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 02/21
MC Trustees Ltd
vs.
MFSA

Today, 5th July 2023,

The Tribunal

Having seen the appeal by appellants of the 14th May 2021wherein the Appellants stated:

> This is an appeal in terms of Article 21 of the MFSA Act (Chapter 330 of the Laws of Malta) and Article 44(1) of the Retirement Pensions Act from a decision of the Malta Financial Services Authority (the "**MFSA**" or the "**Authority**") taken on the 16th April 2021 ("**Decision**") (attached Decision marked as **DOC MCTM 1**).
>
> **THE MFSA DECISION**
>
> 1. In its Decision, the MFSA decided to impose an administrative penalty amounting to €160,000 on the basis that the Appellant allegedly (i) failed to act in the best interest of its members and ignored its fiduciary obligations as a Trustee of the Scheme (as defined below) as required in Part B 2.3.1. of the Standard Operational Conditions ("**Conditions**") applicable to Retirement Scheme Administrator's ("**RSA**"), the Trust and Trustees Act and the Trustees Code of Conduct, (ii) failed to implement adequate internal control procedures to protect the Scheme members from any financial loss in terms of the Conditions (iii) failed to ensure that the individual member accounts are

adequately liquid at all times in terms of the Conditions (iv) failed to meet its obligations in terms of Article 19(1)(l) of the Special Funds (Regulation) Act (now repealed) in view that it did not ensure that all instructions and decisions affecting the Scheme were in conformity with the law and the Scheme particulars and (v) failed to implement procedures for the effective handling of complaints in terms of Part B 1.4.4 of the Pension Rules.

2. For reasons explained below, and as will be explained in further detail during the proceedings before this Financial Services Tribunal ("**Tribunal**"), in reaching its decision, MFSA wrongly applied the law, and abused its discretion. In addition, the Decision is manifestly unfair, the fine imposed disproportionate and the whole process is in breach of the principles of natural justice and the Appellant's rights under the Constitution of Malta and the European Convention Act (Chapter 319 of the Laws of Malta). On the merits, the Appellant refutes the allegations in their entirety as they are unfounded in law and in fact.

B. PRELIINARY PLEAS

The Appellant respectfully submits that the whole process impinges on the Appellant's right to a fair hearing for the following reasons:

(B.1) ***Lack of Fair Hearing and Due Process – Manifest Unfairness***

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

It is submitted that the manifest breach of the Appellant's fundamental right to a fair trial constitutes "manifest unfairness" thereby giving a right of Appeal before this Tribunal under Article 21 (9)(b) of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) ("the **Act**") on the basis of which this Tribunal has the power to annul the Decision under Article 21(13)(a) of the Act. The unfairness of MFSA's Decision is further aggravated by the way MFSA dealt with the Appellant and reached its "conclusions" within unrealistic timeframes.

In its Minded Letter (dated 22 February 2021 – attached and marked as **DOC MCTM 2**), the Authority refers to "*discussions held during a compliance visit carried out by the Authority at MCTM offices in July 2016*" and on the basis of these discussions (and documentation provided by the Appellant to the Authority), the Authority found the Appellant to be in breach of a number of its standard license conditions issued in terms of the Special Funds (Regulation) Act (now repealed) and the RPA as well as provisions of the Trust and Trustees Act ("**TTA**").

In its reply dated 23 March 2021 (which had to be submitted within just 30 days in spite of the fact that the Authority sent its Minded Letter 55 months after its on-site inspection) (attached and marked as **DOC MCTM3**), the Appellant strongly objected to MFSA's minded position and stated *inter alia* that, in brief, (a) the Special Funds

Regulation Act was repealed in 2016 and therefore the Authority cannot impose a fine on the basis of an act which is no longer in force (b) the Authority cannot impose two separate fines for the same breach (being the allegation that it did not act in the best interest of its members) simply due to its trust licence (c) MCTM did not have the authority nor the licence to challenge any of the investments chosen as being adequate for the member/s in question unless a clear breach of the applicable pension rules was identified (d) the fund was adequately liquid and that (e) it did have adequate internal controls and an effective complaints registration procedure and therefore there was absolutely no purpose for the Authority to implement its minded position. Despite this contestation, MFSA simply insisted upon its minded position and reflected it into a final determination.

Firstly, the Appellant contends that, as shall be elaborated upon during these appeal proceedings, the discretionary excessive penalties imposed by the Authority and which resulted from an investigative process lead arbitrarily by the MFSA, are intrinsically criminal sanctions (the Constitutional Court and the European Court of Human Rights have already termed penalties of this nature to be criminal sanctions); criminal sanctions which are imposed without due process. The Appellants submit that penalties which equate to criminal sanctions must be judged and determined by a 'court' (and not by the Authority) in order to ensure that the person so charged is afforded a fair hearing within a reasonable time by an independent and impartial **court** established by law in terms of Article 39 of the Constitution. This was made clear by the Maltese courts on several occasions one of which is ***Angelo Zahra vs Prim Ministru*** where the court made it clear that "*hemm kazijiet fejn il-multa amministrattiva tant tkun severa li tikkwalifika bhala penali ghax tenut kont tas-severita' taghha titqies derivanti minn akkuza kriminali ghall-finijiet tal-Artikolu 6 tal-Konvenzjoni u tal-Artikolu 39 tal-Kostituzjoni*".

In ***Rosette Thake noe. Et v. Kummissjoni Elettorali et*** datat 8.10.18 f'dan ir-rigward qalet illi "*Fit-tieni lok, din il-Qorti taqbel mal-konsiderazzjonijiet u konkluzjoni raggjunta mill-ewwel Qorti li l-massimu tal-multa amministrattiva li tista' timponi l-Kummissjoni huwa wiehed ingenti u huwa intiz sabiex iservi ta' piena ghal min jikser l-obbligi tieghu taht l-Att u huwa wkoll ta' deterrent billi ghandu l-ghan li jipprevjeni agir vjolattiv tal-Att. Ghalhekk il-multa fil-livell massimu taghha kontemplata fil-ligi ma tistax titqies bhala rizarciment tad-danni jew bhala multa purament amminstrativa. Fir-rigward din il-Qorti taghmel referenza ghall-kazistika, lokali u ewropea, citata in extenso mill-ewwel Qorti, u tosserva li fid-determinazzjoni tal-punt jekk multa amministrattiva ghandhiex in-natura ta' piena, ma jiddependix min-nomenklatura li tinghata fil-ligi domestika, izda tiddependi wkoll minn natura u mis-severita` tal-multa*";

The Appellants therefore submit to this administrative tribunal that the decision-making process lacked the proper guarantees for a fair hearing and the principles of natural justice (the right to a fair hearing, amongst others) have not been respected.

Moreover, the Appellant respectfully submits that the whole process impinges on its right to a fair hearing because it has been found guilty as charged by the MFSA acting as judge and prosecutor only being given the opportunity to 'defend' itself against an already declared pre-determined minded position by its adjudicator that brought the charges against it. On this point, the Appellant notes that it was not privy to any

opinions, recommendations or documentary evidence which formed part of MFSA's investigation which led to the imposition of its fine and this fact alone goes against the principles of 'transparency' and 'equality of arms' which are fundamental to the right to a fair hearing which must be effectively applied, more so when an appellant is combating a mightier opponent, such as the MFSA. At this stage, the Appellant reserves the right to request this Tribunal to order that the Appellant's file and its content is made available to this Tribunal and the Appellant as without access to its file the Appellant is unarmed when trying to seek justice.

(B.2) Lack of Impartiality: The investigative and decision-making bodies of the MFSA overlap, leaving no room for real impartiality in the whole process. Accordingly, the whole process is in breach of the principles of natural justice and of the constitutionally protected fundamental right to a fair hearing also because the unit within the MFSA which investigated the Appellant forms part of the same body that in turn evaluated that unit's same findings and the Appellant's representations with a view to reaching the Decision.

This was also the situation in the UK which was subsequently reformed to bring it in line with the European Convention on Human Rights and the 1998 UK Human Rights Act so as to ensure a fair hearing.[1] Pior to the reform in 2000, the Joint Parliamentary Committee on Financial Services and Markets concluded that '*there has been a perception that the Financial Services Authority's internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and also that the FSA will be able to act as prosecutor, judge and jury*'.[2] Due to the strong belief that the design of the decision-making process (which did not provide for a division of the said functions) lacked fairness, the legislator sought to separate these functions thereby creating a separate Regulatory Decisions Committee responsible for reaching decisions on disciplinary matters referred to it by the investigators. Although still forming part of the Financial Conduct Authority (following reforms to the UK Financial Services Act 2012) by deciding on its behalf, the members of the Regulatory Decision Committee are independent and are not involved in other matters of regulation.[3]

In *Dubus SA vs France*,[4] the European Court of Human Rights found a violation of Article 6(1) due to the apparent bias created by the lack of a clear division of functions within the French Banking Committee (FBC). [5] The applicant, an investment company registered in France was reprimanded by the FBC on violations of French regulatory law. The FBC had carried out the relevant investigation procedures and issued an inspection report followed by disciplinary proceedings against the applicant. The applicant raised the anomaly that the FBC is not only investigating and prosecuting but it is also acting as a judicial authority by hearing and adjudicating whether the applicant was in fact in breach, thus acting as a judge in its own case and in turn breaching the principle of *nemo judex in causa propia*. Here the Applicant claimed that disciplinary proceedings undertaken by the FBC lacked independence and impartiality which are

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[1] Iain MacNeil, An Introduction to the Law on Financial Investment (2nd edn Oxford, Hart Publishing, 2008).

[2] Report of the 27 April 1999. Part VI para 147.

[3] George Staple QC, 'Financial Services and the Human Rights Act', in Clifford Chance (editor) The Human Rights Act and the Criminal Justice and Regulatory Process (Hart Publishing 1999)132.

[4] Dubus SA vs France, Application no: 5242/04 (ECHR, 11 June 2009)

[5] French Banking Commission which is the national supervisory authority responsible for credit and investment establishment, tasked with the investigation, prosecution, and judicial adjudication of any such irregularities committed in these markets.

essential to a fair hearing and thus was in breach of Article 6(1) of the ECHR. The Strasbourg Court remarked that the lack of any clear distinction between the functions of prosecution, investigation and adjudication in the exercise of the FBC's judicial power, was not compatible with the requirement of an 'independent and impartial tribunal' under Article 6(1). It added that while these fused functions may not necessarily render the proceedings unfair of themselves, it created an appearance of 'prejudgment' by the said Authority. The Court held that despite the French government's defence that different arms of the institution undertook the functions of prosecuting and adjudication, in practice it gave the impression that one is prosecuted and tried by the same entity. According to *Dubus* the mere appearance of 'prejudgment' was sufficient because justice must only be done but must appear to be done.

These breaches of the Constitution and the European Convention on Human Rights (as outlined in B1 and B2 above and which shall be further elaborated on throughout these appeal proceedings) vitiate the MFSA's Decision and render it intrinsically and manifestly unfair. It follows that the mere appearance of a breach of Appellant's right to a fair trial gives rise to the manifest unfairness required to vitiate MFSA's Decision which ought to be struck down by this Tribunal.

C. Disproportionate application of Administrative penalty – Manifestly Unfair

Without prejudice to the above, the Appellant objects to the quantification of the Administrative Penalty as it is disproportionate in nature thus resulting in an unequal level playing field which is also a fundamental principle with regards to regulatory supervision.

According to the OECD Core Principles of Private Pension Regulation (which serve to encourage efficient regulation and supervision by pension regulators) (the "**OECD Principles**"), supervisory authorities such as the MFSA should ensure that investigatory and enforcement requirements are proportional to the risks being mitigated and that their actions are consistent throughout.

The OECD Principles specifically state that "*the remedial actions and if necessary sanctions* (the imposition of sanctions should always be used as a 'last resort' as the OECD insist that the regulators are to first prevent and then protect through monitoring and guidance) *imposed by the pension supervisory authority should be proportional to the amount of risk posed by the fund to its members and beneficiaries and the pension system as a whole - taking into account the nature, scale, complexity and seriousness of the potential compliance irregularities relating to the relevant party - and should represent the most efficient use of supervisory resources.*".

The OECD Principles go on to say that *"once a problem is identified, a clear and well-defined 'due process' should be followed. Due process describes the checks and balances that a supervisory authority should have in place to ensure that supervised entities are treated fairly, consistently and transparently. To ensure proportionality, requirements should be set out in legislation, secondary regulation or detailed industry guidance (outlining various circumstances and risk as well as the associated intervention measures). Appropriate documentation, guidance and examples should be regulated or provided to staff. Subject to the availability of regulatory and administrative powers and measures, the response should be escalated appropriately to achieve the desired regulatory objectives. Depending on the nature, scale and complexity of the problem detected, a graduated response or exceptional measures*

should be adopted. In fulfilling its supervisory powers, the pension supervisory authority should give pension funds and plans flexibility, where appropriate, in the way they achieve compliance with regulatory requirements.

Supervisory decisions and intervention should be consistent (both horizontally between pension funds and vertically over time), taking appropriately into account circumstances of each individual case. Supervisors should have well-documented procedures (for example, documentation, training, peer review, specialist team reviews and/or senior oversight) for ensuring that similar decisions are taken in similar circumstances and that these decisions are taken on objective and unbiased grounds".

It is made amply clear (also through the OECD Working Papers on Insurance and Private Pensions (Regulation and Supervisory Oversight) that the effective and consistent functioning of a regulator depends on ensuring that a level-playing field applies to all licensed entities.

The Appellant notes that according to the Authority's website, the fines imposed on other RSA's were minimal and the maximum administrative penalty imposed on a pension administrator was €70,000 for breaches which are far more serious than the alleged breaches relevant to the Appellant. As shall be evidenced, in December 2020, the MFSA imposed a fine of €30,000 to a pension administrator for (a) failing to adhere to a post licensing condition (b) failure to notify the regulator with a material fact (c) failure to obtain consent from the Authority prior to outsourcing its custody function and (d) failure to operate according to its scheme document. Very similar breaches to the case in question following a risk-based analysis.

Yet the MFSA sought to fine the Appellant an excessive cumulative fine of EUR 160,000 for breaches which are of a much lower risk using the risk-based approach of supervision which is also the recommended approach regulators are to take when supervising pension administrators. The Appellant also contends that the MFSA did not provide any evidence that the alleged breaches resulted in any serious loss of funds in relation to the beneficiaries.

Inequality of regulatory treatment is unfair and in the law of pensions this principle is supported by an important economic consideration – pension funds play a key social role in channelling retirement contributions to finance retirement benefits. Apart from the need for equality of treatment for reasons of equity, there are sound economic reasons why enforcement should be uniformly, consistently, and rigorously enforced with respect to all administrators. Hence the principle of proportionality is to be maintained to establish boundaries to preempt excess of regulatory authority and to achieve sound regulatory practice. Exceptional regulatory treatment must come with systematic reasons that outweigh the need for equality: the Appellant was and is not aware of any systematic reason giving rise to the imposition of the highest penalty to be imposed on a pension administrator.

This renders the MFSA's decision intrinsically and manifestly unfair and ought to be struck down by this Tribunal.

D. PLEAS ON THE MERITS OF THE "BREACHES" FOUND BY THE MFSA

Without prejudice to the above, the grounds of appeal on the merits are clear and consist of the following:

D.1 Alleged failure to act in the best interests of members:

- ineffective due diligence on Mr. Pye – Manifestly Unfair & Abuse of discretion.

At the outset, in no uncertain terms, it is to be made clear to this Tribunal that the MFSA attempts to admonish MCTM for onboarding the advice of an introducer appointed by a number of members of the pension scheme managed by MCTM - Mr John Pye of Waterstones Investment Associates Inc–an 'unregulated' advisor (at the time when advisors did not need to be so regulated) and who was later found to have breached the UK Chartered Insurance Institute's Code of Ethics through his repeated misuse of CI Intellectual Property. The UK institute consequently imposed several sanctions on Mr Pye. The MFSA tries to pin down MCTM under a number of rules for exactly the same thing (as stated in MCTM's reply letter) just because (as is very apparent) the MFSA are discontent with Mr John Pye and not with MCTM but MCTM are within the Authority's jurisdiction and are the obvious sacrificial lamb.

The members of the Scheme were members of a member directed scheme which means (as correctly pointed out by the Authority) *"that the members can direct their investments of their individual accounts*" and (as also correctly pointed out by the Authority) "*as the scheme is member-directed, members are able to indicate to MCTM their preferred investment advisor/manager when presenting their letter of wishes regarding their investment preferences."*

The Authority in its Decision concluded that "*it found that the due diligence carried out by MCTM was weak and ineffectiv*e" even though the due diligence (as stated by the Authority in its Decision) would involve the RSA "*requesting information from the investment advisor/manager such as company registration, licence and copies of passports of directors. In the case of investment advisors who sometimes also act as introducers, a Terms of Business/Introducer Agreement is signed. MCTM would then complete an Advisor/Introducer Assessment Sheet and approves the investment advisor or investment manager accordingly"*. All the above documents had been collected by the Appellant and retained in file. However, the Authority states that (with respect to Mr Pye) the information was "little". The MFSA also objected to MCTM's acceptance of My Pye's qualifications "*which did not permit Mr Pye to provide investment advice and pensions planning but is solely a qualification for individuals who would like to provide advice on pension transfer activities*".

The MFSA simply makes a statement of 'due diligence being too weak' or 'information too little' without providing the basis and the motivation behind such conclusion or guidance as to what was expected from MCTM. Clearly the Authority is simply throwing all sorts of accusations in the pot without substantiating or providing the basis for such findings. The Business Introducer Terms of Agreement (attached as **Doc MCTM4**) Mr Pye (chosen as a broker/advisor by various members of the Scheme) confirmed that he was regulated in the UK by the Chartered Insurance Institute and could therefore act as an introducer. He also stated that he was qualified to take on the role as introducer.

Moreover, once again the Appellant fails to understand what the Authority deems by "effective" due diligence. Yet again, MFSA simply sets an undefined, unguided and highly ambiguous measure of what it requires. Accordingly, service providers like the Appellant are in no position to know when and at what point they would have reached MFSA's moving mark and at best have to guess and hope that their procedures are "effective" in the eyes of the MFSA. MFSA provided no insight as to what they deem

to be "effective", thereby rendering the Appellant unable to address MFSA's concerns or present an adequate defence in this respect. With such undefined standards, service providers like Apellant could hardly ever get it right as happened in this case. This is abusive and manifestly unfair.

MCTM acted in accordance with a practice accepted as proper in the industry. What is happening here is that the MFSA is testing the due diligence process not on what was actually done at the time but rather by what they consider ought to have been done with the benefit of hindsight. This is evident throughout the Decision an example of this being their consideration in which they state that "... ***regardless of the fact that the Pension Rules at the time did not explicitly require an RSA to perform such due diligence"***.

Reference is made to ***Mr D vs Pension Practitioner.com (PP.com)***[6] in relation to Scheme Edge Group Pension Fund – decided by the UK Ombudsman on the 27 November 2017 by means of which the UK Pension Ombudsman rejected a complaint against a small self-administered scheme (SSAS) provider in relation to investments in carbon credit investments made on the instigation of an introducer.

In brief the facts of the case are as follows: the provider sent the documents to set up the SSAS to the unregulated adviser. The documents set out, amongst other things, that the introducer was not a signatory to any investments or bank accounts and did not recommend any investment products or give investment advice (this was also clear in the documents provided by Mr Pye to the Scheme members). The investment failed and a member (Mr D) complained to the Pension Ombudsman arguing that the member should have been told that the unauthorised introducer was not FCA "accredited" and he also referred to COBS rules 2.1.1 (where a firm must act honestly, fairly and professionally in accordance with the best interests of its client) and 9.2.1 (where a firm must ensure that a personal recommendation, or a decision to trade, is suitable for its client) governing the investments made from monies held within the SSAS.

The Ombudsman found that as the unauthorised introducer appeared to be acting upon the instructions of the member, it was for Mr D to carry out his own due diligence on his "adviser". The Ombudsman concluded that the onus and risk was on the member and not on the Scheme Administrator since he was chosen by them.

- ***Mr Pye was not licensed to provide investment advice – Wrong Application of the law***

With regards to the allegation that Mr Pye was not qualified to give investment advice, the Appellant states that, at the time, there was absolutely no legal or regulatory requirement for advisors to be licensed.

The members of the Scheme knew and understood that Mr Pye was not providing them with financial advice as the consent form instructing Mr Pye to execute their instructions clearly stated that he was not licensed to provide investment advice which in fact he did not and was not required to be licensed. MCTM, Mr Pye and the Scheme members had documentation in place to ensure that each of the three (the member, introducer and administrator) knew and understood the limits of their role in the overall process and that any loss was caused by the members decision, knowing that the underlying investment was chosen by them.

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[6] https://www.pensions-ombudsman.org.uk/sites/default/files/decisions/PO-7504.pdf

The Appellant also refutes the Authority's decision to impose a fine because Mr Pye who was appointed by the members of the scheme (at the time when the particular investments were chosen all advisers were appointed by the members themselves as this was permitted under the rules applicable at the time) was not regulated or that his advice resulted in losses on the investments. This is an unjustified allegation, and it is re-iterated that, at the time, there was absolutely no requirement for advisors to be licensed or regulated.

In fact reference is made to the Parliamentary Debate Number 339 dated 12 April 2011 in which it was made amply clear that:

*"**ONOR. TONIO FENECH:***

.. ommissis..

*Tinkludi provvedimenti dwar l-għotja jew tneħħija tal-liċenzji u rikonoxximenti. Fil-fatt anke hawnhekk qed indaħħlu l-kunċett ta' liċenzjar. Fil-liġi tal-iSpecial Funds Act kienet biss reġistrazzjoni. Ovvjament jekk irridu ntejbu l-qafas regolatorju huwa meħtieġ li mhux sempliċiment xi ħadd jirreġistra biex ikun jista' jagħmel fond imma li jkun illiċenzjat u allura jsir **il-proċess ta' due diligence** u jsir il-proċess ta' skrutinju li huwa meħtieġ. Dan anke biex nassiguraw li pajjiżna jibqa' jżomm ir-reputazzjoni għolja li għandu f'dan is-settur, ta' ġurisdizzjoni li hija serja. Il-kunċett ta' reġistrazzjoni qed jispiċċa f'dan l-abbozz ta' liġi u minflok qed tidħol is-sistema ta' liċenzjar u allura l-ħtieġa li operatur f'dan is-settur irid ikun detentur ta' liċenzja."*

In Addition to the above, the latter section of the Advisor/Introducer assessment sheet **(DOC MCTM 5)** reads "the adviser/introducer is acceptable to MC Trustees when all following boxes can be ticked..."and at no point makes refrence to the advisor being licensed to carry out financial/investment advice. In actual fact, the Advisor/Introducer assessment sheet clearly indicates that "the Firm" ie Mr Pye/Waterstone is **not** a regulated fiancial advisor. Consequent to the change in regulation, MCTM informed Mr Pye that he could no longer advise members of the Scheme. The engagement with Mr Pye was terminated: no rule was breached. Rather than taking this quick remedial action into consideration (as a general principle, in deciding whether or not to take disciplinary action against any firm for breaches of the rules, one of the factors to be taken into consideration is any remedial steps the firm has taken since the breach was identified, including whether consumers have suffered loss and been compensated[7]) the MFSA states that the termination of engagement was wrongly worded. Once again, it is apparent that the MFSA is trying to put fault on MCTM where there is none.

-Licence granted to the RSA under the TTA is seperate and distinct from the licence granted to the RSA in the the RPA- Wrong Application of the law & Abuse of Discretion.

The Decision refers to MC Trustees being licensed and acting both under the TTA and under the RPA and in fact the Authority has subjected MC Trustees to two separate fines for the same alleged breach (being the allegation that it did not act in the best interests of its members), simply due to this trust licence.

As submitted in MC Trustees reply letter, the Appellant makes it clear that the licence granted to it under the TTA is separate and distinct from the licence granted under the RPA and the fact that there can be an abridged process under the Pension Rules for the Appellant to accede to the licence to as act as RSA under the RPA, does not mean that the Authority can impose a double fine on the Appellant simply because the pension scheme in question is a trust.

[7] What is mis-selling? 0 J.I.B.L.R. 2004, 19(1), 1-6

Once again the Appellant reiterates that while it acknowledges that since the Scheme is a trust and that certain parts of the TTA apply to the Scheme in general, simply because it is a trust based scheme, it is indeed unjust and an abuse of the Authority's power to submit the Appellant to a dual system of regulation and fine the Appellant accordingly when the sole regulatory regime that should apply to MC Trustees as administrator of the Scheme should be that of the RPA by virtue of the fact that the Scheme is a pension scheme. The fact that the MFSA are trying to fine the Appellant for alleged breaches under their basic trust licence and their RSA licence is not only unfair but also mean-spirited (the latter is apparent in the fact that although the Appellant is regulated by the RPA the fine under the TTA (€50,000) is more than double than the fine under the RPA (€20,000)!). The MFSA ex admissis (in a footnote) state that "*although the Authority has found MCTM to have breached more than one requirement, for the purposes of determining the administrative penalty, the identified breaches were considered as one breach*": this is correct: the breach would be one breach as the licence is one layered (not dual) licence! In fact the MFSA barely explains why the breaches of the TTA and the Code of Conduct occurred because it relied entirely on the argumentation made in relation to the alleged breach of the RPA, therefore strengthening the Appellants arguments that the rules want to cover the exact same principles.

D.2 Alleged failure to implement adequate control procedures- wrong application of the law.

According to the Authority's decision the *Appellant "did not make any effort to gain an understanding of the invesments that were recommended by the members' financial advisors, but merely filled out dealing instructions based on such recommendations and forwarded them to investment houses without questioning the financial advice provided to members"* thus resulting in the fact that MCTM neglected *"its responsibility as RSA to safeguard themembers interests and ensuring that proper and prudent operation practices are undertaken in line with the liquidity and diversification requirments laid down in the Pension Rules, the Scheme's investment restriction, and the level of risk members were willing to accept"*.
With all due respect, it is unfair that the MFSA is stating that the Appellant did not act prudently on the basis of the above-allegation. The MFSA fails to define their interpretation of the word 'prudent' and it would seem that, according to the MFSA prudent behaviour solely equates to '*the monitoring of investments so that the principles of prudence and diversification are adhered to ..*" MCTM understand that 'prudence' is an over-riding principle and equates to acting in accordance with scheme documentaton, understanding the terms of the trust, taking advce on technical matters (which they did), acting in the best financial interests of the scheme beneficiaries and the duty to ultimately invest- which they did. As explained in the Appellants reply to the Minded Letter, the adequacy and liquidity of the pension assets for the scope of providing the member with a pension in a QROPS is different to the classical pension provision in that members of a QROPS (as from January 2016) have the option to go for 'flexi access' which effectively means that they can withdraw any part or all of their pension at any time, as long as the member's pension fund originated from a UK pension. Also the Authority seems to completely disregard the fact that most members introduced by Mr Pye were introduced into the Scheme in 2011-2016 when the investment restrictions applicable today and the specific rules applicable to member directed schemes today, were very different.
This is crucial as MCTM did act according to the law at the time and did have adequate

controls in place in accordance with its obligations back then. One example is that MCTM engaged Lombard Bank Malta ("**Lombard**") in 2010 to provide MCTM with investment management services to the Scheme and to monitor the liquidity and diversification of the assets held by the Scheme on a consolidated basis. In order to ensure that the best interests of the beneficiaries is retained, Lombard would monitor each portfolio and release reports stating that '*in their opinion the Scheme's portfolio has to a reasonable degree followed the principles of diversification and liquidity suitable for long-term pension fund*'.

In addition to the above, the MFSA, in its Decision states that "..*To this effect, the appointment of Lombard Bank Malta plc was effectively terminated by means of a letter to MCTM dated 19 December 2019, explaining that it was being precluded "from providing the complete 'investment management function'"* thus negatively insinuating that Lombard was not comfortable with the way the Scheme was operating for some reason or another. The truth is that Lombard terminated their engagment as the law had changed and diversification and liquidity had to apply to individual member accounts and not on the Scheme as a whole.

With respect to the notion of "prudence and best interests" in Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd and others [2015] EWHC 448 (Ch), Asplin J confirmed that "*the duty to act in the best interests of the beneficiaries should not be viewed as a paramount, stand-alone duty separate from the proper purposes principle*" thus when considering the scope of this duty, it is necessary to understand that at the time (without the benefit of hindsight) the Appellant exceeded all expectations at law in an attempt to further safeguard the best interests of the members of the Scheme.

It must be also made clear that the over-riding principle of 'prudence' does not mean that the Appellants have an obligation to guarantee that the investment will not make any loss and if any loss is made, then the Appellants guarantee a refund thereof. There is no understanding to this effect and it would be unsound for the MFSA to expect service providers to act as guarantors for any possible (foreseeable or unforeseeable) loss on behalf of their members unless evidence of negligence is apparent. The mere fact of investment falls does not establish a case for regulatory breach and automatic reimbursement of any loss suffered by the relevant member.

D2.1 - Allegation of mis-selling - abuse of discretion.

The Authority also alledged that the Appellant permitted the investment of assets in investments that were not suited for retail investors.

It is submitted that the MFSA is imposing a more onerous obligation on MCTM than that required by the pension rules. A pension administrator is not entrusted with assessing suitability. Neither can it do so. Its role is limited to administering the scheme in a manner so as to ensure that it meets the criteria of the said member pursuant to the investment advice received by the Member from its appointed investment advisor and to ensure that the limitations imposed upon it by the investment restrictions (if applicable) are being adhered to.

Appellant was not in a position to make recommendations on the suitability of the investments or otherwise as explained above, but more importantly the requirement for the investments to be retail in nature in the Pensions Rules came into force **after the investments were originally placed** and therefore should not have had any bearing on the Authority's decision or reasoning.

In their considerations, MFSA state that "*The Authority is of the view that as a result of MCTM's shortcomings in so far as due diligence is concerned, the RSA made it*

possible for Mr Pye to provide improper financial advice to Scheme members". There is absolutely no indication or proof evidencing the fact that Mr Pye did in fact provide improper financial advice to Scheme members. The words 'improper financial advice' is used flippantly by the MFSA in its' decision which is imprudent as the regulator knows the complexities of such statement in the financial services industry. There is nothing to show that the 'advice' given by Mr Pye resulted in the member's investment decision or was itself the product of a process of selection involving influence. As the Tribunal is aware, the simple giving of information without any comment will not amount to advice. What constitutes 'investment advice' is information given to a member which involves a process of selection or an element of comparison or evaluation or persuasion which is likely to lead to a relevant transaction by the member. Also the word 'improper' should not be used in its general term in a financial investment context. Improper advice is commonly used to refer to an advised sale which does not meet the requirements for 'suitability' or the 'know your customer obligations'. It must be emphasised that it is the suitability of the recommendation for the member, not the investment performance of the product that matters. As long as suitability was established at the time of sale, and the required explanation of risk made, then member dissatisfaction about investment returns achieved gives no basis for an allegation of 'improper advice' or 'mis-selling'. The MFSA does not elaborate on this serious allegation and once again the Appellants are at a loss as to the investigation which led to such conclusion. The Appellants refute this allegation in its' entirety.

The Appellant refers to a decision by the ***Court of Appeal Chancery Division [2020] EWHC 1229 between Russell David Edward Adams and Options UK Personal Pensions LLP vs the Financial Conduct Authority*** decided on the 1 April 2021, which appeal arises out of the transfer by the claimant (Mr Adams) of a pension fund into a 'self invested personal pension' (SIPP) and the investment of the proceeds in store-pods. The investment having proved very unsuccessful, Mr Adams sought relief against the operator of the SIPP. The administrator of the SIPP claimed that it acts on what was termed as 'execution only' (same as the Appellant) and 'did not provide any advice and acts only on the express instructions of its members'. The Court of Appeal did not accept the Mr Adamas contentions and dismissed the claim on the basis of a lack of causal connection between the advice given and the losses made.

Judge Havelock-Allan QC considered the meaning of "advice" and said:

> *"81.. The key to the giving of advice is that the information is either accompanied by a comment or value judgment on the relevance of that information to the client's investment decision, or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient. In both these scenarios the information acquires the character of a recommendation.*
>
> *82. To attempt any greater definition of the giving of advice in an investment context would be unwise and is probably impossible. I suggest, however, that the starting point of any inquiry as to whether what was said by an IFA in a particular situation did or did not amount to advice is to look at the inquiry to which he was responding. If a client asks for a recommendation, any response is likely to be regarded as advice unless there's an express disclaimed to the effect that advice is not being given. On the other hand, if a client makes a purely factual inquiry such as 'what corporate bonds are currently yielding X% or 'how does this structured product work?, it is not difficult to conclude*

that a reply which simply provides the relevant information is no more than that."

The question whether MCTM was in breach of its duties (suitability or otherwise) must be judged without the wisdom of hindsight, by reference to the regulatory requirements in force at the time of the transaction. The FCA have also published a recent note on mis-selling clarifying that:

"Firms are rightly concerned that they should not be subject to retrospective redefinition of regulatory requirements, which could be coloured by hindsight. Retrospective redefinition is out of the question, given the need for the FSA ultimately to justify any proposed disciplinary action before the Financial Services Markets Tribunal. The rules and standards to be enforced will continue to be those in place at the time of the sale and not retrospective reconstruction."

Therefore, the Appellant humbly submits that this allegation must also be dismissed on the above-mentioned basis.

E.1 Allegation that individual accounts not adequately liquid– wrong application of the law

The Authority alledged that the Appellant allowed the investment of some of the Scheme's assets in CISs having high level of risk thus risking that the CISs **could** suffer from insufficient liquidity. The Appellant explained, in its reply letter, that all investments were chosen by the members themselves, supported by the advice of their appointed financial advisor, regarded as overall adequate and approved by Lombard at the time of the choice made by the member, and finally accepted and approved by the Appellant who had the sole obligation of ensuring compliance with the pension rules at the time and who did not have the authority or license to challenge any of the investments chosen as being adequate for the member of otherwise, unless a clear breach of the pension rules applicable at various points in time was identified.

In fact as stated above, the Appellant had entered into investment management agreement with Lombard specifically to monitor and report on the liquidity and diversification of the assets held by the Scheme on a consolidated basis.

As stated in the Appellants reply to the Minded Letter, it must be made amply clear that the Scheme is a QROPS (Qualifying Recognised Overseas Pension Scheme) for UK tax purposes meaning that the normal withdrawal rules do not apply by virtue of Pension Rules for Personal Retirement Schemes B 4.6.8. Simply, this means that the liquidity requirement must be seen in light of part B 4.6.8. which states that "in respect of such UK Transfer Funds or UK Tax Relieved Funds, Members shall take benefis in a manner consistent with those provided for under UK rules provided for under UK Authorised Member payments for pension income under UK legislation'. Therefore the liquidity requirement for a QROPS is very different to the classical pension provision in that members of a QROPS, have the option to go for flexi-access' ie they can withdraw any part or all of their pension at any time, as long as the member's pension fund originated from a UK pension.

In addition to the above, MCTM refers to the Pension Rules for Personal Retirement Schemes with respect to requirements on investment restrictions as well as the application of the Scheme's investment policy at the level of the member account. MCTM as explained in its Reply Letter explained that these requirements apply to the existing investments of members in amember directed shceme once any movements occur within that member's pension account or in the case of new investments entered into, as from 1 January 2019. However the Authority replied and said that *"given that the Scheme has always operated on a member-directed basis* (N.B. member directed schemes were only introduced in 2016 hence it is wrong to state that the Scheme has

always operated on that basis), *it has always been MCTM's responsibility to monitor the investment held within the indivdual member accounts. The new Pension Rules being mentioned by MCTM in its representations have simply clarified this requirement."* This is entirely incorrect, the new Pension Rules **introduced** this requirement which has a completely different meaning to the word 'clarified'. This requirement did not exist and now it does!

It is further submitted that MFSA failed to establish a causal link between the alleged wrongdoings outlined in its Decision and the liquidity of the sub-funds of the Schemes. There has been absolutely no loss suffered by the members hence it is wrong and unjust for the Appellant to be fined for a 'potential' loss which has not yet occurred and will not or might not occur.

E.2.2 Alleged failure to act in conformity with the law and the scheme particulars - Wrong Application of the law.

MCTM notes that the Authority fined MCTM for breaches of the Special Funds (Regulation) Act which has been repealed in 2016 with the coming into force of the RPA. The MFSA cannot impose a fine on the basis of an Act which is no longer in force at the time of the Minded Letter.

Firstly, the Authority makes reference to Article 12 of the Interpretation Act (Chapter 459 Laws of Malta). Profs. J.M Ganado in his notes on Prolegomena specifically on the interpretation of Article 12 of the Interpretation Act, cautions the use of Article 12 as this is to be interpreted very limitedly when dealing with administrative acts since the logical outcome is that non-retroactivity is absolute (due to the imbalance of powers between the regulator and the individual). He cites the case *Baldacchino vs Caruana Demajo*[8] in which the court clarified that "*meta m hemmx klawzola retroattiva, u meta l-kliem tal-ligi ma jkunux jimportaw retroattivita, ma ghandux ikun hemm effett retroattiv, lanqas jekk tkun materja ta interess jew ordni pubbliku.*"

It is hereby submitted that with all due respect to the Authority, it cannot impose a fine of the basis of an Act which is no longer in force at the time of the minded letter in question. It is undoubtedly correct to state that after the repeal of a law, no penalty can be enforced nor punishment inflicted for a violation of its provisions committed while it was in operation, unless provision be made for that purpose. To say that proceedings can nevertheless be followed up once a law has been repealed contravenes the sense of the word 'repeal'. That a rule of such importance to the general welfare is not accepted by the Authority is remarkable and an example of thoughtless judicial laissez faire by the Authority. Enforcing an ex post facto law is wrong: there was no such law at the time of the Minded Letter so the act could not come within the purview of the MFSA.

On this point, reference is made to Parliamentary Sitting Number 338 held on the 12 April 2011 in which the Pensions Retirement Bill was discussed clearly stating that the Special Funds (Regulation) Act was to be repealed, specifically:

"**ONOR. TONIO FENECH:**

".. omissis..

> *Ħassejna wkoll li mhux biss nemendaw l-Ispecial Funds Act - li konna introdućejna għaxar snin ilu f'dan il-pajjiż - imma minħabba l-iżviluppi li seħħew ukoll fuq livell Ewropew, b'direttivi ġodda li daħlu fis-seħħ u b'ċerti żviluppi u opportunitajiet li rajna fid-diskussjoni li kellna mal-prattikanti f'dan is-settur,* ***ħassejna l-ħtieġa li minflok nipprovaw nagħmlu patch-work ta' dik il-liġi, nipproponu liġi ġdida.*** *(emphasis added)."*

[8] 1. Baldacchino vs Caruana Demai.o, Vol. 38, Part 1, Page 61, (1954).

This was further stated in the Parliamentary Sitting Consideration of Bills Committee stage meeting number 081 held on the 20 July 2011 wherein during the parliamentary debate the following was said:

> *"**ONOR. TONIO FENECH (Ministru tal-Finanzi, l-Ekonomija u Investiment):** Sur President, din il-liġi tissostitwixxi dik li kienet l-iSpecial Funds Act. Ħafna mill-affarijiet mhux neċessarjament inbidlu imma ovvjament billi qed issir liġi ġdida qed nerġgħu narawhom fil-liġi tagħna.. omissis...."*

In its Decision the Authority acknowledges that the Special Funds (Regulation) Act has been repealed in 2015 with the coming into force of the RPA, though it refers to Article 55 of the RPA which states that "*subject to the provisions of article 56, the Special Funds (Regulation) Act is hereby repealed without prejudice to anything done or which may be done under that Act , saving every authorization, approval or order taken or commenced thereunder, which shall continue to be valid ad in force, as If such authorization, approval or order were taken or commenced under this Act*" thus insisting that the MFSA can still act on any shortcomings that occurred under the Special Funds (Regulation) Act even though the act was repealed. This was clearly not the intention of the legislator and it is amply clear that this transitory provision relates to and refers to any authorization granted under the act which shall continue to be valid. This was clearly the legislator's intention and reference is made to the parliamentary discussion of the final bill- Consideration of Bills Committee meeting number 081 held on July 20 2011 in which the legislator stated the following:

".. omissis..

Klawsola 55 – Tħassir tal-Att li Jirregola Fondi Speċjali. Kap. 450.

Clause 55 *– Repeal of the Special Funds (Regulation) Act. Cap. 450.*

THE CHAIRMAN: Il-Ministru.

ONOR. TONIO FENECH: Sur President, din il-klawsola qed tħassar l-Att li Jirregola Fondi Speċjali.

THE CHAIRMAN: Hawn iktar rimarki? (Onor. Membri: *No*) Il-mistoqsija hija klawsola 55. Dawk favur? (Onor. Membri: *Aye*) Dawk kontra? *Agreed.*

Klawsola 55 għaddiet nem. con. u ġiet ordnata biex issir parti mill-Abbozz ta' Liġi.

Klawsola 56 – Setgħa li għandu Ministru biex jagħmel arranġamenti transitorji.

Clause 56 *– Minister's power to make transitional arrangements.*

ONOR. TONIO FENECH: Sur President, din il-klawsola qed tirregola t-transizzjoni biex dawk il-fondi li kienu stabbiliti taħt l-Att l-antik jibqgħu joperaw taħt l-Att il-ġdid.

THE CHAIRMAN: Hawn iktar rimarki? (Onor. Membri: *No*) Il-mistoqsija hija klawsola 56. Dawk favur? (Onor. Membri: *Aye*) Dawk kontra? *Agreed.*

Klawsola 56 għaddiet nem. con. u ġiet ordnata biex issir parti mill-Abbozz ta' Liġi."

Moreover, if there was indeed a continuation of a regulatory regime and the Special Funds (Regulation) Act can be triggered whenever the MFSA deems it appropriate then why did the MFSA ask all Retirement Scheme Administrators to re-apply for their licences as RSAs and also their Scheme Licences, by the end of June 2015, six months after the RSA came into force?

On the basis of the above MCTM reiterates that the MFSA could not impose a fine on MCTM for an alleged breach of the Special Funds (Regulation) Act which was repealed in 2015 with the coming in force of the RPA.

E. 2.5 Failure to implement adequate procedures for the effective handling of complaints – abuse of discretion.

According to the Authority, the Appellant failed to make distinction regarding a complaint made orally or in writing and a number of discrepancies and inconsistencies had been found. As pointed out in its reply to the minded letter, the administrative errors and discrepancies pointed out by the Authority would have constituted a serious deficienty only in so far as a lodged complaint (be it formal or otherwise) were effectivly ignored, or not duly resolved, by the Appellant in its role as RSA. This is however not the case. The Appellant handles all complaints in line with the Promise and Compromise Procedure, which was made available to the Authority for its review. However the Authority proceeded to fine the Appellant a hefty €30,000 administrative sanction which is higher than the other fines imposed even though the 'risk element' is much lower that the other alleged breaches. This is manifestly unreasonable, unfair and unjust.

THEREFORE in light of the above, and for reasons that may be brought during the hearing of this appeal according to law, the appellant MC Trustees (Malta) Limited humbly requests that this honourable Financial Services Tribunal annuls in its entirety the decision of the Malta Financial Services Authority of the 16th April 2021, or varies and thus decreases the administrative penalty imposed and consequently proceeds to uphold the plea and submissions of the appellant, with costs.

Having seen the reply of the Authority of 23rd September 2021 wherein it stated:

1. That first and foremost this reply is being presented following an appeal filed by MC Trustees (Malta) Limited ('**Appellant**') on the 14th May 2021 in order to challenge the decision issued by the Malta Financial Services Authority ('**Authority**') on the 16th of April 2021 ('**Decision**' – a copy of which is hereby being attached and marked as **Dok MFSA 02**).

2. As will be explained in detail both in this reply and elaborated further in the course of these proceedings, in reaching its Decision, the Authority neither abused of its discretion nor did it act in a manner that is manifestly unfair as is being alleged by the Appellant. Neither did the Authority wrongly apply any provisions of the law, impose a disproportionate administrative penalty, breach the principles of natural justice or breach the Appellant's rights under the Constitution of Malta and the European Convention Act. The requests and allegations tabled by the Appellant before this Tribunal are therefore completely unfounded both in fact and at law and should be rejected in their entirety by this Tribunal with all legal costs to be borne by the Appellant.

3. By way of background MC Trustees (Malta) Limited was registered in Malta on 11th December 2009 as a limited liability company and authorised to act as a Retirement Scheme Administrator on the 4th February 2010. On the 1st of January 2016, after the coming into force of the Retirement Pensions Act 2011 ('**RPA**') and as part of the Transition Process in terms of Article 56 of the RPA, the Authority granted the Appellant a registration pursuant to article 6(1) of the RPA and authorised the Appellant to act as a Retirement Scheme Administrator to retirement schemes registered under

the RPA. Presently, the Appellant administers two Personal Retirement Schemes: (1) the MCT Malta Private Retirement Scheme which was licenced by the Authority on the 19th February 2010 and (2) the MCT Malet International Retirement Scheme which was licenced by the MFSA on the 31st December 2013.

4. The MCT Malta Private Retirement Scheme ('**the Scheme**') was established under the laws of Malta and governed by a Trust Deed and Rules on the 19th February 2010. The Scheme is administered by the Appellant and is a defined contribution personal retirement scheme which has the objective to provide retirement benefits for members. It is a member-directed Scheme which means that members can direct their investments of their individual accounts. The Scheme is in the form of a personal retirement scheme – a scheme not linked to an employment relationship and which is administered without any intervention of an employer. While the Scheme is open to residents and non-residents of Malta, the Scheme is not actively marketed to residents of Malta and is primarily targeted instead to non-residents of Malta, mainly former UK residents with pension rights accruing in the UK. In this regard, the Scheme is classified as a Recognised Overseas Pension Scheme ('**ROPS**') with the HMRC in the UK.

5. The Scheme is also primarily funded from cash contributions as well as from transfers of deferred pensions from UK registered Pension Schemes. The assets of the Scheme are not pooled, and no units are issued by the Scheme to its members. The trust arrangement consists of separate individual accounts catered for from an accounting perspective. The Scheme, however, issues aggregate audited accounts although individual members are provided with a personalised annual statement regarding their individual account. As the Scheme is member-directed, members are able to indicate to the Appellant their preferred investment advisor/manager when presenting their letter of wishes regarding their investment preferences.

6. When carrying out its investigation, the Authority noted that the Appellant was in breach of the Special Funds (Regulation) Act ('**SFA**') and the Pension Rules issued thereunder, the Retirement Pensions Act ('**RPA**') and the Pension rules issued thereunder as well as the provisions of the Trusts and Trustees Act and the Trustees Code of Conduct on the basis of the following:

   i. The Appellant failed to act in the best interest of its members and ignored its fiduciary obligations as a Trustee of the Scheme as required in Part B 2.3.1 of the Standard Operational Conditions applicable to Retirement Scheme Administrators, Articles 21(1) and 21(2)(a) of the Trusts and Trustees Act ('**TTA**'), as well as Paragraph 6.0 of the Trustees Code of Conduct;

   ii. The Appellant failed to implement adequate internal control procedures to protect the Scheme members from any financial losses in terms of Part B 2.6.4 (g) and Part B 2.7.1 of the Standard Operational Conditions applicable to Retirement Scheme Administrators;

   iii. The Appellant failed to ensure that the individual member accounts are adequately liquid at all times as required by Part B 2.7.2 (a) of the Standard Operational Conditions for Retirement Scheme Administrators as well as the Licencing Conditions issued by the Authority to the Appellant and the Scheme;

iv. The Appellant failed to meet its obligations in terms of Article 19(1)(l) of the Special Funds (Regulation) Act in view that it did not ensure that all instructions and decisions affecting the Scheme were in conformity with the law and the Scheme Particulars; and

v. The Appellant failed to meet its obligations in terms of Part B 1.4.4 of the Pension Rules for Service Providers in view that it did not implement adequate procedures for the effective handling of complaints resulting in inconsistent approach when classifying complaints as well as discrepancies in the recordkeeping of complaints.

7. By virtue of a minded letter issued on the 22nd of February 2021 ('**Minded Letter' – Dok MFSA 01**) the Appellant was informed of the issues identified by the Authority when carrying out its investigations and of the Authority's intention to impose a penalty amounting to €160,000 for all the potential breaches outlined in the Minded Letter after carefully taking into consideration, amongst others, the gravity and duration of the infringements, the aspect of proportionality, the level of co-operation and the measures in place to prevent such infringements. The Appellant was subsequently given an opportunity to submit its written representations, detailing specific reasons as to why the regulatory action proposed in the Minded Letter should not be taken by the Authority. Written representations were then submitted by the Appellant on the 23rd March 2021 ('**Representations**').

8. After careful consideration of all the circumstances of the case, including the representations tabled by the Appellant on the 23rd March 2021, the Authority informed the Appellant that its Representations did not justify a reconsideration of the Authority's minded position indicated in the Minded Letter. The Authority therefore proceeded to issue its final decision on the 16th April 2021 informing the Appellant of its imposition of an administrative penalty of €160,000 in terms of the powers granted to the Authority as per Article 17(6) of the Special Funds (Regulation) Act, Article 46 of the Retirement Pensions Act and Article 51(7) of the Trusts and Trustees Act.

9. That in the Appeal tabled before this Honourable Tribunal, the Appellant submits that the whole process of investigation carried out by the Authority raises a serious breach of its fundamental right to a fair hearing in the determination of its own civil rights and obligations as protected by Article 39(2) of the Constitution of Malta ('Constitution') and Article 6 of the European Convention on Human Rights ('ECHR'). The Appellant argues that this alleged manifest breach constitutes 'manifest unfairness' and thus raises, for the Appellant, a right of Appeal before this Tribunal under Article 21(9)(b) of the Malta Financial Services Authority Act ('MFSA Act').

10. That, the Authority submits in this regards that it is not in agreement with the Appellant's line of reasoning. It is evident that the grievance being raised by the Appellant in this respect is not aimed at the Authority, but it is, rightly or wrongly, aimed at the legislation in virtue of which the Authority acted and in this respect, the Authority humbly submits that this Tribunal does not have the competence or jurisdiction to determine such a grievance as raised by the Appellant in sections B1 and B2 of the appeal under examination and this as shall be shown during the course of

these proceedings. Reference is, in this respect, being made 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 in fact 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. Dik li qed jissolleva l-appellant hija kwistjoni dwar il-konformita' tad-disposizzjonijiet tal-ligi relattivi mal-Kostittuzzjoni u mal-Konvenzjoni Ewropea, liema kwistjoni hija mil-ligi espressament riservata ghall-qrati ta-gurisdizzjoni kostituzzjonali."

11. That, furthermore, and without prejudice to the above, the Authority also contends that it cannot comprehend why the Appellant raised such matters under the title 'Preliminary Pleas'. If the Appellant understands that Article 21(9)(b) of the MFSA Act provides it with a remedy to file an appeal on this point, then the arguments should be tabled before this Tribunal as a normal ground of appeal. There is nothing 'preliminary', by nature in the arguments raised by the Appellant in this respect.

12. That, moreover, the arguments raised by the Appellant on this point are premature at this stage when considering the fact that the Appellant is claiming a serious breach of its fundamental right to a fair hearing but has not even exhausted all other local remedies available unto it in the meantime.

13. That, in substance, the Authority refutes the allegation that its decision-making process lacks proper guarantees for a fair hearing and that the principles of natural justice have not been respected throughout said process. That the Appellant is very mistaken when it claims that during the decision-making process it was merely given an opportunity to defend itself against an already declared pre-determined minded position by its adjudicator. The Authority strongly emphasis that all the reasons and facts on the basis of which the Authority was minded to impose the administrative penalty were communicated to the Appellant in clear detail in the Minded Letter. The fact that the Authority was not convinced to change its mind following the Representations should not be taken to imply that the Authority had already taken its decision before communicating the Minded Letter to the Appellant. As this Tribunal is aware, there were other instances wherein the Authority was convinced otherwise following receipt of an appellant's representations, however, this was not the case with regards to the case under examination.

14. That furthermore, the Authority also wishes to emphasise that it has in built safeguards and structures specifically designed to ensure a fair hearing and that the organ of the Authority deciding on the imposition of the penalty is different from those persons who would have investigated the case in question. In this particular case, a review was first carried out by the Insurance and Pensions Supervision function after which the matter was then referred to the Enforcement function to assess whether there are grounds which merit the taking of Enforcement action, and the decision was eventually taken by the Executive Committee.

15. Under section 'C' of its appeal tabled before this Tribunal, the Appellant objects to the quantification of the administrative penalty imposed by the Authority stating that this results in an unequal level playing field. It also states that the sanctions imposed by the Authority should be a last resort taking into account the nature, scale, complexity and seriousness of the potential compliance irregularities. Further to this, the Appellant claims that the imposition of an administrative penalty is 'exceptional regulatory treatment' and the Authority strongly disagrees in this respect. The imposition of an administrative penalty should not be a last resort nor should it be imposed as an exceptional instance and though the Appellant appears to think otherwise it does not provide any valid grounds at law as to why the imposition of an administrative penalty should actually be a last resort or constitute exceptional regulatory treatment.

16. That in this respect the Authority notes that the Appellant provides no clear argumentation for its objections in this respect and merely tries to draw a futile comparison with other fines imposed against other Retirement Scheme Administrator's ('RSA') without entering into a detailed comparison of the similarities/differences of the facts of the investigations it references.

17. The Appellant also claims that the breaches of one particular RSA, for which a lower administrative penalty was imposed, were far more serious than the breaches relevant to the Appellant, and this without providing any clear explanations or argumentation to substantiate this claim. In this respect, the Authority humbly submits that it is not up to the Appellant to determine which breaches are of a more serious nature. In fact, in terms of the first proviso to article 21(9)(b) of the MFSA Act, not even the Tribunal may query the discretion of the Authority, so long as this has been exercised properly.

18. Furthermore, if what the Appellant means by 'serious' is the 'gravity' of the breaches in question, the Authority submits that as stated on page 22 of its Decision, the 'gravity' of the infringements is only one of the aspects that is taken into consideration by the Authority when determining the quantum of the administrative penalty to be imposed. In fact, on page 22 of its Decision, the Authority states outright that:

"*In determining the quantum of this penalty, the MFSA has taken into consideration, amongst others, the gravity and duration of the infringements, the aspect of the proportionality, the level of co-operation and the measures in place to prevent such infringements.*"

That the Authority also draws the Tribunal's attention to the clear breakdown provided to the Appellant of the fines which are being incurred for the several breaches noted by the Authority. Through this it becomes immediately clear that the fine of €160,000 is being imposed on the Appellant for several breaches and not for one alone.

19. That finally, on this point, the Appellant goes to great length to argue that such enforcement actions should be uniformly, consistently and rigorously enforced with respect to all administrators, however, once again the Appellant provides no sound

comparison or reasoning as to why it is under the impression that the Authority does not operate with said consistency. Therefore, the Authority is of the opinion that the grievance opined by the Appellant under section C of the appeal is unfounded both in fact and at law.

20. Under Section D of its Appeal, the Appellant argues that the Authority was wrong in claiming that the Appellant failed to act in the best interest of its members when it carried out an ineffective due diligence on Mr Pye. The Authority wishes to specify here that the Appellant's due diligence process in connection with Mr Pye merely entailed the acceptance of documents from Mr Pye himself without conducting the proper verifications as to whether the documentation presented was correct and reliable, something which is necessary whenever conducting a due diligence assessment. Indeed, the Appellant's due diligence failed to detect that Mr Pye was not, in fact, in possession of the G60 qualification. Such a minimal standard of due diligence certainly could not have safeguarded the Scheme members' best interest as required in terms of Part B 2.3.1 of the Standard Operational Conditions for Retirement Scheme Administrators and the RSA's actions only made it possible for Mr Pye to provide improper financial advice to Scheme members, regardless of the fact that at the time the Pension Rules did not explicitly require an RSA to perform such due diligence. The Authority also submits that as the Trustee of the Scheme, the Appellant was, in terms of article 21(1) of the Trusts and Trustees Act and paragraph 6 of the Trustees Code of Conduct, also required to act with the prudence, diligence and attention of a bonus paterfamilias and to exercise its fiduciary duties prudently and competently. In this respect, by requesting documentation and information without properly verifying the information obtained, the Appellant certainly cannot be deemed to have satisfied these requirements.

21. Moreover, the Terms of Business Agreement entered into between the Appellant and Waterstone Investment Associates Inc. dated 21st June 2012 states that *"if there is a financial regulator in the jurisdiction in which the Business Introducer is established, then the Business Introducer must be regulated by that entity in order to be considered a Business Introducer. If there is not a Financial Regulator in the jurisdiction in which the Business Introducer is established, then the Business Introducer must be approved or recognised by a professional body acceptable to MC Trustees (Malta) Limited."* The Terms of Business agreement also notes that *"Upon receipt of this Terms of Business signed on behalf of the Firm, MC Trustees (Malta) Limited will undertake due diligence on the Firm. On satisfactory completion of the due diligence, MC Trustees (Malta) Limited will counter sign these Terms of Business and return a copy to the Firm for its safekeeping."*

22. That, in spite of the above, no evidence was obtained by the Appellant in order to verify that Mr Pye was actually approved or recognised by a professional body which was acceptable to it. The Authority wishes to reiterate and highlight the obligations that the Appellant has always had as an RSA to act in the best interest of its members and as a Trustee of the Scheme to exercise its fiduciary duties prudently and competently. In view of the above, it is evident that with its actions the Appellant did not act in the best interest of its members and ignored its fiduciary obligations as a Trustee of the Scheme.

23. That the Appellant also tries to argue that the Authority requests an effective due diligence to be carried out by an RSA but never effectively explains what it means by the terms 'effective', 'due diligence being too weak' or 'information too little'. In this respect the Authority points out that the Appellant is well versed within the industry and has a clear indication of what a proper due diligence should contain. Mere receipt of documentation without any formal checks or verifications being carried out is not an 'effective' due diligence and the Appellant is well aware of this. The Appellant's mere reference to the fact that the Pension Rules did not outline the due diligence that was to be carried out, down to the last letter, does not exonerate the Appellant from the requirement to act in the best interest of its members and from its fiduciary obligations as a Trustee of the Scheme.

24. That the Appellant also tries to argue that the Authority applied the wrong application of the law when it claimed that Mr Pye was not qualified to give investment advice as at the time there was absolutely no legal or regulatory requirement for advisors to be licensed. In this respect, the Authority would like to clarify that it did not expect Mr Pye to be licenced in order to provide financial advice, however, the Appellant accepted him on the basis that he was G60 qualified when in actual fact he was not. This could have misled the Scheme members to believe that their financial advisor (approved by the Appellant) was qualified when in reality he was not.

25. Furthermore, the Authority also notes that following its review of the Adviser/Introducer assessment sheet dated 8 October 2013 held by the Appellant, Mr John Rusher, the former Chief Executive Officer of the Appellant company, put down a written note "Per Adviser letter", and another note saying, "Need certificates?" beneath the heading "Copies of relevant qualification certificates for all individual advisers". Moreover, on the Adviser / Introducer assessment sheet, next to the question "Is the adviser / introducer Firm able to provide relevant financial / investment advice?", John Rusher ticked the box "No" and then added a note which reads "BUT G60 QUALIFIED". The Authority here wishes to point out that although in the Adviser/Introducer assessment sheet the Appellant marked Mr Pye as 'G60 Qualified' the Appellant never verified/obtained proof of such qualification and failed to gain an understanding of what a G60 qualification means.

26. The Authority is pointing this out because although Mr Pye was a registered member with the UK's Chartered Insurance Institute ('CII'), the CII's website listed him as an ordinary member as he was still in the process of attaining the G60 qualification. Mr Pye was later also found to have breached the CII Code of Ethics through his repeated misuse of CII intellectual property and failure to co-operate with the CII during its investigation. In this respect, on the 9th of March 2018 the CII imposed the following sanctions on Mr Pye (i) reprimanded; (ii) required to take the CII on-line ethics course before taking any CII exams or assessments or apply for any CII recognition of prior learning; and (iii) suspended from membership of the CII/PFS for a period of 2 years. Thus, the fact that he was not actually qualified should have been picked up by the Appellant in their due diligence process.

27. Furthermore, it is important to note that although in the Adviser/Introducer assessment sheet the Appellant remarked that Mr Pye was not able to provide relevant

financial/investment advice, the RSA had still accepted instructions from Mr Pye to invest the Scheme members' pension funds. Thus, the Authority finds it hard to understand how the RSA acted in the best interest of the Scheme members and exercised its fiduciary duties as a Trustee prudently and competently, irrespective of the fact that at the time there was no legal or regulatory requirement for advisors to be licensed. The Authority further submits that as the Trustee of the Scheme, the Appellant was also required, in terms of article 21(1) and 21(2)(a) of the Trusts and Trustees Act, to act in utmost good faith and to safeguard the trust property from loss or damage. In the circumstances, the Appellant can hardly be deemed to have satisfied these requirements.

28. Finally, on this point, the Appellant tries to argue that consequent to the change in regulation it informed Mr Pye that he could no longer advise members of the Scheme and terminated the engagement. However, based on communications held between the RSA and the Authority, this was not quite the case. The Appellant did not discontinue its business relationship with Mr Pye as a result of the new Pension Rules which coincidentally necessitated that any member appointed financial advisers were to be regulated. It was in actual fact only due to Mr Pye's decreased 'communication availability' and the fact that 'various clients had been in touch with the Appellant stating their frustration at Mr Pye and their decision to remove him as their adviser', that the Appellant decided to stop taking new business from Mr Pye.

29. The Appellant moves on next to argue that the Authority subjected the Appellant to two separate fines for the same breach (i.e. the allegation that it did not act in the best interests of its members) and that in so doing the Authority wrongly applied the provisions of the law and abused its discretion. The Appellant argues over here that the licence granted to it under the TTA is separate and distinct from the licence granted under the RPA and the fact that there can be an abridged process under the Pension Rules for the Appellant to accede to the licence to act as RSA under the RPA does not mean that the Authority can impose a second fine upon the Appellant simply because the pension Scheme merits of this appeal is a trust.

30. In this respect, the Authority firstly submits that in terms of article 21(9)(a) of the MFSA Act, the question for determination by this Tribunal shall be whether, for the reasons adduced by the Appellant, the Authority has in its decision wrongly applied any of the provisions of the MFSA Act. Thus, if the Appellant's intention was to also challenge the Authority's application of the provisions of the Trusts and Trustees Act or any regulations or rules made thereunder, then, in addition to filing the appeal in terms of article 21 of the MFSA Act and article 44(1) of the Retirement Pensions Act, the Appellant ought to also have filed the appeal in terms of article 55 of the Trusts and Trustees Act.

31. Without prejudice to the above, unfortunately the Authority feels that the Appellant missed its point altogether in this part of the appeal. On this matter, it is important to clarify that the authorisation to act as a Retirement Scheme Administrator was originally granted to the Appellant pursuant to Article 17 of the Special Funds (Regulation) Act 2002 on 4 February 2010. On the other hand, on 19 February 2010, the Authority granted the Scheme a registration pursuant to section 3 of the Special

Funds (Regulation) Act 2002 to carry out the activities of a retirement Scheme set up in the form of a Trust. In fact, the Trust and Trustees Act is also much relevant and applicable to the Appellant, as per Article 1(2) and Article 43(6)(c) of the TTA, in light of the Appellant's role as RSA and Trustee of the Scheme. Given that the Appellant acts as Trustee solely to retirement Schemes under the RPA, it is not required to obtain authorisation under the Trusts and Trustees Act.

32. Indeed, article 1(2) provides that: "*The provisions of this Act, except as otherwise provided in this Act, shall apply to all trustees, whether such trustees are authorised, or are not required to obtain authorisation in terms of article 43 and article 43A*", with article 43(6)(c) in turn providing that: "*A person licensed in terms of the Retirement Pensions Act to act as a Retirement Scheme Administrator acting as a trustee to retirement Schemes shall not require further authorisation in terms of this Act provided that such trustee services are limited to retirement Schemes...*".

33. At authorisation stage the Authority has also drawn the RSA's attention to the Authority's Trustees Code of Conduct issued under the Trust and Trustees Act which is also applicable to the Appellant in light of the Scheme's constitution as a Trust. The Authority wishes to reiterate that the Appellant as Trustee of the Scheme, has many duties relating to the property vested in it, and these include acting diligently, acting honestly and in good faith and with impartiality towards beneficiaries.

34. The Authority therefore, considers the RSA's statement that the Authority has subjected the Appellant to two separate fines for the same alleged breach as incorrect in view of the fact that as explained above, the Appellant is bound to observe all requirements emanating from both the RPA and the TTA in the provision of its services to the Scheme. Moreover, as highlighted in the Decision Letter, there are a number of instances where although the Authority has found the Appellant to have breached more than one requirement, for the purpose of determining the administrative penalty, the identified breaches were considered as one breach.

35. Moreover, as already highlighted to the Appellant in the Decision Letter, the administrative penalties which the Authority imposed are for different breaches identified under the TTA, the Trustees Code of Conduct, and the SFA. The administrative penalty proposed under the TTA relates to the breach of the Appellant's duty to act with the prudence, diligence and attention expected of it in the provision of services to the Scheme as a Trustee, whereas the administrative penalty proposed under the SFA relates to various responsibilities which the Appellant as the Scheme's administrator, had in terms of its licence conditions and the Pension Rules applicable at the time.

36. It is also important to point out that even if the Authority had to subject the Appellant to two separate fines for the same alleged breach, reading of article 51(7) of the TTA and article 17(6) of the SFA makes it very clear that the Authority has the right to impose administrative penalties wherever there has been a contravention of the respective act. Thus, if the same act infringes two different pieces of legislation, then the Authority has the power to impose a penalty under both pieces of legislation.

37. Moreover, contrary to what is being claimed by the Appellant, the fine imposed under the TTA is not being imposed "simply because the pension Scheme in question is a trust". As already explained in the Decision Letter, the alleged breaches were not Scheme related but relate to the Appellant and its duties/obligations at law as RSA and Trustee of the said Scheme.

38. The Appellant also states that the fact that the Authority has fined the RSA for breaches under its basic trust licence and their RSA licence is not only unfair but also mean-spirited (the latter apparent in the fact that although the Appellant is regulated by the RPA the fine under the TTA (€50,000) is more than double than the fine under the RPA (€20,000)). On this point the Authority would like to clarify that on account of the Appellant's authorisation to provide trusteeship services to the Scheme in terms of the TTA, the penalty for the breach under the TTA is actually higher than the other breaches of the SFA in view of the fact that the calculation was based on the maximum amount of administrative penalty that the Authority may impose in terms of article 51(7) of the TTA which provides that: "*the Authority may by notice in writing and without recourse to a court hearing, impose an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each infringement or failure to comply, as the case may be*". On the other hand, the calculation of the other breaches was based on the maximum amount of administrative penalty that the Authority is powered to impose in terms of article 17(6) of the SFA which provides that: "*...the Authority may without recourse to a court hearing impose an administrative penalty which may not exceed ninety-three thousand and one hundred and seventy-four euro and ninety-four cents (93,174.94)*". Thus, the fact that the Authority could impose an administrative penalty of up to €150,000 for the breach in terms of the TTA was the reason why the administrative penalty imposed for this breach is higher than the other fines imposed by the Authority in terms of the SFA.

39. Furthermore, this continues to prove the point made by the Authority in paragraph 17 above that when determining the quantum of the penalties imposed, the Authority has taken into consideration, amongst others, the gravity and duration of the infringements, the aspect of the proportionality, the level of co-operation and the measures in place to prevent such infringements.

40. Under section D of its appeal the Appellant then argues that the Authority unfairly draws the conclusion that the RSA did not act prudently on the basis that it did not make an effort to gain an understanding of the investments that were recommended by the members' financial advisors but merely filled out dealing instructions based on such recommendations and forwarded them to investment houses without questioning the financial advice. The Appellant argues here that the Authority failed to define its interpretation of the word 'prudent'.

41. What the Appellant, however, fails to note in all of this is that it has the obligation to arrange for the Scheme assets to be invested in a prudent manner and in the best interest of beneficiaries. In this respect, the Authority is mainly concerned with the fact that the Appellant has also permitted assets to be invested in investments that were not suited

for Scheme members considered to be retail investors. Following an analysis of some of the members' pension funds advised by Mr Pye, the Authority noted that these members held units in high-risk Collective Investment Schemes ("CISs") that had gone into suspension or liquidation, as well as structured products not suitable for Scheme members which realised a loss upon maturity.

42. The Appellant explains that its understanding of the term 'prudence' is an over-riding principle and equates to acting in accordance with scheme documentation, understanding the terms of the trust, taking advice on technical matters, acting in the best financial interests of the scheme beneficiaries and the duty to ultimately invest – all of which it claims to have carried out.

43. On this point, the Authority reiterates the obligations that the Appellant has always had as an RSA to act in the best interest of its members and as a Trustee of the Scheme to exercise its fiduciary duties prudently and competently. Reference is hereby being made to the in-principle letter dated 24 June 2009 which clearly states that "*MCTM shall retain the ultimate responsibility regarding the investments of the Individual Funds in order to ensure compliance with the diversification principles and any investment restrictions as may be applicable as well as in the exercise of MCTM's trusteeship obligations. In this regard, while MCT may have regard or take into account the Member's letter of wishes, it should exercise its discretion in relation thereto rather than merely act in accordance with such letter of wishes. We understand that 'member direction' in the UK implies that a member has full control over the investments of his pension assets. While in terms of the above operational arrangement there is an element of 'member-direction', however the ultimate control thereof remains in the hands of the Trustee."*

44. As per the above conditions laid out, it is abundantly clear that the Appellant was not obliged to invest in everything which its member chose. To this effect, as RSA and Trustee of the Scheme, the Appellant was responsible for ensuring that the investments chosen by each member were in compliance with the diversification principles and the applicable investment restrictions and thereby ensuring that the monies are invested in the best interests of that member. Moreover, the Scheme Particulars, specifically Section 7, provides that, "*The Retirement Scheme Administrator will monitor all investments so that the principles of prudence and diversification are adhered to and in the exercise of its trusteeship obligations.*"

45. The Scheme's Trust Deed also recognises the Appellant as having an overriding right/discretion when approving (or otherwise) investments selected by members. In fact, clause 8.3 of the said Trust Deed clearly stipulates that, "*Except as specifically required by the Rules, the Trustee shall not be required to consult, or act upon the wishes of Beneficiaries.*"

46. When carrying out its analysis, the Authority noted that the way in which the Appellant was operating was not in line with what was communicated at application stage and

included in the subsequent registration conditions. The Authority's views were demonstrated in the below set of emails:

[i] An email sent on 16 June 2020 to a member of the Scheme who had appointed Mr John Maurice Pye as his financial advisor whereby the Client Liaison Manager of the Appellant company informed the said member of the Scheme that, "*MC Trustees act on an execution-only basis in that we receive instruction from the client and/or advisor and we carry that instruction out by forwarding onto the relevant Investment Manager to purchase and/or sell, in your particular case this would be Royal London 360. MC Trustees are responsible for the administration of your pension. As such, MC Trustees are not the advisor, fund manager or investment manager. The adviser in your case was John Pye whose role was to advise you on the investments that were to be purchased and sold in your portfolio and is responsible for the choices of investments in your portfolio. The Fund manager is responsible for the direct performance of a particular fund and the Investment Manager are responsible for holding the funds, producing investment pricing and other related information including the prompt purchasing/selling of selected securities as originally instructed by your financial adviser.*"; and

[ii] An email sent by Mr Edward Thorpe on 22 January 2021 in response to the Authority's email dated 6 January 2021 whereby Mr Thorpe stated that, "*As the trustees of the pension Scheme we only act on instruction in relation to the client investments and this instruction comes from the client/advisor themselves. If the client wishes to hold their pension fund in cash in the QROPS bank account, then it is held as cash; if they want to invest then they send us instruction to invest and we act on that...we act on instruction only, and that we are not the investment manager, we are not the fund manager, we are not the investment/financial advisor nor do we have any input on how investments perform or how investment managers administer the funds...*"

47. The responses received by the Authority from Mr Thorpe on the 22 January 2021 seems to be contradicting the feedback received from him on 4 February 2021 (upon further clarification requested by the Authority on this matter) whereby he explained that the Appellant carries out exercises to ensure that the investment portfolio of each member is in line with the investment parameters laid down in the Pension Rules and the members' risk profile.

Reference is hereby being made to these emails for the simple reason that while the requirements are clear that the Appellant has to retain the ultimate responsibility with respect to the investments of individual funds and that it should not consult, or act upon the wishes of members, in the mentioned correspondence the Appellant declared that it solely acts on an execution-only basis (i.e., receiving and transmitting of orders). Thus, it is evident that the way in which the Appellant operated was not in line with what was communicated at application stage and included in the subsequent licencing conditions. Moreover, in this respect, contrary to what the Appellant is claiming, the Appellant neither acted in accordance with Scheme documentation, nor did it understand the terms of the trust and clearly did not act in the best interests of the Scheme beneficiaries.

48. The Appellant here also claims (i) that the adequacy and liquidity of the pension assets for the scope of providing the member with a pension in QROPS (as from January 2016) gave the members the option to go for 'flexi access' which effectively means that they can withdraw any part or all of their pension at any given time as long as the members' pension fund originated from a UK pension and (ii) most members introduced by Mr Pye were introduced into the Scheme in 2011-2016 when the investment restrictions applicable today and the specific rules applicable to member directed schemes today, were very different.

49. With regards to (i) while the Authority is aware that the UK introduced the flexi-access drawdown option in April 2015, the Appellant as the Trustee of the Scheme should still have ensured adequate liquidity and excluded high risk investments, with a keen awareness of the ultimate need for the Scheme to pay benefits. Although Scheme members had the option to withdraw any part or all of their pension at any time, this does not exonerate the Appellant from ensuring that member accounts are adequately liquid. The notion of liquidity is an underlying principle in pension funds as this ensures that retirement benefit payments to Scheme members can be met. In fact, through the analysis carried out by the Authority it became evident that the Appellant failed to look into the nature of the investment funds that were being recommended to its Scheme members. Indeed, had the Appellant tried to gain an understanding of certain funds' holdings, it would have concluded that such holdings lacked sufficient liquidity, and thus so did the funds themselves. It is also important to note that when the flexi-access drawdown regime was introduced within the Pension Rules issued under the RPA in 2016, there were several Scheme members who could not make use of this option as their pension fund was highly illiquid.

50. Moreover, throughout the Authority's analysis, it did not observe any differences between the investments held within member accounts of individuals who had retired or else very close to their intended retirement age and the investments held within member accounts of individuals who did not intend to retire in the near future. This is indicative of the fact that the Appellant was not assessing the liquidity position of the individual member accounts that were under its administration and trusteeship.

51. Also, on the basis of the analysis carried out by the Authority it transpired that the RSA allowed the investment of some of the Scheme's assets in CISs having high level of risk. In fact, through information obtained from the fund fact sheets, these CISs were intended for qualifying and professional investors and this was due to the level of risk they presented. Moreover, following a review of documentation obtained from the Appellant, the Authority found that several CISs undertaken on the advice of Mr. Pye were suspended or appeared to be in serious financial difficulty. Thus, given the nature of these investments, members that were highly exposed to these high risky suspended CISs are suffering from insufficient liquidity in their pension fund.

52. Based on a review of a sample of member accounts, it transpired that most of the members advised by Mr. Pye had the same high-risk CISs in their pension fund, which CISs were managed by specific fund managers. It is also to be noted that a good number of these CISs that subsequently went into suspension were made between 2011 and 2014 (both years included), and most of them are still in suspension to this very day.

Although the members have not actually realised any losses, the illiquidity of such investments makes it impossible for members to dispose of their units and, in certain instances, take out retirement benefits. Also, the Authority never came across communications between the Appellant and Mr. Pye wherein the Appellant company challenged the questionable recommendation of certain investment funds to Scheme members.

53. With regards to (ii) the Authority humbly submits that the Appellant fails to give a detailed account of which different rules were applicable at the time. The example given by the Appellant in this respect (regarding Lombard's engagement) certainly sheds very little light in this respect when taking the facts of this relationship into consideration as shall be shown below.

54. When looking at the investment management services which the Appellant is claiming to have been provided by Lombard Bank Malta plc, the Authority is not in agreement with the Appellant's interpretation due to the fact that the Authority made it clear at the outset that the Appellant was to retain the ultimate control and responsibility when it came to the individual funds of the members. Once again, the Authority deems it appropriate to stress the point that the RSA, as Trustee of the Scheme, has always had a duty of care towards its members, as well as the Appellant's Trust Deed mentions that the Trustee was not obliged to consult, or act upon the wishes of Beneficiaries. Thus, it is clear that the Appellant had an overriding right/discretion when approving (or otherwise) investments selected by members.

55. Moreover, the role of Lombard Bank Malta plc as an investment manager did not, in any way, free the Appellant of its responsibilities as an RSA towards the Scheme members. As noted above, Lombard Bank Malta plc was appointed as an investment manager and its duties were limited to overseeing the assets held within the Scheme as a whole. Indeed, Lombard Bank Malta plc did not analyse the individual member accounts, nor was it required to. Moreover, given that the Scheme has always operated on a member-directed basis, it has always been the Appellant's responsibility to monitor the investments held within the individual member accounts. This was also clarified in the in-principle letter dated 24 June 2009 as already mentioned above.

56. Finally, the Authority considers it important to point out that the Adviser/Introducer assessment sheet concerning Mr Pye was completed and approved by the same official of the Appellant i.e., Mr John Rusher who at that time was the CEO of the Appellant company, thus it is evident that the four eyes principle was not followed.

57. In view of the above it is clear that the Appellant did not have adequate internal control procedures to ensure that Scheme assets are invested in a prudent manner as well as to protect the Scheme members from financial losses.

58. Under clause D2.1 of the Appeal, the Appellant attacks the Authority's claim that the Appellant permitted the investment of assets in investments that were not suited for retail investors claiming that the Authority was imposing on the Appellant a more

onerous obligation on it than that required by the pension rules. The Appellant essentially claims that an RSA is not entrusted with assessing suitability and its role is limited to assessing the Scheme in a manner so as to ensure that it meets the criteria of the said member pursuant to the investment advice received by the member from the appointed investment advisor and to ensure that the limitations imposed upon it by investment restrictions (if applicable) are being adhered to.

59. The Appellant also claims that it was not in a position to make recommendations on the suitability of the investments or otherwise and the requirements for the investments to be retail in nature in the Pension Rules came into force after the investments were originally placed.

60. Finally, the Appellant also remarks that there is absolutely no indication or proof evidencing the fact that Mr Pye did in fact provide improper financial advice to Scheme members.

61. The Authority strongly disagrees with the Appellants claims under this ground of appeal. The Authority never at any point alluded that there was a case of mis-selling. The Authority instead reiterates that the Appellant was to retain the ultimate control and responsibility when it came to the individual funds of the members as has already been explained above. If anything, the Appellant had an overriding right/discretion when approving (or otherwise) investments selected by members. Also, from discussions held with the Appellant's officials, the RSA explained to the Authority that the investment advisors/managers are responsible to ensure that the contributions of the members are invested in accordance with their risk profile and the investment restrictions. However, it is important to point out that the Appellant as the RSA and Trustee of the Scheme was and is always responsible to ensure that the contributions of the members are invested in line with the diversification principles and any investment restrictions (as may be applicable), as well as in the exercise of the Appellant's trusteeship obligations. Thus, in its role as a Trustee of the Scheme, the Appellant was bound to administer the Scheme and its assets to high standards of diligence and accountability. The Trustee, having acquired the property of the Scheme in ownership under trust, had to deal with such property as a fiduciary acting exclusively in the interest of the members and beneficiaries.

62. Furthermore, as explained in paragraph 51 above, on the basis of an analysis carried out by the Authority, it transpired that the RSA allowed the investment of some of the Scheme's assets in CISs having high level of risk. In fact, through information obtained from the fund facts sheets a number of CISs were intended for qualifying and professional investors, and this was due to the level of risk they presented. Given the nature of these investments, member accounts that were highly exposed to these high risky suspended CISs have led to number of Scheme members that are suffering financial detriment in their pension fund. Moreover, while reviewing the documentation submitted by the Appellant, the Authority observed that there were a number of suspended CISs that were common to various members, though the extent to which the selected members were invested in the suspended CISs varied considerably. Also, after reviewing the fact sheets of the suspended CISs, the Authority determined that the investment objective of the suspended CISs differs greatly and range from investments

in bamboo plantations, recycling facilities, and physical commodities held for speculative purposes. Furthermore, it is to be noted that the suspended CISs are domiciled in various jurisdictions, which include the Cayman Islands, Luxembourg, Isle of Man, Mauritius, Australia, and Bermuda. What is important to mention is the fact that the fund facts sheets all made it clear that the fund strategies adopted by the fund managers of the now suspended CISs present a high level of risk and were solely targeted to qualifying and professional investors, and thus it can be concluded that these were not intended for the Scheme members.

63. The Authority also found out that a portion of the selected member accounts had also invested in structured products throughout the years, which investments are also not intended for Scheme members. For the most part, these structured products realised a loss upon maturity. That said, these realised losses pale in comparison to the losses that will very likely be suffered as a result of holdings in the suspended CISs referred to above. Thus, it is evident that as was the case with the high-risk CISs, the Appellant did not challenge Mr Pye's recommendation to invest in these structured products, and merely forwarded the dealing instructions to the respective investment houses.

64. In view of the above, the Authority reiterates that the Appellant did not have adequate internal control procedures to ensure that Scheme assets are invested in a prudent manner as well as to protect the Scheme members from financial losses.

65. Under section E1 of its appeal, the Appellant challenges the Authority's decision stating that the Appellant allowed the investment of some of the Scheme's assets in CISs having high level of risk thus risking that the CISs could suffer from insufficient liquidity. In its defence the Appellant raises the argument that it did not have the authority or license to challenge any of the investments chosen as being adequate for the member or otherwise, unless a clear breach of the pension rules subsisted. In fact, the Appellant claims it entered into an investment management agreement with Lombard specifically to monitor and report on the liquidity and diversification of the assets held by the Scheme on a consolidated basis.

66. In response to the arguments raised by the Appellant the Authority reiterates that given that the Scheme has always operated on a member-directed basis, it has always been the Appellant's responsibility to monitor the investment held within the individual member accounts. This was also amply clarified in the in-principle letter issued to the Appellant on the 24th June 2009 and the registration letter issued to the Appellant on the 4th February 2010, when the Authority stated that the RSA was to retain the ultimate responsibility with respect to the investment of individual funds (ie, the investments held within the individual member accounts). Further to this, section 7 of the Scheme Particulars stipulated that the RSA will monitor all investments so that the principles of prudence and diversification are adhered to and in the exercise of its trustee obligations. Clause 8.3 of the Trust Deed also states that the Trustees shall not be required to consult, or act upon the wishes of the Beneficiaries.

67. The Appellant under this ground for appeal also raises the point that, being a QROPS subject to flexi-access, the members of the Scheme were able to withdraw their pension

via flexi access by taking that part of their portfolio of investments which was readily liquid and leaving the rest behind. Therefore, the Appellant argues, the RSA's only responsibility is to ensure liquidity of the investments as at the time of attainment of the members intended retirement age – only if the member would not have withdrawn everything in his/her retirement fund before that. In relation to this point, while the Authority is aware that the UK introduced the flexi-access drawdown option in April 2015, the Appellant as the Trustee of the Scheme should still have ensured adequate liquidity and excluded high risk investments, with a keen awareness of the ultimate need for the Scheme to pay benefits as mentioned earlier.

68. That, therefore, in view of the above, the Authority submits that the way in which the Appellant operated was not in line with what was communicated at application stage and included in the subsequent licencing conditions.

69. Under section E2.2 the Appellant addresses the fine that the Authority issued unto the Appellant for breaches of the Special Funds (Regulation) Act which had been repealed in 2016 with the coming into force of the RPA. The Appellant argues here that the Authority cannot impose a fine on the basis of a piece of legislation which is no longer in force at the time of the matter being communicated to the Appellant.

70. The Authority refers here to Article 55 of the Retirement Pensions Act which repeals the Special Funds (Regulation) Act and states the following: "*Subject to the provisions of article 56, the Special Funds (Regulation) Act is hereby repealed without prejudice to anything done or which may be done under that Act [emphasis added], saving every authorisation, approval or order taken or commenced thereunder, which shall continue to be valid and in force, as if such authorisation, approval or order were taken or commenced under this Act.*"

71. This clause together with Article 12 of the Interpretation Act (Chapter 249 of the Laws of Malta) attest that although the Special Funds (Regulation) Act has been repealed, the Authority can still act on any shortcomings that occurred under the Special Funds (Regulation) Act. The Authority reiterates therefore that although he Special Funds (Regulation) Act has been repealed, the Authority is still within its rights to pursue the appropriate course of action as per the legislation quoted above.

72. The Authority is also surprised with the Appellant's reasoning in this respect because it is well aware of the general legal principle that one should not be found to be in breach of a law which it was unable to be aware of at the time of the wrongdoing. Had the Authority found a breach under the new law, chances are the Appellant would have claimed wrong application of the law any way on the grounds that the legislation was not known to him at the time when it carried out its actions which were deemed to give rise to the breach. Furthermore, the Authority would also like to point out that the administrative penalty imposed on the Appellant with respect to breaches of the Special Funds (Regulation) Act was based on the maximum amount of administrative penalty that the Authority could at the time have imposed in terms of the Special Funds (Regulation) Act, which is less than the maximum amount of administrative penalty

that the Authority may impose in terms of the Retirement Pensions Act. Therefore, had the Authority found a breach under the new law, rather than Special Funds (Regulation) Act, the amount of the administrative penalty imposed would have been higher.

73. Reference is also being made to the Appellant's remarks that if there was indeed a continuation of a regulatory regime and the Special Funds (Regulation) Act can be triggered whenever the Authority deems it appropriate then why did the Authority ask all Retirement Scheme Administrators to re-apply for their licences as RSAs and also their Scheme Licences, by the end of June 2015, six months after the RSA came into force – the Authority remarks that this line of argumentation is superfluous at best. It is a well-known matter that when a new legislation comes into place the interested parties are to conform with the new requirements. What the Authority on the other hand has always claimed is that the change in law did not bring about any drastic changes but rather there was a complete continuation between the old and new regime specifically with respect to the law in discussion.

74. With respect to section E2.5 of the appeal the Appellant contests the Authority's decision that the Appellant failed to implement adequate procedures for the effective handling of complaints. The Appellant argues here that this would have constituted a serious deficiency only in so far as a lodged complaint was effectively ignored or not resolved when carrying out its role as RSA.

75. In reply to this the Authority submits that the fact that the lodged complaint was not effectively ignored or not resolved does not mean that the Appellant was not in breach of its obligations in terms of Part B 1.4.4 of the Pension Rules for Services Providers. In fact, in a decision delivered by this Tribunal on the 19th of May 2021 in the appeal filed by ITC International Pensions Ltd against the Authority, this Tribunal held that:

"The fact that the delay in the submission of the said audited statements did not cause any damage or loss is not relevant in this case. Any damage and/or loss would or could have lead to other consequences and not the imposition of the said administrative fine, and hence this cannot be considered as a justification for the deviation in the deadlines for the submission of the annual audit reports."

Thus, the fact that the Appellant did not effectively ignore or not resolve the lodged complaint cannot be considered as a justification for the Appellant's non-compliance with Part B 1.4.4 of the Pension Rules for Service Providers.

76. In reply to this the Authority notes that when reviewing the Appellant's complaints handling process, the Authority determined that the Appellant was not handling complaints in line with various sections of Appendix II (A.1 (c)) of Part E of the Pension Rules for Service Providers. There were a number of discrepancies and inconsistencies in the Appellant's recordkeeping. For example – the Authority noted that the Appellant made a distinction between formal and informal complaints with only the former being included in the Complaints Register. This leaves room for interpretation as to which complaints are to be recorded in the Appellant's Complaints Register. Furthermore, Scheme members were not being treated fairly with this inconsistent approach.

77. The Appellant also claims that the fine imposed by the Authority with regards to this breach is a rather hefty one in comparison to the other breaches and fines imposed respectively. The Authority notes that although the fine for this breach is higher than the other breaches, the Authority has classified this breach as 'medium risk' specifically because its risk element is lower than the other ones. However, the fine for this breach is actually higher than the other breaches in view of the fact that the calculation was based on the maximum amount of the administrative penalty which the Authority may impose in terms of article 46 of the RPA which provides that: "…an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) in respect of each infringement or failure to comply, as the case may be…" On the other hand, the calculation of the other breaches was based on the maximum amount which the Authority could have imposed at the time in terms of article 17(6) of the SFA which provides that: "…the Authority may without recourse to a court hearing impose an administrative penalty which may not exceed ninety-three thousand and one hundred and seventy-four euro and ninety-four cents (€93,174.94)".

78. Therefore, the fact that the Authority could impose an administrative penalty of up to €150,000 for this breach was simply the reason why the administrative penalty imposed for this breach is higher than the other fines imposed by the Authority.

79. In conclusion, the Authority stands by its Decision and humbly submits that it exercised its discretion in a fair manner and according to the provisions of the law as stated above.

80. Therefore, for the reasons premised above, the Authority respectfully requests this Honourable Tribunal to dismiss the appeal as tabled by the Appellant for all the reasons espoused above, with costs against the Appellant and to subsequently confirm the Decision of the Authority.

Having seen the Acts of the case;

Having seen the notes of submission filed by the Parties;

Having seen that on the 12th January 2021 the Parties had agreed that this appeal is to be heard in the English Language;

Having seen that the Appeal was deferred to the 17th May 2023 for a judgement;

Having seen its Decree of the 15th May 2023 wherein the Tribunal suspended the delivery of the judgement after having noted that:

Having seen that together with the affidavit of Edward Thorpe, the Appellants exhibited an extract from the website of the Appellate Authority referable to the

Enforcement Decisions Committee (Doc. MCTM 14) and made reference to this matter in its note of submissions;

Having seen that the Authority argued, in its note of submissions, that the pleas raised by the Appellants in relation to impartiality and lack of fair hearing is based on an alleged breach of the Appellant's fundamental human rights and hence did not enter into the merits of the procedures used by the Authority in the imposition of fines;

Having also seen the provisions of Article 3 (a) and (c) and also Article 3 (f) of Chapter 490 of the Laws of Malta and article 11 of Chapter 330 of the Laws of Malta;

Having seen that the procedures used by the Authority and the compliance or otherwise of such procedures with the provisions of the applicable law are matters that the Tribunal should consider and being matter of public order, may also be raised ex officio;

Having seen that the said compliance with the provisions of the applicable law is a matter that needs to be addressed and determined by the Tribunal since such a matter is intrinsically part of the pleas raised by the Appellants in their appeal;

Having seen that it would be more appropriate if both parties are given the opportunity to address the procedures used by the Authority in the regulatory action subject of this appeal, through submissions;

Having seen the additional written submissions made by the Parties further to the afore-mentioned decree;

Having seen that the Appeal was deferred to today for a judgement;

Considers:

Facts:

1. The Appellant Company was registered in Malta on 11th December 2009 as a limited liability company and authorised to act as a Retirement Scheme Administrator ('**RSA**')pursuant to the Special Funds (Regulation) Act on the 4th February 2010.

2. On the 1st of January 2016, after the coming into force of the Retirement Pensions Act ('**RPA**') and as part of the Transition Process in terms of Article 56 of the RPA, the Authority granted the Appellant a registration pursuant to article 6(1) of the RPA and authorised the Appellant to act as a Retirement Scheme Administrator to retirement schemes registered under the RPA.

3. Presently, the Appellant administers two Personal Retirement Schemes: (1) the MCT Malta Private Retirement Scheme which was licenced by the Authority on the 19th

February 2010 and (2) the MCT Malet International Retirement Scheme which was licenced by the MFSA on the 31st December 2013.

4. The MCT Malta Private Retirement Scheme ('**the Scheme**') was established under the laws of Malta and governed by a Trust Deed and Rules on the 19th February 2010. The Scheme is administered by the Appellant and is a defined contribution personal retirement scheme which has the objective to provide retirement benefits for members. It is a member-directed Scheme which means that members can direct their investments of their individual accounts. The Scheme is in the form of a personal retirement scheme – a scheme not linked to an employment relationship and which is administered without any intervention of an employer. While the Scheme is open to residents and non-residents of Malta, the Scheme is not actively marketed to residents of Malta and is primarily targeted instead to non-residents of Malta, mainly former UK residents with pension rights accruing in the UK. In this regard, the Scheme is classified as a Recognised Overseas Pension Scheme ('**ROPS**') with the HMRC in the UK.

5. The Scheme is also primarily funded from cash contributions as well as from transfers of deferred pensions from UK registered Pension Schemes. The assets of the Scheme are not pooled, and no units are issued by the Scheme to its members. The trust arrangement consists of separate individual accounts catered for from an accounting perspective. The Scheme, however, issues aggregate audited accounts although individual members are provided with a personalised annual statement regarding their individual account. As the Scheme is member-directed, members are able to indicate to the Appellant their preferred investment advisor/manager when presenting their letter of wishes regarding their investment preferences.

6. When carrying out its investigation, the Authority noted that the Appellant was in breach of the Special Funds (Regulation) Act ('**SFA**') and the Pension Rules issued thereunder, the Retirement Pensions Act ('**RPA**') and the Pension rules issued thereunder as well as the provisions of the Trusts and Trustees Act and the Trustees Code of Conduct. The breaches noted by the Authority were:

   i. The Appellant failed to act in the best interest of its members and ignored its fiduciary obligations as a Trustee of the Scheme as required in Part B 2.3.1 of the Standard Operational Conditions applicable to Retirement Scheme Administrators, Articles 21(1) and 21(2)(a) of the Trusts and Trustees Act ('**TTA**'), as well as Paragraph 6.0 of the Trustees Code of Conduct;

   ii. The Appellant failed to implement adequate internal control procedures to protect the Scheme members from any financial losses in terms of Part B 2.6.4 (g) and Part B 2.7.1 of the Standard Operational Conditions applicable to Retirement Scheme Administrators;

   iii. The Appellant failed to ensure that the individual member accounts are adequately liquid at all times as required by Part B 2.7.2 (a) of the Standard Operational Conditions for Retirement Scheme Administrators as well as the Licencing Conditions issued by the Authority to the Appellant and the Scheme;

   iv. The Appellant failed to meet its obligations in terms of Article 19(1)(l) of the Special Funds (Regulation) Act in view that it did not ensure that all instructions

and decisions affecting the Scheme were in conformity with the law and the Scheme Particulars; and

v. The Appellant failed to meet its obligations in terms of Part B 1.4.4 of the Pension Rules for Service Providers in view that it did not implement adequate procedures for the effective handling of complaints resulting in inconsistent approach when classifying complaints as well as discrepancies in the recordkeeping of complaints.

7. By virtue of a minded letter issued on the 22nd of February 2021 ('**Minded Letter**') [9] the Appellant was informed of the issues identified by the Authority when carrying out its investigations and of the Authority's intention to impose a penalty amounting to €160,000 for all the potential breaches outlined in the Minded Letter. The Appellant filed written representations in reply to the said minded letter on the 23rd March 2021 ('**Representations**'). In the said reply, the Appellant strongly objected to MFSA's minded position and stated *inter alia* that, in brief, (a) the Special Funds Regulation Act was repealed in 2016 and therefore the Authority cannot impose a fine on the basis of an Act which is no longer in force (b) the Authority cannot impose two separate fines for the same breach (being the allegation that it did not act in the best interest of its members) simply due to its trust licence (c) MCTM did not have the authority nor the licence to challenge any of the investments chosen as being adequate for the member/s in question unless a clear breach of the applicable pension rules was identified (d) the fund was adequately liquid and that (e) it did have adequate internal controls and an effective complaints registration procedure and therefore there was absolutely no purpose for the Authority to implement its minded position.

8. The Authority did not feel that ant of the Representations justified any reconsideration of any claim made by it in the Minded Letter and proceeded to issue its final decision on the 16th April 2021 ('**Decision**'). The Authority referred to the powers granted to it as per Article 17(6) of the Special Funds (Regulation) Act, Article 46 of the Retirement Pensions Act and Article 51(7) of the Trusts and Trustees Act and confirmed the imposition of the administrative penalty of €160,000.

9. The Appellants felt aggrieved by the Decision and submitted this Appeal. The Appellant raised a number of preliminary pleas and also rebutted the charges raised against it in the Decision of the Authority.

Preliminary Pleas:

Lack of Fair Hearing and Due Process – Manifest Unfairness
Lack of Impartiality

10. The Tribunal will address the two preliminary please together.

[9] Doc MFSA 1

11. In its first plea, the Appellant raised breach of its fundamental right to a fair hearing in the determination of its own civil rights and obligations as protected by Article 39 (2) of the Constitution of Malta and Article 6 (*Right to a Fair Trial*) of the European Convention on Human Rights (**"ECHR"**). The Appellant maintains that the manifest breach of the Appellant's fundamental right to a fair trial constitutes "manifest unfairness" thereby giving a right of Appeal before this Tribunal under Article 21 (9)(b) of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) ("the **Act**") on the basis of which this Tribunal has the power to annul the Decision under Article 21(13)(a) of the Act.

12. The Appellant argues that the unfairness of MFSA's Decision is further aggravated by the way MFSA dealt with the Appellant and reached its "conclusions" within unrealistic timeframes.

13. The Appellant refers to the fact that in its Minded Letter the Authority refers to "*discussions held during a compliance visit carried out by the Authority at MCTM offices in July 2016*" and on the basis of these discussions (and documentation provided by the Appellant to the Authority), the Authority found the Appellant to be in breach of a number of its standard license conditions issued in terms of the Special Funds (Regulation) Act (now repealed) and the RPA as well as provisions of the TTA.

14. It is however clear that in its first plea, the main contestation of the Appellant is based on the fact that the discretionary excessive penalties imposed by the Authority are intrinsically criminal sanctions which must be judged and determined by a 'court' (and not by the Authority) in order to ensure that the person so charged is afforded a fair hearing within a reasonable time by an independent and impartial court established by law in terms of Article 39 of the Constitution.

15. The Appellants refer to the judgements in the names ***Angelo Zahra vs Prim Ministru*** and ***Rosette Thake noe. Et v. Kummissjoni Elettorali et***.

16. The Appellants therefore claim that the decision-making process lacked the proper guarantees for a fair hearing and the principles of natural justice (the right to a fair hearing, amongst others). Furthermore, the Appellants submit that the whole process impinges on its right to a fair hearing because it has been found guilty by the Authority acting as judge and prosecutor only being given the opportunity to defend itself against an already declared pre-determined minded position by its adjudicator that brought the charges against it.

17. The Appellant also argues that that it was not privy to any opinions, recommendations or documentary evidence which formed part of the Authority's investigation which led to the imposition of the fine and this fact alone goes against the principles of 'transparency' and 'equality of arms' which are fundamental to the right to a fair hearing.

18. The Appellant reserved the right to request the Tribunal to order that the Appellant's file and its content is made available to this Tribunal and the Appellant [10].

19. In its second plea, the Appellant argues that the investigative and decision-making bodies of the MFSA overlap, leaving no room for real impartiality in the whole process. Accordingly, the whole process is in breach of the principles of natural justice and of the constitutionally protected fundamental right to a fair hearing also because the unit within the MFSA which investigated the Appellant forms part of the same body that in turn evaluated that unit's same findings and the Appellant's representations with a view to reaching the Decision.

20. The Authority rebutted both pleas by arguing that the grievance raised by the Appellant in this respect is not aimed at the Authority, but aimed at the legislation in virtue of which the Authority acted. The Authority thus argued that the Tribunal does not have the competence or jurisdiction to determine such a grievance and referred to the decision of the Tribunal of the 28th of September 2012, in the case ***Christopher Pace vs L-Awtorita' Ghas-Servizzi Finanzjarji ta' Malta*** wherein it was in fact 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. Dik li qed jissolleva l-appellant hija kwistjoni dwar il-konformita' tad-disposizzjonijiet tal-ligi relattivi mal-Kostittuzzjoni u mal-Konvenzjoni Ewropea, liema kwistjoni hija mill-ligi espressament riservata ghall-qrati ta- gurisdizzjoni kostituzzjonali."

21. Without prejudice to its argument that the Tribunal lacks the jurisdiction to analyse this matter, the Authority still noted that all the reasons and facts on the basis of which the Authority was minded to impose the administrative penalty were communicated to the Appellant in the Minded Letter. The fact that the Authority was not convinced to change its mind following the Representations should not be taken to imply that the Authority had already taken its decision before communicating the Minded Letter to the Appellant.

22. The Authority also remarked that there were other instances wherein the Authority was convinced otherwise following receipt of an appellant's representations, however, this was not the case with regards to the case under examination and this "as this Tribunal is aware" [11].

23. The Authority further referred to the built safeguards and structures specifically designed to ensure a fair hearing and that the organ of the Authority deciding on the

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[10] No such request was made. However the Authority presented its evidence and the officers whose affidavit the Authority presented were duly cross-examined. Furthermore the said affidavits were accompanied by a number of documents.

[11] No evidence was presented in **these** proceedings as to which cases the Authority referred to in its reply to this Appeal

imposition of the penalty is different from those persons who would have investigated the case in question. In this particular case, a review was first carried out by the Insurance and Pensions Supervision function after which the matter was then referred to the Enforcement function to assess whether there are grounds which merit the taking of Enforcement action, and the decision was eventually taken by the Executive Committee.

24. The Tribunal is being requested to determine that the actions of the Authority breach its fundamental human rights and effectively order that the said actions are deemed as null and void.

25. The Tribunal refers to:

Article 46 of Chapter 514 of the Laws of Malta (RPA) which states the following:

Without prejudice to any other powers assigned to the competent authority in terms of this Act, where a licence holder or an officer, or any other person responsible for a licence holder contravenes or fails to comply with any of the conditions imposed in a licence and, or where the competent authority is satisfied that a person's conduct amounts to a breach of any of the provisions of this Act, regulations or Pension Rules made thereunder, including failure to cooperate in an investigation, the competent authority may by notice in writing and without recourse to a court hearing impose on the licence holder, officer and, or any other person, as the case may be, an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) in respect of each infringement or failure to comply, as the case may be and, where such infringement or failure to comply continues, a further penalty not exceeding one hundred and sixteen euro (€116) for each day during which the infringement or failure to comply continues.

Article 17(6) of the Special Funds (Regulation) Act (Chapter 450 [12]):

Where a retirement fund administrator or retirement scheme administrator contravenes or fails to comply with any of the conditions imposed under this article, the Authority may without recourse to a court hearing impose an administrative penalty which may not exceed ninety-three thousand and one hundred and seventy-four euro and ninety-four cents (93,174.94).

Article 51(7) of the Trusts and Trustees Act (Chapter 331):

[12] Repealed by Chapter 514

(a) Without prejudice to any other powers assigned to theAuthority in terms of this Act, where a trustee, or a director of atrustee company or any other person entrusted with themanagement and administration thereof, or any other person havingobligations with respect to the trustee, contravenes or fails tocomply with any of the conditions imposed in an authorisationissued under article 43, or the conditions imposed in article 43A, orthe conditions imposed by the Authority upon registration inaccordance with article 43B, and, or where the Authority issatisfied that the trustee's or the person's conduct amounts to abreach of any provisions of the Act, regulations or rules issuedthereunder, or of any directive, obligations or other requirementmade or given by the Authority, including failure to cooperate in aninvestigation, the Authority may by notice in writing and withoutrecourse to a court hearing, impose an administrative penalty whichmay not exceed one hundred and fifty thousand euro (€150,000) for each infringement or failure to comply, as the case may be.

(b) Administrative penalties or other measures that may be imposed by the Authority on a trustee or any of thepersons referred to in paragraph (a) as may be specified, may be imposed in the form of a fixedpenalty, a daily penalty, or both.

26. All the above-quoted Acts nominate the Appellate Authority as the Authority or the Competent Authority referred to in the above-quoted articles.

27. The Decision subject of this Appeal was taken by the Authority on the strength of the powers granted to it by the above-quoted laws. Hence, the request of the Appellant effectively means that the Tribunal is being requested to determine that the Authority breached the Appellant's rights when it acted according to the powers conferred to it at law.

28. The Court of Appeal in the case ***Smash Communications Limited vs. l-Awtorita tax-Xandir et.*** [13] held:

10. L-argument tal-konvenuti huwa validu. Huwa minnu illi, taħt l-art. 469A(1)(a) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, il-qorti fil-kompetenza "ordinarja" tagħha tista' tħassar għemil amministrativ jekk dan "jikser il-Kostituzzjoni"; madankollu, dik il-ġurisdizzjoni tolqot biss l-għemil amministrativ u mhux il-liġi li taħtha jsir, b'mod illi, jekk l-għemil ikun sar kif tridu l-liġi meta l-liġi ma tħalli ebda diskrezzjoni dwar kif għandu jsir dak l-għemil amministrattiv, il-qorti ma tistax tgħid illi l-liġi għandha titqies li ma għandhiex effett, għax dak tista' tagħmlu biss fil-kompetenza "kostituzzjonali" tagħha, u lanqas ma jkollha l-possibilità li tinterpreta l-liġi ordinarja b'mod "konformi" mal-Kostituzzjoni jekk dik l-interpretazzjoni ma tkunx possibbli mingħajr ma, effettivament, tgħid illi l-liġi ma tiswiex. Dan ma jfissirx illi meta l-liġi tagħti diskrezzjoni u l-awtorità tinqeda b'dik id-diskrezzjoni b'mod li jikser il-Kostituzzjoni dak l-għemil ma jistax jitħassar taħt l-art. 469A(1)(a), għax diskrezzjoni mogħtija b'liġi xorta tista' tinqeda biha b'mod li jikser il-Kostituzzjoni; li jfisser hu illi, jekk il-liġi ma tħallix għażla dwar kif l-awtorità għandha timxi, hija biss

[13] 481/2004 delivered on the 24th June 2016

il-qorti fil-kompetenza tagħha kostituzzjonali li tista' tħassar dak l-għemil billi tgħid illi l-liġi ma għandhiex ikollha effett.

11. Inċidentalment, għandu jingħad illi l-Prim'Awla tal-Qorti Ċivili għandha s-setgħa, taħt l-art. 46(3) tal-Kostituzzjoni, illi tassumi kompetenza "kostituzzjonali" wkoll f'kawża "ordinarja", iżda fil-każ tallum dan ma għamlitux, x'aktarx għax il-kwistjoni ta' ksur tal-Kostituzzjoni ma "qamitx" waqt il-proċeduri iżda kienet effettivament waħda millpremessi tal-talbiet tal-attriċi mill-bidunett tal-kawża u għalhekk ilkwistjoni kellha titqajjem ab initio b'rikors kostituzzjonali.

12. Naturalment, dan kollu jiswa jekk tassew il-konvenuti mxew kif trid il-liġi u ma kellhomx għażla li jimxu mod ieħor; għalhekk imiss issa li naraw jekk il-konvenuti tassew imxewx kif trid il-liġi – kif qegħdin igħidu huma – jew imxewx ma' "konvenzjonijiet" maħluqa "abużivament" minnhom stess, kif tgħid Smash.

13. Il-kwistjoni mela hi jekk il-konvenuti setgħux jimxu mod ieħor flok ma tinħareġ l-akkuża minn organu tal-Awtorità – fil-każ tallum mill-Kap Esekuttiv tagħha – biex tingħata deċiżjoni fuq dik l-akkuża mill-istess Awtorità. Qari tal-art. 41 tal-Kap. 350 juri illi hija effettivament l-Awtorità li toħroġ "avviż ta' akkuża" u li tiddeċiedi dwar dik l-akkuża. Għalhekk ma setax isir mod ieħor ħlief illi jingħata l-"avviż ta' akkuża" mill-Awtorità jew minn organu tagħha sabiex eventwalment l-istess Awtorità tiddeċiedi jekk hemmx ħtija taħt l-akkuża wara li "tosserva lgaranziji ta' smigħ xieraq u fil-pubbliku". Fi kliem ieħor, l-akkuża ma setgħetx inħarġet minn xi persuna jew korp ieħor li ma jkunx parti millAwtorità, kif effettivament tgħid illi kellu jsir is-sentenza appellata.

14. Għalhekk, għar-raġunijiet mogħtija fuq, is-sentenza tal-ewwel qorti effettivament hija "disapplikazzjoni" tal-liġi, ħaġa li l-qorti fil-kompetenza "ordinarja" tagħha ma setgħetx tagħmilha. Dan l-aggravju tal-konvenuti għalhekk għandu jintlaqa' u ma jibqax meħtieġ li nqisu laggravji l-oħra.

29. It is thus clear that in as much as Ordinary Court cannot deem an authority as having acted in breach of a person's rights when it applied the law, likewise, this Tribunal is not vested with the jurisdiction to determine the matter raised by the Appellant in its first two please, since it is clear that the Appellate Authority acted in accordance with the provisions of Article 17(6) of the Special Funds (Regulation) Act, Article 46 of the Retirement Pensions Act and Article 51(7) of the Trusts and Trustees Act when it imposed the penalty on the Appellant.

On the basis of the above, the first two pleas of the Appellant, in so far as they relate to the powers of the Authority, are being rejected.

30. The other facet of the said preliminary pleas when read together, is the lack of due process and impartiality in the manner in which the Authority determines the action that it takes against a regulated entity.

31. The procedure used by the Authority in this case was initiated by a site visit which occurred in 2016 and continued with internal investigations, exchanges and sharing of information with the Appellant, the issue of a minded letter, the reply of the Appellant to the said minded letter and the issue of the Decision.

32. The Appellants argue that the simple fact that the Minded Letter was issued years after the site visit is certainly indicative of a haphazard approach by the Appellate Authority. Furthermore the Appellant argues that the way the investigations were carried out and the referral to the Executive Committee of the Authority for it to issue a Minded Letter, which Committee would ultimately also issue the Decision, breaches the rights of the Appellant since the decision is not taken by an Impartial decision taker.

33. The Authority referred to the built safeguards and structures specifically designed to ensure a fair hearing and that the organ of the Authority deciding on the imposition of the penalty is different from those persons who would have investigated the case in question. In this particular case, a review was first carried out by the Insurance and Pensions Supervision function after which the matter was then referred to the Enforcement function to assess whether there are grounds which merit the taking of Enforcement action, and the decision was eventually taken by the Executive Committee.

34. The Tribunal considers that the powers of the Appellate Authority are entrenched in Article 4 of Chapter 330 of the Laws of Malta. The said powers include the power to regulate, supervise and monitor as well as the power to enforce.

35. Article 5(1) of Chapter 330 then states that the main organs of the Authority are the Board of Governors, the Executive Committee and Directorates as may be established by the Board of Governors from time to time.

36. Article 9(1) of Chapter 330 states:

The Executive Committee shall be responsible for the implementation of the strategy and policies of the Authority, for the approval of regulation, for the approval of and for the issuing of licences and other authorisations, and for the monitoring and supervision of persons and other entities licensed or authorised by the Authority in the financial services sector, for the enforcement of the regulatory framework in the financial services sector, for carrying out the day-to-day management and the finances of the Authority including human resources and ancillary services, and for the general coordination of the Authority's administrative affairs.

37. Finally, Article 11(1) of Chapter 330 states:

The Enforcement Decisions Committee shall decide or take such action as it considers appropriate, promptly and without delay, in relation to any recommendation for enforcement action brought before it by the Chief Officer responsible for Enforcement or any other official from the Directorate responsible for enforcement;

38. According to Article 11(12) of Chapter 330, the said Committee shall be considered as independent from the Board of Governors and the Executive Committee and according to Article 11(8), before arriving at a decision, it must notify the entity subject of the enforcement action of the intended action, with the said entity given a time to respond.

39. In its additional note of submissions, the Authority concedes that the Decision was taken by the Executive Council and not the Enforcement Decisions Committee, but refers to Article 11(1) which states:

> *Provided that the Executive Committee may take any enforcement action itself if:*
> *(a) it considers that, in the particular case, the action proposed should occur before it is practicable or possible to convene the Enforcement Decisions Committee; or*
> *(b) it considers that, in the particular case, an urgent decision on the proposed action is necessary to protect the interests of consumers.*

40. The Authority argues that on the basis of the afore-mentioned proviso to Article 11(1) the Executive Committee is authorised to take enforcement action itself.

41. The Provisions of the current Article 11 were introduced through Article 9 of Act VII of 2019 and the said Act came immediately into force upon its enactment [14].

42. Hence, one would expect that immediately after the introduction of Article 11, the Enforcement Decisions Committee would have been established and its members appointed by the Board of Governors [15]. The Executive Committee, with the approval of the Board of Governors, should have established a detailed remit for the Enforcement Decisions Committee [16]. In reality, through the powers granted to it through the provisions of Article 11(3), on the 22nd December 2022, the Executive Committee issued the Policy Document on Non-Material Enforcement Action. To date there is no evidence that the Enforcement Decisions Committee is actually appointed [17] and from the further submission made by the Authority in its additional note of submission it would seem that this Committee has not been yet appointed. Neither does it seem that there is any detailed remit document as required under the provisions of Article 11(3).

43. The Decision in this case was issued on the 16th April 2021 and the Minded Letter was issued on the 22nd February 2021. The latter was signed by the Chief Officer of

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[14] 29th March 2019
[15] Vide Article 11(4) and 11(5)
[16] Vide Article 11(3)
[17] https://www.mfsa.mt/about-us/enforcement-decisions-committee/

Enforcement whereas the Decision was attached to a letter issued by the same Chief Officer of Enforcement. The Decision contains no information as to which organ of the Authority considered the submissions of the Appellant, or which organ actually decided on the mater. Neither does it contain any reference to any date when it was taken and is seemingly unsigned.

44. The minded letter refers to a meeting held at the offices of the Appellant in July 2016, and clearly the investigation by the Authority into the manner through which the Appellant was carrying out its activities started prior to the said site visit and continued after. The Minded Letter was issued 4 years after the site visit. At no stage did the Authority provide any evidence to sustain its argument that the Executive Committee had to take action itself because, "*in the particular case, the action proposed should occur before it is practicable or possible to convene the Enforcement Decisions Committee; or .... in the particular case, an urgent decision on the proposed action is necessary to protect the interests of consumers.*"

45. The above-listed timelines also clearly indicate that there was no objective reason why the Authority, through its Executive Committee, should have used the exceptional procedures established in the Proviso to Article 11(3) rather than the procedure established in the rest of Article 11.

46. It is pertinent to note that the appointment of the Enforcement Decisions Committee falls completely within the remit of the Authority in that its members are appointed by the Board of Governors [18] of the Authority. Hence the Authority certainly cannot claim that it was not practical or possible to convene the Enforcement Decisions Committee [19]. If that were the case then the Authority would easily circumvent all the procedures involving the Enforcement Decisions Committee simply by not appointing such a Committee.

47. Furthermore, the exceptional procedure established in the Proviso to Article 11(1) is clearly related to "the particular case" that is being determined rather than to generic circumstances.

48. Having established that the Proviso to Article 11(1) does not apply to this particular case, the Tribunal has to now determine whether the fact that the Executive Committee determined the matter involving the Appellant, rather than the Enforcement Decisions Committee, impinges on the validity of the Decision.

49. Prior to the enactment of Acy VIII of 2019, the enforcement powers of the Appellate Authority were exclusively vested in the Executive Committee. As from 2019, the powers of the Executive Committee in relation to supervision and enforcement did not really change since according to Article 9(1):

[18] Vide Article 11(2)
[19] Article 11(1), Proviso (a)

"The Executive Committee shall be responsible for the implementation of the strategy and policies of the Authority, for the approval of regulation, for the approval of and for the issuing of licences and other authorisations, and for the monitoring and supervision of persons and other entities licensed or authorised by the Authority in the financial services sector, for the enforcement of the regulatory framework in the financial services sector, for carrying out the day-to-day management and the finances of the Authority including human resources and ancillary services, and for the general coordination of the Authority's administrative affairs."

50. On the otherhand, the Enforcement Decisions Committee, which is certainly not a sub-committee of the Executive Committee [20], was given a very specific remit as specified in Article 11(1):

"The Enforcement Decisions Committee shall decide or take such action as it considers appropriate, promptly and without delay, in relation to any recommendation for enforcement action brought before it by the Chief Officer responsible for Enforcement or any other official from the Directorate responsible for enforcement:"

51. The provisions of the law are clear enough and the Authority clearly acted in breach of the provisions of the law when it simply ignored the provisions of Article 11, by first failing to appoint the Enforcement Decisions Committee, and then by failing to recognise the distinction between the roles of its Executive Committee and the Enforcement Decisions Committee.

52. It is quite clear that as from the date of the coming into force of Act VIII of 2019, the Authority had to refer decisions relating to enforcement to the Enforcement Decisions Committee. This was certainly not done in this particular case.

53. The provisions of Article 11 and more specifically the role, functions and powers of the Enforcement Decisions Committee, were intended to create a system through which decisions are taken by a committee that is deemed as independent and distinct from the Board of Governors and the Executive Committee of the Authority. The Tribunal will not delve into whether this mechanism has the necessary safeguards to ensure that the principles of natural justice are observed since this matter goes beyond the remit of this Tribunal, and more specifically goes beyond the remit of this Appeal. The principle however remains that in this case, the procedures established under article 11 of chapter 330 of the Laws of Malta were not observed.

54. As already explained, the Enforcement Decisions Committee is not a sub-committee of the Executive Committee. Hence one cannot certainly argue that the decision was

[20] This is a matter of bad legislative drafting since Article 2 describes the Enforcement Decisions Committee as a sub-committee of the Executive Committee, when this is clearly not the case since this is not a sub-committee of the Executive Committee appointed under Article 9(2) of Chapter 330. Also the Enforcement Decisions Committee must report about its progress to the Board of Governors and acts independently from the Board of Governors and the Executive Committee in accordance with Article 11(12).

infact taken by the competent organ withing the Authority rather than a sub-committee of the competent organ. Neither can one argue that the Enforcement Decisions Committee has not been vested with the exclusive jurisdiction to take enforcement action on matters falling under the supervision of the Authority other than in the limited and exceptional circumstances listed in the Proviso to Article 11(1) and the minor matters listed in Article 11(3).

55. This failure tantamounts to a serious breach by the Authority and a departure from the provisions of Chapter 330 of the Laws of Malta. The action taken against the Appellant is of a serious nature not only because of the value of the penalty imposed, but also because of the subjective assessment made by the Authority in relation to the manner through which the Appellant operated its licensed activity.

56. The Authority is responsible for this failure of observance of the law and, as already explained, the failure to refer the matter to the Enforcement Decisions Committee in accordance with the provisions of Article 11 cannot be justified.

57. David Fabri [21] notes that:

"The power and the right to impose administrative sanctions, including the withdrawal of licences and the imposition of penalties, against licence-holders and others are one of the most important parts of the armoury in the hands of a strong regulatory agency. Throughout its existence since 1988, this power was always vested in the Executive Committee, or in the Supervisory Committee which had for some years replaced it……
New Article 11 introduced a few years back purported to change this situation and added a new organ whereby the regulators were no longer empowered to issue administrative sanctions directly themselves, but could henceforth only issue recommendations. The Enforcement Decisions Committee (EDC) …. Was set up to receive these recommendations and decide upon them. This this way, the MFSA could shed the accusation, often made, that the Executive Committee was acting as the proverbial prosecution, judge and jury. Enforcement decisions were now to be taken by a different body whose sole function was to receive, accept or reject such recommendations." [22]

The same Author whilst being very critical, and rightly so, of the drafting and incoherence of certain provisions regulating the Enforcement Decisions Committee, clearly concludes that the role of the said Committee is intended to create a create demarcation or roles and duties within the Authority – *"The EDC is not just another debating committee, but has a special, specific and very significant role and powers. It is now the most important enforcement decision-taker withing the MFSA."* [23]

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[21] Studies in Maltese Regulation: Financial Services Law, 2022
[22] Pp. 41
[23] Supra pp. 42

58. Procedural rules are intimately connected to the rules of Natural Justice and procedural ultra vires may lead to consequences in relation to the validity of the decision take. *"In public law, a requirement may be "mandatory" or "directory". A breach of a directory norm does not bring about the nullity of the administrative act, but that of a mandatory one does."* [24]

59. In ***Denise Buttigieg vs. Rector University of Malta*** [25] the Court held that failure in an examination on a subject that was not declared in writing to be a core subject, was declared without effect:

"Mill-banda l-ohra pero' mill-lat purament legali ma jistax jigi njorat il-fatt li, kuntrarjament ghal dak stipulat firregolament numru 10, ma rrizulta minn imkien in iscriptum li dak is-suggett huwa wiehed obbligatorju. Dan irregolament jirrikjedi f' termini espressi u cari li fil-katalogu jkun hemm indikat is-suggetti meqjusa bhala obbligatorji, u in mankanza ta' dan, ma jistax jinghad in stricto jure li xi study unit huwa obbligatorju fit-termini tar-regolament imsemmija maghmula mill-istess Universita'.

Ir-ratio legis f' dan ir-rigward huwa manifest u cioe' li dawk l-istudy units li huma obbligatorji u li ghalhekk fuqhom tiddependi l-hajja universitarja tal-istudenti fil-korsijiet rispettivi jkunu indikati f' mod car, u li l-obbligatorjieta' taghhom tkun tirrizulta inekwivokabilment bil-mitkub; b'hekk ikunu maghrufa lil min, u verifikabbli minn, kull min hu involut u interessat, bil-konsegwenza li tigi eliminata sitwazzjoni ta'incertezza li tista' tkun ta' pregudizzju ghallistudenti. Ir-regolament jirrikjedi espressament li ssuggett jigi indikat bhala obligatorju fil-katalogu ppubblikat, u ghalhekk mhux sufficjenti li fil-bidu, jew matul, is-sena lghalliema jinformaw lill-istudenti verbalment li dawk issuggetti elenkati fil-handout huma obbligatorji in toto jew in parte."

60. In ***Attard vs. Prof. Roger Ellul Micallef noe*** [26], the Court declared null a change in admission requirements to a University Course, since the changes were not done through the enactment of subsidiary legislation as mandated by law.

61. The failure to observe the provisions of Article 110(1) of the Constitution in relation to disciplinary proceedings against public officers through the Public Service Commission renders the action null [27].

62. The UK Court of Appeal in the case ***Bradbury vs. Enfield LBC*** [28] held:

It is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.

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[24] Tonio Borg, Maltese Administrative Law, 2021, pp. 173
[25] First Hall Civil Court per Mr. Justice N. Cuschieri decided on the 22nd December 2003
[26] Court of Appeal 4th March 1998
[27] Denis Tanti vs. Prim Ministru et , Court of Appeal 16th November 2004
[28] Decided on the 23rd August 1967 (1 WLR 1311)

63. Similarly there are numerous other examples where the failure to observe mandatory procedures were deemed as null by the UK Courts [29].

64. It is amply clear that in accordance with the provisions of Article 11 of Chapter 330 of the Laws of Malta, matters relating to enforcement had, as from March 2019, to be referred and determined by the Enforcement Decisions Committee. This procedure is mandatory in nature and the failure to observe the provisions of the law and this specific requirement, impinge on the validity of the Decision.

65. On the basis of the above the Tribunal has no other option than to consider the Decision taken by the Authority as being defective and hence null and void

    On the basis of the above, the Tribunal finds that the Authority acted in breach of the provisions of Article 11 of Chapter 330 of the Laws of Malta and hence upholds the plea raised by the Appellant, namely that there is a lack of due process and impartiality in the manner in which the Authority determines the action that it takes against a regulated entity, and hence considers the Decision as null and void.

    On the basis of the above, the Tribunal need not enter into the merits of the other pleas raised by the Appellant in its Appeal.

    For the avoidance of any doubt, this decision should be reflected in any public pronouncements made or issued by the Authority in relation to the Decision.

    Costs are to be borne by the Authority.

[29] Administrative Law, Wade & Forsyth (11th Edit) pp. 185 et seq