"*Trust us with your money*!" – an overview of how the law treats funds placed with banks, investment services providers and collective investment schemes

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We probably all have, at some point or another, placed funds with banks or with investment services providers or collective investment schemes. The likelihood is that when doing so we did not give much thought to the nature of the legal relationships created thereby or to the consequences, particularly in terms of the resulting rights and corresponding duties, that could follow from such placements.

In trying to have a better understanding of the laws that govern these matters a useful starting point could be a "broad brushstroke" analysis of the main legal "institutes" or sources that may possibly govern the ensuing legal relationships.

I. *Unpicking the basis of the legal relationship between a bank, etc, and its customer*

A. First, and foremost: a contract!

The relationship between a bank (or, otherwise, between an investment services provider or a collective investment scheme) and its customer is primarily contractual in nature.[15] In application of the general principle set out in article 993 of the Civil Code[16] all contracts must be 'carried out in good faith.' This would suggest that each party to the contract, naturally including a bank or investment services provider or collective investment scheme, owes a duty of good faith towards the other party.[17]

Furthermore, a contract that is entered into in good faith is to be deemed binding on the parties thereto 'not only with regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, *or law*, is incidental to the obligation, *according to its nature*.'[18]

B. Money: the quintessential fungible and consumable

Naturally, at least in the main part, banks, investment services providers and collective investment schemes deal in and with money, and possibly other investment instruments. Indeed, these are their principal stock-in-trade! We are here mainly interested in money. It is recalled that money (and more generally, funds) is deemed to be 'fungible,' in the sense that it is *generic*, as opposed to *specific*, in nature. A fungible thing is one that may be easily substituted by another of the same kind or *genus*.[19] A corollary to this is the principle that an

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[15] In the English case N. Joachimson v. Swiss Bank Corporation [1921] 3KB 110, 117, it was held that in 'the ordinary case of banker and customer, their relations depend entirely or mainly on implied contract.'

[16] Chapter 16 of the Laws of Malta.

[17] See, Saliba v. Pace *et*, Commercial Court, 19th June 1973.

[18] Article 993 of the Civil Code [emphasis added].

[19] A. Torrente, P. Schlesinger, Manuale di Diritto Privato, Tredicesima Edizione (1990), Dott. A. Giuffrè Editore, § 60, p 123: 'fungibile è il bene che può essere *sostituito* indifferentemente con un altro, in quanto

obligation to pay (or to repay) a given quantity of fungible things is not extinguished by the actual loss of the things themselves. The obligation (of payment or repayment) remains intact in respect of things of the same kind.

A further distinction in this regard may be drawn between 'consumable' and 'inconsumable' goods. Consumable goods are those goods the benefit whereof can only be enjoyed or secured through the single use, or *alienation*, thereof.[20] This would clearly be the case, through alienation, for money or funds, and therefore the natural and logical conclusion to be drawn from these considerations is that money is both a 'fungible' and a 'consumable' thing.

C. The mandatary or agent

Banks, investment services providers and also (albeit possibly to a lesser degree) collective investment schemes, can be seen, at times, as acting as the mandataries or agents of their customers. A mandate (or procuration) is a contract whereby a person (in this hypothesis, the customer) gives to another (in this context, the bank *et cetera*) 'the *power*[21] to do something for him'.[22] In any such situation the mandatary is 'bound to carry out the mandate so long as he is vested therewith, and in case of non-performance he is answerable for damages and interest.'[23] In general at law the mandatary is 'answerable not only for fraud, but also for negligence in carrying out the mandate.'[24]

D. Fiduciary obligations

At law fiduciary obligations may come into being through 'assumption of office or behaviour' whenever a person (the "fiduciary") 'holds, exercises control or power of disposition over property for the benefit of other persons,'[25] or 'receives information from another person subject to a duty of confidentiality' in circumstances where the recipient of that information is aware, or ought reasonably to be aware, that the 'use of such information is intended to be restricted.'[26]

Furthermore, if a person is either vested with ownership or has registered in his or her or its name or holds or exercises control or powers of disposition over property subject to fiduciary obligations as aforesaid, the property in question is considered to be "ring-fenced" at law by being deemed to 'constitute a distinct and separate patrimony consisting of all relative rights and obligations with respect thereto.'[27] And the said property is accordingly not subject to claims or rights of action of the fiduciary's own creditors, except as otherwise provided in the Civil Code or in special laws.[28]

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non interessa – secondo la comune valutazione fatta dalle parti – avere proprio quel bene [*omissis*] ma una data quantità di beni di quel genere. [*Omissis*] *il danaro è eminentemente fungibile*' [emphasis added].

[20] Ibid, § 61, p 125: 'Consumabili sono, perciò, *quei beni che non possono prestare utilità all' uomo* senza perdere la loro individualità o *senza che il soggetto se ne privi*' [emphasis added].

[21] Or, "authority."

[22] Article 1856(1) of the Civil Code [emphasis added].

[23] Article 1873(1) of the Civil Code.

[24] Article 1874(1) of the Civil Code.

[25] Article 1124A(1)(*b*) of the Civil Code.

[26] Article 1124A(1)(*c*) of the Civil Code.

[27] Article 1124C(1) of the Civil Code.

[28] Ibid.

If the property subject to fiduciary obligations is only "in the possession of" the fiduciary but still owned by the beneficiary, the parties to that arrangement have a greater degree of freedom in the determination, by their reciprocal agreement, of their respective duties and rights.[29] If on the other hand the relationship involves the fiduciary ownership of the property (by the fiduciary), with regard to third parties such ownership is equivalent to ownership in the full sense of that term (in accordance with the provisions of Title II of Part I of Book Second of the Civil Code), whereas as between the fiduciary and the beneficiary those same rules of law apply as however potentially 'modified by' the provisions of § VII of Sub-title III of Title IV of Part II of Book Second of the Civil Code, and those of any special laws and other provisions of the Civil Code which may be applicable.[30]

In each of the aforesaid hypotheses the fiduciary has a duty at law to carry out his or her or its obligations, 'in all cases,' 'with utmost good faith' and to 'act honestly.'[31] In addition to the foregoing, general, duties a fiduciary is bound by other duties which may however be excluded or modified *inter alia* by the express terms of any instrument in writing. These duties, which are set out in article 1124A(4) of the Civil Code, include the following: (*a*) to exercise the diligence of a *bonus paterfamilias* in the performance of the fiduciary duties; (*b*) to avoid any conflict of interest or any conflict of trust or fiduciary obligations; (*c*) not to receive undisclosed or unauthorised profit from the position or functions nor to permit any other person to do so; (*d*) to act impartially when the fiduciary duties are owed to more than one person; (*e*) to keep the property held as a fiduciary segregated from all other property; (*f*) to maintain suitable records in writing of the beneficiary's interest; (*g*) to render account in relation to the property held under fiduciary obligations; (*h*) to return on the beneficiary's demand or upon the termination of the fiduciary obligations the property held under fiduciary obligations; (*i*) to keep confidential the affairs of the beneficiary; and (*j*) to carry out the purpose designated for the fiduciary arrangement in place in relation to the property held by the fiduciary.

Fiduciary duties may be 'implicitly waived or varied in certain circumstances' relating to matters or considerations such as the scope, purposes and contexts of the fiduciary obligations imposed and, or the method of engagement of the fiduciary and, or the manner of the acceptance or assumption or undertaking of the fiduciary obligations.[32]

E. Enter the regulator!

Finally, when looking into how banks and investment services providers (etc) are expected to conduct themselves when handling their customers' money, funds or assets, we also need to briefly consider special laws that apply to these "regulated" business sectors, principally as a result of EU-wide Directives and Regulations that have been adopted over the years, particularly following the 2008 financial crisis. Of special interest in this regard are the Depositor Compensation Scheme Regulations [S.L. 371.09] (the "Depositor Compensation Regulations"), and the Investment Services Act (Control of Assets) Regulations [S.L. 370.05] (the "Investor Assets Regulations"). The Depositor Compensation Regulations implement the relevant provisions of Directive 2014/49/EU of the European Parliament and of the Council of the 16th April 2014 on deposit guarantee schemes. The Investor Assets Regulations on the other hand implement certain provisions of the Commission Delegated Directive (EU) 2017/593 of

[29] Article 1124C(3) of the Civil Code.
[30] Article 1124C(2) of the Civil Code.
[31] Article 1124A(4) of the Civil Code.
[32] Article 1124A(9) of the Civil Code.

the 7th April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to *inter alia* safeguarding of financial instruments and funds belonging to clients.

In terms of regulation 2 of the Depositor Compensation Regulations a "deposit" is 'a credit balance, including, as the case may be, any interest accrued thereon, which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit.' In a nutshell, the Depositor Compensation Regulations facilitate the recovery of "compensation" by depositors from the Depositor Compensation Scheme established under regulation 4 thereof in the event that deposits that are due and payable to depositors by a credit institution being a participant in the Depositor Compensation Scheme are not paid by that credit institution 'under the legal or contractual conditions applicable thereto:' either when the competent authority (the Malta Financial Services Authority or "MFSA") has determined that in its view the credit institution in question 'appears to be unable,' at that time, for 'reasons which are directly related to its financial circumstances, to repay the deposit' and that the same credit institution 'has no current prospect of being able to do so;' or if a court or tribunal has made a ruling 'for reasons which are directly related' to that credit institution's 'financial circumstances' which 'has the effect of suspending the rights of depositors to make claims against it.'

The Investor Assets Regulations impose strict duties on persons 'acting in the course of rendering an investment service'[33] under the Investment Services Act,[34] who are entrusted with 'the control of assets belonging to a customer' in 'the course of rendering an investment service to such customer.'[35] For the purposes of the Investor Assets Regulations the term "assets" is taken to mean 'movables and immovable property of any kind,'[36] and accordingly clearly also includes money or funds.[37]

The primary duty imposed by the Investor Assets Regulations upon investment services providers who hold customer assets in the course of their activities is to hold such assets '*solely for and on behalf of and in the interest of the customer*.'[38] The Investor Assets Regulations also clearly require investment services providers to 'safeguard [customer] assets and the interest of the customer therein.'[39]

Towards that end investment services providers are called to carry out their functions and duties relating to the safeguarding of customer assets entrusted to them in the course of their activities in accordance with the provisions of the Investor Assets Regulations, the terms and conditions of agreements entered into with their customers, the conditions set out in their investment services licences and other requirements that may be laid down in that regard by the MFSA.[40]

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[33] Including custody of assets.
[34] Chapter 370 of the Laws of Malta.
[35] Regulation 3(1) of the Investor Assets Regulations.
[36] Regulation 2(2) of the Investor Assets Regulations.
[37] Regulation 9(1) of the Investor Assets Regulations refers specifically to the receipt of 'customer money.'
[38] Regulation 3(1) of the Investor Assets Regulations [emphasis added].
[39] Regulation 7(1) of the Investor Assets Regulations.
[40] Regulation 7(2) of the Investor Assets Regulations.

Having made the foregoing considerations, we may proceed to describe and distinguish a number of different situations or circumstances relating to funds placed by customers with banks, or with investment services providers or collective investment schemes.

II. *Placing funds in accounts held by customers with banks*

The placement of funds by a customer in an account held by that customer with a bank is not treated as a deposit, in the legal sense of that term, at law.

Under our law 'deposits' are governed by the provisions of Title XIX in Part 2 of Book Second of the Civil Code. It is important to recall that at law only movable things can be the subject of a deposit.[41] In theory this would include money (or more generally, funds). Article 1891 in that Title provides that deposit is 'a contract whereby a person receives a thing belonging to another person subject to the obligation of preserving it and of returning it in kind.' Interestingly a depositary, being 'a person who holds a thing in the name of another person,' cannot prescribe in his or her or its own favour.[42] The placement of money or funds with a person against an undertaking by the recipient (or depositary) to preserve that 'deposit' and to 'return it in kind' would therefore possibly, and at face value, qualify as a 'deposit' at law.

However, as previously observed,[43] money is the quintessential fungible and consumable object. In consequence of this feature article 1894 of the Civil Code provides that a deposit of money, or of other things which are consumed by use, is regulated by the laws relating to the loan for consumption (or, *mutuum*), whenever power is granted to the depositary or recipient to make use of the thing deposited on the sole condition of returning as much of the same kind and quality. The key here is the power or ability of the depositary or recipient to have the full, and unfettered, *use* of the thing or things so loaned (or, 'deposited') as long as the same quantity and quality of the thing or things so deposited is or are returned to the same depositor at the time agreed upon for that purpose by the parties to the agreement.

In a similar vein article 1842 of the Civil Code states that a *mutuum*, or loan for consumption, is a contract whereby one of the parties delivers to the other a certain quantity of things which are consumed by use, *subject to the obligation of the borrower to return to the lender as much of the same kind and quality*.'[44] The borrower therefore becomes the "owner" of the things loaned, and the loss thereof falls upon the borrower, independently of the manner in which such loss may have occurred.[45] The liability resulting from the loan of money is 'for the same numerical sum stated in the contract.'[46]

This understanding is reflected in the landmark decision delivered by the House of Lords in the United Kingdom in the names Foley v. Hill.[47] This judgment highlighted the bank's entitlement to employ deposited funds for its lending and operational activities, subject to the customer's right to repayment, either upon demand or on the lapse of a pre-determined term. In Lord Cottenham's words:

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[41] Article 1892(2) of the Civil Code.
[42] Article 2118 of the Civil Code.
[43] In Part I B above.
[44] Emphasis added.
[45] Article 1843 of the Civil Code.
[46] Article 1844(1) of the Civil Code.
[47] (1848) 2 H.L. Cas. 28.

> "money, when paid into a bank, ceases altogether to be the money of the principal … it is then the money of the banker; who is bound to return an equivalent sum to that deposited with him when he is asked for it."

It is self-evident that this statement is perfectly consistent with the legal principles that underpin and describe a loan for consumption under Maltese law. This position is also supported by a long line of judgments delivered by our Courts stretching back to 1900.[48] In World Water Fisheries Limited v. Bank of Valletta plc the First Hall of the Civil Court stated in its judgment that '*f'tali ċirkostanzi dan ix-xorta ta' depożitu għandu aktar mill-mutwu kif spjegat minn artikolu 1842 tal-Kodiċi Ċivili … fehma msaħħa aktar mit-termini ta'l-artikolu 1894 ta'l-istess Kodiċi*.' On this basis the Court concluded that like any other contract, the deposit of money with a bank is governed not only by the express terms agreed between the parties, but also by those implied obligations which the parties are reasonably expected to observe, and which ultimately define their respective rights and duties.

The treatment of funds held with a bank by its customer is also consistent with the definition of the term "deposit" set out in the Depositor Compensation Scheme[49] which acknowledges and emphasizes in particular the bank's obligation 'to repay' such deposits 'under the legal and contractual conditions applicable.'

For the sake of having a complete and clear analysis, a distinction ought to be drawn between a loan for consumption, or *mutuum*, and a loan for use, which at law may be either a *commodatum* or a *precarium*. The *commodatum* predicates the borrower's right to "use" the thing loaned, either for a specified time or purpose, with the corresponding obligation *to restore the very same thing* to the lender once that time or purpose is exhausted.[50] A *precarium* operates very much on the same lines as a *commodatum*, with the only difference being that in the former the lender has the power to claim the thing loaned back at his or her or its pleasure. The obligation incumbent on the borrower to restore 'the thing itself' would seem to suggest that neither the *commodatum* nor the *precarium* appear to be a good fit in practice (and daily reality) for a loan of money (or, funds) or, for that matter, of any other fungible and, or consumable object.

It is emphasized that the *mutuum* is a contract, and as with any other contract the will of the parties to the contract is largely (possibly subject only to certain terms that may be implied by law to protect "consumers'' or parties with a "weaker bargaining hand") sacrosanct; and once legally entered into the contract has the force of law for the contracting parties.[51]

The parties to a *mutuum* have significant leeway in setting out the terms and conditions of their agreement. In particular, whilst at law no interest is due in respect of *mutuum* unless this is

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[48] Miggiani v. Galea *noe*, Commercial Court, 15th December 1900 [Vol XVII, part 3, p 105]; Schembri *noe* v. Galea *noe*, Court of Appeal, 12th November 1919 [Vol XXIV, part 1, p 971]; Parthenis v. Warner on behalf of Barclays Bank, Court of Appeal, 18th January 1932 [Vol XXVIII, part 1, p 681]; Camilleri v. Camilleri *noe et*, Court of Appeal, 11th April 1958 [Vol XLII, part 1, p 208]; Annie Mizzi v. HSBC Bank Malta plc, Court of Appeal (Inferior Jurisdiction), 9th July 2014; and Kevin Attard v. Romina Tonna Vella, First Hall of the Civil Court, 10th October 2016.

[49] See Part I E above.

[50] Article 1824 of the Civil Code.

[51] Article 992(1) of the Civil Code.

expressly agreed upon,[52] the parties are permitted to 'stipulate for interest on a loan' of money.[53] Moreover, the law steps in if the borrower has bound himself or herself or itself to pay interest without fixing the rate thereof, in which case interest is deemed by law to be fixed at the rate of five *per centum* (5%) *per annum*.[54]

It is submitted that in principle a loan for consumption is not compatible with, and should not give rise to, fiduciary obligations, since as previously observed under such an arrangement and the legal relationship resulting therefrom 'the borrower becomes the owner of the thing lent.'[55]

It is important to bear in mind in this regard that, once a deposit of money made by a customer with a bank is considered to be a *mutuum*, the action for the return of money given on loan is barred by the lapse of five years from the date when the repayment first falls due.[56] If no term for the repayment of a loan has been agreed to, say in the case of a current or call account, or if the loan is repayable 'on demand' or 'within a short time,' there exists no *exordium obligationis* from which prescription starts running, and accordingly prescription can only start to run from the day on which an express demand for repayment is made by the creditor (or customer).[57] If, on the other hand, the money placed by a customer with a bank were to be treated as an actual "deposit,"[58] it would be impossible at law for the bank, as a depositary, to prescribe[59] in its 'own favour.'[60] Interest on a loan for consumption is always subject to a 5-year prescription.[61]

To the extent that the bank with which a deposit is placed is a participant in the Depositor Compensation Scheme referred to in Part I E above, the depositor who placed such deposit may receive compensation through the said Scheme in the event that the bank is itself unable to repay that deposit on the grounds set out in the Depositor Compensation Regulations.

III. *Withdrawals of funds in accounts held with banks*

On the understanding that funds 'deposited' by a customer with a bank are so placed on the basis of a loan for consumption made by the customer to the bank on the terms expressly and, or impliedly agreed upon between them, a withdrawal of funds made by the same customer on his or her or its request from the customer's "account" held with the bank is to be construed in the first place as a repayment (in whole or in part) by the bank of the loan made to it by the customer.

It goes without saying that for such withdrawals to be valid and legally "enforceable" they must be made by the customer in accordance with the terms of the agreement in place between the same customer and the bank. Accordingly, withdrawals from current or call accounts may be made "on simple demand." Those made from fixed term accounts may only be made upon the

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[52] Article 1849 of the Civil Code
[53] Article 1850(1) of the Civil Code.
[54] Article 1854 of the Civil Code.
[55] Article 1843 of the Civil Code.
[56] Article 2156(*e*) of the Civil Code.
[57] Camilleri v. Cachia, First Hall of the Civil Court, 22nd February 1922 [Vol. XXV, part 2, p 42].
[58] As per article 1892(1) of the Civil Code.
[59] In other words to take over the ownership of that money through acquisitive prescription or to prevent the return thereof on the grounds of extinctive prescription.
[60] Article 2118 of the Civil Code.
[61] Article 2156(*d*) of the Civil Code.

lapse of the term agreed upon, or against the payment by the customer to the bank of a "penalty" or "damages" or "breakage costs" if made prior to the lapse of the term.

IV. *Using funds in accounts held with banks by transferring those funds to third parties*

If the bank carries out or performs any transaction acting upon the instructions, and therefore on behalf, of its customer in relation to funds held by the latter with it, being a payment out of the customer's "account" held with the bank and made in favour of a third party indicated for that purpose by the customer, other than being a repayment (in part or in whole) of the loan originally made by the customer to the bank, the bank is in that hypothesis also acting as a mandatary or agent of its customer. In any such situation the customer is effectively delegating the bank to pay a third party on the customer's behalf. There are therefore elements of mandate or agency that are, so-to-say, "superimposed" onto the underlying loan for consumption. These elements should presumably entail the considerations and consequences briefly outlined in Part I C above in relation to mandataries and agents.

The question that naturally arises in this regard is if the bank is also to be considered a fiduciary of its customer in such situations. The inter-play of the provisions of articles 1124A(1)(*b*) and 1124C, that are referred to in Part I D above, would appear to point to that conclusion. However, with regard to funds 'withdrawn' through the use of cheques drawn against the bank our Courts have in the past, and before the coming into force of the provisions in question, taken a different approach,[62] holding that cheques are governed by the special rules on bills of exchange found in the Commercial Code,[63] and that accordingly the bank has no fiduciary obligations in such situations. The soundness of that judgment is perhaps questionable not least because whereas article 260 of the Commercial Code makes it crystal clear that certain provisions applicable to bills of exchange 'apply to promissory notes' there is no corresponding provision relating to 'drafts or cheques on bankers or cashiers.' Indeed article 262 of the Commercial Code that deals with drafts or cheques simply provides that these must be dated and specify the sum to be made whilst being made payable to a person named therein or to his order (or to bearer), and that they must be 'payable on presentment.'[64]

V. *Placing funds with banks solely and specifically for the purpose of transferring them to third parties*

It is strongly arguable that the placement of funds with a bank by a customer *solely and specifically* for the purpose of transferring those funds (or, more accurately, 'the same numerical sum' so placed) to a third party on the customer's behalf does not, in any shape or form, partake of a loan for consumption made by the customer to the bank, but is to be treated as a pure mandate (or procuration) made or given by the customer (as mandator) to the bank (as mandatary or agent), which mandate would also, for the reasons explained further below,

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[62] See Daniel *sive* Danny Cremona *noe* v. Narrareno *sive* Ronnie Zammit, Court of Appeal, 3rd April 1992.

[63] Chapter 13 of the Laws of Malta.

[64] It is also interesting to note that in terms of article 1124J(c) of the Civil Code, 'the provisions of this Title [in other words, those of Title IV of Part II of Book Second of the Civil Code] shall apply to all fiduciary obligations, which exist at the time of coming into force of these provisions [23rd November 2004], or any amendments thereof, even if arising before such date, as well as any fiduciary obligations arising thereafter: provided that such provisions shall not apply retrospectively where their effect is to deny or restrict any vested right or create any liability where such did not occur under law prior to such provisions coming into force.'

give rise to a fiduciary relationship between the customer (as beneficiary) and the bank (as fiduciary), and therefore to fiduciary obligations, possibly tempered by contract.

The "inter-section" between a mandate and fiduciary obligations is explained through article 1871A(1) of the Civil Code in terms of which a person who 'holds property for another' is deemed to hold such property subject to fiduciary obligations, and the resulting arrangement and relationship between the parties are regulated both by the provisions of the Civil Code relating to mandate as well as by those relating to fiduciary obligations. The language of this provision appears to suggest that the very act of 'holding property for another' triggers the coming into existence of the fiduciary obligations described in article 1124A(4) of the Civil Code, and that are referred to in Part I D above.[65]

The conclusion to be drawn from the foregoing is that whenever a bank accepts the placement with it by its customer of funds *solely and specifically* for the purpose of transferring 'the same numerical sum' so placed to a third party on the customer's behalf and instructions, the relationship thereby established between that customer and that bank is one governed by the rules of law relating to mandate and those governing fiduciary obligations.

VI. *Placing funds to be invested by investment service providers (including, to the extent applicable, banks)*

The placement of funds (or, for that matter, of any asset) by a customer with an investment services provider in order for the same to be invested is, by inference, in the first place governed by:[66] (i) the provisions of the Investor Assets Regulations; (ii) the terms and conditions of any agreement entered into between the investment services provider and its customer; (iii) the conditions set out in the investment services provider's licence; and (iv) other requirements that may be laid down in that regard by the MFSA.[67] At its core however, when what is placed by a customer with an investment services provider is a movable thing,[68] including money, such placement still remains a "deposit" in terms of law,[69] and accordingly the investment services provider may never claim to acquire ownership of that "deposit" in its favour through prescription.[70]

In this context regulation 3(3) of the Investor Assets Regulations provides that '*except as expressly provided in the agreement entered into between the subject person and the customer* and notwithstanding the provisions of the Civil Code *the control of assets belonging to a customer by a subject person shall not give or be deemed or construed to give to the subject person any rights over such assets nor shall it create any form of loan between the subject person and the customer* and this notwithstanding the nature of the assets or the rights or

[65] Interestingly however, article 1872 of the Civil Code provides that the provisions of that Code do not 'affect the provisions of the Commercial Code, or *of any other special law or other usages of trade*' [emphasis added].

[66] Although no hierarchy is established, it is likely that in the event of any conflicts the provisions of the Investor Assets Regulations would prevail, followed by any conditions set out in the service provider's licence and additional requirements established from time to time by the MFSA, and lastly by the terms and conditions of the agreement in place between the customer and the investment services provider.

[67] Regulation 7(2) of the Investor Assets Regulations.

[68] By reference to article 1892(2) of the Civil Code.

[69] As per article 1891 of the Civil Code: 'deposit, in general, is a contract whereby a person receives a thing belonging to another person subject to the obligation of preserving it and of returning it in kind.'

[70] Article 2118 of the Civil Code.

obligations of the subject person in relation to the assets.'[71] Furthermore, it is specifically provided that the customer retains a right of ownership over those assets even if they are 'registered in the name and title of or are otherwise vested in the subject person.'[72]

The effects of article 1894 of the Civil Code are expressly negated by regulation 3(2) of the Investor Assets Regulations, in the sense that assets entrusted by a customer to the control of an investment services provider in the course of rendering an investment service to the same customer can never be deemed to give rise to a loan for consumption between the said parties, and this even notwithstanding anything to the contrary in the agreement entered into between them or the fact that the assets are registered in the name and title of or are otherwise vested in the investment services provider. In consequence of this such assets are "ring-fenced" at law.[73] Furthermore, the investment services provider's creditors 'have no claim or right of action on or against' those assets, which are therefore not 'affected in any manner by the provisions of laws and regulations in force regulating the insolvency or bankruptcy' of the investment services provider.[74]

In conclusion, although the provisions of the Investor Assets Regulations do not expressly refer to "fiduciary obligations" it is evident that the duties imposed thereby are of a "fiduciary" nature. Furthermore, it is equally clear that an arrangement whereby an investment services provider controls a customer's assets in the course of rendering its services would fall within the scope of article 1124A(1)(*b*) of the Civil Code and would accordingly automatically trigger the fiduciary obligations contemplated in article 1124A(4) of the Civil Code, as described in Part I D above.

[71] Emphasis added.
[72] Regulation 4(1) of the Investor Assets Regulations.
[73] They are 'deemed' under regulation 3(2) of the Investor Assets Regulations 'to constitute a distinct patrimony, separate from that belonging to the subject person and from that of other customers the assets of whom are also held under the control of the subject person.'
[74] Regulation 5(1) of the Investor Assets Regulations.