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MALTA

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Dr Ian Stafrace LL.D. Chairman
Dr. Nicholas Valenzia LL.D. Membru
Mr. Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) Membru

FST 06/22

Atom Trustees Limited (C-67911)

vs.

Malta Financial Services Authority

Illum 22 ta' Lulju 2026

It-Tribunal

Ra ir-rikors tas- Socjeta Appellanta li permezz tieghu iddikjarat:

Written appeal by Atom Trustees (C67911) (hereinafter referred to as the "**Company**" or the "**Appellants**").
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 21st June 2022 ("**Decision**").
The Company respectfully submits the following:

A. BACKGROUND

1. That on the 6th of January 2022, the MFSA wrote to the Company stating that, in terms of:

- (a) Article 20 of the Retirement Pensions Act (which was introduced to Chapter 514 of the Laws of Malta by means of Act V of 2020 which was enacted on the 3rd of March 2020 thus making this provision inapplicable to the 2019 Financial Documents – as defined below) and Part B 4.2.18 of the Pension Rules for Service Providers (the "**Pension Rules**"), the Appellants were obliged to submit their Audited Annual Financial Statements by the 30th of June 2020 (an extension due to the Covid-19 pandemic had been granted),

- (b) that in terms of Part B 4.3.18 and 20(g) of the Pension Rules the Annual Financial Return (audited) and Annual Financial Statements were to be submitted within 4 months of the Accounting Reference Date,

- (c) in terms of Part B 4.3.15 and 17 of the Pension Rules the Interim Financial Return (unaudited) and the Annual Financial Return (unaudited) had to be submitted within one month of the date up to within which it has been prepared.

  According to the MFSA and as stated in the said letter, the Company filed its (i) Audited Financial Statements for the period ending 31st December 2019 on the 22nd of March 2021 (these were due on the 30 of June 2020), (ii) Annual Financial Return (audited) for the period ending 31st December 2019 on the 7th July 2021 (these were due on the 7th of May 2021), (iii) their Interim Financial Return (January – March 2020, April- June 2020 and July-September 2020) on the 19th November 2021 (these were due on the 28th of May 2021) - the letter dated 6th of January 2022 shall be referred to as the ***Minded Letter which is attached and marked as DOC AT 1.***

2. That by means of the above-mentioned letter, the MFSA informed the Company that it was minded to impose a total administrative penalty amounting to nineteen thousand three hundred Euro (€19,500) (the "**Administrative Penalty**") for the late submission of the Audited Annual Financial Statements for the year ended 31st December 2019, for the non-

Submission of the Auditor's Management letter for the year ended 31st December 2019, for the non-Submission of the Unaudited Annual Financial Return covering period January to Marcy 2020, (hereinafter referred to as the "**2019 Financial Documents**") and the late submission of the interim financial returns from January to December (total fine EUR 10,500) as well as for the non-submission of the Auditors' Management letter for the year ended 31 December 2019, the non-submission of the half-yearly Financial Statements for the year 2020 and the late submission of the Audited Annual Financial Statements for the year ended 31st December 2019 (late submissions by the RSA) (total file EUR 8,800). The Tribunal is to note that by means of the Minded Letter, the MFSA informed the Company that it was (unfairly) minded to impose separate penalties for the same breach (of Article 20) as fines for the late submission by the entity as a CSP provider and separate fines for the late submissions by the entity in its role as Retirement Scheme Administrator ("**RSA**"). The Company was given 14 calendar days to reply to the said Minded Letter.

3. That on the 20th of January 2022, the Company sent its representations in reply to the above-mentioned Minded Letter justifying its reasons for the delay in submitting the 2019 Financial Documents. With regards to the Interim Financial Statements, the Company asked for the MFSA to take into consideration several submissions made in relation to Covid-19 and the principle of proportionality. The Company set out their rebuttals to the imposition of the Administrative Penalty and referred to Part B 1.4.1, Part B 2.3.7 and Part B 4.2.23 of the Pension Rules which, in brief, require the MFSA's prior approval once an auditor is being replaced. Briefly, the Appellants (in April 2020) had been informed by their previous auditors (PWC) that their hourly rate was about to increase substantially and that it would not make commercial sense for both PWC and the Appellant to continue with their engagement since the fees will be extortionate in comparison with the income generated by the Appellants and the scheme administered by them (which only had 9 members). The Appellants immediately made the MFSA aware of the auditor's termination and informed the Authority of their intention to appoint Mr Roberto Mifsud as their newly

appointed auditor. As shall be further explained below, the Authority, after verbally assuring both Mr Mifsud and the Appellants that the auditor's application would be approved, sent a communication letter, five months later, informing the Appellants that Mr Mifsud was in actual fact not approved in terms of the Retirement Pensions Act, albeit being approved as an auditor in terms of the Trust and Trustees Act.

Therefore the Company submitted that the Authority was fully aware of the impasse faced by the Appellants and was also aware of the fact that the period in question was the period in which the island was on lock-down due to the Covid-19 pandemic making it impossible or very difficult for the Appellants to attend to meetings with or allow third parties (auditors) to access their physical files (for the purpose of the audit) since most entities were either closed or on lock-down. The Appellants worked tirelessly to contact other audit offices and Mr Busuttil of Busuttil & Micallef agreed to take on the brief, once all due diligence had been completed (as the Tribunal is aware due diligence and on-boarding procedures do take time due to the copious regulatory checks involved and imposed on all service providers/professionals). The MFSA granted their approval for the latter auditors on the 20th October 2020. The Company contends that the reason for delay should be considered as justifiable, thus the imposition of the Administrative Penalty is unwarranted. – the letter dated 20th January 2020 shall be referred to as the ***Reply to Minded Letter which is attached and marked as DOC AT 2.***

4. That, five months later, the Company was notified with the MFSA's Decision dated 21st June 2022 by means of which the MFSA informed the Company that its representations justify a '*reconsideration of the MFSA's proposed regulatory action as communicated to the RSA in the Authority's Minded Letter of the 6th January 2022*." However the Authority stated that the Appellants should have appointed an approved auditor from the Approved Auditors List as this would have "*easily saved the RSA time rather than having to go through the lengthy process of authorisation*" – without taking into consideration of the fact that the Appellants wished to have Mr Mifsud

approved to actually save time he was known to the Appellants. With regards to the non-applicability of Article 20 of the Retirement Pensions Act -the MFSA noted that the Pension Rules have remained unchanged with the amendments introduced by Act V of 2020 – thus *ex admissis* the incorrect provision of the law had been quoted in the Minded Letter. Notwithstanding the above, the MFSA decided that '*following the representations sent to the MFSA and in light of the identified breaches which the RSA acknowledged, the Authority is of the view that the RSA's representations justify a reconsideration of the proposed administrative penalty. In this regard, the proposed administrative penalty of €19,300 with respect to the identified breaches is reduced by 25%*" which amounts to €14,475 (the "**Revised Administrative Penalty**"). Even though public authorities' decisions should fully inform those affected and such decisions are to be well-reasoned, the Decision did not clarify the representations which were deemed to be valid and which defence justified the Revised Administrative Penalty. - ***Decision attached and marked as DOC AT 3.***

B. BASIS FOR APPEAL

5. That, 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 the reasons explained below, and as will be explained in further detail during the proceedings before this Financial Services Tribunal, in reaching its Decision, the MFSA **abused of its discretion** thereby rendering the Decision **manifestly unfair.**

***6.* PRELIMINARY PLEAS**

The Appellant respectfully submits that the process starting from the auditor's approval application leading to the Decision is manifestly unfair.

(I) The conduct of the MFSA gave rise to the legitimate expectation that the Authority would approve Mr Mifsud as the newly appointed auditor – manifestly unfair.

Fairness is a fundamental goal of regulation- this is especially the case with regulatory decisions. Public authorities are expected to act fairly and consistently in all their dealings. Such a requirement arises under public law, independent of any guidance set out by the public authority. Legitimate expectation is guided by fairness. It is also established case-law of the European Courts of Justice that unduly delaying the procedure and the failure to act quickly may give rise to the legitimate expectation of the individual that the application is lawful (the disparity of powers between an individual and the Authority should always be taken into consideration). By protecting legitimate expectations, courts uphold values which underlie the functioning of democratic bureaucracies, namely, fairness, good faith and legal certainty.

In this case, the MFSA had approved Mr Mifsud as an auditor under the Trust and Trustees Act (*document attached to Reply to the Minded Letter and marked as ATOM 3*) and this confirmation gave assurances that gave rise to a legitimate expectation that the application would also be approved for the purposes of the Retirement Pensions Act. It must be made clear that, at its most basic, if a public authority conferred on a person a legitimate expectation of a procedural benefit, that same public authority may not frustrate that expectation if to do so would prove to be so unfair as to amount to an abuse of power. In this case the Authority had confirmed Mr Mifsud as auditors under the Trust and Trustees Act (*reference is made to the Unilever decision*[1] *which established that a legitimate expectation can be established, not only on the basis of a statement made by HMRC, but also by reference to HMRC's past conduct)* **and, as shall evidenced,** had also given verbal assurances to both Mr Mifsud and the Appellants that he would also be approved under the Retirement Pensions Act. This implied promise, clear and unambiguous assurance, coupled with the MFSA's conduct gave rise to the Appellant's reliance on the assurance that Mr Mifsud would be approved. This assurance led to the Appellants continuing with their proposed course of action (that of

[1] *R v Inland Revenue Commissioners, ex parte Unilever plc [1996] C.O.D. 421)*

appointing Mr Mifsud as their auditor) and the frustration of such assurance has led to the imposition the hefty Revised Administrative Penalty.

It is common ground and central to the reasoning of public law and courts that the MFSA is subject to public law requirements of fairness. Considering the textual void of the definition of legitimate expectation under Maltese law, it would be appropriate to attempt a preliminary definition of the doctrine THOMAS states that:

"*The principle [of legitimate expectations] raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.*"

The combined elements of the above definition may be distilled into (i) a reasonable expectation of a lawful benefit or hearing (ii) induced by the administration, and (iii) communicated to the individual which (iv) binds the authority to act in the manner represented. In this case the MFSA gave numerous assurances that Mr Mifsud would be approved, and those assurances were effectively relied upon. Detrimental reliance is a consequence of trust so affording it protection should be especially strong where the individual has incurred losses after being induced by such representation.

Decision-makers, whether administrative or judicial, should act fairly, consistently, and transparently. This fairness principle has also been recognised by the Maltese Courts on various occasions. In ***John Bundy u Clyde Puli vs Awtorita' tax-Xandir (P.A. 3.10.2001)*** the courts made reference to the ***John Lowell et nominee vs Dr Carmelo Caruana nominee*** (P.A. MCC 14.08.1972) and ***Sciberras vs Housing Secretary*** (P.A. 21.07.1973) where the court stated that:

".. u fosthom il-Qrati tagħna għandhom ġurisdizzjoni sabiex jaraw li l-istess Awtorita' Governattiva ezercitat l-istess diskrezzjoni lilha mogħtija in konformita mal-Liġi, u fil-limiti tal-istess, b'mod li tali diskrezzjoni qatt ma

għandha tiġi użata għall-skopijiet mhux permessi mill-liġi, jew b'mod abbusiv jew mhux raġonevoli, u għalhekk tali diskrezzjoni għandha tintuża in bona fede mhux arbitrarjament u kapricosmant."

In ***Testaferrata Moroni Viani et vs MEPA (22.04.1996. CA)***, the Court held that if an authority passes instructions to the applicant on how to register an appeal before it, then those instructions should be followed, and the appeal should not be declared null just because the applicant failed to follow some additional step indicated in a legal notice, but not in the instructions. By applying equity to the case before it, the Court felt that it could not disadvantage the applicants when these came to rely on the erred interpretation of the law given to them by the same authority before which the appeal was filed. The Appellants as well as Mr Mifsud were given verbal assurances that the approval was 'just a matter of time' and that the delays were simply due to the Authority's bureaucratic procedures. Thus the Appellants cannot be penalised for following such assurances and relying upon them.

In this case the Court also held that good faith (which is a moral standard that constrains authorities when reneging from its promises) binds authorities to give complete and honest information to whoever requires it. This latter obligation has an obvious rationale; the public is very likely to rely on representations given to them by public authorities so good faith requires them to act honestly in their relations with individuals.

Moreover, wide discretionary powers (such as the powers of the MFSA) are underpinned by Parliament's intention that they be exercises consistently, and fairly. In Malta, Rule 21 of the Code of Ethics for public Employees (Public Administration Act) requires public officers to deal with cases consistently and fairly. The fact that the MFSA gave representations that Mr Mifsud was to be approved and 5 months later decided that he did not fit the MFSA's criteria, is tantamount to unfair conduct by the authority.

On the basis of the above the Appellants contend that the Authority did not act fairly, consistently and appropriately when it gave the Appellants a legitimate expectation that Mr Mifsud would be approved as their newly appointed auditor which assurance were given verbally as well as by means of the Authority's conduct.

(II) Disproportionate application of Administration 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 supervisory supervision.

The Company contends that the Authority abused their discretion for imposing a fine amounting to the Revised Administrative Penalty for the filing of the 2019 Financial Documents when taking into consideration the representations made in their Reply to the Minded Letter which representations were not only reasonable and genuine but also objectively justifiable when the circumstances and attributes of the Authority are taken into account (the 5 month period within which the Authority communicated their objection to Mr Mifsud's application). The MFSA also failed to consider the financial position of the Company as it would have been made apparent that the quantum of the fine is disproportionate to the profits made or income generated. The RSA is actually loss making and generates absolutely no profit.

The Appellants contend that the Authority was not reasonable when exercising its discretion as it is assumed (such assumption has to be made since the Decision does not give any basis of legal reasoning) that the mitigating circumstances listed in the Guidance Note on the Methodology to Set Administrative Penalties Imposed on Entities and Individuals (2022) were not taken into consideration and proportionality was not achieved. This can be seen from the fact that the Authority was rather inefficient in its application process which inefficiency consequently contributed to a delay in filing of the required financial documents. This would certainly determine a substantial mitigation of the administrative penalty the Authority imposed based on the test of reasonableness.

Proportionality is a principle embedded in both EU and ECHR law and touches on most of the decisions taken by public bodies:

"[Proportionality] is one of the fundamental principles of Community law, standing alongside such other principles as those of equal treatment and legitimate expectation." - (*R v Secretary of State for the Environment, ex parte Oldham Metropolitan Borough Council [1998] ICR 367, Laws J (at 384H to 385A).)*).

In addition to the above, reference to the table illustrating the quantum of penalties in the Minded Letter, in determining the quantum of the proposed administrative penalties, the Company contends that even though the Authority is empowered to choose the penalties which seem appropriate to it, it must exercise its power in accordance with the principle of **proportionality**. This means that (i) penalties must not go beyond what is strictly necessary for the objectives pursued and (ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the functioning of the entity[2]. The parameters and the methodology for respective weighting used are completely arbitrary and seem to have been formulated unilaterally by the Authority without ever being communicated to the public.

The Appellants contend that the penalties are not merely harsh but plainly unfair as (i) there was absolutely no impact on or effect on any third parties (ii) the need for a change in auditor happened in the midst of a pandemic whereby the Company together with the rest of the country was in an unprecedented lock-down (even the HMRC, on the 20th March 2021, recognised that Covid-19 may be accepted as a reasonable excuse for any appeals made against late filing penalties) (iii) there has been no loss of capital which has been caused to members or third parties by the potential breach identified. Rather than encouraging efficient regulation and supervision, the MFSA is doing its best to add financial burdens on the Company to squeeze out as much as it can from it, on the understanding that it (like many other companies) had difficulty in meeting its filing obligations during the Covid 19 pandemic.

[2] Paraskevas Louloudakis v Elliniko Dimosio (Case C262/99) [2001] ECR I-5547.

Therefore based on 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.

(III) Pleas on the Merits of the alleged breaches found by the MFSA – manifestly unfair.

As detailed in their Reply to the Minded Letter, the Appellants explained that:

(a) Article 20 of the Retirement Pensions Act was introduced to Chapter 514 of the Laws of Malta by means of Act V of 2020 which was enacted on the 3rd of March 220 thus making this provision inapplicable to the 2019 Audited Financial Statements for the year 2019 of the alleged breaches. The MFSA contend that the Pension Rules both in 2019 and 2020 have remained unchanged with the amendments introduced by Act V of 2020. This effectively means that law/offence/alleged breach referred to in the Decision was not applicable to the late filing period.

(b) The Authority, according to the Minded Letter, imposed a €6,500 penalty for the alleged breach of Article 20 of the Retirement Pensions Act for late submission for the Gemstone Scheme and another 6,500 for the alleged breach of the same Article 20 of the Retirement Pensions act for Atom Trustee as RSA. It is unfair and unjust that the Authority imposes two separate penalties for the same alleged breach! The Appellants contend, and it would be reasonable to do so, that the alleged breach should be considered as one breach and not two separate breaches.

(c) That the late filing was due to the fact that their previous auditors had terminated their engagement (at the last minute) and it took 5 months for the MFSA to communicate the fact that Mr Mifsud was not approved to act as an auditor in terms of the Retirement Pensions Act but was approved to act as auditor under the Trust and Trustees Act.

Once again, this unfair reasoning goes against the principle of good faith and reasonableness.

THEREFORE in light of the above, and for reasons that may be brought during the hearing of this appeal according to law, the appellant Atom Trustees Ltd humbly requests that this honourable Financial Services Tribunal annuls in its entirety the decision of the Malta Financial Services Authority of the 21st June 2022, or varies and thus decreases the administrative penalty imposed and consequently proceeds to uphold the plea and submissions of the Appellants, with costs.

Ra ir-risposta ta' l- Awtorita' Appellata tramite liema iddikjarat:

This reply by the Malta Financial Services Authority (hereinafter the "**Authority**") is being submitted in response to the appeal filed by the appellant from a decision of the Authority of the 21st June 2022 in terms of which the appellant company was fined a total of €14,475 for the late and non-submission of a number of documentation with the Authority.

The appellant company is authorised and licensed by the Authority to act as a Retirement Scheme Administrator (hereinafter the "RSA"). The Retirement Pensions Act and various Pension Rules impose on it the obligation to file certain documentation both as an administrator as well as for and on behalf of the Retirement Scheme (hereinafter the "RS") that it administers, in this case Gemstone Retirement Scheme.

For sake of clarity hereunder is a detailed list of the various breaches committed both by the RSA and by the RS, together with relevant details on each breach.

Late Submissions by the RSA					
Document	**Original Deadline**	**Extended Deadline**	**Submission Date**	**Total Days of Delay**	**Laws and/or Regulations Breached**
Audited Annual Financial Statements year ended 31/12/19	30th April 2020	30th June 2020	22nd March 2021	266 (Delayed by more than 200 days but not more than 300 days from the stipulated deadline).	Art. 20 Retirement Pensions Act Pt B 4.3.18 Pension Rules for Services Providers
Audited Annual Financial Return year ended 31/12/19	30th April 2020	7th May 2021	7th July 2021	62 (Delayed by not more than 100 days from the stipulated deadline)	Pt B 4.3.20(g) Pension Rules for Service Providers
Interim Financial Return covering period Jan – March 2020	30th April 2020	28th May 2021	19th November 2021	176 (Delayed by more than 100 days but not more than 200 days from the stipulated deadline)	Pt B 4.3.15 Pension Rules for Service Providers
Interim Financial Return covering period April – June 2020	31st July 2020	28th May 2021	19th November 2021	176 (Delayed by more than 100 days but not more than 200 days from the stipulated deadline)	Pt B 4.3.15 Pension Rules for Service Providers
Interim Financial Return covering period July – Sept 2020	31st October 2020	28th May 2021	19th November 2021	176 (Delayed by more than 100 days but not more than 200 days from the stipulated deadline)	Pt B 4.3.15 Pension Rules for Service Providers

Non-submissions by the RSA				
Document	**Original Deadline**	**Extended Deadline**	**Total Days of Delay**	**Regulations Breached**
Auditors' Management Letter for the year ended 31/12/19	30th April 2020	30th June 2020[3]	Not submitted by the decision date.	Pt B 4.3.18 Pension Rules for Service Providers
Unaudited Annual Financial Return for the year 31/12/19	31st January 2020	N.A.	Not submitted by the decision date.	Pt B 4.3.17 Pension Rules for Service Providers

Late Submissions by the RS				
Document	**Original Date**	**Submission Date**	**Total Days of Delay**	**Law and Regulations Breached**
Audited Annual Financial Statements for the year 31/12/19	30th June 2020 (6 months from Accounting Reference date)	29th January 2021	213 (Delayed by more than 200 days but not more than 300 days from the stipulated deadline)	Art. 20 Retirement Pensions Act Pt B 2.3.9 Pension Rules for Personal Retirement Schemes

[3] This extension was provided through the publication of the circular as in footnote 1.

Non-Submissions by the RS			
Document	**Original Date**	**Total Days of Delay**	**Law and Regulations Breached**
Auditor's Management Letter for the year 31/12/19	30th June 2020 (6 months from Accounting Reference date)	Not submitted by the decision date.	Pt B 2.3.9 Pension Rules for Personal Retirement Schemes
Half-yearly Financial Statements for the year 2020	31st March 2020 (3 months from Accounting Reference date	Not submitted by the decision date.	Pt B 2.3.5 Pension Rules for Personal Retirement Schemes

By means of its minded letter of the 6th January 2022, the Authority informed the appellant company that it was minded on imposing a total administrative fine of €19,300.

After having taken into consideration the representations made by the appellant company in terms of its letter dated the 20th January 2022, the Authority opted to reduce the fine by 25% bringing the imposed fine down to €14,475.

The appellant company felt aggrieved by the said decision and filed an appeal claiming that the decision of the Authority was manifestly unfair.

Basis for Appeal and the Authority's Rebuttal

1. **Delay in Vetting proposed Auditor**

The appellant company submits that the reason for the delay in submitting the relative documentation is attributable to the Authority's delay in processing its application for the approval of a new auditor.

The appointment/change of auditor for persons authorised and licensed under the Retirement Pensions Act is subject to approval by the Authority.

First and foremost, it must be highlighted that the Authority issues a list of approved auditors. The auditors on this list are professionals who have already been vetted and approved and consequently if a service provider chooses an auditor from this list, then no further vetting and approval is required by the Authority. Notwithstanding the foregoing, the Authority would still require a notification of the proposed appointment.

If on the other hand the service provider opts for an auditor who has not already been approved then the said person needs to be subjected to an authorisation process by the Authority. The scope of the authorisation process is to ensure that such person satisfies the criteria established by both the Act and the relative regulations.[4]

In the case in question the appellant company informed the Authority that it wished to change its auditors in April 2020. Notwithstanding the fact that it was fully aware of its obligation to submit certain documentation by the end of June of the same year instead of opting for an auditor already approved, it chose to submit the name of an auditor who still needed to be undergo a vetting process by the Authority.

The Authority prior to approving a person to act as an auditor of an RSA and RS needs to be satisfied that the person proposed satisfies various criteria, crucial of all is the independence of the auditor.

Owing the importance of the role of auditor in terms of the Retirement Pensions Act, the vetting process is a vigorous one. In the case at hand the Authority had certain serious reservations as to the independence of the proposed auditor and consequently needed further clarifications.

The person proposed by the appellant company was a certain Mr Roberto J Mifsud. During the vetting process it emerged that the provision of accounting and auditing services to the RSA and RS was to be done by the same company, Core Group (Accountancy) Limited. The accounting was to be done by one of Core Group's

[4] Article 16(2) of Chapter 514 & article 4.3.24 of the Pension Rules for Personal Retirement Schemes

employees, Ms Caroline Mellors whilst the audit would be carried out by Mr Mifsud, who is also the owner and one of the directors of Core Group (Accountancy) Limited.

Due to these issues, during the vetting process the Authority required more information and clarifications, and in the end it decided not to approve Mr Mifsud on the basis that it opined that the provision of accounting and auditing services by the **same company**, Core Group (Accountancy) Limited created threats to independence.

The arrangement to combine one or more services of the firm with one or more services of the client is considered as a close business relationship and thus a potential threat to independence. Providing non-assurance services may create self-review, self-interest and advocacy threats.

Providing an audit client with accounting and bookkeeping services, such as preparing accounting records or financial statements, creates a self-review threat when the firm (Core Group Accountancy Ltd) subsequently audits the financial statements. The fact that the firm is also involved in management decisions as the accounting is prepared up to trial balance stage may impair the independence.

The issue was not around the individual's competence but around independence, on the basis that Mr Mifsud's firm was also carrying out the accounting, which it then proposed to audit. This naturally goes against one basic key audit concept, which is that of independence.

Furthermore, from the vetting process it was noted with concern that the audit for the year ended 31 December 2019 had been carried out pending to sign off. Meaning that Mr Mifsud had conducted the said audit without the Authority's approval.

The Authority submits with respect that it has a duty and obligation to carry out such vetting exercises rigorously and exhaustively, as it did in the case at hand. Furthermore, with respect to both Mr Mifsud and the appellant company they ought to have known that having the same company providing both accounting and audit services constitutes a serious threat to independence.

Conclusion

The Authority submits that every regulated entity has the right to make the necessary changes of its service providers. The Authority claims further that such changes must be implemented with due consideration to the entity's compliance with regulatory obligations in terms of law. Arguments by the appellant company with respect to the Authority's supposedly late response for the approval of a new auditor is merely an attempt by the appellant company to find an excuse for its regulatory failures.

For the above reasons the Authority humbly submits that there was no unreasonable delay on its part in vetting the application of Mr Roberto Mifsud to act as auditor in terms of the Retirement Pensions Act, and this notwithstanding that the appellant company should not have submitted the name of an auditor who had a serious potential threat to his independence.

Lastly given the limited time available, the appellant company had the possibility of choosing a pre-approved auditor which would have speeded up the process of approval.

2. Legitimate Expectation

The appellant company argues that since Mr Mifsud had been approved by the Authority to act as an auditor in terms of the Trust and Trustees Act it had a legitimate expectation that its application for him to be approved in terms of the Retirement Pensions Act would be successful.

At the offset it must be made clear that an auditor appointed in terms of the Trust and Trustees Act, unlike in the case of the Retirement Pensions Act, does not require approval by the Authority. In fact, no Personal Questionnaire was a requisite in terms of the Trust and Trustees Act.

Consequently, appellant company's assertion that Mr Mifsud was approved by the Authority to act as auditor in terms of the Trust and Trustees Act is incorrect. The

Authority never approved him for such a role since no approval was required. The Authority simply acknowledged receipt of the notification supplied by the appellant company of its decision to change auditor.

Furthermore, the appellant company claims that both itself and Mr Mifsud had been given verbal assurances that Mr Mifsud would be approved for purposes of the Retirement Pensions Act. The Authority refutes these allegations as being totally unfounded and untrue.

The Authority submits with respect that the doctrine of *Legitimate Expectation* cannot be applied in the case at hand and this for the following reasons.

The doctrine of legitimate expectation exists under common law following the well-known case ***R vs North and East Devon Health Authority ex parte Coughlan***. The said doctrine has in recent years been applied even though in very rare cases in cases of review of administrative decisions.

The basis of the doctrine of legitimate expectation is that one has the right to request the review of an administrative decision on the basis that the decision is contrary to a pattern of conduct, representation or a promise made by a public authority.

In the case at hand the appellant company is not challenging the decision of the Authority not to approve Mr Mifsud as an auditor of the RSA and RS in terms of the Retirement Pensions Act. The decision of the Authority not to approve Mr Mifsud as an auditor for the RSA and RS was a correct one, and left unchallenged, to the extent that on the 5th November 2020 the appellant company actually withdraw its application.

The appeal in question is from a decision of the Authority imposing an administrative penalty on the appellant company for the late submission and non-submission of certain documentation in terms of law, and consequently the doctrine of legitimate expectation does not come into play.

In subsidium and without prejudice to the above the said doctrine does not apply in the case at hand since the criteria laid down by jurisprudence for its applicability do not subsist.

As held in the case of the European Court of Human Rights **BÉLÁNÉ NAGY v. HUNGARY** decided on the 13th December 2016

> *A legitimate expectation must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision.*

In the case decided by the Court of Appeal of England and Wales held that **R (Bibi) v Newham LBC [2001] EWCA Civ 607**, it was held:

> *There must have been a pattern of conduct, or a representation, or a promise, that makes it unfair for a public authority to disregard the expectation.*

<u>Conclusion</u>

For the above reasons the Authority humbly submits that the appellant company's argument that it had a legitimate expectation that Mr Mifsud would be approved as an auditor in terms of the Retirement Pensions Act is unfounded and should consequently be discarded.

3. **<u>Disproportionate Application of Administrative Fines</u>**

The appellant company is claiming that the fines imposed were disproportionate to the alleged breaches given that the RSA has been operating at a loss and that the said breaches have not yet resulted in any losses or damages to the pension assets, members of the scheme, or third parties.

The rationale behind the meaning of proportionality is that regulatory authorities cannot exercise their discretion as they like, but they must weigh the facts and the circumstances of each case.

Essentially, proportionality signifies that the means used in order to achieve a particular aim must be commensurate to the aims which are pursued by that particular measure. Therefore, measures taken by a regulatory authority should strike a fair balance between the public and the private interests involved, and such balance is not struck where the individual has been made to bear an excessive burden.

Sporrong and Lonroth v. Sweden (EcrtHR 23/09/1982) – *"Some notion of fair balance should be struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights. It cannot find this balance if the person concerned has to bear…an <u>individual and excessive burden</u>."*

Depalle v France (Applikazzjoni numru 34044/02) – "*...there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden."*

Article 46 of the Retirement Pensions Act empowers the Authority to impose fines up to and including €150,000. The Authority in this case elected to impose a fine of €14,475, reduced from €19,300.

Consequently, the question that needs to be asked is whether a fine of € 14,475 for ten breaches when the maximum at law is €150,000 per breach, is disproportionate bearing in mind the breaches committed.

In ***JD Capital vs MFSA*** (FST 06/20), this Tribunal made the following argument:

"The appellant argues that the MFSA abused its discretion in view of the fact that the penalty of €5,000 was too high and not commensurate with the Appellant's failure.

It is important to note that in terms of article 22(1) of the PFMA, The Authority could have imposed a penalty of up to €1,000,000. This in view of the seriousness of shortcomings in complying with the PFMA obligations.

An imposition of €5,000 when the law allowed the Authority to impose a penalty of up to €1,000,000 certainly cannot be said to be an abuse of discretion!

With reference to the breaches committed it is important to bear in mind that to date there are still a number of documents which have not been submitted as well as the days of delay taken to file the documents.
As can be seen from the attached document (Annex 1), the appellant company has a history of non-compliance with respect to the submission of regulatory documents even though various chasers were sent by the MFSA.

A simple analysis of the breaches which are the subject of this appeal, will clearly show that a number of the documents submitted late were filed very long after the appointment of the new auditors, which goes to show that the argument being made by the appellant company that its failure to comply with its regulatory obligations due to the time taken by the Authority to process their application for the approval of a new auditor is not justified.

The appellant company in its arguments to substantiate its allegation that the administrative penalties imposed were applied disproportionately, claims that the Authority failed to apply *Guidance note on the Methodology to set Administrative Penalties Imposed on Entities and Individuals (2022).*

It is important to point out that the Penalty Model available on the MFSA's website[5] does not apply to cases of unequivocal breaches such as late submission of regulatory information to the MFSA.

This notwithstanding however, had the Authority to follow the said penalty, the administrative penalties imposed would have considerably higher.

The ten breaches in question would have been rated as follows: Two breaches (submissions of AFS by the RSA and AFS by the Scheme) as **Low** while the remaining eight breaches as **Very Low**.

On the basis of the average revenue generated by the appellant company in the preceding three financial years, it is classified in the relevant group in terms of the categorisation table shown in page 6 of the penalty model. The categorisation table displays 6 categories from A to F; Category A being the highest group while Category F being the lowest group within the categorisation table. Taking into consideration the average revenue generated by Atom during the financial years 2017, 2018 and 2019, Atom would have been classified as **Category F**.

According to the Categorisation Scoring Matrix the administrative penalty would be calculated as follows: penalty amount for low-risk breaches is €10,000 and very low €5,000, thus a total administrative penalty of €60,000 reduced by 25% amounts to €45,000 as opposed to a total administrative penalty imposed of €14,475.

<u>Conclusion</u>

For the above reasons the Authority humbly submits that the appellant company's argument that the administrative penalties imposed were applied disproportionately is unfounded and should consequently be discarded.

[5] https://www.mfsa.mt/wp-content/uploads/2022/05/Guidance-Note-on-the-Methodology-to-Set-Administrative-Penalties-Imposed-on-Entities-and-Individuals.pdf

4. Pleas on the Merits of the alleged breaches found by the Authority

(a) The appellant company argues that since Article 20 of the Retirement Pensions Act was introduced by means of Act V of 2020 which was enacted on the 3rd March 2020 the provision is inapplicable to the 2019 Audited Financial Statements.

Prior to the coming into force of Act V of 2020, article 20 of Chapter 514 read as following:

The retirement scheme and Retirement Scheme Administrator shall comply with any reporting requirements as may be required by Pension rules.

With the coming into force of the said Act V of 2020, article 20 was substituted with the following:

Every retirement scheme and Retirement Scheme Administrator shall forward to the competent authority a copy of its audited financial statements within the periods stipulated in the Pension Rules and shall comply with any reporting requirements, as may be required by Pension Rules.

The Pension Rules for Service Providers that have been applicable since 2015 under article B4.3.14 state the following:

The following shall be submitted to the MFSA within four months of the Accounting Reference Date: (a) audited annual financial statements prepared in accordance with International Financial Reporting Standards, including the auditor's report; (b) the auditors' management letter; (c) the Annual Financial Return submitted in accordance with 4.3.20 (g) of these Pension Rules; and, (d) the auditor's report prepared in accordance with 4.3.29 of these Pension Rules.

The Pension Rules for Personal Retirement Schemes issued in 2018. Rule B 2.3.9 thereof states,

The annual report, together with a copy of the auditor's management letter and the auditor's report, shall be produced and submitted to the MFSA within six months of the end of the period concerned, or at any other time as may be authorised or directed in writing by the MFSA.

It is clear from the above that the obligation to file the relative documentation with the Authority is imposed by the Pension Rules, which rules had been in force prior to 2019.

(b) The appellant company argues that the Authority imposed a €6,500 penalty for the breach of Article 20 of the Retirement Pensions Act for late submissions for the Gemstone Scheme and another €6,500 for the breach of the same article 20 of the Retirement Pensions Act for Atom Trustee as RSA.

What appellant company is alleging is not correct. The RSA and the Scheme are required to submit separate Audited Financial Statements. These documents are distinct one from the other, so much so that there are separate Rules which cater for both requirements. In fact whilst Part B 4.3.14 of the Pension Rules for Service Providers stipulates that the Audited Financial Statements of the RSA have to be submitted to the Authority within four months, Part B 2.3.9 of the Pension Rules for Personal Retirement Schemes stipulates that Annual Report (including the Audited Financial Statements) has to be submitted within six months of the end of the period concerned.

Final Conclusion

For the above reasons the Authority humbly submits that the decision of the Authority of the 21st June 2022 was just and merits confirmation, and consequently the appeal of Atom Trustees (Malta) Limited should be rejected with costs.

Ra il- provi imressqa mill- Partijiet u wara li sema it-Trattazzjoni ikkunsidra:

L- Appellant tramite l- appell taghha li wasal ghand it-Tribunal fit- 13 ta' Lulju 2022 ressqet tlett aggravji sabiex tikkontesta id-Decizjoni ta' l- Awtorita' tal- 21 ta' Gunju 2022 u cioe:

a. L- Ewwel Aggravju: *The conduct of the MFSA gave rise to the legitimate that the ty would approve Mr. Mifsud as the newly appointed auditor – manifestly unfair;*
b. It-Tieni Aggravju: *Disproportionate application of Administration Penalty – Manifestly Unjust;*
c. It-Tielet Aggravju: *Pleas on the Merits of the alleged breaches found by the MFSA- manifestly unfair.*

Illi l- Awtorita' wiegbet ghall-istess billi dwar l- Ewwel Aggravju hija tghid illi mhux minnu li damet sabiex taghti risposta dwar l- Awditur propost oltre il- fatt li ma krejat l- ebda aspettativa legittima. Tghid ukoll, dwar it-Tieni Aggravju, li il- multa imposta m' hijiex sproporzjonata. Dwar it-Tielet aggravju hija issostni illi anke qabel id-dhul fis-sehh ta' l- Artikolu 20 tramite l- Att V tas-sena 2020, xorta kien hemm l-obbligu ta' sottomissjoni tad-dokumentazzjoni mitluba oltre il- fatt illi kemm l- RSA kif ukoll l- iScheme it-tnejn kellhom l- obbligu ta' sottomissjoni.

Kunsiderazzjonijiet tat-Tribunal:

Preliminari:

1. Illi kif tghid l-istess Appellanta fir-rikors ta' l- Appell taghha, f' April tas-sena 2020, wara li l- Awdituri li kellha, u cioe PWC, kienu infurmwaha illi it-tariffi taghhom kienu ser jizdiedu, hija hadet ud-decizjoni li twaqqaf lill- Awdituri li kellha, u bdiet process sabiex tahtar awditur gdid. Illi l- ewwel persuna minnha nominat kien certu Robert Mifsud. L- Awtorita xi hames xhur wara, infurmat lill- Appellanta illi hija ma kienetx approvat il- hatra ta' Mifsud bhala awditur, u dan, skond l- Appellanta, wara li l- Awtorita', jew ufficjal ta' l-stess, kien ta' assigurazzjoni verbali ("verbally assured") illi din il- hatra kellha tigi approvata. Illi wara li il- hatra ma gietx

approvata, l- Appellanta avvicinat lill Busuttil & Micallef li gew approvati bhala awdituri fl- 20 ta' Ottubru 2020.

2. Illi dan kollu qieghed jinghad sabiex kollox jitqieghed u jitqies f' perspettiva, ghaliex huwa car illi is-socjeta Appellanta mhux spiccat minnghajr awditur, izda kienet hija li hadet decizjoni ftit granet qabel id-data ta' skadenza tas-sottomissjonijiet (li giet estiza b' xaghrejn minhabba il- Covid) li twaqqaf lill- Awditur taghha minhabba it-tariffi pretizi mill-istess Awditur. Illi allura kienet is-socjeta appellanta stess illi iddecidiet li twaqqaf lill- Awdituri li kellha, u li prezumibilment kienu gew approvati fil- laqgha generali tas-sena precedenti (tramite engagement letter) kif dejjem isir, u dan meta is-sena 2019 li l- audit u l- financial statements taghha kellhom jitlestew sa April 2020, kienet spiccat. Dan kollu qieghed jinghad ghaliex ma jinfteihemx kif is-socjeta appellanta ta' l- anqas ma haditx id-decizjoni li twaqqaf lill- Awditurig has-sena ta' wara u mhux twaqqafhomn f' April 2020 milli jlestu l- audit u r-rapporti tas-sena 2019.

L- Ewwel Aggravju:

3. Illi f' dan l- aggravju l- Appellanta targumenta illi hija kellha "verbal assurance" illi l- Awditur il- gdid minnha maghzul kellu jigi approvat. Targumenta ukoll illi l- Awtorita' damet sabiex tiehu decizjoni dwar din it-talba.

4. Illi m' huwiex ikkontestat illi l- appell in kwistjoni m' huwiex dwar jekk l- Awtorita kienetx korretta meta hija irrifjutat il- hatra ta' Roberto Mifsud bhala awditur. Ovvjament, ir-raguni moghtija mill- Awtorita ghandha rilevanza izda tali rilevanza hija limitata biss fl- analizi ta' dan l- aggravju hekk kif imressaq fir-rikors ta' l- appell.

5. Illi skond l- affidavit ta' Dr. Nicole Cachia, f' April 2020 hija infurmat lill- Awtorita b' dak li PWC kienu qalulhom, u cioe illi huma kienu kumpannija zghira u li minhabba ezercizzju intern, il- PWC kienet qed twaqqaf l- inkarigu fuq klijenti zaghar. Dan sakemm ma jithallsux tariffi gholja li l-istess PWC kienet qed tippretendi.

6. Jidher li kien hemm diskussjonijiet verbali fejn ufficjal ta' l- Awtorita, certu Claudio Scerri, kien bhal donnu assigura li m' kellux ikun hemm problema ghall- approvazzjoni ta' Roberto Mifsud bhala awditur, u dan ghaliex diga kien awditur approvat taht it- trust and Trustees Act.

7. Jirrizulta pero ukoll illi Roberto Mifsud ma kienx wiehed mill- awdituri indikati fuq il- lista ta' Awdituri approvati, tant illi l-istess Claudio Scerri kien informa ill-istess Nandine Cachia, illi l- approvazzjoni ta' persuna fuq il- lista tkun hafna izjed mghagla.

8. Jidher li saret applikazzjoni formali sabiex l-istess Roberto Mifsud ikun approvat u wara numru ta' reminders f' Awissu u Settembru ta' l-istess sena, l- awtorita infurmat lill- Appellanta illi kien hemm problema bl- approvazzjoni ta' Mifsud bhala awditur peress illi il- kumpannija Core Group (Accountancy) Limited ma setghatx tipprovdi servizzi ta' accounting u servizzi ta' audit. Jidher illi Mifsud kien wiehed mis-sidien u d-diretturi ta' Core Group (Accountancy) Limited u l- Awtorita kellha oggezzjoni li Mifsud ikun awditur meta tramite il- kumpannija tieghu stess huwa jaghmel ix-xoghol ta' book-keeping u accounting ghall-istess Appellanta. Illi skond l- Awtorita dan l- arrangement kien jimmina l- indipendenza tal- awditur u ghalhekk hasset illi ma kelliex tapprova din it-talba.

9. Minn dawn il- fatti johrogu zewg ilmenti mill- Appellanta, u cioe jekk kienx hemm il- htiega ta' trapass ta' 5 xhur sabiex l- Awtorita tiddeciedi fuq il- hatra ta' Mifsud bhala awditur u jekk l- Appellanta kelliex l- aspettativa legittima li l-istess Mfsud kien ser jigi approvat.

10. Illi huwa car illi meta l- Appellanta iddecidiet li tbiddel l- awdituri ftit jiem qabel l- iskadenza tat-terminu tal- prezentata ta' l-istess, hija hadet sogru, li ma kienx zghir. Kif diga inghad, it-Tribunal iqis tali decizjoni mhux biss wahda ta' sogru, izda wahda kemmxejn irresponsabbli meta tqis li hawn si tratta ta' entita regolatorja li kienet ben konxja ta' l-obbligi taghha. Jidher car, ta' l- anqas minn dak li qalu ufficjali ta' l-istess Appellanta, illi minkejja li PWC kienet qed twaqqaf inkarigi ta' entitajiet ta' certu daqs, daqstant iehor jidher li kien hemm proposta li l- audit seta jsir bi hlas ta' tariffi ghola. Ma johrogx car ukoll x' ghamlet l- Appellanta rigward l-inkarigui li certament

kienet diga ikkonfermat a favur PWC fil- laqgha generali precedenti, liema inkarigu isir a bazi ta' proposta u engagement. Kif l- Appellanta accettat li ftit granet qabel it-tlestija ta' l- audit tas-sena 2019 twaqqaf l- inkarigu tal- awditur li prezumibilment kien diga hadem fuq l- inkarigu, minflok ma insistiet illi PWC tonora l- inkarigu diga fdat lilha, hija hi haga li ma ssibx spjegazzjoni.

11. Illi wara din id-decizjoni, l- Appellanta ghazlet li tinnomina bhala awditur lis-sid u direttur ta' kumpannija li kien diga jaghmel ix-xoghol ta' accounting u book-keeping taghha stess. Kif diga inghadm, it-Tribunal m intalabx li jiggudika fuq tali decizjoni, izda certament li anke hawn is-socjeta Appellanta hadet decizjoni ben konsapevoli. L-Appellanta kienet taf illi il- hatra ta' awditur ma kienetx id-dominju ta' persuna wahda li tahdem ma' l- Awtorita. Hemm process u anke jekk tali persuna kien indika illi huwa ma jarax problem peress li l-istess Mifsud diga kien approvata bhala awditur taht legislazzjoni dfferenti, zgur li tali osservazzjoni ma tistax tigi elevata fuq livell ta' aspettattiva legittima. Illi tajjeb illi jerga jinghad, kif osservat l- Awtorita, illi Mifsud ma giex approvat ghal dan l- inkarigu, minhabba il- kwistjoni tal- indipendenza tieghu, u mhux a bazi ta' kompetenza. Allura certament li jekk Mifsud kien kapaci jkun awditur a bazi ta' legislazzjoni differenti, certament li set akine ikun kapaci jservi ta' awditur tas-socjeta Appellanta. Izda f' dan il- kaz, ic-cahda ma kienetx a bazi ta' kompetenza.

12. Fattur iehor important kien illi l-istes Mifsud ma kienx fuq il- lista ta' awdituri li diga kienu approvati mill- Awtorita. Kif jinghad mill-istess deposizzjoni ta' Dr. Nadine Cachia, Claudio Scerri kien infurmaha illi jekk huma jaghzlu persuna jew ditta minn din il- lista, "would hasten the authorisation process". Sinjal car illi anke persuna fuq il- lista ta' dawk l- awditur li kienu diga approvati, ma kienetx garanzija li dak il-persuna kien ser jigi approvat. Kemm Mifsud, u kemm il- persuni li kien hemm fuq il-lista certament li kienu persuni kapaci u kompetenti. Izda kif diga inghad, il- kaz odjern gie deciz fuq il- kriterju tal- indipendenza u mhux a bazi tal- kompetenza.

13. Jekk kienx hemm il- htiega li tali decizjoni tigi ikkomunikata 5 xhur wara hija materja kemmxejn soggettiva. Izda it-Tribunal, minkejja li jista jkollu opinjoni dwar jekk id-decizjoni setghatx tittiehed jew tigi kkomunikata qabel, zguq li ma jsib xejn x' jiccensura fuq kif agixxiet l- Awtorita.

14. Jibqa il- fatt illi ma kien hemm l- ebda aspettativa legittima li n-nomina ta' Mifsud kienet xi haga procedurali. Daqs kemm lanqas ma hija aspettativa legittima illi persuna li kien diga jinstab fuq il- lista li kellha l- Awtorita, necessarjament kellu jigi approvat.

15. Illi id-dottrina ta' l- aspettativa legittima gieli giet diskussa quddiem il- Qrati Maltin li taw rikonoxximent ghal din l-istess dottrina li ssib hafna mill- fondamenti taghha fil- common law. Tant illi fil- kaz ***La Stella Band Club vs. Il- Kummissarju tal- Pulizija (Qorti Appell 136/97 deciza 19 ta' Lulju 1997), l- Ewwel Qorti (Qorti tal- Magistrati Ghawdex 17 ta' Lulju 1997)*** kienet irrimarkat illi sabiex ireggi dan il- principju, persuna li favuriha dejjem inhareg permess ghall- attivita ghandha l- aspettativa legittima li tali permess jerga jinhareg that l-istess cirkostanzi. Fil- kaz ***Johan Said vs. Kummissarju tal- Pulizija (Qorti Appell 325/12 deciza 18 ta' Dicembru 2012) l- Onorabbli Qorti ta' l- Appell*** ikkonfermat l- applikazzjoni tad-dottrina fil- qafas legali ta' Malta u qieset illi fil- kaz li kellha quddiema, entita pubblika kellha tqis ic-cirkostanzi kollha, u mhux biss dak li genwinament seta haseb il- persuna li resqet l- aggravju.

16. Jibqa car il- fatt illi tenut kont tac-cirkostanzi, zgur illi l- Appellanta qatt ma seta kellha l- aspettattiva legittima illi in-nomina ta' Roberto Mifsud kienet ser tigi approvata. Id-diskors li l- ufficjal ta' l- Awtorita kellu mal- ufficjal tal- Appellanta jibqa fil- livell ta' diskors u opinjoni oggettiva li Mifsud kien persuna li kellu il- kapacita li jserviu ta' awditur. Izda taht l- ebda vesti jew tigbid ta' immaginazzjoni, tali konstatazzjoni ta' fatt qatt ma setghat twassal illi l-istess Mifsud ikun approvat. Dan meta ir-raguni ta' tali cahda ma kellha xejn mal- principju oggettiv tal- kompetenza izda anzi kienet a bazi ta' principju soggettiv ta' indipendenza.

17. Illi ghaldaqstant dan l- aggravju qieghed jigi michud.

It-Tieni Aggravju:

18. L- Appellanta tilmenta illi il- penali fuqha imposti kienu sproporzjonati.

19. Tramite il- minded letter tas- 6 ta' Jannar 2022, l- Awtorita' infurmat lill- Appellanta illi il- multa proposta kumplessiva kellha tkun ta' € 19,300. F' Pagna 6 u 7 ta' l-istess minded letter hemm spjega ta' kif tali multa inhadmet. L-istess multa kienet maqsuma in kwantu fl- ammont ta' € 10, 500 fuq is-Retirment Scheme Association (RSA) u € 8,800 fuq ir-Retirement Scheme (RS). L- Appellanta irrispondiet ghal din l- ittra tramite ittra tal- 20 ta' Jannar 2022. Permezz tad-Decizjoni, l- Awtorita' ikkoncediet skont ta' 25% fuq l- ammont diga indikat ta' € 19,300 u b' hekk il- multa kumplessiva giet ridotta ghal € 14,475. Tali revizjoni tal- multa sar mill- Awtorita' ghas-segwenti raguni:

"Following the representations sent to the MFSA and in the light of the identified breaches which the RSA acknowledged, the Authority is of the view that the RSA's representations justify a reconsideration of the proposed administrative penalty."

20. Fir-rikors ta' l- appell taghha l- Appellanta tilmenta illi ma tafx ezatt x' inhi ir-raguni ghalfejn wara is-sottomissjonijiet taghha, l- Awtorita' irriduciet il- multa b' 25%.

21. Filwaqt illi huwa minnu illi l- Awtorita' ma tghatix spjega ghalfejn naqset il- multa bl- ammont ta' 25%, certament illi jibqghu kundiserazzjonijiet fattwali u oggettivi li juru car u tond illi l- Appellanta naqset mill-obbligi taghha. Anke l- allegazzjoni illi l- Awtorita' ma segwitx il- Guidance note taghha ta' Mejju 2022 [6] dwar l- imposizzjoni ta' multi m' hijiex sostanzjata. Illi ghandu biss biss jinghad illi fil- pagna 4 tal- istess Guidance Note jinghad hekk:

This Guidance Note provides information on the process followed by the MFSA when setting the appropriate level of an administrative penalty. It is important to highlight that the penalty methodology explained in this Guidance Note does not apply to cases relating to submissions of regulatory reporting to the MFSA. In this respect, the Authority issued another Guidance Note in December 2022 (available through this

[6] https://www.mfsa.mt/wp-content/uploads/2022/05/Guidance-Note-on-the-Methodology-to-Set-Administrative-Penalties-Imposed-on-Entities-and-Individuals.pdf

link) which provides information on the process followed by the MFSA when setting the appropriate level of an administrative penalty to be imposed on Persons following breaches relating to submissions of regulatory reporting to the MFSA.

22. Il- Guidance Note ta' Dicembru 2022 ma kienetx applikabbli ghall-kaz odjern stante li d-Decizjoni ittiehdet f' Gunju 2022.

23. Illi kif jirrizulta car, l- Awtorita' ghandha il- poter illi timponi multa sa massimu ta' € 150,000 skond l- artikolu 46 tar-Retirement Pension Act, liema massimu japplika ghal kull ksur tal- Ligi jew Regolamenti.

24. Illi certament meta wiehed iqis dak kollu li gara u l- fatt illi s-sottomissjonijiet li kellhom isiru saru tardivament, u mhux bi ftit, wiehed difficli li jsib element ta' sproporzjonalita' fid-Decizjoni mehuda mill- Awtorita', izjed u izjed wara l- iskont ta' 25% fuq il- multa originarjament indikata.

25. Illi anke l- argument li kien hemm il- pandemija tal- Covid certament ma jreggix. Jibda biex jinghad illi kienet l- Appellanta stess illi meta bdiet il- Covid u anke fl-eqqel tal-lockdown, li hadet decizjoni li ma tkomplix bl- awdituri li kellha. Kif allura issa tuza l-istess Covid bhala skuzanti ghall- problem li kellha thabbat wiccha maghhom sabiex issib awditur gdid u d-dewmien li kien hemm hija kemmxejn kontradittorja.

26. Illi lanqas ma jreggi l- argument illi hadd ma bghata konsegwenzi minhabba il- fatt illi is-sottomissjonijiet li kellhom isiru saru tardivament. Zgur u mhux forsi li l- Awtorita' qatt ma tista tiehu azzjoni regolatorja sempliciment billi tqis jekk kienx hemm konsegwenzi jew le minhabba tali nuqqas. L-obbligi tas-sottomissjonijiet huwa obbligu oggettiv u certament li tezisti l- aspettattiva illi entita regolatorja taghmel dak li hija marbuta li taghmel permezz tar-regolamenti illi hija stess tkun applikat li ssegwi. L- osservanza o meno ta' tali obbligi jipprexindi mill-konsegwenzi li tali nuqqasijiet kellhom jew seta jkollhom.

27. Illi ghaldaqstant dan l- aggravju qieghed jigi michud.

It-Tielet Aggravju

28. Illi hawn l- Appellanta targumenta illi l- artikolu 20 tal- Kap. 514 gie introdot tramite l- Att V tas-sena 2020 u ghalhekk ma kienx applikabbli ghall- kaz odjern.

29. Illi huwa minnu illi l- Artikolu 20 kif inhu illum fil- Kap. 514 dahal fis-sehh tramite l- Att V tas-sena 2020. Izda precedentement, l- artikolu 20 kien jipprovdi illi l- RS u l- RSA kellhom l-obbligu li jaghmlu dawk is-sottomissjonijiet skond il- Pension Rules.

30. Skond ir-regola B4.3.14 tal- Pension Rules tas-sena 2015, u li allura kienu applikabbli ghall- perjodu in kwistjoni, u cioe il- financial statements tas-sena 2019:

> *The following shall be submitted to the MFSA within four months of the Accounting Reference Date: (a) audited annual financial statements prepared in accordance with International Financial Reporting Standards, including the auditor's report; (b) the auditors' management letter; (c) the Annual Financial Return submitted in accordance with 4.3.20 (g) of these Pension Rules; and, (d) the auditor's report prepared in accordance with 4.3.29 of these Pension Rules.*

31. Skond ir regola B2.3.9 tal- Pension Rules for Personal Retirement Schemes tas-sena 2018:

> *The annual report, together with a copy of the auditor's management letter and the auditor's report, shall be produced and submitted to the MFSA within six months of the end of the period concerned, or at any other time as may be authorised or directed in writing by the MFSA.*

32. Illi allura huwa car illi tali obbligu kien jezisti u kienet korretta l- Awtorita' li tapplika il- provvedimenti tal- Artikolu 20 tal-Kap. 514 kif vigenti fil- moment tad-Decizjoni.

33. Illi ghaldaqstant dan l- aggravju qieghed jigi michud.

Decide

Illi in vista tas-suespsot l- Appell interpost mill- Appellanta qieghed jigi michud u d- Decizjoni tal- Awtorita' tal- 21 ta' Gunju 2022 qeghdha tigi ikkonfermata, bl-ispejjez kontra l- Appellanta