

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**16th Circular addressed to the financial services industry
regarding Malta's transposition/implementation of the
Markets in Financial Instruments Directive ('MiFID')**

Proposed Rules Relating to Tied Agents

20th August 2007

The MFSA invites comments by not later than 24th September 2007, on the proposed Investment Services Rules which have been drafted to transpose certain requirements of Article 23 of the MiFID. Interested parties are to send their comments in writing addressed to the Director – Securities Unit, MFSA

1.0 Background

Reference is made to the circulars issued on:

[a] 3rd April 2007 dealing with the introduction of the Tied Agents Regime in Malta, in terms of Article 23 of the MiFID.

[b] 24th May 2007 which served as a consultation document in respect of a number of proposed draft Legal Notices which would need to be issued in order to transpose certain requirements of the MiFID into Maltese Law. In particular, reference is made to the draft Legal Notice entitled Appointment of Tied Agents Regulations, 2007 (hereinafter referred to as "the Legal Notice") which was attached to this circular. A copy of this draft Legal Notice is being attached also herewith for ease of reference.

In addition to the above Legal Notice, as indicated in our circular of the **3rd April 2007**, MFSA has drafted the relevant Investment Services Rules which Licence Holders appointing tied agents would be expected to follow. The substantive rules would form part of Section 2, entitled "*Conduct of Business*", of the Standard Licence Conditions.

The purpose of this circular is to serve as a consultation document for the abovementioned rules.

2.0 Main Highlights of the Relevant Investment Services Rules

2.1 Registration of Tied Agents

In terms of Regulation 3 of the Legal Notice, tied agents shall be subject to registration by MFSA in a register which it will keep for this purpose. Application for registration must be made on behalf of a proposed tied agent, **by the Licence Holder wishing to appoint such person as its tied agent**. An Application Form will be drawn up for this purpose and will be available on the MFSA's website in due course.

Licence Holders applying for registration of tied agents, would be required to confirm in writing to the MFSA that they are satisfied that the proposed person is of sufficiently good repute and possesses appropriate general commercial and professional knowledge so as to be able to communicate accurately all relevant information to clients or potential clients. Moreover, where the proposed tied agent is to provide investment advice, the Licence Holder appointing such tied agent, should also be satisfied that the person concerned has, *prima facie*, the competence which is required by MFSA to enable such tied agent to provide investment advice. Supporting documents and the relevant details would need to be supplied to MFSA together with the relative application form. MFSA shall further assess such information and will take a decision as to whether to authorise the proposed person to provide investment advice or not.

2.2 Eligibility Criteria

Licence Holders may appoint both individuals and other legal persons (including limited liability companies) as their tied agents. However, in the case of legal persons, the eligibility criteria established for individual tied agents would need to be satisfied by all the individuals who will be acting on behalf of the legal person appointed as tied agent.

2.3 Responsibility of Licence Holders

The responsibility for the control and monitoring of tied agents rests ultimately with the Licence Holder appointing such tied agents. Moreover, the Licence Holder would be responsible for any breach of the Investment Services Rules committed by its tied agents.

Licence Holders would be required to maintain all records, including those relating to the "Know Your Client" procedures and evidence that the tied agent has carried out the necessary suitability and/or appropriateness tests where these are required. Such records would need to be made available to MFSA's officers during Compliance Visits.

2.4 Other Issues

Tied Agents will not be allowed to hold and control clients' money or assets. Moreover, tied agents can only act for one Licence Holder at any one time.

3.0 Contacts

Should you have any queries, please do not hesitate to contact:

Dr. Sarah Pulis

25485232

spulis@mfsa.com.mt

Mr. Christopher Buttigieg

25485229

cbuttigieg@mfsa.com.mt

DRAFT RULES RELATING TO TIED AGENTS

(To be inserted in Part A of the Investment Services Rules)

Licence Holders wishing to appoint Tied Agents

1. Introduction

In terms of the Investment Services (Tied Agents) Regulations, 2007 (hereinafter referred to as 'L.N. XXX of 2007'), an Investment Services Licence Holder may appoint tied agents to act on its behalf with clients or prospective clients.

A tied agent is a natural or a legal person who, under the full and unconditional responsibility of only one Investment Services Licence Holder on whose behalf it acts carries out one or more of the following services:

- promoting of investment and/or ancillary services to clients or prospective clients;
- receiving and transmitting instructions or orders from the client in respect of investment services or instruments;
- placing of financial instruments and/or
- providing investment advice to clients in respect of investment services or instruments.

Tied agents shall act only on behalf of one Licence Holder. Tied agents appointed in terms of L.N. XXX of 2007 would nonetheless still be able to undertake activities covered by other legislation (e.g. insurance) provided such other activities do not give rise to any conflicts of interests which may be detrimental to the Licence Holder's clients.

These rules, pertaining to the appointment of tied agents have been issued pursuant to MFSA's powers under Regulation 6 of L.N. XXX of 2007.

2. Process for Registration of Tied Agents

In terms of Regulation 3(3) of LN XXX of 2007, an Investment Services Licence Holder may appoint a tied agent for the purposes of promoting its services, soliciting business or receiving orders from clients or potential clients and transmitting them, placing instruments and providing investment advice in respect of such instruments and services offered by the Investment Services Licence Holder.

For this purpose, the Investment Services Licence Holder wishing to appoint a tied agent, must apply to the MFSA by means of the relevant application form set out in Schedule (X) to these Rules together with the appropriate application fee – with respect to each proposed tied agent.

In the case of a legal person, such as a company, being proposed as a tied agent, such person's constitutional documents (e.g. Memorandum and Articles of Association, in the

case of a company) – a copy of which would need to be submitted to the MFSA - should also include a reference to tied agency activities in the object clause.

The Licence Holder should take reasonable care to ensure that a person it proposes to appoint as tied agent (“the proposed person”), satisfies the requirements set out in Regulation 5(3) of LN XX of 2007 and where applicable, *prima facie*, the competence required by MFSA to enable such tied agent to provide investment advice. For this purpose, the Licence Holder shall carry out all the relevant due diligence checks it deems necessary in respect of the proposed person. As part of the application to MFSA for the registration of a tied agent, the Licence Holder shall submit to the MFSA, a declaration that in its opinion, the proposed person is of sufficiently good repute and possesses appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client. MFSA however, reserves the right to carry out further checks in this regard.

On receipt of all the necessary application documents and fees, and after carrying out any further checks as to the proposed person’s fitness and properness, MFSA will grant the proposed person registration in the public register established in terms of regulation 5(1) of LN XXX of 2007. Such registration will be confirmed by the issue of a Registration Certificate to the proposed person.

3. Eligibility Criteria for Tied Agents

MFSA will only consider admitting individuals to the register of tied agents established in terms of Regulation 5(1) of L.N. XXX of 2007, provided that the Licence Holder seeking to appoint such individuals as its tied agents confirms to the MFSA that the persons concerned:

- (a) are resident in Malta;
- (b) are aged 18 years or over;
- (c) have attained, to the satisfaction of the Licence Holder, secondary school level education;
- (d) have a clean conduct certificate issued in their regard by the Malta Police.
- (e) where applicable, *prima facie* satisfy the MFSA’s standard competence requirements applicable to investment advisors.

Where the person considered to be appointed as tied agent is a legal person, the above criteria would need to be satisfied by the individuals to be acting on behalf of such legal person, in carrying out the activities of a tied agent. Moreover, in the case where the proposed tied agent is a company, the Licence Holder would also be required to confirm that it considers the directors of the legal person to be in good standing.

4. *Fees Applicable*

Please refer to the Investment Services Act - Licence and Other Fees Regulations, 2007 for details of the applicable fees¹.

¹ Please refer to the draft Legal Notice entitled “Licence and Other Fees Regulations, 2007” attached to our circular of the 24th May 2007.

To be included in Section 2 of the Investment Services Rules entitled Conduct of Business Rules.

[to Include in Glossary to Investment Services Rules] - Definition of tied agents (as per Legal Notice).

Provisions Applicable to Licence Holders Appointing Tied Agents

For the purposes of these Rules reference to tied agents shall also include individuals acting on behalf of a legal person which is registered as a tied agent of a Licence Holder, in terms of Regulation 5 of the Appointment of Tied Agents Regulations, 2007 (hereinafter referred to as “the Regulations”) and who are directly involved in carrying out tied agency activities.

These rules are additional and without prejudice to the obligations of Licence Holders set out in the Regulations.

2.123 The responsibility for the control and monitoring of the activities of tied agents, in terms of regulation 4(3) of the Regulations, rests with the senior management of the Licence Holder. In this regard, the Licence Holder shall ensure that the tied agents it appoints:

- (a) report to it on a regular basis with respect to the activities carried out by the tied agent;
- (b) pass on to the Licence Holder all the necessary documentation for processing and/or record keeping purposes, promptly;
- (c) continue to satisfy the registration requirements and the eligibility criteria referred in Part A of these Rules on an on-going basis;
- (d) do not hold or control clients' money or assets;
- (e) comply with the requirements of the Investment Services Rules which are relevant to the activities they carry out on behalf of the Licence Holder. Particular attention should be given by the Licence Holder to ensuring compliance, by the tied agent, with the relevant requirements in this section entitled “Conduct of Business” and in Section 3 entitled “Disclosure Requirements for Information to Clients, including Marketing Communications”.

2.124 The Licence Holder shall ensure that the tied agents it appoints, shall, where appropriate make a prior appointment to call clients or potential clients. Unsolicited or unarranged calls shall be made between 9.00 a.m., and 7.00 p.m.

Monday to Friday (excluding public holidays and Saturday) from 9.00a.m. to 5.00 p.m., unless otherwise requested by an existing or potential client.

- 2.125 The Licence Holder shall look into any concerns that may arise at any time regarding its tied agents' fit and proper status and take the necessary action. The necessary action may include, for example, increased monitoring or, if appropriate, suspension or termination of the appointment. In all cases, the Licence Holder should report any concerns it may have in this regard, to the MFSA, without delay.
- 2.126 The Licence Holder shall take reasonable steps to ensure that each of its tied agents:
- (a) carries on only those activities which are permissible in terms of the definition of "tied agent" in regulation 2 of the Regulations and provided such activities are in line with the terms of the tied agent's appointment by the Licence Holder.
 - (b) carries on the activity for which the Licence Holder has accepted responsibility in a way which is, and is held out as being, clearly distinct from any of the tied agent's other business, irrespective of whether such other business is regulated or not.
- 2.127 The Licence Holder will be held responsible for any breaches of the Rules committed by any of the tied agents it appoints.
- 2.128 When carrying out tied agent activities from a place of business or from any other place accessible to the public, the Licence Holder shall require the tied agent to display in a prominent position in that place, or in a part thereof to which the public has access, the certificate of registration or an official copy thereof issued by the Authority.
- 2.129 The Licence Holder shall maintain all records, including those relating to the "Know Your Client" procedures and evidence that the tied agent has carried out the necessary suitability and/or appropriateness tests in terms of SLCs 2.23 to 2.26, pertaining to the activities performed by the tied agents on the Licence Holder's behalf, as are necessary to demonstrate compliance by the tied agent with the relevant provision of these Rules. Such records shall be made available to MFSA officials during Compliance Visits.
- 2.130 The Licence Holder shall ensure that its tied agents:
- (a) do not act as such for other Licence Holders and
 - (b) are not involved in any activities which may give rise to a conflict of interest which could be detrimental to the Licence Holder's clients

2.131 The Licence Holder is to inform the MFSA of any decision to terminate a tied agent's appointment and shall confirm whether such a decision was taken due to any issues of a regulatory nature or concern.

L.N. of 2007

INVESTMENT SERVICES ACT
(CAP. 370)

Appointment of Tied Agents Regulations, 2007

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Prime Minister and Minister of Finance, acting on the advice of the Malta Financial Services Authority as the competent authority for the purposes of the Act, has made the following regulations:

Title. **1.** The title of these regulations is the Appointment of Tied Agents Regulations, 2007.

Interpretation. **2.** (1) In these Regulations, unless the context otherwise requires:-

“Act” means the Investment Services Act;

“ancillary services” means the services listed in Section B of Annex 1 to the Directive;

“competent authority” means the Malta Financial Services Authority appointed under article 2 of the Act;

“European investment firm” means an investment firm as defined in Article 4(1) of the Directive authorised by its European regulatory authority within the meaning of Article 5 of the Directive or authorised by a European regulatory authority in an EEA State;

“Investment Services Licence Holder” means a person who holds an investment services Licence granted by the competent authority in terms of Article 6 of the Act;

“tied agent” means a natural or legal person, who under the full and unconditional responsibility of only one Investment Services Licence Holder or European Investment Firm and on whose behalf it acts, promotes investment and, or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or instruments, places instruments and, or provides investment advice to clients or prospective clients in respect of those instruments or services.

(2) Words and expressions which are also used in the Act shall have the same meaning as in the Act.

Appointment
of tied agents
by
Investment
Services
Licence
Holders.

3. (1) An Investment Services Licence Holder may appoint tied agents for the purposes of promoting its services, soliciting business or receiving orders from clients or potential clients and transmitting them, placing instruments and providing investment advice in respect of such instruments and services offered by the Investment Services Licence Holder.

(2) Tied agents shall be subject to registration by the competent authority in terms of regulation 5 of these regulations and shall be exempt from the provisions of Article 3 of the Act.

(3) An Investment Services Licence Holder may appoint tied agents in Malta only if such tied agents have been admitted by the competent authority in the public register it establishes for this purpose, in terms of regulation 5 hereunder.

(4) Tied agents shall not be authorised to hold and control clients’ money and or assets.

Responsibility of
the Investment
Services Licence
Holder appointing
Tied Agents.

4. (1) Where an Investment Services Licence Holder decides to appoint a tied agent, it remains fully and unconditionally responsible for any act or omission on the part of the tied agent when the latter is acting on behalf of the Investment Services Licence Holder.

(2) The Investment Services Licence Holder shall ensure that its tied agent discloses the capacity in which such tied agent is acting and name of the Investment Services Licence Holder which such tied agent is representing when contacting or before dealing with any client or potential client.

(3) The Investment Services Licence Holder that appoints tied agents shall monitor the activities of its tied agents so as to ensure that they continue to comply with the requirements of these regulations and the Investment Services Rules that may be issued by the competent authority in terms of Article 6 of the Act, when acting through tied agents.

(4) The Investment Services Licence Holder that appoints tied agents shall take adequate measures in order to avoid any negative impact that the activities of the tied agents, which are not covered by the scope of the Directive, could have on the activities carried out by the tied agents on behalf of the Investment Services Licence Holder.

Registration of
Tied Agents.

5. (1) The competent authority shall keep a register of all tied agents appointed in Malta. This register shall be updated on a regular basis and shall be publicly available for consultation.

(2) The competent authority shall also include in the register established in sub-regulation (1) of this regulation, those tied agents which are based in Malta but which are appointed by a European Investment Firm.

(3) The competent authority shall only admit tied agents to the register established in sub-regulation (1) of this regulation if it is satisfied that they are of sufficiently good repute and that they possess appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client.

(4) The competent authority shall not register, or shall withdraw registration where:

Source: MiFiD
recital (39)

(a) the activities actually carried on indicate clearly that a tied agent has opted for registration in Malta for the purpose of evading the stricter standards in force in another Member State or EEA State within the territory of which it intends to carry on or does carry on the greater part of its activities; or

(b) It is no longer satisfied that the tied agent satisfies the requirements in sub-regulation (3) of this regulation.

Additional
Requirements for
tied agents.

6. The competent authority, may, by virtue of Investment Services Rules, issued in terms of article 6 of the Act, reinforce the requirements set out in these regulations or add other requirements for tied agents registered by the competent authority in Malta in terms of regulation 5 of these regulations.

Right of Appeal
to Financial
Services Tribunal.

7. Where the competent authority has refused to register a tied agent or has withdrawn a registration issued to a tied agent in terms of sub-regulation (4) of regulation 5 of these regulations, the person to whom such registration was refused and the tied agent whose registration was withdrawn, shall have a right of appeal from such decision of the competent authority to the Financial Services Tribunal and the provisions of article 19 of the Act shall apply *mutatis mutandis*.

Objective.

8. The objective of these regulations is to implement Article 23 of the Directive, and they shall be interpreted and applied accordingly.