

A critical examination of the regulation of capital market integrity and the supervisory architecture in Europe's smallest Member State

Christopher P. Buttigieg¹



Published online: 14 June 2016
© ERA 2016

Abstract The paper examines the first fifteen years of capital market regulation in Malta. The central argument is that EU law on market abuse combined with the implementation of a single regulator, have strengthened Malta's legislative framework in this field and the mechanisms for supervision and enforcement. Nonetheless, the establishment of the European Systemic Risk Board and the transfer of supervisory powers to the European Central Bank have made it important to reopen the debate on the institutional architecture for supervision in Malta. The paper recommends further study on whether Malta should follow the Irish model by integrating the single regulator in the central bank.

Keywords Capital market integrity · Central bank · Central Bank of Malta · Financial regulation · Financial supervision · Malta Financial Services Authority · Malta Stock Exchange · Single regulator

Dr. Christopher P. Buttigieg is the Director of the Securities and Markets Supervision Unit of the Malta Financial Services Authority ('MFSA') and is a member of the Authority's Supervisory Council. He was responsible for the implementation of the framework for the regulation of Malta's capital market and the team which had the task of transposing the EU's Market Abuse Directive. Dr. Buttigieg has a D.Phil. in Law Studies from the University of Sussex (UK) and is a lecturer in the Banking and Finance Department of the University of Malta. The author would like to thank Dr. Miriam Goldby (Queen Mary University of London) for reviewing the paper. The views expressed in this paper are those of the author at the time of writing and do not necessarily reflect the MFSA's position.

✉ Dr. C.P. Buttigieg
cpbuttigieg@gmail.com

¹ Banking and Finance Department, University of Malta, Tal-Qroqq, MSD 2080 Msida, Malta

1 Introduction

Market abuse, which generally takes the form of prohibited use of inside information and market manipulation, undermines investor confidence and the integrity of capital markets. It must therefore be prohibited. Financial markets should be monitored and suspicions of market abuse should be investigated and enforced. As pointed out by the Malta Stock Exchange Tribunal, “the main reason why the law prohibits insider dealing is because dealing when in possession of unpublished price sensitive information undermines the general public’s confidence in the securities market and thereby severely prejudices investment. Without this confidence investors would be reluctant to invest for fear of becoming easy prey to the knowledgeable sharks.”¹

The approach taken to achieving investor confidence in Malta’s capital markets, through regulation for market integrity, is one of the central themes of this paper. The paper also examines the evolution of the institutional architecture for financial supervision in Malta. This analysis is not limited to what is relevant in the field of capital market regulation but has been extended to all fields of financial services. This was important to attain a full understanding and for the carrying out of a complete assessment of how the institutional architecture evolved in Malta. As a result of the analysis a recommendation is made for further study on whether Malta should follow the Irish model by integrating the single regulator in the central bank.

The Malta Stock Exchange (‘the Exchange’ or ‘MSE’) was established in 1990 through the enactment by the Parliament of Malta of the Malta Stock Exchange Act (renamed in 2002 the ‘Financial Markets Act’²). The Maltese Government wanted to establish a vehicle to facilitate the privatisation of national companies and to create an alternative to bank financing for the funding of Maltese industry.³ Its establishment would also enable the creation of secondary market for Government Stocks in order to make such debt instruments more attractive for investment by the general public.⁴ The setting up of the Exchange was also part of the Government’s strategy to establish Malta as a financial centre.⁵ These developments made it necessary for the Government to adopt regulations that *inter alia* aimed at ensuring market integrity and investor protection.

Until 2002, the MSE was the operator of the trading platform, the clearing and settlement system and the central securities depository, and also the regulator of the financial market. In 2002, it lost most of its regulatory role to Malta’s newly established single regulator for financial services, the Malta Financial Services Authority (‘MFSA’). The MFSA became the regulator of the Exchange and also responsible for

¹ Decision of the Malta Stock Exchange Tribunal as to whether there are sufficient grounds for holding an investigation following a report dated 5 April 2000 which the tribunal received from the Council of the Malta Stock Exchange regarding an alleged or suspected irregular practice in Exchange dealings which occurred when Handelsfinanz-CCF purchased shares in Lombard Bank Malta plc on the 31 August 1999 and on the 2 September 1999 (6 October 2000), Malta Stock Exchange Tribunal.

² Malta Stock Exchange Act 1990, Laws of Malta, Chap. 345.

³ Government of Malta—Ministry of Finance, ‘The Malta Stock Exchange: Legislative Proposals’ June 1990, pp. 1–4.

⁴ Government of Malta—Ministry of Finance, (fn. 3), pp. 1–4.

⁵ Malta International Business Authority (‘MIBA’), Annual Report and Accounts, 1991, p. 7.

investigating suspicious transactions of market abuse. In addition, over time a number of changes were made to the regulatory and supervisory framework for market abuse with a view to bringing this in line with European Directives and Regulations.

The laws that regulate insider dealing in Malta have been in place since 1990 with the enactment of the Malta Stock Exchange Act, followed by the introduction of specific legislation to regulate this area being adopted in 1994, entitled the Insider Dealing Act.⁶ In 2002, the Insider Dealing Act was amended to provide for the prohibition of market manipulation, which Act was eventually repealed in 2005 by the Prevention of Financial Market Abuse Act⁷ that transposed the EU Market Abuse Directive ('MAD')⁸ in Malta. The adoption of a sole regulatory authority in Malta supplemented by the implementation of MAD brought about a paradigm shift in the way the markets are monitored and supervised so that suspicious transactions are identified, investigated and enforced. The process for monitoring and investigating market abuse was made simpler. Moreover, the introduction of the administrative route to enforcement action requires a lesser burden of proof for action to be taken when this is deemed necessary when compared to proving a criminal offence. Significant changes are about to be made to the market abuse legislation in Malta to implement the Market Abuse Regulation⁹ (MAR) and transpose the Market Abuse Directive II¹⁰ (MAD II), which regime may have an impact on the way the MFSA carries out its supervisory work in this field.

The paper aims at critically reviewing the history of the Malta Stock Exchange and the resulting developments in the regulatory framework and the mechanisms for supervision and enforcement that seek to ensure the integrity of Malta's capital market and investor confidence in such markets. This review includes an analysis of the various stages in the development of the institutional architecture for financial supervision, which analysis has been extended to all the sectors of financial services. The paper also seeks to examine the changes to the European regulatory framework for market abuse which Member States are required to implement by July 2016, and assesses the extent of their impact on Malta. Finally, the European supervisory challenges are examined, specifically those relating to the field of market integrity. The paper makes a proposal on how these challenges may be addressed effectively in the future.

The central argument of this paper is that EU law on market abuse combined with the implementation of a single regulator approach for financial services has strengthened Malta's legislative framework in this field and the mechanisms for supervision

⁶Insider Dealing Act, Laws of Malta, Chap. 375 (repealed).

⁷Prevention of Financial Markets Abuse Act, Laws of Malta, Chap. 476, available at: <http://goo.gl/gYHIWr>, accessed 03.01.16.

⁸Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96 of 12 April 2003, pp. 16–25.

⁹Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173 of 12 June 2014, pp. 1–61.

¹⁰Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173 of 12 June 2014, pp. 179–189.

and enforcement. While the implementation of single regulator was the most important development in the field of financial regulation in Malta, as it created a one-stop shop for financial regulation, supervision and consumer protection in Malta, developments in the institutional architecture for financial supervision in Europe, such as the establishment of the European Systemic Risk Board ('ESRB') and the transfer of certain supervisory powers to the European Central Bank ('ECB'), have made it important to reopen the debate on the institutional architecture for financial supervision in Malta. The debate on institutional reform is also important in view of recent financial failures experienced in Malta. In this regard, the paper recommends further study on whether Malta should follow the Irish model by integrating the single regulator in the central bank. The paper also argues that the implementation of MAD in 2005 provided the MFSA with more robust tools for the supervision of Malta's capital market and simplified the process for the taking of regulatory action for breaches of the market abuse legislation, through the application of an administrative route, in addition to the criminal sanctions that had been in place since the 1990's. The implementation of the MAR and MAD II will introduce a number of changes to the Malta framework which may have an impact on the effectiveness of the regulation and supervision in this field.

The paper was prepared further to a thorough research of documents relating to the development of the Maltese financial market, the institutional architecture of financial supervision in Malta, the regulatory framework for market integrity and specifically the regulation that seeks to prevent market abuse. A number of policy documents and legislative Acts that have been repealed were retrieved from public institutions. This is public non-confidential documentation of historical value. A thorough search for relevant articles was also carried out on the web-archives of local newspapers including the Times of Malta,¹¹ which is considered as the most reliable and reputable newspaper on the island. The paper has benefited from the author's experience in this specialised field and the experience of Mr Fredrick Mifsud Bonnici, former Chairman and Deputy Chairman of the Exchange; Dr David Fabri, Head of the Commercial Law Department of the University of Malta and former Director of the MFSA's Legal and International Relations Unit; Mr David Pullicino, Chairman of the MFSA's Listing Committee and Former Deputy Governor of the Central Bank of Malta; and Mr Hilton McCann, Former Director of the MFSA's Investment Services Unit and author of the seminal publication on offshore finance.¹² The author would like to thank these high officials for sharing their views on the topic.

The analysis in the paper has been written taking a historical approach. Analysing the history of the development of Malta's capital market and the regulatory framework for market integrity in Malta is relevant to understand the present position. The paper attempts to place the historical material in the context of Malta's existing institutional architecture for financial supervision and the current framework for the regulation of market abuse, the monitoring of the market and the investigation and enforcement of suspicious transactions. This paper attempts to add to existing literature in this field by making a contribution from the angle of Europe's smallest Member State by population and gross domestic product.

¹¹ Archives of the Times of Malta available at: <http://goo.gl/919jG2>.

¹² *McCann* [5].

For the purpose of publication, this paper has been split into two parts. This publication contains the first part of the paper, which examines the first fifteen years of capital market regulation in Malta. It gives some background on the MSE, analyses in detail the institutional architecture for the regulation and supervision of financial services in Malta, including the process that led to the establishment of a single regulator in Malta. It also examines Malta's framework for the prevention of market abuse. The second part of the paper, which will be entitled 'The Regulation of Capital Market Integrity in Malta since MAD', will examine the implementation of MAD in Malta, the salient changes to the EU market abuse regime that will be brought into force by MAR and MAD II, and the impact which these changes may have on Malta's framework. The second part of the paper will also assess the European challenges in the field of market integrity and make a number of recommendations on how these may be addressed.

2 The first fifteen years of Capital Market regulation in Malta and the evolution of the institutional architecture for supervision

This section of the paper examines the development of Malta's Capital Market and the relative institutional architecture, regulation and supervision—from the establishment of the MSE in 1990 up to the implementation of MAD in 2005. It is split into two sub-sections; the first subsection examines the evolution of the institutional framework for financial supervision in Malta from three sectoral regulators and a regulator for offshore business to a single regulator for financial services. Financial regulation, which may be defined as the act of making laws and rules including soft law to regulate the processes of financial services, is on its own not enough to ensure integrity of capital markets and investor protection. Supervision and enforcement action, being the action of monitoring the implementation and application of the rules in specific cases, are equally important.¹³ Experience in financial supervision suggests that without supervision and enforcement, certain parts of the industry may be inclined not to comply with regulation. The effectiveness of supervision partly depends on the institutional architecture applied for this purpose.¹⁴ It is therefore important to examine the evolution of the institutional framework for financial supervision in Malta. This examination is followed by a second subsection that considers the first fifteen years of capital market regulation in Malta.

2.1 The institutional architecture

The MSE, which is an EU Regulated Market in terms of the EU Markets in Financial Instruments Directive¹⁵ ('MiFID'), commenced trading operations in January

¹³Buttigieg [2].

¹⁴Buttigieg [2], p. 200.

¹⁵Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145 of 30 April 2004, pp. 1–44.

1992.¹⁶ Fully owned by the Government of Malta, the MSE is Malta's main capital market¹⁷ and is an integrated exchange providing trading, clearing and settlement and central securities depository services. It is one of the smallest stock exchanges in Europe with 41 listed companies that all together have a market capitalisation that exceeds €10 billion with a total yearly market turnover of around €940 million, involving around 26,000 trades.¹⁸ An examination of the activity of the companies listed on the MSE indicates that these companies vary in market segments and cover the financial, retail, construction, hospitality, information technology, communication and real estate sectors. In the main, these are Malta-based companies that have sought to supplement bank financing with funding from the capital markets or which acquire funding other than from bank financing for specific projects.

The Government of Malta considered the possibility of establishing a stock exchange as far back as 1969.¹⁹ In this regard, a committee was appointed to carry out a feasibility study. This project was however delayed, as Malta did not have a well-developed share market; at the time there were only few companies that were interested in offering their shares to the public.²⁰ Implementation was carried out two decades later, when in 1988 the Government of Malta decided that the island should move in the direction of becoming a financial services centre, with offshore business being the main target.²¹ A specific Ministry was set-up to coordinate the offshore financial centre project and a White Paper on International Business Activities was published outlining the legislative framework that had to be adopted for this purpose.²² In addition the Ministry of Finance worked on the setting up of the MSE and resurrecting the 1969 committee papers to take a fresh look at the feasibility of this initiative.²³ The Ministry established a new committee for this purpose

¹⁶Information obtained from the MSE's web-page: <http://goo.gl/ha0QDA>, accessed 14.11.2015.

¹⁷There is a second regulated market in Malta, the European Wholesale Securities Market, which is a market for wholesale debt securities that lists corporate and structured bonds with minimum denominations of €100,000. See amongst others: A. Manduca, 'EWSM to boost financial services—MSE Chairman' The Times 23.02.2012, <http://goo.gl/4ncHT4>; and 'MSE joint venture announces its inaugural listing' The Times, 23.06.2013 <http://goo.gl/0AVln3>. All documents accessed on 31.12.2015. More information on the EWSM is available on the following web-page: <http://www.ewsm.eu>, accessed 14.11.2015.

¹⁸Information obtained from the MSE's web-page: <http://goo.gl/eLJqi9>, accessed 14.11.2015.

¹⁹See amongst others: R.L. von Baumgart-Psalya 'A Stock Exchange for Malta' Times of Malta 06.02.1969; 'No point for Malta Stock Exchange yet, says stockbroker', Times of Malta 15.07.1969; R.D.K. Edwards, 'To have or not to have a Stock Exchange', Times of Malta, 14.08.1969; and 'Bankers Discuss Stock Exchange', Times of Malta, 22.11.1969. All documents available at: <http://goo.gl/wC0kRV>, accessed 06.01.2016.

²⁰'No point for Malta stock exchange yet, says stockbroker' Times of Malta 15.07.1969, available at: <http://goo.gl/wC0kRV>, accessed 06.01.2016.

²¹See amongst others: 'Government Launches Legal Structure for Offshore Business Activities' The Times 08.09.1988, <http://goo.gl/wC0kRV>; A. Curmi, 'Malta's first steps toward becoming an international financial centre' Malta Independent, 31.08.14, <http://goo.gl/SkrJHd>. All documentation accessed 14.11.2015.

²²See amongst others: Financial observer's column, 'Offshore Financial Centres—Malta', The Times 22.10.1988, <http://goo.gl/wC0kRV>, accessed 06.01.2016; and MIBA, Annual Report and Accounts, 1990 p. 20.

²³Detail provided by Mr Fredrick Mifsud Bonnici, former Chairman and Deputy Chairman of the MSE, during an interview held on Monday 15th February 2016 for the purpose of this paper.

that was chaired by the Governor of the Central Bank. The Committee eventually advised the Minister that in its opinion the setting up of an exchange was indeed feasible.²⁴ Eventually, at the beginning of the 1990's legislation was enacted to establish two independent agencies, the MSE that was, at the time, both a market operator and a regulator of securities business, and the Malta International Business Authority ('MIBA'), which would be Malta's promoter and regulator for offshore financial services.²⁵ The Malta Stock Exchange Act 1990 established the MSE,²⁶ regulated its governance and functions and provided a framework for the orderly trading of securities on the exchange. The concentration rule²⁷ applied and trading activity in securities that were quoted on the Exchange had to take place on exchange, though off-exchange transactions were allowed in exceptional circumstances.²⁸

Although the MSE was itself a regulator, the Malta Stock Exchange Act 1990 granted supervisory powers to the Central Bank of Malta ('CBM') to examine the affairs of the Exchange and its members from time to time.²⁹ Specifically, the CBM was granted the high level duty to maintain orderly conditions in the capital market and the power to:

... appoint inspectors to examine the affairs of the Exchange and its members from time to time under conditions of secrecy. Inspectors shall make a report of any inspection carried out by them and shall refer therein to the operations of the Exchange and its members, the observance of the provisions of this Act, the Statute and Bye-Laws and on any other matter that such inspectors may deem to be relevant to the proper functioning of the Exchange and to the protection of the Exchange, its members, investors and the public in general, and to any other matter as the Governor may require to secure a sound securities market.³⁰
... require the Exchange to report to it on any transaction effected by licensed stockbrokers in listed and unlisted securities.³¹

²⁴Ibid.

²⁵See amongst others: 'House Starts Debating Draft Offshore Legislation' *The Times*, 25.10.1988; Financial Observer's Column, 'Offshore Financial Centre—Malta' *The Times*, 05.11.1988; C. Mangion, 'Malta International Business Authority' *The Times* 14.11.1988. All documents available at: <http://goo.gl/wC0kRV>, accessed 06.01.2016. MIBA, Annual Report and Accounts, 1991 p. 7.

²⁶Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 3.

²⁷The EU Investment Services Directive, Council Directive 93/22/EEC, allowed the application of the 'concentration rule' which meant that Member states could require investment firms to route client orders through regulated markets. Available at: <http://goo.gl/DwXAsE>, accessed 04.01.2016. See also *Ferrarini/Recine* [4], p. 249.

²⁸Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 11.

²⁹Fn. 23, Mr Fredrick Mifsud Bonnici opined that no rules existed at the time which specifically regulated the activity of the Exchange and that this power did not go beyond the right of the CBM to inspect records and was applied very limitedly in practice. Mr Mifsud Bonnici also made the point that the International Organisation of Securities Commissions ('IOSCO') had officially accepted the MSE as full member and the CBM and the Malta Financial Services Centre (the successor of MIBA) as an associates. In addition Mr Mifsud Bonnici stated that all delegations to IOSCO meetings were led by MSE officials. This implied that the MSE was the primary regulator of listed instruments as well as brokers in so far as they dealt in listed securities and there responsible for the orderly functioning of the market.

³⁰Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 16.

³¹Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 34.

The CBM had been responsible for banking supervision since the enactment of the Banking Act of 1970³² and was as a result the only experienced and respected regulator on the island. Therefore, the point can be made that the policy decision to grant supervisory powers to the CBM in relation to the Exchange was that of allowing a well-respected, independent third party with extensive supervisory experience and which had been involved in the setting up of the MSE, to keep an eye on the newly established Exchange.³³ It may be pointed out that this was important to guarantee the integrity and orderly functioning of Malta's new capital market, thereby strengthening investor confidence in this market. This was the only instance in Malta's history of financial regulation where a *de facto* regulator and supervisor was itself subject to ongoing supervision by another supervisor, the CBM, which on an *ad hoc* basis carried out full examinations of the affairs of the Exchange, with the purpose of evaluating the functions of the Exchange, so as to ensure that adequate procedures were being followed.³⁴

The setting up of MIBA had meant to test the ground on whether Malta could become a serious international financial centre.³⁵ When the appetite for growth in financial business was established, the Government of Malta decided in 1994 to remove the distinction between offshore³⁶ and onshore³⁷ and as a result MIBA was re-constituted as the Malta Financial Services Centre (MFSC).³⁸ During the Parliamentary debates on this development it was outlined that MIBA had performed well in terms of the regulation of the offshore business and it had established a mechanism to protect from the possibility of abuses in the system.³⁹ However, MIBA had to be transformed so as to remove all connotations with offshore, particularly in view of Malta's plans to apply for EU Membership. The view had been voiced that Malta was not likely to be considered for full membership if it continued offshore activities. In addition, Malta was also facing international pressures to abolish offshore business, particularly from the Financial Stability Forum⁴⁰ which considered this type of

³²Information obtained from the CBM's web-site <http://goo.gl/Loy40h>, accessed 20.01.2016.

³³Government of Malta—Ministry of Finance (fn. 3), p. 6.

³⁴Annual Report of the Central Bank of Malta for the year ended 1996, p. 88.

³⁵J.G.P. Bonello, 'Bare knees and bear markets' *The Sunday Times*, 06.02.1994, p. 7; 'The New MFSC Regime' *The Sunday Times* 18.12.1994, p. 69; 'Malta as international financial centre: Reception at Goldsmiths' Hall, London' *The Sunday Times* 18.06.1995, p. 20. All documents available on the archives of the Times of Malta <http://goo.gl/919jG2>, accessed 16.01.2016.

³⁶For a detailed explanation of the meaning of 'Offshore' see *McCann* [5], Sect. 2.3 'What does 'Offshore' mean?'

³⁷MIBA, Annual Report and Accounts, 1993, p. 6.

³⁸The Malta Financial Services Centre (MFSC) was established on 19.09.1994, when by Legal Notice 114, MIBA was replaced by the MFSC.

³⁹'Opposition agrees with setting up of financial centre' *The Times*, 24.03.1994, p. 15, <http://goo.gl/919jG2>, accessed 16.01.2016.

⁴⁰The Financial Stability Forum (FSF) was an international group consisting of major national financial authorities such as finance ministries and central banks and international financial bodies. The FSF was founded in 1999 to promote international financial stability. For more information see: www.fsb.org, accessed 16.01.2016.

business as being conducive to the laundering of money.⁴¹ The Offshore Centre label was casting doubt internationally on Malta's integrity as a reputable financial Centre and for this reason all strings had to be detached from this classification.

The creation of the MFSC was the first step in the process for the establishment of a single regulator. The MFSC still retained the promotional and regulatory functions of MIBA and was responsible for financial services in general,⁴² including insurance and investment services. The MFSC also retained responsibility for the offshore banks that provided services only to persons outside Malta, which, as a result of the Government of Malta's decision to close all offshore business, were in the process of winding down their activity. The CBM remained responsible for the regulation and supervision of local banks.⁴³ With regard to the integrity of Malta's capital market, while the MFSC was responsible for regulating the provision of investment services to clients in general in terms of the new Investment Services Act, the MSE remained responsible for the regulation of the stock market, stock brokers and issuers of financial instruments. Furthermore, until 1994 the provision of insurance services was supervised by the Ministry of Finance in terms of the Insurance Business Act.⁴⁴ With the establishment of the MFSC, this function was passed on to the new Authority. The point can be made that this change was necessary in view of international financial institutions' expectations that supervision should be carried out by autonomous financial supervisors⁴⁵ who had to be independent from the political class and the industry.

Further to the establishment of the MFSC, high-level meetings were organised on a monthly basis between the Minister of Finance, the Governor of the CBM, the Chairman of the MFSC and the Chairman of the MSE to discuss strategy issues relating to the work of these institutions and the future of the financial industry.⁴⁶ A Regulatory Co-Ordination Forum⁴⁷ was also set-up at senior management level to coordinate the supervisory work of the newly established supervisor with that of the CBM and MSE, thereby avoiding duplication. This served as a forum for discussion, mutual cooperation and learning. In the field of supervision of the capital market, this became the official meeting place for the CBM, MSE and MFSC, all of which had a role in the regulation and supervision for market integrity. It is reasonable to contend that overall the Forum had the purpose of laying down part of the ground work for the single regulator, in terms of creating the level of cooperation necessary to allow a smooth transition to the new framework, although its effectiveness, usefulness or success remains a moot point. Indeed, experience suggests that it is likely that the

⁴¹D. Fabri, 'The New MFSA: The Recent Changes in Different Contexts' *the Accountant*, Autumn 2003, p. 39.

⁴²MIBA, Annual Report, 1993, p. 8.

⁴³MFSC, Annual Report and Financial Statements 1994, p. 6.

⁴⁴'House debates comprehensive law on insurance' *The Times* 04.02.1998, <http://goo.gl/919jG2>, accessed 16.01.16.

⁴⁵Mwenda [6].

⁴⁶(Fn. 23).

⁴⁷Discussions with Mr Aldo Giordano, Director—Resolution Unit, MFSA and former Deputy Manager of the Compliance Department of the CBM, who was the Secretary of the Regulatory Co-ordination Forum.

territorial agenda of the different financial regulators may have created an atmosphere of mutual mistrust, making this Forum largely ineffective.

The establishment of the single regulator occurred in 2002, when the MFSC was re-constituted as the MFSA. The MFSA took over all regulatory functions from the CBM,⁴⁸ the MSE and the MFSC. The MFSA became responsible for regulating and supervising banks, insurance companies, investment services licence holders, collectives investment schemes, trustees, stockbrokers and for monitoring market integrity in general.⁴⁹ Specifically with regard to market integrity, the policy to create a single regulatory authority required stockbrokers to be regulated by the MFSA under the Investment Services Act, and therefore to obtain a licence in terms of the Act that replaced the authorisation that had originally been granted by the MSE. In addition, companies wanting to obtain admission to Listing now had to apply to the MFSA, which was also granted the role of Listing Authority.⁵⁰ The role of the MFSA as capital market regulator and Listing Authority is analysed in more detail in the next section of this paper.

As a result of the transfer of powers to the MFSA, the MSE was left with its operational role, although one may argue that the MSE still retained a quasi-regulatory function as it remained responsible for ensuring the integrity of its own market primarily by ensuring compliance by its members with the MSE's bye-laws and monitoring the market for suspicious activity. Market confidence is fundamental for the existence of capital markets. It is therefore logical that exchanges should remain responsible for the integrity of their market. In addition, given the MSE's extensive supervisory knowledge and experience, the retention of part of its former supervisory function was important to ensure continuity with regard to the extent of supervisory engagement with capital market participants. At inception the MFSA had little experience in matters relating to the monitoring of capital markets and therefore the overall supervision of the market would have suffered had the MSE been required to relinquish all its supervisory responsibilities. The MFSA certainly did not have the same degree of knowledge and technical resources to take on such work without the MSE's support. Nonetheless, the setting up of the MFSA as single regulator led to the simplification of the process for international collaboration with regulators in foreign jurisdictions,⁵¹ which is fundamental for a financial supervisor operating in an environment largely made up of international players. Supervisory arrangements for cooperation with regulators in other jurisdictions could now be established by one regulator in Malta instead of three. Over time these arrangements have proved to be particularly important with regard to investigations of possible breaches of market integrity regulations in instances where cross-border transactions have been carried out.

⁴⁸Central Bank of Malta Act, Laws of Malta, Chap. 204, Article 34. In terms of this article the CBM remains responsible for the regulation and supervision of payments and securities settlement systems. This is the only element of financial business which is outside the remit of the MFSA. Available at: <https://goo.gl/PcxQPe>, accessed 04.01.2016.

⁴⁹'MFSC to Regulate stockbrokers' The Times, 22.11.2001, <http://goo.gl/919jG2>, accessed 16.01.16.

⁵⁰Financial Markets Act, Laws of Malta, Chap. 345, Article 11.

⁵¹Fabri (fn. 41), p. 41.

The legislative framework for the MFSA excluded the promotional part of what used to be the MFSC's function, as clearly this created a conflict with its regulatory, supervisory and its newly explicit consumer protection role.⁵² In due course the Government of Malta set up FinanceMalta, a public-private partnership established as a foundation with the sole purpose of promoting Malta as a financial centre.⁵³ Nevertheless, MFSA senior officials have continued to be involved in discussions on the development of Malta's financial centre, which is considered important given the significance of this sector for the Island's economy.⁵⁴ It has, however, been argued that a financial regulator's involvement in business development is useful as long as it does not conflict with its regulatory and supervisory functions. Fabri makes the point that "the proper job of a regulator is to regulate and supervise to achieve the general good, not to sell, not to please, not to pander"; regulation which is meant to achieve the high-level objectives of investor protection, financial stability and market integrity "should not be debased to a marketing brochure or an investment".⁵⁵ Therefore, the participation of a financial regulator in processes which aim at making a jurisdiction more attractive as a financial centre are appropriate as long as these do not create conflicts of interest and do not distract it from its core regulatory and supervisory functions, which are important for consumer protection and financial stability.

As required by statute, the MFSA has placed considerable emphasis on consumer education, especially during the initial stages of its existence, with a number of publications and events being held.⁵⁶ To further advance the consumer protection agenda in Malta, the MFSA included the office of a Consumer Complaints Manager which was established as part of the new framework with the primary function of investigating complaints from private clients about financial services transactions,⁵⁷ including transactions carried out on behalf of clients in securities listed on the MSE. The Consumer Complaints Manager has the role of analysing and investigating complaints with a view to making an independent appraisal and encouraging the parties to

⁵²Malta Financial Services Authority Act, Laws of Malta, Chap. 330, Article 4 (1) set *inter alia* two central functions of the MFSA on consumer protection: 'to promote the general interests and legitimate expectations of consumers of financial services, and to promote fair competition practices and consumer choice in financial services'; and 'to investigate allegations of practices and activities detrimental to consumers of financial services, and generally to keep under review trading practices relating to the provision of financial services and to identify, and take measures to suppress and prevent, any practices which may be unfair, harmful or otherwise detrimental to consumers of financial services'. Available at: <http://goo.gl/Y7S3zP>, accessed 04.01.2016.

⁵³See amongst others: M. Farrugia, 'New foundation to promote Malta as financial centre' The Times 22.05.2007, <http://goo.gl/B7JvnC>; 'Finance Malta—New Body to Promote Financial Services Abroad', The Times 01.03.2007, <http://goo.gl/b5TsiL>, accessed 31.12.2015. For more information on FinanceMalta visit: <http://goo.gl/PTQxGo>, accessed 14.11.2015.

⁵⁴For example, the Chairman of the MFSA was appointed the Deputy Chairman of FinanceMalta at inception. This is a role he still retains, <http://goo.gl/t2g2Ur>, accessed 08.03.2016.

⁵⁵D. Fabri, 'Issues in Local Regulation' Speech delivered during the Conference on Banking and Finance, University of Malta 07.03.2016.

⁵⁶See amongst others: 'MFSC published investor guides' The Times Business 25.10.2001, p. 3, 'Public Confidence is a Must: Interview with Professor Bannister, Chairman of the MFSA', The Times, 25.04.2002. All documents available in the archives of The Times <http://goo.gl/919jG2>, accessed 16.01.2016.

⁵⁷Malta Financial Services Authority Act, Laws of Malta, Chap. 330, Article 20.

the dispute to reach settlement. Recommendations made by the MFSA in relation to consumer complaints are not binding decisions. Although the MFSA's position on a complaint carries some weight with licensed financial services providers, authorised persons may still disagree with the MFSA's position and on this basis ignore any recommendation for compensation of the aggrieved investor. This would mean that the aggrieved investor would then have to seek remedy at the level of the Courts.

While it has no decision-making powers, the office of a Consumer Complaints Manager is a *quasi* out of Court mechanism to settle complaints, which the legislator established *inter alia* to further strengthen investor confidence in Malta's capital markets. The establishment of the office of Consumer Complaints Manager was a positive development as it sought to ensure that investor grievances can be addressed without undue delay. However, investor complaints resulting from a number of financial product mis-selling scandals in Malta during the past seven years have placed considerable strain on the office of the Consumer Complaints Manager, which in turn led to a public outcry for reform in this area.⁵⁸ Experience suggests that the office of Consumer Complaints Manager was established and equipped to deal with complaints in the normal course of business. It was therefore not equipped to handle a crisis situation such as that which occurred as a result of the product mis-selling scandals that were uncovered during the financial crisis. One of these scandals involved Bank of Valletta, Malta's largest bank, which was found to have extensively sold a professional investor fund to retail unsophisticated investors.⁵⁹ The flooding of the Office of Consumer Complaints Manager with consumer grievances led to delays in the processing of complaints, which at times took more than four years to be processed.⁶⁰

On the one hand the extent of complaints received by the MFSA's Consumer Complaints Manager sustains the general perception that the MFSA's supervisory engagement may not be sufficiently robust to prevent serious consumer failures from occurring.⁶¹ This position is also supported when one considers the number of on-site

⁵⁸See amongst others: N. Laiviera, 'Consumer association calls for redress for BOV's La Valette property fund investors' MaltaToday, 02.07.2011, <http://goo.gl/QBCyj7>; 'Government to establish a financial arbiter', Malta Independent, 28.05.2015, <http://goo.gl/FWDIoE>, 'Arbiter may offer up to €250,000 in compensation for financial services shortcomings', Malta Independent 28.05.2015, <http://goo.gl/DYmkLF>; 'Financial arbiter to deliver binding decisions on compensation for financial services shortcomings', Malta Independent 20.07.2015, <http://goo.gl/5UA5N2>; T. Diacono, 'Financial arbiter could bypass BoV in compensating La Valette investors' MaltaToday 06.08.2015, <http://goo.gl/E2Jh4N>; all documents accessed 26.12.2015.

⁵⁹See amongst others: 'Property fund investors urged to refuse 'indecent proposal' The Times, <http://goo.gl/AcKehE>, 01.06.2011 'MFSA fines BOV €205,150 after third la Valette fund investigation' The Times, 04.06.2012, <http://goo.gl/i2M3DK>, 'Anger By Property Fund Shareholders Dominates La Valette Funds AGM' Malta Independent 12.02.2012, <http://goo.gl/Orh3cJ>; all documents accessed 08.03.2016.

⁶⁰See amongst others Malta's Minister of Finance's reply to Parliamentary Question 31729 by Hon. Marie Louise Coleiro Preca on 06.02.2012, available at <http://goo.gl/Z0KdYh> and M. Vella, 'MFSA directive against BOV: No public notice to investors' MaltaToday 04.11.11, <http://goo.gl/Z7Z7CD>; all documents accessed 08.03.16.

⁶¹See amongst others: M. Vella, 'Financial regulator carried out just 19 compliance visits in 2013' Malta-today, 26.01.2015, <http://goo.gl/7WhQ7e>; M Vella, 'Maltese Cross bust: MFSA says it rested on PWC's audits' MaltaToday, 05.01.15, <http://goo.gl/A7yleZ>; and R. Xuereb, 'Investor protection or business promotion: the MFSA dilemma' Maltatoday Letters, 28.12.14, <http://goo.gl/IDZoGR>; all documents accessed 08.03.2016.

inspections carried out by the MFSA when compared to the growth in this sector over the past eight years.⁶² In this connection, while the sector has doubled in size during this period, the number of on-site inspections carried out has decreased. One may argue that this state of affairs may be partly due to the: [i] extensive regulatory work which the MFSA was required to carry out in order to implement the Regulations and Directives that were adopted by EU Institutions following the financial crisis; and [ii] the significant number of enforcement cases that were undertaken by the Authority during recent years⁶³ which also led the MFSA to establish an Enforcement Unit in 2013. Experience suggests that these streams of work have diverted the MFSA's resources from its supervisory functions, thereby weakening the extent of its supervisory engagement.⁶⁴ On the other hand, from the Consumer Complaints Manager's perspective the failure to process the numerous complaints promptly was considered as largely reflective of the saying that *justice delayed is justice denied*. Moreover, licence holders did not always follow the recommendations of the Consumer Complaints Manager to compensate aggrieved investors. This state of affairs led to a general call for a better system to safeguard consumers' interests.

To address the public demand for a better system for consumer protection, a new law was proposed in the Parliament of Malta in 2015 to set up the Office of the Arbitrator for Financial Services to mediate, investigate, and adjudicate complaints filed by a customer against a financial services provider.⁶⁵ The main difference between the MFSA's Consumer Complaints Manager and the Arbitrator established in terms of the Arbitrator for Financial Services Act, 2016 is that while the former can merely make recommendations for the settlement of consumer complaints,⁶⁶ the latter can make decisions which are binding at law,⁶⁷ thereby making the process for the settlement of consumer grievances easier, faster and perhaps more equitable. One may suggest that once appointed, the Arbitrator for Financial Services will be yet another institutional change in the field of the regulation of this sector which will further strengthen the process for investor protection and, as a result, investor confidence in Malta's capital market. Although in the context of evolution of the institutional architecture for financial regulation to achieve consumer protection, one may argue that the most important development was by far the establishment of the single regulator in 2002, which brought the regulation of all financial services under one roof, thus harmonising consumer protection standards across the board.⁶⁸

⁶²See Malta's Minister of Finance's replies to Parliamentary Question 13717 by Hon. Kristy Debono on 23.01.2015, available <http://goo.gl/ygTFO3>; and Parliamentary Question 23524 by Hon. Marlene Farrugia on 24.02.2016, available at <http://goo.gl/6HBLlg>, both documents accessed 14.03.16.

⁶³See the section of the MFSA web-page on administrative measures and penalties <http://goo.gl/V3v69b>, accessed 16.03.2016.

⁶⁴This is difficulty faced in other jurisdictions. See for example the outcome of recent peer reviews carried out by the European Securities and Markets Authority, <https://goo.gl/QPQtgD>, accessed 16.02.2016.

⁶⁵Arbitrator for Financial Services Act, 2016, <http://goo.gl/ZXxkJ>, accessed 16.03.2016.

⁶⁶Malta Financial Services Authority Act, Chap. 330, Article 20, <http://goo.gl/s9Fs86>, accessed 06.01.2016.

⁶⁷Arbitrator for Financial Services Act, 2016, Article 19.

⁶⁸The establishment and the transfer of powers to the MFSA from the Malta Financial Services Centre, the Central Bank of Malta and the Malta Stock Exchange were made through amendments to the Malta

Although it had been the Government of Malta's intention to pursue the single regulator route since 1994,⁶⁹ this was delayed particularly in view of diverging opinions between the Nationalist Party and the Labour Party in Malta, regarding the transfer of responsibility for banking supervision from the CBM to a single regulator outside the central bank.⁷⁰ The Government of Malta's decision to set up a single regulator was taken at a time when different models⁷¹ were being debated for banking regulation. The policy debate on the future of the institutional architecture for financial supervision in Malta focused on whether the regulation and supervision of banks was best done by the CBM or whether the single regulator model should be implemented.⁷² There was at the time a lobby that believed that the regulation of banks as licensed institutions was best carried out by a central bank which was able to monitor the day-to-day liquidity of the bank through the payment system.⁷³ The first signs of trouble at a bank when these occur are probably noticed within the payment system managed by central banks as the liquidity of the troubled bank gradually becomes more problematic before it starts to dry up prior to that bank approaching the Central Bank for emergency liquidity. Indeed, the role of lender of last resort is still presented today as one of the rationales for granting central banks a supervisory function.⁷⁴ In addition, the CBM had the experience in banking supervision that a newly established single regulator did not have.⁷⁵ As a matter of fact, in dealing with the banking debacles of the 1970's namely BICAL and the National Bank Group,⁷⁶ one opinion suggested that the CBM had accumulated important knowledge and experience that would be

Financial Services Centre Act (Laws of Malta, Chap. 330), the Central Bank of Malta Act (Laws of Malta, Chap. 209) and the Malta Stock Exchange Act (Laws of Malta, Chap. 345) amongst others in 2002 through Part IV, V and VI of the Special Funds Regulation Act (Laws of Malta, Chap. 450), <http://goo.gl/KhaVt4>, accessed 26.12.2015.

⁶⁹See Amongst Others: J.G.P. Bonello, 'Repatriate—All Is Forgiven' *The Sunday Times*, 28.11.1993; 'MFSC moves closer to single regulator role' *The Times Business*, 18.10.2001; 'Opposition agrees with setting up of financial centre' *The Times*, 24.03.1994, p. 15. All documents available at <http://goo.gl/wC0kRV>, accessed 06.01.2016.

⁷⁰See amongst others: 'Dalli Sees financial services growth through EU Membership', *The Times*, 19.06.2002, p. 12, <http://goo.gl/AYbBAF>, accessed 14.11.2015; 'Opposition disagrees with amendments on Central Bank, MFSC' *The Times*, 04.02.2002, <http://goo.gl/wC0kRV>, accessed 06.01.2016; D. Fabri, 'Recent Amendments to Malta Financial Services Legislation' *The Accountant*, September 2002; As noted in D. Fabri, 'A Single Unified Supervisory Authority for Financial Services in Malta and Beyond—Some Legal and Regulatory Issues' *id-Dritt 2006 Volume XIX* p. 263, the election of a Labour Government in 1996 suspended the move towards a single agency for a few years, and then re-activated in late 1998 following the re-election of the Conservative party.

⁷¹Group of 30, 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' 2008, <http://goo.gl/9EUJFM>, accessed 05.01.2016.

⁷²D. Fabri (fn. 70), pp. 263–265.

⁷³Discussions held for the purpose of this paper with Mr David Pullicino, former Deputy Governor of the Central Bank of Malta. Also see amongst others: 'Bank Supervision Issue Comes to Ahead' *The Times Business* 30.11.2000, p. 1, <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁷⁴C.A.E. Goodhart, 'Linkages between Macroprudential and Microprudential Supervision, Speech delivered at the Banking and Finance Annual Conference, University of Malta, 07.03.2016.

⁷⁵L. Spiteri, 'Banking hitches and itches' *The Times Business & Finance*, 14.06.1997, p. 27, <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁷⁶For an examination of the BICAL and National Bank Group failures see J. Consiglio, 'A History of Banking in Malta' (Malta 2006).

jeopardised if the transfer of regulatory powers to a single regulator were to be implemented.⁷⁷ In this regard, a Former Finance Minister and Governor of the CBM, expressed the view that:

Hiving the regulatory role from the Central Bank would deprive that institution of the link that has always existed within it between the research and supervisory departments. That link is important, as it enables data collected from the banks to be analysed internally harmoniously (that is, without possible institutional or legal friction) and in good time. That facility has always played an essential role in the Bank's ability to oversee the banking system as well as to follow economic and financial developments through the monetary data it collected from the banks.⁷⁸

That prudential regulation of banks was better placed within the CBM had also been the view of the International Monetary Fund ('IMF'), which visited Malta in 1996. The IMF had specifically commented that this approach was recommended not only because of the CBM's demonstrated capacity effectively to supervise credit and financial institutions but also because of the synergies between the supervisory and monetary policy roles of the bank with respect to the financial data requirements as well as to the banks' mandate as lender of last resort.⁷⁹ The IMF had specifically concluded that the supervision of financial services should be transferred to the CBM by 2004,⁸⁰ which suggests that the MFSC's supervisory standards were not as robust as those of the Bank.

The Government of Malta had, however, already decided the fate of the institutional architecture for financial supervision. No technical arguments could persuade the Government to change its policy decision. The die had been cast in favour of the single regulator outside the central bank and it was only a question of time before this policy would be implemented. The Minister considered the integrated model for financial supervision as more efficient in view of Malta's small economy, as a single regulator⁸¹ could oversee the financial system as a whole better than a model

⁷⁷L. Spiteri, 'A risky transplant' *Times of Malta*, 09.12.1998, p. 11, <http://goo.gl/wC0kRV>, accessed 06.01.2016.

⁷⁸Spiteri, (fn. 77), 11.

⁷⁹L. Brincat, 'The Minister and the Fund' *The Sunday Times*, 03.01.1999, p. 14, <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁸⁰IMF, 'Malta, Recent Economic Developments' 18.07.1997, p. 38, <https://goo.gl/afBJeG>, accessed 19.01.2016.

⁸¹It is noteworthy that in addition to the single regulator for financial services, the MFSA, the legislative reform during this period also included the establishment of the Financial Intelligence and Analysis Unit (FIAU) in terms of the Prevention of Money Laundering Act. The setting up of the unit was one of the recommendations made by a team of experts from the Council of Europe and the Financial Action Task Force (FATF) who had visited Malta in September 1998. See amongst others: 'The case for a Financial Intelligence Unit' *The Times Business*, 06.01.2000, p. 6; 'Steps to Set up Financial Intelligence Unit', *The Times Business*, 17.02.2000, p. 1; 'Financial Intelligence Unit Starts Taking Shape' *The Times Business*, 20.04.2000, p. 1; 'Financial Intelligence Unit Bill Start Taking Shape' *The Times Business* 15.03.2001, p. 1; 'New Law to set up Financial Intelligence and Analysis Unit' *The Times* 18.12.2001, p. 11; 'Financial Intelligence Bill Approved' *The Times*, 20.12.2001, p. 12. All documents available at <http://goo.gl/wC0kRV>, accessed 16.01.2016.

where different individual regulators existed for different aspects of financial services. At the time, it was pointed out that the introduction of a single regulator would also do away with unnecessary duplication of supervision, where entities having a licence from multiple regulators were being subject to multiple supervisory obligations which sought to achieve the same objective.⁸² Indeed, the most important benefit, or so it was claimed, was that a one-stop-shop regulator offers the advantage in that financial services providers would only refer to one authority and as a result avoid overlaps and gaps in the regulatory structures.⁸³ For instance, when a bank ventures into insurance (by establishing subsidiaries) and investment services business, it is only the single regulator that would be responsible for regulating and supervising the bank. Moreover, it was also argued that the single regulator model would benefit consumers, practitioners and the country in view of the economies of scale that could be derived from a more streamlined and accountable system.⁸⁴ This model was eventually chosen, which led to the banking supervision team moving from the Central Bank to the MFSA⁸⁵ and the Central Bank Governor having a seat on the MFSA board. It also led to a split between macro and micro-prudential supervision whereby the MFSA became responsible for all aspects of micro-prudential supervision⁸⁶ while the CBM became responsible for macro-prudential supervision.⁸⁷ In due course a Joint Financial Stability Board was established for the purpose of ensuring effective cooperation between the CBM and the MFSA in the area of financial stability.⁸⁸

The debate on whether financial supervision in Malta should be within or outside the central bank should have ended with the establishment of the single regulator. However, recent developments at European level, in particular the establishment of the European Systemic Risk Board for macro-prudential supervision in Europe, and the assignment of competence for the prudential supervision of banks to the European Central Bank, call for the reopening of the debate on the institutional architecture for financial supervision in Malta. Ultimately, given the duplication of processes which have to be carried out at the level of the CBM and the MFSA as a result of the

⁸²M.J. Naudi, 'Stock Exchange Chairman will not seek reappointment: Interview with Mr Fredrick Mifsud Bonnici' *The Sunday Times* 03.01.1999, p. 12; 'Financial Services Centre to be sole regulator for the financial sector' *The Times*, 04.06.2002, p. 11. All documents available at <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁸³C. Portanier, 'The case for a standing financial law panel' *The Times Business*, 17.01.2002, p. 7, <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁸⁴"A Single Focal Point: The Malta Financial Services Authority formally came into being on October 1. Its Chairman, Joe Bannister, explains what it has set out to achieve" *Times of Malta Business*, 24.10.2002, available <http://goo.gl/wC0kRV>, accessed 06.01.2016.

⁸⁵'Banking Unit moves to MFSA offices' *The Times Business*, 31.01.2002, p. 3, <http://goo.gl/wC0kRV>, accessed 16.01.2016.

⁸⁶Micro-prudential supervision is concerned about the stability of individual financial institutions and is largely conducted through the over-sight of the governance, compliance, capital structures and risk management of individual financial institutions.

⁸⁷Macro-prudential supervision is interested in the safety and stability of the financial system as a whole and seeks to identify threats to systemic stability by analysing the trends and imbalances in the financial system.

⁸⁸Central Bank of Malta Act, Laws of Malta, Chap. 209, Article 17B.

implementation of the Single Supervisory Mechanism⁸⁹ and for macro-prudential purposes, and the fact that the ultimate decision maker within the SSM is the Governing Council of the ECB, a member of which is the CBM's Governor, it might be appropriate at this stage to study the possibility of integrating the functions of the MFSA in the CBM. The current state of affairs where two different institutions are responsible for different levels of supervision has resulted in a situation where more often than not officials from both institutions are required to represent the island in the same European and International fora or to give feedback on the same dossiers that are being debated in Brussels. In addition, the CBM and the MFSA are in certain instances repeating the same analytical processes for different or at times for the same purposes. Therefore, such integration together with a process for the re-engineering of the structures of the newly constituted CBM would also be more effective than the existing framework, especially if the newly integrated CBM had to implement lean techniques⁹⁰ for better efficiency. Moreover, the integration of the MFSA into the CBM would also allow Malta to benefit from economies of scale as a number of common administrative functions such as finance, human resources, legal, international relations, internal audit and risk management departments of these institutions could be merged.

The proposed integrated model in the central bank, which should also serve to address the inherent tensions between capital market supervision and prudential supervision⁹¹ where the entity being supervised is a bank that is listed on the capital market, has already been implemented by a number of small European countries including Ireland. In 2010 the Central Bank of Ireland ('CBI') was vested with the supervisory functions of the Irish Financial Services Regulatory Authority ('IFSRA'), which had been established in 2003 as Ireland's single regulator.⁹² The decision to dissolve the IFSRA and transfer supervisory powers to the CBI was made primarily as a consequence of the Irish banking crisis,⁹³ as a result of which a number of significant supervisory deficiencies were identified.⁹⁴ These deficiencies led the Irish Government to reform the regulatory and supervisory system and to invest significantly in strengthening supervisory engagement through the CBI. The recent financial failures in Malta that had an impact on the consumer of financial services on the island⁹⁵ and

⁸⁹For a brief outline of the Single Supervisory Mechanism see explanation on the SSM web-page <https://goo.gl/nOat5O>, accessed 08.03.2016.

⁹⁰For an outline of lean techniques see explanation available at <http://goo.gl/BdDw4v>, accessed 08.03.2016.

⁹¹*Buttigieg* [1].

⁹²Established in terms of the Central Bank and Financial Services Authority of Ireland Act 2003.

⁹³See amongst others: J. Brennan, 'Top watchdog job to be split three ways in regulatory overhaul' Irish Independent, 27.06.2009, <http://goo.gl/bjYP48>; C. Sheehy, 'No board member of Financial Services Regulatory Authority had bank regulation experience, banking inquiry told' Irish Independent, 11.06.15, <http://goo.gl/j6lHdE>; Houses of the Oireachtas, 'Report of the Joint Committee of Inquiry into the Banking Crisis—Liam O'Reilly—Former CEO, Irish Financial Services Authority', 11.06.2015, <https://goo.gl/U36zn3>; all documents accessed 13.03.16.

⁹⁴For an examination of the Irish banking crisis see amongst others: *O'Sullivan/Kennedy* [7].

⁹⁵For example see the following on the failure of Maltese Cross Financial Services which had an impact on investors in Malta: 'MFSA update on Maltese Cross Financial Services' Times of Malta, 22.08.2014,

in certain instances abroad,⁹⁶ support the view that Malta may benefit from a debate which considers the possibility of adopting an approach similar to that adopted by Ireland.

In the final analysis, while the MFSA in its various formats is the product of over 15 years of continuous development of the institutional architecture for financial supervision in Malta, it is not necessarily the final product. An institution is adequate to meet the challenges of the period when it was created. Financial failures that suggest that the MFSA's supervisory engagement may not be sufficiently robust and the changes to the European supervisory architecture, support the notion that the time may be right for Malta to reconsider its existing institutional architecture for financial supervision. In fact, the need to strengthen supervision and make it more effective by *inter alia* maximising scarce local expertise and minimising duplication as far as possible, calls for one properly structured organisation which employs the best people in financial services and has the best supervisory intelligence systems, rather than the current model where professionals, data and systems are split between the CBM and the MFSA. A process of reform for the integration of the MFSA's functions and operations within the CBM and the application of lean techniques for efficiency, would clearly address the current segregation of professionals into different institutions when their expertise could be more effectively utilised if their effort were a concerted one. This is important particularly if supervisory engagement is to be strengthened in the future.

2.2 Regulation for financial market integrity

The Government's decision in 1994 to phase out the offshore business, establish an international financial centre⁹⁷ and eventually create a single regulator for financial services,⁹⁸ led to a major legislative reform in the field of financial services. Indeed, most of the groundwork for the implementation of the single regulator was made

<http://goo.gl/JEYXEN>; W. Johnston, 'Company director pleads not guilty to €4m investor fraud' Times of Malta, 18.09.2014, <http://goo.gl/zodlSo>; M. Agius, 'Former Maltese Cross Financial Services director to be indicted for misappropriation, fraud' Maltatoday, 14.10.2014, <http://goo.gl/sXsBEO>; 'Maltese Cross case: Accused told other directors of financial problems on return from cruise' Malta Independent, 14.10.2014 <http://goo.gl/xxbgTo>; M. Mifsud, 'Poking Maltese investors has made them very cross' Maltatoday, 08.01.2015, <http://goo.gl/hWePuM>; Maltese Cross Financial Services case: MFSA will recompense investors with nearly €2.5 million 24.06.2015, <http://goo.gl/5BCERc>, accessed 16.03.16.

⁹⁶For example see the following on the failure of Setanta Insurance in Malta which had an impact on policy holders in Ireland: Central Bank of Ireland, 'Opening Statement by Director of Consumer Protection Bernard Sheridan to Joint Oireachtas Committee on Finance, Public Expenditure and Reform', 09.07.2014 <http://goo.gl/MfQoyv>; J. Hehir, 'Times for action on Setanta situation' Irish Independent 09.11.2014; <http://goo.gl/cyvFa6>; Houses of the Oireachtas 'Setanta Insurance Liquidation: Discussion', 01.04.2015, <http://goo.gl/vuR5An>; D. O'Donovan, 'Setanta compensation is 'a complete fiasco' Irish Independent 02.04.2015, <http://goo.gl/CjIGII>; 'Setanta mess is a long way from being over' Irish Independent, 13.09.2015, <http://goo.gl/zc4suX>; C. Phelan, 'Motorist will pay if action is not taken on Setanta Insurance Court Ruling' Irish Independent, 17.01.2016, <http://goo.gl/QYTro3> and C. Weston, 'Insurance companies warn of motor premium hikes on back of Setanta Court of Appeal ruling' Irish Independent, <http://goo.gl/J8Qk2f>, all documents accessed 15.03.2016.

⁹⁷MFSC, Annual Report, 1997, p. i.

⁹⁸MFSC, Annual Report, 1994, p. 6. See also Fabri (fn. 70), p. 262.

during this period particularly the introduction of the concept of ‘competent authority’ in the legislation which allowed a more straightforward legislative process once the decision to introduce the single regulator became final in 2002.⁹⁹ During the early 1990’s a new set of financial services laws¹⁰⁰ was adopted by Parliament to strengthen Malta’s regulatory framework in this field. The legislative activism of the time included the adoption of the Investment Services Act 1994,¹⁰¹ which has the purpose of regulating the carrying on of investment business, and the Insider Dealing Act 1994¹⁰² that was eventually repealed and replaced by the Prevention of Financial Market Abuse Act 2005.¹⁰³ The Insider Dealing Act was not the first piece of legislation to deal with market malpractice.

The Malta Stock Exchange Act 1990 defined the term ‘insider dealing’¹⁰⁴ and set a supervisory mechanism for the investigation and the prosecution of suspicious transactions. The mechanism set various layers of checks to be carried out to determine whether a suspicious transaction was tantamount to insider dealing. The Governor of the Central Bank of Malta had to appoint inspectors to carry out an investigation and produce a report.¹⁰⁵ The report would then be passed on to the Minister of Finance and if from the report it transpired that circumstances existed to suggest insider dealing, the Minister was granted the power to appoint special inspectors to carry out a supplementary investigation and report to him on their findings.¹⁰⁶ Where from a special inspector’s final report it resulted that an offence of insider dealing had been committed, the Minister was required to refer and transmit a copy of the report to the Commissioner of Police for prosecution.¹⁰⁷ In addition the Malta Stock Exchange Act 1990 established the Malta Stock Exchange Tribunal¹⁰⁸ (“MSET”) which had been assigned a rather mixed bag of roles,¹⁰⁹ including the function of investigating “irregular practices in Exchange dealings” on the Malta Stock Exchange¹¹⁰ and to determine compensation for the victims of insider dealing where a person was found guilty of such an offence. In this regard, it is noteworthy that at the time the MSET was the only authority that had an express power in terms of Maltese Law to or-

⁹⁹D. Fabri, ‘Financial Services Legislation: Some Reflections on Recent Amendments’ IFS News October 2002.

¹⁰⁰MIBA, Annual Report, 1993, p. 6.

¹⁰¹Investment Services Act, Laws of Malta, Chap. 370, available at <http://goo.gl/Y2S4bI>, accessed 04.01.2016.

¹⁰²Insider Dealing Act, Laws of Malta, Chap. 375.

¹⁰³Prevention of Financial Markets Abuse Act, Laws of Malta, Chap. 476.

¹⁰⁴Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 2, defined ‘insider dealing as dealing in securities on the Exchange on the basis of inside, confidential and price-sensitive information acquired from or by any individual connected with the company to which the information refers, whether lawfully entitled to such information or otherwise, irrespective of how he came into possession of this information, and used by any person with the view to make a profit or take any other advantage’.

¹⁰⁵Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 16.

¹⁰⁶Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 17.

¹⁰⁷Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 19.

¹⁰⁸Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 20.

¹⁰⁹D. Fabri, ‘The Malta Stock Exchange Tribunal and Insider Dealing’, The Accountant 2001.

¹¹⁰Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 26.

der a person who had been found guilty of insider dealing to compensate an injured party.¹¹¹

The MSET was eventually wound down in 2002 and some of its functions were assumed by the Financial Services Tribunal¹¹² established in terms of the Malta Financial Services Act.¹¹³ During the period of its existence, the MSET considered two cases of suspected insider dealing, in which cases insider dealing was not in the end proven.¹¹⁴ This seems to suggest the difficulty faced at the time in proving the occurrence of insider dealing. This is no surprise as foreign supervisors still find this to be a major challenge.¹¹⁵ Indeed, the framework for the investigation of suspicious transactions under the original Malta Stock Exchange Act, 1990 was rather cumbersome, as the highest burden of proof was required to be satisfied: i.e. one had to prove that an insider had, beyond all reasonable doubt, the intention to commit insider dealing. In today's regulatory environment where regulatory independence from politicians to avoid political capture is considered crucial to ensure proper financial supervision,¹¹⁶ the role of the Minister in the investigation of insider dealing looks rather odd. However, at the time the development of the high-level principles on the independence of financial supervisors was still in its early stages, indeed it was still common to find Ministries involved in financial supervision. Such was the case of domestic insurance in Malta, which was, until 1994, supervised by the Ministry of Finance in terms of the Insurance Business Act 1981.¹¹⁷ In this regard, one may suggest that since the MSE was a newly established operator providing a service that was crucial for the development of Malta's economy, particularly its financial centre, it was sensible for the Government to retain a certain degree of control over the manner in which the Exchange was operating. This was an experiment that could not be allowed to fail if Malta's financial centre was to grow successfully.

Since the provisions which regulated insider dealing in terms of the Malta Stock Exchange Act 1990 were rather restricted and to a certain extent incomplete, the Insider Dealing Act 1994 complemented the Malta Stock Exchange Act 1990 for the better achievement of market integrity, as it introduced a more comprehensive set of requirements on insider dealing. The enactment of the Insider Dealing Act 1994 was necessary for Malta fully to comply with international standards on the regulation of market integrity. Malta had applied for EU Membership in 1990 and legislative and administrative structures had to be introduced in order to meet EU standards, including for example the introduction of the internal market passport, and the bank deposit guarantee and investor compensation schemes. These formed part of the EU *acquis*

¹¹¹Fabri (fn. 109), p. 27.

¹¹²Special Funds (Regulation) Act, Laws of Malta, Chap. 450, Part VI, Amendment of the Malta Stock Exchange Act, Article 134 provided that any proceedings before the Malta Stock Exchange Tribunal which had not been concluded before the coming into force of the changes to the Malta Stock Exchange Act, would continue being heard and determined by the Malta Financial Services Tribunal.

¹¹³Malta Financial Services Authority Act, Laws of Malta, Chap. 330, Article 21.

¹¹⁴Fabri (fn. 109), p. 27.

¹¹⁵Caravajal/Elliot [3].

¹¹⁶Buttigieg [2].

¹¹⁷Fabri (fn. 70), p. 261.

communautaire—which also included the EU’s Insider Dealing Directive¹¹⁸ (IDD), which provided for the prohibition of insider dealing, the granting of investigative powers to competent authorities and the establishment of cooperation mechanisms between competent authorities for the investigation of suspicious transactions of a cross-border nature. In addition, the Insider Dealing Act 1994 also formed part of a set of legislative reforms that the Government of Malta was introducing to attract high-level foreign direct investment in the field of financial services to Malta, which investment required a well-regulated environment.

The legislative reform in 1994 aimed at promoting an open market that was not only free but also fair, efficient and transparent and which provided for high standards of investor protection.¹¹⁹ In this regard, the Insider Dealing Act 1994 added the deterrent of increasing the pecuniary sanction and the term of imprisonment which could have been applied by the Courts where a person was found guilty of insider dealing from a fine not exceeding five thousand Maltese Liri (around €11,600) and/or a term of imprisonment not exceeding two years in terms of the Malta Stock Exchange Act 1990¹²⁰ to a fine not exceeding two hundred and fifty thousand Maltese Liri (around €582,000) or imprisonment not exceeding seven years or to both such fine and imprisonment in terms of the Insider Dealing Act 1994.¹²¹ Nonetheless, it is noteworthy that the powers to take action against insider dealing in terms of the Insider Dealing Act 1994 were never tested in practice. Indeed, for the eleven years of the Act’s existence no criminal prosecutions were undertaken in this field.¹²² This again seems to underline the possible difficulties of proving this form of white-collar crime to the standard of proof which is beyond reasonable doubt.¹²³ It may also hint at the potential lack of a robust supervisory and investigative governance mechanisms for the identification, investigation and prosecution of suspected insider dealing, notwithstanding the provisions of the Malta Stock Exchange Act 1990.¹²⁴

In 2002 the framework for financial regulation was once again reformed and the necessary changes were made for the purpose of implementing the single regulator.¹²⁵ As part of the process for the establishment of the single regulator in 2002, the Malta Stock Exchange Act 1990, was renamed the Financial Markets Act, which

¹¹⁸Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334 of 18 November 1989, pp. 30–32.

¹¹⁹J. Dalli, ‘Financial Services: A Silent Revolution’ The Malta Financial & Business Times, 08.05.2002, <http://goo.gl/6fQMRA>, accessed 04.01.2016.

¹²⁰Malta Stock Exchange Act, Laws of Malta, Chap. 354.

¹²¹Insider Dealing Act, Laws of Malta, Chap. 375, Article 10.

¹²²D. Fabri, ‘1990–2005: From Insider Dealing to Market Manipulation’ The Accountant, 2005.

¹²³A standard of proof which is beyond reasonable doubt means that if there is the slightest doubt as to the accused guilt, he/she will be given the benefit of the doubt.

¹²⁴Malta Stock Exchange Act, Laws of Malta, Chap. 345, Article 17. See also Article 19 which determined that where from a special inspector’s final report it resulted that an offence of insider dealing had been committed the Minister was required to refer and transmit a copy of the report to the Commissioner of Police.

¹²⁵See amongst others: ‘The MFSC in the year 2000’ The Times Business, 27.01.2000, p. 3; J. Dalli, ‘Opening Up an Economy’ The Malta Financial & Business Times, 17.04.2002, available at <http://goo.gl/RzCV42>, accessed 04.01.2016.

Act now provided for the liberalisation of the stock exchange market in Malta and the transfer of responsibility or the supervision of the said market from the CBM to the MFSA.¹²⁶ The Government of Malta decided to liberalise the market for trading platforms and as a result the decision had been made that the planned single regulator would also cover the supervision of the MSE.¹²⁷ Indeed, it was deemed incorrect that in a scenario where other exchanges could establish operations in Malta, the MSE should continue to act as both a player and a regulator at the same time.¹²⁸ This resulted in one of the most significant changes experienced by the MSE¹²⁹ as it ended its local monopoly as the exclusive venue for the listing and trading of securities in Malta. It opened up the possibility for a multiplicity of Exchanges to be set-up on the island. This became a reality with the establishment of the European Wholesale Securities Market¹³⁰ in 2012 and the possible establishment of other trading venues in 2016.¹³¹ The changes in 2002, also meant that the MSE could now focus less on regulation and supervision and more on business development.¹³²

The legislative changes for the introduction of the recognised stock exchange regulatory framework were largely modelled on the UK framework applicable at the time. The provisions of the Financial Markets Act were complemented with a number of second tier regulations made by the Minister of Finance, that set the recognition requirements which had to be satisfied both at application stage to be granted recognition by the Authority, and on an on-going basis to retain the same, and other legal notices to regulate the operation of the capital market.¹³³ Although the Finan-

¹²⁶Financial Markets Act, Laws of Malta, Chap. 345, Part II, Recognised Investment Exchange. Also see: the Annual Report of the Central Bank of Malta for the year ending 2002 p. 15, available at <http://goo.gl/BBHG9D>; the Annual Report of the MFSA for the year ending 2002 p. 18, available at <http://goo.gl/oBq7II>; and 'Financial Services Centre to become sole regulator of the financial centre' Times of Malta, 04.06.2002, available at <http://goo.gl/HWnPFH>; all documents accessed 14.11.2015.

¹²⁷'Competition Comes to the Trading Floor' Times of Malta Business, 09.05.2002, available at <http://goo.gl/wC0kRV>, accessed 06.01.2016.

¹²⁸'Talks for Single Financial Services Regulator Start' Times of Malta Business 19.04.2001, available at <http://goo.gl/wC0kRV>, accessed 06.01.2016.

¹²⁹See amongst others: MSE Annual Report 2002, <http://goo.gl/ejRbPh>; and D. Lindsay, 'The Malta Stock Exchange: Past, Present and Future—Interview with General Manager E. Muscat' The Malta Financial & Business Times 09.07.2003, available at <http://goo.gl/URJdf0>; all documents accessed 04.01.2016.

¹³⁰(fn. 16).

¹³¹The MFSA is currently processing three applications for new trading venues to be set-up in Malta, the processing of which should be completed by 2016.

¹³²During 2002, the Exchange had embarked in the BorzaMed project, which had the ultimate objective of setting up a Mediterranean Stock Exchange. In this regard, a protocol was signed in September 2002 by the Stock Exchanges of Malta, Tunis and Egypt. The platform for cooperation on this project was to be based on mutual recognition of the regulatory requirements of each signatory to the Protocol. A number of preliminary studies were also carried out which indicated that the setting up of a common trading platform was a feasible proposition. However, for a number of reasons the project never reached completion. See amongst others: H. Grech, 'Med stock exchanges alliance to be set up' Times of Malta 15.09.02, available at <http://goo.gl/tXTnnN>; 'Mediterranean cross border securities trading in the pipeline' The Malta Financial & Business Times 11.09.2002, available at <http://goo.gl/K8wTnP>; and 'BorzaMed Project for Med. Capital markets alliance launched' The Malta Financial & Business Times 25.09.02, available at <http://goo.gl/pITXkG>; all documents accessed 04.01.2016.

¹³³Recognised Investment Exchange (Recognition Requirements) Regulations 2003 (Legal Notice 3 of 2003); Membership and Access Regulations (Legal Notice 285 of 2004); Off-Exchange Trading Regula-

cial Markets Act regulated the activity of recognised investment exchanges, the MSE still retained its privileged status as a public corporation set up in terms of the same Act to carry out specified statutory duties in the public interest.¹³⁴

Part IV of the Financial Markets Act at the time provided for the establishment of the MSE and stipulated that the MSE should automatically be considered as recognised in terms of the Act; that is without requiring the MFSA's specific approval, although the MSE was still required to comply with recognition requirements set in terms of the Act.¹³⁵ Nonetheless, given its special status in terms of Law, it would have been impossible for the MFSA to withdraw its authorisation had the MSE failed grossly to comply with the recognition requirements. In such instances the MFSA would have had to revert to other types of supervisory powers in terms of the Act, such as the removal of the board of directors of the Exchange or its senior management. The MSE's special status was abolished in 2007 when, as part of the implementation of the EU's Markets in Financial Instruments Directive,¹³⁶ the Financial Markets Act was amended to remove the MSE's institutional set-up from the Act and its permanent authorisation in terms of the Act, and transfer its business to the Malta Stock Exchange plc,¹³⁷ a registered company in terms of the Companies Act, 1995,¹³⁸ which was issued with formal authorisations by the MFSA in terms of the Act.¹³⁹

In 2002, the Financial Markets Act also established the Listing Authority responsible for approving admissibility to Listing on the Exchange.¹⁴⁰ The creation of the Listing Authority was likewise part of the process for the establishment of a single regulator for financial services. The role of Listing Authority is vested in the Board of Governors of the MFSA. To ensure a high level of compliance with Listing Rules by companies which apply for admission to Listing, the Financial Markets Act also

tions 2004 (Legal Notice 286 of 2004); and the Recognised Investment Exchange (Transparency) Regulations 2004. All these regulations were in due course repealed and replaced with regulations which transpose the EU Markets in Financial Instruments Directive.

¹³⁴As explained in Fabri (fn. 41), p. 42, Unlike companies and commercial partnerships, public corporations set up under special legislation do not have a general law, such as the Companies Act, Laws of Malta, Chap. 386, regulating their behaviour.

¹³⁵Financial Markets Act (version prior to the 2007 amendments), Laws of Malta, Chap. 345, Article 24 (2).

¹³⁶Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145 of 30 April 2004, pp. 1–44.

¹³⁷The transfer of business to the Malta Stock Exchange plc was also part of the Government's plan to eventually privatise the MSE. See amongst others: 'Malta Stock Exchange Only one of three in EU still in State hands ... but for how long?' Malta Independent 28.05.2006, available at <http://goo.gl/P12dKW>; K. Sansone, 'Privatisation of stock exchange remains an option' The Times 23.02.2012, available at <http://goo.gl/LDvLDN>, accessed 31.12.2015.

¹³⁸Companies Act, Laws of Malta, Chap. 386, available at <http://goo.gl/apQjvw>, accessed 04.01.2016.

¹³⁹Various Financial Services Laws (Amendment) Act, 2007, Laws of Malta, Act No. XX of 2007, Article 155.

¹⁴⁰Financial Markets Act, Laws of Malta, Chap. 345, Article 11.

provided for the establishment of a Listing Committee,¹⁴¹ having the role of making recommendations to, and otherwise assist, the Listing Authority in the admissibility to listing of financial instruments. In order to support the Listing Committee, the Financial Markets Act also allocates responsibility of assisting and giving advice to the Listing Committee to the MFSA's Securities and Markets Supervision Unit (SMSU).¹⁴² In practice, the SMSU reviews all incoming applications for Admissibility to Listing including prospectuses that are submitted in terms of the Listing Rules and makes its recommendations to the Listing Committee on these applications before these are recommended by that Committee to the Listing Authority for their approval. This review system for applications for Listing is carried out at the three levels. The SMSU, Listing Committee and the Listing Authority each of which have the role of ensuring that issues offered to the public are properly vetted and address any concerns that may arise on transparency and possibly the merits of the issue, particularly where the issue targets the retail investors. The Listing Authority additionally applies policies that are merit-based controls in the form of detailed mandatory minimum admission criteria that are generally applied to further strengthen investor protection. These include not only documentation to be provided at the time of issue but additional information on the issuer that is to be updated and published on the issuers website on an annual basis.

The Insider Dealing Act 1994,¹⁴³ which in 2002 was renamed the Insider Dealing and Market Abuse Offences Act, was also amended in order to regulate offences of market manipulation which had long been considered by academics and policy makers alike as harming the integrity of capital markets as much as insider dealing. The MFSA was also granted the role of investigating possible instances of market abuse and reporting to the Malta Police about the outcome of the investigation.¹⁴⁴ The Financial Markets Act, article 36, created a mechanism of reporting which sought to ensure that technical experts in the field of financial markets have a significant role to play in the identification and investigation of suspicious transactions. Therefore, while the Insider Dealing and Market Abuse Offences Act rendered the practice of market abuse a criminal offence and provided for the appropriate penal sanctions, the applicable provisions of the Financial Markets Act created the framework for the proper monitoring of the market and the investigation of cases involving possible market abuse.

The Financial Markets Act provided that where a suspicion arises, the MFSA was to appoint an inspector to carry out an investigation for the purposes of establishing the veracity of the suspected market malpractice. The inspector was to produce a report and submit it to the MFSA for its consideration and on forwarding to the police if the suspicion is confirmed by the inspector. The point can be made that at this early stage of regulation of market abuse in Malta where this was still to be prosecuted exclusively as a criminal offence with a standard of proof which is beyond reasonable doubt, the legislators appear to have wanted to establish various levels of

¹⁴¹Financial Markets Act, Laws of Malta, Chap. 345, Article 14.

¹⁴²Financial Markets Act, Laws of Malta, Chap. 345, Article 14 (2).

¹⁴³Insider Dealing Act, Laws of Malta, Chap. 375.

¹⁴⁴Financial Markets Act (2002 version), Article 36.

checks by technical experts where a suspicion arose before such an investigation was to be passed on to the police for prosecution.

In the final analysis, market abuse is always a difficult crime to prove. In fact, the big stumbling block in prosecuting a person who is suspected of being guilty of market abuse is the paucity of evidence, meaning that although trading by a director after a board meeting but before a company announcement looks very suspicious, it is very difficult to prove beyond reasonable doubt that such director acted on the basis of insider information obtained during the said board meeting. In view of the difficulties encountered in proving market abuse as a criminal offence, it is not surprising that there was at the beginning of this century, growing support to make persons who are reasonably considered to be guilty of market abuse subject to administrative regulatory sanction rather than to criminal law, the former requiring a lower burden of proof, based on a balance of probabilities.¹⁴⁵ This development materialised with the introduction of the MAD in 2003, which will be analysed in the second part of this paper.

3 Conclusion

This paper is the first part of wider research on regulation for capital market integrity and supervisory architecture in Malta. The development of Malta's capital market and the relative institutional architecture, regulation and supervision from the establishment of the MSE in 1990 up to but not including the implementation of MAD in 2005, have been examined. With regard to the institutional architecture for financial supervision, the paper concludes that while the MFSA is the result of over 15 years of continuous development of the framework for supervision in Malta, this is probably not a final product. The time may be right to reconsider the existing framework. The need to make supervision more effective by *inter alia* maximising scarce local expertise and minimising duplication as far as possible, call for one properly structured organisation which covers monetary policy and financial supervision, rather than the current model which divides these responsibilities between the CBM and the MFSA. The integrated model would also serve to address the inherent tensions between capital market supervision and prudential supervision, where the entity being supervised is a bank that is listed on the capital market. The paper suggests that the implementation of an integrated model should be given close consideration by policy makers in Malta. In the field of the regulation for capital market integrity, while regulation to prohibit market abuse has been in place since the 1990's, proving a suspicion of market abuse beyond reasonable doubt has proved to be difficult. In this regard, the introduction of MAD changed the ball game as it introduced the administrative route

¹⁴⁵This means that the Court will assess the oral, documentary and real evidence advanced by each party and decides which case is more probable. The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was more likely than not ... the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

for taking action against market abuse. The second part of this paper, which will be published separately, will deal specifically with the implementation of MAD in Malta and the challenges faced in view of the revised Directive and new Regulation, which have to be implemented by July 2016.

References

1. Buttigieg, C.: An evaluation of the theories and objectives of financial regulation post the 2007–2009 financial crisis: a European perspective. *ESLA Malta Law Rev.*, 147–151 (2012)
2. Buttigieg, C.: Strengthening the governance of national financial supervision in the EU: existing weaknesses and a proposal for reform. *ERA Forum* **15**(2), 197–227 (2014)
3. Caravajal, A., Elliot, J.: The challenge of enforcement in securities markets: mission impossible. IMF working paper (August 2009). Available at <https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf>, accessed 15.03.16
4. Ferrarini, G., Recine, F.: The MiFID and internalisation. In: Ferrarini, G., Wymeersch, E. (eds.) *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond*. Oxford University Press, Oxford (2006)
5. McCann, H.: *Offshore Finance*. Cambridge University Press, Cambridge (2006)
6. Mwenda, K.K.: *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator*. World Bank, Washington (2006)
7. O’Sullivan, K.P.V., Kennedy, T.: What caused the Irish banking crisis? *Journal of Financial Regulation and Compliance* **18**(3), 224–242 (2010)