

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"). The Malta Financial Services Authority ('MFSA' or 'Authority') is established as the competent authority under the Act and is empowered to issue rules and guidance *inter alia* in relation to the provision of company services '*by way of business*'.

This guidance note should be read in conjunction with the CSP Act, the [Company Service Providers Rulebook](#) and the [Rulebook Applicable to Limited Company Service Providers](#) under the Company Service Providers Act (hereinafter referred to as the 'CSP Rulebooks'). This guidance note clarifies the Authority's interpretation of the phrase '*by way of business*'. However, should there be anything in this guidance which conflicts with the Act, Regulations or Rules then it is the Act, Regulations or Rules which will prevail.

2. Persons Providing Company Services

In terms of Article 3 of the CSP Act which governs the requirements for the provision of company services in or from Malta

- no person shall act as a company service provider or a limited company service provider, or hold himself out to act as such, in or from Malta unless that person is duly authorised or registered, as applicable, to do so in accordance with the Act and any regulations made, and rules issued thereunder; and
- no person shall act as a Restricted Company Service provider in or from Malta unless that person has duly notified the Authority of this in accordance with the Act and any regulations made, and rules issued thereunder.

'Company services' are defined in Article 2 of the CSP Act, as any of the following services:

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

Persons who carry out, or intend to carry out, any of these company services **to third parties 'by way of business'** are required to seek authorisation or registration, as applicable, in terms of the CSP Act. Such persons are subject to ongoing supervision by the MFSA once authorised or registered as a company service provider or limited company service provider respectively in terms of the CSP Act.

The CSP Act and the applicable Rules establish criteria for a person providing company services (or intending to provide such services) to qualify as a 'company service provider', a 'limited company service provider' or a 'restricted company service provider'. Such persons are therefore required to conduct an assessment and establish whether their services are being provided '*by way of business*' to third parties. Depending on the outcome of such assessment and the nature and extent of company services provided, the person concerned would then be required to:

- apply for authorisation as a company service provider, or
- apply for registration as a limited company service provider, or
- submit a notification as a restricted company service provider,

to the Authority in terms of the Act and the applicable Rules.

Where there is a doubt as to whether a person would be deemed to be a company service provider, a limited company service provider or a restricted company service provider by carrying out a particular activity, the matter shall be conclusively determined by the

Authority. A restricted company service provider, albeit not acting or providing company services '*by way of business*', is an individual who is required to notify the Authority of the fact that:

- (a) s/he acts as a director and, or a company secretary in a company and, or a partner in a partnership and, or holds a similar position in relation to other legal entities; and
- (b) does not act or hold any position as referred to in paragraph (a) *by way of business*; and
- (c) s/he meets the requirements established in the rules issued by the Authority in the CSP Rulebooks. These requirements mainly consist of and may be summarized as follows:
 - (i) the individual must not have more than five (5) involvements as director and, or company secretary in a company and, or a partner in a partnership and, or a similar position in relation to other legal entities; and
 - (ii) the individual must not have involvements in more than two (2) groups of companies as per the definition in the CSP Rulebooks.

3. Interpretation Criteria

For a person to be considered a company service provider or a limited company service provider, the company services must be provided by such person '*by way of business*' in addition to being provided to third parties.

The Authority's interpretation in relation to legal entities providing or intending to provide company services is that such service is deemed to be provided '*by way of business*' due to the very nature of having established or utilised a body corporate to offer such service. This interpretation applies irrespective of the number of roles held or the circumstances in which such body corporate is providing the company service. However, in very specific and limited circumstances and subject to the MFSA's no objection, a company may not be deemed as acting '*by way of business*' if it seeks to act as director and, or company

secretary of a limited number of companies within the same group of companies and is not remunerated, whether directly or indirectly, for acting as such. In this regard a request should be made in writing to cspsauthorisations@mfsa.mt prior to the company providing any such company service.

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 Rulebooks provide details of the criteria and factors that are taken into consideration by the Authority when interpreting the phrase '*by way of business*'.

3.1 Further Interpretation

a. Holding Oneself Out

The term '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 company 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 company services.

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 carried out on a regular and habitual basis.

c. Directly or Indirectly Remunerated

Where the company services being provided by a person are being remunerated through another person which is associated or connected with the person providing such services or in the case of a group of companies, which belongs to the same group, 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 (or registration, if applicable in the specific circumstances of the case) in terms of the Act.

3.2 Factors Taken Into Consideration by the Authority

The Rulebooks also include 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 and the Authority urges individuals either currently undertaking or contemplating commencing the provision of company services, 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 Rulebooks 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 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, registration or notification in terms of the CSP Act?*

Where an individual acts exclusively as a director and, or company secretary of a Company or 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 (and hence by way of business). Family relationship refers to a relationship with a person by consanguinity and, or affinity.

However, should the same individual provide other company services to third parties, besides the family business, and hold himself out to provide such services to the public or provide such services regularly and habitually, then authorisation or registration (as applicable) is required.

2. *If I am carrying out the activity by way of business and do not fall within the exemptions specified in the Company Service Provider (Exemption) Regulations will authorisation or registration always be required?*

The 'by way of business' test is a factual one. Therefore, if you are doing the activity by way of business it means that you need to apply for authorisation or registration, as applicable. In such scenarios the submission of the notification form is not applicable. If in doubt seek guidance from the Authority.

3. *An individual is providing directorship and/or 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?*

If the appointment as a director and/or company secretary 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.

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. However, a negligible percentage is not deemed to qualify as a beneficial interest.

4. *Does an individual who is acting as a director or company secretary on one company require authorisation or registration in terms of the CSP Act?* An individual who is providing directorship services to one company and is soliciting further appointments from the public, requires authorisation / registration since s/he will be deemed to be providing directorship services *by way of business*.

On the other hand, if s/he is not soliciting business, therefore not deemed to be providing the activity by way of business, no authorisation or registration is required however the Notification process will apply. The same reasoning applies where an individual is providing company secretarial services.

A similar example is where an individual is providing a directorship service to one overseas company operating in or from Malta this will not be considered as providing services 'by way of business' as long as the person concerned is not soliciting further appointments from the public. In each of these scenarios, the individual will, however, be required to notify the Authority of the fact that s/he holds the role of director or company secretary in accordance with the Act and the applicable CSP Rulebooks.

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

Such employee whose services as director and/or company secretary are being arranged by an authorised CSP 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 applies to both full-time and part-time employees as long as additional directorship and/or company secretary services are not provided to parties other than pursuant to that individual's contract with the authorised CSP and to its clients i.e. the services are exclusive to the CSP. If company services are provided '*by way of business*' to third parties not related with the authorised CSP who is employing such individual, then in such a case authorisation or registration (as applicable) is required.

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

No, a person holding office of director and/or company secretary does not require authorisation or registration 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 (as defined in the Rulebooks), no authorisation or registration is required. However, should the same person act as a director and/or company secretary on other companies outside an employment relationship, providing that service to third parties '*by way of business*' then authorisation or registration will be required.

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

Where warranted professionals provide company services as incidental services in connection with the services for which they are retained by the client (such services not being within the definition of company 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 as explained below.

The Authority recognises that some warranted professionals have made the provision of company 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 company services to third parties '*by way of business*' and should be authorised or registered (as applicable) under the CSP Act. There are other warranted professionals who have not made company services a central feature of what they do but may be requested to provide occasional company 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 company services or perform company services regularly and habitually, against remuneration, these will automatically be considered as performing company services '*by way of business*' and therefore subject to authorisation or registration (as applicable) 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.

In this circumstance the incorporation of the special purpose vehicle is considered as incidental services to core activity and therefore not considered a company

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 joint venture entity in which the partners will invest their funds and conduct the joint venture.

As example 1 above, this is considered as incidental service to the core activity.

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 company service to third parties *'by way of business'*.

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.