

UFFIĊĊJU TAT-TRIBUNAL GĦAL  
SERVIZZI FINANZJARJI  
ĊENTRU MALTI TA' L-ARBITRAĠĠ  
33, TRIQ NOFSINHAR,  
VALLETTA VLT 11



OFFICE OF THE FINANCIAL  
SERVICES TRIBUNAL  
MALTA ARBITRATION CENTRE  
33, SOUTH STREET,  
VALLETTA VLT 11

Dr Ian Stafrace LL.D. Chairman

Dr. Nicholas Valenzia LL.D Membru

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

FST 01/22

Curmi & Partners Ltd

vs.

MFSA

It- Tribunal

Ra l-appell interpost mill-Appellanta liema appell gie intavolat fil-hamsa (5) ta' Jannar 2022 li fih l-appellanta ssostni:

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## A. BACKGROUND

1. In terms of Rule 4-5.3.1 of Part B1 of the Rules for Investment Services Providers, applicable until 5 August 2021, the Company, a holder of a Category 2 license issued by the MFSA, were to submit the annual audited COREP return, audited annual financial statements, a copy of the Auditors' management letter and an original copy of the Auditors' report (collectively referred to as the "Documents"), within four months of the accounting reference date. The Company's reference date is 31 December, and accordingly, the Company was to submit the Documents by 30 April 2020 ("Deadline Date").

2. In view of the unforeseen and unprecedented disruptions as a result of the Covid-19 pandemic, the Authority issued a circular dated 20 March 2020 (the "March 2020 Circular", enclosed and marked as 'CP 2') stating that "the MFSA is aware of the increasingly difficult conditions being faced currently, and presumably to be faced in the immediate future, by licensed entities in effectively responding to unprecedented challenges in terms of ensuring operational continuity, whilst also adhering to their regulatory obligations. Considering the significant effects of the COVID-19 situation on the financial services sector,

**the MFSA considers it necessary and proportionate to apply flexibility in the applicable deadlines for the submission of regulatory reporting falling due over the next months. In general, the MFSA will be accepting a delay from the reporting deadline for some of the submissions/publications falling due by March or April 2020." [emphasis added].**

### *Investment Firms*

*For the reporting requirements applicable to investment firms:*

- *Category 1-4 (excluding credit institutions) - Annual Report, Audited Financial Statements, COREP Return, and Management Letter, Circularisation Exercise Report)*

*The MFSA is ready to accept next submissions due by March or April up to two-~~two~~ months from the reporting date following an official request received, and on a case-by-case basis.*



3. *The Company submitted the Documents on the 21 May 2020 ("Submission Date"), that is three weeks from the Deadline Date, and accordingly, well within the two<sup>11</sup>~~SEP~~ month extension from the Deadline Date permitted by the Authority in terms of the 20 March 2020 circular;*

4. *The Authority informed the Company that it was "minded to impose (sic) an administrative penalty of five thousand Euro (€5,000) in terms of Article MA(1) of the Investment Services Act"1 for submitting the Documents after the Deadline Date and invited the Company to provide its written submissions by not later than 3 November 2021 "setting out the reasons (if any) as to why the regulatory action proposed in the said Minded Letter should not be taken by the Authority". The Company provided its written submissions by means of its letter dated 3 November 2021 (enclosed and marked as 'CP 3');*

5. *Notwithstanding the Company's written submissions, in its Decision the Authority provided that "for reasons explained below, the Authority has concluded that such representations do not justify a reconsideration of the Authority's position with regards to the minded administrative penalty which was communicated to the Company on 20 October 2021" , In this respect, the Authority imposed an administrative penalty amounting to five thousand Euro (€5,000) (the "Administrative Penalty").*

#### **B. BASIS FOR APPEAL**





6. *This is an appeal in terms of Article 21(9) of the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta. For reasons explained below, and as will be explained in further detail during the proceedings before this Financial Services*

*Page 2 paragraph 1 of the Decision*

*Tribunal ("Tribunal"), in reaching its decision, the MFSA grossly abused its discretion thereby rendering its Decision manifestly unfair.*

*i. The Administrative Penalty is Arbitrary, draconian and, in any event, excessive*

7. *The Administrative Penalty is arbitrary, draconian and in any event, excessive, thereby rendering the Decision manifestly unfair and an abuse of the Authority's discretion.*

8. *In the first instance, whilst the Authority in its Decision claims to have assessed the representations of the Company with "careful consideration" and provided "reasons as explained below in the Decision]", the Decision is nothing more than a reproduction of the minded letter, without the provision of any reason whatsoever. The Authority merely reproduced in summary format the representations of the Company and in response provided that "the MESA made its assessment and is of the view that the representations do not justify a reconsideration of the MFSA's proposed regulatory action as communicated to the Company in the Authority's Minded Letter of 20 October 2021." The Authority's assessment was merely limited a reiteration that the Documents were submitted late and in so doing failed to consider the mitigating circumstances acknowledged by the Authority itself in its guidance circular of the 20 March 2020 in view of the unprecedented circumstances brought on by operating during the commencement of the Covid-19 pandemic. Instead, the Authority grossly abused its*







*discretion by applying a very heavy fisted approach, reversing on its own commitment to apply a degree of flexibility with respect to the submission of returns and other documents in terms of the applicable rules and applying a fine more akin to a punitive sanction.*

*9. It is respectfully submitted that the Decision is a far cry from being a considered and reasoned one. Instead, the MFSA simply stuck to its guns, and repeated that which was already communicated in its Minded Letter. This approach renders the Minded Letter, as a precursor to the Decision, and the opportunity to provide representations is a mere formality without any real substance or probative value. This opaque practice of the Authority is grossly unfair and impinges on the Appellant's right to due process;*

*10. The Authority appears to have considered that a three-week delay, notwithstanding the circular issued only a few weeks prior, warrants the imposition of a penalty in the sum of Euro five thousand. However, the parameters and the methodology resulting in the said penalty and the respective weighting given to the period of delay which in turn transposes into the Administrative Penalty are completely arbitrary and seem to have been formulated unilaterally by the Authority - without any apparent legal basis, and without ever being communicated to the public. Further compounding the gross abuse of discretion, as will be proven throughout these proceedings, the Authority has not even been consistent in its heavy handed approach, applying two weights and two measures with respect to the imposition of a penalty or otherwise across the industry in license holders' regard during the period between March 2020 to June/July 2020, where it on occasion, did indeed afford the flexibility it committed to apply in terms of the circulars published by the Authority without imposing a penalty for delays within the two month extension;<sup>2</sup>*

*11. Therefore, in the most arbitrary manner and in a clear abuse of its discretion, the*



*Authority imposed a penalty of Euro five thousand purportedly a sum that the Authority considers effective enough to dissuade the Company from continuing in its state of affair in relation to the breach. However, there was no continuing breach as the Company had indeed submitted the Documents well within the two-month period afforded by the Authority beyond the Submission Date in terms of its circular dated 20 March 2020. Therefore, rather than dissuasive, the Administrative Penalty is punitive in nature, and accordingly, the methodology in relation to the imposition of such penalties needs to be transparent and prescribed at law. In view of the complete arbitrariness in allocating the Administrative Penalty, the Decision ought to be set aside on this basis.*

*ii. The Administrative Penalty is Manifestly Unfair and Unjustified*

*12. In its Decision, the Authority held that the Company was not able to avail itself of the two-month extension communicated in the 20 March 2020 Circular as the Company had not put forward a specific request on this basis. Accordingly, the Authority considered that this extension was not available to the Company to avail itself of. However, even from a cursory read of the 20 March 2020 Circular, the Authority point of departure was to accept, in a rather blanket manner, a delay from the reporting deadline falling due by March or April 2020 - "In general, the MF SA will be accepting a delay from the reporting deadline for some of the submissions/publications falling due by March or April 2020." So much so, whilst accepting a delay was the rule (and not the exception) for reporting deadlines falling due by March or April 2020 (as in the Company's case), the Authority expressly provided that delays for submissions due by May or June will be accepted as an exception on a case-by-case basis, and not the rule - "The MFSA is not inclined to accept a delay for submissions/publications due by May or June but, based on its ongoing assessment of the situation, it will consider such, at a later stage, if warranted". Accordingly, a contrario sensu, given that the MFSA in its March 2020 Circular advised that it was not inclined to accept a delay for submissions due by May or June as a rule, it follows that delays for submissions due in March or April where to be accepted, without an assessment on a case-by-case basis. It is therefore, submitted that the requirement to request was a mere formality and not contingent upon any particular circumstance/s or justification to be shown by the licence holder to the satisfaction of MFSA in order to benefit from such extension afforded by the Authority for submissions falling due*





by March or April. It would therefore seem that the Administrative Penalty was imposed not due to the late submission of the Documents, but rather for the Company's apparent omission in requesting permission to avail itself of the granting of an extension by the Authority of two-months of which the Company only delayed by three weeks from the Submission Date.

13. The Submission Date coincided with the onset of the Covid-19 pandemic, at a time of great uncertainty not only on a micro level but on a macro international level. The Company, along with all other industry members turned their focus to ensuring continuity across its operations. At the time, very little was known as to the lasting effects of the pandemic, and the forecast grew bleak. So much so, the Authority issued a subsequent circular in June 2020 (enclosed and marked as document 'CP 4') further acknowledging the challenges faces by industry players and provided that whilst the Authority at first "was not inclined to accept a delay for submissions/publications due by May or June. Having said that, the Authority understands that the lingering effects of the COVID-19 pandemic are posing unprecedented challenges upon regulated firms, specifically with respect to meeting regulatory submissions deadlines, Accordingly, after having assessed the COVID-19 pandemic situation on the financial services sector, as well as following feedback from the industry, the MFSA considers it necessary and proportionate to once again apply flexibility in the applicable deadlines for the submission of regulatory reporting falling due, In this respect, the MFSA may accept a delay from the reporting deadline for some of the submissions/publications falling due by June 2020 albeit, on a case-by-case and very exceptional basis". Albeit subtle, the Authority's position in the June 2020 circular differed from that in the March 2020 circular in that whilst in the latter circular the extension granted by the Authority was indiscriminately ("In general [emphasis added], the MFSA will be accepting a delay from the reporting deadline for some of the submissions/publications falling due by March or April 2020"), pursuant to the June 2020 circular, the Authority exercised more discretion to consider an extension on a case by case basis. This is further evidenced by the fact that in the June 2020 circular, the Authority detailed far more extensively the terms relating to an extension for those submissions due in May or June explaining that "As a general rule however, requests will only be considered where the requesting entity provides sufficient justifications to demonstrate that delay in the



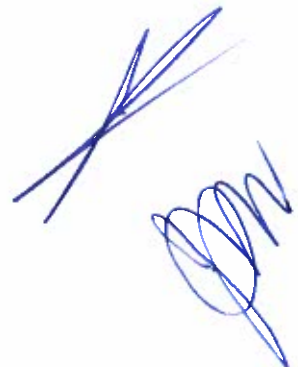
*regulatory submission is due to COVID-19 related circumstances." Again, a contrario sensu, this was not the case for submissions due in March or April, as in the Company's case. The Company fell within the purview of the March 2020 Circular and therefore, would have and ought to have been afforded the flexibility which the Authority itself committed to grant.*

*14. Notably, whilst the timely submission of the Documents is important from a prudential supervision perspective in order to have access to the data reported in the Documents, yet the Authority took twenty months to consider a three-week purportedly delayed submission as amounting to a breach meriting an Administrative Penalty of Euro five thousand, thereby further highlighting the disproportionality of the penalty imposed. In addition, it is pertinent to point out that the Company was never in receipt of any notification or reprimand from the Authority for any late filing or submission from its inception as an operator in the industry thereby further underscoring the disproportionality of the Administrative Penalty.*

*15. In addition, and subsidiarily, in either case, pursuant to Legal Notice 141 of 2020, Legal and Other Time Periods (Suspension and Interruption) (Cap 609) on General Provisions applying to the Suspension of Legal and Judicial Times Regulations, 2020, the statutory time periods, in this case the period to submit the Documents by the Submission Deadline, were suspended and only commenced once the said order was lifted by operation of the law. Accordingly, aside from falling within the two-month extension afforded by the Authority, the Submission Deadline was also extended by operation of the law.*

*16. On this basis, the Authority wrongly applied the law and also grossly abused of its discretion when imposing the Administrative Penalty.*

**C. CONCLUSION**







*THEREFORE, in light of the above, and for reasons that may be brought during the proceedings before this Tribunal in terms of law, the Appellant humbly requests that this honourable Financial Services Tribunal annuls in its entirety the Decision of the*

*Malta Financial Services Authority of the 6 December 2021, and accordingly, upholds the appeal with costs against the Authority.*

Ra r-risposta imressqa mill-Awtorita Appellata li fiha, rrispondiet ghall-appell interpost u sostniet:

*The Authority respectfully submits:*

*That on the 20<sup>th</sup> of October 2021, the Authority sent a Minded Letter to Curmi & Partners Limited whereby it communicated the proposed regulatory action of a total penalty of €5,000 for a number of breaches (the "Minded Letter"). Such amount consisted of the proposed penalties of €2,000 for the late submission of the Audited COREP Return, €2,000 for the late submission of the Audited Financial Statements, €500 for the late submission of the Auditor's Management Letter and €500 for the late submission of the Auditor's Report, all for the year ended 31<sup>st</sup> of December 2019;*

*That such late submissions were in breach of Part B1 R4-5.3.1 of the Investment Services Rules for Investment Service Providers which were applicable until the 5<sup>th</sup> of August 2021. As per such regulations, all Category 2 and 3 License Holders had to submit the aforementioned documentation within four (4) months of the accounting reference date;*

*That, on the 3<sup>rd</sup> of November 2021, Curmi & Partners Limited replied citing the pandemic as the reason behind such late submissions, whilst also acknowledging their failure to apply for an extension in terms of the Authority's Circular dated 20<sup>th</sup> of March 2020. The Authority did not feel that these representations warranted a change in the proposed penalty and thus*



*proceeded by imposing such penalty by means of a Decision on the 6<sup>th</sup> of December 2021 (the "Decision");*

*Curmi & Partners Limited felt aggrieved by the Decision and on the 5<sup>th</sup> of January 2022 availed itself of its right of appeal before the Financial Services Tribunal in terms of Article 21 of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) asking for the same Tribunal to annul the Decision and consequent penalty;*

### ***The Appeal***

*That, as will be explained in great detail throughout this reply and elaborated further in the course of these proceedings, in reaching its Decision, the Authority did not act in a manner that is manifestly unfair, nor did it wrongly apply the applicable provisions of the law or impose a disproportionate penalty. The requests and allegations tabled by Curmi & Partners Limited before this Tribunal are not only completely unfounded in fact and at law, but are frivolous and vexatious and should be rejected in their entirety by this Tribunal with all legal costs to be borne by the same Curmi & Partners Limited.*

*That, preliminarily, the Authority submits that the content of this reply is without prejudice to the submissions, evidence and findings put forth in the Minded Letter and the Decision, which are to be deemed to form an integral part of this reply.*

*That, the appeal tabled by Curmi & Partners Limited is based on a gross misinterpretation of the Circular issued by the Authority dated 20<sup>th</sup> of March 2020. Curmi & Partners Limited are correct in noting that the Authority realised the difficult situation which the world was faced with during the early stages of the pandemic, and that the Authority consequently catered for this by means of such Circular, whereby the Authority allowed for the possibility of a two (2) month extension to the four-month period from the reporting date permitted for regulatory*





*submissions as per Part B1 R4-5.3.1 of the Investment Services Rules for Investment Service Providers;*

*That, however, the same Circular clearly provides that in the case of Investment Service Providers, such possibility may only be granted "following an official request received, and on a case-by-case basis". A contrario sensu, it follows that in the absence of such an extension, no two-month extension could be granted or be deemed to have been granted. In the current case, it is abundantly clear that no such request was ever submitted, and this by admission of the Company itself, and consequently the two-month extension is certainly not applicable. This is, in fact, duly noted by Curmi & Partners Limited in their reply to the Minded Letter, where it is stated that:*

*The failure, which we acknowledge, on the part of the Company was that it did not officially avail itself of the two-month extension that was offered. Unfortunately, the Company cannot comment sufficiently on this front as this event occurred over 17 months ago and with the change of certain personnel at the Company since then it is not possible to carry out a full enough investigation into why a request for an extension was not made.*

*That this fact was also acknowledged in the appeal tabled by Curmi & Partners Limited. Therefore, it is evident that the two-month extension provided for in the Circular dated 20<sup>th</sup> of March 2020 is not applicable in this case, and, as such the regulatory submissions made by the company are to be deemed as having been submitted late;*

*That, furthermore, the reasoning provided in paragraph 12 of this appeal is completely flawed and incorrect. While it is true that in the aforementioned Circular there is written that "In general, the MFSA will be accepting a delay from the reporting deadline for **some** of the submissions/publications falling due by March or April 2020", it is reiterated that the part on Investment Service Providers specifically provides that the extension can only be granted "following an official request received, and on a case-by-case basis." The Authority further*



*clarifies that, contrary to what is being argued by Curmi & Partners Limited, it is unequivocal that the Circular did not grant a blanket two-month extension to all License Holders;*

*That further to this, the argument that "it follows that delays for submissions due in March or April were to be accepted, without an assessment on a case-by-case basis" is entirely incorrect. The Authority reiterates that the Circular stipulates in plain terms that an extension may only be granted "following an official request received, and on a case-by-case basis." Therefore, it follows that the any argument posed in contrast to the May and June submission deadlines is irrelevant and should not be considered in light of the clear and direct provision stating the opposite in the Circular;*

*That Curmi & Partners Limited argue further that "It would therefore seem that the Administrative Penalty was imposed not due to the late submission of the Documents, but rather for the Company's apparent omission in requesting permission to avail itself of the granting of an extension of two-months". The conclusion reached here is once again incorrect and irrational. The Authority would like to clarify that the penalty imposed is a direct consequence of breaching Part B1 R4-5.3.1 of the Investment Services Rules for Investment Service Providers, i.e., late regulatory submissions. Evidently, and by the company's own admission, it failed to submit the relevant documentation in the stipulated timeframe. While the Authority did offer Investment Service Providers the opportunity to request an extension to this period, such a request was not made and, as such, the original four-month period is applicable;*

*That, therefore, it is amply clear from the above that there was an incontrovertible and undeniable administrative breach on Curmi & Partners Limited's part. Additionally, any reference to the regulatory submissions being made within the two-month extension provided for in the aforementioned Circular is completely unfounded given that such extension was never requested by the company and, as such, is inapplicable;*

*That, furthermore, Curmi & Partners Limited argue that the Decision was unfair in that the representations made by the company were not considered, and that the Decision reproduced*





*the considerations made by the Authority. The Authority categorically denies this and would like to clarify that consideration is certainly not tantamount to acceptance. While the representations made in reply to the Minded Letter were duly noted and considered, they did not justify an alteration or amendment to the action proposed in the Minded Letter. The argument that not accepting the representations is evidence that "the opportunity to provide representations is a mere formality without any real substance or probative value" is therefore entirely unfounded. The implication of this is that anytime representations are made in reply to a Minded Letter, the proposed action should be amended without any weight being given to whether such representations justify a proposed action or otherwise;*

*That with regard to Curmi & Partners Limited's argument that the Authority used "two weights and two measures" in granting flexibility to some Licence Holders and not to others, the Authority submits that such flexibility was indeed granted to all License Holders, including, without a shadow of a doubt, Curmi & Partners Limited. The penalty was, in this case, applied notwithstanding such flexibility being offered on the sole basis that Curmi & Partners Limited did not avail itself of the option of requesting an extension for its regulatory submissions. Should the company have done so, due consideration would have been given to the request, and if the case as presented at the time, merited a degree of flexibility, then they would have benefited from the flexibility offered by the Authority. The penalty imposed by the Decision can be chalked down to negligence and/or lack of foresight on the part of the company and certainly cannot be attributed to discriminatory behaviour on the Authority's part;*

*That Curmi & Partners Limited also claim that the Authority failed to consider any mitigating circumstances in the case. This is once again completely untrue and unfounded. The Authority submits that a considerable number of mitigating factors were taken into consideration in reaching the quantum of the respective penalties. These include inter alia:*

- i. the fact that the company had not previously been responsible for any breaches resulting in regulatory action;*





- ii. *the relatively low degree of impact and seriousness of the breaches;*
- iii. *the level of cooperation of the company with the Authority;*
- iv. *the fact that the late regulatory submissions were submitted within one hundred (100) days from the effective deadline;*

*That should the above factors not have been considered by the Authority, the penalty imposed could have been drastically heftier. Additionally, the Minded Letter clearly states that they are setting a **minimum** administrative penalty for each respective breach, further evidence that the penalty imposed is well within the confines of what can be considered proportionate and fair for a clear administrative breach. The Authority also submits that the amounts imposed through the Decision are significantly lower than the maximum allowed by Article 16A of the Investment Services Act (Chapter 370 of the Laws of Malta), further evidencing the unfoundedness of Curmi & Partners Limited's arguments;*

*That, despite the above considerations, the argument that the submissions were late due to the pandemic cannot be justified since the Authority offered an adequate remedy which was not availed of purely through the choice or negligence of the Company itself. Further to this, the argument that Curmi & Partners Limited did its utmost to ensure that the Authority's regulations were adhered to also cannot be accepted given the company's failure to even request an extension to the deadline offered by the Authority through the Circular dated 20<sup>th</sup> of March 2020.*

*That, lastly, the timeframes relevant to the case in question are not covered by Legal Notice 141 of 2020 and, as such, the provisions of such legal notice are completely extraneous and inapplicable to the case in question. Therefore, the argument made in this regard is to be dismissed as unfounded;*





*That in essence, seeing as the two-month extension is not applicable to this case, and in view of the fact that the regulatory submissions were clearly made later than the four-month timeframe provided in Part B1 R4-5.3.1 of the Investment Services Rules for Investment Service Providers (applicable until the 5th of August 2021), there was a clear breach of the abovementioned provision and, as such, the Decision was correct and proportionate and that the Authority exercised its discretion in a fair manner and according to the provisions of law;*

*Therefore, for the abovementioned reasons, the Authority respectfully requests that this Honourable Tribunal dismisses the appeal as tabled by Curmi & Partners Limited and to confirm the Decision issued by the Authority on the 6<sup>th</sup> of December 2021, with costs against the same Curmi & Partners Limited.*

Ra id-dokumenti u l-provi sottomessi mill-partijiet;

Sema it-trattazzjoni tal-partijiet u ra li l-appell gie differit ghall-lum sabiex jigi deciz;

Ra' l-atti kollha tal-kaz

Kunsiderazzjonijiet tat-Tribunal:

1. Illi s-socjeta' appellanta qeghdha tilmenta mill-multa ta' hamest elef Euro (€ 5000) fuqha imposta mill-Awtorita' permezz tad-decizjoni tas-sitta (6) ta' Dicembru 2021, liema multa giet imposta a bazi ta' l-Artikolu 16A(1) tal-Kap. 370 tal-Ligijiet ta' Malta.
2. Illi in succinct, dak li wassal ill-Awtorita' appellata sabiex tiehu il-mizuri li wasslu ghall-kontestazzjoni odjerna kien il-fatt illi s-socjeta' appellanta ssottomettiet l- *annual COREP return, audited annual financial statements*, kopja ta' l-*Auditors' management letter* u l-original ta' l-*Auditors' Report* ghas-sena finanzjarja Dicembru 2019, fil-21 ta' Mejju 2020, u dan meta suppost tali dokumenti kellhom jigu sottomessi sat-30 ta' April 2020.



3. Illi s-socjeta' appellanta ssostni illi hija esperjenzat diffikolta' amministrattiva fil-perjodu ta' Marzu-April 2020 u dan minhabba il-pandemija tal-COVID 19, tant illi anke' l-Awtorita' stess, tramite ic-cirkolari taghha tal-20 ta' Marzu 2020, gharfet l-isfidi illi entitajiet regolati kienu qeghdin jesperjenzaw. U f' kull kaz, dak li kellha l-obbligu li tissottometti gie debitament sottomess fil-21 ta' Mejju 2020, u cioe' tlett (3) gimghat wara id-*deadline*.
4. L-Awtorita' appellata ssostni illi l-estenzjoni indikata fic-cirkolari tal-20 ta' Marzu 2020 ma kienetx wahda awtomatika, izda tinghata biss jekk l-entita' taghmel talba ghall-estenzjoni, liema estenzjoni qatt ma ntalbet mis-socjeta' appellanta.
5. Illi l-Awtorita' wiegbet ghal domandi mressqa mis-socjeta' appellanta f'dawn il-proceduri tramite dokument ta' Alistair Cuschieri, illi ingieb ukoll sabiex jixhed fis-seduta tat-18 ta' Mejju 2022. Illi in succinct, is-Sur Cuschieri qal illi kull minn talab ghall-estenzjoni, din inghatatlu. Kull minn kien tard fis-sottomissjonijiet tieghu jew ghax ma talabx estenzjoni, jew ghax minkejja li inghata tali estenzjoni, baqa' inadempjenti jew tardiv, wehel multa hliet ghall-kazijiet li kienu "justifiable". Huwa spjega cirkostanzi fejn l-azzjoni li l-Awtorita' kienet "minded" li tiehu, inbidlet u dan minhabba cirkostanzi "justifiable". Bhala ezempju semma fejn l-entita' li kienet qeghdha tigi soggettata ghall-azzjoni amministrattiva, uriet illi l-fatti li wasslu ghad-dewmien ma kienux fil-kontroll taghha (bhal per ezempju fejn l-entita' kienet qeghdha tigi wara l-awdituri).
6. Illi tenut dan kollu, fil-kunsiderazzjoni ta' dan it-Tribunal, il-kwistjoni allura tikkoncentra ruhha, dwar jekk tali azzjoni kelliex tittiehed minhabba l-fatt illi s-socjeta' appellanta naqset li titlob ghall-estenzjoni stipulata fic-cirkolari tal- 20 ta' Marzu 2020. Dan peress illi jirrizulta illi li kieku ghamlet hekk, ma kienx ikun hemm l-ebda azzjoni ghaliex l-estenzjoni kienet tinghata <sup>1</sup> u bhala fatt, is-sottomissjoni tad-dokumenti saret ferm fit-terminu ta' l-istess estenzjoni (fil-21 ta' Mejju 2020).
7. Illi m' hemmx dubju illi c-Cirkolari tal-20 ta' Marzu 2020 kienet tobbliga lill-entitajiet regolati bhal ma hija s-socjeta' appellanta (*Investment Firms*) sabiex huma jaghmlu talba ghall-estenzjoni tat-terminu. M' hemmx dubju illi dan kien miktub car fl-istess cirkolari, u allura, fl-opinjoni tat-Tribunal, l-argumenti imressqa mis-socjeta' appellanti dwar x' setghat kienet l-intenzjoni jew jekk l-Awtorita' indikatx, fl-istess cirkolari, illi hija kienet qeghdha tintrabat li taghti estenzjoni, huma lkoll irrilevanti. Certament illi

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<sup>1</sup> Kif xehed Alistair Cuschieri kull minn talab estenzjoni dina inghatatlu





- jekk l-istess cirkolari inqrat b' mod daqshekk dettaljat mis-socjeta' appellanta li waslitha ghall-certu inferenzi jew konkluzjonijiet, qari akkurat ta' l-istess cirkolari kien juri bic-car illi kien hemm il-htiega li ssir talba ghall-estenzjoni.
8. Jibqa' pero' il-punt tal-proporzjonalita', izjed u izjed meta hawn si tratta ta' rruzura punittiva ghaliex dina giet imposta wara illi s-socjeta' appellanta ghamlet dak li kien mitlub minnha li taghmel, u cioe' wara s-sottomissjoni tad-dokumentazzjoni. Illi tali proporzjonalita' trid tigi ukoll ikkunsidrata a bazi ta' dak li jipprovi l-kumplement ta' l-Artikolu 16A, u cioe' r-regolamenti (4) u (5) ta' l-istess. In fatti, l-Awtorita' ppublikat l-azzjoni minnha mehuda permezz ta' Avviz ippublikat fl-10 ta' Dicembru 2021 <sup>2</sup>.
  9. Illi m' hemmx dubju illi l-Awtorita' ghandha d-diskrezzjoni li mhux biss tiehu azzjoni punittiva, izda li wkoll taghzel x' tip ta' azzjoni hija ghadha tiehu.
  10. Skond l-artikolu 16A(1) tal- Kap. 370:

*“(1) Minghajr pregudizzju ghal kull setgħa ohra mogħtijalill-awtorità kompetenti skont dan l-Att, meta detentur ta' licenzajew manager, segretarju, direttur jew xi persuna ohra responsabblijejn id-detentur ta' licenza jikser jew jonqos milli jikkonforma ruħu ma' xi kondizzjonijiet imposti f'xi licenza, u, jew meta l-awtoritàkompetenti tkun sodisfatta l-aġir ta' xi persuna jammonta għal ksurta' xi waħda mid-dispożizzjonijiet ta' dan l-Att, regolamenti, Regolita' Servizzi ta' Investiment jew Regoli tal-Kondotta tal-Operat mahruġa taħtu, inkluzi n-nuqqas li tikkopera f'xi investigazzjoni, l-awtorità kompetenti tista' b'avviz bil-miktub u minghajr il-ħtieġata' ebda smiġħ fil-qorti timponi fuq id-detentur tal-licenza, manager, segretarju, direttur, u, jew kull persuna ohra skont il-każ,penali amministrattiva li ma tkunx ta' izjed minn mija u ħamsin elfeuro (€150,000) għal kull ksur jew nuqqas ta' konformità, skont il-każ. Id-dispożizzjonijiet tal-artikolu 16(4) tal-Att dwar Awtorità għas-Servizzi Finanzjarji ta' Malta għandhom japplikaw mutatis mutandis”*

11. Illi l-Awtorita' jidher illi kellha cirkostanzi ohra fejn analizzat il-pozizzjoni tal-entita' u qieset illi m' ghandiex tiehu passi meta l-ispjegazzjoni kienet wahda gustifikata (“justifiable”).
12. Illi dan it-Tribunal ma jhossx illi ghandu jiddisturba hafna id-diskrezzjoni kif tigi ezercitata mill-Awtorita', filwaqt li pero' jara illi l-istess Awtorita' timxi b' mod gustifikat, proporzjonat u skond il-Ligi. Ir-regolamentazzjoni tal-qasam finazjarju huwa punt delikat u ghandu jkun ibbazat fuq pratici rigoru u oggettivi. Izda dan ma jfissirx

<sup>2</sup> <https://www.mfsa.mt/publication/regulatory-action-against-curmi-and-partners-limited-the-company/>



- li ghandu jintilef kull skop ta' proporzjonalita'. Dan izjed u izjed meta azzjoni amministrattiva tigi ppublicizzata.
13. Illi m' hemmx dubju illi c-cirkostazzjoni tal-perjodu ta' Marzu 2020 kienu eccezzjonali. Kulhadd esperjenza tibdiliet kbar anke' fl-affarijiet l-izjed semplici tal- hajja ta' kulljum. Ma kienx zmien facli sabiex wiehed ikun jista' jespleta xogholu u ghal dan il-ghan gew anke' ntrodotti Ligijiet u Regolamenti *ad hoc*. Numru ta' entitajiet bdew jesperimentaw sistemi godda ta' kif wiehed jahdem b' mod remot u dan peress illi bosta *employers* kienu qeghdin jilqghu l-istedina ta' l-awtoritajiet tas-sahha sabiex fejn hu possibbli biex haddiema jahdmu mid-dar.
  14. Illi dan huwa rikonoxxut fic-cirkolari tal-20 ta' Marzu 2020 u l-Awtorita' Appellata, bhal kullhadd, ukoll kienet qeghdha tesperjenza realta' gdida. Huwa car illi l-Awtorita' Appellata riedet tilhaq bilanc bejn l-aspett regolatorju tas-servizzi li jaqghu taht il-gurisdizzjoni taghha u l-problemi li l-entitajiet minnha regolati kienu qeghdin jiffaccjaw. L-Awtorita' ma ghalqietx ghajnejha ghal dan kollu u harget din ic-cirkolari, li kif jirrizulta, serviet ben tajjeb l-iskop taghha. Id-diffikultajiet li kienu qeghdin jiffaccjaw l-entitajiet regolati hija ukoll ikkonfermata mill-fatt illi sussegwentement, l-istess Awtorita' harget cirkolari aggornata minhabba li kien hemm min lanqas setgha jonora l-obbligi tieghu minkejja l-estenzjoni moghtija.
  15. Illi huwa ghaldaqstant car illi l-azzjoni amministrattiva kienet izjed imsejjsa fuq il-fatt illi s-socjeta' appellanta ma ghamlitx talba ghall-estenzjoni tat-terminu sabiex tissottometti d-dokumentazzjoni, milli ghaliex id-dokumentazzjoni giet effettivament sottomessa tard.
  16. Minn naha l-ohra huwa pjuttost ovvju illi meta entita', bhal ma hija s-socjeta' Appellanta, issottomettiet id-dokumentazzjoni taghha tlett (3) gimghat wara d-*deadline* normali, din tkun ghamlet hekk mhux ghax kienet traskurata jew ghax m' ghamlitx dak li kellha taghmel f' hinu (bhal per ezempju tghaddi l-accounts taghha lill-awdituri fl-ahhar mument). Huwa car illi tardivita ta' dan it-tip hija rizultat ta' xi xi haga li ma kienitx prevista. Certament li s-sitwazzjoni tal- Covid 19 u izjed u izjed dak li kien qieghed jigri f' Marzu/April tas-sena 2020 jghodd bhala xi haga li ma kientx prevvista.
  17. Illi tajjeb ukol illi wiehed josserva illi l-azzjoni da parti ta' l-Awtorita' ttiehdet kwazi sena u nofs wara l-akkadut u wara li ghattiet "financial year" ohra (ghas-sena 2020). Dan qieghed jinghad bhala stat ta' fatt.
  18. Illi l-Awtorita' ikkonfermat illi kellha cirkostanzi (jidher li kien hemm numru taghhom) fejn hija ma haditx azzjoni ghaliex l-entita' wriet illi d-dewmien ma kienx attribwibbli



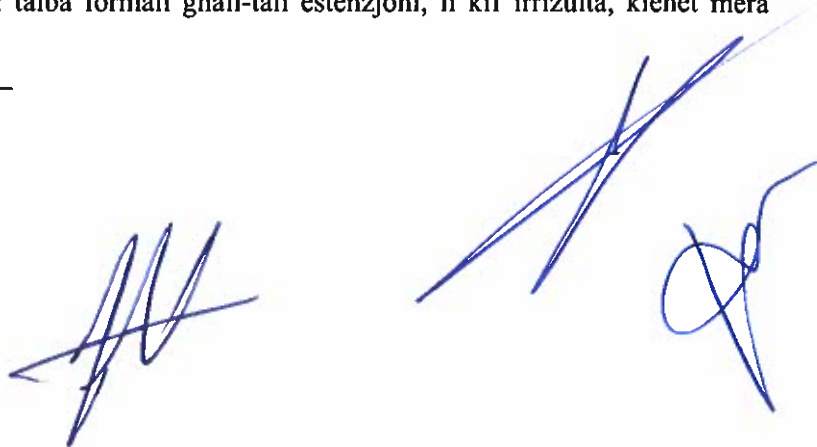
lejha. Izda minn qari tad-decizjoni appellata, l-Awtorita' taghmilha cara illi fl-ahhar mill-ahhar l-obbligu tas-sottomissjoni tad-dokumentazzjoni huwa tal-Bord tad-Diretturi tal-entita' regolata<sup>3</sup>. Wiehed ma jistax jara kif din il-konkluzjoni, li certament hija oggettivament korretta, hija pero' konformi mal-pozizzjoni mehuda mill-Awtorita' Appellata fejn ma haditx azzjoni kontra dawk l-entitajiet illi wrew illi d-dewmi en ma kienx tort taghhom. Ghaliex jekk l-Awtorita', f' kazijiet ohra, qieset cirkostanzi estranji bhala raguni valida u sufficjenti, kellha wkoll per lo meno, fid-decizjoni taghha fil-kaz odjern, tindika ghaliex ir-ragunijiet moghtija mis-socjeta' appellanta ma kienux ragunijiet sufficjenti sabiex ma tittihidtx azzjoni. Dan ukoll fl-ottika tal-fatt illi l-Awtorita' kellha perspettiva wiesa ta' dak li kien qieghed jigri fis-settur minhabba illi dan ma kienx xi kaz uniku. Kif qal ben tajjeb is-Sur Cuschieri<sup>4</sup>:

*"ezempju li kien komuni fl-exercise li ghamilna kien meta l-licence holder b'evidenza, ghax ovvjament il-licence holder ikollu cans igib ir-representations ghandna bhala Awtorita' to reassess our proposed regulatory action. Bazikament kien hemm numru ta' licence holders li b'evidenza jigifieri xxerjaw mal-Awtorita' chasers li baghtu lill-awdituri taghhom biex juru lill-Awtorita' li it wasnt mainly their fault li they have submitted late deregulatory information imma kien hemm other third parties li basically ma kinitx possibli ghalihom...nifhmu jigifieri li l-awdituri fiz-zmien li ahna qedghin nitkelmu fuqu kienu kollha ghaddejjin minn pressures habba l-pandemija u kien hemm numru ta' awdituri li ma setghux jonoraw certu deadlines, u l-Awtorita' hasset fejn kien hemm kazijiet li pero ghaddiet l-evidenza lill-Awtorita', jigifieri ghaddew emails fejn they chased the auditors on a weekly basis per ezempju. Jigifieri anka, f'dan l-aspett l-iktar li kien hemm instances u mhux dejjem jigifieri l-Awtorita' did not proceed with imposing the proposed regulatory action".*

19. Illi huwa car illi dik il-koncessjoni illi l-Awtorita' riedet taghti lis-settur permezz tac-cirkolari ta' Marzu 2020 m' ghandiex tintilef minhabba n-nuqqas da parti tas-socjeta' appellanta li taghmei talba formali ghall-tali estenzjoni, li kif irrizulta, kienet mera

<sup>3</sup> Ara paragrafu 3.0 tad-decizjoni.

<sup>4</sup> Deposizzjoni 18 ta' Mejju 2022





formalita' ghaliex l-estenzjoni inghatat lil kull min ressaq it-talba. U f' din l-ottika l-azzjoni mehuda mill-Awtorita' fejn qieset illi s-socjeta' appellanta kienet sempliciment hatja billi hija *"failed to adhere to its obligations in terms of Rule 4-5.3.1 of Part B1 Rules for Investment Services Providers (applicable until 5 August 2021), to submit the Audited COREP Return, the Audited Financial Statements, the Auditors' Management Letter and the Auditors' Report for the year ended 31 December 2019, within the regulatory deadline."* m' hijiex decizjoni gusta, u dan ghaliex l-Awtorita' kellha, minkejja l-fatt li talba formali ma kienetx saret, tevalwa r-ragunijiet imressqa quddiemha mis-socjeta' appellanta, u tenut kont tal-fatturi kollha, bl-izjed importanti ikun il-fatt illi d-dokumentazzjoni giet sottomessa tlett (3) gimghat wara d-deadline originali u ferm qabel l-estenzjoni li s-socjeta' appellanta kienet intitolata ghaliha a bazi tac-cirkolari, tilqa' l-ispjegazzjoni ta' l-istess socjeta' appellanta u tehlisa minn kull azzjoni amministrattiva.

Ili in vista tal-premess, it-Tribunal qieghed jilqa l-appell interpost mis-socjeta' appellanta u thassar id-decizjoni ta' l-Awtorita' Appellata tas-sitta (6) ta' Dicembru 2021 kif ukoll tordna illi din id-decizjoni tigi riflessa fl-avviz ippublikat mill-Awtorita' fuq din l-azzjoni.

Tenut kont tac-cirkostanzi tal-kaz kull parti ghandha tbghati l-ispejjez taghha.



