

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



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Christian Ellul

vs.

Malta Financial Services Authority

Rikors Numru FST 2/20

Illum 26 ta' Gunju 2024

It- Tribunal

Ra l-appell interpost mill-Appellant liema appell gie intavolat fil – hamsa (5) ta' Gunju 2020 li fih l-Appellant isostni:

We write for and on behalf of Dr Christian Ellul and we refer to the correspondence received from the MFSA dated the 8th May 2020, hereunder referred to as 'The Decision'.

In the said letter Dr Ellul was directed to divest himself from all the qualifying shareholdings which he holds, whether directly or indirectly, in RES Malta Ltd and SOLV International Ltd, and to refrain from accepting any new appointments and acquiring any shareholding which require the Authority's approval in entities licensed or otherwise authorised or supervised by the MFSA for a period of five (5) years from the date of this decision notice.

This Decision followed three letters sent by MFSA dated the 18th November 2019; two minded letters which were sent to Mr Karl Schranz and Dr Christian Ellul respectively and a letter containing a decision taken against E&S Consultancy Limited, all of which were sent simultaneously and addressed identical alleged shortcomings. The decision taken against E&S Consultancy is currently pending appeal before this same Tribunal, while the minded letters

were rebutted through written representations made by the appellant and Mr Schranz, respectively, on the 17th December, to no avail.

Our client is hereby appealing from the said Decision in terms of Article 16(8) of Chapter 330 of the Laws of Malta. The appellant's grounds for appeal are as follows:

Article 5(1)(c)(iii) of the CSP Act, Rule 5.0 of the CSP Rules and Paragraph 4 of the Code of Conduct for Trustees

To this effect the MFSA has claimed that the appellant does not satisfy the fitness and properness which is required for a person to occupy the post of director of a company which is applying for a registration or is registered in terms of the CSP Act and goes on to highlight the requirement of honesty. Particular emphasis was also made by the MFSA on the requirement that the criteria set out to define fitness and properness should be met continuously and not only at licensing stage, alleging that the appellant has not met such requirement.

The reasons given by the MFSA for this alleged lack of fitness and properness are based on, inter alia, the fact that the appellant did not inform MFSA of MGA's determination that he was not fit proper. To this effect, it is relevant to point out that appellant was never made to understand that this decision of the MGA was a final decision.

In fact, there really was no final decision from the MGA until its Counter-Protest which was filed on the 2nd July 2019. Until then, the discussions with the MGA were still ongoing for the MGA to change its position, and not decision, about the situation. It was only after the 2nd July 2019, that the appellant, Mr Schranz and E&S Consultancy initiated Court proceedings against the MGA.

Nonetheless, this matter had indeed been disclosed to the Authority's CEO Mr Joseph Cuschieri and E&S Consultancy reported the matter again in its annual compliance report dated the 26th June 2019, despite the fact that it was at the time awaiting a reply from the MGA to the Judicial Protest which was filed against it on the 30th May 2019.

It is also pertinent to point out that the position taken by the MGA is currently being appealed on the basis of lack of adherence to the adequate procedure and the very fact that the MGA based such a determination solely on so-called 'adverse media' and that proceedings for libel have been instituted in respect of same.

The rest of the reasons on which MFSA based its allegations that the appellant lacked fitness and properness stemmed from alleged links to Marian Kocner, Andreas Wolfl and Vadim Blaustein. The allegations of these links have all been rebutted by the appellant in his written

representations dated the 17th December 2019 (attached and marked as Doc A) submitted to the MFSA following its Decision as well as by E&S Consultancy Limited in its appeal to the MFSA's decision.

In this regard, appellant also makes reference to Appeal FST 06/19 in the names *E&S Consultancy Limited vs Malta Financial Services Authority* (copy of which is also attached and marked as Doc B) in which appeal the appellant company submits and addresses identical allegations which were made against it and which are now being made against the appellant, which submissions apply mutatis mutandis to this appeal.

The reasons mentioned in both Doc A and Doc B attached to this appeal constitute, in so far as applicable, the grounds of this appeal and are not being reproduced simply in order to avoid repetition.

Rule 15.06 of the Rules for Company Service Providers

The Authority has deemed the appellant to be lacking good repute and this on the basis of its allegation that the appellant did not disclose the MGA's determination which has been explained above and the appellant's alleged connection to three unsavoury and dubious persons.

The appellant points out that while the Authority is deeming him irresponsible for not detecting and resisting imprudence, dishonesty and other irregularities by Mr Blaustein even though Blaustein itself never began operations, the very same Mr Blaustein, who is described by the Authority as "*unsavoury and dubious*" and being "*the principal cause for the regulatory action taken by two foreign regulatory authorities*", is still deemed to be fit and proper in the eyes of the MFSA. However, the appellant who is accused of having links to this same individual is being deemed not fit and proper because of these same links. The appellant makes it clear that he has never been arrested or accused of any criminal action.

Conclusions

The appellate Authority has decided to direct appellant to divest himself of all qualifying shareholdings which he holds, whether directly or indirectly, in RES Malta Ltd and SOLV International Ltd and to refrain from accepting any new appointments and acquiring any shareholding which require the Authority's approval in entities licensed or otherwise authorised or supervised by the MESA for a period of five (5) years from the date of this decision notice.

This Decision is draconian and unprecedented. The appellant has never committed any offence, been arrested, investigated, been subject to a criminal inquiry or charged and definitely not convicted of a crime. The vast majority of the reasons behind the Authority's Decision is his alleged links to three persons, two of which are to this day deemed fit and proper by the same Authority and have not been prohibited from being Directors on licensed entities and other licenced entities who had closer dealings with such persons have not been reprimanded or had their license cancelled. Yet, the appellant has been publicly labelled by the Authority as dishonest and lacking integrity. This has never been done before, not even to people who are currently charged with serious crimes.

Besides, the Decision taken stems from the actions the Authority took against E&S Consultancy Limited, which actions taken still form the subject matter of pending appeal proceedings. Nonetheless, the Authority has opted to act in the manner explained above vis-à-vis the appellant notwithstanding that such proceedings have not been concluded.

Moreover, the Decision which the Authority took to direct appellant to divest himself of all his qualifying holdings in RES Malta Ltd and SOLV International Ltd comes as a surprise to the appellant, given the fact that appellant had already officially informed the Authority of his intention to sell RES Malta Ltd and give up the licence of SOLV International Ltd. The fact that the Authority completely disregards these facts which were officially made known to it months before (as shown in the attached emails marked as Doc C) and persists in giving such orders notwithstanding their futile nature, continues to show how the Authority is acting in a draconian manner. Consequently, the appellant whilst referring to the above submissions and while it reserves the right to make further submissions and bring all relevant evidence in support of this appeal, hereby humbly requests this Tribunal to overturn the decision taken by appellate Authority as outlined in its decision dated 8th May 2020.

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

1. That first and foremost, this reply is being presented following an appeal filed on the 5th June 2020 by Dr Christian Ellul (the "Appellant") in order to challenge the decision of the Malta Financial Services Authority (the "Authority") dated 8th May 2020 (the "Decision", hereby attached and marked as Dok MFSA 03) wherein it was decided that:

"Dr Ellul can no longer be deemed to be fit and proper, and is prohibited, in terms of article 48(2)(a) of the Trusts and Trustees Act, article 11 of the Company Service Providers Act and article 16(2)(b) of the Malta Financial

Services Authority Act, from holding any position and accepting any new appointments in entities or in relation to activities licensed and/or otherwise supervised by the MFSA for a period of 5 years from the date of this decision notice.

In furtherance to the above regulatory action, the Authority is imposing the following directives in terms of article 48(2)(a) of the Trusts and Trustees Act, article 11 of the Company Service Providers Act and article 16(2)(b) of the Malta Financial Services Authority Act and directing Dr Ellul to: (i) divest himself, at the earliest possible, of all the qualifying shareholders which he holds, whether directly or indirectly, in RES Malta Ltd and SOLV International Ltd; and (ii) prohibit him from accepting any new appointments and acquiring any shareholdings which require the Authority's approval in entities licensed or otherwise authorised or supervised by the MFSA for a period of 5 years from the date of this decision notice.

Provided that, insofar as the directive set out in point (i) above relates to SOLV International Ltd, it shall only come into effect if SOLV International Ltd fails to surrender its licence within a maximum of six months from the date that the Company is notified of this decision. Further to the directives being imposed above, the Authority was originally minded to impose an additional directive for Dr Ellul to resign from all positions previously approved by the Authority held in RES Malta Ltd and SOLV International Ltd. However, in view of Dr Ellul's resignation from such positions after the issuance of the Authority's minded letter, the said directive has been excluded from the Authority's final decision."

2. That secondly and for sake of completeness, the Authority is hereby also attaching a copy of the Minded Letter which was issued on the 18th November 2019 (**Dok MFSA 01**) where in the Authority informed the Appellant of its serious concerns as to whether he can be considered a fit and proper person together with Dr Christian Ellul's reply to said letter, dated 17th December 2019 (**Dok MFSA 02**).

3. That thirdly and for sake of correctness, the Appellant stated that he is filing said appeal under article 16(8) of Chapter 330 of the Laws of Malta. However, this article merely refers to the procedure as to how any administrative or disciplinary sanction or measure decided by the Authority shall be published. Any appeal filed before this Honourable Tribunal is filed under articles 21(8) and (9) of the Malta Financial Services Authority (Chapter 330 of the Laws of Malta).

4. That fourthly, at the time that the decision of the Authority was taken, the Appellant carried out a role as director and ultimate beneficial owner ("UBO") of E&S Consultancy Limited (the "Company" or "E&S") and RES Malta Limited ("RES"), both of which are registered as Company Service Providers in terms of the CSP Act, a role as

director and UBO of SOLV International Limited ("SOLV") a company authorised as a Trustee in terms of the Trusts and Trustees Act ("TTA"). Appellant was also the director and company secretary of Blaustein Limited ("Blaustein"), another company registered in terms of the CSP Act, until the 23rd April 2018.

5. Submissions regarding breach of article 5(1)(c)(iii) of the Company Service Providers Act (Chapter 529 of the Laws of Malta) ("CSP Act"), Rule 5.0 of the CSP Rules and Paragraph 4 of the Code of Conduct for Trustees.

a. Under Article 5(1)(c)(iii) of the CSP Act, it is a requirement that the proposed directors of a company applying for a registration or registered in terms of the CSP Act be fit and proper persons in order to occupy such post with the company in question. The fitness and properness requirement is an ongoing requirement which must be satisfied on a continuing basis.

b. The criteria by which one shall be judged to be "fit and proper" are laid out in Rule 5.0 of the CSP Rules. These rules provide, inter alia, that for an individual to be considered fit and proper, he should possess the necessary integrity, competence and solvency and must also be "*a person who is [...] honest.*"

c. A Personal Questionnaire ("PQ") must be submitted in order for the Authority to assess whether a person satisfies the fitness and properness requirement, which PQ must be completed by all qualifying shareholders, board members and other key functionaries of an applicant company. As per the terms of the said PQ and for the purpose of the ongoing assessment of the fitness and properness requirement, in the event that there is a material change to the information provided in the PQ, the relevant person is required to notify the Authority immediately.

d. Similar requirements exist also under the Code of Conduct for Trustees wherein every director and officer of a trustee company must be a fit and proper person for the position they hold and must therefore satisfy the criteria set out in the Code of Conduct for Trustees, i.e. competence, soundness of judgment and integrity, which are cumulative and must be satisfied on an on-going basis.

e. The Authority ultimately decided that the Appellant does not satisfy the fitness and properness requirement stipulated in the abovementioned provisions on a number of grounds, which are set out in detail in the Authority's Decision. Briefly, the said grounds are as follows:

i. In 2017, a company which the Appellant was linked to submitted an application for a remote gaming licence with the Malta Gaming Authority ("MGA"). When assessing this application the MGA deduced that the Appellant, Mr Karl Schranz and E&S Consultancy Limited (the "Company"), of which the Appellant is a director and ultimate beneficial owner, are not to be deemed fit and proper. This information was never communicated to the Authority even though the Appellant was obliged to do so in terms of the PQ. The Appellant argues here that he was never informed of the MGA's above-mentioned decision, all the way until the 2nd of July 2019 following which an appeal from the MGA's conclusions was filed. The Authority in this regard humbly submits that these proceedings are now public and a copy of them shall be presented before this Tribunal in due course. The proceedings paint a

different picture completely and show that the Appellant was very much forewarned of the MGA's thoughts before a final decision was taken thereby. In fact, the Appellant presented his representations before the MGA issued its final decision was actually taken on the 5th June 2018. The date referred to by the Appellant, the 2nd July 2019, merely refers to the date when the MGA submitted a counter protest as a reply to the Appellant's protest filed before the Maltese Courts in relation to the MGA's decision, i.e. well over a year after the MGA had communicated its decision to the Appellant. The Appellant also attempts to argue that he had informed the Authority's CEO of the above, verbally during a meeting held there with on the 21st January 2019. The Authority reiterates that even if these claims were to be true the Appellant still failed to satisfy his obligations at law on two accounts: the Authority was not notified immediately, nor was it notified in writing. The Authority ultimately found that the Appellant's lack of transparency on the matter certainly fails to show a level of honesty and integrity.

ii. The Appellant has or had links with and, or provided services to a number of non-reputable individuals namely Mr Marian Koener, Mr Vadim Blaustein and Mr Andreas Wolf.

iii. Mr Koener is a well-known figure in Bratislava and still finds himself at the centre of a number of scandals namely embezzlement, fraud, organised crime etc (vide detail on said scandals in the Authority's Decision). The Appellant was not only Mr Koener's son in law but also provided Mr Koener with company services namely those of company secretary and directorship roles as can be seen from the records of the Malta Business Registry. The Company, E&S was also a shareholder in two of Mr Koener's companies namely International Finance Group Limited and International Investment Holdings Limited. The Appellant insists that a full due diligence was carried out before servicing Mr Koener and his companies, however, the Authority remains of the view that the Appellant either failed to carry out the necessary checks throughout his relationship with Mr Koener or else was fully aware of the widely reported accusations surrounding Mr Koener and chose to turn a blind eye to the matter. Ultimately the Authority finds both situations unacceptable and present a clear picture of the Appellant's lack of integrity.

iv. As for the Appellant's relationship with Mr Wolf, this is described in great detail in the Authority's decision and the Appellant simply rebuts these concerns by questioning why the Authority is only raising an eyebrow vis-a-vis his relationship with Mr Wolff and his companies but fails to take action against Mr Wolff himself. The Appellant therefore not only repeatedly tries to deflect the matters raised by the Authority but provides no information which addresses or appeases the Authority's concerns either.

v. Mr Blaustein is a director and ultimate beneficial owner of multiple overseas related entities. He is at the centre of a number of accusations related to malpractices, tax evasion, extortion and human trafficking resulting in the withdrawal of his company's trustee licence in the Netherlands. He has also had his company's license to offer corporate services withdrawn in Cyprus following his arrest in 2016. The Appellant was on the board of directors of Blaustein Limited until 23rd April 2018 (he resigned following an on-site inspection carried out by the Authority at Blaustein Limited in 2017) and E&S continued to provide a registered office to Blaustein Limited until the 5th of February 2019, well after the accusations against Mr Blaustein came to light among the international

community. The Appellant merely responded to all the above, which is further elaborated in the Authority's Decision, by stating that before taking Mr Blaustein's company on board as a client, a C6 due diligence search was carried out and Mr Blaustein was found to have a clean conduct. The Authority, however, submits that these searches are not to only take place at the initial stage of taking on a new client but rather on-going checks should be carried out, particularly when a client gets named in the news so regularly and in relation to matters and accusations which are not to be taken lightly. The Appellant also tries to argue that while he was found to be lacking in fitness and properness, no such determination was made with respect to Mr Blaustein. However not only is the claim being made by the Appellant unsubstantiated, but also, it does not change the facts noted in the Authority's Decision, nor is it of any relevance with respect to the fitness and properness of the Appellant or the lack thereof.

vi. Further to the above, the Authority notes that through all its discussions with the Appellant and in all the submissions made thereby, including this appeal, the latter follows a repeated trait of avoiding to answer the questions directly and shifts the attention onto the Authority instead. The Authority wishes to reiterate that as directors and ultimate beneficial owners of the Company, registered by the Authority to provide corporate services, the Appellant and his business partner act as a gatekeepers to the financial services industry and are therefore expected to carry out serious checks on the clients and business they are bringing to the country. In light of the foregoing, the Appellant had a duty to refuse any undesirable business or contacts which can harm Malta's reputation and it was certainly not the Authority's role to do this on behalf of the Company. The Company, through its representatives, has instead repeatedly proven that it is not selective in the process of taking on business and repeatedly serviced individuals of ill repute.

6. Submissions regarding breach of Rule 15.06 of the CSP Rules.

a. Rule 15.06 of the CSP Rules provides that the persons who direct and/or manage the person registered in terms of the CSP Act must be "*of sufficiently good repute[...] to ensure the sound and prudent management of the Registered Person.*" The rule further provides that the directors involved "*must have...the necessary personal qualities to detect and resist any imprudence, dishonesty or other irregularities by the other person*".

b. The Authority has informed the Appellant that in view of the issues mentioned in paragraph 4 above, he can no longer be considered to be an individual of good repute. Furthermore, considering the professional relationship that the Appellant had with Mr Blaustein, acting as director of Blaustein Limited, one would have expected better care, attention and knowledge on behalf of the Appellant, of Mr Blaustein's transgressions, especially following Mr Blaustein's arrest in December 2016 when articles began to surface all over the media. Considering the Appellant's relationship with Mr Blaustein at the time, acting as director of his company, the lack of knowledge being claimed by the Appellant regarding the allegations against Mr Blaustein is far from credible. The necessary action and checks should have been taken by him at the time. He should not have turned a blind eye towards them.

c. The Appellant's arguments in reply to the above once again stating that it is unfair that he was found to be lacking in fitness and properness, whereas no such determination was made with respect to Mr Blaustein or Blaustein Limited. However, not only is the claim being made by the Appellant unsubstantiated, but also it does not change the facts noted in the Authority's Decision, nor is it of any relevance with respect to the fitness and properness of the Appellant or the lack thereof.

d. Furthermore, the Appellant claims that his actions were nowhere close to those which were committed by Blaustein and this, in the Authority's humble opinion, not only confirms the Appellant's shortcomings, but also continues to prove the Authority's point all along, namely, that the Appellant is missing the discussion altogether. The whole point of these proceedings' centres around the fact that the Company of which the Appellant was a director and ultimate beneficial owner, was registered by the Authority to provide company services to companies wishing to offer their services in Malta and as such it is subject to certain duties and obligations. One of the most fundamental duties of the Company, acting through its representatives is, to ensure that the client's services are of sufficient good standing and repute and therefore it should steer clear from those who carry out illegal works that could strongly tarnish the reputation of the country.

7. That contrary to that which is being stated by the Appellant, these proceedings are certainly not unprecedented, nor are they the only ones currently ongoing. The Appellant has persistently concerned himself with the work that is being carried out by the Authority and the actions of other individuals but fails to shed any proper light on his own actions.

8. That in its appeal, the Appellate finally concludes by remarking that this Decision was wrongly taken as it stems from the actions which the Authority took against E&S Consultancy Limited, even though the said action is currently still not final and pending appeal before this Tribunal. The Authority on this point submits that the regulatory action taken against the Company is separate from that taken against the Appellant, even though the two cases are related. The fact that the Company has lodged an appeal from the Authority's decision is irrelevant to the case at hand since they are two separate cases independent from each other vis-a-vis different persons. The Authority is therefore in no way obliged to refrain from taking regulatory action against the Appellant until the appeal filed by the Company is decided upon.

9. That in conclusion, the Authority respectfully submits that despite the arguments tabled by the Appellant, the Authority stands firm with its Decision. The arguments raised by the Appellant are, even at this stage, still unsubstantiated and most of the time do nothing more but point fingers onto others instead of address the concerns at hand.

10. That, furthermore, before reaching its Decision the Authority has taken into consideration all the above-mentioned

serious concerns and breaches carried out by the Appellant, each of which had been amply laid on in its Decision. The Authority also took into consideration all the Appellant's representations before reaching its final Decision and therefore, the Authority has in no way abused its discretion nor did it act in a manner which is manifestly unfair as is being alleged by the Appellant.

11. Therefore, the Authority respectfully requests this Tribunal to reject the Appellant's appeal and to confirm the regulatory action and directives imposed and laid out in the Authority's Decision.

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 l-Awtorita Appellata hadet decizjoni ¹ kontra is-socjeta E&S Consultancy Limited, socjeta li taghha l- Appellant huwa socju (ultimate beneficial owner) u direttur, u dan skond dak li jipprovdi il- Kap. 529 tal- Ligijiet ta' Malta, u dan stante li l- Appellanta kienet registrata bhala Corporate Service Provider (CSP).
2. Illi tramite ta' l-istess decizjoni, il- licenzja ta' l-istess E&S Consultancy Limited giet ikkancellata.
3. Illi precedentement ghad-Decizjoni, l-istess Awtorita kienet harget Minded Letter² fejn infurmat lill- istess E&S Consultancy Limited b' dawk in-nuqqasijiet li kienu qeghdin iwasslu lill- Awtorita sabiex tagixxi.
4. Illi E&S Consultancy Limited wiegbet ghall-istess Minded Letter u sussegwentement l- Awtorita harget id-decizjoni taghha li minnha l- Appellanti ressqet Appell³.

¹ 18 ta' Novembru 2019

² 16 ta' Mejju 2019

³ Appell 6/19 li qiegħed jigi deciz illum ukoll

5. Illi pero, anke in segwitu tal- Minded Letter, E&S Consultancy Limited interponiet appell separat ⁴ quddiem dan it-Tribunal, u liema appell ser jigi deciz illum ukoll.
6. Illi fit- tmintax (18) ta' Novembru 2019, u cioe kontemporanjament meta l- Awtorita haregt id-decizjoni fil- konfront ta' E&S Consultancy Limited, hija harget Minded Letter fil- confront ta' l-Appellant fejn indikat illi a bazi ta' dak illi l-istess Awtorita kienet iddecidiet fil- konfront ta' E&S Consultancy Limited, hija kienet be hsiebha tiehu azzjoni fil- konfront ta' l- Appellant in vista tar-rwol tieghu ta' UBO u Direttur ta' E&S Consultancy Limited u ta' RES Malta Limited, it-tnejn li huma licenzjati bhala CSP skond il- Kap. 529 tal- Ligijiet ta' Malta, kif ukoll bhala UBO u Direttur ta' SOLV International Limited li kienet awtorizzata bhala trustee skond il- Kap. 331. Issir ukoll referenza ghar-rwol ta' l-istess Appellant ta' direttur u company secretary fil- kumpannija Blaustein Limited li kellha Licenzja ta' CSP.
7. Illi l-Appellant wiegeb ghall-istess minded letter tramite ittra tas- 17 ta' Dicembru 2019 ⁵ u jirrizulta illi wara il- hrug tal- Minded Letter huwa irrozenja minn direttur ta' Res Malta Limited to SOLV International Limited.
8. Illi l-Awtorita harget id-Decizjoni finali taghha fit- tmienja (8) ta' Mejju 2020.
9. Illi l-Appellant hassu aggravat minn din id-Decizjoni u interpona l-Appell fil- hamsa ta' Gunju 2020.
10. Illi l-Appellant jibbaza l-aggravji tieghu f' dan l-appell billi jindirizza punt punt il- partijiet tad-Decizjoni li wasslu ghall-istess Decizjoni.
11. Izda, fil- parti "conclusions" ta' l-istess rikors ta' l-appell, l-Appellant jilmenta illi l- Awtorita ma kienx messha hadet id-Decizjoni meta kien hemm appell pendenti mid-decizjoni taghha fil- konfront ta' E&S Consultancy Limited. Jghid ukoll l- Appellant illi huwa kien diga informa lill- Awtorita illi huwa kien ser ibiegh l-ismha tieghu fis-socjeta RES Malta Limited u li is-socjeta SOLV International Limited kienet ser iccedi il- licenzja taghha. Izda minkejja dan, l-Awtorita xorta wahda hadet id-Decizjoni. Illi hawn it-Tribunal qieghed jenfasizza illi huwa marbut li jimxi ma dak kontenut fir-rikors promotur u mhux ma dak li tressaq bhala argumenti fin- nota ta' sottomissjonijiet ta' l-Appellant.

⁴ Appell numru 3/19

⁵ Dok. MFSA 02 esebit mar-risposta ta' l-Awtorita

12. Illi it-Tribunal ser jindirizza dawn iz-zewg punti imqajma fil- konkluzjoni tar-rikors ta' l-Appell qabel ma jitratta l-Appell fil- mertu.

A. Decizjoni minkejja li kien hemm appell mid- decizjoni fil- konfront ta' E&S Consultancy Limited u li l- Appellant kien ser ibiegh RES Malta Limited u SOLV International Limited kienet ser iccedi il- licenzja taghha:

13. Illi l-Awtorita, in segwitu ghall- hrug tad-decizjoni fil- konfront ta' E&S Consultancy Limited, giet notifikata b' appell interpost mill-Appellanta mill-istess decizjoni. Izda dan l-appell mid-decizjoni E&S Consultancy Limited gie sottomess fis-17 ta' Dicembru 2019. Illi l-Minded Letter fil- kaz odjern harget fl-istess data li l- Awtorita hadet id-decizjoni fil- kaz E&S Consultancy Limited. Minkejja li sa dak in nhar ma kien ovvjament gie sottomess l-ebda appell, id-dritt li jsir appell kien ghadu disponibbli ghas-socjeta E&S Consultancy Limited. Meta saret ir-risposta ghall- Minded Letter mill- Appellant, u certament qabe id-Decizjoni fil- kaz odjern, l-Awtorita kienet taf illi kien hemm appell mill- kaz E&S Consultancy Limited.

14. Rigward il- punt imqajjem illi l- Awtorita ma kellix tipprocedi ghad-Decizjoni pendenti l-appell mill- kaz E&S Consultancy Limited it-Tribunal ihoss illi l-Appellant m' ghandux ragun. Dan ghaliex fl-ahhar mill- ahhar, il-posizzjoni ta' l-Appellant fil- kaz odjern ma tinbidilx ghaliex l-akkuzi li jsiru fil- konfront tieghu, minkejja li tista tghid huma identici ghall-akkuzi li saru fil-konfront ta' E&S Consultancy Limited, xorta jaghtu u taw id-dritt lill- Appellant li jikkontesta l-istess. L- Appellant dan id-dritt ma tilfux u l- posizzjoni tieghu baqghet impregudikata tant illi huwa interpona appell liema appell issa qieghed jigi deciz.

15. Illi lanqas m' ghandha ragun l-Appellant rigward l-ilment tieghu illi huwa kien ser ibiegh is-socjeta RES Malta Limited u li SOLV International Limited kienet ser iccedi il- licenzja taghha. Regime regolatorju, u l- konsegwenzi ta' l-istess, m' ghandhomx jispicaw fix-xejn biccessjoni ta' licenzja jew bit-trasferiment ta' socjeta. Dan stante li l-azzjoni regolatorja hija marbuta ma episodji li diga sehew, u id-Decizjoni ma kienetx biss marbuta ma' RES Malta Limited u SOLV International Limited u r-rwol ta' l- Appellant f' dawn iz-zewg kumpanniji.

16. Illi fil- fehma tat-Tribunal entita regolata, minkejja li totjeni licenzja b' mod liberu u volontarju, ma tistax tohrog mill- qafas regolatorju bl-istess mod li dahlet bih. U dan ghaliex entita regolata necessarjament ghandha tkun soggetta ghal qafas regolatorju sa dak il-mument illi dak li ghalih hija kienet regolata jigi konkluz b' mod korrett u in piena osservanza tar-

regolamenti li jirregolaw dik l-attivita. Wiehed irid izomm f' mohhu illi attivita regolata tattira regime regolatorju specjali u specifiku intiz fuq kollox sabiex jizgura l-integrita, reponsabilita u fiducja ⁶. Dan zgur qatt ma jista jintlahaq jekk entita regolata tista tohrog minn dan il-qafas b' mod unilaterali, meta trid hi u kif trid hi. Lanqas ma jaghmel sens illi dan jkun jista jsir in segwitu ta' azzjoni ta' infurzar jew meta tinhareg minded letter. Dan l-argument huwa kontradittorju ghar-raguni bazika li ghaliha attivita ghandha tkun regolata. Fl-ahhar mill-ahhar ir-regolamentazzjoni hija intiza sabiex tilhaq aspettativa ta' serjeta u fiducja. Dawn huma elementi reciproci li jiddependu fuq ir-regolatur, l-entita regolata u it-terzi li jinqded bis-servizzi ta' l-entita regolata. Is-semplici hsieb illi l-entita regolata tippretendi illi tista tohrog minn dan b' mod unilaterali huwa il-kuntrarju ta' dak kollu illi kull qafas regolatorju ghandu jilhaq.

17. Illi dan huwa in succinct principju li fuqu strahet l-Onorabbli Prim Awla tal- Qorti Civili fid-deicjzoni taghha fl-ismijiet *AllInvest Company Limited et. vs. X et (Rikors numru 888/13 JZM deciza 30 ta' Marzu 2017)*. Illi f' dan il-kaz, kumpannija li applikat sabiex tigi xolta a bazi tal- Kap. 386 sabet l-oggezzjoni ta' l-Awtorita Appellata. U l- Onorabbli Qorti qalet hekk:

Fl-istess waqt meta kumpannija kostitwita skont il-Kap 386 imbaghad tezercita mansjonijiet specjali u specifici li huma regolati b`legislazzjoni specjali u specifika hemm it-twettieq tal-obbligi taghha jitwessa` bil-bosta u jaqbez dak li huwa previst mil-ligi generali.

Fil-qasam tas-servizzi finanzjarji, ghax jaf illi t-trasparenza, ir-responsabilitajiet fiducjarji, u l-kontabilita` jigu l-ewwel u qabel kollox, illegislatur haseb ghal legislazzjoni kwazi kwazi of strict liability sabiex ihares b`mod legittimu u xieraq min jinvesti fil-konfront ta` l-operaturi tas-settur.

Illi ghalhekk l-Awtorita kellha kull dritt li tkompli bl-azzjoni li kienet bdiet tramite il- minded letter u l-investigazzjoni li kienet inbdiet qabel dan.

18. Illi issa it-Tribunal ser jghaddi sabiex jitratta l- Aggravji fil- mertu imressqa mill- Appellant. Illi hawnhekk it-Tribunal ifakkar ukoll illi skond dak li jipprovdi l-Artikolu 21(9) tal- Kap. 330, il-gurisdizzjoni tieghu hija hekk deskritta:

⁶ Ara Art. 5 Kap. 330 Ligijiet ta' Malta

(9) *It-talba għad-deċiżjoni tat-Tribunal għandha tkun, għar-raġunijiet miġjuba mill-appellant*

(a) *jekk l-awtorità kompetenti tkunx, fid-deċiżjoni tagħha, applikat hazin xi wahda mid-dispożizzjonijiet ta' dan l-Att, jew ta' xi regolamenti maħruġin tahtu;*

(b) *jekk id-deċiżjoni tal-awtorità kompetenti tikkostitwixabbuż ta' diskrezzjoni jew tkunx ingusta manifestament:*

Izda d-diskrezzjoni tal-awtorità kompetenti ma tistax, sakemm tkun giet eżerċitata b'mod xieraq, tkun mistoqsija mit-Tribunal.

B. L-Ewwel Aggravju: Il- Kaz MGA, Marian Kocner, Andreas Wolfl u Vadim Blaustein u ksur ta' l-Artikolu 5(1)(c)(iii) tal- Kap. 529 u Rule 5.0 tas- CSP Rules u Para 4 tal- Code of Conduct for Trustees

19. Illi l-Appellant jargumenta illi d-Deciżjoni tal- l-Awtorita Appellata illi l-Appellant kiser l-artikoli u r- Rules fuq imsemmija hija wahda abusiva u disproporzjonata, u konsegwentement l- Awtorita Appellata kienet applikat hazin il- Ligi u/jew abbuzat mid-diskrezzjoni tagħha u/jew hadet deciżjoni illi hija manifestament ingusta.

20. Illi l-Awtorita, fir-risposta tagħha, filwaqt illi tiggustifika id-deciżjoni tagħha f' dan ir-rigward, targumenta illi dan it-Tribunal ghandu jistharreg jekk fattwalment id-Deciżjoni kienetx wahda gusta u ekwa skond ic-cirkostanzi tal- kaz.

21. Illi hawn it-Tribunal jagħmel referenza għall- ewwel, it-tielet u r-raba aggravju hekk kif decizi fis-sentenza tal-lum stess fil- kaz *E&S Consultancy Limited vs. Malta Financial Services Authority* ⁷ (Kaz E&S), fejn gie trattat proprju il- kaz tac-cahda tal- licenzja tal- MGA u r-rilevanza ta' l-istess fuq il- licenzja taht il- Kap. 529 ta' E&S Consultancy Limited. Giew ukoll trattati ir-relazzjonijiet bejn is-socjeta E&S u Marian Kocner, Andreas Wolfl u Vadim Blaustein u kif tali relazzjonijiet incidew fuq il- licenzja ta' E&S bhala CSP. Illi it-Tribunal jinnota ukoll illi anke fl- aggravju tiegħu, l-Appellant stess jagħmel referenza għar-rikors ta' l-appell interpost minn E&S li kien saħansitra allegat bhala Dok. B mar-rikors ta' l-Appell. It-Tribunal iqis illi l-osservazzjonijiet u dak deciz fil- Kaz E&S għandu japplika bl-istess mod fil- kaz odjern fl-intier tiegħu. Dan għaliex l- Appellant huwa wiehed mill- UBO's u Direttur tas-socjeta E&S u Mallura,

⁷ Appell 6/19

l-Appellant ghandu wkoll xi jwiegeb ghal dak li ghamlet jew m' ghamlitx E&S. Illi l-Appellant, kien wiehed mill-persuni responabbli mill-ottempranza u l-osservanza tal- Ligijiet u r-Regolamenti da parti E&S, u li certament dak li gara fil-kazijiet hawn fuq imsemmija jimpatta fuq il- *fitness and properness* ta' l-Appellant bl-istess mod li impatta fuq E&S.

22. Illi rigward il- kwistjoni tal- MGA tajjeb illi jinghad illi l- MGA sabet illi l-Appellant ma kienx *fit and proper* ghall-licenzja mitluba minnha. Decizjoni li kif inghad fil- Kaz E&S illum hija res judicata. Illi certament, kif inghad fil- Kaz E&S, it-Tribunal ihoss illi hawn si tratta ta' materja important li necessarjament kellha twassal lill- Awtorita Appellata sabiex tagixxi hija ukoll.

23. Illi l- paragrafu 4 tal- Code of Conduct of Trustees jipprovdi:

Every director and officer (defined in Article 2(1) of the Companies Act) of a trustee company, and every individual acting as a trustee must be a fit and proper person to hold the particular position which he holds or is to hold. In determining whether a person is fit and proper to hold any particular position, the applicant's competence and soundness of judgement for fulfilling the responsibilities of that position will be assessed. To this end, the Authority considers whether the person has had experience of similar responsibilities previously, the record in fulfilling them and, where appropriate, whether the person has appropriate qualifications and training. As to soundness of judgment the Authority looks to the person's previous conduct and decision taking. The diligence with which he is fulfilling or is likely to fulfil those responsibilities and to whether the interests of the company's clients, or his clients in the case of individual trustees, are in any way threatened by his holding that position are also considered. The probity of the person concerned is very important: it is essential that a person with responsibility for the conduct of trust business is of high integrity. In contrast to the fitness element of this criterion which reflects an individual judgment relating to the particular position that the person holds or is to hold, the judgment of probity reflects much more of a common standard, applicable irrespective of the particular position held. Specifically, the Authority takes into account the person's reputation and character. It considers, inter alia, whether the person has a criminal record; convictions for fraud or other dishonesty would clearly be particularly relevant. Particular weight is also given to whether the person has contravened any provision of trust, banking, insurance, investment or other legislation designed to protect members of the public against financial loss, due to

dishonesty, incompetence or malpractice. In addition, it considers whether the person has been involved in any business practices appearing to be deceitful or oppressive or improper or which otherwise reflect discredit on his or her method of conducting business. The Authority also takes into consideration whether the person has been censured or disqualified by professional or regulatory bodies. The application of those who have are unlikely to be acceptable to the Authority. While any evidence of relevant past misconduct needs to be taken into consideration, the Authority recognises that lapse of time, and a person's subsequent conduct, are factors which may be relevant in assessing whether the person is now fit and proper for a particular position.

24. Illi certament li kif diga gie spjegat izjed qabel kif ukoll tenut kont ta' dak deciz mit-tribunal fil- Kaz E&S, it-Tribunal isib illi l- Awtorita kienet korretta meta sabet illi l- Appellant kien kiser dak li jipprovdi il- Paragrafu 4 tal- Code of Conduct for Trustees. L- Appellant kellu l- obbligu car illi jinforma lill- Awtorita bid-decizjoni tal- MGA, u li tali informazzjoni kella tinghata b' mod immedjat. Illi tajjeb illi wiehed hawn ukoll josserva illi is-socjeta SOLV International Limited kellha licenzja ta' trustee, materja ta' sensitivita u serjetta assoluta. Wiehed ghandu jzomm f' mohhu illi skond l- artikolu 3 tal- Kap. 331:

Trust teżisti meta persuna (imsejha trustee) iżzomm, bhala sid jew ikollha vestita fha proprjeta taht l-obbligu litinnegozja dik il-proprjeta għall-benefiċċju ta' persuni (imsejha l-benefiċjarji), kemm jekk ikunu jew ma jkunux għadhom aċċertati jew jeżistu, li ma jkunx biss għall-benefiċċju tat-trustee, jew għalghan ta' karità, jew kemm għal dak il-benefiċċju u dak l-għan imsemmija hawn fuq

25. Illi tenut kont ta' dak li qieghed hawn jinghad kif ukoll kif l- Appellant, tramite is-socjeta E&S agixxa u rrelata anke ma Marian Kocner, Andreas Wolf u Vladim Blaustein, u stante li instab illi E&S kienet hija stess kisret il- provvedimenti tal- Kap. 529 u s- CSP Rules, l- Awtorita necessarjament kellha tagixxi ukoll kontra l-Appellant.

26. Illi ghaldaqstant kienet korretta l-Awtorita illi tqis li kien hemm ksur ta' l-Artikolu 5(1)(c)(iii) tal- Kap. 529, tar- Rule 5.0 tas- CSP Rules u ta' Paragrafu 4 tal- Code of Conduct for Trustees u ghaldaqstant it-Tribunal qieghed jichad l-ewwel aggravju ta' l-Appellant.

C. It-Tieni Aggravju – Ksur tar-Rule 15.06 tar- Rules for Company Service Providers

27. Illi hawn l-Appellant jilmenta mill-fatt illi l-Awtorita qieset li l-Appellant agixxa bi zkur tar- Rule 15.06 kien zbaljat.

28. Illi l- Awtorita tqis illi skond din ir- Rule, CSP ghandha tkun amministrata minn persuni ta' reputazzjoni tajba u li jkollhom l- abbilta li jgharfu l-imprudenza, id-dizonesta u n-nuqqas ta' tharis ta' regolamenti minn persuni ohra.

29. Illi skond din ir-Rule:

Where a Registered Person is set up as a commercial partnership, the Registered Person shall ensure that it is effectively directed and/or managed by at least two individuals in satisfaction of the "dual control" principle. Such persons shall be of sufficiently good repute and sufficiently experienced so as to ensure the sound and prudent management of the Registered Person.

For the purposes of this Rule, it shall not be sufficient for one of the two persons to make some, albeit significant, decisions relating only to a few aspects of the business. Each must play a part in the decision-making process on all significant decisions. The persons involved are not expected to duplicate each other's position but both must demonstrate the qualities and application to influence strategy, day-to-day policy and their implementation, and both must actually do so in practice.

Where there are more than two individuals directing the business, it is not necessary for all of these individuals to be involved in all decisions relating to the determination of strategy and general direction. Nevertheless at least two individuals must be involved in all such decisions. Both persons' judgments must be engaged in order that major errors leading to difficulties for the undertaking are less likely to occur. Similarly, both persons must have sufficient experience and knowledge of the business and the necessary personal qualities to detect and resist any imprudence, dishonesty or other irregularities by the other person. Thus, where a single individual is particularly dominant in an undertaking this will raise doubts about the fulfilment of the criterion.

30. Illi l-Awtorita issostni illi tenet kont li l- MGA kienet sabet li l- Appellant ma kienx fit and proper, kif ukoll il- konnessjoni ta' l-Appellant ma Marian Kocner, Andreas Wolfl u Vadim Blaustein, li skond l- Awtorita huma deskritti bhala nies "unsavoury and dubious", l- Appellant ma kienx in liena ma dak li tipprvdi din ir- Rule. L- Awtorita tirreferi ukoll ghall- fatt illi waqt site visit ghand Blaustein Limited, li taghha l- Appellant kien direttur, hija kienet sabet li kien

hemm nuqqas ta' komunikazzjoni bejn l- Appellant u il- ko-direttur Schranz u Vladim Blaustein.

31. Illi l-Appellant isostni illi Blaustein Limited qatt ma kienet bdiet topera u jikkontendi illi jekk Blaustein kien ghadu persuna fit and proper kif qatt seta kien il- kaz illi l- Appellant ma jitqiesx bhala fit and proper.

32. Illi certament illi l- Appellant jonqos milli japrezza il- fatt illi tramite l-involviment tieghu, Blaustein Limited ottjeniet licenzja ta' CSP taht il- Kap. 529. Illi hawn it-Tribunal jaghmel referenza ghal dak minnu deciz fil- Kaz E&S u b' mod partikolari ghall- paragrafi 57, 58 u 59. It-Tribunal ihoss illi daqs kemm is-socjeta E&S kienet agixxiet bi ksur ta' l-obbligi taghha, daqstant iehor l-Appellant, li ta' E&S kien wiehed minn zewg diretturi, necessarjament ghandu jgorr ir-responsabilita. Liema responsabilita hija ben riflessa f' dak li tipprovdi ir-Rule 15.06 li fl- ahhar mill- ahhar hija riflessjoni ta' responsabilita individwali f' kaz li id-detenntur ta' licenzja tkun entita u mhux persuna fizika.

33. Illi ghaldaqstant kienet korretta l-Awtorita illi tqis li kien hemm ksur ta' Rule 15.06 tas- CSP Rules u ghaldaqstant it-Tribunal qieghed jichad it-tieni aggravju ta' l-Appellant.

D. Konkluzjoni:

Illi fik diga inghad il- gurdizzjoni ta' dan it-Tribunal hija stabbilita b' dak li jipprovdi l-artikolu 21(9) tal- Kap. 330.

34. L-Appellant jargumenta illi kemm ilu jopera huwa qatt ma kien suggett ghal xi azzjoni regolatorja u qatt ma wehel xi multa jew sofrax xi azzjoni regolatorja. Illi fattwalment, anke jekk dan huwa korrett, ma jfissirx illi l- Awtorita ghandha tkun impeduta milli tagixxi skond il- Ligi kontra entita regolata.

35. Jghid ukoll illi hemm licensed holders ohra li agixxew ma l-istess individwi li ghalihom taghmel referenza l- Awtorita. Hadd minn dawn ma gie kkastigat bhal ma gie ikkastigat hu.

36. Illi hawn tajjeb illi wiehed josserva illi it-Tribunal irid iqis id-decizjoni ta' l-Awtorita fil-konfront ta' l-Appellant u mhux xi azzjoni jew nuqqas ta' azzjoni li seta kien hemm fil- konfront ta' ohrajn. Illi it-Tribunal qieghed jaghmel din l-osservazzjoni anke peress illi waqt it-

trattazzjoni tal- kaz, l-Appellant jirreferi ghal xi kazijiet ohra li skond hu juru illi l-Awtorita trattat entitajiet regolati ohra b' mod differenti minn kif giet trattata hu. Illi kif diga inghad, it-Tribunal irid jara d-Decizjoni ta' l-Awtorita f' dan il- kaz fuq il- fatti marbuta ma dan il- kaz u fuq kif l- Appellant iddefenda l- operat tieghu, u mhux billi jsir paragun ma kazijiet ohra. Dan oltre il- fatt li hawn si tratta ta' analizi dwar jekk l-Awtorita agixxietx in konformita mal- Ligi u jekk abbuzatx mid-diskrezzjoni taghha fil- kaz odjern.

37. U tenut kont tac-cirkostanzi kollha tal- kaz it-Tribunal iqis illi l- Awtorita hadet id-Decizjoni a bazi tal- assjem tal- fatti kollha imputabbli lill- Appellant. Huwa minnu li id-Decizjoni tista titqies bhala decizjoni iebes, pero id- Decizjoni fil- konfront ta' l-Appellant necessarjament trid tinqara fil- kuntest tad-decizjoni li ittiehdet fil- konfront ta' E&S fejn dina kellha il- licenzja taghha ta' CSP irtirata.

38. Illi fil- kaz ta' l-Appellant, id-Decizjoni zzommu milli jservi ta' azzjonista f' RES Malta Limited u SOLV International Limited ⁸, oltre li l- Appellant gie projbit milli jservi ta' ufficjal jew azzjonist ta' entita regolata ghal perjodu ta' hames (5) snin ⁹.

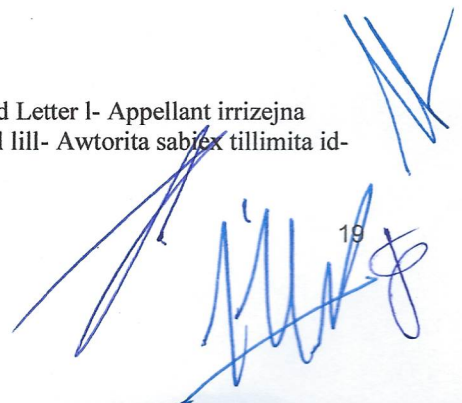
39. It-Tribunal iqis illi dan il- bilanc irid jitqies f' kuntest, u il-kuntest tal kaz odjern, u l- mod li bih agixxa l-Appellant, kien fattur importanti li a bazi tieghu l- Awtorita hadet tali Decizjoni. Decizjoni li fl- ahhar mill- ahhar l- Awtorita kellha il-poter li tiehu. Dan ma jfissirx illi l- Awtorita tista tiehu decizjoni bhal din minnghajr l-ebda kunsiderazzjoni stante li kif diga inghad wiehed irid jirrispetta ukoll il- principju tal- proporzjonalita. Kif diga inghad dan kollu ghandu jinqara flimkien ma' dak deciz dwar kif agixxiet is-socjeta E&S Consultancy Limited u l- fatt illi l-licenza ta' din kienet giet irtirata mill- Awtorita.

40. Illi pero, tenut kont tac-cirkostanzi kollha, u tenut ukoll kont tal- fatt kemm dan is-settur huwa dipendenti mhux biss fuq is-sahha tar-regolatur, izda fuq l-integrita u it-trasparenza tal-varji operatori, it-Tribunal ihoss illi d-decizjoni ta' l-Awtorita tehtieg li tigi kkonfermata.

Illi in vista tal- premiss, it-Tribunal qiegheed jichad l-appell ta' l-Appellant u jikkonferma id-Decizjoni ta' l- Awtorita tat- tmienja (8) ta' Mejju 2020 bl- ispejjez kontra l- Appellant.

⁸ Paragrafu (i) tad-Direttiva fid-Decizjoni. Il- fatt illi wara li inharget il- Minded Letter l- Appellant irrizejna minn Direttur ta' RES Malta Limited u SOLV International Limited kien wassal lill- Awtorita sabjex tillimita id-Direttiva taghha fid-Decizjoni ghat-tnehhija ta' l-ismha.

⁹ Paragrafu (ii) tad- Direttiva fid-Decizjoni



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