

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**CONSULTATION ON AMENDMENTS TO
PENSION RULES FOR PERSONAL
RETIREMENT SCHEMES**

**FEEDBACK STATEMENT ISSUED
FURTHER TO INDUSTRY RESPONSES
TO MFSA CONSULTATION
DOCUMENTS**

MFSA REF: [9-2017 / 15-2018]

04 JANUARY 2019

1. Introduction

Further to the Consultation on Amendments to the Pension Rules for Personal Retirement Schemes dated the 6th December 2017 and after receipt of substantial feedback from the pensions market on the proposed Draft Pension Rules for Personal Retirement Schemes, the MFSA issued a second Consultation Document on the 16th November 2018 relating to various amendments to the Pension Rules for Personal Retirement Schemes issued under the Retirement Pensions Act (Cap.514) (“the RPA”).

The purpose of the said Consultations was mainly to clarify the applicability of the Pension Rules for Personal Retirement Schemes to member-directed Schemes and to material changes proposed to the regime of member-directed Schemes.

Further to the said Consultation Documents and the publication of the Pension Rules for Personal Retirement Schemes on the 28th December 2018, the MFSA is issuing a feedback statement on the comments received in relation to the consultations referred to above. An outline of the main comments received and the MFSA’s position in relation thereto is provided below.

2. Main Comments received on the proposed amendments to the Draft Pension Rules for Personal Retirement Schemes and the MFSA’s position

2.1 Member-Directed Schemes

The Introduction of a new ground of Member-Direction – “Professional Member”

2.1.1 Industry comment: *A market participant acknowledged that the introduction of this new ground of member-direction is as a result of discussions from other Retirement Scheme Administrators. A suggestion was brought forward to amend the criteria and require 10 years of experience in a professional position. Further clarification was also sought as to the interpretation of the criteria of this new ground.*

MFSA’s Position: The Pension Rules for Personal Retirement Schemes, introduce an additional new ground of member-direction. As stated in the Consultation Document of the 16th November 2018, the criteria in paragraph 9.3 of the Pension Rules are modelled on Directive 2014/65/EU on Markets in Financial Instruments (MIFID II) with some modifications in order to protect members of personal retirement schemes. For further guidance on these criteria, reference can be made to Section 11, entitled Client Categorisation, in the [Questions and Answers on MiFID II and MiFIR investor protection and intermediaries](#), published on the 3rd October 2018, by the European Securities and Markets Authority (ESMA35-43-349).

2.1.2 Industry Comment: *An amendment was suggested to SLC 9.3(i) of the Draft Pension Rules clarifying that the requirement for a Member to work or has worked in the financial services sector for at least three years in a professional position is to be limited to the last ten of his working life.*

MFSA's Position: After due consideration, the MFSA agrees with the proposed amendment and, as a result, SLC 9.3(i) of the Pension Rules for Personal Retirement Schemes has been amended accordingly.

2.1.3 Industry Comment: Clarification was sought as to what happens when a member account starts over EUR 500 000, but subsequently falls below this threshold.

MFSA's Position: Where a member or a prospective member satisfies the criteria found in SLC 9.3(ii) of the Pension Rules Personal Retirement Schemes, the Retirement Scheme Administrator is to ensure that the member's account within the Scheme contains EUR 500 000, at the time the member is requesting to join into the Personal Retirement Scheme. The MFSA would expect the professional member to keep the Retirement Scheme Administrator informed about any changes, which could affect his position as a professional member.

2.1.4 Industry Comment: A suggestion was put forward by a market respondent to amend S.L.C.9.3(i), since the requirement to "possess the experience, knowledge and expertise to make his own investment decisions and properly assess the risk that he incurs" is already found in the previous paragraph.

MFSA's Position: The MFSA has amended S.L.C. 9.3 of Part B of the Pension Rules for Personal Retirement Schemes taking into account the feedback received from the market.

Investment Restrictions in case of member-directed schemes

2.1.5 Industry Comment: In the Consultation Document dated 16th November 2018, the MFSA stated that with regards to the investments already placed prior to the entry into force of the new investment restrictions, and taking into account the market feedback, the MFSA proposes that, in order for members not to suffer any charges and exit fees, the said investment restrictions would be applicable to such members only once any movements occur within the member's pension account or in the case of new investments entered into, as from 1st January 2019 onwards. Clarification is sought as to whether these "movements" would mean that a member would have to wait for the maturity of structured notes or fixed-term investments/loan notes.

MFSA's Position: The MFSA would like to clarify that the said investment restrictions shall apply to the investments of members who joined a member-directed scheme before 1st January 2019, once any movements occur within the member's pension account. Thus, if no movement occurs, the member may take the option of allowing the investment to mature, in order to avoid members suffering any charges and exit fees. Nevertheless, should a member feel uncomfortable holding the investment until it matures, such member can sell the investment as he/she deems fit. In the case of new investments, the investment restrictions shall apply as from 1st January 2019.

The Role of the Retirement Scheme Administrator in the context of member-direction

2.1.6 Industry Comment: *It was queried whether the Retirement Scheme Administrator is required to approve investment transactions and give agreement prior to the investment being executed by an investment manager, who has been appointed with a mandate and given discretion, to manage a member's funds.*

MFSAs Position: The MFSAs have noted the comments from the market. The MFSAs would like to clarify that it is not necessary for the Retirement Scheme Administrator to approve each and every investment transaction of the investment manager. The Retirement Scheme Administrator is required to monitor on an ongoing basis the investment manager and the investments chosen by that investment manager to ensure that such investments are in accordance with the Scheme's investment restrictions, the Scheme's investment policy and the risk profile of the said member. Where this is not the case, Retirement Scheme Administrator is expected to challenge the transactions carried out. The MFSAs would expect that proper documentation is retained when such a situation arises.

2.1.7 Industry Comment: *A market participant claimed that the Retirement Scheme Administrator will typically enter into such agreement regarding services, roles and responsibility at a Firm level and not on behalf of the Member, on a Member by Member basis. The Member will appoint the Adviser as part of the application process and the approval by the RSA will be conditional on a signed agreement being in place between the Advisory Firm and the RSA and the Adviser meeting the requirements of these Pension Rules.*

MFSAs Position: Where the Member opts for the scenario in SLC 9.2(a) of the Pension Rules for Personal Retirement Schemes, the Retirement Scheme Administrator shall enter into an agreement with the investment advisor on behalf of the Member in relation to the member account. Furthermore, upon suggestion of the pensions market, the Pension Rules for Personal Retirement Schemes have been amended so that the Retirement Scheme Administrator is required to ensure that the Member has clearly appointed the investment advisor to provide investment advice and that no appointment is permitted until an agreement is in place. This requirement shall apply to new members joining the Scheme as from the 1st January 2019.

Compliance with the diversification requirement at member level

2.1.8 Industry Comment: *An industry participant requested a clarification as to the term "diversification". Moreover, clarification was also sought as to whether the diversification requirement shall take into account the total wealth of the client and whether the diversification requirements apply to professional members.*

MFSAs Position: In the Consultation Document dated 16th November 2018, the MFSAs stated that in so far as compliance with the diversification requirement at member-level is concerned, the MFSAs are of the view that the investment advisor and, or investment manager appointed at the level of the member account, are to ensure that diversification requirement is satisfied prior to providing the advice. However, the MFSAs also remain of the view that the Retirement Scheme Administrator is to be considered responsible to verify and monitor that investments in

the individual member account are diversified, and the Retirement Scheme Administrator is not to merely accept the proposed investments, but it should acquire information and assess such investments. Therefore, the MFSA would like to emphasise that the Retirement Scheme Administrator is responsible to ensure that the diversification requirement in relation to the member account is complied with. The MFSA would like to clarify that the diversification requirement applies to the member account of the member, and that the diversification requirement applies also to professional members.

Specific information to be provided to the Member

2.1.9 Industry Comment: *A market participant suggested amendments to SLC 9.5(i), (v) and (vi) of Part B of the Pension Rules for Personal Retirement Schemes. It was suggested that SLC 9.5(i) is amended to read “(i) the total value of the investment(s) held in the Members Account;”, SLC 9.5(v) is amended to read “(v) all applicable charges and fees deducted by the Retirement Scheme Administrator from the Member’s Account;”, whilst SLC 9.5 (vi) is amended to read “(vi) information of the availability of online access, which provides real time information of the investment held in the Member’s Account or in the event this option is not provided by the investment company or assessable by the Member, the option for the Member to request this information from the investment company through the Retirement Scheme Administrator, as required.”.*

MFSA’s Position: The MFSA is of the view that the amendment proposed in SLC 9.5 (i) would prejudice the member’s right of information, as they would not be informed of the underlying investments in their account. With regards to the amendment proposed to SLC 9.5(v), the MFSA is of the view that reference to commissions should be retained, however, in order to address the concerns of the market, the MFSA introduced a new SLCL 9.5(b). Finally, the MFSA is of the view that the amendments proposed to SLC 9.5(vi) are not appropriate, since such information is to be provided by the Retirement Scheme Administrator.

2.1.10 Industry Comment: *An industry respondent is concerned that the current requirement to inform the Member immediately as soon as material changes occur might be interpreted as meaning as soon as the event occurs. The respondent claims that the Retirement Scheme Administrator can only notify the respective Member(s) as soon as it is notified or becomes aware and having had time to carry an analysis to ascertain which Members (if any) are impacted.*

MFSA’s Position: After due consideration, the MFSA amended SLC 9.5(f) so that any material information and any material changes are to be immediately disclosed to the member, upon the Retirement Scheme Administrator first becoming aware of such material change.

The Retirement Scheme Administrator’s approval of the investment manager and investment advisor

2.1.11 Industry Comment: *A respondent sought clarification as to what will happen should a member not find another competent and approved regulated advisor. Clarity was also sought as to whether the transitional period given to investment advisors should also apply to investment managers.*

MFSA's Position: In the Consultation Document dated 16th November 2018, the MFSA agreed to a transitional period of six months after the implementation date of the proposed amendments to the Pension Rules for Personal Retirement Schemes is granted, (until 1st July 2019) so that the Retirement Scheme Administrator ensures that the investment advisors of current members take any necessary actions to comply with the requirements of SLC 9.6(b)(i) of the Pension Rules for Personal Retirement Schemes.

The MFSA would like to clarify that notwithstanding this six month transitional period, measures are to be taken without delay, so that the requirements of SLC 9.6(b) are met by the investment advisors concerned.

Furthermore, the MFSA would like to clarify that the Retirement Scheme Administrator is required to inform the members of the new requirements to appoint an investment advisor who complies with the requirements of SLC 9.6(b) Pension Rules for Personal Retirement Schemes. The Retirement Scheme Administrator shall inform the member that where such member does not co-operate with the Retirement Scheme Administrator to appoint an investment advisor satisfying the criteria in SLC 9.6(b) of the Pension Rules for Personal Retirement Schemes, within the established time frame of six months, the Retirement Scheme Administrator shall take appropriate action, and if necessary, consider the termination of membership of such member with the retirement scheme.

After due consideration, the MFSA is of the view that the transitional period given to investment advisors should also apply to investment managers in order to comply with SLC 9.7(b) of the Pension Rules for Personal Retirement Schemes.

2.1.12 Industry Comment: *A market respondent proposed that the requirement in S.L.C. 9.6 (b) (i) (bb) for an investor advisor and the requirement found in S.L.C. 9.6(c) for an investment advisor to be “duly authorised to provide such services in accordance with Directive 2014/65/EU or Directive 2016/97 (in the case of insurance-based investment products)” be amended to include reference to “and/or as legally required”, so as to require an investment advisor firm to be qualified and competent to provide advice.*

MFSA's Position: The MFSA agrees with the proposed suggestions of the market. However the MFSA would like to point out that where an investment advisor is registered under the Directive 2016/97 (Insurance Distribution Directive), a Discretionary Fund Manager who is licensed under Directive 2014/65/EU, would need to be appointed in order to manage the underlying funds, unless the investment advisor is authorised under the Directive 2016/97 (Insurance Distribution Directive) and also authorised under Directive 2014/65/EU.

2.1.13 Industry Comment: *A market participant is concerned that the requirement found in SLC 5.1.2 which requires that the Member may withdraw from the contract entered into with the Scheme, without incurring any penalty and without having to give any reasons is too wide. A suggestion was put forward so that the Member may withdraw from the contract entered into with the Scheme, without incurring any penalty by the Retirement Scheme Administrator and without having to give any reasons.*

MFSA's Position: The MFSA amended SLC 9.10 and introduced a new paragraph (f) of the Pension Rules for Personal Retirement Schemes which will allow members of a member directed scheme to be able to withdraw from the contract entered into with the retirement scheme, without incurring any penalty by the member in relation to the charges of the Retirement Scheme Administrator and without having to give any reasons.

Due diligence on custodian at member level

2.1.14 Industry Comment: Clarification was sought by an industry participant as to whether due diligence checks must be carried out on custodians appointed by the Retirement Scheme Administrator. In so far as the oversight function is concerned, clarification was sought as to whether such function will apply to the Life Wrapper.

MFSA's Position: In the Consultation Document dated 16th November 2018, the MFSA clarified that an entirely member-directed Scheme will not be required to establish the two mandatory functions at Scheme level (i.e. the Investment Management Function and the Custody Function), since the investment advisor and, or investment manager and, or the custodian, where applicable, will be appointed by the member at each member account level. Where the investment manager of a member decides to appoint a custodian, the Retirement Scheme Administrator shall carry out due diligence on the custodian. Furthermore, the MFSA would like to clarify that the due diligence which the Retirement Scheme Administrator is required to undertake, is on the provider of the Life Wrapper and not on the custodian of the funds held within the Life Wrapper. On the other hand, a non-member directed Scheme will be required to have in place the mandatory functions (i.e. the Investment Management Function and the Custody Function) at Scheme level and the investments of the members would be pooled.

2.1.15 Industry Comment: A market participant is concerned that having a direct link between the Retirement Scheme Administrator and Custodians, as stated in S.L.C. 9.8 of the Draft Pension Rules for Personal Retirement Schemes is not practical and cannot be implemented.

MFSA's Position: Following discussions with the pensions market, S.L.C. 9.8 of the Pension Rules for Personal Retirement Schemes has been amended taking into account the concerns put forward by the pensions market. The MFSA has amended SLC 9.8 so that the Retirement Scheme Administrator is to have effective access to information relating to the member's investments held by the custodian, so that the Retirement Scheme Administrator can effectively monitor the Scheme in aggregate and as a whole and retain overall control.

2.2 Amendments to Part B.5 on Conditions relating to information for Scheme Members and Beneficiaries

2.2.1 Industry Comment: A number of market participants are concerned with the requirement that S.L.C. 5.1.3(d) of the Draft Pension Rules for Personal Retirement Schemes, which requires a Retirement Scheme Administrator to fully disclose all costs, commissions or fees at the time the member joins the Scheme. It was argued that the Discretionary Fund Manager would at that point in time not know what specific investments the Member will invest in or the fees payable to an Investment Company or charged by a Fund.

MFSA's Position: The MFSA remains of the view that the Retirement Scheme Administrator has a fiduciary obligation and should be aware of all the information necessary in relation to costs, commissions and fees. However the MFSA would like to clarify that SLC 5.1.3 of Part B of the Pension Rules for Personal Retirement Schemes applies to the member upon joining of the Scheme, where the said member is to be provided with information in relation to costs, commissions and fees which the Member is expected or will be expected to bear. The MFSA is of the view that upon joining the scheme, the information in SLC 5.1.3(d) has to be provided to the member, in order for a member to make an informed decision.

In the case of member-directed schemes, the Retirement Scheme Administrator receives from the investment advisor appointed by the Member, a Fee Disclosure Sheet, signed by the Member, which details all costs, commissions or fees payable to the Investment Advisor and investment company. In the event of any changes in the costs, commissions or fees of an investment advisor or an investment company, the Retirement Scheme Administrator shall ensure that a notification is sent to the Member.

2.2.2 Industry Comment: *A market participant has suggested that the requirement in S.L.C. 5.1.3(d) of the Draft Pension Rules for Personal Retirement Schemes which requires beneficiaries to be notified of the conditions relating to information for Scheme Members and Beneficiaries upon joining the Scheme should be amended.*

MFSA's Position: After due consideration, the MFSA amended S.L.C. 5.1.3(d) and remove the notification requirement for beneficiaries.

2.2.3 Industry Comment: *An industry respondent commented that the right of withdrawal or cancellation period is dangerous, since clients will be asked to sign a waiver before getting the full disclosure of fees and commissions, by which time it would be too late to cancel.*

MFSA's Position: The MFSA would like to clarify that S.L.C. 5.1.2 of Part B of the Pension Rules for Personal Retirement Schemes gives the member the opportunity, upon acceptance by the Retirement Scheme Administrator of the member's application, to withdraw from the contract entered into with the Scheme within a period of thirty calendar days.

The MFSA agrees with the comments of the market that waivers should only be signed after a client receives full disclosure of the requirements of SLC 5.1.3 of the Pension Rules for Personal Retirement Schemes.

2.2.4 Industry Comment: *A market participant is concerned that the requirement in SLC B.5.2 for members and beneficiaries to be notified of any material changes to the Scheme's Investment Policy in advance of the change being implemented is not practical and only serves to delay the Retirement Scheme Administrator's ability to amend the Scheme's Investment Policy.*

MFSA's Position: The MFSA would like to point out that the current Pension Rules requires the Retirement Scheme Administrator to inform the member of any changes in the Scheme Document, whilst the MFSA is proposing to limit this to "material changes". The MFSA is of

the view that in the interest of the members that such members are to be notified in advance of any changes to the Scheme's Investment Policy.

2.2.5 Industry Comment: Clarification is sought on S.L.C. 5.4 of the Draft Pension Rules for Personal Retirement Schemes which requires the Retirement Scheme Administrator to provide the Member and Beneficiary with appropriate information on retirement or when other benefits become due, on the right of commencement of payment of retirement benefits. The requirement to provide the beneficiary with appropriate information on retirement or when benefits are due is unclear, since it is the Member, together with their investment advisor who determine the optimal time to commence benefits.

MFSA's Position: The requirement to provide beneficiaries with appropriate information on retirement or when other benefits become due, about the right of commencement of payment of retirement benefits will be removed.

2.3 Amendments applicable to all Personal Retirement Schemes

Schemes which qualify as Qualifying Recognised Overseas Pension Schemes (QROPS)

2.3.1 Industry Comment: A number of market participants are concerned that the fact that a QROPS is made subject to "applicable UK legislation" relating to retirement benefits, does not in turn disallow the ability of a Malta QROPS to pay a cash lump sum of 30%.

MFSA's Position: The MFSA remains of the view that where a Retirement Scheme is a QROPS, UK Rules will apply and the maximum cash lump sum which may be withdrawn in a manner consistent with those provided for under UK Rules, provided for under UK Authorised Member payments for pension income under UK Legislation.

2.3.2 Industry Comment: Some market respondents contend that the mandatory taking of income by members who reach the age of 75 years can potentially put members in a disadvantageous position financially, which is contrary to the Retirement Scheme Administrator's fiduciary obligation to administer the scheme in his/her best interests.

MFSA's Position: In the Consultation Document dated 16th November 2018, the MFSA clarified that article 3(2)(b) of the Retirement Pensions Act and the Pensions Rules for Personal Retirement Scheme, requires that a personal retirement scheme or arrangement shall not constitute a retirement scheme under the Retirement Pensions Act if it provides for commencement of payment of retirement benefits to a member on a date that is earlier than that on which such member has attained the age of 50, or not later than the age of 75 (except in specific cases where the scheme or arrangement provides that the payment is made by reason of the disability or death of a member).

2.3.3 Industry Comment: A market participant sought clarification on the use of the term "applicable UK legislation" in S.L.C. 4.6.8 of the Draft Pension Rules for Personal Retirement Schemes, since there appears not to be applicable UK Legislation which provides for the range of retirement benefit options from a QROPS.

MFSA's Position: Following various discussions with the pensions market on SLC 4.6.8 of the Pension Rules for Personal Retirement Schemes, the MFSA has amended SLC 4.6.8 taking into consideration the feedback received during these discussions.

Back office administration

2.3.4 Industry Comment: A market participant commented that following the removal of the back office administrator recognised under the Retirement Pensions Act, in the Consultation Document dated 6th December 2017 the MFSA outlined the acceptable tasks for outsourcing and requested clarification as to what are the tasks may be outsourced.

MFSA's Position: The MFSA would like to clarify that the activities indicated in the Consultation Document are not to be taken as an indication of the activities which a Retirement Scheme Administrator may outsource but were indications of what in the MFSA's view, are activities which are administrative in nature which the back-office administrator could have been responsible for. The Retirement Scheme Administrator is to be guided by the outsourcing requirements found in the Pension Rules for Personal Retirement Schemes and the Pension Rules for Service Providers.

Applicability

2.3.5 Industry Comment: Confirmation is sought as to whether SLC B1.3.5 to B1.3.16 does not apply to Member Directed Schemes, and whether SLC 1.3.17 to 1.3.19 applies solely in the context of the Retirement Scheme Administrator as a Service Provider under SLC B1.3.1 to 1.3.4.

MFSA's Position: Reference is made to SLC 9.10 (b) and (c) of the Pension Rules for Personal Retirement Schemes which states that SLC 1.3.5 to 1.3.16 of Part B of the Pension Rules for Personal Retirement Schemes do not apply to member directed schemes. The MFSA would like to clarify that the ongoing fitness and properness found in SLC 1.3.17 to 1.3.19 of Part B of the Pension Rules for Personal Retirement Schemes which the MFSA is required to carry out will apply to the Retirement Scheme Administrator and any related parties to the Scheme.

The ongoing fitness requirements for member directed schemes which the Retirement Scheme Administrator is to comply with are found in SLC 9.6 to 9.9 of the Pension Rules for Personal Retirement Schemes.

2.3.6 Industry Comment: A market respondent is concerned that S.L.C. 3.1.2 and 3.2.1(i) of the Draft Pension Rules for Personal Retirement Schemes creates a conflict between investing in the best interests of the Member and investing in the best interests of the Beneficiaries.

MFSA's Position: The MFSA is of the view that the reference to beneficiaries in SLC 3.1.2 of the Pension Rules for Personal Retirement Schemes should be retained, whilst SLC 3.2.1(i) of the Pension Rules for Personal Retirement Schemes should be amended to refer to members as well as to beneficiaries.

Schemes set up as Trusts

2.3.7 Industry Comment: *Some market respondents proposed to remove the requirement in S.L.C. 8.2 which provides that a Scheme shall not be in the form of a discretionary trust.*

MFSA's Position: The requirement that a Scheme cannot be set up in the form of a discretionary trust is not a new requirement and is already in force in the Pension Rules for Personal Retirement Schemes. Furthermore, in paragraph 3.2.28 of the Feedback Statement issued further to industry responses to MFSA Consultation Document, published on the 7th January 2015 the MFSA acknowledged the concerns of the industry and therefore, clarified what is meant by “discretionary trusts”, that is, trusts which allow the trustee to decide which beneficiaries are to benefit in terms of the trust deed. The MFSA would like to clarify that it is these type of trust arrangements which will not be permitted by the MFSA.

Schemes set up as Umbrella Funds

2.3.8 Industry Comment: *Clarity is sought on S.L.C. B7.4 of the Draft Pension Rules for Personal Retirement Schemes which requires that where the Scheme is set up as an Umbrella Fund, in addition to approval for the Scheme, each Sub-Fund shall be approved by the MFSA.*

MFSA's Position: The MFSA would like to clarify that the MFSA's approval shall not be required where the offering Memorandum and offering supplements are the same with respect to the said Sub-Fund.

Amendments to Scheme Document

2.3.9 Industry Comment: *In the Consultation Document dated 16th November 2018, S.L.C. 9.2 of the Draft Pension Rules for Personal Retirement Schemes requires that in the case of a Scheme which is entirely member-directed, such Scheme may permit a Member to direct the investments of their individual accounts (member directed schemes), based on one more of the following grounds, and such direction shall be provided for in the Scheme Document. A market respondent queried whether a transitional period would be given so that any Retirement Scheme which does not comply with S.L.C. 9.2 will be able to amend the Scheme Document.*

MFSA's Position: The MFSA is of the view that a transitional period is not required. Where a Retirement Scheme Administrator is of the view that the Scheme Document is to be amended, the Scheme Document shall be submitted to the MFSA to obtain approval, and the same procedure as any amendment to the Scheme Document is to be followed.

Contacts

Any queries are to be addressed by email on ipsu@mfsa.com.mt.

**Communications Unit
Malta Financial Services Authority
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