

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Consultation Procedure

Regulation of Central Securities Depositories ('CSD')

27th January 2009

This Circular is being addressed to Investment Services Licence Holders and Listed Companies.

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, the Economy and Investment.

The MFSA invites comments by not later than the 27th February, 2009 on this consultation document. Interested parties are to send their comments in writing addressed to the Director – Securities Unit.

The following draft legal notices are being proposed for the better regulation of the activities of central securities depositaries authorised in terms of the Financial Markets Act, 1990:

[A] Central Securities Depositaries (Authorisation Requirements) Regulations, 2009

These regulations set out the authorisation requirements which shall be satisfied by an applicant for authorisation as a central securities depositary and which shall be satisfied by each authorised central securities depositary on a continuing and ongoing basis if it is to remain an authorised central securities depositary.

[B] Central Securities Depositaries (Control of Assets) Regulations, 2009

These regulations, which are modelled on the Investment Services Act (Control of Assets) Regulations, are intended to regulate the control of assets held by central securities depositaries and other relevant matters including the rights of owners of such assets, functions, duties, liabilities and fees of subject persons, the use of clearing, settlement and de-materialised systems and settlement risk and the termination of control of assets.

[C] Designated Financial Instruments Regulations, 2009

These regulations have the purpose of stipulating the classes of instruments which are to be considered as designated financial instruments for the purpose of Part IV of the Financial Markets Act and the information on designated financial instruments which must be made available to the public.

The above-mentioned regulations have been attached as an annex to this circular.

Contacts

Should you have any queries regarding the above or the attached annex, please do not hesitate to contact:

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Chairman
Malta Financial Services Authority

Minister of Finance, the
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L.N. of 2009

FINANCIAL MARKETS ACT
(CAP. 345)

Central Securities Depository (Authorisation Requirements) Regulations, 2009

IN exercise of the powers conferred by article 30 of the Financial Markets Act, the Minister of Finance, the Economy and Investment after consultation with the Malta Financial Services Authority as the competent authority for the purposes of the Act, has made the following regulations:

Title and commencement. **1.** (1) The title of these regulations is the Central Securities Depository (Authorisation Requirements) Regulations, 2009.

(2) These regulations shall come into force upon publication.

Interpretation. **2.** In these regulations unless the context otherwise requires:

“Act” means the Financial Markets Act and the words and expressions used shall have the same meaning as is given to them in the said Act, unless otherwise defined herein;

“applicant” means a person who has submitted an application to the competent authority to operate or provide the services of a central securities depository;

“market contract” means a contract entered into by a member or participant in a regulated market or a user in accordance with and subject to the bye-laws of such regulated market or guidelines of a central securities depository and which shall be brought into effect through the clearing and settlement systems provided by a central securities depository;

“users” means any person, body corporate or other entity who makes use of the services provided by a central securities depository, including members of a regulated market, companies, investors, and members of the general public.

Authorisation requirements.

3. (1) These regulations set out the authorisation requirements which shall be satisfied by an applicant if it is to qualify as a central securities depository and which shall be satisfied by each central securities depository on a continuing and ongoing basis if it is to remain a central securities depository.

(2) The burden of proving to the competent authority that the authorisation requirements have been or are being properly satisfied rests exclusively on the applicant or the central securities depository, as the case may be.

Suitability.

4. (1) The central securities depository must be fit and proper to perform its functions and be of good standing.

(2) The persons who:

(a) effectively direct the business and operations of a central securities depository; or

(b) are in a position to exercise, directly or indirectly, significant influence over the management of the central securities depository

shall satisfy the fit and proper criterion, by being of sufficient good repute and, where relevant, sufficiently experienced as to ensure the sound and prudent management and operation of the central securities depository.

Constitution, Governance and General Organisational Requirements.

5. (1) The constitution, governance, organisational structure and management systems of the central securities depository shall be adequate and appropriate for the scale and nature of its business.

(2) The central securities depository shall have systems and controls in place which ensure that the performance of its functions are adequate and appropriate for the scale and nature of its business.

(3) Without prejudice to the generality of sub-paragraphs (1) and (2) of this paragraph, the central securities depository shall:

(a) establish, implement and maintain decision-making procedures and an organisational structure which clearly and in a documented manner specifies reporting lines and allocates functions and responsibilities;

(b) employ personnel with the skills, knowledge and expertise necessary for the discharge of responsibilities allocated to them and ensure that its officers are aware of the procedures which shall be followed for the proper discharge of their responsibilities;

(c) establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures

at all levels of the central securities depository and to safeguard the security, integrity and confidentiality of information as appropriate;

(d) maintain adequate and orderly records of its business and internal organisation;

(e) ensure that the performance of multiple functions by its officers does not and is not likely to prevent those persons from discharging any particular function soundly, honestly and professionally;

(f) establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to its systems and procedures, the preservation of essential data and functions, or, where that is not possible, the timely recovery of such data and functions.

(4) Without prejudice to regulation 16, the central securities depository shall ensure that it is able to control the performance and quality of any contractual commitments for any services or facilities that it outsources to third parties.

Safeguards for users of central securities depository's services.

6. (1) The central securities depository shall ensure that its business is conducted in an orderly manner and affords proper and adequate protection to users of its services.

(2) Without prejudice to the generality of sub-paragraph (1) of this paragraph, the central securities depository shall, by virtue of appropriate procedures to the satisfaction of the competent authority, ensure that:

(a) satisfactory arrangements are made for securing the timely discharge of the rights and liabilities of the parties to transactions in financial instruments in relation to which the central securities depository provides clearing and settlement services;

(b) appropriate measures are adopted to reduce the extent to which the facilities of the central securities depository can be used for an unlawful purpose;

(c) satisfactory arrangements are made for the safeguarding and administration of assets belonging to users of those facilities, where relevant; and

(d) the integrity and accuracy of its records pertaining to holders of financial instruments and transactions in financial instruments.

Compliance.

7. (1) The central securities depository shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the central securities depository to comply with its obligations under the Act, the regulations issued thereunder and the Financial Market Rules, as well as with its obligations under other applicable legislation, as well as to detect the associated risks, and shall put in place adequate measures and procedures designed to minimize such risk and to enable the competent authority to exercise its powers effectively.

(2) The central securities depository shall establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:

(a) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with the requirements of sub-paragraph (1) of this paragraph, and the actions taken to address any deficiencies in the central securities depository's compliance with its obligations;

(b) to advise and assist the relevant persons responsible for carrying out the functions of the central securities depository to comply with the central securities depository's legal and regulatory obligations;

(3) The central securities depository shall:

(a) keep a record of all of its breaches of the Act or the regulations arising therefrom or Financial Market Rules issued thereunder; and

(b) notify the competent authority of all such breaches as soon as the central securities depository becomes aware of the breach.

Risk
Management.

8. (1) The central securities depository shall take the following actions with a view to manage its risks:

(a) establish, implement and maintain adequate risk management policies and procedures which identify the risks, including, particularly operational risk relating to the central securities depository's activities, processes and systems, and where appropriate, set the level of risk tolerated by the central securities depository;

(b) adopt effective arrangements, processes and mechanisms to manage the risks relating to the central securities depository's activities, processes and systems, in light of that level of risk tolerance;

(c) monitor the following:

(i) the adequacy and effectiveness of the central securities

depository's risk management policies and procedures;

(ii) the level of compliance by the central securities depository and its relevant persons with the arrangements, processes and mechanisms adopted in accordance with sub-paragraph (b) of this paragraph;

(iii) the adequacy and effectiveness of measures taken to address any deficiencies in those arrangements and procedures, including failures by the relevant persons to comply with such arrangements or follow such procedures.

(2) The central securities depository shall establish and maintain a risk management function that implements the policy and procedures referred to in sub-paragraph (1) of this paragraph.

Financial
Resources.

9. (1) The central securities depository shall have financial resources sufficient for the proper performance of its functions.

(2) Without prejudice to the generality of the foregoing, each central securities depository shall satisfy at all times those minimum financial resources requirements and minimum financial reporting requirements that may be prescribed by the competent authority from time to time.

Accounting.

10. (1) The central securities depository shall maintain proper accounting records to show and explain its transactions, assets and liabilities.

(2) Without prejudice to the generality of the foregoing, the accounting records of a central securities depository shall:

(a) disclose with reasonable accuracy, at all times, the financial position of the central securities depository;

(b) enable the financial statements which may be required by the competent authority to be prepared within the time limits specified by the competent authority.

(3) This regulation shall apply in addition to other obligations regarding reporting and accounting as may be applicable under any other law.

Co-operation with the competent authority.

11.(1) The central securities depository shall, at all times and on an ongoing basis, cooperate, by the sharing of information or otherwise, with the competent authority.

(2) For the purposes of the foregoing provision, the central securities depository shall have appropriate arrangements with its users enabling it to obtain confidential information from its users and to disclose such information to the competent authority and in particular, to assist and collaborate with the competent authority without delay in response to a specific written request received from the competent authority in the performance of its functions according to law.

Guidelines to regulate the central securities depository's services.

12.(1) The central securities depository shall make guidelines to better regulate the use of its services and to regulate access to its systems and matters connected therewith.

(2) Without prejudice to the generality of sub-paragraph (1) of this paragraph, the central securities depository shall ensure that its guidelines adequately address each of the functions which it is authorised to perform.

(3) The central securities depository shall have effective arrangements for monitoring and enforcing compliance with its guidelines.

(4) Any guidelines or amendments made thereto shall be subject to the prior approval of the competent authority.

Complaints.

13.(1) The central securities depository shall have in place effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its functions.

(2) The arrangements shall include arrangements for a complaint to be fairly and impartially investigated by a person independent of the central securities depository, and for him to report on the result of his investigation to the central securities depository and to the complainant.

(3) The arrangements shall confer on the person mentioned in subparagraph (2) of this paragraph the power to recommend, if he thinks it appropriate, that the central securities depository:

(a) makes a compensatory payment to the complainant;

(b) remedies the matter complained of, or takes both of those steps.

(4) Sub-paragraph (2) of this paragraph is not to be construed as preventing the central securities depository from making arrangements for the initial investigation of a complaint to be conducted by the central securities

depository.

Default rules
in respect of
market
contracts.

14. (1) The central securities depository shall have rules to deal with any default which, in the event of a user of the central securities depository being or likely to become unable to meet his obligations in respect of one or more market contracts, enable action to be taken in respect of unsettled market contracts to which he is a party.

(2) The bye-laws may authorise the taking of the same or similar action in relation to a user who appears to be likely to become unable to meet his obligations in respect of one or more market contracts.

(3) The central securities depository shall have adequate arrangements for ensuring that parties to the contract are notified as soon as reasonably practicable of the default, the identity of the other parties to the contract and of any decision taken under the bye-laws in relation to contracts to which they are a party.

(4) The central securities depository shall cooperate, by the sharing of information or otherwise, with any other authority or body having responsibility for any matter arising out of, or connected with, the default of a user of the central securities depository.

Central
securities
depository
unable to pay its
debts.

15. (1) Where the board of directors or other similar governing body of a central securities depository becomes aware that the central securities depository is unable to pay its debts or is imminently likely to become unable to pay its debts or becomes aware of any other reason or circumstance which may lead to the central securities depository's suspension or cessation of its activities or of its winding up, it shall forthwith inform the competent authority in writing.

(2) In any such event, whether advised by the central securities depository or otherwise, the competent authority may issue such directives in writing as it may deem appropriate to the central securities depository, and its directives may include the appointment of a controller to take control of the central securities depository's operations and assets or the appointment of a liquidator as may be specified by the competent authority in such directives.

(3) The competent authority may issue Financial Market Rules for the better implementation of the provisions of this regulation.

Satisfaction of
authorisation.
requirements.

16. In considering whether an applicant or a central securities depository satisfies the authorisation requirements applying to it under these regulations, the competent authority shall take into account all relevant circumstances.

Outsourcing.

17. An applicant or a central securities depository may be allowed to satisfy some of the authorisation requirements applying to it under these regulations by entering into an agreement to the satisfaction of the competent authority for any functions specified in the said agreement to be performed on its behalf by another person. Financial Market Rules may further regulate such agreements.

Chairman
Malta Financial Services Authority

Minister of Finance,
the Economy and Investment

L. N. of 2009

FINANCIAL MARKETS ACT
(CAP. 345)

Central Securities Depository (Control of Assets) Regulations, 2009

IN exercise of the powers conferred by article 30 of the Financial Markets Act, the Minister of Finance, the Economy and Investment, after consultation with the Malta Financial Services Authority, has made the following regulations:-

Part 1
Preliminary

Citation and
commencement

1. (1) These regulations may be cited as the Central Securities Depository (Control of Assets) Regulations, 2009.

(2) These regulations shall come into force upon publication.

Scope

2. These regulations are intended to regulate the control of assets by a person authorised to operate as a central securities depository.

3. (1) Any reference in these regulations to the Act is a reference to the Financial Markets Act, and subject to the provisions of paragraph (2) of this regulation, the provisions of article 2 of the said Act shall also apply to these regulations.

(2) In these regulations, unless the context otherwise requires-

“assets” means movable property of any kind;

“control of assets” means the holding or control of assets belonging to, or on behalf of a customer, by a person hereinafter referred to as the subject person; and

“customer” means any person whose assets are held under the control of a subject person.

“subject person” means a person who is in possession of an authorisation to operate as a central securities depository under the Act.

Part 2 General

Assets held under control constitute a distinct patrimony.

4. (1) A subject person having the control of assets belonging to a customer in the course of rendering a service to such customer, shall hold such assets solely for and on behalf of and in the interest of the customer.

Cap. 16

(2) Notwithstanding anything stated in section 1894 of the Civil Code or in the agreement entered into between the subject person and the customer or the fact that a customer’s assets held under the control of a subject person are registered in the name and title of or are otherwise vested in the subject person, such assets shall be deemed to constitute a distinct patrimony, separate from that belonging to the subject person and from that of other customers the assets of whom are also held under the control of the subject person.

(3) Except as expressly provided in the agreement entered into between the subject person and the customer and notwithstanding the provisions of the Civil Code, the control of assets belonging to a customer by a subject person shall not give or be deemed or construed to give to the subject person any rights over such assets nor shall it create any form of loan between the subject person and the customer and this notwithstanding the nature of the assets or the rights or obligations of the subject person in relation to the assets.

Customer enjoys right of ownership in

5. (1) A customer whose assets are held under the control of a

assets.

subject person enjoys a right of ownership in such assets notwithstanding that they may be registered in the name and title of or are otherwise vested in the subject person. Where such assets are held by the subject person as part of a common pool of identical assets or are otherwise held in a clients' or common account, the customer enjoys an undivided share in ownership of all the assets held collectively by the subject person in such a pool or account.

(2) The records, accounts and other statements held or issued by the subject person in terms of paragraph (3) of regulation 7 of these regulations shall, saving any proof to the contrary, constitute evidence of their contents and of the right of ownership of the customer as provided in paragraph (1) of this regulation.

Assets held under control not subject to the rights of creditors of the subject person.

6. (1) The creditors of a subject person shall have no claim or right of action on or against the assets held under the control of the subject person for and on behalf of and in the interest of any customer and such assets shall not be affected in any manner by the provisions of laws and regulations in force regulating the insolvency or bankruptcy of the subject person.

(2) In the event of any such insolvency or bankruptcy or related order or resolution, or in the event that the competent authority so requires, the subject person or any administrator or receiver or other officer appointed to represent it by any court or otherwise, shall on demand of any customer or of the competent authority, immediately transfer the control, possession and title to all assets held by or in the name of the subject person on behalf of the customer to another subject person or to such other person as may be instructed by the customer or by the competent authority.

Cap. 12

(3) In the event that any assets held under the control of the subject person are, at the request of any creditor of the subject person, made subject to any precautionary or executive act or warrant granted by any Court in terms of the Code of Organisation and Civil Procedure, the customer on whose behalf such assets are being held or the competent authority may, by application to the Court, request the release of the assets from such act or warrant and the Court shall, on production of evidence as it may deem fit, accede to the application without undue delay.

Applicability of Duty on Documents and Transfer Act, 1993 and Income Tax Act.

Act XVII of 1993
Cap. 123.

7. (1) The delivery of the assets of a customer to a subject person and from a subject person to a customer or another subject person for the purpose of the control of assets in terms of these regulations shall not be deemed to constitute a chargeable transfer for the purposes of the Duty on Documents and Transfers Act, and for the purposes of subsection (1) of section 5 of the Income Tax Act, where the delivery of such assets does not constitute a change in the beneficial owner of the assets.

(2) For the purpose of this regulation, beneficial owner means a

person who is the real owner of, or who is otherwise beneficially entitled to the assets held under control by the subject person, as is provided in regulation 4 of these regulations.

Part 3 Control of Assets

Functions and duties
of subject person.

8. (1) A subject person having the control of assets belonging to a customer shall safeguard such assets and the interest of the customer therein.

(2) The subject person shall carry out such functions and duties as shall be required in accordance with these regulations, the terms and conditions of the agreement entered into with the customer, the conditions of any authorisation to operate as a central securities depository, and such other requirements as may be laid down by the competent authority.

(3) The subject person shall maintain proper and adequate records and accounts of all customers' assets held under control. The records and accounts shall identify the customers to whom such assets belong and shall clearly indicate that the assets of every customer are separate and distinct from the assets belonging to the subject person and from other customers' assets held by the subject person. The records and accounts shall, upon due notice being given to the subject person, indicate where any pledge or other right over assets held under the control of the subject person has been given by the customers to any third parties and where any order by any Court has been made in connection with such assets.

(4) The subject person entrusted with the control of assets belonging to customers shall, to every extent reasonably possible, segregate in a proper manner the assets of every customer from the assets belonging to the subject person and from the assets of other customers:

Provided that the subject person may, with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any authorisation

to operate a central securities depository and such other requirements as may be laid down by the competent authority and without prejudice to the customer's right of ownership over the assets held under control, place and keep such assets in a common pool of identical assets or otherwise deposit them in a clients' or common account.

(5) The subject person shall make appropriate arrangements for the protection of customers' assets held under control and shall ensure that such assets are placed under adequate systems to safeguard such assets from damage, misappropriation or other loss and which permit the delivery of such assets only in accordance with the terms and conditions of the agreement entered into with the customer.

(6) Where it is not reasonably possible for the subject person to carry out any of the duties specified in this regulation due to the nature of the assets and of the arrangements whereby control is exercised, the said duties may be varied with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any authorisation to operate a central securities depository and such other requirements as may be laid down by the competent authority.

Liability of the
subject person.

9. (1) A subject person having the control of assets belonging to customers shall be liable for any loss or prejudice suffered by the customers due to the subject person's fraud, willful default or negligence including the unjustifiable failure to perform in whole or in part the subject person's obligations arising under these regulations, the terms and conditions of the agreement entered into with the customers, the conditions of any investment services licence or such other requirements as may be laid down by the competent authority.

(2) For the purposes of this regulation, subject person includes such other subject person to whom functions, duties or assets may be delegated or entrusted in terms of regulation 9 of these regulations.

10. (1) Where reasonably required by the nature of the assets and of the arrangements whereby control is to be exercised, a subject person may, with the written consent of the customer and in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any authorisation to operate a central securities depository and such other requirements as may be laid down by the competent authority, make use of any market clearing system, settlement system, de-materialised book entry system, centralised custodial depository or similar system for the purpose of the control of assets in terms of these regulations.

(2) Such systems as are provided for in paragraph (1) of this

regulation may also be used to effect all transactions including conveyance, assignment, transfer, transmission and pledging of assets held under the control of the subject person and the law of the country in which the system is maintained shall apply to the validity of such transactions notwithstanding the provisions of any other law.

(3) The agreement with the customer shall clearly define the extent of liability of the subject person for any losses that may be incurred by the customer as a result of the use of such systems.

Subject person's fees. **11.** The subject person shall have the right to charge fees to the customer and to be reimbursed for expenses in accordance with the terms and conditions of the agreement entered into with the customer. The subject person may, if authorised to do so by the terms and conditions of the said agreement, exercise a right of retention over the customer's assets held under control, to the extent of any lawfully due but unpaid fees and expenses, until such fees and expenses are paid.

Termination of the control of assets. **12.** (1) Without prejudice to any requirements as may be laid down by the competent authority, an agreement for the control of assets belonging to a customer may be terminated by the customer, by the subject person or by order of the competent authority.

(2) Upon the termination of an agreement for the control of assets, the subject person shall convey for no consideration the assets held for the customer, as instructed by the customer or by the competent authority, without prejudice to the subject person's right to payment of any lawfully due fees or expenses in terms of the agreement entered into with the customer and to any obligations arising in favour of the customer thereunder.

Chairman
Malta Financial Services Authority

Minister of Finance, the
Economy and Investment

L.N. of 2009

FINANCIAL MARKETS ACT
(CAP. 345)

Designated Financial Instruments Regulations, 2009

IN exercise of the powers conferred by articles 28 and 30 of the Financial Markets Act, the Minister of Finance, the Economy and Investment after consultation with the Malta Financial Services Authority as the competent authority for the purposes of the Act, has made the following regulations:

Title and commencement.

1. (1) The title of these regulations is the Designated Financial Instruments Regulations, 2008.

(2) These regulations shall come into force on such date as the Minister of Finance, the Economy and Investment may by notice in the Gazette establish.

Interpretation.

2. In these regulations unless the context otherwise requires:

“Act” means the Financial Markets Act and the words and expressions used shall have the same meaning as is given to them in the said Act, unless otherwise defined herein; and

Cap. 386.

“Registrar” has the same meaning assigned to it under the Companies Act.

Designated financial instruments for the purposes of Part IV of the Act.

3. The following categories or classes of financial instruments the register of which is maintained in a central securities depository shall be considered ‘designated financial instruments’ for the purposes of Part IV of the Act:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depository receipts in respect of shares;

(b) bonds or other forms of securitised debt, including depository receipts in respect of such securities and including government stocks; and

(c) treasury bills.

Public access
in terms of
Article 28 (5)
of the Act.

4. (1) The information as specified in sub-regulation (2) in relation to the designated financial instruments set out in paragraphs (a) and (b) of regulation 3 shall be open to the inspection of any person in terms of article 28(5) of the Act.

(2) The following information shall be available for public inspection:

(a) in the case of shares in companies, partnerships or other entities and other securities equivalent to shares in companies, partnerships or other entities:

i. the names and addresses of the holders thereof;

ii. a statement of the number of shares held by each holder;

iii. any pledges thereon within the meaning of Title XXI of Part II of Book Second of the Civil Code.

(b) in the case of bonds or other forms of securitized debt in companies, partnerships or other entities:

i. any pledges thereon within the meaning of Title XXI of Part II of Book Second of the Civil Code.

Place for
public
inspection.

5. (1) A central securities depository shall on a daily basis provide the Registrar by such means and in such format, including electronic communication, with an updated record of the information referred to in regulation 4 and for this purpose it shall as may be necessary or convenient from time to time enter into arrangements with the Registrar.

(2) The Registrar shall make the information provided by a central securities depository in terms of sub-regulation (1), available to the public .