



INTERCONTINENTAL TRUST

International Tax & Management Services

INTERCONTINENTAL TRUST NEWSLETTER

VOLUME 4 - ISSUE 1

The Financial Services Act 2007

The Financial Services Act 2007 (“The FSA”) came into force on the 28th September 2007. As the Minister of Finance and Economic Development stated in parliament, the FSA is aimed primarily at:

1. Consolidating all amendments brought to the Financial Services Development Act (“FSDA”) since it was enacted in 2001
2. Streamlining and consolidating the whole licensing framework for various non-bank financial institutions and financial services providers; and
3. Revisiting and updating the conceptual approach to global business.

The licensing of financial services providers and global businesses are dealt with differently under the Act. Service providers, including global businesses carrying out financial services activities, are subject to more stringent licensing and supervisory conditions.

Furthermore, the Act adopts a new conceptual approach concerning the licensing of global businesses. The Act now distinguishes between businesses conducted by Mauritian Companies outside of Mauritius and businesses conducted in Mauritius. Only those conducting business outside of Mauritius may apply for a global business licence.

The Financial Services Commission (“FSC”) has issued a circular letter describing the new conceptual approach to global business.

PART A: GLOBAL BUSINESS

The FSA has adopted a new definition for global business under section 71(1) which provides as follows:

“...Subject to the other provisions of this section, a resident corporation which proposes to conduct business outside Mauritius may apply to the Commission for a Category One Global Business licence or a Category Two Global Business Licence...”

As per the new definition, the constitutive elements of global businesses are now:

1. A resident corporation
2. Conducting business outside Mauritius

Features of the new definition:-

1. Conduct business outside Mauritius

Previously, the requirements for obtaining a Category one or Category two global business licence were that the business had to be conducted with persons resident outside Mauritius and had to be conducted in a currency other than that of the Mauritius currency. Thus the business could have been conducted in Mauritius. The wordings “...from within Mauritius...” in section 19(2)(a) of the FSDA lend support to that. It required a Category One Global Business Company (“GBC1”) to have substance in Mauritius.

The criteria for the obtention of a global business licence under the old law were as follows:

GBC1 - Any business or other activity:

- Conducted with persons all of whom are resident outside Mauritius
- Conducted in a currency other than the Mauritius Currency
- As specified in the second schedule

GBC2 - Any business or other activity:

- Conducted by a private company incorporated or registered in Mauritius
- Not conducted in Mauritius Currency
- Not conducted with persons resident in Mauritius

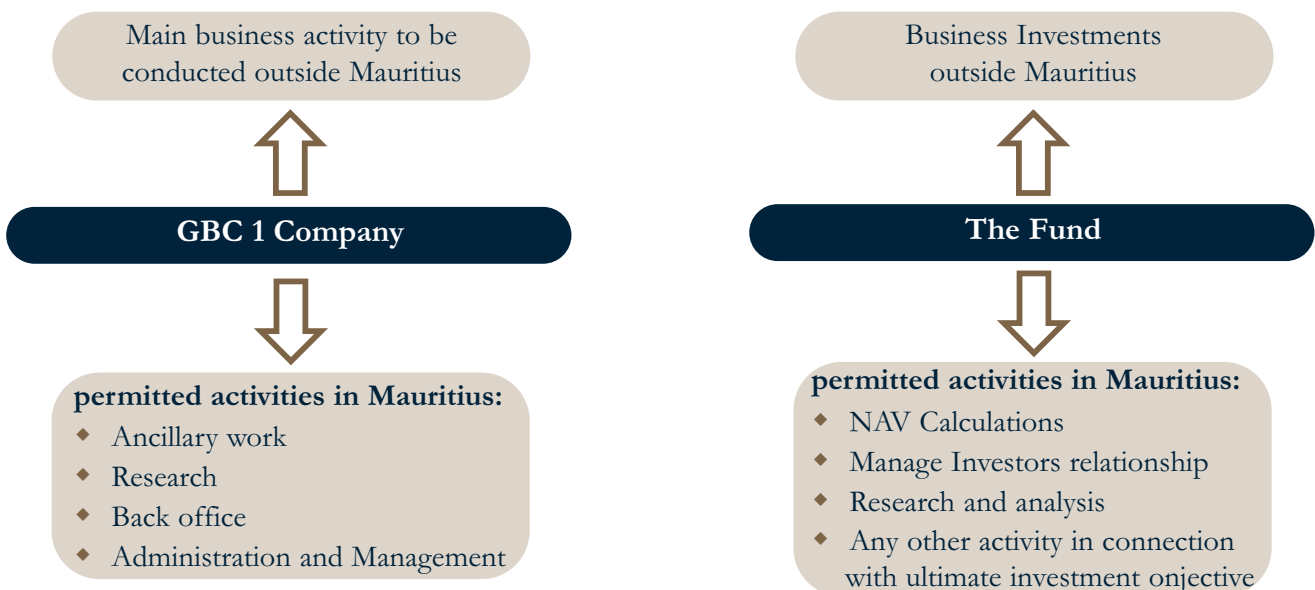
In contrast, a literal interpretation of section 71(1) of the new Act would suggest that Global Business companies, especially GBC1, cannot undertake any business operations or transactions in Mauritius since the business has to be conducted outside of Mauritius. However, the Minister of Finance and the Chief Executive of the Financial Services Commission were quick to dissipate any misunderstanding concerning the concept of doing business outside Mauritius. They affirmed that they would in fact encourage GBC1 to have substance in Mauritius. The law as will be applied by the FSC will enhance substance and promote value-addition by allowing a larger scope of work to be conducted in Mauritius by a GBC1. The Minister stated that the test as to whether the business is being conducted outside Mauritius is not a narrow one.

1.1. The ultimate purpose test

In determining whether the business is conducted outside of Mauritius, the FSC proposes to consider all relevant circumstances of each case and in particular, will apply the ultimate purpose test. Under that test, it will be necessary to ascertain whether the ultimate purpose of the company is an investment or a service to be made or provided outside Mauritius. Questions like what is the business of the company and where the business is conducted provides useful guidance as to whether the business is conducted outside of Mauritius. Ancillary work, research, back office administration, management will not be considered as the business of the company.

To illustrate the above, we refer to the example of a collective investment scheme (“CIS”) set-up in Mauritius and investing in another country. The Fund will still qualify for a Global Business Licence even if it employs staff in Mauritius to do its NAV calculations, manage investor relationships, carry out research and analysis in Mauritius and carry out all other activities required in connection with the ultimate investment objective.

In the example above, although the administration of the fund is conducted in Mauritius, the ultimate purpose of the fund is to make investments. Since the investments are effected outside of Mauritius, the business will deem to be conducted outside of Mauritius and thus qualifies for a global business licence.



1.2. Overall structure of the business

Moreover, when determining whether the business is conducted outside of Mauritius, the FSC will also look at the overall structure of the business. For example, a Fund Manager providing its services to a fund holding a category one global business licence. Despite the fact that the Fund Manager is providing its services to a Mauritius company, the Fund Manager will still qualify for a global business licence since the services are provided in view of the ultimate purpose of the fund which is investments to be made outside of Mauritius.

2. Resident Corporation

GBC 1

- ◆ Body corporate - public or private formed or registered under the Companies Act 2001
- ◆ Trust, societe or partnership or any body of persons governed by the laws of Mauritius

Resident Corporation Section 71

GBC 2

- ◆ Only a private company registered under the Companies Act 2001 may apply for a Category 2 Global Business licence.

Under section 71, only corporations formed or registered in Mauritius can apply for GBL. However, the definition of corporation in the Act is wider and does not include restrictions as to the place of formation and registration of the company.

3. Managed and controlled from Mauritius

While a GBC1 is to carry out its business outside of Mauritius, its management and control has to be in Mauritius. Section 71(4)(a) of the FSA requires the FSC, when considering an application for or a renewal of a GBC1, to have regard as to whether the company will be or is being managed from Mauritius. This new provision now gives statutory force to the concept of “control and management” in Mauritius.

Section 71(5) (b) further sets out the factors that the FSC may have regard to in deciding whether the corporation is managed and controlled from Mauritius. The section provides as follows:

“(b) In determining whether the conduct of business will be or is being managed and controlled from Mauritius, the Commission shall have regard to such matters as it may deem relevant in the circumstances and without limitation to the foregoing may have regard to whether the corporation -

- (i) shall have or has at least 2 directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgement;*
- (ii) shall maintain or maintains at all times its principal bank account in Mauritius;*
- (iii) shall keep and maintain or keeps and maintains, at all times its accounting records at its registered office in Mauritius;*
- (iv) prepare or proposes to prepare its statutory financial statements and causes or proposes to have such financial statements to be audited in Mauritius;*
- (v) provides for meetings of directors to include as least 2 directors from Mauritius.”*

However, the list in section 71(5)(b) is only indicative of the factors that may be considered by the FSC such that a corporation not satisfying the conditions of section 71(5)(b) may still qualify for a global business licence.

Nonetheless, it would be in the interest of the Company intending to take the benefit of tax treaties to comply with section 71(5) (b). The provisions of section 71(5)(b) are almost similar to the undertakings required by the Circular Letter issued by the FSC with regard to the enhanced procedure relating to the issue of a Tax Residency Certificate. Under the circular letter, a company had to provide the FSC certain undertakings before the FSC approved the issuance of the TRC to the Company.



4. Global business activities.

Section 71 imposes no restriction as to the activities that can be carried out by a GBC1. Under the FSDA, there was a prescribed list of activities that a GBC1 could undertake. GBC1 are now able to conduct any activity, financial or non-financial services, provided that it is not unlawful or contrary to public interest or does not cause prejudice to the good repute of Mauritius as a Financial Services Centre.

On the other hand, GBC2 cannot carry out any activity as listed in the fourth schedule to the Act.

- Distribution of financial products
- Factoring
- Leasing
- Occupational Pension Scheme
- Pension fund Administrators
- Pension scheme Management
- Retirement Benefit Scheme
- Superannuation Funds
- Registrar and Transfer Agent
- Treasury Management
- Such other financial business activity as may be specified in the FSC Rules.

A GBC1 may conduct

- ◆ Financial services (provided the relevant licence/ authorization/ approval/ registration is obtained)
- ◆ Non-Financial services



Business Activities



A GBC2 may conduct any activity except

- ◆ Financial services including banking, holding or managing a CIS
- ◆ Corporate services
- ◆ Trusteeship services by way of business

PART B:

REGULATION OF FINANCIAL SERVICES

As mentioned earlier, the licensing and supervision of financial services providers and Global Business entities will be dealt with separately under the Act. Part IV, in particular, provides for the regulation of financial services providers.

Applicability of the part IV:

1. Part IV applies to all persons carrying out financial services.

Financial services is defined in the second schedule to the Act as being the carrying out of the following activities:

- Assets Management
- Credit Finance
- Custodian Services (non-CIS)

A quick comparison with the FSDA reveals that the Financial Services Act has broadened the range of activities that qualifies as financial services.

Also where under any relevant Act, the conduct of an activity is subject to the requirement of a licence, the application for such licence shall be made in accordance with Part IV. The relevant Acts are the Insurance Act 2005, Protected Cell Companies Act 1999, Securities Act 2005, Securities (Central Depository, Clearing and Settlement) Act and Trust Act 2001. As such, licensing of CIS, CIS Managers, CIS Administrators and Custodians will have to be made in accordance with Part IV of the FSA.

2. Most importantly Part IV would not apply to corporation holding a Global Business Licence unless that corporation also carries out a financial services activity. As mentioned above, GBC1 are allowed to conduct financial or non-financial activities. Where the GBC1 is also conducting financial services, the GBC1 would also be required to apply under Part IV for a licence / certificate/ authorization to conduct financial services.

It is to note that the application for a licence to conduct financial services and also for a Category One Global Business Licence will be dealt with simultaneously by the FSC.

Intercontinental Trust Ltd is regulated by the Financial Services Commission in Mauritius.

For any additional information please contact: Ben Lim or Tommy Lo or Yan Ng at

Intercontinental Trust Limited

Email: intercon@intnet.mu

Web Site: www.intercontinentaltrust.com

DISCLAIMER

The information in this brochure was prepared by Intercontinental Trust Limited to provide potential clients with a broad overview of the opportunities available in Mauritius. While all reasonable care has been taken in the preparation of this brochure, Intercontinental Trust Limited accepts no responsibility for any errors it may contain, whether caused by negligence or otherwise, or for any loss, however caused, sustained by any person that relies on it. Readers are advised to consult with appropriate, qualified professional advisors before taking action. Intercontinental Trust Limited will be pleased to discuss any specific issues.