abuse of MFSA's discretion, and is manifestly unfair.

B. PRELIINARY PLEAS

1. *Lack of Fair Hearing and Impartiality – Manifest Unfairness*

1.1 On a preliminary basis the Appellant is raising a serious breach of its fundamental right to a fair hearing in the determination of its own civil rights and obligations as protected by Article 39 (2) of the Constitution of Malta and Article 6 (*Right to a Fair Trial*) of the European Convention on Human Rights (**"ECHR"**).

1.2 It is submitted that the manifest breach of Appellant's fundamental right to a fair trial constitutes "manifest unfairness" thereby giving a right of Appeal before this Tribunal under Article 21 (9)(b) of the Act on the basis of which this Tribunal has the power to reverse the Decision under Article 21(13)(a) of the Act. The unfairness of MFSA's Decision is further aggravated by the way MFSA dealt with the Appellant and reached its "conclusions".

In its letter dated 10 May 2018 (**"May 2018 Minded Letter"**) **(Doc. App2)**, the Authority informed the Appellant that following the MFSA's on-site inspection at the registered address of Novium Opportunity Umbrella SICAV plc ("Nous") on 1 and 2 December 2015, and on the basis of the findings relating to Novium AG which were identified by the Authority during the said inspection, MFSA was minded to no longer consider Novium AG as a person of "*sufficient standing and repute*" in terms of Regulation 3(h)(ii) of the Investment Services (Exemptions) Regulations (the **"Exemption Regulations"**). In its May 2018 Minded Letter, the Authority further states that should it [MFSA] "*after*

[1] Document 1

taking into consideration any representations which you [the Appellant] may submit, decide to proceed with the above course of action, you will no longer be exempted for the purposes of the requirement of a licence in terms of article 3 of the Investment Services Act. In such a case, and as a consequence thereof, you shall, as from that point: (i) cease from providing the services of management of investments and, or investment advice to collective investment schemes licensed by the MFSA to whom you currently provide such services in terms of the exemption under Regulation 3(h)(ii) of the Investment Services Act (Exemptions) Regulation; and (ii) refrain from offering such services to any collective investment schemes licensed by the MFSA".

In its reply dated 7 July 2018 (**Doc. App3**), Appellant strongly objected to MFSA's minded position and stated *inter alia* that given it was no longer managing any of the umbrella funds and their sub-funds prior and during the time of its reply, the Appellant was not operating under any exemption and therefore there was absolutely no purpose for the Authority to implement its minded position.

Subsequently, on 22 August 2018 ("**August 2018 Supplementary Minded Letter**") (**Doc. App4**), with reference to the May 2018 Minded Letter and the Appellant's reply thereto, MFSA issued a *"supplementary minded letter on the MFSA's minded position regarding proposed regulatory action"* wherein they asked the Appellant to *"confirm that Novium AG is not undertaking any investment services activity from Malta in terms of the Investment Services Act (Chapter 370) of the Laws of Malta)"*. In addition, MFSA referred to *"the serious findings identified in our letter dated 10 May 2018 and the recent developments... the Authority has revised the nature of the proposed regulatory action against Novium AG. In this regard the Authority is minded to issue a Directive to Noivium, AG in terms of Article 15 of the Investment Services Act prohibiting Novium AG from: (a) undertaking any investment services activity in terms of the Investment Services Act for a period of four (4) years applicable from 12 December 2018 and (b) operating under any exemption permitted in terms of the Investment Services Act (Exemption) Regulations for a period of four (4) years applicable from 12 December 2018"*.

The Authority granted the Appellant two (2) working days to reply.

In its reply, on the 23 August 2018 (**Doc. App5**), the Appellant confirmed that *"it is not undertaking any investment services activity in terms of the Investment Services Act. REPEAT: The Company reiterates it is not providing any of its services to MFSA licensed collective investment schemes and hence it is not operating under any exemption granted to it in terms of Regulations 3(2) of the Investment Services Act (Exemption) Regulations. The Company trusts that this double reiteration has conclusively addressed this matter"*.

Despite this confirmation MFSA simply reproduced its minded position reflected in the August 2018 Supplementary Minded Letter into a final determination and delivered its Decision.

It is submitted that the above decision making process not only lacks the proper guarantees for a fair hearing but resulted in a blatantly unfair hearing and a consequent manifestly unfair Decision.

Firstly, the May 2018 Minded Letter or rather MFSA's "first minded letter" is based on the Authority's findings following an on-site site inspection at NOUS' offices in

December 2015, **being 29 months before communicating these alleged findings to the Appellant**. There was no subsequent correspondence between the Authority and the Appellant prior to the May 2018 Minded Letter. In its reply to the said Letter, the Appellant provided its representations to all the points raised by the MFSA and yet in MFSA's August 2018 Supplementary Minded Letter, MFSA simply ignored all the representations made by the Appellant. In the same August 2018 Supplementary Minded Letter, at first the Appellant was momentarily relieved to learn that the MFSA had withdrawn from its unfounded minded position contained in the May 2018 Minded Letter. However, this relief was very short lived as it was soon blown away when, in the same letter, MFSA declared that it was minded to issue a directive in the Appellant's regard in one way or another, in any shape or form and whatever this may be. In fact, the so called "minded letters" were a mere formality given that MFSA had essentially already reached a decision to impose a directive irrespective of any representations made by the Appellant in response to such "minded letters". This is further evidenced by the two day time period granted by the Authority to react to the August 2018 Supplementary Minded Letter, when it took MFSA no less than 75 days to react to the Appellant's letter of the 7 June 2018 in response to the May 2018 Minded Letter, and it further took MFSA no less than 29 Months to communicate its alleged findings following an on-site inspection at NOUS' offices.

It is submitted by Appellant, that by virtue of MFSA's 'minded letters' the die was cast given that MFSA's mind was previously made up well before such communication. This case at hand certainly evidences this predisposition of the MFSA particularly since *inter alia*: (i) MFSA took 29 months to first communicate its alleged findings to the Appellant, (ii) MFSA simply ignored the representations made by the Appellant in response to the Authority's May 2018 Minded Letter; (iii) despite Appellant confirming and reiterating that requested by the Authority vis-a-vis the Appellant's terminated investment mandates, MFSA still followed through with the Decision, (iv) MFSA issued a supplementary minded decision without providing any basis for such supplementary letter and (v) MFSA granted the Appellant two working days to reply to the August Supplementary Minded Letter. MFSA not only declared itself to be prejudiced but the Decision proved it!

Secondly, the Appellant strongly submits that the very fact that MFSA designates the term "minded letters" to its communication is in itself evidence of the pre-determined position of the MFSA. The nomenclature itself clearly indicates MFSA's prejudice placing the receiving party in a position where it has to defend itself before a biased and partial Authority given that the Authority's "mind" is essentially conditioned to decide in the manner communicated in its "minded letter". This is in clear breach of the principles of Natural Justice and constitutes a manifest unfairness.

1.3 The Appellant respectfully submits that the whole process impinges on its right to a fair hearing because it has been found guilty as charged by the MFSA acting as judge and prosecutor only being given the opportunity to defend itself against an already declared pre-determined minded position by its adjudicator that brought the charges against it! The limited grounds of appeal before this Tribunal under Article 29(9) of the Act which is then further aggravated by an even more limited right of appeal to the

Court of Appeal from any decision of this Tribunal under Article 21 (14) of the Act "on a question of law only", continues to add insult to injury.

1.4 Moreover, the investigative and decision making bodies of the MFSA overlap, leaving no room for real impartiality in the whole process. Accordingly, the whole process is in breach of the principles of Natural Justice and of the constitutionally protected fundamental right to a fair hearing also because the unit within the MFSA which investigated the Appellant forms part (in terms of Article 10 of the Act), of the same body that in turn evaluated that unit's same findings and the Appellant's representations with a view to reaching the Decision.

1.5 This was also the situation in the UK which was subsequently reformed to bring it in line with the European Convention on Human Rights and the 1998 UK Human Rights Act so as to ensure a fair hearing.[2] Pior to the reform in 2000, the Joint Parliamentary Committee on Financial Services and Markets concluded that *'there has been a perception that the Financial Services Authority's internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and also that the FSA will be able to act as prosecutor, judge and jury'*.[3] Due to the strong belief that the design of the decision-making process (which did not provide for a division of the said functions) lacked fairness, the legislator sought to separate these functions thereby creating a separate Regulatory Decisions Committee responsible for reaching decisions on disciplinary matters referred to it by the investigators. Although still forming part of the Financial Conduct Authority (following reforms to the UK Financial Services Act 2012) by deciding on its behalf, the members of the Regulatory Decision Committee are independent and are not involved in other matters of regulation.[4]

In *Dubus SA vs France*,[5] the European Court of Human Rights found a violation of Article 6(1) due to the apparent bias created by the lack of a clear division of functions within the French Banking Committee (FBC).[6] The applicant, an investment company registered in France was reprimanded by the FBC on violations of French regulatory law. The FBC had carried out the relevant investigation procedures and issued an inspection report followed by disciplinary proceedings against the applicant. The applicant raised the anomaly that the FBC is not only investigating and prosecuting but it is also acting as a judicial authority by hearing and adjudicating whether the applicant was in fact in breach, thus acting as a judge in its own case and in turn breaching the principle of *nemo judex in causa propia*. Here the Applicant claimed that disciplinary proceedings undertaken by the FBC lacked independence and impartiality which are essential to a fair hearing and thus was in breach of Article 6(1) of the ECHR. The Strasbourg Court remarked that the lack of any clear distinction

[2] Iain MacNeil, An Introduction to the Law on Financial Investment (2nd edn Oxford, Hart Publishing, 2008).
[3] Report of the 27 April 1999. Part VI para 147.
[4] George Staple QC, 'Financial Services and the Human Rights Act', in Clifford Chance (editor) The Human Rights Act and the Criminal Justice and Regulatory Process (Hart Publishing 1999)132.
[5] Dubus SA vs France, Application no: 5242/04 (ECHR, 11 June 2009)
[6] French Banking Commission which is the national supervisory authority responsible for credit and investment establishment, tasked with the investigation, prosecution, and judicial adjudication of any such irregularities committed in these markets.

between the functions of prosecution, investigation and adjudication in the exercise of the FBC's judicial power, was not compatible with the requirement of an 'independent and impartial tribunal' under Article 6(1). It added that while these fused functions may not necessarily render the proceedings unfair of themselves, it created an appearance of 'prejudgment' by the said Authority. The Court held that despite the French government's defence that different arms of the institution undertook the functions of prosecuting and adjudication, in practice it gave the impression that one is prosecuted and tried by the same entity.

1.6 These breaches of the Constitution and the European Convention on Human Rights vitiate the MFSA's Decision and render it intrinsically and manifestly unfair. According to *Dubus* the mere appearance of 'prejudgment' was sufficient because justice must only be done but must appear to be done. It follows that the mere appearance of a breach of Appellant's right to a fair trial gives rise to the manifest unfairness required to vitiate MFSA's Decision which ought to be struck down by this Tribunal.

2 ***Ultra Vires – Abuse of Discretion***

2.1 The Appellant respectfully submits that the Decision constitutes an abuse of discretion in that it goes *ultra vires* MFSA's power at law.

2.2 By way of background, Appellant is a Swiss Company at the time regulated by the Swiss Financial Services Authority (FINMA) and was appointed investment manager of three Maltese umbrella funds: NOUS, Excellence Investment Umbrella SICAV plc ("**EIUS**") and Public Private Real Estate Funds SICAV plc ("**PPREF**") (collectively referred to as the "**Schemes**"). Accordingly, in principle, Appellant does not automatically fall under MFSA's jurisdiction and is entitled to operate without licence from MFSA. Further, given that (i) the Appellant is foreign entity which did not conduct any activity in or from Malta, and (ii) given that it did not solicit business, Appellant **did not** require any exemption from licensing from MFSA to carry out such investment management services. Had the Appellant solicited members of the public for business, it would have required an exemption expressly granted by MFSA. In the latter case, the exemption would been issued by MFSA provided it would have been satisfied that the entity is of sufficient standing and repute (Regulation 3(h)(ii)(iii) and Regulation3(2) of the Exemption Regulations. As a matter of fact, because Appellant is a foreign entity (and at the time was regulated by a foreign regulator) and it did not and does not solicit members of the public to take its services, Appellant not only carried out its functions as investment manager of the Schemes without the need of a licence issued by MFSA, but even under no exemption issued by MFSA under the Exemption Regulations.

2.3 It is disconcerting to note that throughout both minded letters, MFSA conveniently overlooks the fact **both** EIUS and NOUS are in the process of liquidation. Moreover, MFSA ignores the fact that by means of a letter dated 30 April 2018 (**Doc. APP6**) to the board of directors of NOUS, it granted its 'no objection' to the appointment of Dr. Keith

Farrugia as liquidator of NOUS with the assistance of Dr. Alfredo Imparato and Mr. Zampa Debattista as auditor. Moreover, MFSA itself had previously directed the board of directors of NOUS and EIUS *inter alia,* to:

(a) refrain from making any further use of any of the services offered to the respective funds, either directly or through sub-delegation, by its Investment Manager, Novium AG Investment Solutions and this irrespective of any arrangement or agreement entered into between the Company and the respective funds;

(b) take all the necessary steps for the dissolution and consequential winding up of EIUS and NOUS in accordance with all applicable provisions at law, including the appointment of a liquidator; and

(c) until such time as a liquidator is appointed, the board of directors of the respective fund are to take charge of the safekeeping and management of NOUS' and EIUS' assets irrespective of any arrangement or delegation.

By means of a letter dated 7 February 2018 (**Doc. App7**), the board of directors of NOUS informed MFSA that as of the effective date of MFSA's directive, NOUS had not made use of any of the Appellant's services and provided MFSA with a board resolution dated 29 November 2017 to this effect. Furthermore, the board of directors of NOUS resolved that until such time as a liquidator is formally appointed, the board of directors of NOUS has formally taken charge of the safekeeping and management of NOUS' assets. Moreover, by means of its letter dated 30 April 2018, MFSA considered the request by NOUS to voluntarily suspend its licence and accordingly **suspended the collective investment scheme licence granted to NOUS in relation to all of its six sub-funds.**

2.4 The above also applies to EIUS in so far as it relates to the commencement of liquidation proceedings and the appointment of the above mentioned liquidator and auditor.

2.5 In relation to PPREF, MFSA was informed that the fund was suspended with no trading activity and therefore there was no purpose for the Appellant to be retained as investment manager. In view of this, the Appellant had resigned as investment manager of PPREF by agreement reached with the board of directors of PPREF. The Authority was duly informed of this by means of letter dated 7 July 2018 in reply to the May 2018 Minded Letter.

2.6 Therefore, the Appellant was not **then,** is not now and will not be providing any of its services to the MFSA licensed collective investment schemes nor is it operating under any exemption granted to it in terms of the Exemption Regulations. It is baffling how MFSA could issue directives to its licensees (NOUS, EUIS and PPREF) to desist from making use of any of the Appellant's services which directives are being adhered to and consequently all arrangements have been terminated, **and yet** issue the May 2018 Minded Letter informing the Appellant of the Authority's intention to withdraw a presumed exemption **but is no longer doing so by virtue of the same directives.** This

inconsistency is indicative of the abusive exercise of MFSA's discretion in the Appellant's regard.

2.7 Not only did MFSA totally ignore the Appellant's representations in reply to the May 2018 Minded letter, but went one step further. Upon being informed of the above inconsistency in its own logic, as if one minded letter was not enough, MFSA deemed it fit to issue an **additional minded letter** which they termed *"Supplementary minded letter on the MFSA's minded position regarding proposed regulatory action"* without providing rhyme or reason for MFSA's change in position to the one communicated by means of the August 2018 Supplementary Minded Letter.

2.8 Therefore, the August 2018 Supplementary Minded Letter was not a reply to the Appellant's letter of the 7 June 2018 but an additional/supplementary minded position, whilst totally discarding the representations made by the appellant on the **alleged findings by the MFSA following the on-site inspection** at NOUS' offices back in December 2015. By means of the August 2018 Supplementary Minded Letter, MFSA asked the Appellant to *"confirm that Novium AG is not undertaking any investment services activity from Malta in terms of the Investment Services Act (Chapter 370 of the Laws of Malta)"*. In addition MFSA stated that *"in view of the serious findings indentified in our letter dated 10 May 2018 and the recent developments explained above, the Authority has revised the nature of the proposed regulatory action against Novium AG. In this regard, the Authority is minded to issue a Directive to Novium AG in terms of Article 15 of the Investment Services Act prohibiting Novium AG from (1) undertaking any investment services activity in terms of the Investment Services Act, and (b) from operating under any exemption permitted in terms of the Investment Services Act (Exemptions) Regulations for a period of four (4) years applicable from the date of the MFSA's communication to the final position"*. In this respect the Appellant submits the following:

2.8.1 MFSA completely ignored the Appellant's representations in the May 2018 Minded Letter seeing as it had effectively already pre-decided to issue a directive in the Appellant's regard in one shape or form;

2.8.2 The Appellant understands that the *"recent developments"* stated by the Authority refers to the termination of the investment management agreement between Novium AG and PPREF which the Appellant informed the Authority of by means of its reply letter dated 7 June 2018. Once MFSA chose to be so reticent, it remains a mystery as to how and why such "development" was deemed fit by the Authority to issue a supplementary minded letter and *"revised the nature of the proposed regulatory action against Novium AG"*.

2.8.3 The Authority's first minded position contained in the May 2018 Minded Letter consisted of MFSA ceasing to consider the Appellant of *"Sufficient standing and repute"* in terms of Regulation 3(h)(ii) of the Exemption Regulations and as a result, the Appellant will not be able to

provide its services to MFSA licensed funds under the said exemption. In its August 2018 Supplementary Minded Letter, MFSA revised its minded position such that, in spite of the fact that Appellant was **not operating under any exemption and had ceased all of its investment mandates with all MFSA licensed funds,** the Appellant shall nonetheless be prohibited from undertaking any investment services under the Exemptions Regulations for a period of four years. It therefore begs the question:

What did the Authority seek to achieve by revising its May 2018 Minded Letter in the manner that it did if, at the end of the day, the Appellant either way had ceased its operations and provision of its services to all MFSA Licensed Funds?

The answer to this question ties back to the first preliminary ground of this appeal: MFSA already had prematurely decided in the Appellant's regard to a point where there could be no turning back. So it scraped the bottom of the barrel and found an excuse by way of *"recent developments"* to follow through with a directive in spite of the fact that MFSA was well aware that the practical effect of this directive was none other than causing harm to the Appellant in the pending legal proceedings in Belgium (currently in Appeal following a Judgment in favour of Appellant in the First Instance) instituted by an investor in one of NOUS' sub-funds, specifically the Bull Bear Sub-Fund.

2.9 By way of conclusion on this ground of appeal, it submitted that the Decision constitutes an abuse of discretion in that it is *ultra vires* because:

(i) MFSA has no power *a priori* to generally prohibit Appellant from undertaking any investment services activity for any period of time;

(ii) MFSA has no power to prohibit Appellant from operating under any exemption *ope legis* in terms of the Regulations for any period of time because it is clear that MFSA has no power to suspend the operation of the law;

(iii) MFSA has no power to prohibit Appellant from operating under an exemption that has not been granted to Appellant in terms of Regulation 3(2) of the regulations for any period of time;

(iv) MFSA has no power to *a priori* prohibit Appellant from operating under an exemption in terms of the Regulations 3(2) of the Regulations for any period of time on the assumption that Appellant shall not be of sufficient standing and repute for as long as MFSA deems that such prohibition is to last. It is abusive and manifestly unfair to pre-judge Appellant in this way;

(v) MFSA has no power to prohibit Appellant from carrying out a service that it was not carrying out at the time of the Decision and long before MFSA had prohibited the carrying out of such service.

(vi) MFSA has no right to issue a directive that has no practical effect other than damage Appellant's reputation as well as its position in current litigation abroad.

C. PLEAS ON THE MERITS

FURTHER ABUSE OF DISCRETION AND MANIFEST UNFAIRNESS IN RESPECT OF THE "DEFICIENCIES" AND "SHORTCOMINGS" FOUND BY THE MFSA

I. Governance

The Decision is based on MFSA's findings following an on-site inspection conducted by MFSA at the registered address of NOUS on 1&2 December 2015. It is submitted that the Authority could not base a decision on an onsite inspection at the registered office of NOUS, being a different juridical entity to the Appellant with an entirely different place of operation. At the very least, one would expect MFSA to request the Company to make its representations in relation to the governance and compliance culture and investment management processes by Novium AG rather than merely relying on an on-site inspection visit going back to December 2015 at the registered address of a separate entity. In this respect, the investigative powers of MFSA were incorrectly carried out thereby rendering the entire process abusive and unfair.

In its Decision, MFSA only elicit and reproduce a summarised extract of the findings and representations of the Appellant which MFSA paraphrased themselves and in so doing refer to the delay in issuing NOUS' and EIUS audited financial statements as a basis for MFSA's finding of the Appellant's alleged flawed governance. In its fervor to find fault with the Appellant, MFSA fails to consider that the production of audited financial statements is **not** a responsibility of the Appellant as investment manager but of NOUS as the scheme. MFSA appear to be blurring the lines between the two entities.

Moreover, in its representations the Appellant explained that following the on-site inspection, the Appellant had adopted a number of measures in order to comply with MFSA's requests which measures were referred to in the post-visit correspondence between NOUS (not the Appellant) and MFSA, particularly in the letters dated 16 May 2016, 4 November 2016 and 30 November 2016. MFSA appeared not to consider this and simply concluded "*notwithstanding the attempts made by the Company to remedy the deficiencies in its governance, the governance functions of Novium AG remained seriously lacking as evidenced by the dire circumstances of the Schemes*". The Appellant fails to understand what the MFSA means when using the term "*dire*". It also appears that MFSA is alleging that the circumstances of the Schemes are a direct cause of the alleged deficiencies in the governance functions of the Appellant. It is strongly submitted that this was never adequately substantiated by the MFSA and any conclusion in this respect is strongly rejected.

Moreover, the Appellant reiterates that it has implemented all measures requested by MFSA as will be proven throughout these proceedings, like an internal Risk and Compliance, monthly compliance meetings, yearly on site visit of the Scheme-Compliance officer and others until the termination of its investment mandate, even though such measures were not a requirement according to the Swiss Regulatory Regime.

(a) Divergence from Terms of Reference

Again, MFSA paraphrases the Appellant's representation in this respect.

In its conclusion, MFSA hold that the Appellant's representations (as paraphrased) do not reflect the structure of the Investment Committee when the on-site inspection by the Authority took place. It is strongly submitted that the very *iter* of this conclusion flawed given it emerged from the offices of the NOUS' administrator at the time - Valletta Fund Services - a different entity to the Appellant. Indeed, the investigative methodology adopted by the Authority is flawed thereby resulting in incorrect and hence, unfair conclusions.

MFSA expresses dissatisfaction with the fact that the Appellant did not inform MFSA about the resignations of members forming part of the Investment Committee. Firstly, there exists no rule or law making it a requirement to inform MFSA of any such resignations and secondly MFSA's conclusions in this respect are incorrect and, yet again unfair. In actual fact, Mr. Roberto Soglia resigned as employee of the Appellant on the 29 February 2016 but was retained as a member of the Investment Committee until the termination of the investment management agreement between the Appellant and NOUS. The same applies to Mr. Andrea Brückner, who resigned as employee of the Appellant in April 2017 but remained in the Investment Committee. At no time was the Investment Committee constituted with only one member, even when the Schemes and their relative sub-funds had no investment activity in the three years preceding the commencement of liquidation proceedings. Therefore, *ex admissis* the Investment Committee, albeit adequately constituted, was in any case **not taking any investment decisions and therefore its constitution is purely academic as in practice it was not undertaking any investment decisions.**

(b) Lack of Due Diligence, Assessment etc. prior to Conducting Investments

MFSA concludes that the Appellant's due diligence processes were not "*rigorous*" and further notes that the Appellant "*does not rebut the findings of the Authority*".

Firstly the Appellant refers to its reply dated 7 June 2018 (Doc. APP 3) to MFSA's May 2018 Minded Letter, specifically the last paragraph of page 3 which begins with the sentence "*The Company [Appellant] **vehemently refutes this allegation***" and subsequently substantiated this statement by means of detailed representations and several appendices thereto. This is another instance where MFSA simply ignores the Appellant's representations and merely elicits that which in its view is the Appellant's position whilst deliberately distorting Appellant's representations. The Appellant highly suspects that the representations contained in its letter dated 7 June 2018 were only superficially read or were hardly given due consideration by the Authority. After

all, the Authority's position was already "minded" or pre-determined and therefore any representations on the part of the Appellant were simply set aside.

Secondly, the Appellant fails to understand what MFSA means by the term "rigorous" in relation to the extent of the due diligence MFSA expected the Appellant to undertake. MFSA is simply setting an undefined, unguided and highly ambiguous yardstick of what it requires. This yardstick of 39 inches long could measure anything between a fraction of an inch to as much as thirty-nine inches long depending on the requirements of the MFSA as it deems fit in its sole and absolute discretion. Indeed, this is what abuse of discretion and manifest unfairness is all about. With this approach, service providers like the Appellant are in no position to ascertain whether they are in line with MFSA's undefined and undefinable criteria because MFSA has created moving targets. Therefore, the Appellant could hardly be blamed for failing to understand what rigorous means in practical terms, given that in its view it had conducted sufficient and professional due diligence prior and during its tenure as investment manager of the Schemes.

Thirdly, as an example of this alleged lack of proper due diligence processes, MFSA refer to the investment in Vision Industries Corp through the Quality Investment Fund ("**QIF**") and allege that no formal due diligence report was set out. NOUS had by means of numerous letters informed MFSA that this is not the case, and yet MFSA appear to have committed to its stern position without providing a basis for disregarding the representations made by NOUS in its various letters, including but not limited to letters dated: 8 December 2014 (**Doc. App 8**), 15 December 2014 (page 2) (Doc. App 9), 19 February 2015 (pages 3-7) (**Doc. App 10**), 13 April 2015 (**Doc. App 11**), 8 June 2015 (page 3) (**Doc. App 12**), 18 September 2015 (page 4) (Doc. App 13), 26 October 2015 (Pages 3-6) (**Doc. App 14**), letter dated 5 February 2016 (**Doc. App 15**) as well as the Memorandum of advice by Dr.jur. Hehli Hidber addressed to the board of directors of QIF (**Doc. App 16**) in relation to the investment in Vision Industries Corp and the proceedings instituted by the Appellant against various parties involved.

The bankruptcy of Vision Industries Corp is of no direct consequence to the alleged lack of due diligence (which is denied) carried out by the Appellant in relation to this investment. No further or rather "rigorous" due diligence analysis would have avoided the bankruptcy of this publically listed company particularly since there was a clear case of misrepresentation by the persons involved in this entity (vide memorandum of advice **Doc. App16**).

(c) Lack of Due Diligence on Critical Service Providers

MFSA concludes that the Appellant did not conduct "*effective due diligence on proposed valuers and service providers*" and further notes that the Appellant "*did not contest the fact that it did not have specific procedures for the conduct of effective due diligence...*". Against the Appellant refers to its reply dated 7 June 2018 (**Doc. APP** 3) to MFSA's May 2018 Minded Letter, specifically paragraph 2 on page 3 which begins with the sentence "*Again, this is unfortunately incorrect*" followed by representations thereto. Again MFSA conveniently misquotes the Appellant's representations further evidencing the flawed basis of MFSA's Decision.

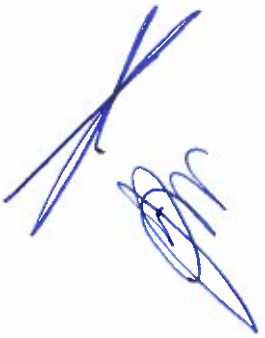
Moreover, once again the Appellant fails to understand what the Authority deems by "effective" due diligence. Yet again, MFSA simply sets an undefined, unguided and highly ambiguous measure of what it requires. Accordingly, service providers like the Appellant are in no position to know when and at what point they would have reached MFSA's moving mark and at best have to guess and hope that their procedures are "effective" in the eyes of the MFSA. MFSA provided no insight as to what they deem to be "effective" despite the Appellant's request to do so, thereby rendering the Appellant unable to address MFSA's concerns or present an adequate defence in this respect. With such undefined standards, service providers like Apellant could hardly ever get it right as happened in this case. This is abusive and manifestly unfair.

In support of MFSA's conclusions, MFSA refer to the appointment of Mr. Cornelis Niessen as a third party investment advisor on the Bull Bear Opportunities Fund. MFSA allege that the appointment was made without the prior approval of the board of director's of NOUS. With all due respect, the manner in which Mr. Niessen was appointed and MFSA's discontent in this respect is a totally different issue to the alleged lack of due diligence on the service providers by the Appellant.

Moreover, the Authority is reminded that this matter is *sub judice* and is subject to a separate appeal before this Tribunal. However, given that the Authority saw fit to bring this matter under the purview of this Decision too, the Appellant submits that in accordance with clause 4.1 of the Management Agreement between the Scheme and the Manager, the Manager is entitled to delegate management powers over the Bull Bear Opportunities Fund ("**Bull Bear Sub-Fund**") and its assets at all times to 'sub-managers'. Accordingly, the Dutch Investment Team (DIT) was appointed as Sub-Manager from the start of the Bull Bear Sub-Fund with the consent of the Scheme in keeping with resolution 7 of the Board of Directors of NOUS dated the 25 th June 2010, whereby it was resolved that '*Any of the two of Dr. Mario Praschil, Mr. Paolo Bruckner and Mr. Mark Meyer be and are hereby authorised and empowered [...] to negotiate, enter into, sign , execute and deliver any agreements, deeds, application or other forms, notifications, confirmations, declarations or any other document in relation to any of the above (the "Documents') in the name and on behalf of the Company [the Scheme]* ". Based on these same parameters as the appointment of the previous Trade Advisers DIT, the Manager replaced the DIT and appointed Mr. Niessen on 15 April of 2013. This being premised, *ex admissis* there is no *nexus* between the alleged lack of consent of the board of directors of NOUS with regard the appointment of Mr. Niessen and the alleged losses suffered by the Bull Bear Sub-Fund. The said loss was not directly caused by any claimed lack of approval by the Scheme with regard the appointment of Mr. Niessen or even less so of any lack of due diligence on the Appellant's service providers. This absence of causation negates the basis for this alleged deficiency concluded by the Authority.

Lastly, the fact that the above matter is subject to a separate appeal filed by the Appellant before this Tribunal further evidences the manifest unfairness underlying MFSA's Decision in that it seeks to raise issues being discussed in separate proceedings.

(d) Segregation of assets between sub-funds



In this respect the Appellant notes that MFSA acknowledges that *"this issue was eventually resolved"*. The Authority further notes that *"this could have resulted in adverse repercussions"*. In point of fact there were no repercussions particularly because as MFSA was informed, given that NOUS did not have its own bank account one of the sub-funds had settled some payments only to be subsequently refunded proportionately to its NAV. Moreover, these payments mainly related to fees like supervisory fees and other similar expenses with absolutely no bearing on the liquidity of the sub-funds. It is reiterated that this incident did not result in any harm to the investors and was immediately rectified following MFSA's concerns.

(e) Record Keeping

In its May 2018 Minded Letter, MFSA stated that it *"found out that Novium AG was unable to provide a comprehensive update on the financial status of NOUS due to incomplete records relating to the payables and receivables..."* and on this basis concluded that *"Novium AG is missing basic records and information which are essential for the management of a MFSA licensed collective investment scheme"*.

In its reply, the Appellant submitted that it *"fails to understand the basis on which MFSA makes such a statement and the means how it "found out" that the Company was unable to provide a comprehensive update on the financial status of NOUS. In its Minded Letter, MFSA simply makes the statement with absolutely no basis to substantiate its alleged findings."*

In its Decision, MFSA notes that its findings are derived directly from the previous Compliance Officer of NOUS. Firstly, the MFSA made absolutely no verifications on this point with the Appellant, again breaching its right to a fair and adequate hearing. The first time the Appellant was informed of the source of this information was by means of this Decision. In this respect it is submitted that the previous administrator of NOUS – Valletta Fund Services - always received all the records to complete the quarterly NAV calculation. After resignation of Valletta Funds Services, Appellant continued to update the records for the purposes of the NAV calculation.

Specifically with reference to NOUS, as will be proven throughout the course of these proceedings, Appellant always updated the records with *inter alia* a list of transactions reconciled with the bank accounts, a list of invoices and all other bank transactions for each sub-fund and for each SPV which were delivered to the respective sub-funds and SPVs every quarter.

(f) Approval of NAV of a Suspended Fund

MFSA disregarded the Appellant's representation in this regard holding that *"since the NAV determination and dealings within Primatist Multi-Strategy Fund were suspended therefore there could have been no changes to the NAV following such suspension"*. The Appellant strongly submits that this conclusion of the MFSA is nonsensical. As a financial services authority, surely MFSA can appreciate that the value of assets still vary and change despite a suspension in dealings. A passive asset does not necessarily retain the same value simply because it is not trading.

Furthermore, in spite of the fact that the fund was not dealing, the NAV still changed because the fund continued to incur running costs (Bank, Service providers etc.) which had an influence on the value of the fund because of its very small volume and

therefore an informal calculation of the NAV was undertaken. Moreover, the Appellant fails to understand why this amounted to a "deficiency"/ "shortcoming" and remains in the dark as to which rule, yardstick or measure was breached by Appellant by obtaining an unofficial NAV.

II. *Lack of Compliance Monitoring and other serious deficiencies in the Compliance Function*

MFSA concluded that during the "*on-site inspection, MFSA discovered that Novium AG did not have a compliance monitoring programme*". The Authority further held that "*notwithstanding the monthly compliance meetings which were being held following the MFSA's on-site inspection in December 2015, a formal compliance monitoring programme pertaining to Novium AG OR NOUS was never introduced*" and concluded that the Appellant failed to "*carry out the compliance oversight and monitoring function which is required of it as the Investment Manager of a licensed collective investment scheme*"

Firstly, given MFSA have never issued any guidelines to be followed by non-resident entities like Appellant, it remains uncertain what requirements MFSA is referring to here. Therefore, in view of this *lacuna*, purely for the sake of argument, the rules applicable to persons not resident in Malta or operating under the Regulations ought to be those that apply to *De Minimis* Fund Management Companies. In this respect, there exists no rule/licence conditions or requirement to implement a compliance monitoring programme. Once again, MFSA appear to be imposing requirements that do not even exist for local *De Mininis* Fund Management Companies.

Secondly, by MFSA's own admission, the Appellant was having monthly compliance meetings and generated the minutes and action points following such meetings. In this respect, the Appellant fails to understand what the MFSA would have deemed to be sufficient to satisfy their requirements which requirements are in any event not provided by way of guidelines.

III. *Conflicting Roles & Powers of Mr Paolo Brückner*

In the Appellant's reply to the May 2018 Minded Letter, the Appellant refuted MFSA's findings and explained that "*whilst it is true that Paolo Brückner is the CEO of the Company and is therefore, responsible for the Company's [Appellant's] daily business affairs, the fact remains that the Company [Appellant] has always had an additional two independent directors on its board of directors. MFSA's stetement that Mr. Raul Cortes had little to no contribution in the management and decision-making process of the Company [Appellant] is as incorrect as can be and the Company [Appellant] legitimately questions the basis of such statement. During the Company's [Appellant's] engagement as manager of NOUS, EIUS and PPREF, Mr. Cortes was responsible for the asset management of client's investment mandates. Furthermore, until his resignation, Mr. Mark Meyer together with Mr. Cortes were always involved in the management of the various funds. In particular Mr. Mark Meyer was directly responsible for the management of the Personal Care Fund and the Public Private Real Estate Fund and Mr.Cortes was directly responsible for the management of the Primatist and the Quality Investment Fund, whilst Mr. Brückner was more involved in the Private Equity Fund Special Situation and Vintage Watches. Moreover, Mr. Cortes was a director of the underlying SPV of several funds. Therefore, MFSA's view that Mr. Brückner was effectively acting alone giving*

rise to a potential conflict of interest is merely speculative at best and downright incorrect at worst."

The Appellant reiterates the above and further rejects MFSA's conclusions contained in the Decision as being incorrect. MFSA is wrong to state that Mr. Mark Meyer was never replaced as director following his resignation. As a matter of fact Mr. Meyer was replaced as director of both schemes by Mr. Sandro Bartoli and Mr. Joe Portelli. Mr. Portelli was replaced in 2016 by Dr. Jonathan de Giovanni and Mr. Sandro Bartoli was replaced in 2017 by Mr. Charles Ingham.

The Appellant reiterates that it was always managed by a Board with three or four directors namely Mr. Marc Daetwyler, Mr. Werner Mathys, Dr. Michael Cohen (resigned in 2016) and Mr. Paolo Brückner. Concerning the specific activity as asset manager, after the resignation of Mr. Mark Meyer, the responsibility was divided between Paolo Brückner (Managed Accounts and CEO) and Raul Cortes (Funds Management) assisted by a team of two persons. The Appellant strongly rejects the allegation of MFSA that Novium AG was a "one man show". The Appellant is a Swiss registered limited company with a working Board of Directors and a team of staff members whilst all investment and other important decisions, if any, were always taken collectively with the intervention of the investment committee.

Therefore, during its activity as Investment Manager of the Schemes and its sub-funds, the Appellant was regulated under Swiss Law and had a professional team of up to twelve persons. Only in 2017 the team has been reduced to a staff sufficient to manage the remaining funds and the other managed accounts.

In relation to MFSA's comment on the content of the conflict of interest policy, the Appellant notes that in the May 2018 Minded Letter, the Authority accused the Appellant of not having a conflict of interest policy in place upon being informed by someone unknown to the Appellant. The Appellant rebutted this unverified allegation by furnishing the Authority with its conflict of interest policy drawn up in terms of the requirements under the Swiss regulatory regime to which the MFSA now feels that the said policy is not up to scratch. Had the Authority sought to verify the information they received from the unknown source with the Appellant on whether there was a conflict of interest policy in place or not, the Appellant would have furnished this policy immediately without needing to have this included in the minded letter and subsequently in the Decision. Either way, the Appellant stresses that the internal conflict of interest policy complies with the requirements under Swiss rules. The Schemes in turn have their own conflict of interest rules in the Offering Memorandum and the Offering Supplement.

IV. Liquidity Issues of the Schemes

According to MFSA *"as a result of:*

1. *the above-mentioned management, governance and compliance deficiencies;*
2. *as well as Novium AG's failure to conduct an on-going assessment of the Schemes' liquidity situation;*
3. *adopt a rigorous risk management system; and*

4. *carry out on-going due diligence of the Schemes' investment portfolios,*

the Schemes are left in a precarious state..."

In relation to point (1) above, the Appellant refers to its representations contained in its reply letter dated 7 June 2018 (**Doc. App3**) and to the position provided above in this appeal application.

With respect to point (2), MFSA has consistently failed to substantiate this allegation in the two minded positions as well as in its Decision. MFSA simply make a statement without providing the basis and the motivation behind such conclusion.

In relation to point (3) above, MFSA are simply throwing all sorts of accusations in the pot without substantiating or providing the basis for such findings. As an administrative body governed by principles of administrative law, MFSA is bound to give reasons for its findings. Simply stating that following the on-site inspection, MFSA concluded that the Appellant lacked a rigorous risk management system without providing the basis for such finding/s falls foul of the fundamental principles of administrative law.

The above also applies with respect to point (4) above. Before raising the charge of failure to "*carry out on-going due diligence of the Schemes' investment portfolios*" in page 16 paragraph (1) line (3) of the Decision, MFSA had never before claimed that the Appellant failed to carry out this function. It is once again submitted that the MFSA ought to at the very least allow the Appellant to make representations on this point in keeping with the principles of natural justice and its right to a fair hearing before jumping to such a conclusion.

It is further submitted that MFSA failed to establish a causal link between the alleged wrongdoings outlined in its Decision and the liquidity of the sub-funds of the Schemes. Ultimately, by MFSA's very own admission, private equity investments involve limited liquidity and furthermore, the default of some of the investments causing liquidity problems is an inherent risk which could not have been avoided with a more "rigorous" due diligence exercise over the valuers or other third party service providers. The board of directors had informed the Authority that one of the principle reasons for the liquidity problems which started in 2014 was the default of two of the main providers of subscribers of the funds namely the insurance company Hansard Europe who ceased its activity in several European countries due to the change of the regulations and the insurance broker A1 in Italy which had ceased its activity in the fund's sector. This had an adverse effect on the liquidity and caused a complete change in the liquidity schedule of the [funds] which had planned their investments on a much higher volume of available liquid assets. These developments could not have been foreseen by the Appellant.

*V. **Non Compliance with the Offering Documentation of NOUS***

MFSA found that as investment manager of NOUS, Novium AG's relationship with NOUS was governed by the third party investment management agreement between the Appellant and NOUS' Bull Bear Sub-Fund whilst citing to clause 3.1.1 of the investment management agreement dated 25 June 2010 and simply stating that "*Novium AG failed to adopt a rigorous risk management system and this eventually resulted*

in the failure of Bull Bear". Yet again, MFSA simply make an allegation without any basis to substantiate the same allegation. It failed to do so both in the Decision and in both minded letters. Moreover, matters relating to Bull Bear Sub-Fund are subject to another pending appeal before this Tribunal (FST 02/15) (Doc. App 17) and raising them again is further evidence of the unfairness of the Decision in that it seeks to blame Appellant yet again ~~H~~In its conclusions, MFSA goes as far as to state again that *"the Company [Appellant] does not rebut the Authority's findings"*. A previous appeal on this very point cannot be more of a stronger rebuttal! It is also incorrect to state that the Appellant did not rebut the Authority's findings as there is a clear rejection of such allegation in Appellant's reply letter to MFSA dated 6 June 2018. Not only. The Appellant had also rebutted this allegation previously in a letter that **predates the on-site inspection conducted by the Authority which on-site inspection resulting in the findings contained in the Decision. This evidences the fact that the Authority's mind was made up even before the on-site inspection conducted in December 2015, but even goes as far back as January 2015.** The unfairness cannot but be more manifest. In this respect the Appellant reproduces its representations contained in its reply letter to the MFSA dating back to the 27 January 2015 (also attached herewith and marked as Doc. APP 18) and which matter is sub judice:

> ***"[ii] Failure to Adopt a Rigorous Risk Management System***
> *Trading Advisors such as DIT and Mr. Niessen (the "Trading Advisors") implement proven concepts based on real-time market data. In this case, the use of specialised trading and brokerage systems is imperative to be able to compute buy and sell signals and to execute trades immediately due to the quantitative amount of data and different statistical measures, thereby rendering manual computation impossible. As a result, the parameters for buy and sell signals and, consequently, the parameters for risk management must be built into the systems itself. Stop Loss orders, as one tool of risk management, must be entered into the systems at the broker level which typically requires access to dedicated online brokers specialised in derivatives and margin trading such as the ones used by the Manager in cooperation with both Trading Advisors. Typically, traders use their proprietary system linked to the broker system with input from recognised, reliable sources such as Reuters and Bloomberg. The Manager has access to the broker system and to Bloomberg to monitor trades as well as verifying the input. Both the Manager and the Trading Advisors apply their experience and judgement when determining the trading strategy and money allocated based on the investment objectives and restrictions of their clients [...]It is to be appreciated that the events surrounding the losses suffered between the 19th and 20th June 2013, were a result of an unavoidable event risk embedded and intrinsic to the type of investments undertaken in accordance with the offering documentation of the Sub-Fund. The Authority is of the view that the Manager did not act in accordance with the Offering Supplement dated 25th June 2010 as it did not implement stop-losses to minimise the losses, thereby not implementing a rigorous risk management system. It is submitted that the positions could not have been reversed at that stage as there was no available liquidity due to the single largest drop of stock market in the year. Therefore, irrespective of whether a rigorous risk management system as was in place at the time*

in question, this was an extraneous event risk which was inevitable having a drastic effect on the Sub-Fund...

Conclusion

In view of the above, the Appellant respectfully requests this Tribunal to reverse, revoke and set aside the Decision in its entirety.

Having seen the reply of the Authority [7] .

Having seen the additional pleas raised by the Authority on the 1st June 2022 whereby the Authority claimed that since "is-socjeta appellant m' ghadiex membru tal- VQF SRO – il-Financial Services Standards Association fl-Isvizzera, anke kieku, ghall-grazzja ta' l-argument biss, s-socjeta appellanati kellha tirbah dan l-appell, ma hijiex ser tkun f' posizzjoni li tezercita servizz ta' investimenti ai termini ta' l-Att dwar l-Investiment, u kwindi s-socjeta appellant ma fadalliex interess guridiku fl- appell minnha interpost."

Having seen the note presented by the Authority on the 9th June 2022 wherein it exhibited a communication received by the Swiss Financial Market Supervisory Authority ("FINMA") confirming that the Appellant Company was no longer a member of the VQF SRO;

Having seen the verbal of the sitting of the 15th June 2022 wherein the Parties declared the following:

Meta ssejjaħ l-appell dehru Dr Chiara Frendo LL.D ghas-socjeta' apellanti, u Dr Anthea Galea LL.D, Dr Cynthia Scerri Debono LL.D u Dr Kris Borg LL.D ghall-Awtorita' appellata.

Is-socjeta appelanti taghmel referenza ghan-nota pprezentata mill-Awtorita fid-9 ta' Gunju 2022 permezz ta' liema gew prezentati skambju ta' korrispondenza bejn l-MFSA u FINMA fejn irrizulta li FINMA ikkonfermat li "Novium AG's membership

[7] Document 5

with the self regulatory organiztatin for financial services standard association VQF SRO seized to exist on 11th January 2018".

Is socjeta appellanti tiddikjara li m'ghanda ebda kontestazzjoni fuq il-fatti iddikjarati minn FINMA. Is socjeta appellanti tikkonferma ukoll li dan huwa stat ta fatt definittiv u mhux suggett ta' proceduri la lokalment kif ukoll fl-iSvizzera.

L-appellanti iddikjara wkoll li il-membership fil- VQF SRO hija u kienet l-unika regime regolatorju li kien jirregola l-attivita tas-socjeta appellanti u li din kienet il-bazi ta' l-ezenzjoni li kienet harget l-Awtorita Appellata a favur tas-socjeta Appellanti sabiex dina ma tkunx tehtieg licenzja taht l-Investment Services Act.

L-Awtorita Appellata b'referenza ghall eccezjoni ulterjuri mressqa minha fl- 1 ta' Gunju 2022 tikkonferma illi l-awtorizzajoni lokali tas-socjeta appellanti (u cioe l-ezenzjoni li kellha milhtiega ta' licenzja) kienet tiddependi mill-fatt illi ijja membru tal-VQF SRO.

L-partijiet qabblu li in vista ta tali fatti it-Tribunal huwa awtorizzat li jiddeciedu fuq l-eccezjoni ulterjuri mressqa mill-Awtorita'.

Having seen all other acts and documents of the proceedings;

Having noted that both Parties agreed that the Tribunal should decide this additional plea raised by the Authority and informed the Tribunal that the decision on this Appeal can be delivered in the English language;

Having seen that the case was scheduled for today for the Tribunal's decision on the said additional plea;

Considers:

1. The Appellant is a Swiss Entity supervised by the VQF SRO and in terms of Regulation 3(2) of the Investment Services Act (Exemption) Regulations (the Regulations), the Appellate Authority determined that an exemption laid down in Regulation 3(1)(h)(ii) of the said Regulations applies and hence the Appellant was exempted from the requirement of requiring a licence in terms of Article 3 of the Investment Services Act.
2. The fact that the Appellant was a member of the VQF SRO was a material consideration in considering the Appellant *"of sufficient standing and repute"* in accordance with the provisions of the aforementioned Regulation 3(1)(h)(ii) of the Regulations. This was confirmed by both parties in the records of the proceedings of the 15th June 2022.
3. It is thus consequential that if the Appellant is no longer a member of the VQF SRO, and such a fact is final and definitive and not subject to contestation, then the Appellant has lost the status that lead the Authority to exempt it from the need to obtain a license under the Investment Services Act.
4. It is thus clear that as a matter of fact, even before the Decision subject of this Appeal was taken, the Appellant could not be considered as exempt from the requirement of holding a license under the Investment Services Act since its status with the VQF SRO had already changed (the status terminated as from 11 January 2018). Therefore, irrespective of the decision of this Tribunal on the merits of the appeal contesting the Decision of the Authority of the 12th December 2018, the fact remains that the Appellant can no longer enjoy the exempt status afforded to it under the Regulations.

On the basis of the above, the Tribunal upholds the plea of the Appellate Authority and declares that the Appellant does not have any further juridical interest in these proceedings.

Because of the circumstances of the case, each party is to bear its own costs.