

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 02/15

Novium AG

vs.

MFSA

Today, the 19<sup>th</sup> day of May 2021

The Tribunal

Having seen the appeal application <sup>1</sup> lodged by Novium AG (the Appellant) on the 6<sup>th</sup> February 2015, wherein the Appellant contested the “Decision” of the Authority of the 8<sup>th</sup> January 2015, attached to the same appeal as Doc. App1;

Having seen the reply of the Authority <sup>2</sup> wherein the Authority, by way of a preliminary plea rebutted the appeal of the Appellant and claimed that the appeal ought to be dismissed since the letter of the 8<sup>th</sup> January 2015 was not a decision of the Authority and that consequently there lies not right of appeal under the provisions of Article 21 of Malta Financial Services Act or under Article 19 (2) of the Investment Services Act;

Having seen all other acts and documents of the proceedings;

Having heard the oral submissions of the Appellants and the Authority on this preliminary plea;

Having noted that both Parties 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 preliminary plea;

Considers:

1. The Authority, by means of a letter dated 8<sup>th</sup> January 2015, referred to its previous communication of the 29<sup>th</sup> September 2014 and the Appellant’s reply of the 7<sup>th</sup> October 2014.
- 2.
3. This related to Novium Opportunity Umbrella Sicav plc (the Scheme) and the Bull Bear Opportunities Fund (the Sub-Fund).
- 4.
5. The introductory paragraph of the said letter states:

*We (the Authority) would like to bring to your attention the following matters regarding the situation in the Sub-Fund*

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<sup>1</sup> Document 1

<sup>2</sup> Document 5



6. Four issues were listed (i – iv) and the final paragraph numbered “v” and headed as “Action Required” stated the following:

**(v) Action Required**

*In view of the above, the Authority expects the Investment Manager, Novium AG to compensate the Sub-Fund for the losses suffered by it as a result of the mis-trades carried out between 19 and 20 June 2013, irrespective of whether it will pursue a claim against Mr Comelis Niessen as already stated in the Authority's letter dated 29 September 2014.*

*This course of action is being requested by the Authority on the basis that:*

- a) The Investment Manager breached SLC 1.38 of Part Bli of the Investment Services Rules for Professional Investor Funds as a result of the failure to comply with the investment policies and restrictions provided in the Scheme's Offering Supplement;*
- b) The Investment Manager failed to request the prior approval of the Scheme before appointing an Investment Advisor; and*
- c) The liability of the Investment Manager in relation to the duties delegated to third parties.*

*Failure of Novium AG to adopt this remedial measure within 21 days from the date of this letter will leave the Authority with no choice but to review its 'fitness and properness' status.*

*We look forward to hearing from you at your earliest and by not later than 21 working days from the date of this letter.*

7. The Appellant argues that irrespective of what this communication is labelled as, it perceived this as a decision which obliged the Appellant to execute a number of matters. Hence, the Appellant argues, the letter of the 8<sup>th</sup> January 2015 tantamount to a decision of the Authority from which an appeal before this Tribunal is permissible at Law.
8. The Authority argues that this was not a decision in terms of the Law but a letter in which it “states that in the particular circumstances of this case it *expects*<sup>3</sup> the

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<sup>3</sup> Emphasis Added

The image shows three handwritten signatures in blue ink. The first signature is on the left, the second is in the middle and is larger and more stylized, and the third is on the right and is smaller.



*Investment Manager (the Appellant) to proceed in a certain manner”, and hence no appeal may be lodged.*

9. Ian Meli, a Senior Manager within the Securities and Markets Supervision of the Authority testified by means of an affidavit and was later re-examined and cross examined. He exhibited the “Decision” taken against the Appellant by the Authority of the 12<sup>th</sup> December 2018 <sup>4</sup>. In his testimony of the 19<sup>th</sup> November 2019, Mr. Meli stated the following:

**Dr Kris Borg:** *U b'referenza għall-punti a to c ta' dik l-ittra, kien hemm xi azzjoni regolatorja bħala riżultat ta' dawk in-nuqqasijiet li hemm indikati f'punti a to c fl-ittra?*

**Sur Ian Meli:** *Le, għalkemm ma ttieħdet ebda azzjoni minħabba li ma ġewx esegwiti r-rakkomandazzjonijiet ta' remedial measures, il-punti a to c li hemm imsemmijin ġew factored in f'regulatory action li ttieħdet mill-Awtorita f'Diċembru tal-2018.*

10. Upon being cross-examined, Mr. Meli stated:

**Sur Ian Meli:** *Li qed ngħid, li meta toħroġ direttiva, kumpanija hija obbligata li timxi ma' dik id-direttiva.*

**Dr Chiara Frendo:** *Jigifieri illum hekk qed tgħid li hija obbligata li timxi mad-direttiva?*

**Sur Ian Meli:** *Ovvjament jekk hija direttiva.*

**Dr Chiara Frendo:** *Le.*

**Sur Ian Meli:** *F'dan il-kas kif semmejt u aċċernajt id-darba l-oħra, ma kienx hemm direttiva.*

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<sup>4</sup> An appeal from this decision has been filed by the Appellant (FST 1/19)



**Dr Chiara Frendo:** *Dak int qed tghidu. Ovvjament din qed tigi kontestata – għalhekk qegħdin hawn. Issa semmejt ukoll li punti a sa c, li huma l-bażi skont l-ittra, il-bażi li fuqha mbagħad hriġtu dik l-ittra, huma mbagħad dawk li kienu wkoll ikkonsidrati mill-awtorita għad-direttiva sussegwenti mill-awtorita? Qed nifhem sew?*

**Sur Ian Meli:** *Ma kinux huma biss. Kienu xi ftit mill-kunsiderazzjonijiet li ttieħdu biex giet maħruġa d-direttiva li qed nsemmu f'Diċembru tal-2018.*

**Dr Chiara Frendo:** *U intom – l-Awtorita – tqisu d-direttiva hija a stand alone directive independent of any other communication by the authority to Novium AG?*

**Sur Ian Meli:** *Communication in what sense?*

**Dr Chiara Frendo:** *Qed nipprova I don't lead you. I'm being very careful. Id-direttiva sussegwenti tat-2018 kienet għall-Awtorita tqis bħala mizura indipendenti minn dik ta' l-ittra kontenuta tat-2015?*

**Sur Ian Meli:** *Le. L-ittra li kienet ħarġet fit-2015 kienet parti minn exchange ta' korrispondenza.*

**Dr Chiara Frendo:** *Bħala azzjoni qed ngħidlek. Mhux bħala x'hemm miktub. Bħala azzjoni. Fl-aħħar l-Awtorita tghid: it is requested or it is obliging the service provider to ... bħala azzjoni. Qed ngħid sew li hija indipendenti? Jew hija laċjata ma' dik ta' 2015?*

**Sur Ian Meli:** *Tajjeb li niddistingwu bejn il-punti li hemm fl-ittra a to c u d-direttiva jew l-azzjoni. Jigifieri dawn il-punti ma kinux l-absolute points. Jigifieri kien hemm affarijiet oħrajn li ttieħdu into consideration. Dan kien hemm proċess li ovvjament l-Awtorita għaddiet minnu u ħadet iż-żmien. Kien hemm developments oħrajn li ttieħdu into consideration biex ultimately ħarġet direttiva fl-2018. At this time ma kien hemm l-ebda direttiva, kienet azzjoni li rrakomandat l-Awtorita.*

11. The Tribunal read the Decision of the 12<sup>th</sup> December 2018 in the light of the deposition of Mr. Meli.





12. Whereas the parties had agreed, together with the Tribunal, that the preliminary plea was to be decided separately, the Tribunal invited the parties <sup>5</sup> to state their position on this appeal and this contestation in the light of the Decision of the 12<sup>th</sup> December 2018 and the appeal filed therefrom, which appeal is still pending.
13. The Tribunal feels, and especially after reading the deposition of Mr. Ian Meli, the communication which lead to this Appeal, and the Decision of the 12<sup>th</sup> December 2018, that the Decision of the 12<sup>th</sup> December 2018 and the communication subject of this Appeal are related and connected.
14. The Tribunal feels that deciding on whether the communication of the 8<sup>th</sup> January 2015 is in fact a decision which can be contested through an appeal, would necessarily involve it analysing the said communication also in the light of the Decision of the 12<sup>th</sup> December 2018, and appeal from which is still pending.
15. Hence, the Tribunal is of the opinion that any pronouncement on the preliminary plea of the Authority at this stage, may be prejudicial to the final determination of this Appeal and the appeal from the decision of the 12<sup>th</sup> December 2018.
16. In actual fact, the Tribunal feels that both this Appeal and the appeal from the decision of the 12<sup>th</sup> December 2018 ought to be heard concurrently and both appeals decided concurrently, inclusive of any preliminary pleas.

On the basis of the above, the Tribunal abstains, for the time being, from deciding the preliminary plea raised by the Authority and orders that both this Appeal and the Appeal from the decision of the 12<sup>th</sup> December 2018 (appeal FST 1/19) are heard concurrently, and this without prejudice to the final determination of all the grounds of appeal, pleas and counter pleas raised in both appeals.

Costs of this decision are reserved to the final decision.

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<sup>5</sup> During the sitting of the 5<sup>th</sup> May 2021

