



Appell FST 03/21

Investar plc (C65310)

vs

Malta Financial Services Authority

29 ta' Mejju 2024

It- Tribunal

Ra l-appell interpost mill-Appellanta liema appell gie intavolat fis- 26 ta' Novembru 2021 li fih l-appellanta ssostni:

“This is an appeal in terms of Article 21 of the MFSA Act (Chapter 330 of the Laws of Malta) and from a decision of the Malta Financial Services Authority (the “MFSA” or the “Authority”) dated 29 October 2021 (“Decision”) (attached Decision marked as DOC INV1).

A. BACKGROUND

1. On 12 January 2016, the Appellant listed €5,500,000 worth of exchangeable notes on the Institutional Financial Securities Market (“IFSM”). The said exchangeable notes (ISIN: MT0001011205) had a nominal value of €100,000 per note and carried an annual coupon of 6% (“Securities”). The Securities matured on 31 March 2021 and as confirmed by the MFSA, the Securities were, as at the date of the Decision, no longer listed on the IFSM.
2. Pursuant to its investigation, the Authority considered the Company’s failure to approve and publish the Annual Financial Reports (“AFRs”) for years ended 31 December 2017, 2018, and 2019 to be a breach of the applicable rules of “Medium severity”¹ in view of the alleged “severe implications in respect to (sic) market integrity” (the “Breach”).² On this basis, after largely disregarding the representations of the Company, the Authority confirmed its “minded position as indicated in the Authority’s letter of the 7 September 2021”.³ In this respect, the Authority imposed a fixed

¹ Page 6 paragraph 6 of the Decision

² Page 4 Paragraph 3 of the Decision

³ Page 16 paragraph 1 of the Decision

administrative penalty amounting to fifteen thousand Euro (€15,000) ("**Fixed Penalty**"), as well as an additional daily administrative penalty amounting to sixteen thousand, seven hundred and forty Euro (€16,740) ("**Daily Penalty**"), collectively amounting to thirty-one thousand, seven hundred and forty Euro (€31,740) (the "**Administrative Penalty**").

B. BASIS FOR APPEAL

3. This is an appeal in terms of Article 21(9) of the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta. For reasons explained below, and as will be explained in further detail during the proceedings before this Financial Services Tribunal ("**Tribunal**"), in reaching its decision, the MFSA wrongly applied the law and abused its discretion. In addition, the Decision is manifestly unfair; the Administrative Penalty disproportionate; and the whole process is in breach of the principles of natural justice. On the merits, the Appellant refutes the allegations in their entirety as they are unfounded in law and in fact.

C. PRELIMINARY PLEAS

i. *Lack of Due Process*

4. On a preliminary basis, the process leading to the Decision is vitiated in view of the serious breach of the Company's right to due process which renders the decision manifestly unfair.
5. The Authority sent a letter dated 7 September 2021, to Investar outlining the proposed regulatory action the authority was "*minded*" to pursue ("**Minded Letter**"). In response to this Minded Letter, the Company provided its representations in its letter dated 17 September 2021, on the proposed regulatory action, in particular the perceived severity of the breach by the MFSA and the corresponding penalty ("**Reply Letter**").
6. The Authority considered the replies and level of cooperation by Investar to be "*speculative responses based on unfounded judgement*". On this basis, whilst taking into consideration one mitigating factor⁴, the MFSA merely confirmed its minded position and reproduced its position in the final Decision. Admittedly, this barely came as a surprise to the Appellant Company since, from the outset, the Authority's position was already pre-determined, or to use the Authority's terminology, "*minded*" to pursue the course of action it proposed in its Minded Letter. At that stage, the decision-making process of the Authority, if any, was already in a very advanced if not complete stage, merely pending a confirmation of the minded position. In point of fact, in its Decision, the Authority briefly summarized the Company's representations in its Reply Letter and in response thereto, instead of providing a reasoned basis for disregarding the representations, Authority repeatedly concluded that the Breach subsisted throughout the period when the Securities were listed and

⁴ Page 11 of the Decision.

accordingly, the imposition of the Administrative Penalty was warranted in order to dissuade the Company from further breaches of this nature. Aside from the obvious fact that since the Securities matured prior to the Decision the Company was no longer a listed entity at the date of the Decision, and consequently the alleged Breach is certainly not a continuous one as the obligation no longer subsists in view of the delisting, the Authority further failed to motivate the basis behind rejecting the Company's representations. The Decision in the large simply reiterates the "findings" of the MFSA in relation to the Breach identified by the Authority without giving reason for not taking on-board the Company's representations, with the exception of the calculation of the Daily Penalty as explained in Section 2.7 of the Decision. In the concluding section of the Decision, the Authority simply concludes "*it is of the view that the Representations do not justify a reconsideration of the MFSA's minded position as indicated in the Authority's letter of 7 September 2021*".⁵ The Company was not able to ascertain the manner in which the MFSA purportedly carefully considered and deliberated the circumstances of the case against the representations of the Company. Barring one instance, the Authority did not even give an iota of an indication as to why it continued to insist that the Breach is of "*medium severity*" notwithstanding the representations made by the Company. It is respectfully submitted that the MFSA far from reached a considered Decision, rather, it stuck to its guns, and repeated that which was already communicated in its Minded Letter. This approach renders the Minded Letter, as a precursor to the Decision, and the opportunity to provide representations in the Reply Letter, a mere formality without any real substance or probative value. This opaque practice of the Authority is grossly unfair and impinges on the Appellant's right to due process through fair hearing because the Company has been found guilty as charged by the MFSA acting as its own judge and prosecutor, without being given the appropriate means or opportunity to participate in its own cause.

7. Pursuant to the European Convention on Human Rights and the 1998 UK Human Rights Act, the United Kingdom began a process of reform in the decision making processes of the regulatory authorities so as to ensure a fair hearing.⁶ Prior 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*'.⁷ 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 UK 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 UK 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.⁸ Whilst it appears that the Malta Financial Services Act, Chapter 330 of the Laws of Malta, caters for the establishment of a "Resolution Committee", it remains

⁵ Page 16 paragraph 1 of the Decision.

⁶ Iain MacNeil, *An Introduction to the Law on Financial Investment* (2nd edn Oxford, Hart Publishing, 2008).

⁷ Report of the 27 April 1999. Part VI para 147.

⁸ 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.

unclear whether carrying out the functions it purports to carry out within its remit. In particular the Resolution Committee is tasked with – “*Imposing administrative penalties on any person whose conduct, in the opinion of the Committee, amount to a breach of any of the provisions of the MFSA Act or any regulations or Rules issued thereunder transposing the BRRD*”.⁹ In view of the opaque practices by the Authority, it is not clear as to whether it is the Resolution Committee is the body that ultimately confirms the minded position of the Authority, and if so, in what manner, and who therefore, represents the Company’s cause before the Committee, or whether this is entrusted to any other body within the Authority.

8. The investigative and decision-making bodies of the MFSA overlap, leaving no room for impartiality in decision making, and the MFSA is in flagrant breach of the natural justice principle of *nemo iudex in causa propria*, that is nobody ought to adjudicate in matters in which he has interest. There is a complete lack of transparency on the decision-making process within the Authority which in turn impinges on the Company’s fundamental human right of a fair hearing. Even by the mere fact that the Company is invited to make its representations at a stage when the Authority would have already been minded to proceed with the proposed regulatory action is already too late in the process, if there can be said to be one. As an adjudicating body exercising a quasi-judicial function in its decision-making role, the MFSA is unequivocally bound by the rules of natural justice.¹⁰ This was affirmed by the Court in **Nutar Marilena Cristina vs. Kummissjoni dwar is-Servizzi Pubbliku, Dr Angela Sultana, Dr Predrag Andrejev u Dr Josephine Psaila**¹¹ - ‘Il- principji tal-gustizzja naturali u l-principju li l-amministrazzjoni pubblika għandha toqgħod entro l-parametri tal-liġi, huma principji bażiċi li l-amministrazzjoni pubblika għandha tħares meta tiegħu decizjonijiet’. In **Sant vs. Commissioner for Inland Revenue**, the Court held that although the administrative body in exercising its quasi-judicial function is not bound by the same procedures as the courts, it is still bound by the principles of natural justice.¹² It is respectfully submitted that in reaching its Decision, the MFSA flagrantly disregarded these principles and instead forged ahead with its minded position. In view of the lacking fundamental safeguards which are intended to ensure a just and due process leading the Decision, the Appellant respectfully requests this Tribunal to strike down the Decision on this basis.

ii. *The Administrative Penalty is Arbitrary and in any case is excessive*

9. Without prejudice to the above, the Administrative Penalty is arbitrary, disproportionate and in any event, excessive, thereby rendering the Decision manifestly unfair and an abuse of the Authority’s discretion.
10. The Authority claims that Investar had shown little commitment to regularize its position when the potential breach first materialized. This cannot be further from the truth. The MFSA failed to appreciate that, given that the Company is bound to publish consolidated accounts (which consolidated accounts include *inter alia* figures from the Company’s subsidiaries LifeStar Holding p.l.c. and LifeStar Insurance p.l.c.), EY

⁹ <https://www.mfsa.mt/wp-content/uploads/2019/11/Resolution-Committee-Mandate.pdf>

¹⁰ Vide *Reno Alamango v Mary Rose Ciantar*, COA, 29 May 1991

¹¹ First Hall Civil Court, 525/2012 21, per Ms. Justice J. Padovani Grima, 8 November 2013, p.21.

¹² Court of Appeal, 4 March 1992.

Malta, as the auditors of the LifeStar (previously 'GlobalCapital') group for the years ending 31 December 2017, 2018 and 2019, would have been the only auditors able to audit the Company's consolidated financial statements, not least since they are one of just a handful of Maltese auditors authorised to audit insurance companies and, as the MFSA is aware, the LifeStar group includes LifeStar Insurance p.l.c. - a licensed insurance undertaking.

However, EY Malta never formalized an engagement with the group and/or the Company, and after leading the group and the Company to believe that they would proceed with their audit, in 2020 EY Malta informed the LifeStar group and the Company, that they no longer wished to provide the group, or the Company, with their audit services. Naturally, some time then lapsed until the LifeStar group engaged its new, and present, auditors (Grant Thornton Malta), which serves to explain the delay in filing duly audited accounts. The Company kept the MFSA duly informed of these events at every stage. Accordingly, it was an objective impossibility for the Company's financial statements to be audited due to the unavailability of our auditors at the time. Once the auditors were appointed, the Company remained indeed committed to submitting the AFRs but to do this, it explained that the newly appointed auditors needed time to go through the Company's processed and to be brought up to speed.

11. The Authority is also very much aware, and confirms as much in its Minded Letter, of the fact that (a) Investar has never been responsible for any previous breaches which were subject to any previous regulatory action; and (b) *"no loss of capital or income has been caused to members or third parties by the potential breach identified"*¹³ (i.e. the failure to publish AFRs). This being premised, the Authority persisted in its unfounded assertion that the Company's failure to publish annual financial reports *"may have sever implications in respect to (sic) market integrity"*¹⁴ when, as confirmed by the Authority itself, in actual terms, there was **no** such consequence.
12. In response to the above assertion in the Minded Letter, the Company provided that the Authority disregarded the fact that at the time when the Securities were listed, the Company was not an ordinary issuer, but an issuer of notes with a denomination of €100,000 each, which notes could **only** be acquired by 'qualified investors' and, by the time the notes matured, there were only **9 noteholders**. The purpose behind the requirement for the publication of annual financial reports is to allow investors to assess the business performance and assets of the companies in which they invest. Accordingly, given (a) the very small number of noteholders and their level of sophistication; (b) their relationship with our Company; and (c) the extremely low level of liquidity of the notes, it is respectfully submitted that the publication of the AFRs would not have been of much relevance for investors in their assessments. On this basis, and in real terms, the materiality of the alleged Breach is in fact completely absent or, at best, extremely low. Instead in its Decision, the Authority continued to think in probable and hypothetical terms and reiterated that *"irrespective of the close relations ... the recurrence of this breach may have severe implications in respect to (sic) market integrity"* - this notwithstanding the fact that at the time of the Decision, the Company was no longer listed on the IFSM, and therefore not subject to the Capital Markets Rules for Wholesale Securities Markets which the Authority is seeking to

¹³ Pace 6 paragraph 6 of the Minded Letter

¹⁴ Ibid.



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enforce. The Authority appears to have failed to understand that it is not a matter of probability any longer. This may have been the case at a time when the Securities were still listed but most certainly not the case upon the issuance of the Decision. At that point, it either is or it isn't. It either did have an effect or it did not. By the Authority's own admission, it acknowledged that there were no such adverse effects. Accordingly, it follows that the severity of the breach is certainly not that of "medium".

13. In its Minded Letter, the Authority provides that the Fixed Penalty is based 'Company / Potential Breach Categorisation Scoring Matrix' which purportedly resulted in a 'Medium' Level type of breach. However, the parameters and the methodology resulting in a 'medium' score, and the respective weighting given to each consideration which in turn transposes into the Fixed Penalty are completely arbitrary and seem to have been formulated unilaterally by the Authority - without any apparent legal basis, and without ever being communicated to the public. On top of that, the Authority was minded and in fact proceeded to impose a Daily Penalty over and above the Fixed Penalty, which Daily Penalty was subsequently adjusted in the Decision, in view of the mistake in its original computation in the Minded Letter. MFSA's motivates its exercise of its discretion in imposing the Daily Penalty because it deemed the Fixed Penalty not 'effective' enough. In other words, the Authority considered the penalty imposed for a 'Medium' level breach established by their own matrix not to be punitive enough and imposed a further daily penalty. Whilst on the one hand, the Authority arbitrarily assigned a 'medium' level breach rating, it went against its own matrix and increased this to a more severe rating by compounding the Fixed Penalty with a daily penalty of €10. In *Rosette Thake noe. Et v. Kummissjoni Elettorali* et the court concluded that "*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 amministrativa. 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*"; However, given that the Securities are no longer listed, the Fixed Penalty compounded with a Daily Penalty certainly does not have the effect of dissuading the Company from any future breaches, precisely because the Company is no longer subject to Capital Markets Rules for Wholesale Securities Markets. Accordingly, rather than dissuasive, the Administrative Penalty is punitive and pecuniary in nature, intended to punish the Company. 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*".



14. Therefore, in the most arbitrary manner and in a clear abuse of its discretion, the Authority assigned a breach level of 'medium' which does not arise from law and allocated a Fixed Penalty purported benchmarked against the said 'medium' level of severity which it further compounded with a Daily Penalty to reach a value that the Authority consider effective enough to *dissuade* the Company from continuing in its state of affair in relation to the Breach. A state of affair that had, in view of the delisting, ceased. As a Public Authority imposing penalties akin to punitive sanctions, the methodology in relation to the imposition of such penalties needs to be transparent and prescribed at law. In view of the complete arbitrariness in allocating the Administrative Penalty, the Decision ought to be set aside on this basis.

D. PLEAS ON THE MERITS IN RELATION TO THE ALLEGED BREACH

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

iii. *The MFSA wrongly applied the law and instead rested on the rules as issued by the Authority*

16. The source of the requirement for issuers of listed securities to publish financial reports is Directive 2004/109/EC, as amended (the "**Transparency Directive**"). The Transparency Directive regulates issuers of securities traded on regulated markets within the EU (such as the IFSM) and aims to ensure transparency of information for investors through a regular flow of disclosure of periodic and on-going regulated information and the dissemination of such information to the public. However, article 8(1)(b) of the Transparency Directive provides that the requirement to publish annual financial reports (article 4) and half-yearly financial reports (article) 5 does **not** apply to issuers (such as the Company) of "*debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 100 000*". In other words, the Transparency Directive itself (which requires regular issuers to publish annual and half-yearly financial reports for the specific purpose of (i) increasing transparency in the European capital markets; and (ii) ensuring that investors have adequate information at their disposal), **does not deem the publication of financial reports by issuers listed on wholesale markets (such as the Company) to be necessary, precisely because sophisticated investors who invest in instruments such as the notes issued by the Company do not need to rely on the publication of such financial reports in order to take investment decisions.**

17. Notwithstanding the derogation provided in article 8(1)(b) of the Transparency Directive, regulation 4.22 of the Capital Markets Rules for Wholesale Securities Markets issued by the Authority (the "**Rules**") still requires issuers listed on wholesale markets to publish annual financial reports. Therefore, the Rules effectively depart from the derogation in the Transparency Directive and impose stricter requirements on issuers listed on wholesale markets. Whilst the imposition of stricter requirements contained in the Rules is not being contested, it is submitted that the Rules, and any alleged breach thereof, should not be interpreted in a vacuum, but should be interpreted and evaluated in the context of their intended purpose, and in

light of the source of the rules (i.e. the Transparency Directive). In this regard, it is respectfully submitted that had the European legislator deemed the publication of annual or half-yearly financial reports by issuers of debt securities having a denomination of €100,000 to be important for market integrity, the Transparency Directive would not have specifically excluded such issuers from the requirement to publish financial reports. The Authority completely disregarded the Company's representations in the Reply Letter to this effect, merely asserting in a very draconian manner that in terms of the Rules drawn up by them, the requirement to publish AFRs subsisted even for issuers of debt securities with a denomination of €100,000 irrespectively of the scope and intended purpose of the Transparency Directive, being the source of all regulation in this sector. *Dato ma non concessio*, if for the sake of argument only, which is denied, one were to concede that notwithstanding the provisions of the Transparency Directive, the Rules override and publication of the AFRs is mandatory, then the severity of the Breach is however, most certainly mitigated to 'very low'.

18. As previously mentioned, given that the Company is no longer a listed company, it is impossible for it to publish its annual financial reports in terms of rule 4.22 of the Capital Markets Rules for Wholesale Securities Markets.

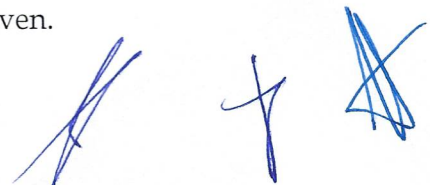
iv. The Decision is based on a false representation of the facts surrounding the cooperation of the Company

19. The MFSA falsely portrayed that the Company did not cooperate and repeatedly failed to keep the Authority informed of developments, alleging that the company "*failed to report back to the Authority*" and "*simply ignored the MFSA's requests*". This is vehemently rejected. As will be proven throughout these proceedings, the Company was always forthcoming with information and clarifications, and even provided the MFSA with copies of management accounts as appropriate. Such management accounts were obviously submitted to the MFSA as a sign of good faith and to demonstrate the Company's commitment to cooperating with the MFSA at all times.

20. In the Decision, the Authority reproduce the chain of **written** correspondence between the Authority and the Company. The Authority failed to list the multiple instances where physical meetings as well as telephonic discussions/meetings were also held, including with the new appointees of the Company. To portray of picture of disregard by the Company is a gross misrepresentation of the facts.

21. Whilst on the one hand the Authority falsely asserts that it did not keep the Authority abreast with any developments, at the same time it accuses the Company of providing "*speculative*" responses and "*based on unfounded judgement*". In its Reply Letter the Company explained that "*it always endeavoured to treat the MFSA with all due respect and has always sought to conduct itself in a professional manner. We therefore take such assertions very seriously and would like to better understand those instances when the MFSA thought that the Company responded speculatively or used unfounded judgement, in order not to repeat such instances in the future.*" Quite typically, no such explanation or indication was given.

E. CONCLUSION



THEREFORE in light of the above, and for reasons that may be brought during the proceedings before this Tribunal in terms of law, the Appellant humbly requests that this honourable Financial Services Tribunal annuls in its entirety the Decision of the Malta Financial Services Authority of the 29 October 2021, or alternatively, varies and thus decreases the Administrative Penalty imposed by the Authority and consequently upholds the appeal or part thereof, with costs against the Authority."

Ra r-risposta imressqa mill-Awtorita Appellata tat- 22 ta' Dicembru 2021 li fiha, rrispondiet ghall-appell interpost u sostniet:

1. On 29 October 2021, the Authority issued a decision finding that the appellant, Investar plc ("**Investar**" or the "**Appellant**"), had breached Rule 4.22 of the Capital Markets Rules for Wholesale Securities Markets (the "**Rule**") due to Investar's failure to approve and publish the Annual Financial Reports ("**AFRs**") for years ended 31 December 2017, 2018 and 2019 (the "**Decision**"¹⁵). The Authority imposed a fixed administrative penalty of €15,000 (the "**Fixed Penalty**") and a daily administrative penalty of €16,740 (the "**Daily Penalty**"), together amounting to the sum of €31,740 (the "**Administrative Penalty**").
2. This decision was taken, and communicated to Investar, only after the Authority had sent a minded letter to Investar dated 7th September 2021 (the "**Minded Letter**")¹⁶, informing Investar of its intention to impose an administrative penalty due to the said breach, and inviting Investar to make its representations with respect to the same. Indeed, Investar replied to the Minded Letter by making its representations through a letter dated 17th September 2021¹⁷. As shall be shown and elaborated upon in this reply, the Authority's decision was taken after due consideration was given to Investar's representations.
3. However, even after Investar's breach of the Rule, which rule subsisted, for a continuous period of more than three years, Investar are now appealing the Authority's decision and alleging that *"in reaching its decision, the MFSA wrongly applied the law and abused its discretion"* and that the Authority's decision is *"manifestly unfair; the Administrative Penalty disproportionate; and the whole process is in breach of the principles of natural justice."*
4. The Authority refutes all such allegations and statements as made by Investar and shall elaborate accordingly in this reply.

¹⁵ Attached to the Appellant's Appeal Application as Doc.INV1.

¹⁶ Herewith attached and marked as Doc.MFSA1.

¹⁷ Attached to the Appellant's Appeal Application as Doc.INV2.



Investar's grievance of the alleged "lack of due process"

5. Investar's grievances relating to the alleged "lack of due process" may be summed up in two main points, and mainly that:

5.1. the Authority failed to take due consideration of Investar's representations as made through its letter of 17 September 2021;

5.2. the Authority acts as *"its own judge and prosecutor"*¹⁸ and that *"the investigative and decision-making bodies of the MFSA overlap, leaving no room for impartiality in decision making, and the MFSA is in flagrant breach of the natural justice principle of nemo iudex in causa propria, that is nobody ought to adjudicate in matters in which he has interest."*¹⁹

6. The Authority shall be dealing with each of these two points in turn.

7. Firstly, particularly with respect to the Investar's allegation that it failed to duly consider Investar's representations as made through its letter of 17 September 2021, the Authority humbly submits that the mere fact that Investar's submissions did not result in the Authority changing most of its initial findings as communicated to Investar in its Minded Letter, does not mean that the Authority did not duly consider such representations.

8. Indeed, the Authority, took note of Investar's representations, duly considered them, and also amended its findings as communicated in the Minded Letter, where it deemed that Investar's submissions had substance. The Authority in fact changed its position with respect to the calculation of the Daily Penalty, and this as is held by Investar itself in paragraph 6 of its appeal application to this Hon. Tribunal.

9. In its Decision, the Authority not only acceded to one of the points raised by Investar, but it also explained, in great detail, the several reasons why the Authority's position remained unchanged even after having duly considered Investar's representations. In fact, the Decision is structured in such a way for it to firstly cite and consider the representations as made to it (in this case, by Investar) and then duly apply its reasoning as to whether such representations are being acceded to or otherwise.

¹⁸ Para 6 of the Appellant's Appeal Application

¹⁹ Para 8 of the Appellant's Appeal Application



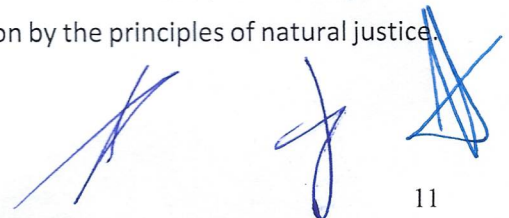
10. Investar's claim that the process of the Authority sending its Minded Letter and then receiving representations is "opaque" and "a mere formality without any real substance or probative value" remains therefore, baseless and unfounded at fact and at law.
11. Secondly, with respect to that which is summed up in paragraph 5.2 above, including therefore, Investar's allegations of breaches of the principles of natural justice because of the fact that in terms of law, the Authority is its own judge and prosecutor, the Authority humbly submits that this Hon. Tribunal is not the right forum to hear and adjudge such claims.
12. The Authority's powers, including those powers which Investar terms as "investigating" and "adjudging" are allocated to it by law and consequently, the question as to whether the law itself, as promulgated, breaches the principles of natural justice, is not for this Hon. Tribunal to consider. The Hon. Tribunal must apply the law, as it stands.
13. Rather, and without prejudice to the above, this Hon. Tribunal's competence is limited by that which is prescribed in Article 21(9) of the Malta Financial Services Act (Chapter 330 of the Laws of Malta) (the "MFSA Act"). This article provides that:

'The question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant –

- (a) the competent authority has, in its decision, wrongly applied any of the provisions of this Act, or any regulations issued thereunder;
- (b) the decisions of the competent authority constitutes an abuse of discretion or is manifestly unfair;

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

14. Consequently, it is amply clear that whilst this Hon. Tribunal may determine whether decisions of the Authority constitute an abuse of discretion or are manifestly unfair, the Tribunal is not the competent forum to determine whether the law validly confers such functions and discretion to the Authority or otherwise.
15. In any case, and without prejudice to the above, the Authority refutes such allegations as unfounded at fact and at law and asserts that it has, at all times, acted in terms of Maltese law and is guided at all times, including in this Decision by the principles of natural justice.



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This shall also become evident in the paragraphs that shall follow in this reply, particularly in those dealing with the merits of this appeal.

16. For the reasons outlined above, the Authority humbly submits that Investar's grievance with respect to the alleged lack of due process ought to be rejected with costs.

Investar's grievance that the Administrative Penalty imposed by the Authority is arbitrary and in any case is excessive

17. Investar's grievances alleging that the Administrative Penalty is arbitrary and excessive, may be summed up as follows:

- 17.1. that the Decision is manifestly unfair and constitutes an abuse of the Authority's discretion;

- 17.2. that the Authority failed to appreciate that it was impossible for the Appellant's financial statements for the years ending 31 December 2017, 2018, and 2019 to be audited;

- 17.3. that the publication of the AFRs would not have been of much relevance for investors in their assessments, and accordingly, the materiality of the alleged breach is completely absent or, at best, extremely low;

- 17.4. the parameters and the methodology resulting in a 'medium' score and the respective weighting given to each consideration resulting in the Fixed Penalty are arbitrary, and seem to have been formulated unilaterally by the Authority without any legal basis or ever being communicated to the public, and accordingly, the Authority acted in abuse of its discretion by assigning a breach level of 'medium'; and

- 17.5. since the securities are no longer listed, the Administrative Penalty does not have the effect of dissuading the Appellant from future breaches and therefore, the penalty imposed is punitive in nature.

18. The Authority shall be dealing with each of these points in turn.

Manifestly unfair Decision and an abuse of the Authority's discretion

19. With respect to the Appellant's allegation that the Decision is manifestly unfair, the Authority submits that in determining the quantum of the Administrative Penalty, it was

indeed guided by the principle of proportionality and the specific circumstances of the case which included, *inter alia*, (i) the repetition of the breach; (ii) the duration thereof; and (iii) the degree of diligence and cooperation shown by Investar towards the Authority. In this respect, the Authority humbly submits that:

19.1. in breach of the Rule, the Appellant failed to publish its AFRs and accounts repetitively, and the matter remained unresolved for a continuous period of approximately three (3) years, despite multiple reminders being sent by the Authority in this respect, as detailed in point 19.3 below;

19.2. the Appellant showed little commitment to regularise its position when the identified breach first materialised, despite it acknowledging it being required to do so in various company announcements it issued on the website of the Malta Stock Exchange²⁰. Hence, the Appellant was well aware of its obligation to publish its AFRs and accounts, however continuously failed to do so for a consecutive period of three (3) years; and

19.3. the Appellant was not at all forthcoming in its cooperation with the Authority since:

19.3.1. the Appellant was sent multiple reminders for the publication of the AFRs and the accounts, and set deadlines to be met by the Appellant in this respect, however, this to no avail, as the Appellant failed to reply or even acknowledge these reminders. In this respect, the Authority refers to the trail of said reminders and deadlines as set out in its Minded Letter;

19.3.2. the Authority often requested clarification from the Appellant on the delays of the finalisation of the audits of the accounts and publications of the AFRs, however, once again, this to no avail, as the Appellant failed to reply or even acknowledge these requests, which in turn, led to the Authority having to chase the Appellant for its feedback; and

19.3.3. responses which were actually sent by the Appellant to the Authority, after multiple rounds of requests by the latter sent via a series of letters, emails

²⁰ See Company Announcement by Investar dated 10 June 2019 by virtue of which Investar announced that "it has encountered delays in the publishing of its Annual Financial Report and Accounts for the financial year ending 31 December 2017. It is the Company's firm intention to have such approval and publication finalised as soon as possible but in no case later than the third quarter of 2019", a copy of which is herewith attached and marked as Doc.MFSA2.

and conference-calls as outlined in the Minded Letter, were inadequate and failed to provide the Authority with that requested.

20. Therefore, in light of the above, the Authority humbly submits that after considering the repetition and duration of the identified breach, as well as the Appellant's failure to cooperate with the MFSA with respect to the breach of the Rule, the Decision is indeed proportionate and fair.

21. In addition to the above, with respect to the Appellant's allegation that the Decision constitutes an abuse of the Authority's discretion, the Authority would like to clarify that:

21.1. in terms of article 39A(1) of the Financial Markets Act (Cap. 345 of the laws of Malta) (the "**FMA**"), "[w]ithout prejudice to any other powers conferred to it by this Act or any other law, **where the [A]uthority is satisfied that a person's conduct amounts to a breach of any of the provisions of [...] any regulations, or Capital Markets Rules issued thereunder, or that a person has contravened or failed to comply with any condition, obligation, requirement or directives made or given by the [A]uthority under any of the provisions of this Act or any regulations or Capital Markets Rules issued thereunder [...], the [A]uthority may by notice in writing and without recourse to a court hearing impose on such person an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each breach or failure to comply, as the case may be, or any other administrative measure, as it may deem necessary**"; and

21.2. in terms of article 39A(2) of the FMA, "[a]dministrative penalties that may be imposed by the Authority, may be imposed in the form of **a fixed penalty, a daily penalty, or both**".

22. Therefore, the Authority humbly submits that the Appellant's allegation that the Authority's Decision constitutes an abuse of its discretion is completely unfounded and should not be upheld, owing mainly to the fact that the MFSA acted well within its powers granted under the FMA (outlined in points 21.1 and 21.2 above) when coming to the Decision to impose the Fixed Penalty as well as the Daily Penalty.

23. Additionally, the power of the Authority to impose an administrative penalty where it is satisfied that an entity's conduct amounts to a breach of, *inter alia*, the Capital Markets Rules, emerges squarely from the law, and hence, its discretion was clearly exercised within the parameters granted to it by law.

24. In light of the above, the Authority once again humbly submits that the Decision to impose the Administrative Penalty cannot be found to constitute an abuse of its discretion since, as emerges clearly from the detailed analysis of the breach outlined in the Minded Letter, the Decision and the Authority's submissions above, there exist various circumstances which justify the Authority's conclusion that Investar's conduct amounted to a breach of the Rule, which is sanctionable under article 39A(2) of the FMA.
25. Therefore, the Appellant's allegations in this respect are clearly unfounded and should not be upheld.

Impossibility to file audited financial statements

26. With respect to the Appellant's allegation that the Authority failed to appreciate the impossibility to file the audited financial statements, the Authority would like to humbly submit that the responsibility to publish the AFRs in a timely manner rests with the Board of Directors of the Appellant.
27. In this respect, the Authority humbly submits that it could not consider the logistical impediments faced by the Appellant when securing their auditors' engagement as a valid mitigating factor when calculating the Administrative Penalty, because had it done so, this would have gone contrary to the principles which underpin its core functions in relation to prudential supervision.
28. Moreover, the extent of the issues encountered by the Appellant in securing the engagement with their auditors as aforesaid, were not highlighted in a timely manner to the Authority. In fact, information was provided only when certain specific requests were made by the Authority itself, and no information on the developments made by the Appellant in this respect were willingly provided by the Appellant. Indeed, the Authority has never been provided with concrete evidence of its commitment to rectify the issue and indeed, this issue remained unresolved.
29. Lastly, the Authority humbly submits that in terms of article 4(1A) of the MFSA Act, "[...] it shall also be the function of the Authority to promote and safeguard the integrity of local regulated markets [and] to ensure investor confidence in local regulated markets". The Appellant's failure to publish its audited financial statements and AFRs, impeded the Authority's ability to carry out its functions under the MFSA Act, and this to the detriment of financial market integrity and investor confidence therein.



30. In light of the above, the Appellant's allegations in this respect are unfounded and should not be upheld.

Materiality of the breach is absent, or at best, extremely low

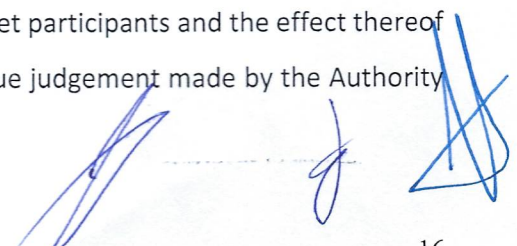
31. With respect to the Appellant's allegation that the publication of the accounts and the AFRs would not have been of much relevance for investors in their assessments, and accordingly, that the materiality of the alleged breach is completely absent or, at best, extremely low, the Authority humbly submits that as a result of the breach by the Appellant of the Rule, noteholders lacked visibility on its financial affairs and as a matter of principle, transparency to the market is imperative.

32. Additionally, when Investar applied for the admission of the notes to listing on the WSM, it had formally declared that it will abide by the applicable Capital Markets Rules, which in turn, explicitly includes the Rule. Also, the Appellant issued various company announcements on the website of the Malta Stock Exchange, admitting that, *inter alia*, "it has encountered delays in the publishing of its Annual Financial Report and Accounts". Thus, the Appellant was clearly aware of its obligations and had formally declared that it will abide by the applicable Capital Markets Rules. Needless to say, despite its declarations, the Appellant continuously failed to fulfil legally imposed obligations, of which it was evidently well aware.

33. Therefore, contrary to that being stated by the Appellant in its Appeal, the failure to abide by the Rule, and this on a repeated basis, is indeed material owing to the fact that the Appellant acknowledged its breach on multiple occasions, and nonetheless failed to rectify its position, to the detriment of market transparency, integrity and investor confidence.

34. Moreover, and without prejudice to the above, the Authority humbly submits that its discretion in taking this Decision was properly exercised, and consequently ought not be questioned by this Hon. Tribunal and this as per article 21(9) of the MFSA Act.

35. The Authority's actions are certainly neither an abuse of discretion, nor manifestly unfair, neither has the Authority wrongly applied any provisions of the FMA or the Rule. Accordingly, to the extent that the conclusion of the Authority with respect to the materiality of the breach of the Rule on other market participants and the effect thereof on the value of the Administrative Penalty, is a value judgement made by the Authority



and based on the reasonable and sound technical merits – it is respectfully submitted that this Hon. Tribunal cannot substitute the Authority’s discretion with its own.

36. In light of the above, the Appellant’s allegations in this respect are clearly unfounded and should not be upheld.


The methodology used by the Authority to allocate the Fixed Penalty is arbitrary

37. With respect to the Appellant’s allegation that the methodology resulting in a ‘medium’ score, and that the respective weighting given to each consideration is arbitrary, the Authority would like to clarify that rather than simply imposing the Administrative Penalty on the Appellant in line with its ability to do so under article 39A(2) of the FMA, the Authority actually did disclose the methodology which it used in order to come to the Administrative Penalty. It did so by informing the Appellant, in its Minded Letter, how it quantified the Administrative Penalty and giving the same the opportunity to provide its submissions on the matter, and this in order to ensure a degree of openness, transparency and fairness in the manner in which the Authority operates.

38. Indeed, the Authority would like to reiterate that it has, when coming to its Decision, exercised its administrative powers in terms of Article 39A(2) of the FMA, in virtue of which it may, where it is satisfied that an entity has breached, *inter alia*, the Capital Markets Rules, impose administrative penalties in the form of a fixed penalty, a daily penalty, or both, so long as the amount thereof does not exceed €150,000.

39. Therefore, in the circumstances outlined above, when considering the seriousness of the breach of the Rule, the repetition and duration of said breach, and the impact that this may have on financial market integrity and investor confidence therein, the Authority deemed it appropriate to impose the Administrative Penalty in the form of both the Fixed Penalty and the Daily Penalty as communicated to the Appellant by virtue of the Minded Letter.

40. Additionally, the Authority humbly submits firstly that the methodology used by the Authority in this respect ensures that the principles of proportionality, effectiveness and the intended dissuasive effect of administrative penalties are observed, and secondly that the Authority retains the ultimate discretion to determine and assess on a case by case basis, the quantum of an administrative penalty (albeit within the limits set out at law).



41. Moreover, and without prejudice to the above, the Authority humbly submits that its discretion in taking this Decision was properly exercised, and consequently ought not be questioned by this Hon. Tribunal and this as per article 21(9) of the MFSA Act.
42. Accordingly, the Authority's actions are certainly neither an abuse of discretion, nor manifestly unfair or arbitrary, neither has the Authority wrongly applied any provisions of the FMA or the Rule. Accordingly, to the extent that the conclusion of the Authority in its calculation of the Administrative Penalty and the methodology used when calculating the Administrative Penalty, are value judgements made by the Authority and based on reasonable and sound technical merits – it is respectfully submitted that this Tribunal cannot substitute its own discretion to that of the Authority.
43. Therefore, in light of the above, the Appellant's allegations in this respect are clearly unfounded and ought not be upheld.

The Administrative Penalty is punitive and pecuniary in nature

44. With respect to the Appellant's allegation that rather than dissuasive, "*the Administrative Penalty is punitive and pecuniary in nature intended to punish the Appellant*", the Authority humbly submits that this could not be further from the truth since although Investar is today not subject to the Capital Markets Rules owing to the de-listing of the notes, the imposition of appropriate administrative penalties on licence holders which are found, to the satisfaction of the Authority, to have breached regulatory requirements, serves as a sufficient deterrent for other entities licenced by the Authority from committing similar breaches.
45. Indeed, contrary to that which is held by the Appellant in paragraph 13 of its appeal, and mainly that this Decision cannot serve as a deterrent simply "*because the Company is no longer subject to Capital Markets Rules for Wholesale Securities Markets*" ignores the Authority's Decision where it specifically held that this Decision serves as a deterrent to *other* entities licenced by the Authority from committing similar breaches, and not specifically the Appellant alone. Furthermore, as is evident from paragraph 10 of the Appellant's appeal, the Appellant is part of a group structure, which group structure also involves at least another listed entity, and consequently the Appellant cannot argue that the Decision does not have a deterrent effect.
46. Accordingly, the Authority humbly submits that just because the circumstances of the Appellant have, post-breach of the Rule, placed it outside the scope of the said Rule, then the applicable administrative sanctions should not be imposed, or that their imposition is purely punitive in nature. This especially so since, the breach remained unresolved by

the Appellant for approximately three (3) years despite multiple requests for compliance being sent to the Appellant, an attitude which surely should not be mirrored by other market participants to whom the Rule still applies.

47. Therefore, in light of the above, the Appellant's allegations in this respect are clearly unfounded and should not be upheld.

Investar's allegation that the Authority wrongly applied the law and instead rested on the rules issued by the Authority

48. Investar's allegation that the Authority wrongly applied the law and instead rested on the rules issued by the Authority, may be summed up as follows:

48.1. Directive 2004/109/EC (the "**Directive**"), which precludes, by virtue of article 8(1) thereof, issuers of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 100,000 (as in the case of the notes in question) from the requirement to publish AFRs, the Rule nonetheless requires issuers to do so, and therefore imposes stricter requirements on issuers listed on wholesale markets. Accordingly, the Rule should be interpreted and evaluated in light of the source of the rules i.e. the Directive;

48.2. The Rule, and any breach thereof, should be interpreted and evaluated in the context of their intended purpose, and in light of the source of the rules i.e. the Directive; and

48.3. Investar is no longer listed and therefore it is impossible for it to publish its AFRs in terms of the Rule.

49. With respect to the Appellant's plea that the Authority wrongly applied the law and instead rested on the Rule issued by it, the Authority unequivocally submits that the Rule is not in conflict with the Directive seeing as Member States are entitled to impose rules at national level which go beyond the requirements of the Directive, as will become evident from the Authority's submissions hereunder.

50. Article 3(1) of the Directive clearly sets out that "[t]he home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive, except that it may not require issuers to publish periodic financial information on a more

frequent basis than the annual financial reports referred to in Article 4 and the half-yearly financial reports referred to in Article 5."

51. Therefore, the only explicit prohibition imposed on Member States by the Directive is that such may not require issuers to publish AFRs more frequently than the requirement contained in article 4 of the Directive, and thus, the Rule cannot be said to be contrary to the Directive on the basis that it is more stringent than the provisions of the Directive. Had the intention of the European legislator been to exclude the possibility of Member States from imposing more stringent requirements than those contained therein, it would have clearly set this out as it did in article 3(1) thereof.
52. The Authority also submits that article 288 of the Treaty on the Functioning of the European Union, provides clearly that "[a] directive **shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.**"
53. Therefore, with respect to the ability of Member States to impose requirements which go beyond those of the Directive, so long as such requirements have the effect of achieving the result of which the Directive seeks to achieve, the choice of form and method, is clearly at the discretion of the respective Member State.
54. To this effect, the Authority humbly submits that recital 1 of the Directive sets out that "[... t]he disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency."
55. Therefore, in the words of the Appellant itself, the Authority humbly submits that indeed, the Rule, and any breach thereof, should be interpreted in the context of their intended purpose and in light of the source of the Directive, which, as outlined in point 53 above, is, *inter alia*, the enhancement of both investor protection and market efficiency. It cannot thus be said that the Authority wrongly applied the law in this respect because the precise rationale behind the imposition of the Rule is indeed, *inter alia*, to enhance investor protection and market efficiency.
56. Therefore, in light of the above, the Appellant's submissions in this respect are clearly wrong, unfounded and should not be upheld.
57. With respect to the Appellant's grievance that Investar is no longer listed and therefore it is impossible for it to publish its AFRs in terms of the Rule, the Authority humbly submits

that the Decision was based on a breach of the Rule by the Appellant during a period of time that it was indeed listed and subject to the Capital Markets Rules, and hence during a time that it was *not* impossible for it to abide by the Rule.

58. Therefore, in light of the above, the Appellant's submissions are clearly unfounded and should not be upheld.

Investar's allegation that the Decision is based on false representation of the facts surrounding the cooperation of the Appellant

59. The Authority humbly submits that Investar's allegation that the Decision is based on false representation of the facts surrounding the cooperation of the Appellant cannot be further from the truth. Reference is once again being made to points 19.3.1 – 19.3.2 above wherein the multiple instances during which the Authority reached out to the Appellant for its cooperation and adherence to the Rule, are set out in summary.

60. In this respect it is amply clear that the Authority did indeed take cognisance of the facts as they occurred i.e. by virtue of a persistent lack of acknowledgement and unwillingness to cooperate on the part of the Appellant, together with a failure thereof to willingly inform the Authority of any developments as to the appointment of their auditors. The Authority was not ever provided with concrete and reliable evidence that the Appellant was endeavouring to rectify the issues and in the view of the Authority, any responses which were provided were inadequate.

61. Therefore, in light of the above, the Appellant's submissions should not be upheld.

Conclusion

62. Accordingly, and for all the reasons explained above, the MFSA respectfully requests this Hon. Tribunal to reject the Appellants' requests and confirm in full the MFSA's Decision, with all legal costs to be borne by the Appellants. "

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

Ra is-sottomissjonijiet tal-partijiet;



21

Ra id-digriet tieghu tas- 6 ta' Ottubru 2023 fejn il-partijiet gew mistiedna jaghmlu sottomissjonijiet ulterjuri;

Ra is-sottomissjonijiet ulterjuri tal- partijiet;

Sema lill-partijiet jiddikjaraw li ma kellhom xejn izjed xi jziedu fuq dak minnhom sottomess bil- miktub, u ra li l-appell gie differit ghall-lum sabiex jigi deciz;

Ra' l-atti kollha tal-kaz

Kunsiderazzjonijiet tat-Tribunal:

1. Illi s-socjeta Appellanta qeghdha tilmenta mill-multa komplessiva ta' wiehed u tletin elf seba' mija u erbghin Euro (€ 31,740) imposta mill- Awtorita Appellata fil- konfront ta' l-Appellanta tramite decizjoni tad- 29 ta' Ottubru 2021 (id-Decizjoni). Illi tali multa giet imposta a bazi ta' dak li jipprovdi l- Artikolu 39A(2) tal- Kap. 345 tal- Ligijiet ta' Malta.
2. Illi l- Appellanta hassitha aggravata mid-Decizjoni u interponiet appell li fih ressqet numru ta' aggravji, ghall-liema l- Awtorita wiegbet fir-risposta taghha.
3. Illi fil- Parti B paragrafu 3 ta' l-istess Appell, l-Appellanta issostni illi:

“in reaching its decision, the MFSA wrongly applied the law and abused its discretion. In addition, the Decision is manifestly unfair; the Administrative Penalty disproportionate; and the whole process is in breach of the principles of natural justice. On the merits, the Appellant refutes the allegations in their entirety as they are unfounded in law and in fact.”

4. L-aggravji imressqa mis-socjeta Appellanta huma maqsuma fi tnejn, u cioe eccezzjonijiet preliminari u eccezzjonijiet fil-mertu.

L- ewwel Aggravju: “Lack of Due Process”



5. Illi l-Appellant jimposta dan l-aggravju fuq il- fatt illi l-Awtorita Appellata kienet diga deciza fuq l-azzjoni li kienet ser tiehu kontra l- Appellanta meta hija harget il- *minded letter* tas- 7 ta' Settembru 2021, u li ma qiesetx dak sottomess minnha b' risposta ghall-istess *minded letter*. Sussegwentement l-istess Appellanta taghmel referenza ghar- Resolution Committee stabbilit taht il- Kap 330 tal- Ligijiet ta' Malta u taghlaq l-istess aggravju billi tirreferi ghall- fatt illi:

The investigative and decision-making bodies of the MFSA overlap, leaving no room for impartiality in decision making, and the MFSA is in flagrant breach of the natural justice principle of nemo iudex in causa propria, that is nobody ought to adjudicate in matters in which he has interest.

6. Illi l- Awtorita twiegeb ghal dan l-aggravju billi tghid illi mhux minnu illi hija ma qiesetx dak sottomess mill-Appellanta fir-risposta taghha ghall-Minded Letter filwaqt illi dwar l-allegat ksur tad-drittijiet ta' l-Appellanta u senjatament il- principju ta' nemo iudex in causa propria, l-istess Awtorita wiegbet illi dan it-Tribunal m' ghandux il-gurisdizzjoni li jistharreg tali ilment stante li il-gurisdizzjoni ta' dan it-Tribunal hija stabbilita u limitata skond l-artikolu 21(9) tal- Kap. 330 tal- Ligijiet ta' Malta.
7. Illi it-Tribunal ser jifred dan l-aggravju fi tnejn.
8. Illi l-ewwel parti ta' l-aggravju hija illi l-Awtorita kienet diga deciza dwar l-azzjoni fil- konfront ta' l-Appellanta meta hiaj harget il- Minded Letter.
9. Illi pero, dan l-aggravju m' ghandux mis-sewwa. L- Awtorita ma tistax tigi kastigata ghaliex tadopera procedura illi qabel ma tiehu decizjoni esegwibbli, hija tinforma lill-entita li kontriha tkun ser tittiehed tali decizjoni bl- aggravji li kienu qeghdin iwassluha li tiehu tali decizjoni u taghti l-opportunita lill tali entita sabiex twiegeb ghall-istess. Ma jfissirx li ghaliex l-Awtorita tkun irriaffermt dak li qalet fil- minded letter, allura b' daqshekk ma tkunx ikkunsidrat il- posizzjoni ta' l-entita li kontriha tkun ser tittiehed decizjoni. Qari akkurat tad- Decizjoni mertu tal- kaz odjern juri illi l-Awtorita ikkunsidrat dak li qalet l-Appellanta, u f certu punt, l- Appellanta inghatat ragun. Hemm spjega dettaljata u akkurata ta' dak deciz mill- Awtorita Appellata anke b' referenza, punt punt, ta' dak sottomess mill- Appellanta. Illi ghaldaqstant din il-parti ta' l-ewwel aggravju qeghda tigi mchuda.

10. Illi it-tieni parti ta' l- ewwel aggravju hija ibbazata fuq l-allegat ksur tad-drittijiet ta' l- Appellanta dwar kif l-Awtorita iddecidiet il- kaz kontriha.
11. Illi fil- mori ta' dan l-Appell, it-Tribunal, permezz ta' digriet moghti minnu tas- 6 ta' Ottubru 2023 kien stieden lill-partijiet sabiex jaghmlu sottomissjonijiet ulterjuri dwar il-procedura stabbilita fil- Kap. 330 tal- Ligijiet ta' Malta dwar kif l-Awtorita ghandha tagixxi meta tkun qed tiehu azzjoni ta' infurzar kontra entita regolata, tramite liema sottomissjonijiet l-Appellanta tenniet il-posizzjoni taghha hekk kif kontenuta fir-rikors ta' l-appell, b' zieda ta' argument imsejjes fuq l-Artikolu 11 tal- Kap. 330 tal- Ligijiet ta' Malta. Illi l-Awtorita issottomettiet illi l-Appellanta, fin-nota ta' sottomissjonijiet ulterjuri kienet qeghdha izzid jew tbiddel l-aggravji minnha imressqa fir-rikors ta' l-Appell promotur u dan it-tribunal ma kellux jistharreg jekk l-Awtorita mexietx skond l-Artikolu 11 tal- Kap. 330 ghaliex dan ma kien aggravju imressaq mill- Appellanta u taht l-ebda cirkostanza tali aggravju ma jista jitqajjem ex officio mit-Tribunal.
12. Illi fil- mori ta' dan l-Appell, l-Onorabbli Qorti ta' l-Appell, fl- appell MC Trustees (Malta) Limited vs. Malta Financial Services Authority (Appell numru 82/23) tramite decizjoni tat- 3 ta' April 2024, iddecidiet fuq punti li certament ghandhom relevanza ghal- kaz odjern.
13. Illi f' dak il- kaz, l- Onorabbli Qorti ta' l-Appell qalet is-segweni:

Jekk il-Qorti kellha taççetta li l-ewwel żewġ aggravji preliminari tas-soċjetà appellata kellhom jiġu kkunsidrati kif deherlu t-Tribunal, mil-lat ta' procedura difettuża addotata mill-Awtorità appellanta, dan seta' biss jagħmlu jekk kien permess ai termini tas-subartikolu 21(9) tal-Kap. 330. Madankollu jirriżulta biċ-ċar mid-dispożizzjonijiet ta' dan is-subartikolu, li huwa ma kellu l-ebda kompetenza jittratta l-ilmenti tas-soċjetà appellata. Kif sewwa fehmet l-Awtorità appellanta, is-soċjetà appellata ttentat tqiegħed l-ilmenti tagħha fl-ambitu tal-imsemmija disposizzjonijiet, senjatament dawk tas-subinċiż (b), fejn dan jagħti lok għal appell meta hemm allegazzjoni li d-deċiżjoni tal-Awtorità appellanta hija 'ingusta manifestament'. Izda l-Qorti tgħid li l-aggravji tagħha jittrattaw ksur tad-dritt ta' smiġħ xieraq riżultat tal-proċess li wassal għall-impożizzjoni tal-penali amministrattiva, filwaqt li s-subinċiż suriferit jikkunsidra appell minn deċiżjoni tal-Awtorità appellanta meta din tkun manifestament ingusta fil-mertu.

14. Illi l- Onorabbli ta' l-Appell kienet ferm cara fl-interpretazzjoni taghha ta' l-artikolu 21(9) li a bazi tieghu hija stabbilita il-gurisdizzjoni ta' dan it-Tribunal, u certament illi rinfacat minn aggravji simili jekk mhux identici ghall- kaz li fuq iddecidiet l-Onorabbli Qorti ta' l-Appell, it- Tribunal ihoss illi ghandu jabbraccja tali insenjament.
15. Illi oltre dan huwa car illi l-aggravju imqajjem mill-Appellant bl-ebda mod ma jindika liema provvedimenti kisret l-Awtorita Appellata fil- process minnha adottat. Issir referenza ghar- Resolution Committee, minghajr pero ma jigi indikat xi rwol dan il- kumitat allegatament kellu jkollu fil- process in kwistjoni. Kumitat li del resto huwa regolat fl- ewwel skeda tal- Kap. 330 u li certament m' ghandu l-ebda rwol fil- process mertu tal- kaz odjern.
16. Illi ulterjorment, stante li l- gurisdizzjoni tat-Tribunal hija hekk limitata skond l-artikolu 21(9) tal- Kap. 330, allura isegwi ukoll illi it-Tribunal huwa limitat dwar liema materji huwa jista jqajjem ex officio, ghaliex jekk it-Tribunal ghandu mano libera li jqajjem dawk l-eccezzjonijiet kollha li l- Qrati taghna ghandhom is-setgha li jqajmu, allura dan ikun qieghed indirettament jiftah u jestendi il-gurisdizzjoni limitata tieghu.
17. Illi ghaldaqstant, anke din il- parti ta' l-Ewwel Aggravju qeghdha tigi michuda u dan ghar-ragunijiet fuq premissi.

It-Tieni Aggravju: *The Administrative Penalty is Arbitrary and in any case is excessive*

18. Illi hawn l-Appellanta targumenta illi il- Multa, li kienet maqsuma fi tnejn, u cioe multa ta' €15,000 ("**Fixed Penalty**") kif ukoll multa ta' kuljum ammontanti ghal €16,740 ("**Daily Penalty**"), kienet "*arbitrary, disproportionate and in any event, excessive, thereby rendering the Decision manifestly unfair and an abuse of the Authority's discretion.*"
19. Illi l- Awtorita wiegbet illi il- multi imposti kienu gusti u b' hekk cahdet l-allegazzjonijiet tal- Appellanta.
20. Illi l- Appellanta issostni dan l-aggravju billi tindika numru ta' punti li skond hi irendu tali multi arbitrarji u eccessivi.

21. Illi dak li wassal ghall-imposizzjoni tal- multi li minnhom qeghdha tilmenta l- Appellanta huwa riportat fil- Parti 2 tad-Decizjoni fejn l- Awtorita tispjega illi l- Appellanta naqset milli tapprova Annual Financial Returns (AFR's) ghas-snin Dicembru 2017, 2018 u 2019 u dan bi ksur tal- Capital Markets Rule 4.22 ²¹ skond liema Regola, *“an issuer must publish its annual report and accounts as soon as possible after they have been approved, and in any event no later than the timeframe permitted under its national legislation”*.
22. Illi tali Regola, tapplika ghall-Appellanta in forza tal- fatt illi l- Appellanta kienet, fit- 12 ta' Jannar 2016 harget exchangeable notes tal- valura nominali ta' kull note ta' €100,000 ghall- ammont totali ta' € 5,500,000. Tali notes hargu fuq l-Institutional Financial Securities Market (IFSM) u mmaturaw fil- 31 ta' Marzu 2021. B' kollox kien hemm disa' (9) notes.
23. Illi mhux ikkontestat illi meta l-Awtorita harget il- Minded Letter, tali notes ma kienx ghadhom listed ghaliex kienu immaturaw. Ovvjament isegwi illi anke meta ittiehdet id-Decizjoni, l-istess notes kienu diga immaturaw.
24. L-Appellanta targumenta illi wiehed irid izomm f' mohhu li kien hemm biss disa' (9) noteholders, u li dawn kienu qualified investors. Tirrikonoxxi ukoll li l- htiega li tippublika l-accounts hija marbuta mal-fatt illi investituri ghandhom ikunu jafu bil-performance finanzjarja tal- kumpannija li fiha qedghin jinvestu Izda, tkompli tghid l-Appellanta, illi f' dan il- kaz tenut kont tan-numru zghir ta' investituri, tal fatt li dawn kienu investiture kwalifikati, li kellhom relazzjoni mal- kumpannija u li tali notes ma kienux daqstant likwidi, il-pubblikazzjoni o meno ta' tali accounts *“would not have been of much relevance for investors in their assessment”* ²².
25. L-Awtorita appellata, fir-risposta taghha ghall- appell, twiegeb ghall dan l-aggravju billi tislet hames punti u senjatament ²³:
- a. *that the Decision is manifestly unfair and constitutes an abuse of the Authority's discretion;*

²¹ Capital Markets Rules for Wholesale Securities Markets.

²² Para 12 tar-rikors ta' l-Appell

²³ Para 17 tar-risposta ghall- Appell

26. Illi mid-Decizjoni, johrog car illi l-imposizzjoni tal- multi kienet marbuta kemm mal-fatt illi kien hemm ksur ripetut tar-regolamenti, li tali ksur dam ma gie rimedjat u li l-Appellanta ma kienetx diligenti fil- mod kif indirizzat tali nuqqas.
27. Illi hawn tajjeb illi jerga jinghad illi minn meta inhargu in-notes fuq l-IFSM, u cioe minn Jannar 2016 ghall-perjodu ta' hames snin, l- Appellanta ma ippublikatx accounts ghas-snin 2017, 2018 u 2019. Permezz ta' nota tal- 20 ta' Dicembru 2022 ²⁴, l-Appellanta esebiet kopja tal- accounts tas-snin 2017 sa 2020 li lkoll gew approvati fis-27 ta' mejju 2022. Illi minn dan jirrizulta ukoll illi teknikament anke l-accounts ta' Dicembru 2020 (meta in-notes kienu ghadhom listed) kienu tardivi u l-unika raguni ghalfejn l-Appellanta ma gietx immultata ghal dan kien ghaliex sad-data li fihom suppost dawn l-accounts kellhom jigu ippublikati, in-notes kienu laqhu immaturaw. Pero xorta jibqa il- fatt illi suppost, l-accounts tas-sena 2020 kellhom ikunu lesti fil-hin.
28. Illi fuq dan wiehed ma tantx hemm xi jzid u wiehed ma jistax jifhem il- bazi li fuqha l-Appellanta tghid illi l-imposizzjoni tal-multi kienet abbusiva u ingusta.
29. Illi hawn issir ukoll referenza ghall- paragrafu 2.2 tad-Decizjoni fejn l-Awtorita tiset sensiela shiha ta' korrispondenza fejn l-Appellanta kienet qeghdha tigi kontinwament imfakkra dwar l-obbligi taghha. Ma hemm l-ebda kontestazzjoni dwar il-fatti kif graw u certament l-Appellanta ma tistax tghid illi kienet qeghda tikkopera mal- Awtorita f' dan ir-rigward.
30. Id-dritt li ghandha l-Awtorita li timponi multi huwa naxxenti mill- Artikolu 39A(1) tal- Kap. 345 tal- Ligijiet ta' Malta, li jimponi massimu ta' € 150,000 ghal kull ksur jew nuqqas ta' konformita, kif jista' jkun il-kaz. Skond l-Artikolu 39A(2), Il-pieni amministrattivi li jistghu jigu imposti mill-awtorita kompetenti, jistghu jigu imposti fil-forma ta' piena fissa, piena ta' kuljum, jew it-tnejn flimkien.
31. Tenut kont tal- fatt illi kien hemm ksur car tar-Regolamenti, allura l- Awtorita keinet fid-dover li tagixxi, u certament li l-azzjoni li hadet hija in linea mal poteri li l-istess Awtorita ghandha skond il- Ligi.

²⁴ Fol 14

b. that the Authority failed to appreciate that it was impossible for the Appellant's financial statements for the years ending 31 December 2017, 2018, and 2019 to be audited;

32. Illi anke hawn l-Appellanta m' ghandiex ragun fl-argument taghha. Meta hija harget in-notes fuq l- IFSM, l- Appellanta kienet taf illi dahlet f' regime regulatorju differenti minn dak li kienet topera fih precedentement. Kienet taf ben tajjeb illi kienet soggetta ghall- Capital Markets Rules for Wholesale Securities Markets tant illi meta hija kienet giet listed, hija iddikjarat (29 ta' Marzu 2016) illi hija kienet ser tagixxi skond dawn ir-regoli.

33. Illi l- Appellanta resqet argument li hija kella diffikolta li tonora l-obbligi taghha minhabba li il- Grupp li minnu taghmel parti l-Appellanta kellu problema bl-ingagg ta' awdituri. Izda ghandu jinghad illi anke hawn, l-Appellanta, uriet nuqqasijiet. L-ewwel nett huwa car illi l-Appellanta gharfet lill-Awtorita b' dawn il- problemi ferm wara li kienu diga skadew l-ewwel termini ta' sottomissjoni tal- accounts. Izda izjed minn hekk, tali informazzjoni inghatat lill-Awtorita wara li dina saqsiet lill- Appellanta (u terga tghid ferma wara l-ewwel interpellanzi).

34. Illi izjed minn hekk huwa ta thassib serju kif l-Appellanta targumenta illi kwazi kwazi kienet skuzata illi ma tippublikax l-istess accounts minhabba il- problema li kellha fl-ingagg ta' awditur ghal xi kumpanniji fil- grupp taghha. Illi l-Appellanti kienet ben konsapevoli tal-obbligi marbuta mad-decizjoni volontarja taghha li tmur fuq l-IFSM. Obbligi cari u oggettivi. Ma ingiebet l-ebda prova li b' xi mod tiggustifika tali nuqqas da parti tal- Appellant u certament li it-Tribunal ihoss illi l- Awtorita kienet fid-dover li tiehu azzjoni dwar tali nuqqas.

c. that the publication of the AFRs would not have been of much relevance for investors in their assessments, and accordingly, the materiality of the alleged breach is completely absent or, at best, extremely low;

35. Illi l-Appellant jargumenta ukoll illi l-pubblikazzjoni ta' dawn l-accounts ma tantx kienu ta' rilevanza ghall-investituri u allura, minkejja li kien hemm ksur tar-Regolamenti, tali ksur ma kienx daqstant materjali.

36. Illi pero anke hawn it-Tribunal ma jara l-ebda bazi fl- argument tal- Appellanta. Jibda sabiex jinghad illi l- Appellanta mhux biss kisret l-obbligu tal- pubblikazzjoni, izda sahsitra l-obbligu inizjali li kellha li tipprepara tali accounts. Illi hawn jerga jigi ribadit illi l-Appellanta ma ippublikatx 3 snin ta' accounts f' perjodu ta' hames snin li kienet regolata. Fir-realta anke l-accounts ta' l-ahhar sena, u cioe 2020, saru tard, u ma kienx hemm azzjoni dwar dawn ghaliex nelfratempo in-notes immaturaw u b' hekk il-kumpannija Appellanta ma baqghatx regolata.
37. Illi laqas ma jregi l-argument li hawn si tratta ta' numru zghir ta' investituri, u li tali investituri kienu investituri kwalifikati u li kienu jafu lill- kumpannija Appellanta ben tajjeb. Illi l-Capital Markets Rules for Wholesale Securities Markets japplikaw proprju ghal dawn it-tip ta' investimenti u l-obbligu tal- preparazzjoni u l-pubblikazzjoni ta' l-accounts huwa car.
38. Kienet ghalhekk korretta l- Awtorita li ma taccettax tali difiza jew argument da parti ta' l-Appellanta.

d. the parameters and the methodology resulting in a 'medium' score and the respective weighting given to each consideration resulting in the Fixed Penalty are arbitrary, and seem to have been formulated unilaterally by the Authority without any legal basis or ever being communicated to the public, and accordingly, the Authority acted in abuse of its discretion by assigning a breach level of 'medium'; and

39. Illi kif diga inghad skond l-artikolu 39A (1) u (2) tal- Kap 345 l-Awtorita ghandha il-poter li timponi multa sa massimu ta' € 150,000 ghal kull ksur, liema multa tista tkun multa fixed kif ukoll multa ta' kulljum. L- Awtorita hasset illi minhabba it-tip ta' ksur kif ukoll il- fatt li kien hemm numru ta' accounts li ma gews ippublikati, hija kellha timponi multa fixed kif ukoll multa ta' kulljum. It-Tribunal ihoss illi il- multa fixed hija ragonevoli meta wiehed jikkunsidra il- massimu li huwa previst mill- Ligi. Illi oltre dan, fil- komputazzjoni tal- multa ta' kulljum, l-Awtorita qieset illi tali multa kellha tieqaf sal-mument illi in-notes immaturaw, meta wiehed seta ukoll iqis illi l-ksur fil- fatt waqaf meta l-accounts tlestew (minkejja li n-notes kienu immaturaw f' Marzu 2021). In vista ta' dan it-Tribunal ihoss illi anke hawn l-Awtorita kienet kawta u ragonevoli fil- komputazzjoni tal- multa ta' kulljum, liema multa ukoll tikwadra ruhha f' dak li jipprovdu l-artikoli 39A(1) u (2) tal- Kap. 345.

e. since the securities are no longer listed, the Administrative Penalty does not have the effect of dissuading the Appellant from future breaches and therefore, the penalty imposed is punitive in nature.

40. Illi fl- opinjoni tat-Tribunal dan l-argument ukoll ma jreggix. Il-fatt illi entita ma tibqax f' qafas regolatur, ma jfissirx li b' daqshekk ghandhom jigu injorati l-obbligi li din l-entita kellha fil- perjodu li kienet regolata. Apparti mill- fatt ili dan l-argument ma jsib l-ebda sostenn legali, it-Tribunal ihoss illi hija korretta l-Awtorita li tara li jkun hemm compliance ma' l-obbligi regulatorji, anke jekk l-azzjoni regulatorja tigi finalizzata wara li l- entita ma tibqax regolata. Izjed u izjed meta si tratta ta' obbligu bhal ma huwa il- kaz odjern li huwa marbut maz-zmien. Bl-argument ta' l-Appellant, it-trapass taz-zmien u l- fatt illi l- Appellanta baqghat fi stat ta' irregolarita sahsitra sa wara it-terminu li fih din kienet ghada regolata, kellu jkun ta' vantagg ghall- Appellanta!

41. Illi ghaldaqstant, anke dan l- Aggravju qieghed jigi michuda u dan ghar-ragunijiet fuq premissi.

It-Tielet Aggravju: *The MFSA wrongly applied the law and instead rested on the rules as issued by the Authority*

42. Illi hawn l- Appellanta targumenta illi r-Regoli applikati mill- Awtorita imorru oltre dak li tehtieg id-Direttiva 2004/109/EC (Transparency Directive). Illi skond l- Appellanta din id-Direttiva ma timponix l-obbligu ta' pubblikazzjoni tal- accounts filwaqt li r-Regoli lokali jimponu tali obbligu.

43. Illi hawn so tratta ta' kaz specifiku fejn l-Appellanta volontarjament ghazlet li tmur fuq l- IFSM. Meta hija harget in-notes fuq l- IFSM, l- Appellanta kienet taf illi dahlet f' reime regulatorju differenti minn dak li kienet topera fih precedentement. Kienet taf ben tajjeb illi kienet soggetta ghall- Capital Markets Rules for Wholesale Securities Markets tant illi meta hija kienet giet listed, hija iddikjarat (29 ta' Marzu 2016) illi hija kienet ser tagixxi skond dawn ir-regoli. Kienet taf ukoll, wiehed jipprezumi illi dawn ir-regoli jimponu l-obbligi tal- pubblikazzjoni ta' l- accounts, anke jekk, fl-opinjoni ta' l-istess Appellanta, tali obbligu imur oltra dak li timponi it- Transparency Directive.

44. Illi l-fatt li dawn ir-Regoli ghamlithom l-Awtorita, jew li dawn ir-Regoli imorru oltre minn dak li timpani Direttiva, huwa kompletament irrilevanti. Ir-Regoli qeghdin hemm biex jigu osservati, u jekk l- Appellanta kellha xi riservi dwar dan, hija setghat facilment taghmel rapprezentazzjonijiet biex ir-Regoli jinbiddu. Certament li ma setghatx tiddeciedi hi li dawn huma obbligi izjed oneruzi meta kienet hija stess li volontarjament ghazlet li tmur fuq l-IFSM.

45. Illi ghaldaqstant, anke dan l- Aggravju qieghed jigi michuda u dan ghar-ragunijiet fuq premissi.

Ir-Raba' Aggravju: *The Decision is based on a false representation of the facts surrounding the cooperation of the Company*

46. Illi l- Appellanta targumenta illi mhux minnu li hija ma ikkooperatx ma' l-Awtorita.

47. Illi f' dan ir-rigward it-Tribunal jaghmel referenza ghall-parti 2.2 tad-Decizjoni li tindika bic-car kif l- Awtorita ikkomunikat mal- Appellanta u s-sekwenza li kien hemm f' dan ir-rigward. Ma ingiebet l-ebda prova kuntrarja ghal dak li hemm dettaljat f' din il- parti tad-Decizjoni. It-tribunal frankament ma jara li m' hemm xejn fuq x' hix ghandu jiccensura lill- Awtorita f' dan ir-rigward izjed u izjed meta wiehed kien jippretendi illi kellha tkun l- Appellanta li in primis tinforma lill- Awtorita bid-diffikulta li kellha sabiex tonora l-obbligi taghha dwar il- preparazzjoni u l-pubblikazzjoni ta' l-accounts.

48. Illi ghaldaqstant, anke dan l- Aggravju qieghed jigi michuda u dan ghar-ragunijiet fuq premissi.

Illi in vista tal-premess, it-Tribunal qieghed jichad l-appell interpost mis-socjeta' appellanta u jikkonferma id-decizjoni ta' l-Awtorita' Appellata tad- 29 ta' Ottubru 2021 bl-ispejjez kontra l- Appellanta.

