

# MFSA

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MALTA FINANCIAL SERVICES AUTHORITY

**FEEDBACK STATEMENT**

**TO**

**MFSA CONSULTATION DOCUMENT ON**

**THE PROPOSED AMENDMENTS TO**

**THE TRUSTS AND TRUSTEES ACT AND**

**OTHER RELATED LEGISLATION**

## 1. INTRODUCTION

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On 12<sup>th</sup> December 2012, the MFSA issued a consultation document regarding the proposed amendments to the Trusts and Trustees Act and other related legislation [Ref: 11-2012].

The documents which were circulated to the financial services industry for comments were the following:

- [a] Revised Trusts and Trustees Act;
- [b] Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations;
- [c] Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations.

The deadline for the submission of comments with respect to the Consultation document was 15<sup>th</sup> February 2013. The Authority received comments from eight members of Malta’s financial services industry. We would like to thank these people for taking the trouble to provide their useful feedback and comments.

A summary of the main comments received in relation to the proposed amendments to the Trusts and Trustees Act (hereinafter referred to as ‘TTA’), the proposed new regulations, and the Authority’s position in relation thereto, is provided in Sections 2 and 3 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

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### 2.1. COMMENTS ON THE PROPOSED AMENDMENTS TO THE TRUSTS AND TRUSTEES ACT

#### *2.1.1. Proposed amendment of Article 1*

The Authority has amended Article 1 to further assert the applicability of the provisions of the Act to all trustees irrespective of whether such trustees are authorised or not required to obtain authorisation in terms of Articles 43 and 43A thereof. This amendment is aimed at clarifying that persons acting as trustees, who are nonetheless not required to obtain authorisation in terms of Articles 43 and 43A, shall still be subject to all of the provisions of the TTA, with the exception of those provisions relating to authorisation or registration of trustees. Therefore such trustees would still have to comply with duties and obligations prescribed in the TTA, even if they are subject to other legislative or regulatory regimes.

#### *2.1.2. Proposed amendment of Article 2*

In the Consultation Document, the Authority announced its intention to revise certain definitions which were already included in Article 2(1) as well as introduce new

definitions. Reported under this heading are the comments which the Authority received in relation to some of the proposed amendments/new definitions.

- [I] **Definition of ‘close links’:** The Authority proposed the introduction of the definition of ‘close links’ in line with the introduction of the concept of close links in Articles 43C and 44.

*Respondents’ comments:* One respondent suggested that the definition of ‘close links’ provided should be clarified since the use of the word ‘permanently’ when describing the relationship with the third person can be very difficult to ascertain in practice. This could render the third limb of the provision superfluous since it would seem almost impossible for two entities to be tied *permanently* to one and the same third party by a control relationship.

*Authority’s comments:* The concept of ‘close links’ is a concept which is used throughout all sectoral legislation. The Authority’s intention behind the introduction of this concept is that of aligning the TTA with the other sectoral legislation. Furthermore, following submissions by the industry, the Authority has also revised the proposed definition to involve individuals in the arrangements.

*Respondent’s comments:* The respondent further states that the definition of ‘close links’ presupposes (in terms of Article 43A(2)) that there is a corporate trustee that is being audited – so one of the parties, presumably, has to be a corporate trustee. The entire definition seems somewhat unclear and it seems difficult to reconcile it with Article 43(A)(2).

*Authority’s comments:* Article 43A(2) deals with private trustees and the concept of ‘close links’ is not meant to apply to private trustees.

*Respondent’s comments:* One respondent further suggested increasing the percentage required to establish the link to 25% rather than 20% not least so as to mirror the requirement for instance under AML-CFT laws for beneficial owners.

*Authority’s comments:* The Authority disagrees with this proposal primarily because the 20% threshold is used across all sectoral legislation where the concept of ‘close links’ is involved.

- [II] **Definition of ‘commercial transaction’:** An amendment to the definition of ‘commercial transaction’ was proposed to include the situation of a person settling an asset on trust as security for a loan, when such loan is obtained for commercial purposes.

*Respondent’s comments:* One respondent suggested that the proposed definition should not be restricted to security for a loan. On the other hand, the security must be tied to a legal transaction and not necessarily to a commercial transaction – the commercial nature would emerge from the act of giving security in itself. The same respondent suggested that one would have to add

the reference to ‘commercial purposes’ in every paragraph of the definition which would defeat the purpose.

*Authority’s comments:* The Authority feels that some restriction is necessary where trusts are used in commercial transactions particularly in view of the fact that the Act exempts these trusts from the application of specific provisions thereof which would otherwise be applicable.

- [III] **Definition of “Operating in or from Malta”:** A respondent proposed a drafting recommendation with which the Authority agreed. The definition of “operating in or from Malta” was revised accordingly.

### 2.1.3. Additional amendments to Article 2 being proposed by the Authority

The Authority has decided to incorporate the following additional definitions in Article 2(1) as follows:

- [I] **Definition of ‘body corporate’:** The Authority is replacing the definition of ‘body of persons’ with the definition of ‘body corporate’ to further supplement Article 43 of the Act.
- [II] **Definition of ‘charitable purpose’:** The Authority is amending the definition of ‘charitable purpose’ to include any charitable, social or philanthropic purpose.
- [III] **Definition of ‘Conflict of Interest’:** The Authority decided to incorporate a definition of ‘conflict of interest’ to supplement Article 21 which is introducing the concept.
- [IV] **Definition of ‘person’:** The Authority reinstated the definition of ‘person’ but revised it to mean an individual or body corporate.
- [V] **Definition of ‘resident in Malta’:** The Authority revised the definition of ‘resident in Malta’ to align with the concept of ‘body corporate’ being introduced in the revised Act.

### 2.1.4. Proposed revision of Article 9

The Authority proposed an amendment to Article 9 to dispel any doubts as to whether a beneficial interest should be transmitted by inheritance or not.

*Respondents’ comments:* This proposed amendment gave rise to several comments namely:

- [I] queries on the actual reasoning behind the amendment and the legal basis for prohibiting a transfer ‘causa mortis’ of a beneficial interest;
- [II] a suggestion to the Authority to actually provide specified and identifiable beneficiaries with the possibility to have their beneficial interests in a trust inherited rather than prohibiting transfers *causa mortis* of beneficial interests in a trust;
- [III] a possible conflict between the proposed Article 9(2) and Article 9(14) which further provides that subject to the terms of the trust, a beneficiary may, by

instrument in writing, sell, charge, transfer or otherwise deal with his interest in any manner;

- [IV] a suggestion to the Authority to define ‘rights of beneficiaries’ and ‘entitlements of beneficiaries.’

*Authority’s comments:* The proposed amendment was not meant to introduce any new principle in Article 9(2) but rather reaffirm the civil law principle that rights of a beneficiary are personal to the beneficiary and as such cannot be transmitted by inheritance.

On the other hand, the Authority acknowledges all the comments received and is therefore proposing a further clarification to this sub-article by indicating that rights of a beneficiary are personal thereto and cannot be transmitted by inheritance, except where express provision therefor is made in the trust deed. In the light of this latest revision, Article 9(2) is being rephrased to read “*Rights of a beneficiary are personal to him and cannot be transmitted by inheritance except as provided for in the terms of the trust...*”

With regards to the suggestion concerning the definition of the terms ‘rights of beneficiaries’ and ‘entitlements of beneficiaries’, the Authority refers to Article 9(1) which defines the **entitlement of a beneficiary** as being the beneficial interest in, or to trust property as the case may be. In view of this, the Authority feels that no further definitions should be introduced.

#### **2.1.5. Proposed amendment to Article 12**

The Authority proposed to extend the perpetuity period of trusts to 125 years.

*Respondent’s comments:* One respondent commented that perpetuity *per se* is not a concept that is defined *rationae temporis* and therefore the setting of a time-limit is not advisable. The law should simply give settlors and drafters of trust deeds the freedom to choose the duration of the trust and if they do not then it is perpetual.

*Authority’s comments:* The Authority disagrees with the respondent’s comment given that the extension of the duration of a trust to 125 years is aligned with the trend adopted in other foreign trusts jurisdictions.

*Respondent’s Comments:* A respondent recommended that a similar amendment be simultaneously made to the Second Schedule to the Civil Code in order to extend the duration of private foundations to 125 years, as otherwise a mismatch between the two legal institutes would be created.

*Authority’s Comments:* The Authority noted the recommendation. However the institute of foundations falls outside the MFSA’s remit and therefore the Authority shall be entering into discussions with the relevant authorities with respect to such proposals.

#### **2.1.6. Introduction of Article 14A**

The Authority proposed the introduction of Article 14A on settlor reserved powers with the aim of regulating specific circumstances wherein the settlor may reserve powers under the terms of the trust.

*Respondents' comments:* This proposal gave rise to several comments both in favour and against the proposed amendment as indicated hereunder. In particular, respondents stated that:

- [I] the proposal is of concern due to the fact that the extensive abilities of the settlors being proposed could trigger a sham risk;
- [II] the possible retention of powers by a settlor is already something which is contemplated by law and the proposed amendment risks shedding doubt on whether the retention of powers other than those listed in the proposal is permissible without undermining the validity and effectiveness of the trust. By introducing such a clause, the risk is in fact that a reverse argument is created that other powers cannot be reserved. The same respondent also proposed drafting amendments to this article, some of which were incorporated in the revised draft;
- [III] a respondent suggested that members of retirement schemes should not have such powers as contemplated in the proposed Article 14A.

*Authority's comments:* This new article was introduced following representations by the industry to the effect that the TTA lacked an express provision dealing with the powers which may be reserved by the settlor whereas other trusts jurisdictions offered such a possibility. It was argued that the introduction of such a provision would place Malta at par with other renowned trust jurisdictions and provide further certainty to the settlor.

Whilst on the one hand agreeing with the industry's representations, the Authority sought to effectively limit the powers which could be reserved. The Authority also addressed the concerns expressed regarding the powers which may already be retained by the settlor in terms of the Act by revising the proposed wording of Article 14A(1) by including a proviso stating that *'the reservation of powers referred to in Article 14A(1)(a) and (b) shall be without prejudice to other powers that can be reserved by the settlor in terms of the other provisions of the Act.'*

With regards to the comment on members of retirement schemes, the Authority notes that these would be regulated by their specific sectoral law.

**2.1.7. Proposed amendment to Article 16**

The Authority revised Article 16(1) to indicate clearly that this provision is meant to apply when a trust terminates due to the lapse of a beneficiary's interest or in the absence of a beneficiary.

*Respondent's comments:* Whilst agreeing with the clarification introduced by the Authority in Article 16, a respondent suggested that this amendment should be further supplemented by an amendment to Article 17 to provide for instances where the trust

terminates and the terms of the trust are silent as to what happens to the trust property on termination.

*Authority's comments:* The Authority notes that the principle proposed by the respondent already features in Article 17.

**2.1.8. Proposed amendment to Article 17**

The Authority proposed an amendment to Article 17(3) to indicate that this sub-article should not be applied in cases where the trust is a protective trust because the very nature of the protective trust would be undermined.

*Respondent's comments:* A respondent noted that the proviso to article 17(3) should be made subject to the terms of the trust and this would give the settlor the flexibility to disapply the proviso without the trust being strictly protective in nature.

*Authority's comments:* The Authority disagrees with such a proposal. Some of the drafting recommendations proposed by the industry during the consultation period were also incorporated.

**2.1.9. Proposed amendment to Article 18**

The Authority proposed an amendment to Article 18(7) to ensure clarity with regards to the appointment of new trustees in situations of death or insolvency of the trustee. The Authority proposed to treat these two scenarios separately.

*Respondent's comments:* One respondent noted that Article 18(7) poses the duty of transferring all trust property to a successor trustee appointed in terms of the trust instrument or by the Court on the heirs or testamentary executor of the trustee.

*Authority's comments:* The proposed amendment is aimed at ensuring clarity, however the principles prescribed in the former Article 18(7) have not been changed.

**2.1.10. Proposed amendments to Article 19**

The Authority proposed the introduction of two new subarticles namely Article 19(5) and (6) to provide that fiduciary obligations should be expressly imposed by law on all persons in control of trust property in order to preserve trust assets, even pending acceptance of the trust and the obligations incumbent on the trustee would commence once the trustee obtains control of the trust assets.

*Respondent's comments:* A respondent argued that Maltese law already provides for the cases contemplated in Article 19(5) and (6) through fiduciary obligations provisions prescribed in the Civil Code and subsequently through the trustee obligations prescribed in the TTA. The same respondent also maintained that any new



legislative amendment should not confuse the distinction that a trustee is only a trustee when the trust is created and at no other point in time.

*Authority’s comments:* The fiduciary obligations prescribed in the Civil Code are less onerous than those prescribed in the TTA and therefore the latter should apply to trustees. The Authority confirms that the obligations ensuing from Article 19(5) and (6) were introduced purposely.

The Authority also agrees with the issue raised by the respondent that a licence holder formally becomes a trustee once the trust is created. In fact, Article 19(6) provides that without prejudice to the forgoing provisions of Article 19, “*the obligations of the trustee under the Act shall be deemed to commence once the trustee obtains control of the trust assets.*” The creation of a trust necessitates three legal certainties amongst which the certainty of the intention to create a trust. Furthermore the proviso to Article 7(2) of the Act which deals with the creation of trusts, provides that where assets are held, acquired or received by a person for another on the basis of oral arrangement of a fiduciary nature, express or implied, there shall be presumed to be a mandate or deposit as the case may be, regulated by the provisions of the Civil Code, unless there is evidence of an intention to create an oral trust.

In view of the above, the Authority confirms that the creation of a trust relationship prior to the acceptance of trusteeship was never the intention behind these amendments but rather, through these amendments, the Authority sought to ensure the preservation of the assets settled in the trust.

**2.1.11. Proposed amendments to Article 21**

The Authority proposed considerable amendments to Article 21 amongst which the following:

- [I] **Amendment to Article 21(1):** The Authority proposed to revise Article 21(1) to include the general duty of trustees to avoid any conflicts of interest.

*Respondents’ comments:* A respondent queried whether a reference to the fiduciary duties prescribed in the Civil Code would suffice rather than expanding upon the concept in the Act. Another respondent noted that there could indeed be genuine situations which although technically would amount to a conflict of interest, nonetheless could be managed in a way that is not prejudicial to the beneficiaries.

*Authority’s comments:* The Authority notes that the provisions of the Civil Code apply to fiduciaries in general whereas the provisions of the TTA apply specifically to trustees. Furthermore, this subarticle is meant to cover situations which could give rise to actual and potential conflicts of interest.

- [II] **Amendment to Article 21(2)(b):** The Authority proposed the introduction of the duty of any trustee to draw up an inventory of all trust assets upon taking up office.



*Respondent's comments:* A respondent noted that while this duty may be easy for a first trustee who is accepting to act on creation of the trust, it may be difficult for a trustee taking on a trusteeship to make a declaration that the inventory comprises all the property under trust. The same respondent also requested a clarification as to whether a professional trustee should draw up the inventory by public deed.

*Authority's comments:* The Authority agrees with both comments raised and proposes to revise Article 21(2)(b) to read “*Trustees shall, when accepting their appointment, draw up in writing an inventory and shall declare that the inventory includes all the trust property and of which the incoming trustee is aware.*”

- [III] ***Amendment to Article 21(3)(e):*** The Authority proposed an amendment to Article 21(3) to further reinforce the concept that unless permitted by the Act or by the terms of the trust, the trustee shall not generally enter into any transaction related to trust property that may give rise to conflict of interest without the authority of the Court.

*Respondent's comments:* A respondent commented that this provision should be revised to cover the concept of self-dealing. Another respondent proposed a drafting suggestion to Article 21(3)

*Authority's comment:* The Authority considers the concept of self-dealing adequately covered in Article 21(3) as currently being proposed.

The Authority disagrees with the drafting suggestion being proposed since this is aimed at regulating solely transactions where a manifest conflict of interest exists to the exclusion of transactions which could potentially give rise to a conflict of interest.

- [IV] ***Amendment to Article 21(4)(b):*** The Authority proposed a ten-year document retention period which runs from the date of termination of the trust.

*Respondent's comments:* Some respondents commented on the duration of the period being imposed as well as on the possibility of storage of such documents in electronic format.

Another respondent noted that in fairness to the trustee rather than a minimum retention period, the Act should provide for a maximum period of retention, leaving it up to the trustee to decide the term of retention of the documents.

*Authority's comments:* The Authority noted the suggestions concerning the possibility of storage in electronic format and is planning to further substantiate this requirement in the Code of Conduct for Trustees. Meanwhile, the Authority is also assessing what the repercussions in general which would result if the electronic storage of documents were to be accepted.

The Authority also notes that this provision was introduced following a detailed analysis of the retention periods prescribed in the sectoral legislation or in any

rules issued thereunder. This notwithstanding, it is proposing to revise this sub-article to provide that “trustees shall be obliged to keep such accounts and records for a period of not less than ten years from the date of the termination of the trust or the trusteeship, whichever event occurs earlier.”

- [V] **Amendment to Article 21(7):** The Authority proposed to revise Article 21(7) to provide certainty that in commercial transactions, the duties of trustees are regulated by the terms of the trust.

*Respondent’s comments:* One respondent stated that the proposed amendment is actually removing the certainty that the original provision sought to achieve in the case of commercial trusts.

*Authority’s comments:* The amendment to Article 21(7) was proposed to clarify that the duties of trustees are regulated by the TTA unless varied by the terms of the trust.

- [VI] **Amendment to Article 21(8):** The Authority proposed this new subarticle to eliminate any conflict of interest which may arise where a trustee is faced with a beneficiary subject to curatorship.

*Respondent’s comments:* The respondent maintained that the proposed provision should not be creating a bureaucratic requirement obliging the trustee to have to go to court to seek directions. The respondent also suggested that since the proposed subarticle (8) refers to beneficiaries subject to tutorship or curatorship, this subarticle should be made applicable to beneficiaries subject to guardianship.

*Authority’s comments:* The Authority agreed with the respondent’s comments and accordingly proposed a revised subarticle. With regards to the issue of guardianship raised by the respondent, the Authority notes that this proposal will be considered at a later stage.

**2.1.12. Proposed Articles 24B and 24C**

The Authority proposed the introduction of 24B and 24C in relation to the office of enforcer.

*Respondent’s comments:* One respondent viewed the introduction of the office of enforcer as a positive move in the local trusts legislation and suggested the possibility of the introduction of non-charitable purpose trusts.

*Authority’s comments:* The Authority disagrees with this proposal and notes that non-charitable purpose trusts are characteristic of offshore jurisdictions.

*Respondent’s comments:* One respondent raised several issues concerning the possibility that:

- [I] rather than creating a separate office, ways could be explored of integrating this role with the role of protector;
- [II] when an enforcer is appointed the powers of the AF are suspended as otherwise one risks having an internal authority and an external authority both having powers simultaneously and overlapping. A drafting suggestion was proposed in this regard;
- [III] the office of enforcer be extended also to charitable and non-charitable purpose foundations.

*Authority's comments:* The Authority disagrees with these proposals as well as with the drafting suggestions proposed. The introduction of these two articles is in line with the trend adopted in foreign jurisdictions entrusting separate roles for the protector and enforcer respectively.

### **2.1.13. Proposed amendments to Article 29**

The Authority proposed an amendment to Article 29(1) with the aim of eliminating any apparent conflict between Article 29(1) and Article 21(4) on the provision of information to beneficiaries.

*Respondent's comments:* One respondent suggested that importance should be attached to the time limit within which to render account to beneficiaries rather than to the principle itself. The respondent also maintained that if the new changes aimed at making the rendering of account a statutory matter as opposed to a contractual one between settlor/trustee and beneficiaries, the time within which to render account must be proportionate to the size, complexity, location, value, corporate structure of the trusts and the number of beneficiaries involved.

*Authority's comments:* The Authority refers to Article 29(1) which provides that “a trustee shall so far as is *reasonable* and *within a reasonable time* of receiving a request in writing to that effect....” which therefore already reflects the principle of proportionality.

*Respondent's comments:* A respondent suggested that rather than deleting the phrase “subject to the terms of the trust” in Article 29, it would seem more appropriate to insert such qualification also in Article 21 to ensure consistency.

*Authority's comments:* The Authority disagrees with this proposal. Rather Article 29 should conform to Article 21 and not vice-versa since the duty to provide information is an irreducible core duty of trustees and should not be made subject to the terms of the trust.

### **2.1.14. Proposed amendments to Article 34**

The Authority proposed the introduction of Article 34(4) to clarify that in the case of resignation or removal of a trustee with the consequential handing over of the property to the new trustee, the latter would be entitled to indemnification out of the trust property with respect of any claims against the outgoing trustee.

*Respondent's comments:* One respondent queried the rationale behind this clause.

*Authority's comments:* The introduction of Article 34(4) sought to clarify that in the case of resignation or removal of a trustee with the consequential handing over of the property to the new trustee, the latter should be indemnified from the trust property for claims against the outgoing trustee. On the other hand, instances of breach of trust should not be indemnified.

#### **2.1.15. Proposed amendments to Article 35**

The Authority proposed an amendment to Article 35(2) to clarify that “class interest” does not refer to a fixed interest.

*Respondent's comments:* One respondent queried the reason for excluding the application of the rules relating to class interests to a fixed interest given that a fixed interest can be a right of use or a right to income and it can be employed successively. Therefore the relevance of classes would still feature even in the case of fixed interests. Furthermore, the respondent also stated that a class could be a way of describing beneficiaries who could have a fixed interest and so the rules dealing with class rights would still be relevant.

*Authority's comments:* The Authority noted the respondent's comments and has opted to revert to the original wording of Article 35(2).

#### **2.1.16. Proposed amendments to Article 36**

The amendment to Article 36 was intended to provide the Court with the possibility of varying the terms of a charitable trust.

*Respondent's comments:* One respondent proposed a drafting suggestion to Article 36(4). Furthermore, a suggestion was made that this article should also reflect the provisions of Article 16(2) so as not to give rise to any contradictions. The same respondent proposed the introduction of a broader provision to permit an amendment to be made to the trust instrument of a charitable trust in those instances where the trust instrument does not contain a variation/amendment clause.

*Authority's comments:* The Authority agreed with the drafting suggestion proposed by the respondent and incorporated same in the revised version of the TTA.

The Authority also notes that Article 36(4) deals with specific circumstances in which the Court may take action always keeping present the intentions of the settlor. After having analysed Article 16(2) and Article 36(4), the Authority does not think that any contradictions can arise between the two provisions.

The Authority disagrees with the proposal to introduce a broader provision to permit an amendment to be made to the trust instrument of a charitable trust in those instances where the trust instrument does not contain a variation/amendment clause.

**2.1.17. Article 38 and the discussion concerning the identification of the Courts**

During the consultation exercise the Authority posed the following questions:

*[I] In principle, do you agree with the need to revise Article 38 of the Act?*

Overall most of the respondents agreed with the need to revise Article 38 of the Act.

*[II] Do you agree with the issues raised by the Authority and the possible revision of Article 38 as proposed by the Authority?*

Overall, most of the respondents agreed with the issues raised by the Authority.

On the other hand, one respondent was categorical in stating that whilst the current system does not work well, the proposed changes would not work in practice.

*[III] Do you have any proposals to forward with regards to a possible revision of Article 38?*

The proposals made by respondents with regards to a possible revision of Article 38 include the following:

- the possibility of introducing a chamber of the First Hall specialising in trust matters (contentious and non-contentious) presided by a judge who is well versed and sufficiently knowledgeable on trust matters and on the law regulating trusts and trustees;
- the need to address the delay in the decision by the courts on applications or preliminary issues concerning trusts. Currently this is proving to be a considerable disincentive to foreigners to set up trusts in Malta particularly when these belong to a culture that embraces the trust concept;
- the need to issue strict guidelines to regulate the procedure proposed by the Authority;
- the need that the Court of Voluntary Jurisdiction remains the court to be seized with trust related matters even when there are contentious issues due to the fact that costs are lower; there is more control on documentation access and secrecy issues and lastly because cases are resolved in a more timely manner;
- the need to revise Article 38(1) to cater for both instances of the court in its voluntary and contentious competence if the Civil Court in its Voluntary Jurisdiction will be allowed to assume the role of the First Hall Civil Court and decide a matter which has been determined to be contentious, otherwise denying the right of appeal would run counter to the principle of ‘doppio esame’ in contentious matters.

*Authority's comments:* The Authority noted the comments raised by the industry. In this regard, it is now proposing to enter into discussions with the relevant authorities in a bid to improving the current situation.

**2.1.18. Proposed amendments to Article 43**

During the consultation exercise, the Authority proposed changes relating to restricting the granting of a licence only to companies, introduction of a minimum share capital requirement and introduction of a financial resources requirement. In particular the Authority posed the following questions.

*[I] Are you in favour of restricting the granting of trustee licences?*

Some respondents were in favour of granting a trustee licence exclusively to companies.

On the other hand, some respondents were against this proposal for the following reasons:

- the requirement of a licence and the enhanced maintenance requirements for such a licence are sufficient to ensure adequate supervision. A corporate form does not of itself add any value or enhance such supervision. On the contrary, it detracts from the concept that a trust involves a relationship with a person, the trustee, who can be either natural or juridical. Furthermore, in reputable jurisdictions competing with Malta for trust business, an individual is still allowed to carry on trust business.
- by not expressly and in no uncertain terms excluding individuals from acting as professional trustees, the proposal seems to actually create a lacuna in cases of individuals who want to act as trustees by way of business, but are not exempt from articles 43A, 43B and 43C in accordance with Article 43(7) and who do not satisfy the requirements of private trustees in Article 43A.

*Authority's comments:* The Authority noted the issues raised by the industry and has reverted to the former situation wherein both individuals and body corporates can hold a trustee licence.

*[II] Are you in favour of the introduction of a minimum share capital requirement? Do you agree that the amount of €25,000 is reasonable?*

Overall there was agreement with the proposal to introduce a minimum share capital requirement; however respondents raised the following concerns:

- the amount should not serve as a barrier to enter the market;
- smaller trust firms could have a problem in achieving such a minimum share capital requirement and the adoption of a risk metric approach with annual reviews was made.
- a suggestion was made to cap the amount to €5,000 rather than prescribing €25,000;

- the introduction of a minimum share capital would not be of any significance and could prove to be unreasonable where trustee services are incidental.

*Authority's comments:* The Authority noted the concerns raised by the industry. In this respect the Authority has decided to reduce the capital requirement to €15,000, which amount must be maintained for as long as the entity is authorised.

The capital requirement is also being imposed on individuals wishing to apply for a trustee licence, as well as on any person (whether body corporate or individual) wishing to apply for authorisation to act as mandatory in terms of Article 43(12). The Authority is also planning to further substantiate the details relating to this requirement in the Code of Conduct for Trustees.

Furthermore, to ensure that the minimum capital of €15,000 is maintained on an on-going basis, the Authority is considering the inclusion of a requirement in the Code of Conduct for Trustees for a licenced entity, whether individual or body corporate, to have liquid assets equivalent to the minimum capital amount.

*[III] Are you in favour of the introduction of a financial resources requirement? Should the imposition of a financial resources requirement be restricted to holders of a full trustee licence? AND*

*[IV] Are you in favour of the introduction of an obligation to purchase a PII?*

All respondents linked the comments related to the financial resources requirement to that of the requirement to purchase a PII. Therefore and for this reason this feedback statement will be tackling the issues raised on these two topics together.

The issues raised by respondents concerned the following:

- the obligation to keep a financial resources requirement should be imposed both on holders of full trustee licences as well as on holders of licences providing fiduciary services. However two different amounts should be introduced to cater for these two different licences;
- the financial resources requirement should be proportionate to the value of the trust property under control but it should not be applied to those companies offering nominee services only and/or trustee services on an incidental/ancillary basis;
- the cost of insurance premia is likely to limit the number of companies which will offer trustee services;
- the imposition of a financial resources requirement and a PII attains the same aim and therefore either one or the other should be imposed;
- the financial resources requirement and the PII are cumulative. Therefore, if one were to carry out a rough estimation of the additional costs imposed on trustees, this would indicate that the annual financial burden shall increase thus leading to an inevitable increase in professional costs.

*Authority's comments:* The Authority confirms its intention to introduce the requirement to maintain an insurance cover in Article 43(4) of the TTA. This requirement will be applicable to both individuals and body corporates intending to apply for a licence to provide trustee services. Furthermore, this requirement will also



be applicable to any person (whether body corporate or individual) wishing to apply for authorisation to act as mandatory in terms of Article 43(12).

The Authority also notes that the Financial Resources Requirement is made up of the minimum share capital requirement and the PII as correctly maintained by all respondents. In this regard, the Authority is considering whether to introduce further requirements enhancing the financial resources requirement at a later stage.

**2.1.19. Additional amendments to Article 43**

[I] **Amendment to Article 43(6):** The Authority proposed an amendment to Article 43(6) to clarify the instances when a regulated entity would not be required to hold a trustee licence.

*Respondent's comments:* One respondent stated that the reference to trustee activities being the 'main activity' of an entity is vague and may give rise to different interpretations.

*Authority's comments:* The proposed amendment clarifies a situation which currently is prone to misinterpretation. The amendment being proposed aims at indicating that the entities listed in Article 43(6)(a) are exempt from the requirement of obtaining a trustee licence only when the provision of trustee services is incidental and ancillary to the main activity being provided. Therefore the provision of trustee services must not constitute the main activity of the entities prescribed in this sub-article.

[II] **Amendment to Article 43(7)(d):** The Authority is proposing to amend Article 43(7)(d) by extending the retention period to ten years.

*Respondent's comments:* One respondent suggested that the calculation of the 10-year record retention period should be from the termination of the trust or the termination of the trusteeship.

*Authority's comments:* The Authority agrees with the proposal and is revising this subarticle to apply a ten-year retention period from the date of termination of the trust or the trusteeship, whichever event occurs earlier.

[III] **Amendment to Article 43(13) and (14):** The Authority proposed the replacement of the current Article 43(13) with a new subarticle outlining the conditions applicable to any company which intends acting as a mandatory in terms of Article 43(12).

*Respondent's comments:* One respondent argued that the proposal to cater for separate authorisation for mandatories creates overlap and much duplication and could also lead to the application of different regulatory standards.

*Authority's comments:* The Authority notes that the introduction of a subarticle outlining the conditions applicable to any applicant intending to act as a mandatory serves to clarify the need for such applicants to conform with

specific conditions to obtain authorisation. The Authority confirms its intention to introduce this new subarticle, and has also extended the application of such conditions to applicants who are individuals.

Furthermore, the proposed subarticle (14) shall provide for the obligation of notification to the Authority of any change or circumstance which may have a bearing on the status as an authorised entity in terms of Article 43(13).

**[IV] *The introduction of Article 43(15) and (16):*** The Authority also proposed the introduction of Article 43(15) to outline the conditions applicable to any person who intends to act as an administrator, trustee, director or similar functionary exercising control over the assets of a private foundation.

*Respondent's comments:* The respondent raised the same issues as those raised with regards to the authorisation for mandatories in relation to the overlap and duplication and the possibility of different regulatory standards. The respondent also stated that any differences (such as the elimination of a minimum share capital rule for corporate administrators) could be appropriately carved out within a clause that applies to all applicants (trustees, administrators and mandatories).

*Authority's comments:* The Authority maintains that the introduction of this subarticle outlines clearly the conditions applicable for the authorisation of applicants wishing to act as administrators of private foundations. The Authority therefore confirms its intention to introduce this new subarticle, which also includes conditions applicable to applicants who are individuals. The Authority also confirms that the capital and PII requirements shall not, at this stage, be applicable to applicants for authorisation to act as administrators of private foundations.

#### **2.1.20. *Introduction of Article 43C***

The Authority proposed the introduction of Article 43C dealing with the duty of auditors to notify the Authority of specific circumstances of which they become aware in their capacity as auditors of corporate trustees.

*Respondents' comments:* A respondent maintained that the remit of this proposed Article is too wide and suggested a deletion of this obligation. Another respondent requested that the term 'serious qualification' be defined and explained.

*Authority's comments:* The Authority disagreed with this proposal. Furthermore, the Authority notes that the reporting requirement is triggered where there is a breach of a material nature and not any sort of breach.

With regards to a possible explanation of the term 'serious qualification', the Authority refers to the IFRSs which prescribe the instances as to what constitutes a 'serious qualification'. Article 43C will be further supplemented by Code of Conduct for Trustees.

**2.1.21. Amendment to Article 44**

An amendment to Article 44 was proposed to include the requirement of a programme of operations with the application documents and by introducing the concept of close links.

*Respondent's Comments:* A respondent stated that the additional requirement to provide a programme of operations at application stage should be accompanied with a detailed enumeration of what ought to be included in such the business plan.

*Authority's Comments:* The Authority refers to the Application Form which is currently available on the MFSA Website. This document already provides a generic indication of what should be included in the Programme of Operations. However, the Authority is also considering the possibility of expanding on this requirement in the Code of Conduct for Trustees.

**2.1.22. Introduction of Article 46B**

The Authority has also decided to introduce Article 46B providing for the power of the competent authority to protect the public interest. Article 46B provides that the Authority may exercise the powers prescribed in this Article where it is satisfied that the circumstances so warrant. The powers attributed to the Authority range from imposing specific requirements on the trustee to take such measures to rectify or remedy the matters to appointing a person to take charge of the assets of the trustee for the powers of the shareholders or any creditors of the trustee.

**2.1.23. Amendment to Article 57**

The Authority proposed to amend Article 57 to empower the Minister to make regulations aimed at regulating the authorisation and regulation of sub-trusts in connection with collective investment schemes and retirement pension schemes.

Overall, most of the comments following the consultation exercise were in favour of the introduction of regulations to make provision for the regulation of sub-trusts in connection with retirement pension schemes but not in connection with collective investment schemes.

In view of this, the Authority will be issuing for consultation in the coming months the proposed regulations regulating the establishment of sub-trusts in connection with retirement pension schemes. On the other hand, the Authority is retaining the enabling power in relation to collective investment schemes.

**2.2. COMPLIANCE**

During the consultation exercise, the Authority informed licence holders of its proposal to request that potential applicants identify an individual who will be

responsible for ensuring the Trustee’s compliance with the requirements imposed by the Act, any regulation and rules issued thereunder. Overall, there was agreement amongst the respondents as to the introduction of a Compliance Officer and Money Laundering Reporting Officer.

The Authority is planning to introduce these requirements in the Code of Conduct for Trustees which will be issued for consultation in the coming months.

**2.3. TRANSITORY PROVISIONS**

Following the submissions received during the consultation exercise, the Authority has decided to retain the transition periods originally announced as indicated in the table below.

PROPOSED CHANGES	LICENCED ENTITITES		Transitory Period
	Trustees	Mandatories	
Minimum Share Capital Requirement	√	√	2 years
Professional Indemnity Insurance	√	√	6 months
Compliance Officer	√	√	6 months
Auditor	√	√	6 months

**3. COMMENTS ON THE PROPOSED NEW REGULATIONS**

**3.1. TRUSTS AND TRUSTEES ACT (REGISTRATION OF NOTARIES TO ACT AS QUALIFIED PERSONS) REGULATIONS**

*3.1.1. General Comments*

*Respondents’ comments:* In the feedback received in relation to the proposed Regulations referred to in caption, questions were raised concerning the role of the Notary as a qualified person, in particular whether such role is restricted to a compliance function or whether it would involve a more active role in the trust business.

Some respondents also expressed concerns with respect to the competence level which would be required of Notaries acting as qualified persons, depending on the role assumed by the Notary acting in such capacity.

*Authority’s comments:* Whilst on the one hand, confirming that when acting as qualified person, the Notary’s role shall mainly consist in a compliance function, the Authority, also confirms its intention to further expand upon the functions and duties involved in such a role in the Code of Conduct for Trustees. Furthermore, the Authority also intends dispelling any doubts which were raised by the industry with regards to the competence of persons acting as qualified persons. In this regard, the

Authority is planning to introduce a requirement for applicants to undergo a competence assessment and relevant training to be able to act as qualified persons.

**3.1.2. Consequential revision of Article 43A(5) of the TTA**

The Authority had already proposed to revise Article 43A(5) to clarify that the application thereof does not merely refer to any will, but specifically to wills containing a trust.

*Respondent’s comments:* In the light of the proposed introduction of the *Trusts and Trustees (Registration of Notaries to act as Qualified Persons) Regulations*, a respondent suggested that an additional amendment should be included in Article 43A(5), to the effect that where the depository notary is appointed as trustee, he may not act as depository notary, notary keeper, or qualified person, as applicable.

*Authority’s comments:* The Authority agrees with the drafting suggestion which was incorporated in the revised Article 43A(5).

**3.2. TRUSTS AND TRUSTEES ACT (NOTARIAL TRUST DEEDS REGISTRATION, CONSERVATION AND ACCESS) REGULATIONS 2013**

**3.2.1. Regulation 2**

*Respondent’ comments:* One respondent noted that Regulation 4 refers to the “notarial archives” and proposed that this should be replaced with reference to ‘Archives of Malta or the Archives of Gozo’.

*Authority’s comments:* The Authority agrees with the comment made. However rather than revising all the regulations which refer to ‘notarial archives’ it has opted to introduce a new definition in Regulation 2 to clarify that the term ‘notarial archives’ shall refer to the Archives of Malta or Archives of Gozo, as applicable.

**3.2.2. Regulation 4**

The Authority received several comments in relation to Regulation 4 as outlined hereunder:

- [I] **Amendment to Regulation 4(2):** Currently regulation 4(2) provides that “*The publishing notary shall also create a register of the said trust deeds and this register shall be held by the depository notary.*”

*Respondent’s comments:* One respondent stated that the register of the deeds belongs to the publishing notary, and the depository notary would receive a copy of the same. The publishing notary would keep the register (i.e. the copy of the deed), the original being delivered to the Notarial Archives. The

publishing notary would not keep the copies of the other documents relative to the trust unless such notary is also the depository notary. Consequently proposed Regulation 4(2) should be revised to read ‘*The publishing notary shall also create a register of the said trust deeds and this register shall be held by the **publishing** notary.*’

*Authority’s comments:* The Authority agrees with the respondent’s comments and the drafting suggestion which has been incorporated in the revised regulations.

- [II] **Amendment to Regulation 4(3):** Currently Regulation 4(3) provides as follows: “*All notarial trust deeds shall be submitted for inspection together with public deeds to the Court of Revision of Notarial Acts in terms of these regulations and they shall be conserved in the notarial archives.*”

*Respondent’s comments:* One respondent noted that there appears to be an overlap between this regulation and Regulation 9(1).

*Authority’s comments:* The Authority is proposing to revise the wording of the regulation to avoid such overlap. Therefore, Regulation 4(3) is being amended to provide as follows: “*All notarial trust deeds shall be conserved in the notarial archives and the access to such deeds shall be regulated in terms of these Regulations.*”

- [III] **Consequential revision of Article 43A(9) of the TTA:** The Authority had not proposed any amendments to this subarticle however, in view of the proposed introduction of the *Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations*, one respondent observed that since this provision allows for a substituted depository notary or a notary keeper to keep copies of the documents delivered to the new depository notary, this should also extend to a publishing notary who delivers acts to the depository notary.

*Authority’s comments:* The Authority agreed with the suggestion and is therefore amending Article 43A(9) of the TTA accordingly. Furthermore, Article 43A(9) shall also provide that the publishing notary shall also be subject to duties of confidentiality with respect to the relevant documents.

### 3.2.3. Regulation 5

The Authority received several comments in relation to Regulation 5 as outlined hereunder:

- [I] *Respondent’s comments:* One respondent proposed that Regulation 5(4)(b) should be amended to clarify that the obligation prescribed therein is of mandatory application.

*Authority’s comments:* The Authority agreed with the comment submitted and has opted to review Regulation 5(4)(b) to provide as follows: “*in the event that*

*a new depository notary is appointed, they shall be delivered to such notary immediately; and'*

- [II] **Consequential revision of Article 43A(7) of the TTA:** The Authority had not proposed any amendments to this subarticle however, in view of the proposed introduction of the *Trusts and Trustees Act (Notarial Trust Deeds, Registration, Conservation and Access) Regulations*, one respondent observed that Regulation 5(4)(a) specifically provides for access to certain documents. The respondent further stated that Article 68A of the Notarial Profession and Notarial Archives Act (NPNA) seems to apply to depository notaries. The same respondent also submitted that since the proposed Regulations seem to specifically provide for access to such documentation, it would seem to be appropriate that any duty to provide information should be consistent with Article 68A of the NPNA. In this regard the respondent suggested that Article 43A(7) of the TTA, which deals with duties to provide information, should refer to Article 68A of the NPNA as applying to the disclosure of trust documents by the depository notary.

Another respondent observed that Article 68A of the NPNA refers to an instance when the MFSA can demand information from the depository notary. The same respondent submitted that rather than cross-referring to Article 68A, Article 43A(7) should be amended to provide for instances where the provision of information is demanded by 'any other law'.

*Authority's comments:* The Authority noted the respondents' comments and agreed that Article 43A(7) merited reviewing.

However the Authority disagreed with the suggestion to amend Article 43A(7) to provide for provision of information as demanded by 'any other law. The Authority feels that such an amendment would widen the scope of application of the said provision too much. Therefore the Authority opted to revise Article 43A(7) to provide that the depository notary '*shall not be obliged to provide information on the trust deed or any other document relative thereto except as provided by this Act or Article 68A of Notarial Law and with the written consent of the trustee or upon an order of Court.*'

#### 3.2.4. Regulation 6

*Respondent's comments:* One respondent observed that the Regulations provide that a trust set up by a testamentary disposition shall be accessible to any person after the death of the testator. In fact the Regulations refer to article 68 of the NPNA. The same respondent stated that such a provision would make trusts created through wills much less popular than trusts created by other means. The respondent also suggested that since article 74(5) of the NPNA also applies to copies of trust deeds, regulation 6 should be amended to specifically refer to Article 74(5).

*Authority's comments:* The Authority notes that by virtue of an established principle at law a testamentary trust would be accessible after the demise of the settlor/testator. Furthermore, the Authority also disagrees that Regulation 6 should cross-refer to



Article 74(5) of the NPNAA because the provisions applicable to wills apply *mutatis mutandis* to testamentary trusts and therefore the said article 74(5) would also be automatically applicable.

**3.2.5. Regulation 7**

This Regulation provides that upon commencement of his office as depository notary of any particular trust and upon termination thereof, the depository notary should submit to the Notary to Government, a return listing all trusts in relation to which he acts in such capacity.

*Respondent's comments:* One respondent stated that this return should only contain the designation of the trust and that no additional detail otherwise the element of publicity would come to detract from the confidentiality of a trust relationship. Furthermore the respondent also stated that the list should not be available to the public, and this should result clearly from the Regulations.

*Authority's comments:* The Authority refers to Regulation 7(5) which appears to be sufficiently clear to cover the issues raised by the respondent.

**3.2.6. Regulation 7**

Regulation 7(2) refers to the guidelines which shall be issued in terms of the same regulations.

*Respondent's comments:* One respondent questioned which entity would be responsible to issue such guidelines.

*Authority's comments:* The Authority is currently holding discussions with the Notarial Council with respect to the issuing of such guidelines. It should also be noted that such guidelines will only deal with depository notaries and documents held under their custody. The Authority wishes to clarify that such regulations would not be applicable to deeds of private foundations, as these would require separate regulation aimed specifically at deeds of foundations.

**3.2.7. Regulation 8**

*Respondent's comments:* One respondent requested the Authority to clarify the interplay between Regulation 6 and Regulation 8, particularly with reference to Article 68A of the NPNAA since there appears to be an overlap between these two regulations. The same respondent queried whether Regulation 6 applies to accessibility of notarial trust deeds held by notaries, whereas Regulation 8 applies to accessibility of notarial trust deeds deposited with the Notarial Archives.

*Authority's comments:* Regulation 6 clarifies that the trust deed, whether forming an integral part of the will or whether annexed thereto, is accessible in the same manner

as an ordinary public will. This principle would apply regardless of whether the copy is being demanded from the publishing notary or from the Notarial Archives.

On the other hand, Regulation 8 applies specifically to the accessibility of deeds from the Notarial Archives. The rationale behind Regulation 8(2) was that of clarifying issues of accessibility to the trust deeds when deposited at the Archives of Malta or the Archives of Gozo. Regulation 8(2) aims at supplementing the provisions of Article 68A which lists the persons who have access to the trust deed but fails to specify who is to verify that the access is being properly given in terms of Article 68A. Therefore the depository notary would be entrusted with the role of checking that access demanded by the trustee is in fact legitimate in terms of law. Thus whilst Article 68A establishes the principle of who is to be given access, Regulation 8(2) sets out the procedure to ensure this.

### 3.2.8. Regulation 9

*Respondent's comments:* One respondent observed that whilst this Regulation refers to 'Revising Officers', there is no definition of 'Revising Officer' in the NPNA.

*Authority's comments:* The Authority noted this comment and has decided to substitute the term 'Revising Officer' with the term 'Review Officer'. Furthermore, this term shall have the same meaning assigned to it in terms of Article 94A of the NPNA.

## 4. CONTACTS

The Bill to amend the Trusts and Trustees Act is expected to be published shortly. Upon the coming into force of the Trusts and Trustees Act, as amended, the Trusts and Trustees Act (Notarial Trust Deeds Registration, Conservation and Access) Regulations, 2013 and the Trusts and Trustees Act (Registration of Notaries to act as Qualified Persons) Regulations, 2013 would also be published, subject to the necessary Ministerial approval being obtained. Any comments or queries in relation to the aforementioned Bill, Regulations or in relation to this feedback statement should be addressed to:

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