

BRIEFING NOTE

Ganado & Associates, Advocates
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Welcome to our new issue of Briefing Note

MFSA PROPOSES NEW REGULATORY FRAMEWORK FOR CSPs

The Malta Financial Services Authority (MFSA) recently issued a Consultation Paper regarding the proposed regulation of corporate service providers (CSPs) in Malta implementing Directive 2005/60/EC of the European Parliament and of the Council of 26th October 2005 *on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing* to the extent of its applicability to CSPs. Member States are obliged to ensure that “...*company service providers shall be licensed or registered ... in order to operate their business legally.*”

New Regulatory Régime

Formerly unregulated, this particular area of the local financial services industry will see licensing extended as a requirement to individuals habitually serving as directors or company secretaries. Other corporate entities engaged in providing these and related services, such as registered office or business address facilities, would also be need to register with the MFSA which will be the regulating authority. However, trustees or fiduciaries under the Trusts and Trustees Act, Chapter 331 are exempt.

CSPs are currently being defined as any natural or legal person providing “*by way of business*” any of the following services to third parties:

- “(a) *formation of companies or other legal entities;*
- “(b) *the operation or management of companies including acting as or arranging for another person to act as director or secretary of a company, a partner in a partnership or in a similar position in relation to other legal entities;*
- “(c) *provision of a registered office, a business correspondence or administrative address and other related services for a company, a partnership or any other legal entity.*”

Registration

Any person acting as a CSP on a habitual and regular basis who is resident or operating in or from Malta will be bound to apply for registration with the MFSA. Registration may be general or restricted to particular specified activities.

A person will not qualify for registration as a CSP if he has been convicted of any offence under various financial services laws in Malta or if subject to disqualification from the appointment to the offices of director or company secretary under certain provisions of the Companies Act, Chapter 386.

CSPs conducting business on the date of the coming into force of the Regulations will need to apply for registration within 3 months from such date. The MFSA must process these applications within 6 months from receipt, including all supporting documentation it may require.

Exemptions

The Regulations will not apply to persons authorised to act as trustees or to provide fiduciary duties under the Trusts and Trustees Act, Chapter 331 or to persons in possession of a warrant for the profession of advocate, notary public, legal procurator or certified public accountant, provided that acting as a CSP is limited to what is necessary and incidental in the course of carrying out his profession and does not otherwise hold himself out as a CSP to the public. The Regulations do not contemplate with sufficient clarity whether law firms are under a similar licensing requirement.

Conditions of Registration

Only “*fit and proper persons*” will be registered by the MFSA. There are various other conditions which must be satisfied by individuals or bodies corporate before registration is granted, and in the case of the latter, a requirement for a minimum of 2 directors (who are themselves fit and proper) has been set, actual corporate activities must be compatible with corporate objects while persons owning or controlling more than 25% of the shares or voting rights must also be fit and proper. Foreign corporate CSPs can also be licensed insofar as the company is incorporated in a reputable jurisdiction.

In registering CSPs, the MFSA will be empowered to impose such conditions as it may deem appropriate. After having granted registration, it may, from time to time, vary or revoke any condition so imposed or otherwise impose new conditions. It may cancel a registration and render it public. Moreover, it may also refuse an application for registration. Within 6 months from the receipt of a complete application, the MFSA will notify any applicant of its decision to grant or refuse registration. Where the MFSA intends to vary any condition to which the registration is subject or to impose a new condition or to refuse an application for the registration or to cancel a registration, it will give the CSP or the applicant (as the case may be) a notice in writing setting out the reasons for such decision. The recipient may make representations in writing to the MFSA giving reasons for its disagreement.

An appeal from certain specified events or circumstances, such as failure to inform the CSP or the applicant (as the case may be) of the cancellation of a registration or of the refusal of an application or the imposition of an administrative penalty will lie to the Financial Services Tribunal. It is our view that a right of appeal is an insufficient remedy and any cancellation or refusal to register should be for good cause.

Any CSP whose registration has been cancelled must ensure, within 30 days from the date of the cancellation, that, where applicable, the services he had been providing to companies or other legal persons are provided by a duly registered CSP. We feel that this is a contentious provision which is also quite unworkable in practice. There could also be anomalous positions where a director or company secretary of record remains in office with all the legal rights and duties stemming from that office despite the fact that he may no longer be licensed as a CSP.

The MFSA will establish a register (indicating names and contact details) of all registered CSPs. The register, regularly updated, will be publicly available on the MFSA’s website. Consequently, a CSP must notify the MFSA of any change having a bearing upon his status. More importantly, any change in a CSP’s Memorandum and Articles of Association (or constitutive instrument) will not be effective until approved by the MFSA.

The MFSA will be empowered to cancel a registration where doing so is desirable for the reputation of Malta or the the protection of the general public.

MFSA Rules

The MFSA has stated that it will be issuing a set of binding Rules applicable to CSPs in order to fully implement the Regulations and publishing drafts for consultation purposes prior to their being put into effect.

Fees and Penalties

Applicable Fees	Administrative Penalties and Offences
Application Fee : €200 (Non-refundable) Registration Fee: €2,000 Annual Supervisory Fee: €2,000	Where the MFSA is satisfied that a CSP's conduct amounts to a breach of the Regulations or the Rules, it may without recourse to a court hearing impose on the CSP and/or any other person as the case may be, an administrative penalty which may not exceed €25,000 for each infringement or failure to comply, without prejudice to any other consequence of the act or omission under civil or criminal law. The Regulations stipulate a number of offences and the relative punishment. Of particular relevance is that any person who acts or purports to act as a CSP in Malta without being duly registered to do so, is guilty of an offence.

SUBMISSIONS BY INTERESTED PARTIES

While we have already presented our submissions on matters which are unclear or with which we do not necessarily agree, the MFSA will be receiving written submissions from interested parties up to the **17th December, 2012**.

The link to a draft of the Regulations and to the written text explaining the purpose and objects of the Regulation can be sourced from:

<http://www.mfsa.com.mt/pages/announcement.aspx?id=5192>

Should you have any comments to make on the Regulations, we are available to assist you in their formulation or transmission to the MFSA. Do contact us to do that or if you require more information or have any questions you are seeking answers to.

We intend to prepare another Briefing Note once the Regulations come into force.

CONTRIBUTORS

The following persons contributed to this issue of our Briefing Note:

Dr. Stephanie Jean Coppini
Dr. Adrian M. Gabarretta
Francesco Apap Bologna

IMPORTANT NOTICE

While every effort has been made to ensure the accuracy of the information contained in this Briefing Note, it is neither intended to impart advice nor to be treated as such; readers are advised to seek confirmation of statements made herein before acting or otherwise relying upon them; specialist advice should always be sought on specific issues.