

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

FEEDBACK STATEMENT

TO

MFSA CONSULTATION DOCUMENT ON

THE PROPOSED REGULATION ON USE

OF TRUSTS FOR PERSONS WITH

DISABILITY

REF. 10-2014

1. INTRODUCTION

On 12th December 2014, the MFSA issued a consultation document [Ref: 10-2014], wherein the Authority put forward a proposal for the introduction of regulations specifically aimed at regulating trustees of trusts for persons with disability. At least one of the beneficiaries of such a trust must be a person with disability. The proposed regulations ensure that trustees of such trusts are subject to additional duties which recognise the vulnerability of the persons who will eventually benefit under these trusts.

The deadline for the submission of comments with respect to the Consultation document was 5th January 2015. The Authority received two sets of comments from members of Malta’s financial services industry.

A summary of the main comments received in relation to the proposed new regulations, and the Authority’s position in relation thereto, is provided in Section 2 of this document. The Authority’s position has been determined after a careful and thorough consideration of the feedback received.

2. SUMMARY OF THE FEEDBACK RECEIVED

2.1. COMMENTS ON THE PROPOSED REGULATIONS

2.1.1 *Title of Regulations and Scope*

The Authority had proposed that these Regulations be entitled the Trusts and Trustees Act (Use of Trusts for Persons with Disability) Regulations.

Respondents’ comments: It was suggested that the title of these Regulations as indicated in the heading, and consequently also regulation 1(1) be amended to “Trusts and Trustees Act (Protected Disability Trusts) Regulations”. It was also suggested that the scope of these regulations in regulation 1(2) be amended to clarify that these regulations are aimed at regulating the establishment and administration of trusts formed for the benefit of beneficiaries at least one of whom is a person with disability, where the said person is entitled to benefit under the trust in a manner which is either exclusive or preferred in relation to other beneficiaries. It was also suggested that a new sub-regulation be introduced to clarify that in case of conflict between the provisions of these Regulations and the provisions of the Act, the former would prevail.

Authority’s comments: The Authority has decided to adopt the amendments proposed both in relation to the title of these Regulations as well as the scope thereof. Furthermore, a new sub-regulation was also introduced to provide that the provisions of the Act and these Regulations would apply notwithstanding anything to the contrary contained in the trust instrument or in any other agreement between the settlor and the trustee.

2.1.2 Regulation 2 - Definitions

The Authority included a number of definitions in the proposed Regulations to facilitate the interpretation of the relevant provisions. The following are the comments received in relation to some of the definitions:

- [I] **Definition of ‘disability’:** It was suggested that in view of the fact that the proposed Regulations include a definition of “person with disability” and “trust for persons with disability”, the definition of “disability” appears to be superfluous.

Authority’s comments: The Authority has decided that the definitions of “person with disability” and “trust for persons with disability” are sufficient for the understanding of these Regulations.

- [II] **Definition of ‘family member’:** Respondents pointed out that, in view of the proposed definition of ‘trust for persons with disability’, the inclusion of ‘*a legal guardian or curator of such individual*’ in subparagraph (e) of this definition means that a legal guardian or curator may also set up a trust for the person under guardianship or curatorship. This could lead to a situation of duplication of fiduciary duties by the legal guardian/curator and the trustee, which could thus result in conflict.

Authority’s comments: The Authority agrees with this observation and subparagraph (e) has been duly removed. Furthermore, the Authority has also decided to include an ‘uncle or aunt’ within the definition of family member.

- [III] **Definition of “trust for persons with disability”:** It was suggested that this definition be substituted by the term “Protected Disability Trust” which would be defined as ‘*a trust which is established in accordance with regulation 3 and which is notified to the Authority in terms of these Regulations.*’ It was pointed out that this would provide a clear term to facilitate identification of this type of trust for the purposes of these Regulations.

Authority’s comments: The Authorities agrees with this proposal and has substituted this definition with a new term and definition for ‘Protected Disability Trust. This amendment also entailed an amendment to regulation 3 as shall be explained below.

2.1.3 Regulation 3 – Protected Disability Trusts

Regulation 3 as originally drafted merely provided that the purpose for establishing a trust under these regulations must be specified clearly and in writing in the trust deed.

Respondents’ comments: In view of the newly introduced definition of Protected Disability Trust, respondents pointed out that regulation 3 also required amendment to establish precisely when a trust qualifies as a Protected Disability Trust.

Authority's comments: The Authority agrees with the proposed change and has amended the relevant regulation to set out specific conditions for a trust to qualify as a Protected Disability Trust. This regulation was also amended to clarify that in the event of the demise of the beneficiary who is a person with disability, the trust shall be terminated.

2.1.4 Regulation 4 – The Trustee

The Authority has decided that regulation 4 as originally drafted (Threshold of trust assets) would be amalgamated with regulation 6 relating to fees, as shall be explained below.

Therefore the provisions relating to the trustee of a Protected Disability Trust have been moved up to regulation 4.

Respondents' comments: The Authority received a number of comments relating to the provisions applicable to trustees of a Protected Disability Trust, namely the following:

[I] Fees of professional trustees: It was pointed out that it is not deemed necessary for such fees to be stipulated in the trust instrument itself as professional trustees normally operate in accordance with 'Professional terms and conditions' which are usually separate to the trust instrument itself. In this respect it would be sufficient that the regulations provide that the fees should be clearly set out in the trust instrument or in any other written instrument;

[II] Private trustee: It is sufficient to refer to a 'private trustee in terms of article 43A of the Act', rather than further qualifying a private trustee under these Regulations and requiring such person to be a family member or person trusted by the settlor. This would also enable other members of the family, not falling within the definition of 'family member' in terms of these Regulations, to act as private trustees;

[III] Beneficial or other interest of the private trustee: The proposed regulation provides that a trustee shall not also be a beneficiary under the same trust. Furthermore sub-regulation (2) specifies that the private trustee shall have no beneficial or any other interest in the trust assets. It was pointed out that if the private trustee is a family member of the beneficiary with a disability, such private trustee may be a parent or sibling of such beneficiary and would not be able to benefit under such trusts due to the conflict of interest which may arise;

[IV] Professional trustee as co-trustee: It was suggested that sub-regulation(2)(iii) would be amended to clarify that wherever a professional trustee is appointed as co-trustee, such co-trustees shall act jointly in the performance of their duties and the exercise of their powers and discretions.

Authority's comments: The Authority agrees with points [II] and [IV] and regulation 4 has been amended accordingly. However the Authority has decided to retain the requirement that fees of professional trustees must be agreed upon between the settlor and trustee and clearly set out in the trust instrument to ensure simplicity and not give rise to any doubts or abuse by the trustee. Furthermore, the Authority maintains its position that a trustee, including a private trustee, shall not have any beneficial or other interest in the trust assets.

2.1.5 Regulation 5 - Fees

As explained in section 2.1.4 above, this regulation has been amalgamated with the originally drafted regulation 4 relating to the threshold of trust assets in a Protected Disability Trust.

Respondents' comments: In relation to the threshold of trust assets, it was pointed out that, as currently drafted, this provision seems to imply that *all* assets held on trust shall not exceed €450,000, which includes *any* growth in value of the trust assets. It was therefore suggested that only the initial and additional settlements be taken into consideration for the purposes of such threshold. Respondents also suggested that the placement of such a cap on the value of assets settled in a Protected Disability Trust in order for these regulations to apply, would defeat the purpose of incentivising the use of such trusts.

Authority's comments: The Authority notes the comments made by respondents and has decided to adopt a different approach whereby it has linked the limit on the remuneration which may be imposed by professional trustees (€400 per year) with the capping on the value of assets which may be held in a Protected Disability Trust. This means that a professional trustee may not impose a fee which exceeds €400 per year where the value of assets settled on trust do not exceed €450,000. In any other case, the professional trustee is not bound by any limit, provided that such fee is agreed to with the settlor, clearly set out in the trust instrument and satisfies all the other conditions set out in this regulation. Furthermore, the Authority has also taken into consideration the drafting suggestion relating to limiting the capping on the assets held under trust to initial and additional settlements.

2.1.6 Regulation 6 - Beneficiaries

This was originally drafted as regulation 7 in the proposed regulations, however due to the changes referred to above it has now been renumbered regulation 6.

Respondents' comments: One respondent stated that the proposed drafting of this regulation is too restrictive and assumes that the settlor will be the parent of the person with disability. On the other hand, one respondent also suggested that the only persons who may benefit under such trusts, other than the person with disability, should be the settlor.

Amongst the comments received, it was also suggested that sub-regulation (2) be amended to refer to the person with disability being a “preferred” beneficiary rather than the “sole” beneficiary, in order to cater for the possibility of the settlor benefiting together with the person with disability.

It was also suggested that, with respect to the provision relating to the disposal of immovable property constituting the primary place of residence of the person with disability forming part of the trust assets, this should be amended to provide that such disposal may be made with the written consent of the protector.

Authority's comments: The Authority noted the comments received and decided to amend this regulation to provide that the terms of trust must provide that either the person with disability benefits exclusively from the trust assets, or that the parents of such person be the preferred beneficiaries during their lifetime, and following their demise the person with disability would be the sole beneficiary under the trust. Furthermore, sub-regulation (2) was also amended to provide that the disposal of immovable property constituting the primary place of residence of the person with disability (and forming part of the trust assets) is only allowed if the prior written consent of the protector is obtained together with confirmation from the Court that such disposal is in the interest of such person with disability.

2.1.7 Regulation 7 –The Protector

This was originally drafted as regulation 8 in the proposed regulations, however due to the changes referred to above it has now been renumbered regulation 7.

Respondent's comments: Various comments were received with respect to the provisions relating to the protector of a Protected Disability Trust, namely the following:

- [I] It was suggested that the protector takes office, and his powers come into effect when the person with disability becomes the sole beneficiary or when he is benefiting exclusively from the trust. It was also suggested that the office of protector should only be mandatory in the event that a professional trustee is appointed as sole trustee.
- [II] Reference was also made to the requirement the protector be in a position to exercise independence of judgement, which respondents stated is a very difficult quality to prove, and therefore suggested that this requirement be removed.
- [III] It was also suggested that the requirement that the protector should not have any actual or potential interest in the trust assets, should also be removed as this precludes beneficiaries from being appointed as protectors.

Authority's comments: The Authority notes the suggestions received, and has the following comments to make:

- [I] The Authority disagrees with this suggestion as it believes that it is not desirable to preclude the possibility of having the powers of the protector coming into effect immediately if it is the settlor's wish to do so. The Authority has also decided to retain the requirement that a protector be appointed in all cases in relation to Protected Disability Trusts;
- [II] The Authority agrees with this observation and has removed the reference to the requirement that the protector be in a position to exercise independence of judgement;
- [III] The Authority disagrees with this suggestion and has decided to retain the requirement that the protector should not have any actual or potential interest in the trust assets.

This regulation was also amended to set out with clarity, situations where the protector must always be consulted and other situations where the protector's consent must always be obtained.

2.1.8 Regulation 9 – Obligations of trustee

This was originally drafted as regulation 10 in the proposed regulations, however due to the changes referred to above it has now been renumbered regulation 9.

Authority's comments: Some minor drafting suggestions were made by respondents, which were taken on board by the Authority. Furthermore, it was also suggested that in sub-regulation (2) reference also be made to curatorship and not only guardianship, which drafting suggestion has also been accepted by the Authority.

2.1.9 Regulation 10 – Investment parameters

This was originally drafted as regulation 11 in the proposed regulations, however due to the changes referred to above it has now been renumbered regulation 10.

Respondent's comments: One respondent stated that these investment parameters should only apply for as long as the person with disability is a beneficiary of the trust.

Authority's comments: The Authority does not agree with this suggestion, particularly in view of its decision to take an approach whereby the trust would be terminated upon the death of the beneficiary who is a person with disability.

2.1.10 Regulation 11 – Resignation of trustee

This was originally drafted as regulation 12 in the proposed regulations, however due to the changes referred to above it has now been renumbered regulation 11.

Respondent's comments: A respondent argued that, in view of the fact that trustees are duty bound in terms of article 20(4) of the Act to concur in executing all documents necessary for the proper vesting of the trust property, it would be too cumbersome to also require a former trustee to continue to act as trustee jointly with the newly appointed trustee for at least 6 months. Moreover, where a private trustee is appointed, and the trust would already have two trustees in office, it is presumed that one of the trustees would still be in office to ensure continuity.

Authority's comments: The Authority has decided to take on board this suggestion and removed this requirement.

3. CONTACTS

The Trusts and Trustees Act (Protected Disability Trusts) Regulations, as amended in view of the feedback received to this consultation exercise, will be published, subject to the necessary Ministerial approval being obtained. A draft copy of these

Regulations as amended following this consultation procedure, is being provided together with this Feedback Statement. Any comments or queries in relation to these Regulations or in relation to this feedback statement should be addressed to:

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