

THE FINANCIAL SERVICES TRIBUNAL

Pierre Lofaro LL.D. – Chairman  
Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) – Member  
Ivan Sammut Dip. Bus. Law & Acc. Adv. Trib. Eccl (Melit.), M.A. (Fin. Serv.),  
LL.D. – Member

FST 04/19

Momentum Pensions Malta  
Limited (C 52627)

vs.

L-Awtorità Maltija għas-Servizzi  
Finanzjarji

Today, the 13<sup>th</sup> day of July 2020

The Tribunal is hereby deciding the two preliminary pleas raised by The Malta Financial Services Authority (“the Authority”) after

Having seen

The Authority’s decision dated the 7<sup>th</sup> of May 2019 and notified to Momentum Pensions Malta Limited (“Momentum”). This decision, which is the subject of this appeal, reads as follows:

“Dear Sirs,

**Re: Momentum Pensions Malta Limited (“the RSA” or “the Company”) and Momentum Malta Retirement Trust (“the Scheme” or “MMRT”)**

*Reference is made to various complaints received at the Authority from members of the Momentum Malta Retirement Trust who appointed Continental Wealth Management as their financial adviser on their respective member accounts. Reference is also made to the various correspondence and meetings with company officials, wherein the Authority explained that it would be looking into the*

*allegations being made, to determine whether there had been any breaches by the Company as the retirement scheme administrator of MMRT of applicable Maltese legislation and/or Rules issued thereunder.*

*In view of the Authority's concerns in relation to the Company and its compliance or otherwise with the requirements emanating from applicable legislation and/or Rules issued thereunder, the MFSA has appointed an Inspector in terms of article 40 of the Retirement Pensions Act. This appointment shall be for a period of four months, or such other period as deemed appropriate by the Authority.*


*The Inspector shall investigate and report to the Authority:*

- a. Whether the Company's role as a Retirement Scheme Administrator was compliant with:*
  - i. The requirements emanating from the Special Funds Act, 2002 and any subsidiary legislation issued thereunder during the period commencing 28<sup>th</sup> April 2011 and ending 31<sup>st</sup> December 2015; and*
  - ii. The requirements emanating from the Retirement Pensions Act and any subsidiary legislation issued thereunder during the period commencing 1<sup>st</sup> January 2016 and ending 31<sup>st</sup> December 2018 in carrying out its activity as Retirement Scheme Administrator for Momentum Malta Retirement Trust; and*
- b. Whether any members suffered (or may suffer) financial losses as a consequence of any lack of compliance referred to in (a) above, and the extent of such losses (if any).*

*The Inspector appointed for this purpose by the MFSA is PricewaterhouseCoopers ("PwC Malta" or "Inspector"), a firm having its registered address at 78, Mill Street, Qormi, QRM 3101, Malta.*

*In terms of article 40(3) of the Retirement Pensions Act, all expenses of, and incidental to, such an investigation shall be paid by the Company.*

*All fees and other disbursements payable to PwC Malta in the exercise of its duties as an Inspector shall therefore be paid to PwC by the Company before the payment of any liabilities. This includes the fees due to PwC for the purposes of this appointment and any*



*other expenses in relation thereto. The fees, exclusive of VAT, due to the Inspector for the purposes of this appointment are estimated to amount to Eur 124,000.*

*PwC Malta shall bill the Company 50% of the estimated fee upfront prior to commencement of its duties as Inspector. This upfront bill will amount to Eur 62,000 (excluding VAT). The balance of fees and any other disbursements (if any) will be billed to the Company on completion of the work. All fees are to be debited to the Company with a copy thereof being submitted simultaneously to the Authority. The Company shall settle the Inspector's invoices within two months of their issuance.*

*For the purpose of carrying to this appointment, the Inspector shall have all powers conferred on it by law including, inter alia, as stated in Article 40 and 42 of the Retirement Pensions Act. To this effect, the Company is directed to fully co-operate and collaborate with the Inspector in the most ample manner in order to allow the latter to exercise and perform the terms of its appointment.*

*Without prejudice to the generality of the foregoing, the Inspector (i) shall have and may exercise all the powers conferred on the Authority by Article 39 of the Retirement Pensions Act (power to obtain information), and any requirement made by the Inspector shall be deemed to be and have the same force and effect as a requirement by the Authority; and (ii) may enter premises occupied by the Company for the purpose of the investigation and of exercising any of the powers conferred by law."*

Having seen

Momentum's appeal to this Tribunal, filed on the 19<sup>th</sup> of June 2019, whereby for the reasons therein mentioned, Momentum requested that this Tribunal

- (i) cancels and revokes part (b) of the Authority's decision (that is the following part: "*b. Whether any members suffered (or may suffer) financial losses as a consequence of any lack of compliance referred to in (a) above, and the extent of such losses (if any)*");
- (ii) cancels and revokes that part of the Authority's decision whereby Momentum was ordered to pay all the expenses incurred by the Inspector appointed by the Authority; and
- (iii) accedes provisionally to its requests with immediate effect.



Having seen

The Authority's reply whereby it defended itself by raising two preliminary pleas as well as pleas on the merits.

The Authority's first preliminary plea is that the Authority's decision to exercise its power to appoint an inspector emanating from Article 40 of the Retirement Pensions Act ("the Act") whenever it deems it necessary or expedient to do so cannot be appealed from to this Tribunal and, therefore, this appeal should not continue to be heard.

The Authority's second preliminary plea is that Momentum's request that this Tribunal provisionally accedes to its request with immediate effect should not even be considered, let alone be upheld, since Article 44(2) of the Act states that an appeal to this Tribunal shall not suspend the operation of any decision or directive in those circumstances where an appeal from them may be lodged. The only exception to this general rule envisaged by the law is when the Authority decides to cancel a licence or a recognition. This is not the case in the matter pending before this Tribunal.

Having seen

All the others acts and documents of the proceedings, including

- (a) The minutes of the sitting held on the 16<sup>th</sup> of October 2019 whereby the Tribunal ordered that the proceedings be conducted in the English language and that the Authority's two preliminary pleas be decided before proceeding further; and
- (b) The Parties' submissions in writing regarding the Authority's two preliminary pleas.

Having seen

That the case was deferred for today for the Tribunal's decision on the Authority's two preliminary pleas.

Considers

By means of its first preliminary plea, the Authority is questioning this Tribunal's competence to take cognizance of Momentum's appeal.

The Authority is maintaining that article 44(1) of the Act does not grant the right to appeal to this Tribunal when the Authority exercises the power granted to it by article 40 of the Act to appoint an inspector.

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Article 40(1) of the Act gives the Authority the power “*whenever it deems it necessary or expedient*” to “*appoint an inspector or inspectors to investigate and report on the affairs of any retirement scheme, retirement fund, service provider, overseas retirement scheme or person, referred to in article 39(1)(a) to (c)*”.

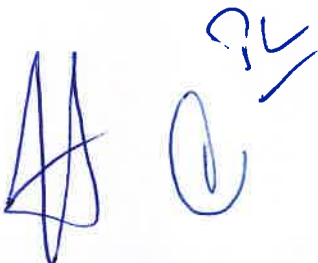
Article 40(3) of the Act gives the Authority the “*power to order that all expenses of, and incidental to, an investigation pursuant to this article be paid by the retirement scheme, retirement fund, service provider, overseas retirement scheme or person concerned.*”

Article 44 of the Act, invoked by the Authority to sustain its first preliminary pleas, states:

**“44. (1) Subject to the provisions of this article, an appeal shall lie to the Financial Services Tribunal established under article 21 of the Malta Financial Services Authority Act with respect to:**

- (a) any notice in accordance with articles 4(4), 5(3) and 6(3);*
  - (b) any failure to inform an applicant within the terms of article 9(8);*
  - (c) any refusal, variation, cancellation or suspension of a licence or recognition under articles 9, 10 and 11;*
  - (d) any decision under article 32(5);*
  - (e) any directive given under article 41; or*
  - (f) any administrative penalty or other measures imposed under article 46.*
- (2) An appeal made under this article shall not suspend the operation of any decision or directive from which the appeal is made:*

*Provided that a decision to cancel a licence or recognition shall not become operative until the expiration of the period within which an appeal lies under this article and, if an appeal is made within such period, the decision shall become operative on the date of the decision of the Tribunal dismissing the appeal or the date on which the appeal is abandoned.*

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(3) *The provision of article 21 of the Malta Financial Services Authority Act shall apply mutatis mutandis to appeals made to the Tribunal under this Act.*

The Authority submits that article 44(1) of the Act clearly and unequivocally lists, in an exhaustive manner, the instances when an appeal can be made to this Tribunal under the Act. The Authority argues that since there is no reference in article 44(1) to article 40 then this Tribunal is not competent to scrutinise decisions taken by the Authority under article 40.

Momentum, on its part, maintains that article 44(1) is not exhaustive. It refers to article 21(9) of the Malta Financial Services Authority Act ("Chapter 330") which provides that

*"The question for the determination of the Tribunal shall be whether, for the reasons addressed by the appellant -*

*(a) The competent authority has, in its decision wrongly applied any of the provisions of this Act; or*

*(b) The decision of the competent authority constitutes an abuse of discretion or is manifestly unfair.*

*Provided that the discretion of the competent authority may not, so long as it has been exercised properly, be queried by the Tribunal"*

Momentum argues that its requests to this Tribunal "*are well within the remit of the Tribunal's general powers*" as stated in article 21(9) of Chapter 330 and that this Tribunal can review all the decisions taken by the Authority in order to determine whether the Authority wrongly applied any provision of the law or determine whether the Authority, in taking such decisions, abused of its discretion or whether such decisions are manifestly unfair.

According to Momentum, article 21 of Chapter 330 establishes this Tribunal and determines its roles, functions and general competence to hear appeals against decisions made by the Authority. Each other law in the financial services sector, such as the Act, where the Authority is the competent person then establishes separate grounds of appeal arising from each of those special laws. These are additional grounds upon which an appeal may be made by virtue of those provisions under special legislation, but certainly cannot oust the residual or general competence of this Tribunal under the very law which establishes it.

This Tribunal does not agree with Momentum's arguments.



**Article 21(9) of Chapter 330 does not grant to this Tribunal the power to review all decisions taken by the Authority. On the contrary, it limits the Tribunal's powers of review in those cases where appeals may be lodged to it from a decision taken by the competent authority.**

**The Tribunal's understanding is that article 21(9) of Chapter 330 applies to decisions taken by the Authority under that particular law, that is Chapter 330.** In those cases the Tribunal's competence is limited to deciding whether:

- (a) The competent authority has, in its decision, wrongly applied any of the provisions of **that** Act, that is Chapter 330; or whether
- (b) The decision of the competent authority taken under **that** Act, that is Chapter 330, constitutes an abuse of discretion or is manifestly unfair.

Furthermore in matters where the Authority exercises its discretion the Tribunal's power is further limited in that the Tribunal cannot query the Authority's discretion when this has been exercised properly. In other words the Tribunal cannot substitute the Authority's discretion with its own discretion in those cases where the Authority exercised its discretion properly.

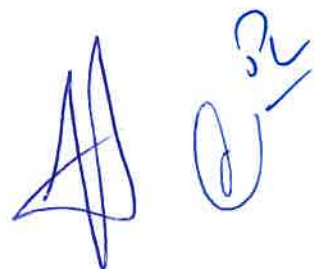
**With regard to the other laws in the financial services sector, the Tribunal's understanding is that its powers are strictly limited by that provision of each particular law which provides for the instances when an appeal may be lodged to this Tribunal under that law.**

In this case, article 44(1) and article 44(3) of the Act.

These articles dovetail with what is stated in article 21(1) of Chapter 330, that is, that *'There shall be a tribunal to be called "The Financial Services Tribunal", in this Act also referred to as "the Tribunal", which shall execute and perform the functions and powers assigned to it by law.'*

Contrary to the Tribunal's power to query whether the competent authority wrongly applied any provision of Chapter 330 granted by article 21(9) of that Chapter, article 44(1) of the Act does not empower the Tribunal to query whether the competent authority wrongly applied any provision of the Act.

The only matters which can be queried by the Tribunal from decisions taken by the competent authority in the exercise of its powers emanating from the Act



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are those listed in article 44(1) of the Act. The appointment of an inspector by the Authority granted to it by article 40 of the Act is not one of them and, therefore, cannot be queried by this Tribunal.

The logical interpretation of article 44(1) and 44(3) of the Act is that this Tribunal can only review decisions taken by the Authority in those instances specifically mentioned in article 44(1) and in doing so the Tribunal is limited, by what is stated in article 44(3) of the Act, to consider only whether in those instances the Authority's decision constitutes an abuse of discretion or is manifestly unfair. Furthermore, in matters concerning discretion, the Tribunal cannot intervene if the Authority exercised its discretion properly.

Thus Momentum cannot appeal from the Authority's decision of the 7<sup>th</sup> of May 2019 to this Tribunal and that, therefore, Momentum's appeal has to stop here. Any further consideration of Momentum's appeal and the Authority's reply, including the Authority's second preliminary plea, would go beyond the competence of this Tribunal.

For the above reasons the Tribunal hereby upholds the Authority's first preliminary plea and hereby decides that no appeal can be lodged to this Tribunal from a decision taken by the Authority under article 40 of the Act. The costs are to be borne by the appellant company.

Three handwritten signatures in blue ink, arranged vertically. The top signature is a stylized 'P' with a horizontal line. The middle signature is a cursive 'A'. The bottom signature is a cursive 'T' with a horizontal line.