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

MALTA

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Appeal FST 03/19

**E&S Consultancy Limited**

**vs**

**Malta Financial Services Authority**

Illum 26 ta' Gunju 2024

It- Tribunal

Ra l-appell interpost mill-Appellanti liema appell gie intavolat fl- erbatax (14) ta' Gunju 2019 li fih l-Appellanti ssostni:

> We write for and on behalf of E & S Consultancy Limited and we refer to the correspondence received from the MFSA dated 16th May 2019, hereunder referred to as 'The Decision'.
>
> In the said letter the Company was informed that "the Authority is minded to cancel the Company's registration granted to it under the CSP Act in terms of Article 6 (1) (a), (b) and (e) of the CSP Act." Furthermore, in the said communication dated 16th May the Company was also informed that, pending the receipt of the representations made by the Company, interim directives were issued in terms of article 11 (1) of the CSP Act, copy of decision attached.
>
> Our clients are hereby appealing from the said decision in terms of article 16 (2) (d) of the CSP Act as well as Article 21 (8) of Chapter 330 of the Laws of Malta.
>
> The appellant company's grounds for appeal are as follows:

1. Perceived failure of E&S to inform the MFSA of any change in status in relation to 'fit and properness' in relation to ongoing matter with MGA

To this effect it is relevant to point out that contrary to what is stated in the decision appealed from, the company has indeed communicated with the MFSA and brought to its attention the ongoing issue it had with the MGA. In fact, this matter was specifically brought up in a meeting with the CEO of the MFSA held on the 10th of January 2019 which meeting was set up *inter alia* so as to ensure that, while the company was contesting the unjustified decision of the MGA, such decision would not have an adverse effect under the Company's registration under the CSP Act. During this meeting the Company also expressed its willingness to offer any clarifications and to undertake any actions that the Authority would have deemed necessary in the circumstances.

It is therefore submitted that the MFSA has, in this regard, wrongly applied the provisions of the Act and/or has abused of its discretion and/or taken a decision that is manifestly unjust.

2. Perceived failure of E&S to inform the MFSA about legal proceedings instituted by JP Flannery and Lexington Services Limited.

The company contests the reasoning of the MFSA that these legal proceedings amount to a material issue which ought to have been disclosed. This is because these proceedings refer to a frivolous claim in relation to ownership of a patent registered in the US Patent and Trademarks Office with registration number 8019807 and which was initiated in the Irish Civil Courts back in 2014 and 2015. The aim of this court case was to put pressure on the counter-parties into settling out of Court. This is in fact what's happened when the cases were withdrawn further to an out of court settlement reached on 10th November 2015.

E&S Consultancy Ltd was simply part of this lawsuit as the holder of one 'B' share in Catharsis Technologies Ltd and Activity Monitoring Solutions Limited (with no rights to vote/dividends). Furthermore, Christian Ellul never featured anywhere in the company structure of Maro Services Limited and was purely acting under mandate. The issue of a warrant of prohibitory injunction in relation to E&S referred to the prohibition from transferring the said 1 'B' share which has a nominal value of Euro 1 . In reality, this is standard practice when such proceedings are instituted.

It is abundantly clear that these proceedings are not a material issue which ought to have been disclosed. Indeed, it is also pertinent to point out that the company has been in constant contact with the MFSA in relation to the granting of the CSP license since 2014. The CSP license was eventually issued on the 3rd of November 2016, practically one year after these legal proceedings had been withdrawn after an out of court settlement has been reached. Consequently, how can a long settled non-material case that predates the vetting carried out by MFSA and the eventual granting of the registration under the CSP Act suddenly impinge on the fitness and properness of the company so many years later?

It is therefore submitted that the MFSA has, in this regard, wrongly applied the provisions of the Act and/or has abused of its discretion and/or taken a decision that is manifestly unjust.

3. Perceived failure of E&S to ensure that a person is of sufficient good standing and repute prior to offering services to that person re Marian Kocner.

This matter is the crux of the appellant company's ongoing discussion with the MGA. It transpires that the MGA have acted after the publication of unfounded libellous tweets and articles. In respect of these tweets and articles the company has acted in a two-pronged manner. Firstly, it approached the various journalists and explained to them their version of events. Most of these journalists reacted, after understanding the unfoundedness of what they had reported, by either withdrawing the article completely or by issuing a clarification. On the other hand, in respect of those journalists who opted to stand by their claim, or repeat same, libel proceedings have been instituted in terms of the Press Act and are currently ongoing.

In this regard it is relevant to premise that Marian Kocner is the former father-in-law of Dr Christian Ellul, whom he only met after meeting his former wife. The companies set up by Kocner in 2010 and 2011 were holding companies in respect of immovable property in Slovakia. Thorough due diligence in relation to the shareholders and UBOs was carried out upon engagement and retained in the appellant company's clients' files.

After Dr Ellul's divorce in 2013, Marian Kocner also acted as co-director of the companies simply for the purpose of putting them into liquidation. It is not amiss to point out again that our clients' acceptance and the setting up of the companies again predated the issue of the CSP license.

While the liquidation process admittedly took years, one of the companies, International Investment Holdings Limited had KSI as its auditors and was eventually liquidated. On the other hand, the other company, International Finance Group was in the process of filing audited accounts, again engaging the services of KSI as auditors.

Notwithstanding the fact that the company was in liquidation, when appellant company was made aware in 2018 of Marian Kocner's possible involvement in serious crimes, the appellant company's directors took the immediate decision to resign from all posts held. Media reports mentioning Marian Kocner only escalated in 2018 following our clients' resignations. It is also pertinent to note that during the course of E&S's involvement with these companies, the appellant company was not aware of any arrests, investigations or criminal action against Marian Kocner. Indeed, moreover, none of this was considered an issue by MFSA in the numerous correspondence regarding the issue of the CSP licence back in 2014. Neither indeed was it an issue when the MFSA actually granted appellant company a CSP licence on 3rd November 2016.

The appellant company is aware of the recent charges filed against Marian Kocner, however these happened over a year after termination of all services to the said Companies and it is rather draconian that the appellant company should be held accountable and guilty by association for charges filed against Marian Kocner after termination of its services.

The appellant company confirms that sound due diligence processes are in place on all its clients. This is evident by the fact that appellant has not received any reprimands or fines following FIAU (28th March 2017) and MFSA inspections. These files have always been and are always available for inspection by the Authorities.

It is therefore submitted that the MFSA has, in this regard, wrongly applied the provisions of the Act and/or has abused of its discretion and/or taken a decision that is manifestly unjust.

4. Perceived failure of E&S to be a fit and proper person.

In this regard MFSA has claimed that the appellant company has lacked honesty and integrity and came to this conclusion, firstly on a perceived lack of transparency. The reasons given by the MFSA for this alleged lack of transparency stem from, inter alia, the failure to inform MFSA about the MGA issue and the legal proceedings instituted by Flannery and Lexington Services Limited. In this respect the appellant company once again makes reference to the submissions made when dealing with ground numbered (1) and (2) of this appeal.

Similarly, the appellant company reiterates its position as above explained in so far as its 'perceived links' to Marian Kocner are concerned.

In so far as the "Links to Andreas Wolfl" are concerned, appellant company cannot but express its disbelief at the position taken by the MFSA. This is because the said Andreas Wolfl and his companies have worked with numerous Corporate Service providers, law firms and audit firms and even Banks in Malta including Ganado Advocates, PWC and Sparkasse plc over the years. Andreas Wolfl was also instrumental in assisting in matters relating to the passing of the Securitisation Act. Meanwhile while the Listing Authority might have fined some of his companies with 'administrative penalties', no further action has been taken against him. If the appellant company is deemed to be dishonest by association to Andreas Wolfl, then numerous other licence holders in Malta would have to also be deemed dishonest. Otherwise, the decision taken by the MFSA is not only non-sensical but an abuse of discretion and/or manifestly unfair.

The MFSA has also deemed fit in its correspondence of the 16th May 2016 to mention appellant company's links to Vadim Blaustein as another reason to label it dishonest.

The facts are as follows:

The appellant company was involved with Blaustein Limited for the purpose of helping it apply for the granting of a CSP registration. Blaustein Limited obtained their CSP licence from the MFSA in 2016. It is understood that all checks were carried out by the appellate Authority itself.

Blaustein Limited did not onboard any clients while the appellant company was involved. Once E&S realised that there was no business activity in sight and Blaustein Limited were not communicative enough, it was decided to terminate all services. This decision taken by appellant company was also communicated to the MFSA.

This notwithstanding years later, the MFSA has opted to mention Vadim Blaustein as another reason as to why it took the decision which is being appealed from. Furthermore, how can the appellate Authority justify its decision today when it would seem none of these issues were brought up when the MFSA itself approved the granting of a CSP license to Blaustein Limited. Moreover, how can such a decision not be considered as manifestly unfair when none of the claims made in the decision of the 16th of May 2019 were ever flagged or brought to the attention of appellant company during the MFSA compliance visit in May 2017?

It is also not amiss to point out that appellant company is being targeted to be dishonest by association to Vadim Blaustein over a year after its directors resigned from all posts.

Besides, it would seem that no such action has been taken by the appellate Authority against Blaustein Limited as at the time of the filing of this appeal.

It is therefore submitted that, the MFSA has, in this regard, wrongly applied the provisions of the Act and/or has abused of its discretion and/or taken a decision that is manifestly unjust.

5. Matter relating to delay in submitting documentation

While it is not contested that the Company's Certificates of Compliance for 2016 to 2017 were filed with a slight delay, the appellant company denies that it ever received more than a single reminder. Furthermore, these matters were never deemed important enough for the MFSA to actually give the appellant company a fine for the late submissions. It would seem however that now, this fact is being used as a reason to cancel E&S's registration as a CSP.

E&S did in fact submit its audited accounts for 2017 and 2018. These were filed on 4th January 2018 and 7th August 2018 respectively.

It is therefore submitted that the MFSA has, in this regard, wrongly applied the provisions of the Act and/or has abused of its discretion and/or taken a decision that is manifestly unjust.

6. Proposed cancellation of E&S's registration as a CSP with immediate effect

In this respect appellant company refers to the submissions made in this appeal and maintains that there is absolutely no reason for the proposed cancellation to be made. One cannot but reiterate that in the course of appellant company's regular correspondence and interaction with the MFSA and its various departments over the years, not one of the reasons brought forward in the decision of the 16th of May has ever been brought to their attention. Besides, throughout the nine years during which appellant company acted as a CSP, never has it been reprimanded or fined for any minor, let alone serious wrongdoing.

The proposed decision is drastic, draconian, disproportionate and manifestly unfair. Neither would it seem that this decision reflects the approach taken by the appellate Authority to other similar regulated entities. Indeed one would have presumed that the least that the MFSA could have done was to give the service provider some prior warning or request a clarification instead of taking the decision of shutting down appellant's business with immediate effect.

Furthermore, appellant submits that what constitutes fitness and properness for a person is not an absolute standard but one which relates to the type of position a person holds, or will hold, with an applicant company and the type of authorisation the company holds or applies for.

Consequently, appellant company whilst referring to the submissions above made and to its reply to the MFSA dated 29th May 2019, and while it reserves the right to make further submissions and bring all the relevant evidence in support of this appeal, it hereby requests this Tribunal to overturn the decision taken by appellate Authority as outlined in its letter dated 16th May 2019.

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

1. By means of its appeal, E&S Consultancy Limited ("E&S" or "the Company") is challenging: (i) the proposed cancellation of the Company's registration granted to it under the Company Service Providers Act (Cap. 529) ("CSP Act"); and (ii) the directives served upon the Company as noted in the Authority's letter dated 16 May 2019 (the "Minded Letter") (annexed as 'Doc A').

2. By means of this Minded Letter and on the basis of the concerns raised and the alleged breaches outlined in the said Minded Letter, the Company was informed that:

(i) the Authority is minded to cancel the Company's registration granted to it under the CSP Act in terms of article 6(1)(a), (b) and (e) of the CSP Act ("proposed cancellation"); and

(ii) pending receipt of the representations of the Company and the Authority's decision on the proposed cancellation, the Company is directed, with immediate effect, to:

a) Refrain from accepting new clients;

b) Refrain from offering its existing clients any services which it is authorised to provide in terms of the CSP Act and which it was not already providing thereto prior to the date of the Minded Letter; and

c) Ensure that the Company's records (including client records, both current and past) in whatever form, be kept safe and not destroyed, erased or disposed of in any manner and be retained at the Company's registered office: Palace Court, Church Street, St Julians (the "Directives").

3. The Authority respectfully submits that this Tribunal does not have the jurisdiction at law to consider the appellant's claims in relation to the proposed cancellation. Neither has the Authority wrongly applied any of the provisions of the law, abused of its discretion or acted in a manner that is manifestly unfair as is being alleged by the appellant.

4. As will be explained in detail in this reply and elaborated further in the course of these proceedings, the requests and allegations of the appellant are completely unfounded and should therefore be rejected by the Financial Services Tribunal with all legal costs to be borne by the appellant.

**Preliminary Pleas**

5. The Authority respectfully submits that this Tribunal does not have the jurisdiction to hear the part of the appeal filed by E&S relating to the proposed cancellation since no decision from which there is a right of appeal before the Financial Services Tribunal has been made by the Authority in relation thereto.

6. As stated by the Company, the appeal is being made in terms of article 16 of the CSP Act and article 21 of the Malta Financial Services Authority Act (Cap. 330) ("MFSA Act"). These articles, more specifically article 16(2) of the CSP Act and article 21(9) of the MFSA Act, specify the actions or decisions of the Authority which can be appealed before this Tribunal. The Authority respectfully submits that the proposed cancellation that is being contested, *inter alia*, by the Company is not a decision of the Authority but simply a proposal, and that consequently there lies no right of appeal from it in terms of article 16 of the CSP Act or in terms of Article 21 of the MFSA Act.

7. In the Minded Letter, more specifically section 6.0 thereof, the Authority is merely notifying E&S that, in view of the matters outlined in the said Minded Letter, the Authority is minded to cancel the Company's registration granted to it under the CSP Act in terms of article 6(1)(a), (b) and (e) of the CSP Act. This is in accordance with

article 7(1) of the CSP Act which provides that where the Authority intends, *inter alia*, to cancel a registration, it shall give the registered person a notice in writing of this intention, setting out the reasons for such decision.

8. It is therefore amply clear that the Authority has not made any decision whatsoever with respect to the proposed cancellation or the grounds therefor.

9. In fact, in the very same section of the Minded Letter, i.e. section 6.0, the Company is given a one-month period within which it is invited to submit its written representations, if any, to the Authority on the proposed cancellation and the grounds therefore, giving reasons why the Authority should not proceed with the proposed cancellation. Immediately thereafter, the Authority adds that it shall carefully consider any representations so made before arriving at a final decision. This is in accordance with the provisions of article 7(2) of the CSP Act.

10. When the Authority issues a decision or takes certain action, it never includes an invitation to the person to whom it is addressed to communicate further with the Authority. Once the Authority takes a decision or takes certain action it is final and no further comments/views are invited from the person to whom it is addressed.

11. It is only after the termination of the period for the submission of representations and after having taken into consideration any representations so made that the Authority shall arrive at a decision. At that point, the Authority will, in terms of article 7(3) of the CSP Act, notify its final decision in writing to the registered person.

12. In addition to the above, when the Authority issues a decision or takes certain action, it will remind the person to whom it is addressed of their right of appeal before the Financial Services Tribunal in terms of the law. By way of example, reference is made to section 7.0 of the Minded letter wherein the Authority draws the attention of the Company of its right to appeal against the Authority's Directives should it feel aggrieved by the issue of such Directives.

13. For the above reasons, the Authority respectfully submits that the Company's appeal, insofar as it relates to the proposed cancellation, is inadmissible and should be rejected by this Tribunal since the appellant is essentially attempting to appeal from regulatory action which is being proposed in the Minded Letter but which clearly has not been decided upon.

**Submissions on the merits**

14. Without prejudice to the above preliminary submissions, the Authority respectfully submits that, in issuing the Directives, the Authority neither abused its discretion, nor acted in a manner that is manifestly unfair. On the contrary, the Authority acted on the basis of the serious concerns raised in the Minded Letter, and in the best interests of the Company's clients, actual or otherwise.

**First Motive: Non-disclosure of the Malta Gaming Authority's decision.**

15. Article 5(7) of the CSP Act provides that *"A company service provider shall notify the Authority of any change or circumstance which would have a bearing upon its registered*

*status as a registered person"*. Furthermore, Rule 13.04(e) of the Rules for Company Service Providers ("CSP Rules") states that a Registered Person is obliged to notify the Authority in writing of any material changes in the information supplied to the MFSA by such Registered Person immediately upon becoming aware of the matter.

16. In addition to the above, in accordance with the declaration set out in section 4 of the application form submitted by the Company when applying for a registration to act as a company services provider in terms of the CSP Act (the "Application Form") (annexed as 'Doc B') and signed by the legal representative thereof, the Company bound itself to notify the Authority "*immediately if the information provided changes in any material way either prior to or subsequent to licensing*".

17. The Authority became aware that, on the 20th June 2018, the Malta Gaming Authority ("MGA") issued a determination whereby it declared the Company, Mr Karl Schranz and Dr Christian Ellul as not being fit and proper for the purposes of the MGA's assessment with regards to their involvement in potential MGA licencees.

18. A determination made by another regulatory authority, especially one that relates to the fitness and properness of the Company, its directors and shareholders, cannot but be considered a material change in circumstance and an important piece of information which should have immediately been brought to the attention of the Authority as required in terms of the Company's obligations at law. Therefore, in accordance with the abovementioned provisions and the declaration set out in the Application Form, the Company was obliged to notify the Authority, immediately and in writing, of the MGA's determination.

19. With respect to the notification requirement mentioned above, the Company is alleging that it had notified the Authority verbally of the MGA's determination on the 10 January 2019, i.e. almost seven months after the communication of the MGA's determination. Furthermore, the Company states in its appeal that it was contesting the unjustified decision of the MGA.

20. First and foremost, it should be noted that to date, i.e. over one year from the date of the MGA's decision, no appeal has been made by the Company with respect to the said decision. Furthermore, even if the claim being made by the Company with respect to the verbal notification provided to the MFSA were true, the Company still failed to satisfy its obligations at law on two accounts: the Authority was not notified of the MGA's determination immediately upon the Company becoming aware of such determination, nor was it notified of such determination in writing. This is clearly contrary to what is required in terms of article 5(7) of the CSP Act, Rule 13.04(e) of the CSP Rules and the Application Form.

**Second Motive: Non-disclosure of legal proceedings.**

21. In terms of Rule 13.04(f) of the CSP Rules, a Registered Person is required to notify the MFSA in writing of any actual or intended legal proceedings of a material nature by or against the Registered Person immediately after the decision has been taken or on becoming aware of the matter.

22. In the course of its supervision, the Authority discovered that the Company was involved in legal proceedings instituted by James Patrick Flannery and Lexington Services Limited against Activity Monitoring Solutions Limited, Catharsis Technologies Limited, Walters & Karrer Internacional SA, WKI Trust SA, Anthology SA, Maro Services Limited (represented by Dr Christian Ellul), and the Company whereby the plaintiffs requested the issuance of a warrant of prohibitory injunction. This request was made by the plaintiffs in connection with a case relating to fraud which was instituted by the very same plaintiffs before the High Court of Dublin. On the 13th March 2014, the First Hall of the Civil Court acceded to the plaintiffs' request for the issuance of a warrant of prohibitory injunction vis-à-vis, inter alia, the Company (warrant number 264/2014/1).

23. While the Company states that, in its opinion, the abovementioned legal proceedings are not a material issue which ought to have been disclosed to the Authority, it does not contest the fact that the existence of the said legal proceedings was not brought to the attention of the Authority.

24. Furthermore, it should be noted that the legal proceedings against the Company, *inter alia*, were instituted as a direct consequence of a case relating to fraud in which two companies of which E&S is a shareholder are involved and which resulted in legal proceedings being instituted before the High Court of Dublin in Ireland.

25. The Authority respectfully submits that legal proceedings connected with a case of fraud are undoubtedly of a serious nature and should have therefore been brought to the attention of the Authority in terms of Rule 13.04(f) of the CSP Rules. However, at no point during the application process, nor after being granted a registration under the CSP Act, did the Company bring these legal proceedings to the attention of the Authority.

26. In its appeal, the Company also questions how "*a long settled non-material case that predates the vetting carried out by MFSA suddenly impinge on the fitness and properness of the company so many years later*". In this respect, the Authority wishes to clarify that the issue in question are not the legal proceedings *per se*, irrespective of whether they are to be considered material or not, but rather the non-disclosure thereof as required in terms of Rule 13.04(f) of the CSP Rules.

**Third Motive: Due diligence checks on clients.**

27. Rule 16.06 of the CSP Rules states "*A Registered Person shall ensure that a person is of sufficient good standing and repute prior to accepting to offer its services to that person.*" In terms of the afore-cited provision, the Company is to ensure that any person to whom its services are offered is of sufficient good standing and repute.

28. International Investment Holdings Limited and International Finance Group Limited were clients of the Company since May 2010 and March 2011 respectively. The former of the two aforementioned companies was struck off on the 27th September 2017. Until then, one of the shareholders of International Investment Holdings Limited was E&S, whereas the directors thereof were Dr Christian Ellul and Mr Marian Kocner and the company secretary was Mr Karl Schranz. Furthermore, E&S provided International

Investment Holdings Limited with a registered office. As for the second company, i.e. International Finance Group Limited, E&S was a shareholder thereof until the 19th March 2018 and, until the same date, Mr Marian Kocner was a director and Mr Karl Schranz was the secretary of the said company. E&S also provided a registered office to this company until the 21st May 2018. As for Dr Christian Ellul, he was a director of International Finance Group Limited until the 20th December 2017. With respect to International Finance Group Limited, it should be noted that, contrary to what the Company is stating in its appeal, the said company was never wound-up and put into liquidation. It should also be noted that the foregoing is public information which is available on the Malta Business Registry database.

29. Mr Kocner is a well-known figure in Bratislava and he has found himself at the center of scandals dating back more than two decades. In fact, in 2005 and 2011 lists of names allegedly leaked by the Slovak police to the news media of people they suspected of being tied to organized crime had Mr Kocner's name on both lists. One of the oldest scandals surrounding Mr Kocner, which relates to the company known as Technopol, dates back to the year 1992. More recently, Mr Kocner was linked to tax evasion and fraudulent transactions worth millions of euros involving businessmen connected to Slovakia's ruling party, as well as the murder of a journalist, Mr Jan Kuciak, who was investigating the alleged tax fraud to which the said financial transactions relate. The scandals and allegations in which Mr Kocner was or is involved are explained in more detail in section 3.0 of the Minded Letter.

30. In view of all the public concerns raised and allegations made vis-à-vis Mr Kocner which date back to 1992, it is baffling how the Company concluded, after conducting "*thorough due diligence*", that International Investment Holdings Limited and International Finance Group Limited, whose director is the very same Mr Kocner, is of sufficient standing and good repute. If such concerns and allegations are not considered enough to conclude that a client, potential or otherwise, is of insufficient good standing and repute, it raises serious doubts as to the due diligence processes being conducted and the standards being applied by the Company in relations to its clients.

31. The Authority respectfully submits that the numerous media reports published and information available in relation to the alleged crimes committed by Mr Kocner should have raised enough red flags for E&S to conclude that, in view of their ties with Mr Kocner, International Investment Holdings Limited and International Finance Group Limited cannot be considered of sufficient good standing and repute and consequently refrain from offering its services to the said companies.

32. Furthermore, it is unclear why the Company chose to terminate its business relationship with the clients in question in 2018, when it was made aware of "*Marian Kocner's possible involvement in serious crimes*", and not at an earlier date, even though Mr Kocner's potential involvement in serious crimes was well known to the general public way before 2018. One would assume that the Company's concerns regarding Mr Kocner's possible involvement in serious crimes, which led to the termination of its business relationship with International Investment Holdings Limited and International Finance Group Limited in 2018, would have been reason enough not to accept the said companies as its clients in the first place.

33. In summary, the fact that E&S had been offering its services to a company whose director, namely Mr Kocner, is being linked with and/or accused of very serious and henious crimes, some of which date back to the year 1992, raises significant doubts as to the due diligence being carried out by the Company with respect to its clients, as well as the kind of business that is being conducted by the Company and introduced to Malta. Moreover, it raises serious concerns as to whether, by offering its services to such unreputable clients, the Company has acted in breach of Rule 16.06 of the CSP Rules.

**Fourth Motive: Fitness and properness status.**

34. In terms of article 5(1)(a) of the CSP Act, one of the underlying conditions which form the basis for the granting of a registration under the CSP Act is that the person applying for the registration be a fit and proper person to provide the services concerned. As is clearly established in Section 5.0 of the CSP Rules, this fitness and properness requirement is an ongoing requirement meaning that the said requirement should be fulfilled not only at registration stage, but also until such time as the Registered Person ceases to hold its registration for whatever reason.

35. For a person to satisfy the fitness and properness requirement, the criteria set out in section 5.0 of the CSP Rules must be satisfied. In brief, this section provides that the fitness and properness requirement shall only be satisfied if a person is of sufficient integrity, competence and solvency. Furthermore, section 5.0 of the CSP Rules provides that "A fit and proper person is a person who is [...] honest".

36. The Company has demonstrated a lack of transparency on a number of occasions as outlined in sections 2.0 and 3.0 of the Minded Letter. More specifically, the Company failed to inform the Authority of:
    (i) the determination made by the MGA in relation to the fitness and properness of E&S, Dr Christian Ellul and Mr Karl Schranz; and
    (ii) the legal proceedings instituted by James Patrick Flannery and Lexington Services Limited against Activity Monitoring Solutions Limited, Catharsis Technologies Limited, Walters & Karrer International SA, WKI Trust SA, Anthology SA, Maro Services Limited represented by Dr Christian Ellul, and the Company.

37. The above is inarguably to be classified as sensitive information which is of significant relevance in relation to the fitness and properness of the Company and which therefore should have been brought to the attention of the Authority. In light of the Company's failure to notify the Authority of the above matters, one cannot but doubt whether the Company has the ability to act honestly and in a trustworthy fashion as required for a person to be considered fit and proper in terms of the law.

38. The Authority's concerns regarding the fitness and properness status of the Company also stems from the undesirable business connections which E&S has with a number of its clients and the individuals involved therewith. One such connection is the Company's link with Mr Marian Kocner, which link is addressed in sections 3.0 and 4.2 of the

Minded Letter, as well as paragraphs 27 to 33 above. The fact that E&S has offered its services to companies linked to such an unreputable individual as Mr Kocner raises serious concerns with respect to the Company's integrity. The Company's ties with Mr Kocner have also been problematic from a reputational point of view as Malta has been linked to Mr Kocner's wrongdoings in media reports on a number of occasions.

39. Also of concern are the Company's business relations with Mr Andreas Wolfl as outlined in section 4.3 of the Minded Letter. The Authority is aware that Mr Wolfl and a number of entities in which he is involved, including Argentarius ETI Management Ltd, are involved in claims being made relating to fraudulent activity which took place vis-a-vis Falcon Funds SICAV plc (the "Scheme") . More specifically, the Scheme is claiming that fraudulent activity could have possibly taken place through the use of Exchange Traded Instruments ("ETIs") issued by the companies controlled by Mr Wolfl.

40. In relation to the above, a court notice was recently published in the Government Gazette No. 20,147 of 8th March 2019 for the purpose of effecting service of the judicial letter number 612/19 in the names Falcon Funds Sicav plc vs Argentarius ETI Management Ltd on the respondent, Mr Andreas Wolfl. By means of this judicial letter, the Scheme referred Mr Wolfl to the "*various investments which have failed or which appear to be about to fail and this because of acts and omissions on [Argentarius'] part, both direct and/or indirect, in a negligent and/or fraudulent manner, as well as lack of expertise and/or non-observance of the applicable laws and regulations and the violation of [Argentarius'] obligations.*" Therein, the Scheme further stated that it is "*holding [Argentarius] responsible for all the damages suffered and which may be suffered as a consequence of [its] behaviour*".

41. Furthermore, it should be clarified that, contrary to the Company's statement that "*the Listing Authority might have fined some of* [Mr Wolfl's] *companies with 'administrative penalties'*", the Listing Authority has in fact fined two companies in which Mr Wolfl is involved, namely ETI Securities and Delta 1, for breaches of the Listing Rules.

42. In its appeal, the Company sings praises of Mr Wolfl's contributions to the passing of the Securitisation Act and dictates how the Authority should exercise its powers and functions vis-à-vis other service providers, a number of which are not even regulated or supervised by the MFSA, while conveniently failing to address the serious allegations mentioned above regarding the involvement of Mr Wolfl and the companies in which he is involved in large-scale fraudulent activity.

43. Therefore, one can only be expected to assume that the Company chose to continue servicing the companies in question, all of which are linked to Mr Wolfl, notwithstanding the fact that a number of these companies and Mr Wolfl are involved in serious allegations of a criminal nature. The fact that the Company maintains a business relationship with entities which were subject to regulatory action, as well as persons who are linked to significant fraudulent activity naturally raise serious concerns as to the integrity thereof. Moreover, the Company's connections with such non-reputable persons who are involved in matters of a serious criminal nature as mentioned above are tarnishing the reputation of Malta as evidenced by the fact that Malta has already been linked to the losses suffered by the Scheme in numerous media reports.

44. In addition to the above, the Company has undesirable business connections with yet another individual, namely Mr Vadim Blaustein. Mr Blaustein is the sole shareholder and sole director of Blaustein Limited, a company registered to act as a company service provider in terms of the CSP Act and which happens to be a client of E&S. Dr Christian Ellul and Mr Karl Schranz, both of whom are shareholders and directors of E&S, were also directors of Blaustein Limited until the 23rd April 2018.

45. Mr Blaustein is also a director and ultimate beneficial owner of multiple related entities overseas, including Blaustein CS B.V. which is the main company, established in the Netherlands. According to information in the Dutch press, clients have been reporting malpractices and filing complaints with the Dutch National Bank ("DNB") since 2012 relating to alleged tax evasion committed by the entities in which Blaustein is involved, including Blaustein CS B.V. . These allegations led to a raid of the offices of Blaustein CS B.V. by the Dutch Fiscal Intelligence and Investigation Service in 2016, which in turn led to Mr Blaustein's arrest for alleged tax evasion, extortion, and human trafficking . While Mr Blaustein was released shortly thereafter, the DNB's investigation eventually led to the withdrawal by the DNB of Blaustein CS B.V.'s licence as a corporate services provider.

46. Mr Blaustein is also the director and ultimate beneficial owner of another entity, Blaustein Corporate Services Limited, which is licensed to provide administrative services under the Cypriot law regulating companies providing administrative services and related matters of 2012 (the "Cypriot law"). Following the news of Mr Blaustein's arrest in 2016, the Cyprus Securities and Exchange Commission ("CySEC") suspended the license of Blaustein Corporate Services Limited on the basis of its failure to satisfy the fitness and properness requirements set out in Articles 7(1) and 8(2) of the Cypriot Law.

47. The fact that E&S offered its services to a company whose director and shareholder, namely Mr Blaustein, was the principal cause for the regulatory action taken by two foreign regulatory authorities, DNB and CySEC, as outlined above not only sheds a negative light on the Company with respect to its choice of clients, but also renders questionable the integrity thereof.

48. In its appeal, the Company again chooses to advise the Authority as to how and when it should exercise its powers and functions with respect to persons falling under its regulation and supervision. However, in no instance does it address the Authority's findings as outlined above in relation to Mr Blaustein and or the entities which he is involved. Therefore, one would assume that the Company accepted Blaustein Limited as a client and continued servicing the said Company until February 2019 and this notwithstanding the fact the abovementioned allegations and the regulatory action taken vis-à-vis Blaustein Limited and/or Mr Blaustein.

49. The Company also claims that the Authority had an obligation of some sort to notify the Company of its findings in relation to Blaustein prior to issuing the Minded Letter. While noting that this obligation does not exist neither in fact nor at law, the Authority respectfully submits that it is the Company's duty to conduct ongoing due diligence on

its clients and, if anything, it was the Company that should have brought these findings on its very own clients to the attention to the Authority, not vice versa.

50. When considering that the Company has not one but several links with a number of individuals and entities who are or have been subject to allegations of serious crimes and wrongdoings, as well as regulatory action, it is not only reasonable but expected that the MFSA, as a supervisory authority entrusted with the protection of consumers' interests, questions the integrity of the Company. The Authority's concerns are exacerbated by the lack of transparency demonstrated by the Company in the instances mentioned in paragraph 36 above. Anyone will agree that, taken in conjunction, these concerns are more than sufficient to justify the re-evaluation of the Company's fitness and properness as required in terms of article 5(1)(a) of the CSP Act and Rule 5.0 of the CSP Rules.

**Fifth Motive: Delay in and failure to submit documentation.**

51. Rule 17.03 of the CSP Rules provides that "*Audited annual financial statements prepared in accordance with appropriate accounting standards, together with a copy of the auditors' management letter and the auditors' report, shall be submitted to the MFSA within four months of the Accounting Reference Date.*" Furthermore, Rule 17.07 of the CSP Rules provides that "*A Registered Person shall submit to the MFSA, on an annual basis, a Certificate of Compliance, in the style recommended in Annex 2 to these Rules.*" On numerous occasions, the Company has failed to submit or submitted belatedly the documentation mentioned in the afore-cited and this notwithstanding the reminders sent by the Authority to the Company.

52. The Certificates of Compliance for 2016, 2017, and 2018, which were to be submitted by 31st January of the years 2016, 2017 and 2018 respectively, were only received on the 8th March 2017, 22nd March 2018, and 21st March 2019 respectively following a reminder sent by the Authority after the submission deadline or each Certificate of Compliance. Therefore, for every Certificate of Compliance, there was a delay in submission of almost two months. In this respect, the Company itself declares that *"it is not contested that the Company's Certificates of Compliance for 2016 to 2017 were filed with a slight delay*". As for the Certificate of Compliance for 2018, the Company does not even bother mentioning it, let alone denying the late submission thereof.

53. In addition to the aforementioned delays in submission, the Company has also failed to submit the audited annual financial statements, together with the auditors' management letter and auditors' reports, for the years ending 31st December 2016 and 2017. While the appellant does not deny its failure to submit the said documentation for the year ending 31st December 2016, it claims that it "*did in fact submit its audited accounts for 2017 ... on 4th January 2018*". However, the Authority categorically refutes this claim and refers to the letter dated 20th June 2018 whereby the Company was reminded that it had yet to submit the audited annual financial statements, together with the auditors' management letter and auditors' reports, for the years ending 31st December 2016 and 2017. In fact, the said documentation for the year ending 31st December 2017 was only received by the Authority on the 29th June 2019, i.e. over one year from the submission deadline and after the issuance of the Minded Letter.

54. Both of the above cited Rules clearly set out the reporting obligations of the Company and leave no doubt as to the submission deadline of the documentation in question. Therefore, by failing to submit the documentation mentioned in Rule 17.03 of the CSP Rules and belatedly submitting, on several occasions, the Certificate of Compliance mentioned in Rule 17.07 of the CSP Rules, the Company has undeniably acted in breach of its reporting obligations as set out in the said Rules.

55. In its appeal, the Company states that the above "*matters were never deemed important enough for the MFSA to actually give the appellant company a fine for the late submissions*" but now "*this fact is being used as a reason to cancel E&S's registration as a CSP.*" The Authority respectfully submits that the law provides the MFSA with various powers which it may exercise as provided for in the very same law and that in accordance with the said law, the Authority – not any other person – has the discretion to determine how and when to exercise its powers at law. More importantly, the Authority reiterates that the findings and concerns of the Authority, as set out herein and in the Minded Letter, which led to the issuance of the Directives are extensive and cannot be seen in isolation.

**Conclusion**

56. The Authority therefore respectfully submits that despite the numerous allegations contained in this appeal, all these allegations remain completely unsubstantiated by the Company and are unfounded in both fact and law.

57. As it clearly emerges from the above, the Authority neither abused of its discretion nor did it act in a manner that is manifestly unfair as is being alleged by the appellant Company.

58. Accordingly, for all the above reasons and as will be explained in greater detail in the course of these proceedings, the Authority respectfully requests this Tribunal to reject the appellant's appeal and all its requests, and to confirm the Directives issued by the Authority on the 16 May 2019, with all legal costs to be borne by the appellant.

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 hawn si tratta ta' appell sottomess mill- Appellanti wara illi hija irceviet il- Minded Letter minnghand l- Awtorita Appellata tas- sittax (16) ta' Mejju 2019. Illi fl-istess Minded Letter l- Awtorita Appellata infurmat lill- Appellanti b' passi li l- Awtorita kienet intezjonata tiehu kontra l-istess Appellanti u l- Appellanti inghatat terminu ta' xahar sabiex hija twiegeb ghall-istess Minded Letter.

2. Illi pero, fl-istess Minded Letter, l-Awtorita ordnat lill- Appellanti sabiex b' effett immedjat hija:

> *a) Refrain from accepting new clients;*
> *b) Refrain from offering its existing clients any services which it is authorised to provide in terms of the CSP Act and which it was not already providing thereto prior to the date of the Minded Letter; and*
> c) *Ensure that the Company's records (including client records, both current and past) in whatever form, be kept safe and not destroyed, erased or disposed of in any manner and be retained at the Company's registered office: Palace Court, Church Street, St Julians (the "Directives").*

3. Illi l- Appellanti wiegbet ghall-istess Minded Letter. Izda l-Appellanti interponiet l-appell odjern ukoll kontestwalment.

***A. Eccezzjoni preliminari:***

4. Illi l- Awtorita wiegbet ghall- appell billi resqet eccezzjoni preliminary fis-sens illi l-Appellanti ma kellha l-ebda dritt li tinperponi appell minn Minded Letter, u dan ghaliex il- Minded Letter harget skond dak li jipprovdi l-artikolu 7 tal- Kap. 529 li jobbliga lill- Awtorita sabiex tinnotifika lid- detentur ta' licenzja bl-intenzjoni li tali licenzja tkun se tigi kkancellata, u tali detentur ikollu zmien sabiex jirrispondi ghal tali notifika. Illi allura, skond l- Awtorita, il- Minded Letter m' hijiex Decizjoni skond dak li jipprovdi l- artikolu 16(2) tal- Kap. 529 jew l- Artikolu 21(9) tal- Kap. 330, u li ghaldaqstant dan it-Tribunal m' ghandux il- gurisdizzjoni li jitratta tali appell.

5. Illi huwa car illi il- Minded Letter kienet intiza sabiex l- Appellanti tkun mgharfa b' decizjoni li l- Awtorita kienet intenzjonata li tiehu fil- konfroint taghha. In segwitu ta' l-istess, l- Appellanti inghatat terminu sabiex hija twiegeb lill- Awtorita u b' hekk tkun tista tiribatti jew twiegeb ghal dak lilha notifikat fl-istess Minded Letter.

6. Illi mhux ikkontestat illi l- Appellanra wiegbet ghall- istess Minded Letter. Izda kontestwalment interponiet dan l-appell permezz ta' liema hija qeghdga tikkontesta l-akkuzi imressqa kontriha fil- mertu.

7. Illi certament illi l- intenzjoni tal- Minded Letter qatt ma kienet illi tkun Decizjoni definittiva. Id-Decizjoni definittiva fil- fatt ittiehdet permezz ta' Decizjoni tat- tmintax (18) ta' November 2019, mill- liema Decizjoni gie interpost appell [1] mill- Appellanti, liema appell qeieghed jigi deciz illum.

8. Izda l-istess Minded Letter, fil- parti finali taghha, hija maqsuma fi tnejn. Fl- ewwel parti hemm indikazzjoni tad- decizjoni li l- Appellata Awtorita kienet behsiebha tiehu fil- konfront ta' l-Appellanti, u cioe il- kancellament u revoka tal- licenzja taghha ta' CSP. Illi din il- parti m' hijiex decizjoni ezekuttiva. Izda fit-tieni parti l- Awtorita harget 3 Direttivi li kellhom effett ezekuttiv u immedjat.

9. Illi skond l-Artikolu 16(2) tal- Kap. 529:

*16 (2) Bla ħsara għad-dispożizzjonijiet ta' dan l-Att, jista' jsir appell quddiem it-Tribunal dwar Servizzi Finanzjarji dwar:*

> *(a) kull nuqqas li jitgħarraf applikant jew provditur ta'servizz lil kumpanniji awtorizzat biċ-ċħid tal-applikazzjoni tiegħu jew bit-tħassir tal-awtorizzazzjonitiegħu skont l-artikolu 7;*
> *(b) kull penali amministrattiva imposta taħt l-artikolu 9 ul-artikolu 15(8);*
> *(ċ) kull ċħid ta' applikazzjoni għal awtorizzazzjoni jewtħassir ta' awtorizzazzjoni skont l-artikoli 5 u 6;*
> *(d) kull direttiva mogħtija taħt l-artikolu 11 jew taħt l-artikolu 16(2)(b) tal-Att dwar l-Awtorità għas-ServizziFinanzjarji ta' Malta;*
> *(e) il-bdil ta' kull kundizzjoni jew li tiġi imposta xikondizzjoni ġdida skont l-artikolu 7.*

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10. Illi skond l-artikolu 21(9) tal- Kap. 330:

> *21(9) It-talba għad-deċiżjoni tat-Tribunal għandha tkun, għar-raġunijiet miġjuba mill-appellant –*
> *(a) jekk l-awtorità kompetenti tkunx, fid-deċiżjoni[2] tagħha,applikat ħażin xi waħda mid-dispożizzjonijiet ta' dan l-Att, jew ta' xi regolamenti maħruġin taħtu;*
> *(b) jekk id-deċiżjoni[3] tal-awtorità kompetenti tikkostitwixabbuż ta' diskrezzjoni jew tkunx inġusta manifestament:*

11. Illi huwa daqstant car illi l- Appellanti qatt ma kellha dritt li tinterponi appell mill-ewwel parti u fuq il- mertu tal- Minded Letter stante li f' dik il- parti l-Awtorita, skond dak li jipprovdi l-artikolu 7 tal- Kap. 529, kienet qeghdha taghti pre-avviz lill-Appellanti ta' decizjoni li kienet ghada trid tittiehed, u li tramite ta' l-istess pre-avviz, l-Appellanti inghata l- opportunita, skond il- Ligi, li twiegeb lill-istess Awtorita. Illi f' kull kaz il- mertu tal- Minded Letter huwa l-istess mertu tad- Decizjoni li kif diga inghad kienet il- mertu ta' appell [4] li ser jigi deciz illum.

12. Izda, kif diga inghad, l-Appellanti inghat tlett Direttivi li kellhom effett immedjat, u certament illi fuq din il- parti, l-Appellanti ghandhom dritt li jinterponu l- appell odjern. Dan ghaliex tali Direttivi certament li jinkwadraw ruhhom f' dak li jipprovdi l-Artikolu 16 (2) (b) tal- Kap. 330, u li allura, applikati il- provvedimenti ta' l-Artikolu 16(2) (d) tal- Kap. 529, appell jista jigi interpost.

13. Izda, dan it-Tribunal huwa marbut li jitratta appelli a bazi ta' l-aggravji hekk kif kontenuti fir-rikors promotur.

14. Illi huwa car illi fir-rikors promotur, l- Appellanti ma resqet l-ebda aggravju fuq dik il-parti tal- Minded Letter fejn l-Awtorita harget tlett (3) Direttivi li kellhom effett immedjat stante li l- aggravji imressqa huma kollha fuq il- mertu tal- Minded Letter.

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[2] Emfazi Mizjuda
[3] Emfazi Mizjuda
[4] Appell FST 6/19

15. Illi in vista ta' dan, minkejja li minn din il- parti tal- Minded Letter, l-Appellanti kellhom dritt li jinterponu l-appell odjern, huma ma resqu l- ebda aggravju minn dak kontenut f' dawn id-Direttivi, u ghaldqstant it-Tribunal m' ghandu l-ebda aggravju x' jikkunsidra f' dan ir-rigward.

***B. Mertu:***

16. Izda, anke sabiex ma jkunx hemm proceduri multiplici inutili, it-Tribunal xorta wahda ser jindirizza l- ahhar aggravju ta' l-Appellanti li fiha jghidu illi r-revoka tal- licenzja kienet qed issir b' mod immedjat u minnghajr pre-avviz. Illi hawn possibilment l-Appellanti qed tirreferi ghal dik il- parti tal- Minded Letter fejn l- Awtorita harget Direttivi li kienu applikabbli b' mod immedjat, u b' mod partikolari daw kir-Direttivi li kienu jobbligaw lill- Appellanti milli taccetta xoghol gdid ta' CSP.

17. Illi huwa car illi l- Artikolu 7 tal- Kap. 529 jirreferi ghall- kaz meta licenzja tkun ser tigi revokata. F' dak il- kaz d- detentur irid jinghata pre-avviz. Hekk fil- fatt sar fil-kaz odjern. Illi huwa l-istess il- principju ta' l- Artikolu 21 (17) tal- Kap. 330. Izda, id-Direttivi dwar li l- Appellanti ma tibqax taccetta xoghol gdid ta' CSP (hekk fir-realta qeghda tghid l- Awtorita fil- paragrafi (a) u (b) ta' din il- parti tal- Minded Letter) u li tizgura li zzomm id-dokumenti (paragrafu (c)), huma mizuri interim a bazi ta' l-artikolu 16(2)(b) tal- Kap. 330. Dak li ordnat li ghandu jsir f' dan il- kaz certament jinkwadra ruhu f' dawn il- poteri li ghandha l- Awtorita u it-Tribunal ihoss illi tali mizuri kienu gustifikati u in linea mal- mertu tal- kaz odjern. Certament li hawn ma kienx kaz ta' kancellament ta' licenzja b' mod immedjat, izda mizura illi kienet tipprojbixxi lill- Appellanti milli tiehu xoghol gdid ta' CSP. Dan mhux qieghed jinghad sabiex jimminimizza l-portata ta' l-istess Direttivi. Anzi, tali Direttivi, specjalment dawk fil- paragrafu (a) u (b) huma Direttivi serjissimi li certament kellhom impatt fuq l-operat ta' l-Appellanti. Izda pero, kif diga inghad, f' kuntest ta' Minded Letter li kienet qeghda tirrakomanda kancellament ta' licenza, tali Direttivi kienu legittimi u gustifikati. Illi ghaldaqstant, anke f' dan ir-rigward, it-Tribunal ma jsib xejn oggezzjonabbli jew kontra il- Ligi fid-Direttivi mahruga fl-istess Minded Letter u jqis illi tali Direttivi kienu gusti u legittimi.

Illi in vista tal- premess, it-Tribunal qieghed jilqa in parti l- eccezzjoni preliminari ta' l-Awtorita

u jiddikjara illi ma kien hemm l-ebda dritt ta' Appell minn dik il- parti tal- Minded Letter li trattat il- mertu ta' decizjoni li l-Awtorita kienet behsiebha tiehu, filwaqt li tichad l- eccezzjoni ta' l-Awtorita ghar-rigward ta' dik il- parti tal- Minded Letter li fiha kien hemm tlett (3) Direttivi li kellhom effett immedjat, izda in vista ta' dak li inghad izjed qabel, it- Tribunal qieghed jichad l- appell ta' l-Appellanti stante li d-Direttivi hekk mahruga kienu legittimi u validi. Illi in vista tal- premess kull parti ghandha tbghati l-ispejjez taghha ta' dan l-appell.