

Consultation Document on the Trustees of Family Trusts Rulebook

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NOTE: These proposals are not binding and are subject to changes and revisions following representations received from industry participants and other interested parties. It is important that persons involved in the consultation bear these considerations in mind.

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1. Background

This Consultation Document is being issued in order to inform the public about a number of proposed changes to be made to the Rules for Trustees of Family Trusts¹ (the 'Rules'), applicable to persons registered in terms of Article 43B of the Trusts and Trustees Act² (the 'Act') (the 'Registered Trustees') and issued pursuant to Article 52(3) of the Act.

The proposed changes to the Rules are aimed at strengthening this regulatory framework whilst also addressing feedback received from the industry along the years clarifying certain specific aspects of the Rules together with some cosmetic changes.

2. Scope of Consultation

By means of this Consultation Document, the Authority is seeking stakeholders' feedback on the following:

1. The revised structure of the Rules and the formulation of the Trustees of Family Trusts Rulebook (the 'Proposed Rulebook'), which is hereby being attached to this Consultation Document;
2. The introduction of high-level principles applicable to Registered Trustees underpinning the Authority's expectations of such trustees;
3. The enhancement of the Authority's registration considerations when considering whether to grant a registration in terms of Article 43B of the Act;
4. The extension of the fitness and properness assessment to any person significantly involved in the applicant's decision-making process, strategy and the implementation thereof;
5. Additional documents to be provided to the Authority as part of the registration process;
6. The removal of the requirement for Registered Trustees to appoint a Money Laundering Reporting Officer;
7. The strengthening of the framework regulating Registered Trustees, including the codification of Directors' duties;

¹ Issued on 29 April 2016

² CAP. 331 of the Laws of Malta

8. Detailed rules governing regulatory submissions and other ongoing obligations such as record keeping; and
9. The introduction of rules relating to an alternative insurance cover in cases of inability to obtain professional indemnity insurance cover (the 'PII').

3. Structure of the Proposed Rulebook

To clearly identify the main topics governed by the Proposed Rulebook, the following six Chapters are being proposed:

1. General Scope and Application;
2. Definitions;
3. Registration of Trustees of Family Trusts;
4. Duties of the Directors;
5. Ongoing Obligations; and
6. Surrender or Suspension or Cancellation of Registration.

It is not excluded that future revisions of the Proposed Rulebook may include the addition of further parts, as may be required.

The Rules, together with additional rules, as indicated hereunder, have been structured and categorised under the appropriate Chapters set out above. The Authority considers the above structure to be in the best interest of clarity and in the spirit of transparency since it provides delineation of all integral aspects of the Registration, mainly the registration process, the general obligations of Registered Trustees and other applicable provisions such as those in relation to the surrender, suspension or cancellation of the registration.

Q1 Do you agree with the proposed structure of the Proposed Rulebook?

4. Proposed Amendments to the Rules

4.1 High-Level Principles

It is being proposed that the Rulebook shall gather, and introduce, high-level principles to be adhered to by Registered Trustees with a view to guide Registered Trustees on the Authority's expectations in the conduct of their operations. The introduction of the following high-level principle is being proposed:

- i. Registered Trustees are expected to act in an ethical manner with due care, skill and diligence, taking into consideration the best interests of their clients and the integrity of Malta's financial system.

The Authority has sought to clarify as much as possible what its expectations are from Registered Trustees and directors of such trustees, who are charged with their management and administration.

Q2 What are your views on the proposed introduction of the above high-level principle applicable to Registered Trustees?

4.2 Registration Considerations

In the spirit of transparency, the Authority is proposing to consolidate, and make public, the relevant considerations and checks that are carried out when deciding whether to grant a registration in terms of Article 43B of the Act, or otherwise. These considerations, which are set out below, are primarily focused on the establishment of a family nexus, which is regarded as a fundamental criterion in such registrations and ties in with the requirements of Article 43B of the Act. Consequently, the Authority is proposing to include the below in R3-2.1 of the Proposed Rulebook, stating that the two main considerations taken by the Authority in the registration process shall be:

- i. that there is an actual relationship between the settlor(s) and the beneficial owner(s) of the family trustee; and
- ii. that any trust administered by the family trustee presents family relationship links.

It is being proposed that the Proposed Rulebook shall also set out that, as part of its registration considerations, the Authority will request from all applicants the rationale as to why Malta was chosen as the jurisdiction for the establishing of the trustee of the family trust (R3-2.2 of the Proposed Rulebook).

The Proposed Rulebook also clearly outlines that the onus of proving that the registration considerations have been satisfied lies with the applicant (R3-2.3 of the Proposed Rulebook).

The above considerations will form part of the Authority's assessment to enable it to determine whether an application submitted under Article 43B of the Act falls within the Authority's risk appetite and whether it is aimed at circumventing the authorisation requirement of a professional trustee under Article 43 of the Act.

Q3 What are your views on the clarification of the Authority's Registration considerations?

4.3 Fitness and Properness Assessment

The fitness and properness assessment in the Rules is conducted in relation to the proposed Directors of the applicant. However, in practice, the Authority has been extending this assessment to other parties within the proposed structure, where it deemed necessary, in order to ensure that all relevant parties are subject to its fitness and properness assessment. In this regard, the Authority is proposing to crystallise this practice and extend the assessment to any other person significantly involved in the applicant's decision-making process, strategy and the implementation thereof in terms of proposed Rule R3-4.4 (ii). The Authority considers that such persons should be assessed for their fitness and propriety before they are able to significantly influence the decision-making process and strategy of a Registered Trustee.

Proposed Rule R3-4.5 also establishes that all criteria referred to in the Proposed Rulebook must be met in satisfaction of the fit and proper test and that it is not the duty of the Authority to prove the converse before it refuses to grant registration to an applicant, or before it intends to suspend or withdraw a registration granted to, or held by, a Registered Trustee. To ensure that there is sufficient clarity as to the Authority's expectations, it is also being proposed that Rule 3-4.2 refers individuals who have applied to act as directors of Registered Trustees to the [Guidance on the Fitness and Properness Assessments](#) applied by the Authority.

Q4 What are your views on the extension of the fitness and properness assessment to persons who are proposed to be significantly involved in the Registered Trustee's decision-making process, strategy and the implementation thereof?

4.4 Additional Documentation to be Submitted to the Authority in relation to the Registration Process

In addition to clearly setting out the conditions to be satisfied by applicants, the Authority is also proposing to delineate all documentation to be submitted by applicants wishing to satisfactorily complete the registration process in R3-3.2 of the Proposed Rulebook. In this regard, it is being proposed that the following documents shall be added in the Proposed Rulebook: an application form, a complete shareholding structure outlining all layers up to the ultimate beneficial owner/s including the natural person(s) and their percentage of ownership in the subject entity, and a comprehensive summary on the background of the settlor/s. Moreover, a new requirement shall require Registered Trustees to ensure that if throughout the duration of such registration the Registered Trustee administers additional trusts, signed copies of such trust deeds are to be submitted to the Authority to ensure that they are being set up in line with the requirements of a trustee of family trusts.

Q5 What are your views on the additional documentation proposed to be required to be submitted as part of the Registration process and on an ongoing basis?

4.5 Removal of Requirement of Appointment of Money Laundering Reporting Officer ('MLRO')

The Authority is proposing the removal of the requirement for Registered Trustees to appoint a Money Laundering Reporting Officer ('MLRO') which follows the determination by the Financial Intelligence Analysis Unit (the 'FIAU') that Registered Trustees, and their operations, do not fall within the definitions of 'subject person', 'trust and company service provider' and 'relevant activity', as set out in Regulation 2(1) of the PMLFTR. Following this determination therefore, Registered Trustees are no longer considered as subject persons in terms of the same Regulations. Consequently, Registered Trustees are not bound by any of the requirements set out in the PMLFTR, including the obligation to appoint an MLRO in terms of Regulation 15 of the Regulations. Following this determination, and also as a result of the discussions held with the FIAU, the Authority is of the opinion that this determination should be reflected in the Proposed Rulebook by removing the requirement for Registered Trustees to appoint an MLRO.

Q6 What are your views on the removal of the requirement for Registered Trustees to appoint an MLRO to reflect the FIAU's determination?

4.6 Duties of Directors

The duties of directors of Registered Trustees are currently set out in the Rules. However, to further strengthen this regulatory regime, it is now being proposed that, Chapter 4 of the Proposed Rulebook will outline other duties which were already applicable to directors of Registered Trustees. These are the following:

- i. The directors are to ensure that the Registered Trustee is effectively directed or managed by at least two individuals in satisfaction of the dual control principle;
- ii. On an ongoing basis, directors are responsible for ensuring the Registered Trustee's reporting obligations are adhered to as set out in Title 2 of Chapter 5 of the Proposed Rulebook. In fact, a dedicated table outlining the applicable regulatory deadlines has also been introduced in Annex 1 of the Proposed Rulebook; and
- iii. The directors are responsible for ensuring the timely and correct reporting of beneficial ownership information of all trusts under administration in line with the Trusts and Trustees Act (Register of Beneficial Owners) Regulations, 2018 (the 'Regulations'). (Reference is also made to Section 4.8 below).

By including the above in the Proposed Rulebook, the Authority considers that directors will have clarity in relation to their duties and ongoing obligations.

Q7 What are your views on the proposed outlining of the Directors' duties applicable to directors of Registered Trustees?

4.7 Reporting Obligations

The Authority is proposing to clearly set out Registered Trustee's reporting obligations, including a comprehensive list of documents to be provided to the Authority as part of their ongoing obligations (R5-2.1 and R5-2.2 of the Proposed Rulebook). This list shall include those obligations which previously emanated from applicable law and MFSA circulars³. These include: the duty to report beneficial ownership information of all trusts under administration on the Trusts Ultimate Beneficial Ownership Register ('TUBOR') and to submit any declaration or other submission as required by the applicable Regulations, the submission of an Annual Compliance Return and audited financial statements. A dedicated table outlining all regulatory deadlines for each respective regulatory submission is also being proposed as Annex 1 to the Proposed Rulebook.

³ For example MFSA Circular entitled 'Circular addressed to Trustees of Family Trusts registered in terms of Article 43B of the Trusts and Trustees Act – Regulatory Submission, issued on 7 March 2023.

In order to avoid duplication of regulatory submissions by Registered Trustees, the Authority is also proposing to remove the requirement for the submission of a Certificate of Compliance to the Authority. The declarations previously included in this regulatory submission will now be included in the Annual Compliance Return, which is now being set out as one of the regulatory submissions due by Registered Trustees, in the Proposed Rulebook.

Q8 What are your views on the proposed updates in relation to regulatory obligations?

4.8 Ongoing Obligations

In relation to the obligation relating to record-keeping, the Proposed Rulebook crystallises this obligation together with the Authority's expectations on the subject matter. This is particularly being highlighted in relation to the obligation of Registered Trustees in terms of the reporting of beneficial ownership information, as set out above, and also in relation to the general records of the Registered Trustee. Additionally, it is being proposed that reference shall also be made to the [Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements](#), issued by the MFSA, to be applied on a best effort basis.

Furthermore, it is being proposed that an obligation to notify, or obtain approval from the Authority in specific circumstances, is introduced. The proposed circumstances where notification is required would be: if the auditor of a Registered Trustee intends to qualify the audit report, if the Registered Trustee becomes aware of actual or intended legal proceedings against it, or if it decides to claim on a professional indemnity or other policy relating to its business as further detailed in proposed Rule R5-4.2 of the Proposed Rulebook.

Q9 What are your views on the proposed updates in relation to the ongoing obligations of Registered Trustees?

4.9 Alternative Insurance Cover Requirement

Chapter 5 Title 4 is being proposed to set out all the requirements of Registered Trustees vis-à-vis the insurance requirement. Following feedback received from the industry informing the Authority of the difficulties faced in obtaining an insurance cover, the Authority is proposing the introduction of an alternative option, which is to be regarded as a means of last resort. In cases where the Registered Trustee is unable to obtain an adequate PII, it will firstly be expected to undertake a thorough assessment of the relative interests and the risks which it would be exposed to in default of having such PII in place. The Proposed Rulebook further highlights that this assessment is to be documented and revisited periodically, particularly upon the happening of key events (such as, an increase or variation in the assets held under trust; situations of conflict, disagreements or threatened action; any legal action) which may ordinarily be covered by an insurance cover. Following this assessment, the Registered

Trustee shall consider any measures to cater for any possible claims which it may receive, together with any mitigating measures it deems fit to adopt in such circumstances.

These measures should include, but are not be limited to, the consideration of setting aside reserves, as well as catering for any possible claims which the Registered Trustee may receive. Moreover, any such mitigating measures should be duly documented in the assessment referred to in R5-5.2 and made available upon request to the Authority.

Q10 What are your views on the alternative measures being proposed in lieu of an insurance cover held by a Registered Trustee?

5. Conclusion

The Authority is seeking feedback from stakeholders. All those wishing to provide feedback on the matters raised in this Consultation Document are invited to send it by email to tcsp supervision@mf sa. mt by no later than **11 September 2023**.