

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. Rober Ducker Membru

FST 08/21

SMM Consultancy Services Ltd

vs.

Malta Financial Services Authority

Illum, 26 ta' April 2023,

It- Tribunal

Ra l-appell interpost mill-Appellanta liema appell gie intavolat fil- 21 ta' Dicembru 2021  
fejn l- Appellanta sostniet:

Reference is made to the decision conveyed onto applicant SMM Consultancy Services Limited bearing company registration number C 68458 as per letter dated the 6th of December 2021, whereby applicant has been subjected to the payment of a penalty after it was found in breach of Rules 17.02 and 17.03 of the Rules for Company Services Providers as it submitted the Annual Compliance Return, the Audited Financial Statements and the Auditor's Management Letter for the year ended thirty-first (31<sup>st</sup>) December two thousand and nineteen (2019) after the stipulated deadline, do hereby tender formal notice and appeal from the decision of the Authority above indicated since it is humbly believed that a different position and decision should have been concluded, and this for the following reasons:

**Preliminary:**

1. As will result from the evidence which will be submitted during these proceedings, the year 2019 for the applicant was a year of great turbulences.
  - a. At the time, the Board of Directors was composed of Dr. Joseph M Sammut and Dr. Josephine Farrugia Mifsud.

Shortly, it was transpired, to the surprise of Dr Joseph Sammut and other employees of the applicant that Dr Josephine Farrugia Mifsud was not only acting in direct unfair competition with the applicant which she was duty bound by law to safe guard and protect as Director, but also took funds belonging to the Applicant which she was not entitled to receive.

All of this was duly reported both to the MFSA and to the Police, which the latter followed up by instituting criminal proceedings against Dr Farrugia Mifsud which procedures are still *sub judice*.

Furthermore, the Commission for the administration of Justice was informed of Dr Farrugia Mifsud's unethicalness and even procedures against her in front of the same Commission are *sub judice*.

- b. The applicant also entrusted and outsourced its Accounts and Audits to Crowe Horwath Malta since, in the opinion of the Board of Directors then, it was a highly reliable accounting and audit firm.

March 2019 saw the first signs of Covid- 19 hitting the Maltese archipelago and with it came various disruptions which directly affected the operations of various entities.

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Actually, it brought with it an international standstill especially within the corporate sector.

Notwithstanding this, the appellant incessantly kept on putting pressure on Crowe Horwath Malta to finalise all pending work notably that concerning the Annual Compliance Return, the Audited Financial Statements, and the Auditor's Management Letter.

Notwithstanding all the above-mentioned, for reasons only known to Crowe Horwath Malta, the latter never finalised the work entrusted to it and this notwithstanding that appellant had always paid up in time to any request for payment put forward by the same Crowe Horwath.

When all attempts failed and time was running out, it was decided by the Board of Directors to immediately terminate Crowe Horwath's services and engage another Accounts and Audit firm with a view of addressing appellant's obligations at law.

Despite all these efforts, it resulted that the Annual Compliance Return, the Audited Financial Statements and the Auditor's Management Letter for the year ending thirty-first (31st December) two thousand and nineteen (2019) were submitted after the stipulated timeframe imposed by the MFSA.

On the 20<sup>th</sup> of September 2021, appellant received notice of a minded administrative penalty and was given till the 4<sup>th</sup> October 2021 for the same to submit any written submissions as to why the regulatory action proposed in the minded letter should not be taken.

On the 6<sup>th</sup> of December 2021, applicant was duly served by a notice that the written submissions were not to be taken into consideration and that regulatory action against SMM Consultancy Services Ltd had been taken by the Malta Financial Services Authority.

Appellant feels aggrieved by this decision and this for the following reasons:

In its deliberations the Authority submitted that:

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*“Registered Company Service Providers (CSPs) are required and expected to take all reasonable measures to submit to the MFSA such documentation in a timely manner, irrespective of whether the relevant task has been delegated to other third-party service providers...Unless there are justifiable reasons for the delay, non-compliant registered CSPs will be in breach of legal and regulatory provisions and could, in certain cases, lead to regulatory.”*

It is humbly submitted that, in this case, there were “justifiable reasons for the delay” in the submission of the requested documents.

- i. As explained above, appellant came to realise that one of the Directors was acting maliciously against its interests and that action was immediately taken to address this issue by reporting all information available to the Executive Police and undergo an internal investigation to ascertain the extent of damage sustained as a direct consequence of the unethical activity of its own Director.

This also entailed the follow up of other procedures to appoint another Director as required by law.

All this took place in 2019, yet internal investigations had to go into 2018 up to 21<sup>st</sup> September 2019 when Dr Josephine Farrugia Mifsud, then Director, was dismissed from her employment with the appelland and a Board of shareholders meeting convened to terminate Dr Farrugia Mifsud’s Directorship position and pass a resolution to appoint a new Director as per legal requirements.

Hence, because of such a situation, legally speaking, the company could not operate with only one Director until the newly appointed Director was approved and appointed.

- ii. Side by side, as will be substantiated during the hearing of this case, although applicant was exerting pressure on its Auditors and Accounts, that is Crowe Horwath Malta, for some odd reason, the latter were doing practically nothing although assuring applicant that all was moving well and that the required deadlines imposed by the MFSA were going to be honoured.

Crowe Horwath’s replies to the appellant’s communications to the same (in person, telephonically or in writing) as will be proved, was always in the sense that work was under way and that the required documents will be finalised soon for submission.

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It was only when it came too close to the relevant deadlines and Crowe Horwath still refrained from concluding its obligations, that the Board of Directors decided to interrupt the brief to Crowe Horwath and assign same to a new Auditor and accountancy firm.

The underlying reason behind such a decision was that this decision would benefit applicant and be in line with MFSA regulations, for if as was always promised, work on the Audited Financial Statements, the Auditors Management letter and the Annual Compliance was under way, then it will only take a serious Audit firm a short span of time to conclude same and submit accordingly.

It so happened, and this as will be substantiated, that, Crowe Horwath Malta had done little, if anything, of what was expected out of them with the consequence that the newly appointed Auditor, namely Joseph Azzopardi, had to practically start everything anew.

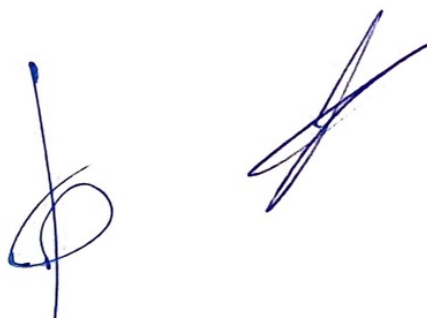
- iii. All of this taken into consideration, the hereunder Legal considerations are being submitted:

As matters stand, applicant acknowledges that its obligation to submit the Audited Financial Statement together with a copy of the Auditor's Management Letter and the Annual Compliance Return was not executed on the established deadlines, however, this not because of any fault attributed to applicant.

- a. It is well established in legal practice that, when it comes to assess the non-compliance of a subject person, considering that the outcome will lead to the imposition of a penalty, the following criteria are normally taken into consideration, that is:
  - i. The extent to which the breach is intentional.
  - ii. Results from negligence.
  - iii. The materiality, gravity, and duration of the breach.
  - iv. The degree of responsibility of the natural or legal person responsible for the breach.

amongst other criteria applicable to the case under consideration.

Together with these considerations, one cannot ignore a further consideration which must have never transpired to any legislator, that is, the situation in the case of a pandemic.

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Undoubtedly, Covid-19 created havoc in various aspects of our society and finally in any Corporate Service Provider Organisation.

It is true that MFSA had extended the deadlines and made it clear that no further extensions were to be allowed. Having said that, such a declaration is somewhat draconian and legally untenable for how can appellant constrain, dictate or make another service provider, that is an Audit and Accountant organisation hand out the required documents if such an organisation is somehow affected by the pandemic and is obliged by law to adhere to other orders and regulations issued by the competent authorities which go diametrically opposed to any other rule or regulation issued by the MFSA?

Without prejudice to the afore-mentioned grievances put forward, as far as the appellant is informed, Crowe Howarth, at various points, was adhering to Covid-19 regulations pertaining to quarantine.

Such a situation had and should have been taken into consideration by the MFSA when assessing whether appellant was in fact negligent or non-complaint.

Undoubtedly, such an issue should and must mitigate any decree of appellants responsibility in the issuance of any penalty if the case.

- b. Coming back to the other mitigating criteria, in view of all that will be further submitted during the hearing of this appeal, it will be proved that appellant did all that was in its power and control to submit all that was required from it on time and as required by law.

As will be submitted all along the hearing of this procedures, appellant persistently chased its Auditors and accountants to conclude the brief and always, notwithstanding the subsisting prevailing circumstances in 2019 till present, Crowe Horwath always promised that it will deliver. Then, there were no grounds of negligence pertaining to appellant.

The only degree, if it can legally be classified as negligent, was the timing of when the actual decision to change Accountants and Auditors was taken. At what point in time would one have expected appellant to conclude that Crowe Howarth will not actually deliver? How many days before the actual deadline? For the sake of the argument, it was always a possibility that Crowe Horwath could have delivered within the stipulated deadlines.



It was only when due date arrived, and Crowe Horwath remained passive, that appellant lost hope and gave up with Crowe Horwath, and, without any loss of time, assigned the work required to a new Audit and Accounting firm. This surely is a significant mitigation that will weigh in favour of appellant when it comes to weigh the degree of responsibility of the natural or legal person responsible for the breach or better still, how much he is responsible for the actual breach.

With all due respect, it is the time that, the Authority, which is the sole regulator of all local service providers within this sphere of activity, to fork out regulations that will reign in the other service providers who undertake to carry out work delegated to them in terms of the Service Providers Act and not dump it on appellant when appellant is helpless in the face of such situations.

- c. In its communication of the 6th of December 2021 to appellant, the Authority also points out that although all that was required, though late, was submitted, till this day the Auditor's Management Letter for the year ended 2019 was never submitted to the Authority.

In this regard, appellant points out that, the Auditor's Management letter has been submitted and refers to the Audit Memorandum whereby there is ample reference to the Management Letter. It is hereby being stated that the Audit Memorandum and the Management Letter are one and the same.

Hence, it is only a question of formality, that is, whether the management letter is to have the outlook of a letter or else it is to be an instrument forming part of the Audit Memorandum.

Hence this too is an instance where it merits to have the minded administrative penalty addressed and reduced.

### **Conclusion**

In conclusion and considering everything which was put forward by the appellant, it is of the opinion that this matter can never amount to negligence or that appellant was responsible for the breach. Appellant has done all that was expected of it to be in line with its obligations.



Furthermore, since appellant is being held liable for the failure of another entity, the penalty inflicted of five thousand, five hundred and fifty euros (€5,550) is deemed excessive and disproportionate given the special circumstances of the case at hand.

Appellant, whilst referring to all that has been submitted, to which it makes ample reference, reserves the right at law to bring forward any other proof that may be available to it at law in defence of its submissions and humbly asks this honourable Tribunal to, whilst rescinding and nullifying the decision reached by the Authority conveyed to it by means of letter dated 6th of December 2021, since it is more than evident that appellant neither acted negligent nor contributed towards the transgression of Rules 17.02 and 17.03 of the Rules for Company Services Providers applicable from the 15th of March 2015, upholds the above tendered submissions and declare the application of the penalty imposed to be excessive and if ruled out altogether, inflicts a lesser one that really takes into consideration all the aspects encompassing this particular case.

Ra ir-risposta ta' l-Awtorita Appellata tal- 20 ta' Frar 2022 fejn l- Awtorita irribattiet it-talbiet tas-socjeta Appellanta bis-segwent:

That on the 20th of September 2021, the Authority sent a Minded Letter to SMM Consultancy Services Ltd whereby it communicated the proposed regulatory action of a total penalty of €5,500 for several breaches during the year ending in December 2019, (the "**Minded Letter**"), a copy of which is attached hereto and marked as Doc MFSA1.

That amongst the breaches, the Appellant company was found to be in breach of Rules 17.02 and 17.03 of the Rules for Company Service Providers, for late submissions and non-submissions, which were applicable until the 15th of March 2021, whereby licensed Company Service Providers had to submit the relevant documentation within four (4) months of the accounting reference date.

That, on the 4th of October 2021, SMM Consultancy Services Ltd replied, claiming that its lack of adherence to the relevant timeframes was the fault of engaged third-party professionals entrusted with its Accounts and Audits as the reason behind such shortcomings. The Company also mentioned the pandemic as an aggravation and that the Audit Management Letter for the year ending 31st of December 2019 had indeed been submitted together with the Audited Financial Statements for the same year.

That the Authority did not feel that these representations warranted a change in the proposed penalty and thus proceeded by imposing such penalty by means of a Decision on the 6th of December 2021 (the "**Decision**"), a copy of which is attached hereto and marked as Doc MFSA2;





Services Tribunal in terms of Article 21 of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) asking for the same Tribunal to annul the Decision and consequent penalty.

## **The Appeal**

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 Letter, both of which are attached hereto and deemed to form an integral part of this reply.

That, also preliminarily, Article 21(9) of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) clearly stipulates that an appeal application may only prove successful in front of this Honourable Tribunal should it be shown that:

- (a) the competent authority has, in its decision wrongly applied any of the provisions of this Act, or any regulations issued thereunder; or*
- (b) the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair.*

That SMM Consultancy Services Ltd has failed to cite any erroneous application of the aforementioned act, any abuse of discretion, or any manifestly unfair decision of the Authority. As such, it follows that the Company's Petition of Appeal is to be dismissed without delay.

That, without prejudice to the above, and as will be explained in greater detail throughout this reply and elaborated further during 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 tabled by SMM Consultancy Services Ltd before this Tribunal are manifestly unfounded in fact and at law and should be rejected in their entirety by this Tribunal.

That, firstly, the Authority submits that SMM Consultancy Services Ltd, is by means of this appeal, raising grounds for dismissal of the Decision that were never mentioned prior to the Petition of Appeal itself, and this in spite of the fact that prior to the same Decision being issues, the Appellant company was given the opportunity to present its arguments in its reply to the Minded Letter. Whilst the company did indeed file a reply to the same, there was never any mention of one of the main grounds on which this appeal is being based, that is Dr Josephine Farrugia Mifsud's alleged malicious activity against the Company.



That, the Authority was notified of Dr. Farrugia Mifsud's termination as Director by means of correspondence received from SMM Consultancy Services Ltd dated the 5th of December 2019 (a copy of which is hereby attached and marked as MFSA3). As is clearly evidenced by the attached document, not only was there no mention of any malicious activity in relation to Dr Farrugia Mifsud's termination as Director, but unequivocally stated that "*her termination does not bring about any regulatory implications of whatever nature*". The Authority hereby submits that it is contradictory to say the least that this termination is now being raised as a reason to justify revocation of regulatory action when two years prior the exact opposite was stated by the same Company. The Authority therefore concludes that, as a consequence of this, coupled with the fact that no point was ever raised by the Company in this respect at any stage prior to the Decision (including during representations made following the Minded Letter), such reasons cannot justify the late regulatory submissions on the part of the Company.

That with regard to the arguments made by SMM Consultancy Services Ltd stating that they did everything in their power to ensure that the regulatory submissions were made within the stipulated timeframes, and that the submissions were late solely due to negligence on the part of the engaged third-party professions, the Authority humbly submits that all Company Service Providers are required to take all reasonable measures to make such regulatory submissions in a timely manner, regardless of whether any tasks have been delegated to third-parties. It is the Board of Directors' duty to ensure that such regulatory submissions are made on time, and not that of any third-party professionals which may have been engaged, and, as such, the late submissions made by the Company cannot be justified in this respect.

That, without prejudice to the above, in reply to SMM Consultancy Services Ltd's submission whereby they assert that they attempted to engage the services of alternative auditors, the Authority would like to add that no evidence has ever been furnished in this respect.

That, additionally, the Authority submits that SMM Consultancy Services Ltd has a history of late regulatory submissions. On the 20th of June 2018, for instance, the Authority had to send a letter to the Company with regard to regulatory documentation for the year ended 31st of December 2016 and 2017 which had not been submitted, a copy of which is attached hereto and marked as Doc MFSA4. In addition to this, the Authority also had to chase for regulatory documentation for the year ended 31st of December 2018• as is evidence by the correspondence attached hereto and marked as Doc MFSA5. In light of a history including a multitude of late regulatory submissions, the Authority cannot accept the argument that only as of the 15th of March 2020 did it become apparent

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to the Company that a change in auditors was due, and that it had in fact done its utmost to ensure that all documentation was filed in a timely manner.

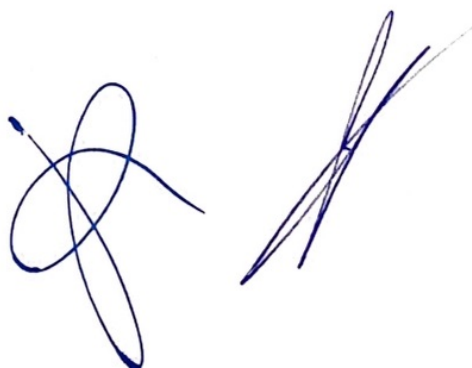
That, moreover, the nature and gravity of the late regulatory submissions must also be taken into consideration. The Audited Financial Statements for the year ended 31<sup>st</sup> of December 2019 were submitted in July of the year 2021, over a year after the effective deadline including the two (2) month extension applicable by virtue of the Circular dated 20<sup>th</sup> of March 2020. Furthermore, the Annual Compliance return for the year ended 31<sup>st</sup> of December 2019 was submitted in July 2020, despite being due in April 2020. Lastly, and contrary to what is being alleged, the Company has only submitted the Audit Management Letter (or Audit Memorandum as referred to by the Company) for the year ended 31<sup>st</sup> of December 2020. The Auditor's Management Letter for the year ended 31<sup>st</sup> of December 2019, which is relevant to the case at hand, has to this day not yet been submitted.

That further to this, it should be noted that SMM Consultancy Services Ltd did not communicate with the Authority in respect of their difficulties with meeting the statutory deadlines and did not communicate with the Authority after the relevant effective deadlines had lapsed. So much so, that it was in fact the Authority who always had to chase the Company and certainly not vice-versa. Therefore, it follows that the failure on the part of the Company to inform or seek guidance from the Authority can only be attributed to the Company itself.

That with regard to SMM Consultancy Services Ltd's arguments that the pandemic was an aggravating factor to the difficulties already faced by them, the Authority hereby submits that such breaches were committed **despite the fact that the Authority acknowledged and catered** for the difficult circumstances and provided extensions and leeway in this respect. This is evidenced clearly through the Circulars dated 20<sup>th</sup> of March 2020 and 30<sup>th</sup> of June 2020. Therefore, the circumstances do not justify failure to adhere to statutory obligations, especially in light of the extensions provided by the Authority. In fact, the Circular dated 20<sup>th</sup> of March 2020 clearly stipulates the following:

*the MFSA expects regulated firms to take all reasonable measures in order to have appropriate contingency plans in place to be able to deal with any eventuality relating to the outbreak of COVID-19.*

*The MFSA's position is aimed at striking the right balance between providing the necessary relief to licensed entities, whilst maintaining its objective of ensuring the protection of markets and consumers/investors... No requirements will be waived or disapplied.*

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That it follows that the Authority's position in this regard was clear from the outset (and even provided for a significant amount' of flexibility) and that SMM Consultancy Services Ltd had been made well aware of this.

That the assertion that the penalty imposed is unfair and disproportionate is once again completely unfounded. The Authority hereby submits that it did take a number of mitigating factors into consideration in the decision to impose the penalty as well as with regard to the quantum. These include, *inter cilia*:

- i. The fact that SMM Consultancy Services Ltd had not previously been subject to regulatory action (this notwithstanding the fact that the Company has been guilty of late regulatory submissions in the past);
- ii. The relatively low degree of impact and seriousness of the breaches in question;
- iii. The level of cooperation with the Authority on the part of the Company;
- iv. The fact that the Annual Compliance Return for the year ended 31st of December 2019 was submitted within 100 days from the effective deadline;

That had these mitigating factors not been considered by the Authority, the penalty imposed would have been significantly higher. Further to this, a glance at Article 9(1) of the Company Service Providers Act (Chapter 529 of the Laws of Malta) clearly evidences that the Authority could have imposed a considerably higher penalty than that actually imposed. It therefore follows that the penalty imposed is just and proportionate given the circumstances.

That, therefore, in light clear breaches of Rules 17.02 and 17.03 of the Rules for Company Services Providers (applicable until the 15th of March 2021), the Decision was correct, just and proportionate and the Authority exercised its discretion in a fair manner and according to the provisions of law;

Therefore, for the abovementioned reasons, the Authority respectfully requests that this Honourable Tribunal dismisses the appeal as tabled by SMM Consultancy Services Ltd and to confirm the Decision issued by the Authority on the 6th of December 2021, with costs against the same SMM Consultancy Services Ltd.

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

Ra in-noti ta' sottomissjoni 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 hija licenzjata sabiex topera bhala Company Service Provider.



2. Illi skond ir-regoli applikabbli qabel Marzu 2021, is-socjeta Appellanta kienet obbligata li tipprezenta Annual Return <sup>1</sup>, l-audited financial statements u l-management letter <sup>2</sup> sa erba' xhir wara l-eghluq tas-sena finanzjaraja.
3. Illi id-dokumentazzjoni relattiva ghas-sena Dicembru 2019 kellha ghaldaqstant tigi sottomessa sa' l-ahhar ta' April 2020.
4. Jidher illi l-Annual Return giet sottomessa fid- 9 ta' Lulju 2020, l- audited financial statements fit- 13 ta' Lulju 2021 filwaqt illi skond l-istess Awtorita, il- management letter ghas-sena Dicembru 2019 ma gietx prezentata.
5. Illi l-Awtorita harget minded letter fil-konfront tas-socjeta Appellanta fl- 20 ta' Settembru 2021 fejn spjegat dawn in-nuqqasijiet u is- socjeta Appellanta inghatat terminu sabiex tispjega il-posizzjoni taghha. Fl-istess minded letter kien hemm indikat l-azzjoni punittiva li l-Awtorita kienet behsiebha tiehu minhabba tali nuqqasijiet.
6. Is-socjeta Appellanta wiegbet ghall-istess minded letter permezz ta' ittra tal- 4 ta' Ottubru 2021 fejn hija spjegat illi id-dewmien kien ikkawzat minnhabba l-agir ta' terzi. Spjegat ukoll illi attwalment il-Management Letter kienet giet sottomessa fil-forma ta' Audit Memorandum presentat flimkien mal-audited financial statements tas- sena Dicembru 2019.
7. Illi l-Awtorita harget id-decizjoni finali taghha datata 6 ta' Dicembru 2021 ("id-Decizjoni") fejn ikkonfermat l-azzjoni li kienet giet indikata fil-minded letter mahruqa precedentement.
8. Illi l-Appellanta interponiet l-appell quddiem dan it-Tribunal fejn resqet numri ta' aggravji sabiex tikkontesta id-decizjoni ta' l-Awtorita.

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<sup>1</sup> Rule 17.02 tar-Rules for Company Service Providers

<sup>2</sup> Rule 17.03 tar-Rules for Company Service Providers



9. Illi fis-sustanza l-Appellanta tghid illi kien hemm raginijiet validi ghalfejn is-sottomissjonijiet saru tardivament oltre il-fatt illi d-decizjoni ta' l-Awtorita kienet wahda mhux ragonevoli u sproprorzjonata.
10. Illi l-ewwel raguni li ingiebet f' dan ir-rigward kien il-fatt illi direttur tas-socjeta Appellanta *"was acting maliciously against its interests and that action was immediately taken to address this issue by reporting all information available to the Executive Police and undergo an internal investigation to ascertain the extent of damage sustained as a direct consequence of the unethical activity of its own Director."*
11. Illi l-Awtorita wiegbet ghal dan l-aggravju billi sostniet illi l-ewwel darba li l-Appellanta resqet il-kwistjoni tad-Direttur bhala raguni tad-dewmien kien tramite ir-rikors ta' l-Appell. Illi oltre dan, l-Awtorita sostniet illi *"the Authority was notified of Dr. Farrugia Mifsud's termination as Director by means of correspondence received from SMM Consultancy Services Ltd dated the 5th of December 2019 (a copy of which is hereby attached and marked as MFSA3). As is clearly evidenced by the attached document, not only was there no mention of any malicious activity in relation to Dr Farrugia Mifsud's termination as Director, but unequivocally stated that "her termination does not bring about any regulatory implications of whatever nature". The Authority hereby submits that it is contradictory to say the least that this termination is now being raised as a reason to justify revocation of regulatory action when two years prior the exact opposite was stated by the same Company. The Authority therefore concludes that, as a consequence of this, coupled with the fact that no point was ever raised by the Company in this respect at any stage prior to the Decision (including during representations made following the Minded Letter), such reasons cannot justify the late regulatory submissions on the part of the Company."*
12. Illi huwa minnu illi il-kwistjoni tad-Direttur Dr. Farrugia Mifsud tressqet bhala raguni mis-socjeta Appellanta l-ewwel darba tramite ir-rikors ta' l-Appell. Pero dan ma jfissirx illi b' daqshekk it-Tribunal m' ghandux jistharreg dan l-Aggravju.
13. Illi pero ghandu jinghad illi huwa kemmxajn kunfliggenti kif materja daqshekk serja u allegazzjonijiet daqshekk sostantivi tressqu ghall-ewwel darba f' rikors ta' appell minn decizjoni ta' l-Awtorita'. Ma jinftheimx kif din il-kwistjoni qatt ma tressqet quddiem l-



Awtorita' mhux biss bhala raguni ta' gustifikazzjoni (bhal ma ta' l-anqas kellu jsir fis-risposta ghall-minded letter) izda anke precedentement stante illi hawn si tratta ta' kwistjoni serjissimma li tmur oltre il-prezentata b' mod tardiv tad-dokumentazzjoni. Allegazzjonijiet ta' "unethical activity" minn Direttur ta' entita regolata tmur oltre minn raguni sabiex jigi gustifikat dewmien.

14. Fl-ittra tal- 5 ta' Dicembru 2019, tramite liema is-socjeta Appellanta innotifikat il-fatt illi l-istess Dr. Farrugia Mifsud ma kienetx ghada sservi ta' direttur tas-socjeta Appellanta, ir-rwol ta' l-istess Dr. Farrugia Mifsud gie deskritt bhala dak ta' non-executive Director u t-ton ta' l-istess ittra huwa indikattiv illi skond l-istess Appellanta, l-istess Dr. Farrugia Mifsud ma tantx kellha influenza jew involvement fl-operat ta' l-istess Appellanta. L-istess Dr. Farrugia Mifsud giet indikata li kienet impjegata mad-ditta legali SMM Advocates fis-sezzjoni tal-litigation u li it-terminazzjoni ta' l-impjeg taghha ma kellu l-ebda effett fuq is-socjeta Appellanta.
15. Illi dak dikjarat mis-socjeta Appellanta f' din l-ittra u dak dikjarat mis-socjeta Appellanta fir-rikors ta' l-Appell huwa kemmxajn kontradittorju ghaliex issa qeghdha tinghata l-impresjoni illi parti mit-tort tad-dewmien da parti tas-socjeta Appellanta kien fil-fatt attribwibbli ghall-agir ta' l-istess Dr. Farrugia Mifsud.
16. Illi it-Tribunal mhux se jidhol fil-kwistjoni ta' x' kien ir-rwol ta' Dr. Farrugia Mifsud u kemm tali rwol wassal ghan-nuqqasijiet da parti ta' l- Appellanta. Il-punt jibqa illi entita regolata ma tistax tinhall mill-obbligi regolatorji taghha sempliciment ghaliex direttur taghha agixxa b' mod hazin. Fl-ahhar mill-ahhar kumpannija topera tramite id-Diretturi taghha, u huwa kemmxajn kontradittorju, oltre li legalment insostenibbli, illi kumpannija tinhall mill-obbligi regolatorji taghha b' dan il-mod. Dak li intqal mill-Appellanta fir-rikors ta' l-Appell taghha bl-ebda mod ma jiggustifika l-agir taghha u certament illi dak li gara bejn is-socjeta Appellanta u Direttur taghha ma jistax iservi ta' pretest ghal nuqqasijiet amministrattivi u regolatorji.
17. Illi it-tieni raguni illi ingiebet kienet illi *"although applicant was exerting pressure on its Auditors and Accounts, that is Crowe Horwath Malta, for some odd reason, the latter were doing practically nothing although assuring applicant that all was moving well and that the required deadlines imposed by the MFSA were going to be honoured."*

18. Illi l-Awtorita wiegbet ghal dan billi sostniet illi *“all Company Service Providers are required to take all reasonable measures to make such regulatory submissions in a timely manner, regardless of whether any tasks have been delegated to third-parties. It is the Board of Directors' duty to ensure that such regulatory submissions are made on time, and not that of any third-party professionals which may have been engaged, and, as such, the late submissions made by the Company cannot be justified in this respect.”*

19. Illi hawn necessarjament trid issir referenza ghall-istess Rules for Company Service Providers u r-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*

20. Illi fl-ebda stadju ma tressqet xi prova illi s-socjeta Appellanta innotifikat lill-Awtorita bil-problemi li kellha anke fir-rigward ta' l-Awdituri taghha. Apparti ir-Rule fuq indikata, huwa principju bazilari illi entita regolata ghandha jkollha komunikazzjoni miftuha u kontinwa mar-regolatur taghha, u s-sitwazzjoni li sabet ruhha fiha l-Appellanta kien kaz klassiku ta' fejn wiehed kellu jiftah djalogu ma' l-Awtorita Appellata, kemm sabiex tippovdi l-informazzjoni, u kemm sabiex possibilment tinghata certu gwida <sup>3</sup>.

21. Illi anke hawn huwa car illi l-Appellanta naqqset u dan izjed u izjed meta din ma kienetx l-ewwel darba illi s-socjeta Appellanta kellha problemi biex izzomm mat-termini ta' sottomissjoni ta' dak minnha mitlub <sup>4</sup>. Illi wiehed jifhem illi il-hatra ta' awdituri hija materja serja, specjament meta si tratta ta' entita regolata. Wiehed jifhem ukoll illi dan jaghmilha difficli sabiex entita regolata tbiddel l-awditur, u meta tittiehed id-decizjoni illi l-awditur ser jinbidel necessarjament ser ikun hemm dewmien marbut mal-fatt illi l-awditur il-gid irid jaghmel l-onboarding procedures tieghu u jiehu konjizzjoni tas-sitwazzjoni tal-kumpanija li qeghed jintalab illi jivverifika tramite l-audit.

<sup>3</sup> Ara f' dan is-sens id-Decizjoni ta' dan it-Tribunal fl-appell CSB vs. Awtorita (appell numru 5/22) deciza 13/7/2022

<sup>4</sup> Ara dak li intqal fir-risposta ta' l-Awtorita u fl-affidavit ta' Alistair Cuschieri



22. Illi wiehed jista jargumenta illi is-socjeta Appellanta sofriet konsegwenzi li ma tantx kellha kontroll fuqhom, minkejja li mhux car jekk id-dewmien kienx kollu kemm hu attribwibbli ghal xi nuqqas ta' l-Awdituri precedenti.
23. 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>5</sup>.
24. 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.
25. 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.*

26. Illi dan it-Tribunal ma jhossx illi ghandu jiddisturba hafna id-diskrezzjoni kif tigi ezerцитата mill-Awtorita', filwaqt li pero' jara illi l-istess Awtorita' timxi b' mod gustifikat, proporzjonat u skond il-Ligi. Ir-regolamentazzjoni tal-qasam finazjarju huwa punt delikat u ghandu jkun ibbazat fuq pratici rigoruzi u oggettivi. Izda dan ma jfissirx li ghandu jintilef kull skop ta' proporzjonalita'. Dan izjed u izjed meta azzjoni amministrattiva tigi ppublicizzata.
27. Illi m' hemmx dubju illi c-cirkostazzjoni fejn entita regolata jkolla il-bzonn li tbiddel l-awdituri huma cirkostanzi 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, dejjem jekk kienu attribwibbli ghal xi nuqqas ta' l-Awdituri, kienu imposti fuq is-socjeta Appellanta u anke hawn wiehed ma jifhimx l-

<sup>5</sup> <https://www.mfsa.mt/publication/regulatory-action-against-smm-consultancy-services-ltd-the-company/>



agir tas-socjeta Appellanta li ma tinfurmax lill-Awtorita Appellata. Lanqas ma jinftiehem ghalfejn l-Appellanta ma talbietx formalment ghal estenzjoni tat-termini sabiex isiru tali sottomissjonijiet.

28. Illi dan in-nuqqas wahdu 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.
29. 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 tinqara fil-kuntest tal-pubblicita li tali azzjoni tinghata hekk kif fuq deskritt, fejn ovvjament, il-quatum tal-multa kwazi jigi sekondarju ghall-fatt illi l-istess azzjoni tinghata pubblicita.
30. Illi t-Tribunal jixtieq jiehu spunt minn dan il-kaz u jistieden lill-Awtorita sabiex tippromwovi il-principju ta' skambju ta' informazzjoni u koperazzjoni bejnha u l-entitajiet minnha regolati. Entita' regolata min naha l-ohra, ma tistax tippretendi koncessjonijiet meta hija tonqos minn element tant baziku ta' koperazzjoni.
31. Illi it-tielet raguni illi ingiebet kienet dik marbuta mad-difikultajiet esperjenzati minhabba il- pandemija Covid 19.
32. Illi l-Awtorita wiegbet ghal dan l-aggravju billi sostniet illi hija estendiet it-termini ghas-sottomissjoni ta' l-audited financial statements u l-management letter sa Gunju 2020 filwaqt illi it-terminu tas-sottomissjoni ta' Annual return baqa invarjat. Qalet ukoll illi skond ic-cirkolari minnha mahruga entita regolata kellha l-opportunita illi titlob ghall-estenzjoni ulterjuri xi haga illi s-socjeta Appellanat m' ghamlitx.
33. Illi anke hawn is-socjeta Appellanta m' ghandiex ragun. Kif diga inghad qabel, mhux talli ma kien hemm l-ebda skambju ma' l-Awtorita Appellata dwar dawn il-problemi, talli lanqas biss saret talba ghall-estenzjoni tat-termini. Ic-cirkolari mahruga kienu cari u mhux talli skada l-ewwel terminu awtomatiku ta' estenzjoni, izda il-financial statements gew sottomessi sena tard. Kif diga inghad it-terminu tas-sottomissjoni ta' l-Annual Return ma kienx estiz u b' hekk jirrizulta car illi l-Annual Return giet sottomessa izjed minn xahrejn tard. Il-financial statements tas-sena 2019 gew sottomessi f' Lulju tas-sena 2021 meta dawn kellhom jigu sottomessi sa Gunju 2020 u il-management letter ghas-sena Dicembru 2019 baqghat qatt ma saret.



34. Illi rigward il-management letter gie sottomess illi din hija kompirza fl- Audit Memorandum <sup>6</sup>. Izda dan il-Memorandum huwa ghas-sena finanzjarja Dicembru 2020 meta dak illi irriferiet ghalih l-Awtorita kien tas-sena Dicembru 2019.
35. Illi hawn wiehed jista jargumenta illi il-Memorandum in kwistjoni jissodisfa dak li wiehed normalment isib f' Management Letter u f' dan ir-rigward it-Tribunal mhix se jidhol fil-kwistjon ta' x' jissejjah document. Illi oltre dan wiehed jista jargumenta illi gialadarba inharget il-Management Letters ghas-sena successive, u cioe 2020, allura dak li gara fis-sena 2019 huwa kemmxejn storiku. Izda wiehed hawn m' ghandux jinsa dak li qalet is-socjeta Appellanta stess fl-ewwel parti ta' l-Aggravju taghha u cioe l-operat ta' Direttur taghha stess. Certament illi materja bhal dik kellha u ghandha issib ruhha f' management letter ta' sena daqshekk rilevanti li fiha jidher li kien hemm turbulazzjonijiet kemmxejn ta' sustanza u ghaldaqstant anke hawn wiehed ma jifhimx il-posizzjoni tas-socjeta Appellanta u ssib illi d-decizjoni ta' l-Awtorita kienet wahda korretta.

Ili in vista tal-premess, it-Tribunal qieghead jichad l-appell interpost mis-socjeta' appellanta u jikkonferma id-decizjoni ta' l-Awtorita' Appellata tas- 6 ta' Dicembru 2021 bl-ispejjez kontra is-socjeta Appellanta.

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<sup>6</sup> Dok MFSA 6 anness ma' l-affidavit ta' Alistair Cuschieri