

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Consultation Procedure

Proposal for a Bill entitled the ‘Various Financial Services Laws (Amendment) Act, 2012’

Note for Consultation

Draft Various Financial Services Laws (Amendment) Act, 2012

Reference is made to the *draft* Bill entitled the ‘Various Financial Services Laws (Amendment) Act, 2012’, as attached herewith.

The proposed Bill amending various financial services laws has a number of objects. Primarily, it transposes the provisions of Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority). This Directive is referred to as “the Omnibus I Directive”.

Further amendments which are unrelated to the Directive are also being proposed in the Bill. These amendments will be delineated further below.

Amendments consequent to the Omnibus I Directive

As can be evidenced from the title of the Omnibus I Directive itself, the amendments brought about by such Directive are wide-ranging and affect various sectors of financial services.

By way of background, as from January 2011, the regulation of financial services across Europe is now overseen by three European Supervisory Authorities (ESAs). The ESAs work with the newly established European Systemic Risk Board (ESRB), to ensure financial stability and to strengthen and enhance the EU supervisory framework. They aim to improve coordination between national supervisory authorities, such as the MFSA, and they also aim to raise standards of national supervision across the EU. The ESAs are: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA). They replace the level 3 (otherwise known as Lamfalussy) committees: Committee of European Banking Supervisors (CEBS), Committee of European Securities Regulators (CESR) and Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

These changes had to be reflected in the respective EU Directives and transposed into national legislation. Accordingly, the Omnibus I Directive was proposed and eventually published. This Directive seeks to upgrade national supervision across the board, by requiring the respective competent authorities to cooperate closely with the ESAs, namely, the EBA, the EIOPA, and ESMA, and to receive requests for exchange of information or cooperation from other authorities.

As a result of the Directive, amendments are being introduced to the Investment Services Act in order to provide that the competent authority (the MFSA) is under an obligation to notify ESMA of the complaint and redress procedures available in Malta. Moreover, the MFSA will now be under a new obligation to notify ESMA whenever it grants or cancels an investment services licence. Furthermore, when the MFSA publicly discloses the

name of a person sanctioned, it shall simultaneously report the fact to ESMA. The Bill also provides for further amendments to the Investment Services Act by contemplating scenarios in which the MFSA may exercise discretion as to whether to refer to ESMA, situations where specific requests to European regulatory authorities have been rejected or not acted upon.

Amendments to the Financial Markets Act were also necessary. In line with the Directive, the MFSA is to draw up a list of the regulated markets for which it is the home Member State, which list shall be forwarded to the other Member States, EEA States and to ESMA. An obligation is also imposed on the Listing Authority to notify ESMA of the approval of a prospectus, simultaneously with the notification of approval to the respective applicant.

Amendments to the Banking Act are also featured in the Bill. It is being proposed to include that the form and information accompanying all applications for a licence under the Banking Act shall be notified to the EU Commission and also to the EBA. Another amendment provides for the substitution of the EU Commission by the EBA as the entity that the MFSA shall notify whenever a licence is issued and whenever a licence is revoked, stating reasons, by the MFSA. In certain cases, the ESRB should also be notified by the MFSA. For example, when the latter is the consolidating supervisor, it shall alert the EBA, the ESRB and the home supervisor of a parent credit institution, where an emergency situation or a situation of adverse developments in financial markets, as explained in the proposed amendment, arises.

Another important amendment brought about as a result of the Directive is an amendment to the Malta Financial Services Authority Act whereby no breach of confidentiality shall occur when the competent authority exchanges or transmits confidential information to ESMA, the EBA, EIOPA, and the ESRB.

Other Amendments not related to the Directive

As stated earlier, the proposed Bill also includes some amendments that are unrelated to the transposition of the Omnibus I Directive. These include amendments to the Companies Act and amendments to the Trust and Trustees Act.

The proposed Amendments to the Companies Act principally amend a number of provisions regulating the office of the Official Receiver. When the Minister appoints an official receiver, he shall act on the advice of the MFSA. The Official Receiver shall now be a senior official employed with the MFSA. At present, the Minister may prescribe regulations specifying the fees payable out of a company's assets for the performance by the Official Receiver of his general duties. With the proposed amendments it will be clarified that the remuneration and expenses incurred by the Official Receiver shall be payable out of the company's assets. Another important amendment is the provision stating that the Official Receiver and anyone assisting him and authorised by the Minister, shall be exempt from any liability whatsoever, unless the act or omission is shown to have been done or omitted to be done in bad faith. Furthermore, it is not sufficient that the Official Receiver assumes office by Minister's appointment, but he must also be notified by the Court. Finally, the Official Receiver is being afforded better protection insofar as concerns disbursement and remuneration payments.

Another new amendment to the Companies Act is the provision that provides that when a public company is a '*societas europaea*' in accordance with Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute of a European company, in lieu of the words "public limited company" or their abbreviation "p.l.c.", the name of the public company shall be preceded or followed by the abbreviation "SE".

The proposed amendments to the Trust and Trustees Act introduce, for the first time, the concept of "Family Trusts". The trustee of such a trust shall be a company with specific objects as stipulated in the Bill. Such a trustee shall not require authorisation in terms of

the Trust and Trustees Act, but shall instead be required to apply for registration by the MFSA.

Finally, an amendment is also being carried out in article 22 of the Prevention of Financial Markets Abuse Act, to provide that the competent authority may publicly disclose the name of a person who is sanctioned, the particular breach, and the administrative sanction imposed, even prior to appeal proceedings being concluded. This amendment relating to the publication of sanctions is being proposed in order to streamline it with article 16(8) of the Malta Financial Services Authority Act and article 16A(4) the Investment Services Act.

Note

This communication is intended to bring this development to the attention of stakeholders for the purpose of consultation with relevant and interested parties.

Interested parties are kindly requested to submit any comments which they may have in relation to this draft legislation, in writing, to **the Legal and International Relations Unit, by not later than the 14th February, 2012.**

Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received not only from licence-holders and other involved parties, but also following the necessary review and vetting by the Office of the Attorney General and the relevant Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind. In the case of primary legislation, in particular, Bills, may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance.

**Communications Unit
Malta Financial Services Authority
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