

THE FINANCIAL SERVICES TRIBUNAL

Pierre Lofaro LL.D. – Chairman
Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) – Member
Ivan Sammut Dip. Bus. Law & Acc., Adv. Trib. Eccl. (Melit.), M.A. (Fin. Serv.),
LL.D. – Member

FST 2/2016

FX-CAM Consulting and Advertisement
Ltd (C57386), formerly Sensus Capital
Markets Ltd

vs.

Malta Financial Services Authority

Today, Wednesday, the tenth (10th) day of July of the year two thousand and nineteen (2019)

The Tribunal

Having seen the appeal lodged by FX-CAM Consulting and Advertisement Ltd ('the Appellant') filed on the 7th of April 2016 whereby it is appealing from the decision of the Malta Financial Services Authority ('the Authority') dated the 8th of March, 2016 in virtue of which the Authority cancelled the Appellant's investment services licence in terms of Article 7 of the Investment Services Act (Chapter 370 of the Laws of Malta).

Having seen that the Appellant's appeal is based on the provisions of Article 21 (9) of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) which states:

"The question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant-

(a) The competent authority has, in its decision wrongly applied any of the provisions of this Act, or

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(b) The decision of the competent authority constitutes an abuse of discretion or is manifestly unfair:

Provided that the discretion of the competent authority may not, so long as it has been exercised properly, be queried by the Tribunal.”

Having seen the Authority's reply filed on the 20th of July 2016 whereby after stating that for the reasons therein mentioned, and as will be explained in greater detail in the course of the proceedings, it requested the Tribunal to reject the Appellant's appeal and all its requests, and confirm the Authority's decision to cancel the Appellant's licence, with all legal costs to be borne by the Appellant.

Having seen the Appellant's application whereby it requested the Tribunal to order the Authority to file every document, including correspondence, reports/assessments and recommendations which were exchanged between the Securities and Markets Supervision Unit and the Supervisory Council which resulted from the inspections carried out by the Authority on the conduct of the Appellant's business activities and which led to the Authority's decision to cancel the Appellant's licence and that these documents are to be filed in the records of these proceedings in their original format, without in any way being edited and/or censored.

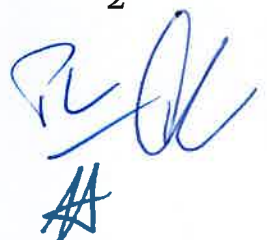
Having seen the Authority's reply whereby, for the reasons therein given, it submitted that the Appellant's request for the exhibition of the aforementioned documents should be rejected.

Having seen the minutes of the sittings which were held by the Tribunal, the documents which were filed by the parties and all the acts of the proceedings, including the parties' submissions in writing.

Having seen that the Tribunal adjourned the case for today for its decision regarding the Appellant's request for the production of the aforementioned documents.

The Tribunal makes the following considerations:

The Appellant is requesting the Tribunal to order the Authority to file, in their original format, every document, including correspondence, reports/assessments and recommendations which were exchanged between the Securities and Markets Supervision Unit and the Supervisory Council which resulted from the inspections carried out by the Authority on the conduct of the Appellant's business activities and which led to the cancellation of the Appellant's licence by the Authority.



The Authority's objection to the Appellant's request is based on the combined reading of Article 637(3) of the Code of Organization and Civil Procedure ('Chapter 12') and the Freedom of Information Act ('Chapter 496').

Article 637 (3) of the Chapter 12 states:

"It shall not be lawful to demand the production of any document which is held by a public authority and -

- (a) which is an exempt document under articles 29, 30 or 36(1) or sub-articles (4) or (5) of article 32 of the Freedom of Information Act; or*
- (b) the disclosure of which is prohibited by any other law."*

The Authority maintains that according to Article 2 of the Freedom of Information Act ('Chapter 496') it is a public authority and consequently Article 36(1) of the said Chapter 496 applies to it and that, therefore, according to Article 637(3) of the Code of Organization and Civil Procedure (Chapter 12) the Appellant cannot demand the production of the documents which it is requesting the Tribunal to order the Authority to produce.

Article 36 (1) of Chapter 496 reads as follows:-

"Subject to article 35 and to subarticles (2) and (3) hereof, a document is an exempt document if its disclosure under this Act would disclose matter in the nature of, or relating to, opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government or another public authority."

This article must necessarily be read in conjunction with article 35 and sub-articles (2) and (3) of article 36 of Chapter 496.

Article 35 states:

"(1) This Part shall apply subject to the provisions of Part V.

(2) A document may be withheld in accordance with the provisions of this Part only if it contains matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure."

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The provisions of Part V of Chapter 496 are not relevant to this appeal and, therefore, only sub-article (2) of article 35 will be considered by the Tribunal.

Sub-articles (2) and (3) of Article 36 in turn state:

“(2) Subarticle (1) shall not apply to a document by reason only of purely factual information contained in the document.

(3) Subarticle (1) shall not apply to:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed by a public authority or not, including reports expressing the opinions of such experts on scientific or technical matters; or

(b) the record of, or a final statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.”

The Authority states that the disclosure of the documents which the Appellant is requesting cannot be produced as they fall within the parameters of exempt documents as defined by Article 36(1) of Chapter 496 since they ‘*would disclose matter in the nature of, or relating to, opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved*’ in its functions.

The Authority further argues, with reference to what is stated in Article 35 (2) of Chapter 496, that the production of the documents being requested by the Appellant contain matter in relation to which their non-disclosure outweighs their disclosure as far as the public interest is concerned.

In its submissions the Authority draws a distinction between:

- (a) its official documents such as the results of its investigations, its official stance and its correspondence with the regulated entity; and
- (b) the opinions, advice (even legal), recommendations, consultations, deliberations which lead to the Authority’s decision. These do not necessarily reflect the Authority’s stance but assist it in arriving at its conclusions and, being internal documents, precede the Authority’s decision.

The Authority maintains that the first set of documents are already available to the Appellant. As for the second set, the Authority argues that their disclosure would undermine its ability to reach its decision freely without being shackled.

The Authority further submits that the documents which the Appellant is requesting

- (a) contain sensitive information concerning individual investors and that their production breaches these persons'/entities' right to privacy and confidentiality; and
- (b) would reveal, to the detriment of the public interest, how the Authority operates in its surveillance of licenced entities.

The Appellant rejects the Authority's arguments and refers to a decision given by this Tribunal in the case **MFSP Financial Management Limited vs L-Awtorità għas-Servizzi Finanzjarji ta' Malta** ('the MFSP case') which was decided on the 10th of July 2013 and which was confirmed by the Court of Appeal in its Inferior Jurisdiction on the 25th of February 2015.

Indeed, the issues in MFSP case are practically identical to those being decided in this appeal. In that case the appellant's request for the production of documents similar to those being requested by the Appellants in this case was upheld. This Tribunal sees no reason why it should depart from the conclusions which it reached on the 10th of July 2013 and which were confirmed by the Court of Appeal in its Inferior Jurisdiction on the 25th of February 2015.

The reasons why the appellant's request was upheld in the MFSP case, and which the Tribunal is confirming in this case in order to uphold the Appellant's request, were the following:

1. The provision contained in article 36(1) of Chapter 496 is not absolute since it is subject to what is stated in article 35 and subarticles 36 (2) and 36 (3) of the same Chapter.
2. Documents containing only matter of a purely factual nature are not exempt under the Freedom of Information Act.¹
3. In the case of the documents referred to in Article 36 (1) of Chapter 496 one has to take into account Article 35 (2) of the same Chapter and

¹ Article 36 (2) of Chapter 496.

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consider what serves the public interest most, whether it is their non-disclosure or their disclosure.

4. Since, according to Article 21 (9) of Chapter 330, one of the questions for the determination of the Tribunal *'shall be whether, for the reasons adduced by the appellant - (b) the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair'* an appellant would find it very difficult to obtain the requested remedy/remedies and the Tribunal would not be in a position to fulfill its functions without the production of the documents mentioned in Article 36 (1) of Chapter 496. The effective access to this Tribunal by an aggrieved person following a decision of the Authority and the Tribunal's function to decide whether the Authority abused its discretion or reached a manifestly unfair decision serve the public interest much more than the non-disclosure of the documents mentioned in Article 36 (1) of Chapter 496.
5. By allowing the production of the documents mentioned in Article 36 (1), one would ensure that the principles of *'transparency'* and of *'equality of arms'* which are fundamental to the right to a fair hearing are effectively applied; more so when an appellant is combating a mightier opponent, such as the Authority.
6. The individual's file in the possession of a government department or a public authority is the individual's personal property and its contents should be available to such individual. Without the documents in that file the individual would be unarmed when seeking justice.

In order to protect the privacy and confidentiality rights of third parties, the Tribunal, in the the MFSP case, ordered that all documents wherein third parties are mentioned were to remain solely accessible to the Tribunal, the parties and their lawyers.

In addition to the reasons given in the MFSP case, the Tribunal adds the following considerations in upholding the Appellant's request for the production of the documents referred to in Article 36 (1), According to:

1. Article 21 (12) (b) of Chapter 330 *"In all cases the Tribunal shall require the best evidence that the party may be able to produce"* and
2. Article 21 (13) (b) of the same Chapter, *"... the Tribunal shall have the power to require the production of any document or other information"*.

The Tribunal cannot determine if the Authority abused its discretion or reached a manifestly unfair decision without having at its disposal the best evidence



and the best evidence is the production of the documents being requested by the Appellants and which the Authority has the power to require their production.

Therefore, for all the above reasons, the Tribunal accedes to the Appellant's request and orders the Authority to file every document, including correspondence, reports/assessments and recommendations which were exchanged between the Securities and Markets Supervision Unit and the Supervisory Council which resulted from inspections carried out by the Authority on the conduct of the Appellant's business activities and which led to the Authority's decision to cancel the Appellant's licence and that these documents are to be filed in the records of these proceedings in their original format, without in any way being edited and/or censored.

The matter whether such documents are to remain solely accessible to the Tribunal, the parties and their lawyers will be considered on a case by case basis.

With costs against the Authority.

Three handwritten signatures in blue ink are present on the page. The top signature is the most prominent, followed by a second signature below it, and a third signature at the bottom. A horizontal line is drawn across the page, passing between the first and second signatures.