Before the Arbiter for Financial Services

Case No. 474/2016

ZB

("the Complainant")

vs

MCM Global Opportunities Fund

SICAV p.l.c. (SV277)

("the Scheme" or "the Company")

Today, 25th March 2019

The Arbiter,

Having seen **the Complaint** which relates to the investments made by the Complainant into the Scheme, during March 2014 to January 2015, for the total sum of GBP278,460.

The Complainant indirectly acquired the following Class GA – GBP Accumulation shares[1] of the Global Equity Opportunities Fund ("the Fund" or "Sub-Fund"), a sub-fund of the Scheme:[2] 2,049.2 shares on 14th March 2014 for a consideration of GBP20,492; 7,660.343 shares on 23rd December 2014 for a consideration of GBP79,139; 7,630.336 shares on 24th December 2014 for a consideration of GBP78,829 and 9,498.48 shares on 26th January 2015 for a consideration of GBP100,000.[3]

The shares into the Scheme were acquired through an insurance plan, bearing policy number GP84152, which the Complainant held with Generali PanEurope'.[4] The Fund shares were held as an underlying investment of the

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[1] *A fol.* 69
[2] *A fol.* 18
[3] *A fol.* 9-12
[4] *A fol*. 4 and 20

insurance plan and the Complainant availed of the services of Aston Advisory Services as Financial Advisor.[5]

The Complainant explained that in November 2015, he received a notification from the administrator of his insurance plan, Generali PanEurope, that the Fund was currently in suspension.[6] The Complainant further explained that in a letter dated 20th June 2016, the Scheme announced that the Fund was being closed and investor shares were to be redeemed.[7] The notification sent by the directors of the Scheme dated 20th June 2016, also indicated that the investor shares in the Fund will be redeemed at nil value.

The Complainant pointed out that no audited accounts were published by the Scheme to show where the money had been invested and the residual value of the Fund's investments. The Complainant claimed that the Scheme's investments could not have been lost in less than a year and alleged that this appeared to not only show gross negligence but also suggest criminal activity.

The Complainant also noted that:

"*The Fund was offered on the basis of capital growth and quarterly performance payments up to and potentially exceeding a hurdle rate of 8%*".[8]

The Complainant would like to file a claim as a creditor on the Scheme's assets and wants to recover the investment of GBP278,460.[9] The Complainant is claiming the reimbursement by the Scheme of his original investment.[10]

The Complainant further remarked that it "*falls within the responsibility of current and past directors of the fund to correct this situation and execute the repayment of this investment by redeeming [his] shares at the original investment value*".[11]

In its reply, the Scheme submitted:[12]

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[5] *A fol.* 4 and 41
[6] *A fol.* 17
[7] *A fol.* 18
[8] *A fol.* 69
[9] *A fol.* 6
[10] *A fol*. 69
[11] *Ibid.*
[12] *A fol.* 51 and 72

"The below information is on behalf of Anthony Farrell and Niall Brooks, the two current directors, of the Scheme.

Both Mr Farrell and myself were appointed as directors in December 2015 (the 'New Directors') upon a request by the UBO of the Company and in order to comply with Maltese Company and local legislation. This was also necessitated that by the MFSA, since the Company required two directors. At the date of appointment, the former directors, administrator, auditor, compliance officer and MLRO had all resigned their positions and we were informed that our role was largely one in arranging an orderly wind down of the Company, since all of its underlying assets were considered by the Investment Manager as irrecoverable. Hence, we were advised that the underlying assets had Euro nil value and the only assets held by the Company were bank balances at Sparkasse bank in Malta, which at the time of our appointment were in an in-active and 'locked' position.

Since accepting the appointment in December 2015, the New Directors have managed to make the bank accounts held at Sparkasse Bank active once more, settled all outstanding fees and expenses, that is with the exception of our own, which currently stand at over Euro 10,000 each, and issued various notices to the shareholders of the fund, on advice of the Fund's attorneys LeCocqassociate Ltd. We have worked closely with the Company's attorneys, LeCocqassociates, in trying to ensure an orderly wind down of the Company. All of the procedures and notices that were issued were in accordance with the Articles of Association and Offering Memorandum of the Fund and on advice of LeCocqassociates.

The New Directors have also kept the MFSA fully appraised of developments. The Directors, namely Niall Brooks, has met with Mr Joseph Agius of the MFSA on a number of occasions and he advised the New Directors not to take any further steps or actions until the MFSA had conducted their own review of the matter and had issued the New Directors with further directions. Since then, we have worked with the MFSA and the MFSA have now suspended the Fund.

It is extremely unfortunate for Mr ZB and other investors in the Company who have lost considerable amounts. The MFSA has carried out a review of what happened and I believe their view is similar to that of the Investment Manager,

in so far as the counterparty to the underlying investments, which were all investments in Asian Companies, misappropriated the funds invested.

We are informed by the Investment Manager that all of the underlying investments are irrecoverable and therefore have Euro nil value and hence the net asset value per share of the fund is Euro nil as well. The New Directors were also informed that the Investment Manager did attempt to trace the underlying assets through the various counterparties in Asia, however after spending large amount of time and money, failed in this attempt. When asked whether they would attempt once more, the answer provided was that they would not due to the considerable cost it would take in tracking down the counterparties in Asia.

As mentioned, all of the service providers have resigned their positions and the Fund currently has a minimal bank balance (approximately Euro 1,000) which is not enough to re-appoint either an administrator, auditor, liquidator or registered office nor to retain an attorney. The original intent was to conduct an orderly wind down of the Fund, ultimately via the appointment of a liquidator, however unless the Investment Manager or the UBO of the fund structure are willing to pay themselves for the liquidator's costs, then none will be appointed. This, as far as we are informed is very unlikely indeed and, even if funds were made available, it would not result in any return of investment to the Fund's shareholders.

To summarise Mr ZB's position, Mr ZB invested in the Fund via a nominee Company i.e. Mr ZB is not the Shareholder of record but the UBO. The Company and/or Mr ZB is not a creditor of the Fund and therefore has no claim over the Company for any reimbursement. The nominee Company / Mr ZB is an investor in the Fund and invested on the basis of the Funds Offering Memorandum (OM). The Funds OM states that investment in the Fund is open only to Professional Investors i.e. those who know the risks of investing in such a strategy such as this. The OM states that an investment in Funds whose underlying investments are in emerging markets e.g. Asian companies, carries certain risks. A Professional Fund such as this also carries the risk of losses, which could also be substantial. Mr ZB's reference to an 8% hurdle rate is misleading since a hurdle rate refers to the % rate over which the Investment Manager may start to charge a performance fee and not an anticipated rate of return on investment in the Fund.

The New Directors have done all they can do at this stage to both keep investors informed and also take care of the Company and ensuring all known creditors have been settled. However, as noted above our hands are tied. All actions leading up to the loss in value of the underlying investments including the decision to invest in Asian Companies in the first place, were taken long before the New Directors were appointed. The former Directors, Administrator, Auditor and Compliance Officer, Investment Manager and Investment Advisory Committee will all have a greater knowledge and understanding of the decision and rationale for undertaking investments in such securities (i.e. Asian Companies).”

Having heard the parties and seen all the documents and submissions

Considers:

The Product in respect of which the Complaint is being made

The Scheme is an open-ended investment company incorporated in Malta with registration number SV 277, and licensed by the Malta Financial Services Authority (“MFSA”) as a Professional Investor Fund (“PIF”)[13] targeting Qualifying Investors.[14] Following its inception on 27th June 2013, the Scheme set-up three sub-funds all of which were established on the 9th July 2013.[15]

The licences of two of the Scheme’s three sub-funds were surrendered voluntarily on 22nd March 2016,[16] whilst the licence of the last remaining sub-fund, the Global Equity Opportunities Fund, in which the Complainant is invested, is held in suspension by the MFSA.

Fact Sheet

According to the Fund Fact Sheet dated December 2014 submitted by the Complainant, the Global Equity Opportunities Fund was launched in June 2014 and had a minimum initial investment of GBP75,000.[17]

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[13] https://www.mfsa.com.mt/financial-services-register/result/

[14] Report of the Directors, Page 4 of the Annual Report and Audited Financial Statements for the period ended 31st December 2013.

[15] *Ibid.*

[16] https://www.mfsa.com.mt/financial-services-register/result/ - results obtained through this link following insertion of the Scheme’s name as Licence Holder.

[17] *A fol*. 70.

The investment objective of the Fund was to:

"*seek diversified, medium to long term capital growth in developing economies by capitalising on a wide range of investment opportunities. The Fund will combine developed market liquidity with investment opportunities in both private and publicly listed companies situated in emerging markets and provide much needed capital, including but not limited to BRICS, North Africa, South East Asia and Mexico. Investments will be focused on providing capital injections to companies with proven asset backed strategies, for example property, agricultural and bulk commodities trading, energy, oil and gas, aircraft leasing*".[18]

The investment overview as outlined in the Fund Fact Sheet further specifies, amongst other, that the Fund will gain exposure "*via both listed and unlisted companies to transaction flows, that will allow the Fund to achieve total annual and uncorrelated capital growth with targeted returns in excess of 10%, with lower volatility. This is similar to a diversified 'private equity' style mandate*".[19]

Financial Position of the Scheme and commencement of Operations of the Fund

The Annual Report and Audited Financial Statements for the period ended 31st December 2013,[20] is the first and, also, the latest available set of accounts filed at the Registry of Companies in Malta. The online system of the Registry of Companies indicates that the Annual Report and Audited Financial Statements for the period ended 31st December 2013, were filed with the Registrar on the 21st October 2014. As at February 2019, these remain the latest set of accounts posted on the online system of the Registry of Companies.[21]

The Report of the Directors for the period ended 31st December 2013, specifies *inter alia* that:

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[18] *A fol.* 70
[19] *Ibid.*
[20] https://registry.mfsa.com.mt/ROC/index.jsp#/ROC/companyDetailsRO.do?action=companyDetails&companyId=SV 277
[21] https://registry.mfsa.com.mt/ROC/index.jsp#/ROC/documentsList.do?action=companyDetails&companyId=SV 277

"*During the period ended 31 December 2013, the Company and its Sub-Funds have not carried out any activities*".[22]

The Notes to the Financial Statements for the financial period ended 31st December 2013, specify *inter alia* the following:

"*1. Basis of preparation*

…

During the period ended 31 December 2013, the Fund incurred a loss of EUR2,006 and its equity deficiency stood at EUR1,006. This is primarily due to the fact that the Company had not yet started operating and had incurred professional fees since inception. The Company's ability to continue as a going concern is dependent upon its ability to generate sufficient cash flows from its future operations. Subsequent to the end of the reporting period, the Company's sub-fund, Global Equity Opportunities Fund, was seeded with subscriptions amounting to GBP283,361. Accordingly, these financials statements have been prepared on a going concern basis.

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14. Events after the financial position date

On 26th May 2014, the Company's sub-fund, Global Equity Opportunities Fund, was seeded with subscriptions amounting to GBP283,361." [23]

Developments relating to the Scheme's Sub-Fund

According to the information posted on the MFSA's website, the MFSA suspended the licence of the Scheme and its Sub-Fund, the Global Equity Opportunities Fund, on the 24th May 2017.[24]

[22] Page 4 of the Annual Report and Audited Financial Statements for the period ended 31st December 2013.
[23] Notes to the Financial Statements - Page 12 and 18 of the Scheme's Annual Report and Audited Financial Statements for the period ended 31st December 2013.
[24] *Ibid.*

The MFSA's notice in relation to the Scheme and its Sub-Fund states the following:

"On 24 May 2017, the Malta Financial Services Authority ("the Authority") suspended the Collective Investment Scheme Licence granted to MCM Global Opportunities Fund SICAV plc ("the Scheme") in respect of its Sub-Fund, namely Global Equity Opportunities Fund. The suspension will be applicable with immediate effect and will remain in force until such time as may be otherwise directed or decided by the Authority.

The Scheme was found to be in breach of:

a) Standard Licence Condition ("SLC") 1.39 of Part BII of the Investment Services Rules for Professional Investor Funds ("the Rules"), whereby the Scheme should take all reasonable steps to comply with the investment objectives, policies and restrictions outlined in its Offering Documentation;

b) SLC 1.23 and SLC 1.29 of Part BII of the Rules, which require the Scheme to have a Compliance Officer and a Money Laundering Reporting Officer at all times;

c) SLC 1.8 of Part BII of the Rules, which requires the Scheme to have an appointed Administrator unless the Investment Manager assumes responsibility for the said function. Upon the resignation of the appointed Administrator, no arrangements were made for another Administrator to be appointed or for the Investment Manager to take over the administration function;

d) Upon the resignation of the appointed Auditor, there was no action taken for the appointment of a new Auditor, meaning that the Scheme was in breach of SLC 1.32 laid down in Part BII of the Rules;

e) During the onsite visit conducted by the Authority, there was not a complete repository of share certificates and other documents evidencing title to the underlying investments held by the Scheme, constituting a breach of SLC 1.13 in Part BII of the Rules; and

f) *SLC 1.62 of Part BII of the Rules as the Scheme failed to submit the audited financial statements for the years ending 31 December 2014 and December 2015.*

This regulatory action has been enforced in terms of Article 7(3)(b) of the Investment Services Act whilst this notice is being published in terms of the powers vested in the Authority under Article 16(8) of the Malta Financial Services Authority Act."[25]

Investment Manager

Malta Capital Management Limited ("MCM") is indicated as the Investment Manager of the Fund.[26] MCM is a company registered in Malta on 11th November 2010, with company registration number C 51149 and licensed by the MFSA.[27] As per the records held at the Registry of Companies, MCM is also the founder shareholder of the Scheme.[28]

The investment services licence of MCM was put into suspension by the MFSA on 12th December 2017. The notice posted on the MFSA's website in relation to the Investment Manager states the following:

"On 12 December 2017, the Malta Financial Services Authority ("the Authority") suspended the Category 2 Investment Services Licence granted to Malta Capital Management Limited ("the Company"), the Investment Manager of MCM Global Opportunities Fund SICAV plc. The suspension will be applicable with immediate effect and will remain in force until such time as may be otherwise directed or decided by the Authority.

The Company was found to be in breach of:

a) *Standard Licence Condition ("SLC") 8(a) in Section 1 of Part BIII of the Investment Services Rules for Investment Services Providers ("the Rules"), whereby the Company should notify the MFSA in writing and at least one month in advance, of a change in its business name;*

[25] *Ibid.*
[26] *A fol*. 70
[27] https://www.mfsa.com.mt/financial-services-register/result/
[28] https://registry.mfsa.com.mt/ROC/index.jsp#/ROC/companyDetailsRO.do?action=involvementList&companyId=SV 277

b) *SLC 29 in Section 1 of Part BIII of the Rules, which requires the Company to act professionally in accordance with the best interests of its clients;*

c) *SLC 35 in Section 1 of Part BIII of the Rules, which requires the Company to maintain financial resources sufficient for the proper performance of its functions. The Company should have sufficient financial resources at its disposal to enable it to conduct its business effectively and to meet its liabilities. SLC 35 then defines the applicable capital requirements regime;*

d) *SLC 22 in Section 1 of Part BIII of the Rules, which requires the Company to have an appointed Compliance Officer;*

e) *SLC 38 in Section 1 of Part BIII of the Rules which requires the Company to have an appointed Auditor; and*

f) *SLC 40 in Section 1 of Part BIII of the Rules as the Company failed to submit the audited financial statements for the years ending 31 December 2015 and 31 December 2016 and the accompanying documentation required.*

This regulatory action has been enforced in terms of Article 7(2)(b) of the Investment Services Act whilst this notice is being published in terms of the powers vested in the Authority under Article 16(8) of the Malta Financial Services Authority Act."[29]

Communications from the Scheme/Other Aspects

Only one official notification sent by the Scheme to all the investors in the Fund was presented during the proceedings of this case. This is the notice dated 20th June 2016.[30] The said communication was signed by the two new and sole Directors of the Scheme whose appointment as Directors was effective from 4th December 2015.[31]

In the said communication, the investors into the Fund were notified *inter alia* that:

[29] *Ibid.*
[30] *A fol.* 18
[31] As per the Form K dated 4th December 2015 filed with the Registry of Companies.

"…the Company is being wound down and the investor shares have to be redeemed…

The investor shares in Class CA- CHF Accumulation Shares, Class GA – GBP Accumulation Shares, Class EA – EUR Accumulation Shares and in Class UA – USD Accumulation Shares, in the Sub-Fund will be redeemed at nil value.

Consequently, the Company will seek to surrender the license for the Sub-Fund and subsequently, liquidate the Company."[32]

The communication of 20th June 2016 does not include details as to what has prompted the winding down of the Scheme nor the reasons for the redemption of the Fund's shares at nil value.

In his subsequent email communication dated 22nd August 2016, addressed to the Directors of the Scheme, the Complainant highlighted his concerns and also requested certain explanations pointing out *inter alia* that:

"*I cannot accept that a fund designated to invest SICAV can apparently lose all its investments when the indices over the period since I initially invested may show a loss but not a TOTAL LOSS*".[33]

In his email reply of the 22nd August 2016, one of the new Directors replied that:

"*We can totally understand your frustrations and anger and as Directors who came on board, when the former directors, administrators, Compliance Officer etc, all resigned, to try and sort out this situation, we too are very frustrated since we have been left in a situation where the fund has no available funds to continue to instruct a law firm, appoint an accountant and appoint a liquidator…*".[34]

In subsequent communications exchanged during September and November 2016, the Complainant asked the Scheme whether a liquidator has been appointed and details as to when this is to be appointed. The Director of the

[32] *Ibid.*
[33] *A fol.* 26
[34] *Ibid.*

Scheme reverted by indicating that this has not yet been appointed and highlighted that they were awaiting instructions from MFSA.[35]

Final Observations and Conclusions

The Complainant is an indirect shareholder of the Scheme, as he had acquired shares into the Fund through his insurance plan. He cannot accordingly be deemed as a creditor of the Scheme. The rights and claims of the Complainant are accordingly those emanating as a shareholder of the Company. Such rights would be outlined in the Memorandum and Articles of Association of the Scheme and the Offering Memorandum and Supplement issued in respect of the Scheme and its Sub-Fund.

Reference may also be made to the applicable legislation for open-ended investment companies with variable share capital (SICAV), such as the Companies Act (Chapter 386) and the Investment Services Act, 1994 (Chapter 370) of the Laws of Malta, including relevant subsidiary legislation, regulations and rules issued thereunder.

As a shareholder of a collective investment scheme, the Complainant is *inter alia* entitled to seek the redemption value of the Fund's shares that he is the holder thereof within the provisions of the Memorandum and Articles of Association of the Scheme and the Offering Documents of the Scheme and its Fund.

The redemption value would be calculated and determined in terms of the said constitutional and offering documents which would also outline the procedures to be followed for the redemption of shares. The shares cannot accordingly be redeemed at a redemption value other than their respective value at redemption point.

Article 2.9.4 of the Articles of Association of the Scheme indeed specifies that:

"*The redemption price per Share shall be the then prevailing Net Asset Value, rounded to three (3) decimal places, on the Dealing Day on which the redemption request is effective unless otherwise stated in the Offering Supplement, provided that the Directors may decide, subject to the conditions specified in the Offering*

[35] *A fol*. 38-40

Memorandum and/or Offering Supplement being satisfied, that the redemption proceeds be made wholly or partially in specie".

Hence, the Complainant's request for the redemption of shares at a price determined by him, where he indicated at the original investment value,[36] is considered not to be permissible as any redemption of shares needs to abide and follow the relevant provisions applicable in the Memorandum and Articles of Association of the Company and Offering Documents and in line with applicable legislative framework.

The Complainant's claim for refund as a creditor of the Company and for his respective shares in the Fund to be redeemed at the original investment value are, for the reasons indicated, not acceptable and are, therefore, being rejected by the Arbiter.

It is, however, considered that the Complainant is justified to make a claim for reimbursement on his investments into the Scheme where the losses suffered by him on such investments came as a result of actions and, or inactions which were in breach of the provisions of the constitutional documents and, or the offering documents of the Company and its Sub-Fund and applicable legislation.

The Complainant claimed that there was gross negligence and also suggested criminal activity. If the Complainant has evidence of criminal activity he should refer the case to the police because from the proofs submitted by him during this case, the Arbiter does not have such evidence.

Gross Negligence

The Complainant claims gross negligence. The Court of Appeal[37] described in clear terms what amounts to gross negligence as follows:

"*M'hemmx dubju illi fis-sistema tal-ligi taghna jezisti dan il-koncett ta' gross negligence ossija culpa leta. Jibda biex jigi osservat illi in linea generali 'n-negligenza tikkostitwixxi koncett negattiv u tikkonsisti fl-ommissjoni ta' dak il-grad ta' diligenza li tehtieg skont ic-cirkostanzi' (Kollez. Vol. XXXIII P IV p 690).*

[36] *A fol.* 69

[37] *TF Clothing Limited (C43280) vs Attrans Limited* (C8520), QA, 24/06/2015, quoting *Atlas Insurance Agency Limited noe vs Express Trailers Limited*, QA, 18 /05/2005

Jezisti però varjanti ta' din in-negligenza. Hekk normalment taht il-ligi Aquiliana 'et laevissima culpa venit' (Kollez. Vol. XLII P I p 358). Imma hu ritenut ukoll illi 'ladarba n-negligenza tkun 'gross and culpable' hija taghti lok mhux biss ghal responsabilità civili imma anke kriminali' (Kollez. Vol. XLV P IV p 984). B' aktar precizjoni, 'it-traskuragni hemm bzonn li tkun "culpable negligence" tali li tammonta ghal criminal misconduct' (Kollez. Vol. XXXIII P IV p 977); In linea ta' principju, kif emers mid-dottrina legali u mill-gurisprudenza l-culpa lata fil-kamp civili hi x'aktarx assocjata man-negligenza tal-professjonist. Dan fis-sens illi jrid jirrizulta li l-izball irid ikun grossolan (Ara Kollez. Vol. XXXII P I p 163; Vol. XXXI P I p 55; Vol. XLII P I p 358). Naturalment, mhux bilfors li tali negligenza hi allacjata mal-professjonista eskluzivament in kwantu skont l-Artikolu 1038 Kodici Civili anke dawk li jindahlu ghal xoghol jew servizz minghajr ma jkollhom il-hila mehtiega jirrispondu ghad-danni.

Din hi dik ir-'recklessness' li b'epitati differenti ssejhet 'gross negligence' (Kollez. Vol. XLIII P IV p 1023); Il-Qorti ssoffermat fit-tul fuq dan l-aspett biex turi li anke fis-sistema legali dan il-kuncett tal-'gross negligence' jew 'faute lourde' mhux aljen ghalina, u allura fejn jokkorri dan, konsimilment ghas-sistema tal-ligi Franciza, fil-kazijiet in ispecje, jista' jigi adoperat b'ekwivalenza ghal 'dol' jew 'wilful misconduct'".

Briefly, the Court of Appeal has stated that gross negligence occurs where there is proof that the negligence is **culpable** and amounting to "*wilful misconduct*" also leading to "*criminal misconduct*". Such proof has to be brought forward by the party alleging it.

From the facts submitted by the Complainant, the claim of gross negligence has not been proven.

The Complainant primarily highlighted the complete loss of his investment within a short period of time of less than a year,[38] the lack of audited accounts submitted by the Scheme[39] and the claim that the Fund is now being wound up and has no value[40] as reasons justifying his claims. No further elaborations were made or evidence provided to proof the claim of gross negligence.

[38] *A fol.* 6
[39] *A fol*. 69
[40] *A fol.* 23

However, it is not necessary to prove *gross* negligence. The proof of *negligence* or the proof of lack of diligence is enough to prove the service provider's responsibility towards the customer.

Since the provision of financial advice and investment rests on the fiduciary obligation that exists between the customer and the service provider, the service provider has the duty to act diligently like a *bonus paterfamilias*.

In order to decide the case on what, in the opinion of the Arbiter, is fair, equitable and reasonable in the particular circumstances of the case, the Arbiter has also taken into consideration the information which is publicly available in relation to the Scheme and referred to the public notices published by the MFSA with respect to the suspension of the Scheme's and Sub-Fund's collective investment scheme licence as well as the suspension of the investment services licence of the Investment Manager as outlined above.

It is considered that the said notices include sufficient details as to indicate, at the very least, negligence on the part of the Scheme and its Investment Manager in the carrying out of their functions.

The Arbiter notes, in particular, that the Scheme was found by the MFSA to have been in breach of various standard licence conditions to which it was subject, including the Scheme's failure to "*take all reasonable steps to comply with the investment objectives, policies and restrictions outlined in its Offering Documentation";*[41] the failure to have the required appointees and service providers in place such as a Fund Administrator, Auditor and Compliance Officer and Money Laundering Reporting Officer; the failure to submit the annual audited accounts following the first reporting period of 31st December 2013; and the failure to have in place "*a complete repository of share certificates and other documents evidencing title to the underlying investments held by the Scheme*".[42]

[41] https://www.mfsa.com.mt/financial-services-register/result/ - results obtained through this link following insertion of the Scheme's name as Licence Holder.

[42] *Ibid.*

Similarly, the Investment Manager was also found by the MFSA to be in breach of various standard licence conditions which included *inter alia* the failure to "*act professionally in accordance with the best interests of its clients*".[43]

These are considered to be significant breaches of duty and misconduct on the part of the Scheme and its Manager which would also give rise to breaches of the provisions of the Memorandum and Articles of Association of the Scheme and the Offering Memorandum and Supplement issued in respect of the Scheme and its Sub-Fund.

Hence, the Complainant is justified in making the complaint against the Scheme also given that the said breaches can reasonably be linked as having had a material bearing with respect to the losses suffered by the Complainant.

In addition, it is considered incomprehensible for a Scheme to be left without sufficient funds to enable it to maintain or appoint relevant service providers to protect the interests of its investors.

Moreover, the investor into the Fund should have been provided with adequate and timely information and proper explanations regarding the material developments relating to the Scheme and its Sub-Fund, including the reasons for the winding down of the Scheme and full details as to the reasons and the basis for concluding that the shares in the Fund are deemed to have a "*nil value*" as well as the actions taken for the recoupment of the underlying assets.[44]

Decision

It is accordingly considered fair, equitable and reasonable to uphold the Complaint in view of the material shortfalls aforementioned in this decision.

The Arbiter concludes that the Complainant should be compensated for his losses.

In accordance with Article 26 (3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders MCM Global Opportunities Fund SICAV p.l.c. to pay the amount

[43] https://www.mfsa.com.mt/financial-services-register/result/ - results obtained through this link following insertion of the Investment Manager's name as Licence Holder.

[44] *A fol.* 18

of GBP278,460, for the loss of capital suffered by him as amply stated in this decision.

With legal interests from the date of this decision till the date of effective payment.

The legal costs of these proceedings are to be borne by the service provider.

Dr Reno Borg
Arbiter for Financial Services