MFSA MALTA FINANCIAL SERVICES AUTHORITY

Feedback Statement

Feedback Statement to the Consultation Document on the Updated CSP Rules

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1.1 Introduction

The MFSA would like to thank stakeholders for their contribution to this Consultation.

Particular aspects of the Consultation Document attracted more feedback than others, particularly the exemptions and the under-threshold classification sections.

Due to the diversity of some of the responses, the Authority has continued to focus upon the need to apply a proportionate and risk-based approach to regulation when determining its position on specific issues raised and on new concepts introduced by the reform.

Matters previously consulted upon by the Authority in its first Consultation Document entitled "Raising the Bar for Company Service Providers" were addressed in the Feedback Statement to the first consultation.

Attention is being drawn to the fact that Act No. L of 2020 came into force on 16 March 2021 amending the Company Service Providers Act, Cap. 529 of the Laws of Malta, (CSP Act) and the new Rulebook for Company Service Providers (Rulebook) was concurrently published on the Authority's website here. The Authority has also published guidance on the application of the CSP Act and Frequently Asked Questions (FAQs) which can be accessed here. The Authority's position on the various matters considered in this Feedback Statement is reflected in the Rulebook and guidance issued by the Authority published on or after 16 March 2021.

1.2 Class A Under Threshold - Revenue

In its Consultation Document, the Authority indicated that the Class A under threshold category applies only to individuals in possession of a warrant, or equivalent, to carry out the profession of advocate, notary public, legal procurator or certified public accountant whose revenue from corporate services forms, or is forecast to form, in the upcoming year, not more than: (a) 35% of the combined total revenue from the provision of all professional services; or (b) EUR100,000, whichever is the higher. The introduction of a second factor, being the EUR 100,000, was intended to complement the percentage of the combined total revenue, thus allowing these individuals to apply the highest of the two factors and strengthen the application of the proportionality principle.

It was also noted that the services included in the Class A under threshold were to be restricted to the formation of companies or other legal entities and excludes persons providing the service of registered office, business or correspondence address.

Stakeholders were requested to advise if they agreed with the introduction of a second factor i.e. the EUR 100,000 in the definition of revenue.

Feedback Received

Most respondents agreed with this proposal commenting that the introduction of the EUR100,000 threshold was appropriate.

An industry body commented that it found no principled basis for the introduction of the second factor (being the EUR100,000) in the definition of "revenue" for the purposes of establishing which persons fall within the Class A under threshold category. It was added that the 35% threshold should

be sufficient for the purpose of determining whether an activity is or is not undertaken by way of business and ought to be relative to the overall business and not a fixed number, although in practice this is probably a number which one can accept.

On the other hand, there were differing views on the introduction of the proposed second factor by some who said that this would create a situation where professionals whose revenue is primarily derived from company formation services albeit up to EUR100,000 will continue to provide this service under a lighter regime, less legal obligations and lower operating costs than authorised CSPs. They argued that would not create a level playing field between under threshold CSPs and over threshold CSPs with the former being able to provide the service at a lower cost and/or realise the same level of profit at lower risk. In conclusion, they argued that where a significant portion of revenue is derived from CSP activities such persons should be subject to the same rules as authorised CSPs.

A respondent said that it would be more logical to apply both factors together by taking into account which factor is considered the *lower* of the two in order to apply the principle of proportionality.

Some indicated that the Rulebook should introduce a mechanism whereby the turnover threshold is reviewed by the Authority on a regular rolling basis to ensure that this category does not fall out of threshold as a result of inflation. It was also suggested that to avoid the risk of a CSP falling out of this category as a result of a small one-off increase in activity, Class A under threshold CSPs should be allowed to fall "out of threshold" for two years of three using a mechanism not dissimilar to that in the General Accounting Principles for Small and Medium Sized Enterprises (GAPSME).

MFSA Position

The Authority having considered that overall the industry finds the figure of EUR100,000 appropriate, is of the view that this figure should be maintained.

It is also of the view that by applying the higher of the two figures that is, (a) 35% of the combined total revenue from the provision of all professional services; or (b) EUR100,000, *whichever is the higher*, the industry will be given sufficient leeway in determining whether CSPs will fall in Class A under threshold or over threshold.

To address the suggestion made for the introduction of a mechanism to take into account a small one-off spike in activity, the Authority has introduced a grace period of three months for those who will be classified as 'under threshold'. This grace period will allow them to determine whether they wish to apply for over threshold status should they go over the threshold for a limited time. This mechanism applies to both Class A and Class B under threshold in R4-5.3 and R4-5.4 respectively. The Authority is considering the comment made on the impact of inflation on Class A under thresholds and a separate exercise will be undertaken at a later stage.

1.3 The Derogation proposed in relation to the Risk Management Function

In its Consultation Document the Authority advised that it would be considering allowing a CSP to establish and maintain a risk management function which does not operate independently, provided:

a) this does not give rise to conflicts of interest; and

b) the CSP demonstrates to the Authority that the establishment and maintenance of a dedicated independent risk management function with sole responsibility for the risk management function is not appropriate and proportionate in view of the nature, scale and complexity of its business and the nature and range of the CSP services and activities undertaken in the course of that business.

Where a Risk Officer is not specifically employed by the CSP, the Authority proposed that the role should be performed by a senior official of the CSP or a non-executive director and that the Authority should be notified of the individual performing such role.

The industry was requested to advise if it agreed that the derogation relating to the risk management function took into account the proportionality principle.

Feedback Received

The majority of respondents agreed that the derogation as proposed takes into account the proportionality principle.

An industry body disagreed with the proposal to consider the setting up of a risk management function which does not operate independently such that the role would be carried out by a senior official of the CSP or a non-executive director. The reason given for this being that the risk management function entails oversight and, by definition, should not be allocated to an executive role within the CSP. It was further argued that non-executive directors form part of those charged with governance at entity wide level and should not be those entrusted with executing the risk management function within a CSP. For these reasons they concluded that the risk management function should always be entrusted to an independent function who could be an external party, only where this function cannot be allocated to the CSP's internal resources within another control function independent from operations. However, they explained that natural persons operating as CSPs and categorized as under threshold should be allowed to carry out the role of Risk Officer themselves.

Another industry body argued that risk management need not be split from the compliance function and that the insistence of a separate Risk Officer as a standard arrangement requiring derogation should be revisited. It claimed that the recruitment of a dedicated risk manager should not be an imperative.

Others raised concerns that there should be further clarity on the risk management function in the context of CSPs and particularly around the wording relating to *the nature, scale and complexity of its business and the nature and range of the CSP services and activities undertaken in the course of that business.*

Generally, it was pointed out by stakeholders that there is a limited number of individuals who can fulfil risk management roles in the current market and that the Authority should consider this issue in this context.

Feedback also included a request to expand on what risks the Authority is considering by referring to risk management, whether this only refers to AML/CFT risks or whether this refers to standard risk management principles that apply to regulated business such as solvency, liquidity, market risk and other financial risks that generally apply to regulated businesses. An industry body commented that risk management principles for regulated business should not apply to CSPs.

MFSA Position

The Authority has considered that, overall, the industry is in agreement with the derogation to the risk management principle and has taken note of the comments received on the risks perceived to be applicable to CSPs and how the risk management function should be applied in this context. It considers that the risk management function should be linked to risks being undertaken by CSPs. Consequently, it considers that the risk management function which independently carries out specified risk management tasks should be performed by those CSPs offering the full range of CSP services that is, Class C CSPs. This is because the range of activities performed by Class C CSPs entails higher risk than CSPs offering limited services. A Class C CSP will be allowed to apply the derogation if it is not appropriate nor proportionate for the risk management function to operate independently in view of the nature, scale and complexity of the CSP's business and the nature and range of the CSP services and activities undertaken in the course of that business. The Authority has taken on board the feedback received and reconsidered its position. As a result, the appointment of an independent Risk Officer will be required only in the case of Class C CSPs, who, depending on their business model, may request a derogation based on the criteria mentioned above.

The Authority would like to clarify that the risk management function should address all risks that are relevant to CSPs and entails an understanding of a CSP's business risks. While the Authority understands that the main risk for CSPs is that of ML/TF there are other risks that require analysis such as solvency, legal, compliance, regulatory, jurisdictional, reputational, cybersecurity and ICT risks. On a more granular basis these can be broken down to reflect very real issues for CSPs, such as loss of key personnel, risk of lost contact with clients, cash flow, adverse media, amongst others.

Having noted the need for clarity in relation to the proportionality principle, the Authority will be issuing guidance on how this will be applied. It also confirms that it has noted the concerns relating to availability of individuals with competence in this area.

For Class A and Class B CSPs, the appointment of an independent Risk Officer will not be required. These CSPs are still expected to consider the risks they face and to address any identified risks with the application of mitigating measures.

1.4 Exemptions

In the Consultation Document the Authority advised that in terms of specific Regulations to be published it was being proposed that specific categories of persons be exempted from the requirement of authorisation for CSPs in terms of Article 3 of the Act and from complying with the provisions of the Act. Feedback received was taken into account prior to the publication of the Company Service Providers (Exemption) Regulations, L.N. 105 of 2021 (Exemption Regulations). The Exemption Regulations can be accessed here.

It should be clarified that the basis for exempting specific categories of persons from the CSP Act is to take into account that these persons are already subject to fitness and propriety checks and/or not providing CSP services to third parties.

It should be noted that following the amendments to the CSP Act all other persons not falling under any of the above-mentioned Exemptions who are providing company services by way of business must be authorised pursuant to Article 3 of the Act. The determination of whether these services are being done by way of business is made by the Authority in accordance with criteria that have been in place since the publication of the Rulebook for Company Service Providers issued on 21 March 2014. These criteria have been expanded upon following the recent changes in the CSP Act and are explained in the Guidance Note published on the Authority's website which can be accessed here. The following is a list of Exemptions proposed in the Consultation Document, together with a summary of feedback received and the MFSA's final position:

1.4.1 a person authorised to act as a trustee or to provide other fiduciary duties in terms of the Trusts and Trustees Act;

There was general agreement with this Exemption and with the notification requirement to the Authority whereby persons authorised in terms of the Trusts and Trustees Act, Cap. 331 of the Laws of Malta, are required to notify the Authority that they are undertaking CSP services.

MFSA Position

Given that this was agreed by all stakeholders, the exemption and notification requirement were adopted. Those intending to avail themselves of this exemption are required to notify the Authority of this prior to providing CSP Services. For further information see here.

1.4.2 a person registered to act as a VFA Agent in terms of the Virtual Financial Assets Act, when providing the activity of a company service provider as part of its activity under the said Act provided that the said activity shall not be or include the service of acting as director or secretary of a company, as a partner in a partnership or of acting in a similar position in relation to any other legal person;

There was general agreement with this exemption. One industry body pointed out that this exemption should be extended so VFA Agents are allowed to provide all CSP services under this exemption and not just company formation services for companies falling under the Virtual Financial Assets Act, Cap. 590 of the Laws of Malta.

MFSA Position

Given that this was agreed by the majority of stakeholders and the Authority believes that granting a blanket exemption to VFA Agents is not compatible with their roles and responsibilities under the VFA Act, the exemption was adopted as proposed in the Consultation Document. Notification should be given to the Authority as explained in this Circular.

1.4.3 a person who only acts as director or secretary of a company, as a partner in a partnership, or who acts in a similar position in relation to other legal persons, in which such person has an ownership and controlling interest;

In relation to the proposed exemption, the majority of the feedback received requested the Authority to clarify what is meant by the term "controlling interest". Suggestions made in relation to the proposed exemption were quite diverse.

An industry body commented that this exemption is too prescriptive and should be widened. It said that ownership interest, whether direct or indirect, in excess of 5% should be the criterion applied and further said that the professionals they represent who do not conduct CSP services as a business should not be considered as falling within a specific Company Service Providers regime. Another industry body advocated tying the exemption to beneficial ownership of 25% or more rather than ownership and controlling interest. A third industry body said that this concept should not be implemented restrictively such that only persons who have a majority shareholding (50% voting rights plus at least one vote) and advocated that any shareholding of 10% or more typically entitles the shareholder to a level of influence, and usually a right to appoint a director, and hence any directorship emanating from or linked to a shareholding of 10% or more should be exempt from the requirement of authorisation. Another industry body suggested amending the wording to refer to a person who has an ownership but no controlling interest where the shareholding would be less than 25%.

Feedback was also received suggesting that meeting any one of the ownership or controlling interest criteria should be sufficient. In general, queries were raised how this exemption would affect persons acting as directors or company secretaries or holding equivalent positions in other legal persons who are involved in family companies, persons acting as directors or company secretaries or holding equivalent positions in other legal persons having a commercial interest that does not translate into an ownership and controlling interest and employees who perform such roles without having ownership or controlling interests. .

MFSA Position

Based on the feedback received, the Authority opted to build upon and amplify the guidance currently provided on the 'by way of business' determination. This was considered more appropriate than introducing an exemption especially when considering concerns raised such as to the holding of directorships of companies beneficially owned by family members or where a commercial interest is held or where an employee relationship exists. For this reason, it has included practical examples of various scenarios in the above-mentioned guidance on the application of the CSP Act.

In view of the above, the Authority did not consider that the specific exemption relating to ownership and controlling interest should be included in the Exemption Regulations, since the starting point should be whether the person is providing the corporate services by way of business.

1.4.4 a person who only offers the services of acting as director or secretary of a company, as a partner in a partnershipor of acting in a similar position in relation to any other legal person, where such legal person is licensed, registered or otherwise authorised by the Authority

The feedback received in relation to this exemption was positive as all respondents commenting on the Exemption Regulations agreed with this exemption. Some pointed out that this exemption should be afforded to persons offering the services of acting as director or secretary to a company, a partner in a partnership or other legal entity licensed, registered or otherwise authorised by an overseas regulatory authority and extended to those acting as director or secretary of an unregulated company which forms part of a group that includes regulated entities. While some argued that this exemption should be opened up to individuals acting as director or secretary of overseas regulated entities wherever regulated, others advocated restricting this to overseas entities regulated in jurisdictions recognised by the Authority as having a comparable level of regulation to that in Malta.

Others queried whether the Authority intended to include persons offering the service of acting as director or secretary to companies listed on the Malta Stock Exchange within this exemption.

MFSA Position

Given that the proposed exemption was agreed upon by stakeholders, the Authority included this exemption in the Exemptions Regulation.

In relation to those persons who hold office in an overseas regulated entity, the Authority considered that these individuals would have undergone fitness and propriety checks due to their role in the regulated overseas entity. Additionally, these individuals would already fall within the supervisory remit of an overseas regulatory authority as officers of a regulated entity. Given that these individuals are already subject to initial and ongoing fitness and propriety checks by another regulatory authority, an exemption has been introduced to take this into account. The exemption applies where an individual holds the role of director or company secretary, partner or an equivalent role in an overseas entity regulated in a recognized jurisdiction. The Exemption Regulations define a "recognized jurisdiction" as an EEA State or EU Member State or any other jurisdiction which, in the opinion of the Authority, has an equal or comparable level of financial services regulation to that in Malta.

In relation to individuals who act as directors or secretaries of companies listed on the Malta Stock Exchange the Authority should clarify that these are not considered as entities that are licensed, registered or otherwise authorised by the Authority. However, it is recognised that an individual proposed as an officer of a listed company goes through a process whereby the Authority tangibly evaluates the individual officer's integrity, reputation and competence through the evaluation of documents provided and checks performed by the Authority, before such individual is appointed as officer of a listed company. For this reason, a specific exemption has been included in favour of directors or company secretaries of companies whose financial instruments have been admitted to listing on a regulated market in Malta in terms of the Financial Markets Act, Cap. 345 of the Laws of Malta. An equivalent exemption was considered necessary for those individuals offering services to third parties limited to acting as director, secretary or equivalent role on entities whose financial instruments have been admitted to listing on a regulated market by an overseas regulatory authority in a recognised jurisdiction (as defined).

As individuals acting as director or secretary of an unregulated company which forms part of a group that includes regulated or listed entities (both locally and overseas) would not be subject to ongoing

fitness and propriety checks by a supervisory authority so the exemption does not extend to such companies. The 'by way of business' determination would still apply in the context of these individuals.

1.4.5 a person who only acts as director or secretary of a company, as a partner in a partnership or who acts in a similar position in relation to other legal persons, in which the government of Malta is the majority shareholder.

The feedback received from the majority of industry bodies was that this exemption should be removed given that these individuals present a high risk as they are Politically Exposed Persons.

MFSA Position

The Authority's revised position in this regard is that a specific exemption is not required since the determining factor with respect to authorisation should be whether they provide CSP services to third parties by way of business.

1.5 Feedback on Under Threshold Classes

1.5.1 CSP Rulebook should not apply to Under Thresholds

An industry body pointed out that the logical extension of the creation of the under-threshold categorisation is that since by definition these practitioners are under threshold, they pose less risk to the system on several counts. They argued that the under-threshold categories should be subject to supervision by the FIAU for AML/CFT purposes but otherwise should not be subjected to further regulation or supervision and accordingly exonerated from the regulatory framework within the CSP Rulebook.

It was also pointed out that the regulation proposed for under threshold categories is disproportionately burdensome and will prove to be counter-productive.

MFSA Position

The Authority's position is based on the rationale underpinning the amendments to the CSP Act which requires all CSP service providers to be authorised and regulated. The Authority will therefore also be responsible for authorisation of the under-threshold categories, consider their fitness and propriety at market entry and on an ongoing basis based on the level of risk they pose to the integrity of the market. In parallel, CSPs are subject persons for purposes of the Prevention of Money Laundering and Funding of Terrorism Act, Cap. 373 of the Laws of Malta, with responsibility for their ongoing compliance with AML/CFT rules lying with the Financial Intelligence Analysis Unit (FIAU).

The Authority has noted that some of the burdens of ongoing obligations listed by many industry participants consist of the following. The Authority's position on each one is shown alongside.

a) an own funds requirement in the form of a bank guarantee or letter of credit. MFSA: this is an option granted to under threshold CSPs as funds may be maintained in other ways, such as a bank deposit.

b) business continuity arrangements. MFSA: as a general rule the Rulebook requires business continuity arrangements to be in place for CSPs (Rule 3-2.2). This applies in the context of individuals too (Rule3-2.6). The Rulebook recognises that the systems, resources and procedures employed should be appropriate and proportionate to the nature, scale and complexity of the business. So when considering the position of an individual appointed as director of a company, the Authority recognises that the company appointing that individual has chosen that individual due to his/her competence, attributes and qualities. The Authority is not expecting the individual concerned to impose the services of another individual upon the client company to perform the service in his/her absence. If the individual CSP believes that so doing may not be desired or acceptable to the client, the CSP should record this in his/her internal procedures.

c) extensive insurance requirement. MFSA: insurance requirements only apply to Class B over threshold CSPs and Class C CSPs. These consist of Professional Indemnity Insurance (PII) but can be substituted by Directors' & Officers' Liability Insurance (D&O), where appropriate.

d) independent audit of the compliance function. MFSA: this requirement has been removed.

e) audited financial statements. MFSA: At this stage, the Annual Financial Return is not in force. Further guidance will be issued once this is published in due course.

f) a statement of solvency with an accompanying balance sheet. MFSA: This was retained given that this is merely a declaration whereby the CSP provides comfort to the Authority that he/she is solvent.

1.5.2 Class A Under Threshold Category

Some commented that Class A under threshold should not be restricted to warranted individuals and extended to legal persons without creating a distinction. Some added that the Rulebook should reflect the Accountancy Professions Act as a number of warranted accountancy firms holding a licence as a firm, organized as either a partnership or company, will be discriminated against if they are not eligible for this category.

Industry stakeholders also suggested that the scope of services for Class A under thresholds should not be limited to formation of companies and other legal entities but rather should be extended to include provision of registered office address, business address and administrative address. It was also suggested that the word "administrative" should be removed in this context.

MFSA Position

In relation to the opening up of the Class A under threshold classification to all persons the Authority has considered the reasons given for extending this to partnerships, companies and firms, rather than limiting it to warranted individuals. It is the Authority's position that if Class A under threshold were to be so extended to companies where the privilege of limited liability is attributed, the regulatory reliefs offered to the under thresholds would need to be restricted as a result of this which would have the effect of putting individuals at a disadvantage. The CSP Act itself recognises this, by requiring all CSPs constituted as companies to have a minimum of two directors. As the partners of civil partnerships of warranted professionals are liable towards the client with whom they have contracted, the Authority

has agreed to extend the Class A under threshold classification to allow civil partnerships of warranted professionals to apply for Class A under threshold classification.

As for the suggestion to include registered office within the services that can be provided by Class A under thresholds, the Authority's position is that this service is a high-risk service for a variety of reasons and by extending the services in the Class A under threshold, the Authority would have to reduce the regulatory reliefs offered to Class A under thresholds. As opposed to company formation services, the provision of registered office creates an ongoing relationship between the client and service provider and poses inherent risk to the service provider as it is the only service that CSPs cannot remove without the client's co-operation.

In relation to the suggestion to remove the word "administrative" from the list of services included in the Class A under threshold definition, the Authority would like to point out that this mirrors the definition of clause (c) of the definition of "company service provider" in Article 2 of the CSP Act. The source of this is Directive EU 2015/849 of the European Parliament and of the Council commonly referred to as the 4th AML Directive. The wording currently included in the Rulebook has been retained to reflect the wording used in the law.

1.5.3 Class B Under Threshold Category

Most stakeholders commented that the proposed threshold of a total of five involvements for Class B under thresholds is too low and may cause undesired effects such as directors or company secretaries shedding off some of their existing roles in order to fall within the under-threshold category. One respondent commented that there is a case to be made for warrant holders to not have a limit or at least one higher than the current limit.

MFSA Position

The Authority has heeded the industry's concerns in this regard and increased the threshold for Class B under threshold CSPs to a total of 10 involvements.

1.5.4 Replace Class B Under Threshold with a revised *De Minimis* Rule

In relation to the Class B under thresholds, some industry bodies suggested that the *de minimis* rule for individuals acting as directors and company secretaries should be retained in lieu of this category. This would result in a situation where the provision of secretarial appointments and directorships within the *de minimis* threshold would remain outside the scope of the Rulebook as is currently the case and the requirement for the "by way of business" revised.

Another industry body mentioned that the *de minimis* should be retained but considered lowering the current level of 10 appointments as justified. It was proposed that Class B under threshold CSPs should be subject to mere notification to the Authority but otherwise exempt from the overall regulatory regime of the CSP Rulebook. It was suggested that, at most, this class should be subject to an equivalent regime to that of 'recognised persons' under the Investment Services Act.

MFSA Position

Addressing the first point raised in the previous section, the Authority draws attention to the Consultation on Raising the Bar for CSPs and its Feedback Statement which clearly explain the Authority's position regarding the removal of the *de minimis* rule.

In relation to the supervision of both under threshold classes this has been covered in Section 1.5.1 of this Feedback Statement.

1.5.5. Inclusion of Class C Under Threshold

Some industry bodies also advocated the creation of a Class C under threshold as in terms of the Rulebook persons whose main revenue is not generated through corporate services, but who offer all the services covered by the definition of a CSP, must apply for a full class authorization process in order to be able to offer all CSP services. They argued that the introduction of an Class C under threshold would uphold the principle of proportionality as when the CSP services are not the main revenue stream for a sole practitioner, this under threshold category would cater for those instances where a practitioner carries out all types of CSP services, but as a minor portion of the overall business. They proposed that this under threshold category ought to be defined by reference to numerical revenue benchmarks and also the number of involvements as director/company secretary.

MFSA Position

The Authority notes that the under-threshold categories are subject to less stringent supervisory obligations. It is the Authority's position that the creation of a Class C under threshold allowing CSPs to provide a variety of services with fewer supervisory obligations would result in unwarranted risks.

1.5.6 Class A Under Threshold not 'by way of business'

Industry bodies representing professionals pointed out that company incorporation qualifies as 'relevant activity' in terms of the Prevention of Money Laundering and Funding of Terrorism Regulations (S.L. 373.01) and is subject to FIAU oversight in the ordinary course of business. It was argued that to the extent that it falls within the Class A under threshold category it should be deemed not to be provided by way of business, whilst continuing to be subject to FIAU oversight.

MFSA Position

As mentioned in the MFSA Position in Section 1.5.1 of this Feedback Statement the Authority's position is based on the rationale underpinning the amendments to the CSP Act which requires all CSP service providers to be authorised and regulated.

1.5.7 Creation of Class D Independent Directors

Feedback was received suggesting that a Class D Independent Director CSP should be created. This category would only be for a corporate CSP 100% owned by an individual providing CSP services, without any employees or associates and would allow these individuals to act through a corporate

form with Directors & Officers' liability coverage and adequate regulated capital in place. The individual shareholder would be the only director and act as the CSPs' own compliance officer and MLRO and provide other services such as compliance officer, MLRO, company secretarial services, registered office services, formation of company services, valuation officer and risk manager.

The Independent Director CSP would, in turn, be obliged to keep abreast of developments and attend training including AML/CFT training so as to perform obligations in line with the applicable regulations and meet all mandated record keeping requirements and file annual returns due to supervisory authorities.

MFSA Position

The Authority's view is that the variety of services that would be provided by Class D Independent Director CSPs without any limit linked to revenue or roles is already covered in the Class C category which essentially allows anyone whether an individual or a firm to conduct any CSP service without limitation on revenue or number of roles.

1.6 Rulebook

1.6.1 Groups of Companies

An industry body commented that the definition of "group of companies" in the Rulebook should be re-considered to take into account the fact that multinationals establish structures where related parties within the same ultimate group are not necessarily parents or subsidiaries of each other directly, but only of the ultimate parent, so the definition should also include sister companies. It recommended amending the definition of 'group company' to reflect this and consider extending the definition to include joint venture companies.

MFSA Position

The Authority's position is that the Rulebook definition which is based on the definition of "group company" in the Companies Act, Cap. 386 of the Laws of Malta, adequately captures the meaning of a group of companies.

1.6.2 Involvements

The Authority was requested to provide a clear and unambiguous definition of 'involvements' including how to handle parent companies and subsidiary companies of companies regulated by the MFSA where, for instance, a regulated entity may as part of its investment strategy decide to hold certain assets through non-regulated fully owned subsidiaries.

Other feedback received on the subject involved a recommendation that non-regulated entities which have common ownership even if they do not form part of an accounting consolidation group should count as one.

MFSA Position

The Authority has noted the request for clarification in relation to "involvements" for Class classification purposes. Where an individual is a director or company secretary of various companies within a group and the group includes a regulated entity in which that person also holds an approved position alongside other involvements in unregulated companies within the group, these involvements would count as one involvement. It follows that if a person is providing directorship services to unregulated companies within that group, the fact that there is a regulated entity within the group does not mean that the involvement is exempt.

1.6.3 Qualitative Assessment of Time Commitment

In relation to the definition of the qualitative assessment of time commitment, it was suggested that this should be broadened to include factors that will take into account the client requirements and resources.

MFSA Position

The Authority has considered the feedback from stakeholders in this regard and the Rulebook definition was reviewed to take into account the factors taking into account the client requirements and resources.

1.6.4 Relevant EU legislation as well as any Guidance Notes, Statements, Industry Best Practices

An industry body commented that the provision found at R1-2.5 requiring CSPs to take into account and, where applicable, comply with any relevant EU legislation as well as any Guidance Notes/Statements/Industry Best Practices which may be issued by local and, or international standard setting bodies is too vague. It added that this should be removed as no person should be subject to legal or regulatory sanctions simply for a threshold which a regulator may have had in mind but failed to articulate in regulation properly and accurately.

MFSA Position

The MFSA has considered this comment and would like to point out that wording such as "where applicable" and "relevant" has to be used as it is impossible to list all present and future legislation, guidance notes, statements, industry best practices applicable to CSPs in the Rulebook. It should also be considered that some of these may not apply in the same manner to all CSPs, given that CSPs have diverse service offerings. The Authority would expect CSPs to comply with relevant and applicable EU legislation such as General Data Protection Regulation (Reg 2016/679) as well as Guidance issued by the Authority, the FIAU and relevant bodies such as Financial Action Task Force as long as these are relevant and applicable to CSPs.

1.6.5 Defining Approved Positions

Another industry body pointed out that in R2-5.5 and R2-7.1 of the Rulebook a clear indication as to what is considered to be an "approved position" and who is considered to be an "approved person" should be given. It was also requested that the terms Directors, Senior Managers and Committee Members be defined in a precise and detailed manner while the level of seniority of posts in respect of which approval should be sought ought to be clarified in line with the expectations for the process in relation to that typically followed for entities authorised by the MFSA.

MFSA Position

It is to be noted that "approved positions" refers to all the senior positions with reporting lines to the CEO or Board of Directors or Board Committees (or equivalent positions), irrespective of their title. This includes the Compliance Officer, MLRO, Risk Manager (where applicable) and Senior Managers. All those positions where, although the person may not be an office holder, he/she is involved in the decision-making process on behalf of the CSP are considered "approved positions".

1.6.6 Share Capital and Financial Resources

An industry body suggested that the Authority should consider the introduction of an unaudited Statement of Wealth as an alternative to presenting a bank guarantee or letter of credit to the Authority in the case of Class B CSPs who are individuals irrespective of whether they are under or over threshold.

The Authority also received a request to specify in unequivocal terms that showing a bank account or term bank account with the required credit balance is sufficient to prove capital adequacy and avoid the complication and expense of a bank guarantee or letter of credit.

Generally, concerns were raised that law firms and accounting firms offering CSP services but previously having been exempt, will now be labelled as CSPs and that this will cause issues with banks where their accounts are maintained. Concerns were also raised as to whether local banks will be granting bank guarantees or letters of credit given the banking industry's reticence when it comes to high-risk sectors.

Another comment received from the industry is that the Rulebook ought to be enhanced and clarified in so far as the share capital and the financial resources requirements are concerned, particularly the accounting terminology used. It was also suggested that whatever its form, a CSP ought to have the established amounts within a capital account in the CSP as money invested permanently within the business and hence in substance forming the basis of the capital level. The capital account should be maintained at the pre-established level even in the face of losses registered, but the capital account does not necessarily have to be ring-fenced in the form of a bank account balance equivalent to the capital account balance.

MFSA Position

The Authority does not consider the introduction of an unaudited Statement of Wealth necessary as CSPs already have other options that are alternatives to presenting a bank guarantee or letter of credit. The Authority has reviewed the wording in the Rulebook applicable to financial resources in order to clarify the key concepts.

In relation to the request received to clarify that showing a bank account or term bank account with the required credit balance is sufficient to prove capital adequacy, it is confirmed that a CSP having the required credit balance in a bank account or term bank account is sufficient proof of capital adequacy in these cases.

1.6.7 Continuing Professional Education (CPE) Hours

Feedback received suggested that the Authority should adopt the CPE hours as currently set out by the Malta Institute of Accountants. Further details were requested by other industry representatives particularly the number of CPE hours required annually, the CPE topics approved and accepted and what will be accepted as CPE hours. Finally, a query was raised whether the same CPE hours acquired for other warrants such as accountants can also be accepted even though these are being claimed elsewhere.

MFSA Position

The Authority has accepted the suggestion made given that these rules are tried and tested and well established in the Maltese context. It would be applying similar rules to those applied by the Malta Institute of Accountants where applicable and further information will be made available in guidance to be published by the Authority.

1.6.8 Insurance Requirements

Feedback was received in relation to the insurance requirements in the Rulebook with some noting that PII is applicable only to Class A and Class C CSPs and D&O insurance to Class B CSPs and the Rulebook should be modified to reflect this. An industry body advised that in its view D&O should be a 'best practice recommendation' as a CSP may opt to rely on other documentation to protect him/her, such as an indemnity from a client. It also queried whether PII will in fact be readily available for CSPs in Malta at an affordable cost.

It was also pointed out that D&O may be taken out by the client such as where a group of companies organises D&O cover at parent company level and this covers all subsidiaries.

MFSA Position

The industry's comments in relation to insurance requirements have been noted by the Authority. For clarity the Authority is pointing out that there are no insurance requirements for under thresholds, although it is best practice for CSPs to have appropriate insurance cover.

Insurance is mandatory for Class B over thresholds and Class C CSPs. In relation to these classes the Authority may accept adequate D&O insurance instead of, or in conjunction with PII, where applicable. It follows that if a Class B over threshold CSP has appropriate D&O cover, whether the CSP has sourced it or its clients have provided the D&O cover, that will satisfy the Authority's requirement of having mandatory insurance cover.

1.6.9 Submission of Personal Questionnaires

It was proposed that R2-5.11 should specify that there is no need to submit an additional Personal Questionnaire if one has already been submitted and approved in a different context.

MFSA Position

The Authority has published Guidelines to the Personal Questionnaire which are cross-sectoral in nature. This is due to the importance of the fitness and propriety test that is to be satisfied by applicants also in the context of their proposed role. For this reason, the Authority requires a separate Personal Questionnaire to be completed for each entity in which the Applicant is being proposed.

Further guidance can also be found here

1.6.10 Compliance Officer for over thresholds

It was suggested that where the applicant is an individual the Authority should allow that person to act as Compliance Officer in the case of over threshold Class B CSPs and not restrict this allowance to under threshold Class A and Class B CSPs.

Stakeholders raised the point that the annual compliance report required to be prepared by third parties for under threshold Class A and Class B CSPs is an unnecessary and costly exercise and this requirement should be removed. It was suggested by some that the compliance report should be prepared by the under threshold CSP and that the Authority should have the right to request it in the exercise of its supervisory duties.

MFSA Position

R2-6.1.3 is intended as an exception for under threshold CSPs taking into account the nature, scope and size of their activities. The supervisory framework has been built around the concept of a proportionate and risk-based approach. In the case of a CSP who is over threshold, whether a natural person or a legal person, the Authority considers that an independent Compliance function should be in place. For this reason, the Authority is not extending this rule to over thresholds.

As for the annual compliance report also referred to in R2-6.1.3 the Authority has removed this requirement. Instead under threshold CSPs will be required to confirm that they are compliant on an annual basis. The Authority will issue a separate communication in this regard at a later stage.

1.6.11 MLRO Qualifications

The point was raised that the requirement to possess both relevant qualifications and experience in AML/CFT matters as per R2-6.2.7 might cause a number of issues in the sector as some MLROs would have years of experience working in AML/CFT but not necessarily have qualifications on the subject. An industry body suggested that in order to address this gap and provide a transitionary mechanism, for the first two years of implementation, the Authority should consider accepting MLROs with only relevant work experience as long as the particular MLRO undertakes a course which would lead up to

a qualification during the first 24 months from authorisation. This was suggested in order to give enough time for current MLROs to update their position.

The Authority was requested to indicate the courses and/or qualifications that are accepted.

MFSA Position

The Authority position in this regard has been updated and the Rulebook amended to state that the Authority may still consider applications where the proposed MLRO is able to demonstrate to the Authority's satisfaction that his/her experience on its own is sufficient.

As for the courses and qualifications that are acceptable, the Authority's position is that there is no one size fits all qualification for MLROs. The MFSA website explains the fit and proper competence assessment which is applied by the Authority in relation to officers including MLROs.

Training that is suitable to the role being fulfilled should be undertaken, it should enhance practical knowledge of the subject while also take into account the experience the individual has in the area and the areas of business undertaken by the CSP.

1.6.12 Companies Act Application

It was mentioned by industry stakeholders that it is critical that the rules proposed by the Rulebook are consonant with the Companies Act, Cap 386 of the Laws of Malta. Others mentioned that the Authority should explain the hierarchy between the Companies Act and the CSP Act and Rulebook.

MFSA Position

The Companies Act applies to all commercial partnerships (including limited liability companies) whether regulated or otherwise, while the CSP Rulebook applies to all Company Service Providers regulated under the Company Service Providers Act. In the Authority's view it is not a matter of hierarchy but rather a matter of application. The Authority considers that consistency has been maintained throughout.

1.6.13 Oversight when arranging for a person to act as director or company secretary of a company or equivalent positions in other legal persons

Stakeholders pointed out that in terms of law a director is an officer of the company and dutybound to act in the best interests of the company. It was argued that a director does not have a duty towards "an arranger." It was also mentioned that even in the event of appointment of a director by a particular class of shareholders, a director has no particular duty towards a nominating shareholder, let alone an "arranger" of office. In conclusion, it was also argued that sharing information with an "arranger" constitutes a breach of directors' duties.

MFSA Position

In terms of the Rulebook, CSPs set up as a legal person can only arrange for their officers or employees to act as directors or secretaries of client companies or other similar position in other legal entities. In such cases the CSP has an agreement with the client and receives the remuneration from the client company despite the fact that the CSP is not acting as the director, company secretary or holding an equivalent office itself. In such a case the Authority expects that with the receipt of the remuneration from the client company, there should be a corresponding duty on the CSP to ensure that the CSP's officer or employee is exercising his/her duties in accordance with the law and to ensure that the individual remains fit and proper throughout his/her tenure of office. It is therefore necessary for the CSP to exercise some level of oversight that its employee is providing the service which the CSP has arranged and is being paid for, to the level expected by the client company and in accordance with the Companies Act. This arrangement should be covered in the client agreement which should establish how the arranging process works, who is being remunerated for the directorship, company secretarial or equivalent role, and disclosure of the relationship between the CSP and the employee providing the role. The relationship in existence is between the client and the CSP and in granting oversight to the CSP the employee is fulfilling his/her duties.

1.6.14 Company Secretary's Liability

In relation to R4-3.1 feedback was received arguing that rendering the company secretary responsible or liable in terms of the Rulebook for matters which do not fall within his/her remit in terms of the Companies Act is unjustified and counter intuitive from a governance point of view as independent company secretaries may be disincentivised to take on the role.

MFSA Position

This particular provision of the Rulebook states that: *"In acting as directors or company secretaries of a company, …. In terms of their Authorisation under the **Act**, CSPs **shall**, **as applicable**:…".* It then goes on to state several obligations in clauses a) to l). By using the words "as applicable" clauses a) to l) should be interpreted to only apply where relevant.

1.6.15 R2 Title 9 Cessation of Business

An industry body recommended that the provisions under this Title be restricted to companies providing full CSP services under Class C as in practical terms the provisions apply to firms, and not to individuals.

In relation to R2-9.5(h) which requires a confirmation from the auditors of the CSP specifying the date by when all business and obligations arising from the CSP Authorisation as CSP have been settled, an industry body considered this to be very onerous and pointed out that this declaration should be made by the directors rather than the auditor.

MFSA Position

The title does in fact apply to all classes of CSPs given that firms can fall within the over threshold Class A, over threshold Class B or Class C.

As for the confirmation required in R2-9.5(h) the Authority is of the view that this should be provided by an independent person who has verified the facts and made an assessment based on these facts, hence the reference to the auditor has been retained. This requirement already existed in Rule 12 of the Rulebook for Company Service Providers issued on 21 March 2014.

1.6.16 Loss of Contact with CSP Client

In relation to item (c) of R3-11.7.1 requiring client agreements to include a provision dealing with situations where the CSP loses contact with a client, the Authority was requested to set out more detailed granular guidance and to co-ordinate with the Malta Business Registry in order to reach a seamless and holistic outcome.

MFSA Position

The Authority recognises this as an area where guidance is required. This is an area that not only affects CSPs but also other firms providing CSP services such as trustees. The Authority will be looking into this outside the context of the CSP reform and providing guidance on this area in due course.

1.6.17 Appointment of Corporate Directors within the CSP group of companies

A proposal was made for the wording in R4-4.1 and R4-4.2 to be modified to permit legal entities in their firm or group of companies to be proposed by the CSP group for such appointments without said legal entities being required to be authorised.

MFSA Position

The Maltese regulatory framework and laws regulating financial services are not structured in this manner. Other jurisdictions allow for one company within a group to hold a licence while all the companies within the group to benefit from this authorisation but Malta has chosen to adopt a different framework consistently across the financial services sector. The CSP Act is no exception as it specifically requires all CSPs to be authorised by the competent authority. Therefore the Authority did not change the wording of the said Rules.

1.6.18 Periodical Review of Rulebook

It was suggested to include a provision in the Rulebook which requires the Authority to assess and periodically review, at least annually, the application of the Rulebook and to consult with CSPs in order to be able to take appropriate measures to address any deficiencies which may only become apparent once the Rules start being implemented.

MFSA Position

One of the Authority's objectives includes a commitment to increased consultation with stakeholders. A consultation on the Rulebook on an annual basis would take substantial time and resources,

however, the Authority is committed to taking on board industry feedback and organise various events during which industry engagement and feedback is taken into consideration.

1.6.19 Rulebook Clarity

The Authority received many requests for specific sections of the Rulebook to be reviewed for clarification purposes.

The industry also commented that some areas of the Rulebook are vague and need further amplification. In other cases, the need for some of the existing provisions in the Rulebook was questioned as well (e.g. the requirement for a CSP to request a prospective client to confirm in writing whether the latter has ever had or currently has any direct or indirect beneficial interest in or whether he ever was or currently is a director of any other company registered in Malta).

MFSA Position

The Authority has conducted an extensive review of the Rulebook taking into account the requests for specific provisions or titles to be clarified and considered whether existing provisions questioned by the industry were still required.

It has also prepared detailed FAQs which are available on the MFSA website for those requiring further detail on the application of principles or specific provisions of the Rulebook.

1.7 Other Feedback

1.71. Incidental Services provided in the course of one's Profession

An industry body emphasised that professionals who perform CSP services while acting in the ordinary course of their professional activity where the corporate services are not the main purpose of the engagement but rather an ancillary part thereof, should not fall to be regulated within the CSP Act. It was recognised that where these professionals conduct CSP services on a habitual basis without any involvement in advising on a particular transaction but rather simply providing corporate vehicles together with other services such as directorships, registered office and company secretarial services these should be regulated by the CSP Act.

MFSA Position

The Authority has considered the argument made in favour of warranted professionals providing 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). It has concluded that this is best considered in the context of the 'by way of business' determination. Please refer to the guidance provided here.

1.7.2 Awareness and Education Programme

A recommendation was made for an awareness and education programme to be put in place ideally in collaboration with other key stakeholders. Existing funding schemes aimed at promoting lifelong learning in the private sector such as the investing in skills scheme currently managed by Jobsplus, should be eligible for courses which are intended to encourage compliance with regulations.

MFSA Position

The Authority is very conscious of the need for awareness and education of individuals in many areas whether compliance, risk management, financial crime awareness. In relation to the CSP reform the Authority is taking part in many key initiatives in order to provide guidance to the industry including webinars being organised by the Authority (see here) and initiatives taken by the Financial Services Academy.

1.7.3 Sanctions

The Authority was asked how sanctions would be applied across the industry. More information was requested on the manner in which the Authority will be monitoring compliance and applying sanctions to ensure that a level playing field is maintained and competition is not distorted.

MFSA Position

The Authority will be following due process and taking account of the prescribed criteria in the application of sanctions to ensure that its approach is fair, transparent, proportionate and dissuasive.

1.7.4 Sustainability

The Authority was encouraged to introduce Environmental Social and Governance principles in the Rulebook on a best-efforts basis which is similar to UK Corporate Governance Code where the role of the board is to:

- promote long term sustainable success of the company
- generate value for shareholders
- contribute to wider society

MFSA Position

The Authority is considering this proposal holistically across all sectors and future publications are earmarked to be issued on this topic.