

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**Proposed Regulatory Regime for
Company Service Providers**

**Feedback Statement
further to Industry Responses to
MFSA Consultation Document dated
23rd November, 2012**

17th May, 2013

1.0 Background

On the, 23rd November, 2012 the MFSA issued a consultation document regarding the introduction of a proposed regulatory regime for Company Service Providers.

This proposed regulatory regime is being proposed in order to fully comply with the requirements of Article 36 of the Third Anti Money Laundering Directive (Directive 2005/60/EC of the European Parliament and of the Council of the 26th October, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)

The MFSA has received a number of comments from a number of persons (16) who could potentially become subject to the proposed regime as well as from the Financial Intelligence Analysis Unit and the Institute of Financial Services Practitioners.

An outline of the main comments received and the MFSA's position in relation thereto, is provided in Section 3.0.

2.0 Developments

The Consultation Document referred to above also included a draft Legal Notice introducing the proposed regime which was to be issued under the Investment Services Act and the MFSA Act.

It is now being suggested that the new regime regulating Company Service Providers be issued under a separate Act of Parliament. Accordingly this will be a stand-alone regime. The text of this Act will be mainly that of the draft Regulations which were issued with the Authority's consultation document referred to above, duly updated after taking into account a number of comments which resulted from this consultation.

3.0 Main Comments Received and MFSA's position

[3.1] Industry Comment: A number of respondents, in particular Insurance Management companies, raised the issue that some of the activities of regulated insurance managers fit into the definition of "*company service providers*" being proposed by the Authority. Insurance managers are already regulated by the Authority and hence subject to "*fit and proper*" requirements and qualify as subject persons for the purposes of the anti- money laundering procedures. The same issue was raised by a fund administrator recognised in terms of Article 9A of the Investment Services Act.

MFSA's Position: The MFSA considers that given that persons who are in possession of licence or authorisation issued by the Authority are by that very fact subject to the "*fit and proper*" test. Such persons who also provide company services by way of business, however, are still subject to the proposed regime for company service providers.

Given that these persons are already considered to be “fit and proper” by the Authority, the registration as a company service provider will be fast tracked. It is important to note that licensed and authorised entities which are also providing company services by way of business would be required to adhere to the ongoing obligations for company service providers which will be issued by the Authority in due course.

[3.2] Industry Comment: A question was raised as to whether a company licensed as a Protected Cell Company, duly licensed under the Insurance Business Act and which as part of its services offers a registered address to its cells, would require registration as a company service provider.

MFSA’s Position: The Authority considers that Protected Cell Companies duly licensed under the Insurance Business Act would not need to register as a company service provider since its cell companies would not need to have separate registered addresses since these do not have separate legal personality.

[3.3] Industry Comment: A respondent indicated that reference to “corporate service providers” rather than “company service providers” should be made since the former tends to be the main term used within the industry to refer to such operators.

MFSA’s Position: The Authority notes this proposal but considers that it would be preferable to use the same terminology as that used in the Third Anti Money Laundering Directive in this context, namely “*company service providers*”.

[3.4] Industry Comment: It was pointed out by a respondent that company service providers may hold themselves out to provide the services set out in paragraphs (a) to (c) of article 2 of the Draft Regulations on the basis of a joint venture/outsourcing agreement with a Maltese company service provider by virtue of which the latter would be effectively performing such services in Malta. To this end, the Authority was requested to confirm that it would only be the Maltese Company Service Provider which would be required to register in terms of the proposed regime, based on the fact that it is only this entity that is actually providing the company services in Malta.

MFSA’s Position: The Authority would like to clarify that in the above scenario, only the local company service provider would need to be registered in terms of the proposed regime since only this company service provider will be providing its services (operating) in or from Malta. The foreign entity is not in any way subject to registration given that it is not resident in Malta and it is not, itself “*operating in or from Malta*”. The Authority intends to clarify this matter further in the Rules it will be issuing and which will be applicable to company service providers.

[3.5] Industry Comment: A respondent suggested that the proposed legal provisions should be amended to clarify the criteria relating to the conditions for which professionals (advocates, accountants etc.) are exempt from the requirement of registration, in order to provide more certainty to these professionals.

MFSA’s Position: The legal provisions will clearly indicate the persons exempt from the requirement of registration as company service providers. Advocates, notaries

public, legal procurators and certified public accountants will be exempt if they are in possession of a warrant or equivalent. Accordingly, this exemption will no longer be subject to the conditions that (a) the provision of company services is limited to what is necessary and incidental in the course of carrying out the abovementioned professions and, (b) that such professionals do not hold themselves out as company services providers to the public.

[3.6] Industry Comment: A respondent suggested that having considered that employees of company service providers act as directors and/or company secretaries for companies administered by the company service provider employing them, an exemption from separate registration for such individuals being employees of registered company service providers should be made. The suggestion was that whilst exempting such employees from separate registration, the onus is placed on the company service providers employing such individuals to provide the Authority with the documentation required on such employees by the Authority.

MFSA's Position: It is not the Authority's intention to have the actual persons appointed by the company service providers as company directors/company secretaries to be registered in their own name. The legislative provisions will reflect this clearly.

[3.7] Industry Comment: It was suggested that the legislative provisions would not seek to regulate persons and/or entities acting as company secretaries and/or directors if these are not resident in Malta since this would seriously and negatively impact the industry in Malta. It was indicated that when one considers the less stringent requirements in other countries, the perception is that this would render Malta very uncompetitive.

MFSA's Position: It is the intention to regulate persons who are resident in Malta or who operate in or from Malta by way of business. This is to ensure that all company service provider activities carried on by foreign entities in or from Malta or outside Malta by locally resident entities are caught under these regulations. This would avert any reputational risks which Malta may face if it fails to regulate activities carried out by its residents even if such activities are undertaken outside Malta.

[3.8] Industry Comment: A respondent requested clarification in the proposed definition of company service providers, specifically that the reference to the "management of companies" does not purport to capture for instance, fund managers or (for self-managed funds) investment committees / portfolio manager to which the management of the assets of a fund (which in Malta, is generally set up in the form of an investment company) is delegated.

MFSA's Position: The Authority confirms that the reference in question does not capture the entities referred to above. The term "management of companies" in the context of the regulation of company service providers should be limited to the decisions taken by companies and their day to day running.

[3.9] Industry Comment: Further clarification was requested as to the meaning of the phrase “*by way of business*”. In particular, a question was raised as to whether local non-Executive Directors who take up directorships with various companies, which may be licensed entities, or regular holding / trading companies would become subject to the new regime. Furthermore, it was also questioned whether directors who are shareholders of the relevant company or who are directors, officers, employees or beneficial owners of the corporate shareholder of the relevant company be considered to be acting ‘by way of business’. It was also pointed out that in the case of Maltese funds, which are usually established in the form of a SICAV, the promoter or an employee, officer, director or owner of the investment manager (in most cases these are established outside Malta) usually takes up the function of director, and often a director resident in Malta is also appointed. In this context it was also queried whether such foreign directors be caught under the proposed regime.

MFSA’s position: The Authority would like to clarify that it was not its intention to capture fund managers, investment committees or portfolio managers. With respect to the requirement for registration, the Authority will be amending the relative legal provision to state that “*Any person resident or operating in or from Malta who acts as a company service provider by way of business, shall apply for registration with the Authority in terms of this Act*”. In this context, the Authority would like to clarify that the phrase “by way of business” means EITHER (a) holding oneself out as providing company services; OR (b) Soliciting members of the public to take such services); OR (c) providing company services on a habitual and regular basis AND being directly or indirectly in receipt of remuneration or other benefit for the provision of such services. The Authority will provide further clarifications as to the phrase “by way of business” in the Rules it will be issuing under the proposed Act and which will be applicable to company service providers.

Furthermore, the Authority would like to clarify that directors in Companies would not be subject to the registration regime in their own name if they are nominated to act as a director on a company by a duly registered company service provider. On the other hand, such directors will only be subject to registration in terms of the proposed regime if they accept appointments as company directors “*by way of business*”.

[3.10] Industry’s comment: A query was raised as to whether law firms and accountancy firms, which are generally organised as partnerships or possibly even as companies, and may provide corporate services through their employees (proposing local directors to clients, acting as company secretary) would be subject to registration under the proposed regime. The partnership as such would not hold the warrant itself and yet it would be arranging for another person to act as director or secretary. Would the firm / partnership be caught by the exemption?

MFSA’s position: The Authority would like to clarify that only warrant holders, irrespective of whether these are partnerships (as may be the case with accountancy firms) or individuals, would be exempt in line with the provisions of the Directive. Furthermore, it is being proposed that persons who hold an authorisation granted from a foreign body and which is equivalent to a warrant granted locally to lawyers and accountants would also benefit from this exemption if such persons are providing company services in or from Malta on the strength of such authorisation.

[3.11] Industry's comments: A respondent indicated that generally, company secretary services are provided by individuals and not by legal persons (except for SICAVs). Accordingly, it should be clarified whether employees of company service providers or entities exempt from the registration requirement are automatically covered by such exemption.

MFSA's position: The Authority would like to confirm that such individuals are not subject to registration. This will be clarified in the Rules to be issued under the relative Act.

[3.12] Industry's comment: It was pointed out that it may be desirable to consider or clarify the **territorial scope** of application of the proposed regime, which is to apply to "any person resident or operating in or from Malta". In this regard, it was queried as to whether the regime only be applied to company service providers established in Malta, or also to foreign service providers servicing local companies, operating on a cross-border basis "into Malta" and what the situation would be in the case of company service providers established in Malta provide cross-border services to companies outside Malta.

MFSA's position: The new regime shall only apply to persons resident in Malta or who operate in or from Malta. Company service providers established in Malta providing services to companies outside Malta would be subject to registration because they are resident in Malta. As a general rule, foreign persons operating in or from Malta and who are acting as company service providers by way of business would need to be registered in terms of the new regime. . The Authority is however considering the possibility of recognising entities which are incorporated or established in an EU/ EEA Member State which has implemented Article 36 of the Anti-Money Laundering Directive or which has a regime which is comparable to that envisaged by Article 36 of the said Directive such that such entities would not be required to be registered in the terms of the proposed regime on the basis of the fact that they already duly regulated in the country of their incorporation or establishment.

[3.13] Industry's comment: A respondent raised the point that many foreign insurance companies need to have a Malta holding company (which also needs to be managed, but which cannot be managed by an insurance management company as this company is only allowed to manage insurance companies). Further guidance was requested as to whether Insurance management companies will be permitted to manage parent/sister companies of insurance companies.

MFSA's position: The Authority considers that there is no legal requirement for an Insurance Management Company to have a Maltese holding company although it recognises that many insurance management companies opt to appoint such a holding company. However, the Authority considers that such holding companies would not be subject to the requirement of registration in terms of the proposed regime for company service providers if such holding companies provide services to members of the same group of companies and which are also entities licenced and/or authorised by the MFSA and as long as such activity is not done by way of business.

[3.14] Industry’s comment: A query was raised as to whether existing directors and/or company secretaries of Listed and/or Licensed Companies, as at the date of coming into force of the proposed regime, should be subject to registration since the said individuals would have already been vetted by the MFSA as being Fit and Proper and are already being regulated. The respondent considered that directors/company Secretaries should not be considered as company service providers since they are directly appointed or employed by the company to which they offer their services. Furthermore, further clarity was requested with respect to whether directors/company Secretaries within a Group of Companies who are appointed by the Shareholders would be required to register in terms of the proposed regime and whether such persons can act as Directors/Company Secretaries of subsidiary, associated or other companies in which any one of the companies holds a minority shareholding.

MFSA’s position: The Authority maintains that the registration requirement for company service providers would depend on whether an entity is providing such services “by way of business”. This phrase would be further clarified in the Rules applicable to company service providers as described in section [3.9] above.

[3.15] Industry’s comment: A suggestion was made to the effect that a maximum number of directorships/company Secretarial positions that a company service provider can have, per individual employed for such a purpose should be established. It was contended that such an approach would enable the Director/Company Secretary to dedicate the required time to the company.

MFSA’s position: The Authority does not favour the establishment of such a quota given that it considers that it should be the company service provider’s responsibility to ensure that it does not appoint any person to a larger number of Boards than it deems appropriate. However, the Authority will consider the possibility of including general criteria in later guidance which would aid company service providers to take decisions in this regard. In this regard, the Authority would also like to point out that the requirements under the Companies Act for directors continue to apply personally to the persons appointed as Directors. Accordingly, any person accepting to act as a director of a company should ensure that he/she is in a position to abide by these legal requirements.

[3.16] Industry’s Comment: A respondent queried whether his company would be subject to registration as a company service provider given that although the main services offered by his company relate to services other than the provision of company services, this company may be requested to provide company secretarial duties and/or directorships on an ad hoc and not on a habitual basis.

MFSA’s position: The Authority would like to clarify that the objects clause of a corporate services provider should not include anything which is incompatible with the provision of such services. Furthermore, as indicated above, if a person is being requested to act as a director/company secretary on an ad hoc basis one will not be subject to registration as a CSP – unless this service is being offered “by way of business” as further explained in paragraph [3.9] above.

[3.17] Industry's Comment: Some respondents have suggested that all company service providers should be made known to the MFSA. This means that even company service providers which may be exempt from registration (and hence regulation) in terms of the proposed regime, should also be notified to the MFSA.

MFSA's position: The MFSA agrees that a complete register of all the entities providing company services should be kept. However, it is of the opinion that the best entity to keep this register would be the FIAU since the register will also only contain the persons which are exempt from MFSA regulation in terms of the proposed regime. Accordingly, the proposed Act will introduce a specific requirement to the effect that persons who are exempt from the requirement of registration with the MFSA should notify FIAU of this fact.

[3.18] Industry's Comment: It was suggested that for an organization to be eligible for the exemption from regulation (not from registration) in the same way as individual warrant holders are under these regulations, the organization should be at least 75% owned or managed by warrant holders, subject to a minimum of two warrant holders to ensure a sound, four-eyes approach to management.

MFSA's position: The Authority considers that in order to qualify for an exemption from registration as a company service provider, a person or a partnership (in the case of accountancy firms) must be a warrant holder in its own right rather than its owners.

[3.19] Industry's Comment: A point was raised that a considerable proportion of the entities offering company services are organized as a group of companies and trade under a common trade name or use common resources across companies. Typically, these entities would have common shareholding, or common directors and senior management. In such cases, it was suggested to treat associated companies as one single unit for the purposes of regulation and supervision whilst listing these separately as authorised CSPs.

MFSA's position: The Authority considers that companies in the same the same group may be subject to different licencing requirements (e.g. insurance/investment services/banking) and hence each member in that group would be subject to different regulatory requirements. Accordingly, it is not always possible from a logistical point of view to treat members in the same group as a single regulated entity.

[3.20] Industry's Comment: The Third Anti Money Laundering directive itself does not make any distinction in the definition of "company service provider" between the mere formation of a company and the subsequent provision of management services. Accordingly, it was considered that the exemption provisions ought to clearly make such a distinction.

MFSA's position: The proposed regime is aimed at persons providing, *inter alia*, the services relating to the formation of companies. The actual management of the Companies lies outside the scope of the proposed regime in that the latter does not purport to regulate the conduct of company directors and the decisions which they may take.

[3.21] Industry's comment: A suggestion was made that highly experienced individuals in the fund or asset management business should be exempt from the requirement for registration under the proposed regime when such persons are appointed as directors of funds or asset managers in Malta.

MFSA's position: The Authority would be considering further this suggestion but would like to point out at this stage that only persons who will be willing to act as directors of companies (which may or may not be regulated entities) "*by way of business*" would be subject to registration.

[3.22] Industry's comment: A significant number of respondents have indicated their concerns with respect to the amounts of the fees being proposed for the purposes of this regime.

MFSA's position: The Authority considers that the fees which should be levied on registered company service providers should take into account, *inter alia*, the cost of the resources that the Authority would need to employ in order to regulate company service providers. However, the comments raised have been noted and the Authority is currently reconsidering the amounts of the fees. These will be announced at a later stage.

Contacts

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Malta Financial Services Authority
MFSA Ref: 01-2013
17th May 2013