

# Regulatory Monitor

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## Proposed amendments to the Investment Services Act

Bill Number 151 of 2002 was introduced before the House of Representatives on the 9th April 2002. It proposes to amend various financial services laws, amongst which is the Investment Services Act 1994 (ISA). The proposed amendments – which are expected to come into force during 2002 – will bring about two fundamental changes.

The first change, which was long expected, relates to advertising. Today, Section 11 of the ISA provides that no person can issue or cause to be issued an investment advertisement without the consent of the MFSC. This meant that investment adverts were submitted to and approved by the MFSC before being published, thus licence holders had the benefit of regulatory approval and no risk of subsequent sanctions as long as the advert was actually published in the manner it was approved by the MFSC.

**When changed, the law will no longer require the prior approval of the MFSC. Instead the investment advert need only be approved by the licence holder itself.**

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## Protecting Yourself ..... from Data Protection

The Data Protection Act is intended to implement the EU Data Protection Directive 1995 (95/46/EC) into Maltese law. Part 8 of the Act, which establishes the office of the Data Protection Commissioner, came into force on the 22<sup>nd</sup> March 2002, and in all probability the rest of the Act will come into force later on this year.

In a nutshell, the scope of the Data Protection Act is to protect each individual's right to privacy with respect to the processing of personal data. Whether we are conscious of it or not, each business in Malta probably has in its possession, to a greater or lesser degree, information about individuals, usually the customers of the business. The Act addresses the issue of how that information can or cannot be used ("processing") by the business ("data controller"), and what measures have to be taken to ensure that such information is kept safely.

The Act does not define the items of information which constitute "personal data". Instead, "personal data" means any information relating to an identified or identifiable natural person, and an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. Therefore if the information in one's possession allows the identification of an individual, that information is personal data and falls under the Act's protection. The most obvious "identifiers" would be name, surname, address, identity card number or e-

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This will afford MFSA personnel more time to check and monitor that licence holders are complying with the ISA, the Guidelines and the Standard Licence Conditions whenever investment adverts are issued. Of course, failure to approve the advert according to law would result in an administrative penalty.

An advert is very subjective and may give rise to different interpretations. Notwithstanding the fact that the Authority may from time to time issue Guidelines on Advertising as a supplementary aid, one would still have to exercise a degree of attention when issuing adverts. Every word has to be weighed, every phrase has to be scrupulously examined. Questions as to whether a particular word or phrase may be conveyed as misleading by the prospective investor have to be asked. Care must be taken in order that accurate and precise information is given on the product.

**The second change falls in the realm of cultural shock: the introduction of personal liability in addition to the liability of the Licence Holder.**

Therefore, where a license holder or the manager, secretary, director or other person responsible for a license holder contravenes or fails to comply with any of the license conditions or with the requirements of Section 6 of the ISA, the MFSA may, impose on the license holder or on the aforementioned persons, as the case may be, an administrative penalty not exceeding Lm 40,000. A person upon whom a notice of an administrative penalty has been served, may within 30 days from receipt of such notice, appeal to the Financial Services Tribunal against the decision of the MFSA.

Section 6 of the ISA has been amended in a way to include also those guidelines and directives which the MFSA may publish from time to time in order to set minimum standards and requirements which have to be observed by license holders when issuing or approving investment adverts. Thus, failure to comply with such guidelines and directives would lead to a breach under Section 6 punishable by an administrative penalty not exceeding Lm 40,000.

**In view of these two fundamental changes to the regulatory framework for investment services, most licence holders are therefore seriously considering the reinforcement of their compliance functions, as well as their advertising approval process, by engaging outside counsel to double-check compliance with the detailed advert rules issued by the MFSA. ❖**

mail address, but of course there are many other "factors" which enable identification. Some factors are given special treatment: personal data that reveals race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, health, or sex life are classified as "sensitive personal data" and such data may only be processed with the explicit consent of the individual.

The controller of personal data must notify the Data Protection Commissioner before carrying out any wholly or partially automated processing operation or set of such operations intended to serve a single purpose or several related purposes. This notification is not necessary if the controller has appointed a personal data representative and this has been notified to the Commissioner.

**The Personal Data Representative**

The personal data representative has the function of independently ensuring that the controller of personal data processes personal data in a lawful and correct manner and in accordance with good practice and also points out any inadequacies to the controller. If the personal data representative has reason to suspect that the controller of personal data contravenes the provisions applicable for processing personal data and if rectification is not implemented as soon as practicable after being pointed out, the personal data representative must notify this situation to the

Commissioner. The personal data representative can also consult the Commissioner in the event of doubt about how the rules applicable to processing of personal data should be applied. Removal from office of a personal data representative shall also be notified to the competent authority.

**Given the obligations of a personal data representative, especially the duty to report to the Commissioner and the duty to assist data subjects, do not appear to allow an employee to be a company's personal data representative. In view of this most data controllers are considering to outsource this important function to suitably qualified external advisors.**

#### **Liability for Breach of Data Protection**

An individual may sue the controller who processes data in contravention of the Act for damages. The reference to damages is to be construed under normal rules of civil law i.e. actual damages and not moral damages. Nevertheless, recent cases in Malta have established the right to moral damages in cases of a constitutional nature, and since data protection is a by-product of the right to privacy, there is the possibility that the Courts would interpret violations of the Data Protection Act as giving rise to liability for moral damages.

If the Data Protection Commissioner concludes that personal data is processed or may be processed in an unlawful manner, he may order rectification, and if rectification is not effected or if the matter is urgent, the Commissioner may prohibit the controller of personal data to continue processing the personal data in any manner other than to store that data, and impose an administrative fine on the controller. The extent of the fine still has to be established by regulations.

Criminal offences are committed by any person who provides untrue information to data subjects or to the Commissioner, processes personal data in contravention of certain provisions of the Act,

transfers personal data to a third country in contravention of the Act or omits to notify processing to the Commissioner. The offence carries a fine not exceeding Lm10,000 or to imprisonment for six months or to both such fine and imprisonment.

Information is an asset that we take for granted. It is also a tool, one that is of growing importance in today's society. The Data Protection Act now addresses the concerns of how information about people is used. Personal data can give the controller a degree of power over the data subject, a power that can be abused. It is therefore important for all businesses to reassure their customers that their data is being handled properly and responsibly in accordance with the principles of data protection. This will build up the reputation of your business with a view to establishing stronger long-term customer relationships. ❖

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**CDF**  
ADVOCATES

20, Cannon Road, St. Venera HMR 07 MALTA  
Tel. (356) 21223334 Fax & Ans. (356) 21248594  
E-mail: [info@cdf.com.mt](mailto:info@cdf.com.mt) Web Site: <http://www.cdf.com.mt>