

SUBSIDIARY LEGISLATION 330.11

MALTA FINANCIAL SERVICES AUTHORITY ACT (TRANSPARENCY OF SECURITIES FINANCING TRANSACTIONS AND OF REUSE) REGULATIONS

7th March, 2017

LEGAL NOTICE 78 of 2017, as amended by Legal Notice 166 of 2020.

1. (1) The title of these regulations is the Malta Financial Services Authority Act (Transparency of securities financing transactions and of reuse) Regulations. Citation and scope.

(2) The purpose of these regulations is to lay down rules on the transparency of securities financing transactions and of reuse, and to implement the relevant provisions of the SFTR as herein defined, and they shall be interpreted and applied accordingly.

2. (1) In these regulations, unless the context otherwise requires: Interpretation.

"the Act" means the Malta Financial Services Authority Act; Cap. 330.

"branch" means a place of business other than the head office which is part of a counterparty and which has no legal personality;

"buy-sell back transaction" or "sell-buy back transaction" means a transaction by which a counterparty buys or sells securities, commodities, or guaranteed rights relating to title to securities or commodities, agreeing, respectively, to sell or to buy back securities, commodities or such guaranteed rights of the same description at a specified price on a future date, that transaction being a buy-sell back transaction for the counterparty buying the securities, commodities or guaranteed rights, and a sell-buy back transaction for the counterparty selling them, such buy-sell back transaction or sell-buy back transaction not being governed by a repurchase agreement or by a reverse-repurchase agreement within the meaning of a repurchase transaction;

"counterparties" means financial counterparties and non-financial counterparties;

"established" means:

(a) if the counterparty is a natural person, where it has its head office;

(b) if the counterparty is a legal person, where it has its registered office;

(c) if the counterparty has, under its national law, no

registered office, where it has its head office;

"financial counterparty" means:

(a) an investment firm authorised in accordance with Directive 2014/65/EU of the European Parliament and of the Council;

(b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council or with Regulation (EU) No 1024/2013;

(c) an insurance undertaking or a reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council;

(d) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC;

(e) an AIF managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU;

(f) an institution for occupational retirement provision authorised or registered in accordance with Directive 2003/41/EC of the European Parliament and of the Council;

(g) a central counterparty authorised in accordance with Regulation (EU) No 648/2012;

(h) a central securities depository authorised in accordance with Regulation (EU) No 909/2014;

(i) a third-country entity which would require authorisation or registration in accordance with the legislative acts referred to in points (a) to (h) if it were established in the Union;

"Financial Services Tribunal" means the Tribunal established in terms of article 21 of the Act;

"margin lending transaction" means a transaction in which a counterparty extends credit in connection with the purchase, sale, carrying or trading of securities, but not including other loans that are secured by collateral in the form of securities;

"non-financial counterparty" means an undertaking established in the Union or in a third country other than entities falling under the definition of a financial counterparty;

"repurchase transaction" means a transaction governed by an

agreement by which a counterparty transfers securities, commodities, or guaranteed rights relating to title to securities or commodities where that guarantee is issued by a recognised exchange which holds the rights to the securities or commodities and the agreement does not allow a counterparty to transfer or pledge a particular security or commodity to more than one counterparty at a time, subject to a commitment to repurchase them, or substituted securities or commodities of the same description at a specified price on a future date specified, or to be specified, by the transferor, being a repurchase agreement for the counterparty selling the securities or commodities and a reverse repurchase agreement for the counterparty buying them;

"reuse" means the use by a receiving counterparty, in its own name and on its own account or on the account of another counterparty, including any natural person, of financial instruments received under a collateral arrangement, such use comprising transfer of title or exercise of a right of use in accordance with Article 5 of Directive 2002/47/EC but not including the liquidation of a financial instrument in the event of default of the providing counterparty;

"securities or commodities lending" or "securities or commodities borrowing" means a transaction by which a counterparty transfers securities or commodities subject to a commitment that the borrower will return equivalent securities or commodities on a future date or when requested to do so by the transferor, that transaction being considered as securities or commodities lending for the counterparty transferring the securities or commodities and being considered as securities or commodities borrowing for the counterparty to which they are transferred;

"securities financing transaction" or "SFT" means:

- (a) a repurchase transaction;
- (b) securities or commodities lending and securities or commodities borrowing;
- (c) a buy-sell back transaction or sell-buy back transaction;
- (d) a margin lending transaction;

"SFTR" means Regulation (EU) 2015/2365 of the European Parliament and of the Council of the 25 November, 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, as may be amended from time to time.

(2) Words and expressions used in these regulations shall have the same meaning as is assigned to them in the Act unless

otherwise defined herein.

(3) In the event that any of these regulations conflict with the provisions of the SFTR, the latter shall prevail.

Competent
authority.

3. The Malta Financial Services Authority established by the Act shall be the designated competent authority in Malta for the purposes of implementing the relevant provisions of the SFTR, and any reference in these regulations to the competent authority shall be read and construed accordingly.

Applicability of the
EU Regulation to
the competent
authority.

4. (1) The competent authority shall exercise all the functions, obligations and powers and shall satisfy all the requirements imposed on competent authorities by the SFTR.

(2) Without prejudice to the provisions of sub-regulation (1), the competent authority may, for the better implementation of the SFTR, exercise any of the powers assigned to it under the Act in relation to:

- (a) a counterparty to an SFT that is established:
 - (i) in Malta, including all its branches irrespective of where they are located;
 - (ii) in a third country, if the SFT is concluded in the course of the operations of a branch in Malta of that counterparty;
- (b) management companies of undertakings for UCITS and UCITS investment companies in accordance with Directive 2009/65/EC;
- (c) AIFMs authorized in accordance with Directive 2011/61/EU;
- (d) a counterparty engaged in reuse that is established:
 - (i) in Malta, including all its branches irrespective of where they are located;
 - (ii) in a third country, where either, the reuse is effected in the course of operations of a branch in Malta of that counterparty, or the reuse concerns financial instruments provided under a collateral arrangement by a counterparty established in Malta or a branch in Malta of a counterparty established in a third country.

Administrative
penalties and other
administrative
measures.
Added by:
L.N. 166 of 2020.

5. (1) Without prejudice to the powers of the competent authority under the Act or any other law, the competent authority shall have the power to impose administrative penalties and other administrative measures for breaches of Article 4 and Articles 13 to 15 of the SFTR.

(2) Without prejudice to the generality of sub-regulation (1), the competent authority shall have the power to impose the following

administrative penalties and other administrative measures for breaches of Articles 4 and 15 of the SFTR:

- (a) an order requiring the person responsible for the breach to cease the conduct and to desist from a repetition of that conduct;
- (b) a public statement which indicates the person responsible and the nature of the breach in accordance with Article 26 of SFTR;
- (c) withdrawal or suspension of the authorisation;
- (d) a temporary ban against any person discharging managerial responsibilities, or any natural person who is held responsible for such a breach, from exercising management functions;
- (e) maximum administrative penalties of three times the amount of the profits gained or losses avoided because of the breach where the said profits or losses can be determined by the competent authority, even if those penalties exceed the amounts referred to in paragraphs (f) and (g);
- (f) in respect of a natural person, a maximum administrative penalties of five million euro (€5,000,000);
- (g) in respect of legal persons, maximum administrative penalties of:
 - (i) five million euro (€5,000,000) or up to ten per cent (10%) of the total annual turnover of the legal person according to the last available accounts approved by the management body for breaches of Article 4 of the SFTR;
 - (ii) fifteen million euro (€15,000,000) or up to ten per cent (10%) of the total annual turnover of the legal person according to the last available accounts approved by the management body for breaches of Article 15 of the SFTR;

Provided that for the purpose of paragraph (g)(i) and (ii), where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting regime according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.

(3) Without prejudice to the generality of sub-regulation (1), the competent authority shall have the power to impose an

administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each breach of Articles 13 and 14 of the SFTR.

(4) Where the provisions of Article 4 and Articles 13 to 15 of the SFTR apply to a legal person, the competent authority may impose administrative penalties and other administrative measures on members of the management body of such legal person and to other individuals who are responsible for the breach of the said provisions.

(5) The administrative penalties and other administrative measures taken by the competent authority shall be effective, proportionate and dissuasive.

(6) When determining the type and level of administrative penalties and other administrative measures, the competent authority shall take into account all relevant circumstances, including, where appropriate:

(a) the gravity and duration of the breach;

(b) the degree of responsibility of the person responsible for the breach;

(c) the financial strength of the person responsible for the breach, by considering factors such as the total turnover in the case of a legal person or the annual income in the case of a natural person;

(d) the importance of the profits gained or losses avoided by the person responsible for the breach, insofar as they can be determined;

(e) the level of cooperation of the person responsible for the breach with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

(f) previous breaches by the person responsible for the breach;

(g) any additional factors which the competent authority deems relevant.

Publications of the
decisions of the
competent
authority.
Added by:
L.N. 166 of 2020.

6. (1) The competent authority shall publish any decision imposing an administrative penalty or other administrative measure in relation to breaches of Article 4 and Articles 13 to 15 of SFTR on its website immediately after the person subject to that decision has been informed of that decision.

(2) The information published pursuant to sub-regulation (1)

shall specify the type and nature of the breach, the identity of the person subject to the decision and any other information which the competent authority deems relevant.

(3) The provisions of sub-regulations (1) and (2) shall not apply to decisions of the competent authority imposing measures that are of an investigatory nature.

(4) Where the competent authority considers, following a case-by-case assessment, that the publication of the identity of the legal person subject to the decision, or the personal data of a natural person, would be disproportionate, or where such publication would jeopardise an ongoing investigation or the stability of the financial markets, the competent authority shall:

(a) defer publication of the decision until the reasons for that deferral cease to exist; or

(b) publish the decision on an anonymous basis where such publication ensures effective protection of the personal data concerned and, where appropriate, postpone publication of the relevant data for a reasonable period of time where it is foreseeable that the reasons for anonymous publication will cease to exist during that period; or

(c) not publish the decision in the event that the competent authority is of the opinion that publication in accordance with paragraphs (a) or (b) will be insufficient to ensure:

(i) that the stability of financial markets is not jeopardised; or

(ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

(5) Where the decision is subject to an appeal before a national judicial, administrative or other authority, the competent authority shall also publish immediately on its website such information and any subsequent information on the outcome of such an appeal. Any decision annulling a decision subject to appeal shall also be published.

(6) Any decision that is published in accordance with this regulation shall remain accessible on the website of the competent authority for a period of at least five (5) years after its publication:

Provided that personal data contained in any such decision shall be retained on the website of the competent authority for the period which is necessary, in accordance with the applicable data

protection legislation.

Right of Appeal.
Added by:
L.N. 166 of 2020.

7. A right of appeal to the Financial Services Tribunal shall lie from the decisions which the competent authority shall take under these regulations and the provisions of article 21 of the Act shall apply *mutatis mutandis*.
