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

MALTA

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 07/20

OTP Financing Malta Co. Ltd

vs.

MFSA

Today 15th December 2021,

The Tribunal

Having seen the appeal application [1] lodged by OTP Financing Malta Company Limited (the Appellant), wherein the Appellant stated:

[1] Document 1

We are instructed by our client, OTP Financing Malta Company Limited, a financial institution duly licensed by the MFSA under the Financial Institutions Act [Chapter 376 of the Laws of Malta] (hereinafter referred to as the "FI Act") of Level 2, Regional Business Centre, University Heights, Msida MSD 1751, Malta (hereinafter referred to as "OTP") to lodge this appeal against the MFSA in terms of the provisions of Article 21 of the FI Act and of the applicable provisions of the Malta Financial Services Authority Act [Chapter 330 of the Laws of Malta] (hereinafter referred to as the "MFSA Act") in relation to a measure taken by the MFSA's Executive Committee regarding the payment of annual supervision fees applicable to financial institutions and communicated to OTP on the 22nd October 2020 (a copy whereof is herewith attached and marked as "Exhibit A").

The relevant facts and documentary evidence

OTP obtained its license under the FI Act on the 31st October 2014. On the 18th May 2015, OTP contacted the then Deputy Director of the Banking Supervision Unit of the MFSA, namely Mr Aldo Giordano, requesting clarification regarding the manner in which OTP is to calculate the annual supervision fee due by OTP in terms of the provisions of regulation 4 of the Financial Institutions (Fees) Regulations (S.L 376.03) (hereinafter referred to as the "FI Fees Regulations") for the years 2015 and 2016. Such clarification was requested in light of the fact that the provisions of the FI Fees Regulations resulted in OTP being subject to a disproportionate and excessive annual supervision fee by reason of its large asset base, despite the fact that it only undertakes restricted lending activities and has an extremely low risk business model, as shall be further explained below.

Further to the aforesaid request, on the 8th June 2015, Ms Josianne Formosa, the then Senior Manager of the Banking Supervision Unit within the MFSA replied that: a) OTP's annual supervisory fee shall be capped at a maximum amount of €85,000 *per annum* (hereinafter referred to as the "Capped Amount"); and b) that such a cap to the annual supervisory fee shall be included as an amendment to the legal notice in due course, such email being annexed hereto and marked as "Exhibit B". The Capped Amount was applied by the MFSA in each of the following years, in other words in 2016, 2017, 2018 and 2019 as can be seen in the invoices annexed hereto and marked as "Exhibit C", "Exhibit D", "Exhibit E" and "Exhibit F" respectively.

On the 1st January 2020, OTP received an invoice from the MFSA for the payment of its annual supervision fee for the year 2020 in the amount of three hundred sixty-one thousand four hundred twelve euros and seventy-seven cents (€361,412.77), such amount clearly being in excess of the Capped Amount. Furthermore, the MFSA also advised OTP that it would be issuing a top-up invoice at some point during the year 2020 to be based on OTP's balance sheet as at the year ending 2019. Indeed, the annual supervision fee now claimed by the MFSA from OTP has increased to four hundred sixty four thousand five hundred thirty five euros and seventy seven cents (€464,535.77) (hereinafter referred to the "Requested Fee") as indicated in the communication dated the 22nd October 2020 (as herewith attached and marked "Exhibit A") which OTP is appealing against.

OTP duly objected to the payment of the Requested Fee, originally by a letter dated 13th January 2020 addressed to Mr Joseph Cuschieri, the MFSA Chief Executive Officer, on the grounds that, *inter alia*, the Requested Fee is manifestly unfair and disproportionate. A meeting between officers of OTP and the Chief Executive Officer and several senior officers of the MFSA was also held following the submission of the aforementioned letter in order to explain the matter in further detail.

OTP submitted that it has a vested interest and a legitimate expectation, based on the MFSA's email of the 8th June 2015 and on the latter's practice since then, that the annual supervisory fee applicable to it does not exceed the Capped Amount. The MFSA's undertaking that the annual supervisory fee applicable to OTP would not exceed the Capped Amount and its further undertaking to amend the FI Fees Regulations accordingly constitute a legally binding commitment made by it in favour of OTP.

The MFSA however ignored OTP's objections to the imposition of the Requested Fee, and insisted (and, as is evident from the communication dated the 22nd October 2020, continues to insist) on the immediate settlement thereof by OTP.

It is submitted that the MFSA's above referred to communication dated the 22nd October 2020 constitutes a measure imposed by the MFSA against OTP for the purposes of Article 21 of the FI Act (hereinafter referred to as the "Measure").

Basis of the appeal

In the light of the foregoing, OTP hereby appeals to the Tribunal to declare the Measure as null and void by virtue of the fact that such Measure is manifestly unfair in terms of Article 21(9)(*b*) of the MFSA Act, on the following grounds:

(A) That the fee as set out in regulation 4 of the FI Fees Regulations is excessive and disproportionate as was previously confirmed by the MFSA and that OTP has a vested interest and a legitimate expectation in the relevant provision of the FI Fees Regulations being amended accordingly, as will be explained below:

(i) regulation 4 of the FI Fees Regulations sets out that a financial institution licensed under the FI Act shall pay to the MFSA an annual supervision fee equivalent to 0.0002 of the total assets as reported in the statutory schedules under Banking Directives BD/06 or Banking Rule BR/06 of the year immediately before the year when the fee is payable.

(ii) The FI Fees Regulations, in calculating the annual supervision fee as set out in paragraph (i) of Part A hereof, therefore apply the same criteria to all financial institutions regardless of other relevant factors such as the type of license held, or the operations conducted by the different licensed financial institutions in respect of which the aforementioned provisions of the FI Fees Regulations apply. This has consequently resulted in disproportionate and excessive fees being levied against certain financial institutions with significant asset bases, as has been the case in respect of the Requested Fees being imposed on OTP as explained in further detail in the subsequent paragraphs below.

(iii) OTP's license (a copy of whereof is herewith attached and marked "Exhibit G") as issued by the MFSA solely authorizes OTP to carry out the activity of lending (including personal credits, mortgage credits, factoring with or without recourse, financing of commercial transactions including forfeiting) to borrowers which form part of the OTP Group. OTP's activities therefore are restricted to lending to companies forming part of the same group which are controlled by its parent, namely OTP Bank Plc. OTP does not accept deposits from the public. Furthermore,

OTP, in terms of its license granted by the MFSA, is required to hive off its books and transfer any non-performing loans to another entity forming part of the OTP Group.

(iv) In light of the foregoing it is amply clear that OTP, in accordance with, and within the express terms of the scope of its license, conducts highly restricted lending activities and the risks inherent to OTP's operations are extremely low, especially when compared with other less restricted financial institutions. Accordingly, from the MFSA's perspective the supervisory burden of OTP's activities is significantly less onerous when compared to that of other less restricted financial institutions.

(v) However, despite the foregoing and as has been previously stated, by virtue of the fact that the nature of OTP's business model results in OTP having a significant asset base, the manner in which the annual supervisory fee is to be calculated as set out in the provisions of Article 4 of the FI Fees Regulations has resulted in OTP being asked to pay the Requested Fee which is excessive and disproportionate in comparison to those fees being levied against other financial institutions which conduct different, yet less restricted and riskier operations. By virtue of the foregoing, it is clear that the relevant provision of the FI Fees Regulations and the criteria for calculating the annual supervisory fee due by financial institutions are manifestly arbitrary and of a discriminatory nature.

(vi) OTP also has a vested right and legitimate interest in asking that the Requested Fee be declared excessive and disproportionate by reason of the fact that until 1st January 2020, the MFSA had capped the annual supervisory fee due by OTP to the Capped Amount. This, as previously stated, was agreed to by the MFSA in 2015 as can be seen in the documents herewith attached and marked as "Exhibit B", "Exhibit C", "Exhibit D", "Exhibit E" and "Exhibit F".

(vii) Moreover, the MFSA, as can be seen in the aforesaid "Exhibit B", recognized the excessive and disproportionate nature of the provisions of regulation 4 of the FI Fees Regulations and stated that "the capping of this fee will be included as an amendment to the legal notice in due course". However, no such amendment has been made and as a result of such inaction, the Requested Fee is arbitrarily, unfairly

and wrongly being imposed against OTP. It is therefore also OTP's vested right that the relevant provisions of the FI Fees Regulations are amended accordingly as promised by the MFSA in May 2015.

(B) Without prejudice to the foregoing, the FI Fees Regulations, in terms of which the payment of the Requested Fee is being demanded by the MFSA, are *ultra vires* the express powers delegated by the provisions of the FI Act as the power to establish the annual (supervisory) fees applicable to licensed financial institutions is expressly vested in the MFSA and not in the Minister responsible for the regulation of financial services (hereinafter referred to as the "Minister"), as will be explained below:

(i) The FI Fees Regulations constitute subsidiary legislation passed or promulgated[2] as regulations by virtue of powers conferred (or delegated) to the Minister by the provisions of Article 12 of the FI Act. Article 12(1) of the FI Act empowers the Minister, acting on the advice of the MFSA, to make regulations to give effect to the provisions of the FI Act. It should be highlighted that none of the following sub-paragraphs in the said article, when referring to matters in respect of which the Minister has the authority to make regulations, specifically refers to the determination or establishment of annual (supervisory) fees. This is therefore in the nature of a general empowering provision of law.

In this regard, an analysis of other relevant provisions of the FI Act is called for.

(ii) OTP is a licensed financial institution in terms of the FI Act and is therefore regulated by and subject to the provisions thereof. Article 3(4) of the FI Act expressly states that 'the granting of a licence or registration, as applicable, shall be subject to an annual fee as *the competent authority may determine from time to time.*'[3]

For the purposes of the provisions of the FI Act, the 'competent authority' is the MFSA as established by the MFSA Act. It should be noted that the provisions of

[2] In accordance with the provisions of the Interpretation Act, including *inter alia* articles 6(d) and 11 thereof.
[3] Emphasis supplied.

the MFSA Act provide that the MFSA is an authority established by law which is to act independently and must not seek or take instructions from any other body or person.[4]

(iii) Article 3(4) of the FI Act specifically provides that the authority to determine the annual (supervisory) fees applicable to financial institutions licensed under the provisions of the FI Act is vested exclusively in the MFSA. The scope and subject matter of such provision are therefore specific in nature.

It should also be reiterated that the relevant provision empowering the Minister to make regulations (through subsidiary legislation) to give effect to the provisions of the FI Act, namely Article 12(1) thereof, is by its nature a general empowering provision of law.

(iv) In light of the foregoing and by application of the principle of interpretation *lex specialis derogat generalis,* the provisions of Article 3(4) of the FI Act should prevail over those of Article 12(1) of the FI Act; and accordingly the delegated legislative powers granted to the Minister (as referred to in Article 12(1) of the FI Act) may not extend to matters which are by law exclusively vested in the MFSA (as the 'competent authority' under the provisions of the FI Act).

(v) It is further noted that Article 13(2) of the FI Act empowers the MFSA to issue, amend or revoke any Financial Institutions Rule, including the Financial Institutions Rule FIR/01 setting out the Application Procedures and Requirements for Authorisation under the Financial Institutions Act 1994 issued by the Malta Financial Services Authority in 2019 (hereinafter referred to as the "FIR/01"), as may be required for carrying into effect any provisions of the FI Act and any regulations and, or Financial Institutions Rules issued thereunder. The MFSA's authority to issue Financial Institutions Rules therefore emanates from Article 13(2) of the FI Act.

[4] Article 3(3) of the MFSA Act

Paragraph 8 of FIR/01 states (on the lines of the provisions of Article 3(4) of the FI Act) that a licence or registration to carry out the business of a financial institution is subject to an annual fee as the MFSA may determine from time to time in accordance with Appendix I thereof. Appendix I of FIR/01 (which refers to Article 3(4) of the FI Act and to the FI Fees Regulations) reproduces in substance the provisions of the FI Fees Regulations.

(vi) As stated in paragraph (i) of Part B hereof, the FI Fees Regulations constitute subsidiary or delegated legislation. At law, subsidiary legislation or delegated legislation is subordinate to primary legislation (such as the FI Act) in that 'it is made by bodies endowed with limited powers (usually conferred by Parliament).'[5] The power to legislate is therefore delegated by Parliament and accordingly 'the end-product is *delegated legislation.*'[6] Furthermore, and in consequence of the subordinate nature of such legislation, unlike primary legislation, 'it may, moreover, be held by a court to be *ultra vires.*'[7]

(vii) It is submitted that the scope and subject matter of the FI Fees Regulations are *ultra vires* (or otherwise, in excess of) the express powers delegated by the provisions of the FI Act (which are to be read in their entirety)[8] and may therefore be impugned. The cause of the invalidity is the fact that the FI Fees Regulations 'go beyond the limited scope of delegated authority on a matter of substance.'[9]

(viii) As explained above, Article 12(1) of the FI Act may not be construed as conferring or delegating to the Minister the power to legislate on the determination or establishment of the annual (supervisory) fees applicable to financial institutions licensed under the FI Act since such power is expressly granted (by Article 3(4) of the FI Act) to the MFSA.

[5] De Smith and Brazier, Constitutional and Administrative Law, 6th edition, p 334.
[6] Ibid.
[7] Ibid.
[8] By reference to the principles of interpretation *incivile est nisi tota lege perspecta una aliqua eius particular proposta iudicare vel respondere*, and interpretation *illa sumenda est quae magis convenit subjecta materiae.*
[9] De Smith and Brazier, *op cit*, p 350.

(ix) The application of the principle *delegatus non potest delegare* also prevents the original recipient of the delegation (the MFSA) from sub-delegating its powers in this regard to any other body or person, including the Minister.

(x) It is evident from the language thereof that the relative empowering provision (in other words, Article 12(1) of the FI Act) is not a *Henry VIII clause* and therefore does not have the effect of enabling any delegated legislation passed thereunder to abrogate or otherwise amend any other provision of the same Act (including, for the sake of clarity, Article 3(4) of the FI Act).

(xi) In light of the foregoing it is submitted that the FI Fees Regulations and the Requested Fees being demanded by the MFSA as emanating therefrom are invalid and unenforceable by virtue of the fact that the FI Fees Regulations are *ultra vires* of the express powers delegated by the provisions of the FI Act.

In the light of the foregoing, OTP hereby appeals to the Tribunal to declare the Measure as null and void and to reverse or vary the Measure and to give directions to the MFSA to implement the Tribunal's decision.

Having seen the reply of the Authority [10] wherein the Authority stated:

Preliminary

1. By virtue of its appeal OTP Financing Malta Company Limited (hereinafter referred to as the "Appellant" or "OTP") is appealing against the content of a letter dated 22nd October 2020 exhibited with the appeal as Exhibit A. The said letter is a request for payment advanced by the Malta Financial Services Authority (hereinafter referred to as the "Authority" or "MFSA") requesting payment of the supervisory fee payable for the year 2020 as per Subsidiary Legislation S.L. 376.03, also known as the Financial Institutions (Fees) Regulations.

[10] Document 7

In terms of article 21 of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta), an appeal shall lie to this Tribunal from decisions of the Authority. The letter of the 22nd October 2020, does not per se constitute a decision of the Authority. The content of the letter dated 22nd October 2020 is merely a reiteration of the supervisory fee due by the Appellant in accordance with regulation 4 of S.L. 376.03, as had been previously communicated to the Appellant by means of two invoices issued by the Authority on the 1st of January 2020 and the 7th of July 2020, whereby the Authority, as the legal person vested with the administration of the Financial Institutions Act, had informed the licensee (i.e. the Appellant) how much, according to the law at hand, the annual supervision fee amounted to. In this regard, the Authority was simply applying the provisions of the law and there was therefore. no decision to be taken. To this effect, the appeal should not be allowed.

2. Without prejudice to the above, if one were to argue that the content of the letter dated 22nd October 2020 amounts to a decision on the part of the Authority then really and truly, the decision was not taken in October 2020 but it was taken prior to January 2020. As stated above, the MFSA's letter dated 22nd October 2020 is simply a reiteration of what had already been communicated to the Appellant by means of two invoices issued by the Authority on the 1st of January 2020 and the 7th of July 2020. The initial request for payment complained about by the Appellant did not result from the letter dated 22nd October 2020 but predates this by about 10 months in view of the fact that on the 1st January 2020, OTP received an invoice from the Authority requesting payment of the sum of Eur361,412.77 with a note saying that halfway through the year 2020 a top-up invoice would be issued depending on OTP's balance sheet as at the year ending 2019. Thus, really and truly the decision of the Authority, if one were to call it so, was taken prior to the 1st January 2020.

In terms of article 21(8) of Chapter 330, an appeal has to be filed within thirty days from the date a decision is notified. As also stated by the Appellant in its appeal, OTP received the invoice requesting the payment of the annual supervision fee for the year 2020 in accordance with the provisions of S.L. 376.03 on the 1st of January 2020. This appeal however was filed on the 12th November 2020, well after the thirty-day period stipulated by law.

Moreover, even if one were to take the date of the notification of the invoice issued by the Authority on the 7th of July 2020 as the day from which the thirty-day period prescribed by law should have started running, the filing of the appeal on the 12th November 2020 would still be well after the thirty-day period stipulated by law.

To this effect, an appeal filed by the Appellant at such a late juncture should not be allowed.

Merits

3. The starting point of any discussion for an appeal before this Tribunal is always the content of article 21(9) of Chapter 330, which states as follows:

(9) The question for the determination of the Tribunal shall be whether, for the reasons adduced 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:

In its appeal, the Appellant is claiming that the so-called 'Measure' (as referred to by the Appellant in its appeal and as defined in the appeal as the content of the Authority's letter dated 22nd October 2020) of the MFSA is to be declared by the Tribunal as null and void since the 'Measure' is manifestly unfair in terms of *article 21(9)(b) of the MFSA Act* on the following grounds:

A. The Fee set out in regulation 4 of S.L. 376.03 is **disproportionate and excessive** and that OTP has a **vested interest and legitimate expectation** that the fees will be amended accordingly;

B. Without prejudice to ground A, **S.L. 376.03 is ultra vires the powers delegated by the provisions of the Financial Institutions Act** (Chapter 376 of the Laws of Malta) as the power to establish the supervisory fees is vested with the MFSA and not the Minister.

The Authority respectfully submits that the Appellant's requests cannot and should not be accepted by this Tribunal in view of the following reasons.

3.1. The request of the Appellant is to declare the 'Measure' null and void. In terms of article 21(13) of Chapter 330 the vires given to this Tribunal is clear. The Tribunal can only determine the following:

i) to confirm, reverse or vary the decision of the Authority under the relevant law and to give directions within its powers or any other law to the Authority to implement the decision of the Tribunal;

i) to require the production of any document or other information;

ii) to order the payment of costs and expenses by any party to the appeal.

To this effect the Tribunal cannot declare the 'Measure' as being null and void as requested by the Appellant.

3.2. If, notwithstanding the fact that the Appellant did not request the Tribunal to vary the Authority's so-called 'Measure', the Tribunal were to consider varying the 'Measure' of the Authority, it is humbly asked on what basis will the Tribunal calculate the relative fee? Can the Tribunal depart from the law?

As will be submitted later on in this appeal, the Authority in calculating the fee which is being here challenged, has applied the law, as it stands – so much so that the Appellant has not chosen to even mention Article 21(9)(a) since it is aware that there absolutely is no wrong application of the law.

3.3. The Appellant is basing its argument on the latter part of article 21(9)(b) of Chapter 330, more specifically on the 'manifestly unfair' ground. Thus, one must see if, and how if at all, the 'Measure' of the MFSA was manifestly unfair, for the Tribunal to take a decision. Now the Measure which the Appellant wants to have declared null and void is the charging of the supervisory fee for the amount of circa Eur464,535.77, which amount was arrived at by strict adherence to what is contained in S.L. 376.03. This will be proved during the hearing of the case, should this Tribunal feel that the case should progress to a hearing.

It is thus submitted that under no circumstances can it be said that the Authority acted in a manifestly unfair manner. The Authority has merely applied the law as it stands. The Appellant's arguments all militate to show that the law as it stands is unfair, however this is not an area that can be tackled by this Tribunal. In this respect, it is worth referring to the judgement delivered by this Tribunal on the 28th of September 2012, in the case *Christopher Pace vs L-Awtorita' Ghas-Servizzi Finanzjarji ta' Malta*, wherein it was held that:

"...l-lanjanza ta' l-appellant hija kontra dawk id-disposizzjonijiet tal-ligi li jaghtu lill-awtorita' s-setgha li tagixxi kif agixxiet. ... B'konsegwenza ta' dan, l-allegazzjoni ta' l-appellant ma tirrigwardax l-eghmil ta' l-awtorita' per se, izda l-ligi li tawtorizza u tezigi dawk l-eghmil. ... [din il-materja] ma tista' qatt tigi deciza minn dan it-tribunal."

The Tribunal can only circumspect the decisions taken by the Authority, and in this case the Authority simply applied the provisions of the law and did not take any decision.

In addition, given that in charging the supervisory fee which is the subject of this appeal the Authority was merely acting in compliance with the law, in order for the Tribunal to determine the charging of this fee as being manifestly unfair, the Tribunal would first have to determine that the provisions of S.L. 376.03, on the basis of which the Authority calculated the supervision fee due by OTP, are manifestly unfair – which is something that this Tribunal does not have the *vires* to do.

3.4. The Appellant is also claiming that the manifest unfairness in the way the Authority exercised its discretion arises (according to the Appellant) in view of the fact that although the fee is being imposed in terms of S.L. 376.03, it is manifestly unfair since by virtue of the email dated 8th June 2015, the Appellant had acquired a 'vested interest' and a 'legitimate expectation' that the fee will be capped at 85,000 Eur and that the law will be amended in this respect.

A careful reading of the email dated 8th June 2015, shows that:

(i) This was only an email in reply to another email of the CEO of the Appellant company in relation to the fees applicable for the <u>years 2015 and 2016 **only**</u>.

(ii) The CEO of the Appellant company is also quoting the S.L. 376.03 (and not the Financial Institutions Act) when asking the Authority about the relative supervisory fees for these two years.

The email dated 8th June 2015 therefore should only be read in relation to the fees for the years 2015 and 2016 even though in subsequent fees (up until 2019) the MFSA continued applying 'de facto' the 'concession' granted to OTP for these two years.

If the Appellant wants to argue that by virtue of the email dated 8th June 2015, it has acquired some sort of vested interest or legitimate expectation this can only (in any case) be argued in relation to the years 2015 and 2016 and not the year 2020 which is currently in dispute. The

application of the capping of 85,000 Eur of subsequent years by the MFSA was not based on any written agreement made with the Appellant.

In this regard it is worth looking at how our courts have looked at the concept of legitimate expectations. In the case *The Waterfront Hotel Limited vs L-Awtorita tal-Artijiet* decided on the 6th May 2019, Appell no. 12/2018 (Judge Anthony Ellul) the court referred to the concept of legitimate expectation and held as follows:

"Illum il-ġurnata f'ħafna każijiet li jinvolvu sħarriġ ta' eġħmil amministrattiv, jissemma l-kunċett ta' legitimate expectation. Kunċett li nsibuh fid-dritt amministrattiv Ingliż;

"*Expectations may broadly be divided into two groups. An expectation may, first of all, be a procedural expectation where a particular procedure not otherwise required has been promised. Thus in the case discussed earlier where the government of Hong Kong announced that certain illegal immigrants would be interviewed before deportation a procedural expectation was established. Second, what is expected may be a particular or favourable decision by the authority. Thus where the Home Secretary had specified the criteria applicable to a decision to allow a child to enter the UK with a view to adoption there was a substantive expectation that those criteria (which were satisfied by the applicant) and not others would be used when the decision was taken*";[11]

"*... an established practice may lead the claimant legitimately to expect that the same practice will be followed in the future. Thus consistent provision of a given procedure may trigger a legitimate expectation that that procedure will continue to be followed. But what if the past practice consists not in the provision of a given procedure, but in the conferral of a particular substantive benefit ? Can a legitimate expectation arise in these circumstances, too ? Laws LJ considered this question in R(Niazi) v Secretary of State for the Home Department (2008) EWCA Civ 755. He indicated (at (43)-(46)) that a claimant is unlikely to be able to spell out of past practice a substantive legitimate expectation that the benefit will continue to be conferred, because, as he explained, such an expectation arises only if there is 'a specific undertaking, directed at a particular individual or group, by which the relevant policy's contiunance is assued'. Further as observed in DM v Secretary of state for the Home Department (2014) CSIH*

[11] Administrative Law, H.W.R. Wade & C.F. Forsyth 10 Edizzjoni (Oxford University Press), paġna 453.

29, 2014 SC 635 at (25), 'Policy may be changed at any time, and a change might be rendered laregely ineffective if it were still necessary to apply the policy that existed at an earlier date'; in other words to recognize enforceable substantive expectations on the basis of a former practice or policy, since abandoned, would make too great an inroad into the executive's ability to respond to the changing demands of the interest (see also Niazi at (34), (41), (43))".

This is consonant with the case in question. The undertaking of the Authority was relative solely and exclusively to the years 2015 and 2016.

Indeed, if one looks at the Fee Notices sent by the Authority to OTP through the years (exhibited in the appeal as Exhibits C to F), the MFSA was quoting the law, i.e. S.L. 376.03, and the Appellant deliberately accepted this with each respective payment. The email of 2015 has no connection whatsoever with the 2020 fee. Thus the Appellant did not acquire any vested right or legitimate expectation in relation to the fee due by it according to law for the year 2020.

Without prejudice to the aforesaid, even if one were to argue that the 8th June 2015 email is also applicable for subsequent years, apart from 2015 and 2016, the Authority would still be able to depart anytime from this 'concession' since the MFSA is not legally bound to keep this concession in place and subsequently it can anytime reverse any unilateral position (there is no agreement in place between OTP and the MFSA), and abide strictly by what the law imposes.

3.5. Another argument advanced by the Appellant relates to the so called 'acceptance' of the MFSA of the unfairness of the supervisory fee by claiming that amendments will be affected in this respect. The same arguments raised above in relation to the email of 8th June 2015 are applicable here, i.e. the wording 'will be amended' can only be applied for the years 2015 and 2016 and certainly not projecting oneself five years into the future. Indeed, in the letter dated 22nd October 2020 (i.e. the so-called 'Measure' in dispute) the MFSA clearly stipulated that the MFSA shall inform licence holders of any such changes *if and when enacted*. Therefore, it has been clear enough with the Appellant that any proposed amendments in relation to S.L. 376.03 are not definitive and certain, and thus the Appellant could not in any way claim that they have acquired some form of vested right or legitimate expectation.

3.6. In so far as fairness is concerned, the supervisory fee charged by the MFSA for the year 2020 was extracted directly from the applicable law in force, i.e. regulation 4 of S.L. 376.03, which, as explained previously, the Appellant has deliberately accepted in paying all the fees up until 2019 - since this was the law the MFSA was indeed quoting all the time. On the other hand, it could be argued that it was the MFSA that acted over generously (and over fairly) with the Appellant for the last years in not demanding more than 85,000 Eur, and in applying the fee of 2020 the MFSA was simply applying the law in force.

3.7. In its appeal, the Appellant states that it wishes to impugn regulation 4 of S.L. 376.03. Proceedings to this effect before this Tribunal are not the appropriate judicial forum.

A similar argument raised by the Appellant is that S.L. 376.03 is ultra vires the powers delegated by the provisions of the Financial Institutions Act. Again proceedings to this effect before this Tribunal are not the appropriate judicial forum.

However, while by virtue of this appeal the Appellant is questioning the validity of S.L. 376.03, the same Appellant adhered to these same regulations when it always paid annual supervisory fees, and now that they are not satisfied with the quantum of the said fees, they are seeking to de-ligitimise the same. Once again this forum is not the appropriate forum to discuss this argument, which is strongly rebutted by the Authority, and hence the arguments brought forward by the Appellant in this respect, do not even deserve to be argued against, before this Tribunal.

Nevertheless, and without prejudice to the above, the specific matters referred to in paragraphs (a) to (i) of article 12(1) of the Financial Institutions Act are, as stated in article 12(1) itself, "without prejudice to the generality of the foregoing" general power given to the Minister responsible for financial services to make regulations to give effect to the provisions of the Financial Institutions Act. The general nature of this provision is also recognised by the Appellant itself in its appeal. Accordingly, the general power vested in the Minister pursuant

to article 12(1) of the Financial Institutions Act applies irrespective of the specificity of paragraphs (a) to (i) of the said sub-article.

3.8 In its appeal, the Appellant is also claiming that the supervision fee charged by the Authority in accordance with S.L. 376.03 is invalid and unenforceable by virtue of the fact that S.L. 376.03 is *ultra vires* of the express powers delegated by the provisions of the Financial Institutions Act. However, in order to make such a determination, the Tribunal would first have to declare the invalidity and unenforceability of S.L. 376.03, which, as explained above, is something that this Tribunal does not have the *vires* to do.

In view of the above, the appeal of the Appellant should be rejected with costs against the Appellant.

Having seen all other acts and documents of the proceedings;

Having seen that the Tribunal, on the 19th May 2021 directed the parties to present all evidence pertaining to the appeal, and not limitedly to the preliminary plea raised by the Authority;

Having noted that this appeal had been deferred for a decision subsequent to the submission of written submissions by the parties;

Having noted that by means of a decree of the 29th November 2021, the tribunal decreed that it will deliver its decision on the 15th December 2021 and not on the 1st December 2021;

Having noted the written submission of the Parties;

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;

Considers:

1. The Appellant is, as from the 31st October 2014, licensed to carry out the activity of "Lending (including personal credits, mortgage credits, factoring with or without

recourse, financing of commercial transactions including forfeiting) in accordance with the Provisions of the Financial Institutions Act, Chapter 376 of the Laws of Malta.

2. According to the license issued in favour of the Appellant, the license "shall be subject to any fees that may be established from time to time by the Authority" [12] and "In terms of Legal Notice 217 of 2003, as subsequently amended, the Institution is subject to an annual supervision fee" [13].

3. Legal Notice 217 of 2003, as amended [14], states:

   (4) A financial institution licensed under the Act shall pay to the competent authority an annual supervision fee equivalent to0.0002 of the total assets as reported in the statutory schedules under Banking Directives BD/06 or Banking Rule BR/06 of the year immediately before the year when the fee is payable: .....

4. After the issue of the license [15], the Appellant raised the issue of the fee computation with the Authority. In a communication of the 18th May 2015, the CEO and Director of the Appellant stated:

   "Further to our conversation this afternoon, kindly advise how we are to calculate the regulatory fees that the Company needs to pay both in 2015 and 2016.

   Based on the Financial Institutions (Fees) Regulations SL 376.03, article 4, OTP appears to be obliged to pay an annual supervision fee equivalent to 0.0002 of its total assets. Therefore, if OFMC closes 2015 with an asset volume of € 1 billion on its books, then the fee payable in 2016 would be € 200,000. Is this correct?

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[12] Condition 1 fol. 1 of the license
[13] Last Para of the License document fol. 5
[14] SL 376.03
[15] First email communication from Appellant to the Authority is on the 18th May 2015 (Doc. JBA2 attached to affidavit of Joseph Bugelli.

In the forecast P&L compiled by OPT Bank plc at the time of the licence application in 2013/2014, an expense of € 5,900 was budgeted for this expense item. At the time, the 2014 revised regulations were already published."

5. A reminder was sent on the 26th May 2015 and the Authority, through Mr. Aldo Giordano replied on the 27th May 2015 that the Authority was *"currently discussing this issue internally and will update you in due course"*.

6. On the 8th June 2015, Josianne Formosa, an officer of the Appellate Authority replied as follows:

   "Further to your email below [16], please note that in terms of the current Legal Notice the annual supervision fee is equivalent to 0.0002 of the institution's total assets as per audited financial statements of the previous financial year end. However, we confirm that the annual supervisory fee for OPTP Financing Malta Company Limited shall be capped at a maximum amount of € 85,000 per annum for the financial year. The capping of this fee will be included as an amendment to the legal notice in due course."

7. The Authority issued invoices for 2016 [17], for 2017 [18], for 2018 [19] and for 2019 [20] all for the amount of € 85,000 per annum. These invoices were paid and there does not seem to exist any contestation on this fact.

8. On the 15th October 2019 a meeting was held between the Appellants and the Appellate Authority, during which meeting the supervisory fee structure was also discussed.

9. The fee structures applicable seems to have been a topical subject and also discussed at a meeting attended by the Appellate Authority with all license holders on the 21st October 2019.

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[16] The reply is to the original email of 18th May 2015
[17] Exhibit C attached to the Appeal application;
[18] Exhibit D attached to the Appeal application;
[19] Exhibit E attached to the Appeal application;
[20] Exhibit F attached to the Appeal application;

10. The Appellant submitted its observations on the fee structure revisions that at the time were being considered by the Authority, and this through a letter of the 25th October 2019 [21].

11. In January 2021, the Appellant was verbally informed that the capping that was established on the fees was being withdrawn and the Appellant was to pay the fees set out in the Regulations.

12. The Appellant objected to this decision through a letter of the 13th January 2020 [22], and this after receiving, on the same day the Supervisory Fee for 2020 for €361,412.77.

13. Meetings were held between the Appellant and the Appellate Authority during which this matter was discussed. The matter was brought to a conclusion through a letter of the Authority of the 22nd October 2020 [23] in which the Authority informed the Appellant that *"the Institution's representations regarding the level of the Supervisory Fee applicable for the year 2020 have been deliberated by the Authority' Executive Committee. Consequently you are hereby being informed that the supervisory fee payable for the year 2020 is applicable in full as per Subsidiary Legislation SL 376.03 – Financial Institutions (Fees) regulations. ...."*

14. The Appellant submitted its appeal on the 12th November 2020, and referred to the letter of the Authority of the 22nd October 2020 as the "Measure" from which it was submitting its appeal.

Preliminary Pleas:

15. The Authority raised a preliminary plea in the sense that the letter of the 22nd October 2020 does not constitute a decision of the Authority, and hence there was no remedy to appeal.

[21] Doc JBA6 attached to affidavit of Joseph Bugelli.
[22] Doc JBA7 attached to affidavit of Joseph Bugelli.
[23] Exhibit A attached to the Appeal and Doc JBA10 attached to affidavit of Joseph Bugelli.

16. Alternatively, if the letter of the 22nd October 2020 was to be considered as a "Decision", then the appeal was *fuori termine* because the letter simply referred to a "Decision" that had been taken in January 2020 or even before. Furthermore, the invoice was issued on the 7th July 2020 and hence, an appeal, if any, had to be filed within 30 days from the issue of the final invoice.

17. The Appellants argue that whereas they had received the invoices for 2020, they could only lodge their appeal after they received the letter of the 22nd October 2020, through which the Authority informed them of its decision that the fees for 2020 were to be computed according to the Regulations.

18. The Tribunal notes that there is no contestation as to the facts which led to this Appeal. However one must keep in mind that up until the previous year, the Appellant was receiving an invoice which was in line with what was communicated to it through the email of 8th June 2015, i.e. a capped fee. It is true that the Authority, in January 2020 had verbally informed the Appellant that the capping was being removed. This was also followed up by an invoice which was based on the provisions of the Regulations.

19. The Appellant had every right to make representations with the Authority to understand why and on what basis the capping was removed. In so much that the Authority did actually acknowledge that it was considering this request [24]. Ultimately through the letter of the 22nd October 2020, the Authority informed the Appellant that after "deliberating" on the Appellant's "representations", the fee payable was to be computed according to the Regulations, and hence without any capping.

20. There is no doubt that the Appellant proceeded with caution and correctly when it questioned the invoice issued against it, and which invoice excluded any capping. The Authority on the other hand, was bound to explain its decision to invoice the fees according to the Regulations and without a capping. This was only done through the letter of the 22nd October 2020, since, in the opinion of the Tribunal, the mere issuing of an invoice, does not, in such a case, tantamount to a decision. The Authority could have easily issued its "decision" before the invoice was issued. It did not however do

[24] Email of Dr. Buttigieg of the 21st May 2020, Doc JBA9 attached to affidavit of Joseph Bugelli.

so. The "Decision" of the Authority is found in its communication of the 22nd October 2020 and hence the Appellant had the right to appeal this Decision. Consequently, the said appeal is also not *fuori termine*.

Merits:

21. The main issue of divergence in the submissions made by the Appellants and the Appellate Authority is on whether the capping was for a specific period (according to the Authority for 2015 and 2016) or indefinite.

22. The jurisdiction of the Tribunal is regulated under the provisions of Article 21(9) of Chapter 330 of the Laws of Malta:

> (9) The question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant –
>
> (a) the competent authority has, in its decision wrongly applied any of the provisions of this Act, or any regulations issued thereunder;
> (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:....

23. The provisions of Article 21 of Chapter 376 of the Laws of Malta states:

> *21.Any person who is aggrieved by a directive, decision and, or measure taken by the competent authority pursuant to the Act and any regulations or Rules issued thereunder, may appeal to the Tribunal within such period and under*

such conditions as established under the Malta Financial Services Authority Act.

24. The Tribunal is of the opinion that the "decision" of the Authority to remove the capping on the fees payable by the Appellant, enables the Appellant to submit this appeal. Yet, the Tribunal must assess the appeal within the limits of its jurisdiction.

25. There is no doubt that the Authority did, in 2015, take a decision to cap the fees payable by the Appellant. Two important aspects however emerge:

    a. The Appellant's licence was issued in 2014 with a specific obligation on the Appellant to pay the fees established under Legal Notice 217 of 2003 as amended.
    b. That the decision as communicated on the 8th June 2015 specifically referred to a request by the Appellant in relation to the fees payable for 2015 and 2016; and

The Legal Notice:

26. Legal Notice 217 of 2003 was amended in 2014 through LN 10 of 2014 [25] wherein regulation 5 was renumbered as 4 and for the words *"an annual supervision fee equivalent to 0.000175 of the total of the items in the balance sheet as reported to the competent authority in terms of Banking Directives BD/06 at the end of the year preceding the year immediately before the year in which the fee is payable:"*, there were substituted the words *"an annual supervision fee equivalent to 0.0002 of the total assets as reported in the statutory schedules under Banking Directives BD/06 or Banking Rule BR/06 of the year immediately before the year when the fee is payable"*.

[25] Brought into force on the 1/1/14

27. As such, at the time of licencing the Appellant was well aware of its legal obligations in relation to the payment of fees [26]. It is therefore quite surprising how in the forecast P&L the Appellant budgeted merely € 5,900 in relation to such fees [27].

28. The same legal notice does not enable any departure or discretion and there is no doubt that the fees as therein established applied in relation to the Appellant Company.

29. The Tribunal can understand a direction that the Authority could or should have given to the Appellant Company, that it would, in accordance with the provisions of 12 of Chapter 376 of the Laws of Malta, propose to the Minister the amendment of the Regulations, to introduce a capping. However, the tribunal cannot understand under which authority, the Appellate Authority, introduced a capping of fees in manifest breach of the provisions of the Law.

30. The Authority did not have the authority or discretion to introduce any such capping. This capping was not publicised and the Tribunal is only aware of another case where this capping was used [28] and discontinued in 2019. The Authority also conceded a reduced fee to two other credit institutions which reduction was discontinued in 2020 [29]. It is quite surprising how the Authority felt it empowered to give such concessions without it having the legal authority to do so, and without showing that it endeavoured or attempted to advice the Minister to amend the Regulations. It is also quite surprising how these unilateral concessions granted by the Appellate Authority were not captured or queried in its own audit and/or review procedures.

31. So it is quite clear that whereas the Authority should have ensured that it advises the Minister to introduced the capping or concession mechanism in the Regulations, if it really believed that this capping and/or concessions were necessary, it could not have pursued in granting a capping or a concession such as the one subject of this case.

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[26] Vide also Doc JBA2 email of the 18th May 2015.
[27] Vide Doc JBA2 email of the 18th May 2015.
[28] Refer to note of the Authority of the 3rd May 2021 Document 12
[29] Refer to note of the Authority of the 3rd May 2021 Document 12

32. The said capping also goes against the same license that the Authority issued in favour of the Appellant, wherein it obliged and bound the Appellant to pay the fees established in the said Regulations. Conditions which the Appellant accepted and agreed to and only question months later when it enquired whether its understanding of how the fees are computed was correct. Even here the Tribunal is quite unsure as to how the Appellant, fully aware of the provisions of the said Regulations, budgeted a mere € 5,900 in its forecasted P&L when the formula established in the same Regulations is quite strait forward and easy to work out.

The request made and the Concession that was given:

33. The Appellant, in May 2015, seven months after being licensed, wrote to the Authority requesting a clarification as to how the fees payable by it for 2015 and 2016 had to be computed. The request was very clear and specific. Even the Appellant's understanding of how the formula established in the Regulations works was very clear.

34. The Authority replied to this email and specially stated that the fees will be capped at € 85,000 per annum. Whilst making it clear that it was referring to the request made in May 2015, the Authority, in its reply did not refer to 2015 and 2016. The Authority further committed itself to have this capping included in an amendment to the Regulations.

35. The Tribunal is of the opinion that the capping granted by the Authority, albeit without any legal basis (or even worse contrary to law) referred to the two years in question, namely 2015 and 2016. Its commitment to have the capping introduced in the Regulations further signifies the Authority's knowledge that it could only guarantee such capping as long as the law is amended. Yet the Authority could not commit to a legal amendment, when at law, it could only propose amendments to the Minister. The Minister was the only person empowered to amend the Regulations [30], and yet again, the Tribunal fails to understand how the Authority could commit itself to this (also keeping in mind that the said Regulations were amended in 2014).

[30] Refer to Article 12 of Chapter 376 Laws of Malta

36. It would seem (since no one from the Authority seems to know what happened) that the Authority maintained the capping even though the Regulations were never amended. No one testified about this and the Authority did not explain whether it did propose such an amendment, and which proposal was rejected by the Minister, or whether the Authority simply ignored all these requirements and did not even propose an amendment. What is certain is that the Authority, fully aware of the fact that it was not empowered at law, capped the Appellant's fees not just for 2015 and 2016, but also for the period between 2017 and 2019.

37. This until one fine day, and without any notice, the Authority decided to withdraw the capping. Again no information was given as to what lead to this change, other than an apparent need of the Authority to better balance its books. The Appellants, and apparently another 3 institutions, were asked to comply with the Regulations since their capping and/or concessions were being withdrawn.

38. At this stage, the Tribunal can simply note that the Authority decided to apply the Regulations correctly. The Tribunal cannot justify the capping introduced by the Authority contrary to the provisions of the Regulations and without any legal authority.

39. The Appellant argues that the capping (and the concurrent commitment to amend the Regulations) gave it a legitimate expectation that the capping would remain.

40. The doctrine of legitimate expectations is not used very often by the Maltese courts [31]. "The doctrine is however still not settled in Maltese jurisprudence ..... The doctrine has implications both as regards procedural and substantive ultra vires." "This ground of review has developed exponentially. It remains a delicate area, since the courts of law should not necessarily hamper Government in its actions and measures; but it provides the courts with reason to strike down actions that are not fair and reasonable; the most interesting matter is that one never knows where the courts will strike next. The strike

[31] Tonio Borg, Maltese Administrative Law pg 190

however, whenever it comes and in whichever direction it goes, must be based on law and not on prejudices, opinions or whims of judges." [32]

41. Under English Common Law, the principle is somewhat more developed, yet the basic principle remains the same: "It is not enough that an expectation should exist; it must in addition be legitimate." [33] The doctrine is then based on a number of requirements some of which being: "First of all, for an expectation to be legitimate it must be founded upon a promise or practise by the public authority that is said to be bound to fulfil the expectation [34]..... Second, the clear statutory words, of course, override any expectation howsoever founded [35]".

42. It is thus clear that the Appellant could have never legitimately expected the capping to continue first and foremost beyond 2015 and 2016, but should have also not legitimately expected the capping to be retained without the amendment to the Regulations. The Regulations were never amended and it is clear that the Authority could not have committed itself to an amendment which goes beyond its remit. Finally, the Appellant was fully aware of the Regulations, of their application and method of computation. These Regulations were not only applicable to it by the simple operation of law, but also because the fees payable in accordance to the same Regulations was an intrinsic part of the license which was accepted by the Appellant and under which the Appellant functioned.

43. The Authority, on the other hand cannot certainly be commended for the way it acted. It capped fees without any legal authority to do so, tied itself to an amendment to the Regulations which it could and was not empowered to do, and maintained its (illegal) decision to cap the fees for five years. The way the Authority acted does not and could not give rise to any legitimate expectation, since the said actions where manifestly contrary to the written law and hence could have never raised any legitimate expectation.

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[32] Ibid pg 191 - 192
[33] Wade & Forsyth, Administrative Law, 11th Edit. Pg. 452.
[34] Ibid pg. 453. Also refer to R v. DPP ex p Kebilene
[35] Ibid pg. 453. Also refer to R. vs Secretary of State for Education ex p Begbie

44. The analyses and consideration of the Tribunal are obviously being made with due consideration of its jurisdiction. The Tribunal cannot conclude that, in withdrawing the capping, the Authority wrongly applied any of the provisions of the Act. Nor can it state that the decision of the Appellant constitutes an abuse of discretion or is manifestly unfair, when it was actually reversing a decision which it took without any legal authority.

The Reasonableness of the Fees set out in the Regulations and the expectation to amend the Regulations:

45. In its appeal, the Appellants argue that the fees established through regulation 4 of the Regulations are excessive and disproportionate, especially when one considers the activities of the Appellant.

46. The Tribunal is however not vested with the jurisdiction to analyse this claim. The Regulations are promulgated through a Legal Notice and the Tribunal does not have the jurisdiction to scrutinize whether the fees are excessive or disproportionate in relation to the licensed activity of the Appellant.

47. As already explained, before obtaining the license, the Appellant was well aware of these Regulations and the fees therein established and accepted to operate within the parameters of the license issued in its favour.

48. As already explained above, the Authority could not commit to something that was beyond its authority, and whereas it could commit to suggest a variation of the Regulations, it could never legitimately bind itself to an amendment of the Regulations.

The Fees should not form part of regulations since the power to establish fees is vested in the Authority, and not the Minister, in accordance with the provisions of Chapter 376 of the Laws of Malta

49. Once more, the Tribunal does not deem itself competent or empowered to scrutinize this grievance. The method of legislating is a matter which goes beyond the jurisdiction of the Tribunal. In this case, the Tribunal is, as was the Authority, bound to apply the

provisions of the Regulations, which are promulgated through a Legal Notice in accordance with the provisions of Article 12 of Chapter 376 of the Laws of Malta. These Regulations are deemed valid and legitimate and have not been contested by the Appellant. And the Appellant cannot certainly contest their validity before this Tribunal whose jurisdiction is limited as explained above.

Decision:

On the basis of the Above, the Tribunal:

1. Rejects the Preliminary Pleas raised by the Appellate Authority and declares that the Appellant had every right submit the appeal and consequently the appeal application was filed within the time limits established at law;

2. Rejects the Appeal of the Appellant;

3. Upholds the Reply of the Authority to the said appeal in so far as such a reply is in line with what has been decided.

Taking into consideration the facts of this appeal, each party is to bear its own costs.