

# Guidance Note on the Application of the Company Service Providers Act

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## 1. Purpose

The purpose of this guidance note is to provide clarifications on the application of the phrase 'by way of business' in terms of the Company Services Providers Act, Chapter 529 of the Laws of Malta), as amended ("CSP Act").

This guidance note should be read in conjunction with the CSP Act and the Company Service Providers Rulebook ("CSP Rulebook").

This guidance note clarifies the Authority's interpretation of the phrase 'by way of business'. However, should there be anything which conflicts with the Act, Regulations or Rules then it is the Act, Regulation or Rules which will prevail.

## 2. Regulated Activities

Article 3 of the CSP Act requires that any person operating in or from Malta who acts, or holds himself out as acting, as a company service provider 'by way of business', shall apply for authorisation with the Authority.

Company Service Providers are defined in Article 2 of the CSP Act as those persons who by 'way of business' provide any of the following services to *third parties*:

- a) formation of companies or other legal entities;
- b) acting as, or arranging for another person to act as, a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal entities; and
- c) provision of registered office, a business correspondence or administrative address and other related services for a company, a partnership or any other legal entity.

These activities must be carried out, or intended to be carried out, as a service *to third parties*. If the activity being undertaken is not provided, or intended to be provided, to a third party, then that person does not require authorisation.

### 3. Interpretation Criteria

For the purposes of Article 3 of the CSP Act the activities regulated by the Act must be provided by a person 'by way of business' in addition to being provided to third parties.

The phrase 'by way of business' means that these activities must be provided by a person who either:

- a) holds himself out as providing company services *inter alia* by soliciting the services on offer to members of the public; or
- b) provides company services on a regular and habitual basis.

If any one of the conditions specified in a) or b) is satisfied, and the person is directly or indirectly in receipt of remuneration or other benefits for the provision of these services, that person is deemed to be providing the service 'by way of business'.

The CSP Rulebook provides details of the criteria and factors that are taken into consideration by the Authority when interpreting the phrase '*by way of its business*'.

#### 3.1 Further Interpretation

##### a. Holding oneself out

'Holding oneself out' involves actual representation to third parties. The test on 'holding oneself out' is not confined solely to a determination as to whether advertising or solicitation takes place.

The following are also indicators that a person shall be deemed to be 'holding himself out':

- a) advertising the services provided or solicitation of business either verbally, through print or online (rather than being requested to provide CSP services); or
- b) making it known that the person will act to meet certain requests; or
- c) being equipped so to act: e.g. office stationery, application form, business cards, business telephone book entries, website; etc.; or
- d) The memorandum and articles of association of a legal person includes the carrying out of CSP activities.

These indicators are not cumulative, however, the greater the number of indicators a person meets, the greater the probability that such person would be considered as 'holding oneself out' by the Authority.

## b. Regular and habitual

The Authority would like to emphasise that the initial focus with respect to the determination as to whether CSP activity is being undertaken 'by way of business' should be on whether the provision of this service is being done on a regular and habitual basis. The provision of one service is not deemed to be regular and habitual.

## c. Directly or indirectly remunerated

Where the company services being provided by a person are being remunerated through another company which is associated or connected with the person providing such services or which belongs to the same group of companies, then the provider of the services would still be deemed to be receiving indirect remuneration for the services it offers and provided that it meets one of the criteria mentioned in (a) and (b) above, it would be subject to authorisation in terms of Article 3 of the Act.

## 3.2 Factors taken into consideration by the Authority

The CSP Rulebook also includes a number of factors and criteria which the Authority takes into consideration when determining whether the activity is being undertaken 'by way of business', as follows:

- a) the amount of time taken to fulfil the responsibility is considered significant;
- b) the individual has no other form of employment;
- c) the level of income received (both in terms of the quantum and as a proportion of the individuals' total income) is considered significant;
- d) the existence of a business relationship through which habitual or frequent or regular appointments are introduced;
- e) the individual is receiving significant non-financial benefits/benefits in kind;
- f) the individual claiming business expenses within his own tax return;
- g) the individual offering or providing more than one type of company service; and

h) the turnover of engagements is considered significant.

These indicators represent a non-exhaustive list of considerations. The Authority urges individuals either currently undertaking or contemplating commencing CSP activities, who remain unsure as to whether they meet the *'by way of its business'* threshold test, to consider taking legal advice and/or discuss their specific circumstances with the Authority.

The Rules also specify that these indicators are not cumulative; however, the greater the number of indicators an individual meets the greater the probability that a *'by way of its business'* determination would be made by the Authority.

The Authority will look at these factors holistically and thus the assessment as to whether an activity is being undertaken *'by way of business'* will depend on a case-by-case assessment of the facts and the specific business model of the person carrying out such activity.

#### 4. Examples

The following examples are based on feedback received from the Industry and clarifications being provided by the Authority:

1. Does an individual who is a director or company secretary in a family company require authorisation in terms of the CSP Act?

Where an individual acts exclusively as a director/company secretary of a Company/Group of Companies in a family business, as a consequence of a family relationship with the founding member/s, these services are not deemed to be carried out as a service to third parties. Family relationship refers to a relationship with a person by consanguinity and/or affinity.

However, should the same individual provide other CSP services to third parties, beside the family business, and holds himself out to provide such services to the public then authorisation is required.

2. If I do not fall within the exemptions and provide any company services will authorisation always be required?

The *'by way of business'* test is a factual one. This means that whether you need to apply for authorisation will always depend on your specific circumstances and applying the criteria outline

in this Guidance. However, where for example an individual is acting as company secretary where his appointments as company secretary are limited to 3 involvements it may be the case that these will not be deemed to be 'by way of business' depending on the facts. Where a director has one or two involvements it may be the case that those facts mean that authorisation is not required. If in doubt seek guidance from the Authority.

There are specific exemptions available for clear-cut situations where authorisation is not required given that the specified criteria are being met. See the question relating to Exemptions.

3. An individual is an authorised Class B under threshold CSP providing directorship and company secretary services and has a beneficial interest in a company which is less than 50%. If such individual is appointed as director to that company, does this company count towards the number of involvements of this CSP to determine whether s/he qualifies as an under-threshold Class B CSP?

If the appointment as a director in this company is a result of a beneficial interest in the company, then this will not count towards the involvements. Any other involvements whereby services are provided to third parties will be taken into account when determining the classification of Class B CSPs.

A beneficial interest means an interest that confers the rights of a beneficiary (voting and financial) on a director in a company and is not tied to a specific percentage of shares owned by the individual. This is determined on a case by case basis and by reference to the circumstances of the case.

4. Does an individual who is acting as a director/company secretary on one company require authorisation in terms of the CSP Act?

A director/company secretary who is providing directorship services to one Company, (where this is not a temporary situation and/or the person concerned is not soliciting further appointments from the public) is not deemed to provide directorship/company secretary services 'by way of business' and thus no authorisation is required.

A similar example is where a director/company secretary who is providing CSP services to one

overseas company operating in or from Malta (or group of companies). This will not be considered to be providing services 'by way of business'.

5. Does an employee of an authorised CSP who is appointed as Director/Company Secretary (under that CSPs authorised power to arrange) require authorisation?

Such a director/company secretary does not require authorisation if s/he is providing services exclusively through the arranging powers of the authorised CSP s/he is employed with. This exemption applies to both full-time and part-time employees as long as additional directorship/company secretary services are not provided to parties other than pursuant to that individuals contract with the authorised CSP and to its clients i.e. the services are exclusive to the CSP. If services are provided to third parties not related with the authorised CSP who is employing such individual, then in such a case authorisation is required.

6. Does an employee of a company who acts as a director and/or company secretary to such company require authorisation?

No, a person holding office of director and/or company secretary does not require authorisation if the appointment is with a company with whom a contract of employment is in place. If in terms of the employment contract the person is also appointed as director and/or company secretary of other companies within the same group, no authorisation is required. However, should the same person act as a director and/or company secretary on other companies outside an employment relationship, then authorisation will be required.

7. Do warranted professionals providing CSP services as an incidental service in the course of their core professional activity require authorisation?

Where warranted professionals provide CSP services being incidental services in connection with the services for which they are retained by the client (such services not being within the definition of CSP services) this will not be considered as being conducted by way of business for the purposes of the CSP Act. In this situation warranted professionals will not require authorisation under the CSP Act.



The Authority recognises that some warranted professionals have made the provision of CSP services a focal part of their professional services, providing these services as a business activity in its own right. These warranted professionals are indisputably providing CSP services to third parties 'by way of business' and should be authorised under the CSP Act. There are other warranted professionals who have not made CSP services a central feature of what they do but may be requested to provide occasional CSP services in the course of advising their clients on particular transactions. For this reason, the provision of registered office, provision of directorship and company secretarial services being all activities involving an ongoing relationship will not be considered as incidental services in the ordinary course of their core professional activity.

In this respect it should be clarified that for those warranted professionals who hold themselves out as providing CSP services or performing CSP services regularly and habitually, against remuneration, these will automatically be considered as performing CSP services and therefore subject to authorisation under the CSP Act.

Examples of incidental services provided in the ordinary course of a warranted professional's core activity are given below:

#### Example 1

In the course of advising a client about a merger and acquisition transaction, it is advised that a company/ies ought to be established as a special purpose vehicle/s as part of the merger and acquisition transaction.

Considered as incidental services to core activity, not considered a CSP service to third parties 'by way of business'.

#### Example 2

In the course of advising a client on a joint venture with a prospective business partner, it is advised that a company/ies ought to be established as a special purpose vehicle/s to act as the JV entity in which the partners will invest their funds and conduct the joint venture.

Considered as incidental services to core activity, not considered a CSP service to third parties 'by way of business'.

#### Example 3

A warranted professional provides a company incorporation service to a client as an incidental

service provided in the ordinary course of his/her core practice. The professional is approached by the same client requesting a company to be incorporated.

Not considered as incidental services to core activity, considered as a CSP service to third parties 'by way of business'.

8. If I provide CSP Services 'by way of business' is it possible that I may be still exempt from authorisation under the CSP Act?

Yes, as there are exemptions included in the Company Service Providers (Exemption) Regulations, 2021 (L.N. 105 OF 2021) intended to deal with clear-cut situations where authorisation is not required given that the specified criteria are being met. Conversely, a person who does not qualify for an exemption in terms of these Regulations, would need to undergo the 'by way of business' test and may still, for example, be deemed as not requiring authorisation under the CSP Act if the facts of the case indicate that the activity is not being carried out 'by way of business', such as where, all things being equal, an individual's appointment as director are limited to one or two Company or a Group of Companies.

For further guidance, please refer to the [FAQs](#) available on the Company Service Providers page on the [MFSA website](#).

The clarifications and examples above are for guidance purposes only and each case will be determined on facts as already indicated above.