

UFFIĊĊJU TAT-TRIBUNAL GĦAL  
SERVIZZI FINANZJARJI  
ĊENTRU MALTI TA' L-ARBITRAĠĠ  
33, TRIQ NOFSINHAR,  
VALLETTA VLT 11



OFFICE OF THE FINANCIAL  
SERVICES TRIBUNAL  
MALTA ARBITRATION CENTRE  
33, SOUTH STREET,  
VALLETTA VLT 11

Dr Ian Stafrace LL.D. Chairman

Dr. Nicholas Valenzia LL.D Membru

Mr. Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) Membru

FST 07/21

S&D Yachts Ltd

vs.

MFSA

Illum 13 ta' Jannar 2022

It- Tribunal,

Ra l-appell interpost mill-Appellanta liema appell gie intavolat fit –tnejn u ghoxrin (22) ta' Dicembru 2021 li fih l-appellanta ssostni:

By means of this letter S&D Yachts Limited (C 3476) hereon referred to as "S&D" is hereby submitting an appeal following the decision of the Malta Financial Services Authority hereon referred to as "the Authority" dated the 6<sup>th</sup> December 2021 in relation to the administrative penalty of two thousand five hundred Euro (€2,500) in terms of Article 9(1) of the Company

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A handwritten signature in blue ink, featuring a stylized 'S' and 'D' followed by a long horizontal stroke.



Service Providers Act imposed by same Authority by means of its decision dated the 7<sup>th</sup> October 2021, in view of the fact that the MFSA considered S&D to be in breach of Rule 17.03 of the Rules for Company Services Providers as it had submitted the Audited Financial Statements and the Auditors Management Letter for the year ended 31st December 2019 after the stipulated deadline.

S&D submitted its representations by means of a letter dated 20th October 2021, in which the Company provided the Authority with an explanation of the circumstances which resulted in the delayed submission of the mentioned regulatory documentation to the Authority. Summarily, S&D held that until very recently the auditor of the company was Mr. Anton Chetcuti Ganado. Mr. Chetcuti Ganado got seriously ill between 2019 and 2020. During 2019 it appeared that Mr. Chetcuti Ganado could continue fulfilling his duties, however as weeks and months passed it was becoming clear that he was not well at all. The Board of Directors therefore asked his office to appoint another auditor on his behalf however the change could not happen overnight and there was a lapse of time before, Malcolm Mifsud, could take on this role of auditor. Mr. Chetcuti Ganado, unfortunately passed away on the 27th October 2020. Since the demise of the Mr. Anton Chetcuti Ganado, the auditor's office has been disbanded and does not exist anymore. In view of this the company has appointed the office of Charles Scerri to carry out the audited financial statements of the company.

Despite the above representations sent to the MFSA, the Authority concluded that, the Company is deemed to have acted in breach of Rule 17.03 of the Rules for Company Services Providers applicable until 15th March 2021, since required documents were submitted late to the Authority on 18th September 2020. This rule merely stipulates that:

*"Audited annual financial statements prepared in accordance with appropriate accounting standards, together with a copy of the auditors' management letter and the auditors' report, shall be submitted to the MFSA within four months of the Accounting Reference Date."*

In this regard the updated rulebook which is applicable after the 15th March 2021, elaborates further and in relation to 'Enforcement and Sanctions' specifically R5-2.3 states that:

*"In determining whether to impose a penalty or other sanction, and in determining the appropriate penalty or sanction, the MFSA shall be guided by the principle of proportionality, deterrence and the disgorgement of profits derived from wrongdoing where the findings were systemic and their scale. The MFSA shall, where relevant, take into consideration the circumstances of the specific case, which may inter alia include:*

...

- vi. the level of cooperation of the CSP with the Authority;*
- vii. previous infringements by the CSP and prior sanctions imposed by MFSA or other regulatory authorities on the same CSP;*
- viii. the good faith, the degree of openness and diligence of the CSP in the fulfilment of his obligations under the Act, relative regulations, Rules and Authorisation conditions or of decisions of the Competent Authority in this regard*



... ”

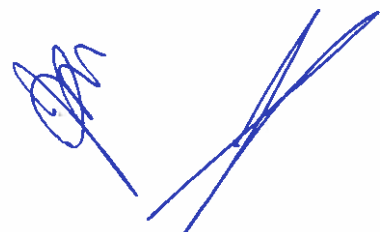
Also, Article 8(1) Company Service Providers Act states that, *“the Authority may issue rules applicable to company service providers as may be required, for the carrying into effect of this Act ... ”* More importantly, Article 8(2) holds that, *“such rules shall be binding on company service providers and others as may be specified therein.”* In other words, notwithstanding the fact that the applicable rules are those as specified in the Rulebook issued on the 21st March 2014, the rules in the newly established rulebook cannot be ignored. Moreover, as a general principle of law, when it comes to disputes relating to the issuance of penalties, the most favourable law to the alleged offender shall apply. Therefore, the above cited rule extracted from the newly amended rulebook should be applied to this case, more so since it does not change the essence of the rule but merely elucidates upon the reasoning that the Authority should undergo when deciding to impose such penalty.

In consideration of the above R5-2.3, S&D always gave its full cooperation with the Authority whenever it was requested by the same Authority to assist in any of its investigations. Additionally, S&D always acted diligently and in good faith in fulfilling its duties as a company service provider. More importantly, up until the issuance of the above penalty, S&D always complied with MFSA regulations, so much so that it has never been fined in this regard.

Thus, in its decision the Tribunal is to examine the fact that when the Authority imposed this penalty it should have taken into account the above considerations. Furthermore, on the merits of the case, it should be noted that certain fulfilment of duties depends on the actions of independent third parties over which the company may have little control on. The office of an auditor within an established company is not an easy role to replace since the due diligence required in assessing prospective candidates to fill in this vacancy necessitates a considerable amount time and effort. In its decision, the Authority was manifestly unfair when it completely overlooked the above reasonable circumstances and chose to impose this substantial and unwarranted penalty, consequently tainting S&D’s reputable name.

Therefore, by virtue of Article 16 (2)(b) of the Company Service Providers Act Cap.529 and in view of the above, S&D is respectfully appealing from such decision and requests the Tribunal in terms of Article 21(13)(a) of the Malta Financial Services Authority Act Cap.330, to annul the decision and the consequent penalty as imposed by the Authority under the relevant law and to give directions within its powers under this Act or any other law to the said Authority to implement the decision of the Tribunal.

Ra r-risposta imressqa mill-Awtorita Appellata li fiha, rispondiet ghall-appell interpost u sostniet:





That on the 7<sup>th</sup> of October 2021, the Authority sent a Minded Letter to the S&D Yachts Limited whereby it communicated the proposed regulatory action of a total penalty of €2,500 for breaches of Rule 17.03 (the “Minded Letter”). Such amount consisted of a proposed penalty of €2,000 for the late submission of Audited Financial Statements for the year ending 31<sup>st</sup> of December 2019 and a proposed penalty of €500 for the late submission of the Auditor’s Management Letter for the same year for a total penalty of €2,500. Such late submissions were in breach of Rule 17.03 of the Rules for Company Services Providers which were in force before the 15<sup>th</sup> of March 2021;

That on the 20<sup>th</sup> of October of the same year, S&D Yachts Limited replied to such Minded Letter stating that such late submissions were on account of the company auditor falling ill and eventually passing away, and asked the Authority not to impose the aforementioned fine on account of this;

That on the 6<sup>th</sup> of December 2021, the Authority communicated its decision with S&D Yachts Limited whereby, after carefully considering the representations made by the Company in reply to the Authority’s Minded Letter, it imposed the proposed comprehensive penalty of €2,500 (the “Decision”);

That S&D Yachts Limited felt aggrieved by the Decision and on the 22<sup>nd</sup> of December of the same year availed itself of its right of appeal before the Financial Services Tribunal in terms of Article 16(2)(b) of the Company Service Providers Act (Chapter 259 of the Laws of Malta) asking for the same Tribunal to annul the Decision and consequent penalty;

That, as will be explained in great detail throughout this reply and elaborated further in the course of these proceedings, in reaching its Decision, the Authority did not act in a manner that is manifestly unfair, nor did it wrongly apply the applicable provisions of the law or impose a disproportionate penalty. The requests and allegations tabled by S&D Yachts Limited before this Tribunal are therefore completely unfounded in fact and at law and should be rejected in their entirety by this Tribunal with all legal costs to be borne by S&D Yachts Limited;

That, preliminarily, the Authority submits that the content of this reply is without prejudice to the submissions, evidence and findings put forth in the Minded Letter and the Decision;

That, in its appeal, S&D Yachts Limited submits the following:







Despite the above representations sent to the MFSA, the Authority concluded that, the Company is deemed to have acted in breach of Rule 17.03 of the Rules for Company Services Providers applicable until 15th March 2021, since required documents were submitted late to the Authority on 18th September 2020. This rule merely stipulates that: *“Audited annual financial statements prepared in accordance with appropriate accounting standards, together with a copy of the auditors’ management letter and the auditors’ report, shall be submitted to the MFSA within four months of the Accounting Reference Date.”*

That, also preliminarily, the Authority would like to clarify that the Decision was made in accordance with Article 9(1) of the Company Service Providers Act, which stipulates the following:

*Where any person contravenes or fails to comply with any of the provisions of this Act or of any regulations or rules issued thereunder, with any of the conditions imposed in an authorisation issued by the Authority, with any directive issued by the Authority, or fails to cooperate with the Authority in an investigation, the Authority may, by notice in writing and without recourse to a court hearing, impose on any such person an administrative penalty which may not exceed fifty thousand euro (€50,000) for each infringement or failure to comply, as the case may be.*

That, furthermore, contrary to what has been implied by S&D Yachts Limited in its appeal, the Authority had indeed taken the principles of proportionality and fairness, in addition to other mitigating factors, into consideration both in imposing the administrative penalty and in determining the respective quantum. Therefore, the argument made by S&D Yachts Limited that R5-2.3 of the Rules for Company Service Providers should have applied in determining the penalty, and that applied the penalty would have been mitigated, is completely unfounded as it is evident that such provision was indeed considered;

That further to this, the Authority submits that in determining the quantum of the penalties, it took into consideration, *inter alia*, the following:

- i. the fact that S&D Yachts Limited has not previously been responsible for any breaches subject to regulatory action;
- ii. the relatively low degree of impact and seriousness of the breaches;



- iii. the level of cooperation of S&D Yachts Limited with the Authority;
- iv. the fact that all statutory documents were submitted within 100 days from the effective deadline<sup>1</sup>;

That in view of the above considerations, the Authority maintains that the administrative penalty imposed is proportionate and fair. Furthermore, it should be mentioned that Article 9(1) of the Company Service Providers Act, by virtue of which the administrative penalty was imposed, stipulates a maximum penalty of €50,000 for each breach identified. Considering that the penalty imposed in the present case is merely of a global amount of €2,500 for breaches of Rule 17.03, it is extremely evident that such penalty is proportionate and fair in light of the aforementioned mitigating factors and considerations.

That S&D Yachts Limited argues that *“it should be noted that certain fulfilment of duties depends on the actions of independent third parties over which the company may have little control on.”* It should be mentioned here that it is imperative that all Company Service Providers take all reasonable measures to submit to the Authority all such documentation in a timely manner, irrespective of whether the relevant task has been delegated to other third-party service providers. Moreover, the timely submission of statutory documentations falls exclusively within the responsibility of the Board of Directors. Furthermore, and without prejudice to the above, it should also be noted that the argument brought forward regarding the demise of the auditor, holds no ground in so far as it is used as a defence to have failed to abide by its statutory obligations, as shall be proven during the hearing of this case.

That S&D Yachts Limited alleges that the Authority was manifestly unfair in overlooking the circumstances and choosing to impose this substantial and unwarranted penalty. This argument is also completely unfounded. The Authority here submits that all representations were duly noted and considered, but did not merit a reconsideration of the penalty proposed in the Minded Letter, especially when considering the minor nature of the penalty and the mitigating factors already considered in the same Minded Letter;

In conclusion, the Authority humbly submits that it exercised its discretion in a fair manner and according to the provisions of the law;

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<sup>1</sup> This was explained in the Minded Letter dated 7<sup>th</sup> of October 2021. Should the relevant documents have been submitted after the lapse of 100 days from the effective deadline, the penalty imposed for each brief would have been significantly higher to reflect this.



Therefore, for the abovementioned reasons, the Authority respectfully requests that this Honourable Tribunal dismisses the appeal as tabled by S&D Yachts Limited and to confirm the Decision issued by the Authority on the 6<sup>th</sup> of December 2021, with costs against the same S&D Yachts Limited.

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Ra id-dokumenti u l-provi sottomessi mill-partijiet;

Sema it-trattazzjoni tal-partijiet u ra li l-appell gie differit ghall-lum sabiex jigi deciz;

Ra' l-atti kollha tal-kaz

Kunsiderazzjonijiet tat-Tribunal:

1. Illi s-socjeta Appellanta qeghdha tilmenta mill-multa ta' elfejn u hames mitt Euro (€2,500) fuqha imposta mill-Awtorita permezz tad-decizjoni tas- 6 ta' Dicembru 2021 liema multa giet imposta a bazi ta l-artikolu 9 (1) tal- Company Service Providers Act u dan stante li l-istess socjeta Appellanta kisret ir- Rule 17.03 tar- Rules for Company Services Providers meta issottomettiet l- Audited Financial Statements u Auditors' Management Letter ghas-sena 31st December 2019 wara it-terminu stipulat.
2. Illi in succinct, dak li wassal ill-Awtorita' appellata sabiex tiehu il-mizuri li wasslu ghall-kontestazzjoni odjerna kien il-fatt illi s-socjeta' appellanta ssottomettiet l- *audited annual financial statements* u l-*Auditors' management letter* ghas-sena finanzjarja Dicembru 2019, fit-18 ta' Settembru 2020, u dan meta suppost tali dokumenti kellhom jigu sottomessi sat-30 ta' April 2020.
3. Illi s-socjeta' appellanta ssostni illi hija esperjenzat diffikolta' sabiex l-audieted financial statements tas-sena 2019 ikunu saru fil-hin u t-termini stabbiliti u dan stante



illi l-awditur taghha, u cioe Anton Chetcuti Ganado kien marad u kien indispost matul is-snin 2019 u 2020, tant illi huwa miet fis-27 ta' Ottubru 2020.

4. L-Awtorita' appellata ssostni illi minkejja li ma hemmx kontestazzjoni fuq il-fatt illi is-Sur Chetcuti Ganado kien marad, dan ma nehha xejn mill-obbligi regolatorji tas-socjeta Appellanta li tissottometti dak minnha mitlub fit-termini stabbiliti.
5. Illi fid-deposizzjoni tieghu, is-Sur Darmanin Kissaun <sup>2</sup> spjega id-diffikolta li kellha il-kumpannija Appellanta meta l-awditur taghha marad peress illi x-xoghol kien waqa kollu fuq awdituri ohra li kienu jahdmu fl-istess ditta u li ma setghux ilahqu max-xoghol u b' hekk l-audit tas-sena 2019 gie sottomess fit- 18 ta' Settembru 2020 minflok sat- 30 ta' April 2020. Spjega ukoll kif meta miet is-Sur Chetcuti Ganado, is-socjeta Appellanta bidlet l-awdituri.
6. Illi meta gie kontro-ezaminat, is-Sur Darmanin Kissaun qal ukoll illi huwa ma kienx informa lill-Awtorita bid-diffikolta li kellhom sabiex ilestu l-audit tas-sena 2019.
7. Illi Alistair Cuschieri, fl-affidavit tieghu, spjega illi il- Company Services Providers, bhal ma hija is-socjeta Appellanta, kellhom estenzjoni "blanket" sat- tletin (30) ta' Gunju 2020 in segwitu tac-cirkolari tal-20 ta' Marzu 2020 li kienet inharget minhabba il-Covid 19.
8. Tramite ic-cirkolari ulterjuru tat- tletin (30) ta' Gunju 2020, l-Awtorita infurmat lill-entitajiet regolati, bhal ma hija is-socjeta Appellanti, illi l-istess Awtorita kienet disposta taghti estenzjonijiet ulterjuri jekk issir talba ghal dan il-ghan, liema talba kienet ser tigi ikkunsidrata on a case by case basis.
9. Illi s-socjeta Appellanti ma ghamlet l-ebda talba ghall-estenzjoni ulterjuri mit-terminu li kien awtomatikament estiz sat-tletin (30) ta' Gunju 2020.
10. Illi skodn l-istess Alistair Cuschieri, skond Rule 17.04 tar-Rules for CSP's li kienu applikabbli dak iz-zmien, l-Appellanta kienet obbligata li tinforma lill-Awtorita li kellha diffikolta sabiex tonora it-termini li fihom is-sottomissjonijiet kellhom isiru.
11. Illi tenut dan kollu, fil-kunsiderazzjoni ta' dan it-Tribunal, il-kwistjoni allura tikkoncentra ruhha, dwar jekk tali azzjoni kelliex tittiehed minhabba l-fatt illi s-socjeta' appellanta naqset li tinforma lill-Awtorita bil-problema li hija kellha sabiex tonora l-obbliga taghha fil-hin minhabba il-kundizzjoni tas-Sur Chetcuti Ganado, u n-nuqqas li hija titlob ghall-estenzjoni stipulata fic-cirkolari tat- 30 ta' Gunju 2020.

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<sup>2</sup> Dok. SD1





12. Illi r-Rule 17.04 tar-Rules for CSP's<sup>3</sup> titkellem fuq diffikolta sabiex l-entita regolata tissottometti l-Annual Return, u mhux l-Audited Financial Statements jew l-Auditors Management Letter. Dan qieghed jinghad bhala punt ta' kjarifika, ghaliex fid-deposizzjoni tieghu, is-Sur Cuschieri donnu indika illi jezisti tali obbligu anke fir-rigward tal-financial statements u l-management letter. Izda pero jezisti ir-Rule 20.1 li jghid:

*A Registered Person is expected to deal openly and in a spirit of co-operation with the Authority and any other relevant regulatory authorities*

13. Oltre dan, minkejja li c-Cirkolari tal-20 ta' Marzu 2020 kienet provdi estenzjoni "blanket" fil-kaz ta' CSP's sat- tletin (30) ta' Guunju 2020, ic-Cirkolari tat- tletin (30) ta' Gunju 2020 kienet tobbliga lill-entitajiet regolati bhal ma hija s-socjeta' appellanta sabiex huma jaghmlu talba ghall-estenzjoni ulterjuri tat-terminu. M' hemmx dubju illi dan kien miktub car fl-istess cirkolari.
14. Jibqa' allura l-punt tal-proporzjonalita', izjed u izjed meta hawn si tratta ta' mizura punittiva ghaliex dina giet imposta wara illi s-socjeta' appellanta ghamlet dak li kien mitlub minnha li taghmel, u cioe' wara s-sottomissjoni tad-dokumentazzjoni. Illi tali proporzjonalita' trid tigi ukoll ikkunsidrata a bazi tal- fatt illi l-Awtorita tippublika l-azzjoni minnha, tant illi f' dan il-kaz inhareg Avviz ippublikat fl-10 ta' Dicembru 2021<sup>4</sup>.
15. Illi m' hemmx dubju illi l-Awtorita' ghandha d-diskrezzjoni li mhux biss tiehu azzjoni punittiva, izda li wkoll taghzel x' tip ta' azzjoni hija ghadha tiehu.
16. Skond l-artikolu 9 ta' l-Att li jirregola l-Appellata:

*Where any person contravenes or fails to comply with any of the provisions of this Act or of any regulations or rules issued thereunder, with any of the conditions imposed in an authorisation issued by the Authority, with any directive issued by the Authority, or fails to cooperate with the Authority in an investigation, the Authority may, by notice in writing and without recourse to a court hearing, impose on any such person an administrative penalty which may not exceed fifty thousand euro (€50,000) for each infringement or failure to comply, as the case may be.*

<sup>3</sup> [https://www.mfsa.mt/wp-content/uploads/2018/12/CSP-Rules\\_FINAL-up.pdf](https://www.mfsa.mt/wp-content/uploads/2018/12/CSP-Rules_FINAL-up.pdf)

<sup>4</sup> <https://www.mfsa.mt/publication/regulatory-action-against-sd-yachts-limited-the-company/>





17. Illi dan it-Tribunal ma jhossx illi ghandu jiddisturba hafna id-diskrezzjoni kif tigi ezercitata mill-Awtorita', filwaqt li pero' jara illi l-istess Awtorita' timxi b' mod gustifikat, proporzjonat u skond il-Ligi. Ir-regolamentazzjoni tal-qasam finazjarj u huwa punt delikat u ghandu jkun ibbazat fuq pratici rigoru u oggettivi. Izda dan ma jfissirx li ghandu jintilef kull skop ta' proporzjonalita'. Dan izjed u izjed meta azzjoni amministrattiva tigi ppublicizzata.
18. Illi m' hemmx dubju illi c-cirkostazzjoni li sabet ruhha fihom is-socjeta Appellanta kienu kemmxejn eccezzjonali u difficili. Izda ma jinftiehmex kif minkejja tali diffikolta, is-socjeta Appellanta hasset illi m' ghandiex tinforma lill-Awtorita bil-problemi li kellha, li del resto kienu problemi li wiehed seta facilment jispjega. Kienu ukoll diffikultajiet illi sa certu punt kienu impost fuq is-socjeta Appellanta u anke hawn wiehed ma jifhimx l-agir tas-socjeta Appellanta li ma tinfurmax lill-Awtorita Appellanta.
19. Illi dan in-nuqqas wahda jimpingi kontra is-socjeta Appellanta u jwassal lit-tribunal sabiex jikkondividi il-posizzjoni li hadet l-Awtorita meta ikkonkludiet li kien hemm ksur ta' l-obbligi tas-socjeta Appellanta.
20. Illi ghal dak li jirrigwardja kemm l-azzjoni li hadet l-Awtorita kienet proporzjonata, it-Tribunal ihoss illi l-Awtorita hadet in kunsiderazzjoni ic-cirkostanzi kollha li sabet ruhha fihom is-socjeta Appellanta, kif ukoll it-track record taghha u imponiet multa amministrattiva li tista tissejjah minima. Certament illi il-portata ta' tali azzjoni trid ukoll tinghata fil-kuntest tal-pubblicita li tali azzjoni tinghata hekk kif fuq deskritt, fejn ovvjament, il-quantum tal-multa kwazi jigi sekondarju ghall-fatt illi l-istess azzjoni tinghata pubblicita.
21. Illi t-Tribunal jixtieq jiehu spunt minn dan il-kaz u jistieden lill-Awtorita sabiex tara jekk sitwazzjonijiet bhal daww li sabet ruhha fihom is-socjeta Appellanta ghandhomx ikollhom xi forma ta' koncessjoni. Izda pero wiehed ghandu jifhem illi l-Awtorita ghandha tippromwovi il-principju ta' skambju ta' informazzjoni u koperazzjoni bejnha u l-entitajiet minnha regolati. Entita regolata minn naha l-ohra, ma tistax tippretendi koncessjonijiet meta hija tonqos minn element tant baziku ta' koperazzjoni.



Ili in vista tal-premess, it-Tribunal qiegħed jichad l-appell interpost mis-socjeta' appellanta u jikkonferma id-decizjoni ta' l-Awtorita' Appellata tas-sitta (6) ta' Dicembru 2021.

Tenut kont tac-cirkostanzi tal-kaz kull parti għanda tbghati l-ispejjez tagħha.



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