L.N. 325 of 2007

INVESTMENT SERVICES ACT (CAP. 370)

European Passport Rights for Investment Firms Regulations, 2007

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Prime Minister and Minister of Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:–

Citation, commencement and objective.

1. (1) The title of these regulations is the European Passport Rights for Investment Firms Regulations, 2007.

(2) These regulations shall come into force on the 1st November, 2007.

(3) The objective of these regulations is to implement Articles 31, 32, 61 and 62 of the Directive, as herein defined, and they shall be interpreted and applied accordingly.

Interpretation.

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

"the Act" means the Investment Services Act;

"ancillary service" shall have the same meaning as that assigned to it by the Investment Services Rules;

"branch" means a place of business, other than the head office, which is a part of the investment firm, and which has no legal personality and which provides the services for which the investment firm has been authorised; all the places of business set up in the same Member State or EEA State by an investment firm with headquarters in another Member State or EEA State shall be regarded as a single branch;

"the competent authority" means the Malta Financial Services Authority appointed under Article 2A of the Act;

"core investment service" means a service listed in Section A of the Annex to the Directive, incorporated in Schedule 1 to these regulations;

"Directive" means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"European investment firm" means an investment firm as defined in article 4(1) of the Directive authorised by its European regulatory authority within the meaning of article 5 of the Directive or authorised by a European regulatory authority in an EEA State;

"European right" means the entitlement of a person to establish a branch, or provide services, in a Member State or EEA State other than that in which it has its head office –

(a) in accordance with the Treaty as applied in the Member State or EEA State; and

(b) subject to the requirements of the Directive and subject to any regulations made under the Act and, or Investment Services Rules issued by the competent authority, in terms of article 6 of the Act, implementing such requirements as may be applicable;

"home Member State or EEA State" means

(a) where the European investment firm is a natural person, the Member State or EEA State in which the head office of that person is situated; or

(b) where the European investment firm is a legal person, the Member State or EEA State in which its registered office is situated or, if under its national law it has no registered office, the Member State or EEA State in which its head office is situated;

"host Member State or EEA State" means the Member State or EEA State where a Maltese investment firm exercises or proposes to exercise European rights;

"investment firm" means any person, other than persons to whom the Directive does not apply in terms of Article 2 of the said Directive listed in Schedule 2 to these regulations, whose regular occupation or business is the provision of any one or more core investment services to third parties on a professional basis;

"Investment Services Rules" means the rules issued by the competent authority in terms of article 6 of the Act;

"Maltese investment firm" means a person licensed in terms of the Act, whose head office is in Malta and who is entitled to carry on an activity in a Member State or EEA State other than Malta in exercise of a European right;

"tied agent" shall have the same meaning as that assigned to it in regulation 2 of the Investment Services (Tied Agents) Regulations; L.N. 327 of 2007.

"the Treaty" means Treaty of Rome signed in 1957, establishing the European Economic Community as subsequently amended.

(2) Words and expressions which are also used in the Act shall have the same meaning as in the Act.

Part I – Exercise of Passport Rights by European investment firms

Exercise of passport rights by European investment firms-establishment.

3. (1) A European investment firm which is seeking to establish a branch in Malta in exercise of a European right shall satisfy the establishment conditions specified in sub-regulation (2) of this regulation and shall be exempt from the provisions of article 3 of the Act.

(2) The establishment conditions for the purposes of this regulation are that –

(a) the European investment firm has communicated its European regulatory authority:

(i) the fact that it intends to establish a branch in Malta;

(ii) a programme of operations setting out *inter alia* the investment services as well as the ancillary services to be offered;

(iii) the organisational structure of the branch, indicating whether it intends to use tied agents;

(iv) the address in Malta from where documents may be obtained;

(v) the names of those responsible for the management of the branch;

(b) the competent authority has received, from the European regulatory authority of the European investment firm:

(i) the information which the European investment firm had provided to it in terms of paragraph (a) of this sub-regulation;

(ii) details of the accredited compensation scheme of which the European investment firm is a member in accordance with Directive 97/9/EC.

(3) A branch of a European investment firm shall not commence business unless –

(a) it has been informed by the competent authority that it may commence business; or

(b) two months have elapsed from the date of transmission by the European regulatory authority of the information it received from the European investment firm in terms of sub-regulation (2) of this regulation.

(4) Where the European investment firm appoints tied agents established in Malta, such tied agents shall be assimilated to the branch which the European investment firm establishes in Malta and shall be subject to the Investment Services Rules and regulations relating to branches.

Exercise of passport rights by European investment firms-services.

4. (1) A European investment firm which is seeking to provide services in Malta in exercise of a European right shall satisfy the service conditions specified in sub-regulation (2) of this regulation and shall be exempt from the provisions of article 3 of the Act.

(2) The service conditions for the purposes of this regulation are that:

(a) the European investment firm has communicated to its European regulatory authority:

(i) its intention to provide services in Malta;

(ii) a programme of operations stating in particular the investment services which it intends to perform and whether it intends to use tied agents in Malta;

(b) the competent authority has received the information in paragraph (a) of this sub-regulation from the European regulatory authority of the European investment firm:

Provided that where the European investment firm intends to use tied agents in Malta, the competent authority may request the European regulatory authority to disclose to it the identity of the tied agents which the European investment firm intends to use in Malta. The competent authority may publish such information.

Reporting to the competent authority.

5. (1) The competent authority may, for statistical purposes, require a European investment firm which has established a branch in Malta in terms of these regulations, to report periodically on its activities in Malta.

(2) In discharging its responsibilities under the Directive, the competent authority may require branches of European investment firms to provide the information necessary for the monitoring of their compliance with Investment Services Rules applicable to them:

Provided that these requirements may not be more stringent than those imposed on licence holders, within the meaning of the Act, for the purposes of monitoring their own compliance with the said Investment Services Rules.

Enforcement of certain obligations by the competent authority.

6. The competent authority shall assume responsibility for ensuring that in providing investment and, or ancillary services in Malta, the branch of a European investment firm complies with the obligations laid down in the Investment Services Rules and in measures adopted pursuant thereto. For this purpose the competent authority shall:

(i) issue Investment Services Rules which the branch of the European investment firm must follow in its operations in Malta; and

(ii) have the right to examine the branch arrangements of the European investment firm and to request such changes as are

strictly needed to enable the competent authority to enforce the said obligations with respect to the services and, or activities provided by the branch in Malta.

On-site inspectionsby the European regulatory authority.

7. The European regulatory authority, in exercising its responsibilities and after informing the competent authority may carry on-site inspections at a branch which a European investment firm has established in Malta, in exercise of a European right.

Part II – Exercise of Passport Rights by Maltese investment firms

Exercise of passport rights by Maltese investment firms – establishment.

8. (1) A Maltese investment firm may exercise a European right to establish a branch if it satisfies the requirements set out in the following provisions of this regulation.

(2) The Maltese investment firm shall give the competent authority a notice of its intention to establish a branch which notice shall contain -

(a) the Member State or EEA State within the territory of which the investment firm plans to establish a branch;

(b) a programme of operations identifying the activities which it seeks to carry on through the branch , indicating whether it intends to use tied agents;

(c) the address of the proposed branch from where documents may be obtained;

(d) the proposed organisational structure of the branch and the names of the proposed managers; and

(e) such other clarifications as may be requested by the competent authority.

(3) Unless it has reason to doubt the adequacy of the administrative structure or the financial situation of the Maltese investment firm, taking into account the activities envisaged, the competent authority shall communicate the information referred to in sub-regulation (2) of this regulation to the European regulatory authority within three months of receiving all the said information from the Maltese investment firm.

(4) The competent authority shall communicate to the European regulatory authority the details of the accredited compensation scheme of which the Maltese investment firm is a member.

(5) The competent authority shall inform the European regulatory authority of any change in the details of a compensation scheme referred to in sub-regulation (4) of this regulation.

(6) If the competent authority decides to refuse to communicate to the European regulatory authority the information it received from the Maltese investment firm in terms of sub-regulation (2) of this regulation:

(a) it shall, within three months from the date when it receives all the said information, give the Maltese investment firm which gave that information the reasons for its decision in writing; and

(b) that Maltese investment firm may appeal to the Tribunal and the provisions of article 19 of the Act shall apply *mutatis mutandis*.

(7) A branch of the Maltese investment firm shall not commence business unless –

(a) the European regulatory authority notifies the Maltese investment firm that its branch may commence business in its territory; or

(b) two months have elapsed from the date of transmission of the information required in terms of sub-regulation (2) of this regulation by the competent authority to the European regulatory authority.

(8) In the event of change in any of the particulars communicated in accordance with sub-regulation (2) of this regulation, the Maltese investment firm shall give written notice of that change to the competent authority at least one month before implementing the change. The competent authority shall also inform the European regulatory authority of this change.

(9) The prudential supervision of a Maltese investment firm shall be the responsibility of the competent authority whether the said Maltese investment firm establishes a branch or provides services in another Member State or EEA State or not, without prejudice to those provisions of the Directive which give responsibility to the European regulatory authority.

(10) Where a Maltese investment firm uses tied agents established in a Member State other than Malta or in an EEA State,

such tied agent shall be assimilated to the branch wherever this is established and shall be subject to the provisions of the Directive relating to branches.

On-site visits by the competent authority.

9. In exercise of its responsibilities and after informing the relevant European regulatory authority, the competent authority may carry out on-site inspections in the branch of the Maltese investment firm situated in a Member State or EEA State.

Exercise of passport rights by Maltese investment firms – services.

10. (1) A Maltese investment firm may not exercise a European right to provide services unless the Maltese investment firm has given the competent authority, notice of its intention to provide services as specified in sub-regulation (2) of this regulation.

(2) For the purposes of this regulation, the Maltese investment firm shall notify the competent authorities of: –

(a) the services which it intends to provide together with a programme of operations stating in particular the investment services which it intends to provide in another Member State or EEA State, indicating whether it intends to use tied agents;

(b) the Member State or EEA State in which it intends to operate.

(3) If the European right of the Maltese investment firm derives from the Directive, the competent authority shall, within one month of receiving the information in accordance with sub-regulation (2) of this regulation, send a copy of it to the European regulatory authority.

(4) When the competent authority sends the information, in terms of sub-regulation (3) of this regulation, the Maltese investment firm may start to provide the service or services in question in the host Member State or EEA State.

(5) In the event of a change in any of the particulars provided by the Maltese investment firm in accordance with sub-regulation (2) of this regulation, the Maltese investment firm shall give written notice of that change to the competent authority at least one month before implementing the change. The competent authority shall inform the European regulatory authority of those changes.

(6) Where the Maltese investment firm intends to use tied agents in the host Member State or EEA State, the competent authority shall, at the request of the European regulatory authority and within a

reasonable time communicate the identity of the tied agents that the Maltese investment firm intends to use in the host Member State or EEA State. The host Member State or EEA State may make public such information.

Entitlement to provide core and ancillary services.

11. A European right shall entitle a Maltese investment firm to provide one or more core investment services:

Provided that a European right may additionally entitle a Maltese investment firm to provide one or more ancillary service, but it shall in no case be exercised solely in relation to ancillary services.

Part III – Contraventions by European investment firms

Contraventions by European investment firms.

12. (1) Where the competent authority ascertains that a European investment firm which has a branch established in Malta is in breach of any of the provisions of the Act or any Investment Services Rules or regulations made thereunder which confer power on the competent authority, such competent authority shall, in writing, require the European investment firm to put an end to its irregular situation.

(2) Where the competent authority has clear and demonstrable grounds for believing that a European investment firm which has a branch in Malta or which is providing services in Malta is in breach of the obligations arising from the provisions Directive and which do not confer powers on the competent authority, it shall refer those findings to the European regulatory authority of the European investment firm.

(3) If the European investment firm concerned fails to take the necessary steps to remedy and rectify its position, the competent authority shall take appropriate measures to ensure that the European investment firm concerned puts an end to its irregular situation. The competent authority shall communicate the nature of these measures to the European regulatory authority.

(4) If despite the measures taken by the European regulatory authority or because such measures prove inadequate, the European investment firm persists in acting in a manner that is clearly prejudicial to the interests of Maltese investors or the orderly functions of Maltese markets, the competent authority, shall, after informing the European regulatory authority, take all the appropriate measures needed in order to protect Maltese investors and the proper functions of Maltese markets. This shall include the possibility of preventing the offending European investment firm from initiating any further transactions in Malta.

(5) If, despite the measures taken by the competent authority, the European investment firm persists in breaching the legal or regulatory provisions referred to in sub-regulation (1) of this regulation, the competent authority, may, after informing the European regulatory authority, take appropriate measures to prevent or penalise further irregularities and, in so far as necessary, to prevent that European investment firm from initiating any further transactions in Malta.

(6) Any measure adopted pursuant to this regulation shall be communicated to the European investment firm concerned in writing, together with reasons justifying such measures and shall be subject to a right of appeal to the Tribunal and the provisions of article 19 of the Act shall apply *mutatis mutandis*.

(7) The competent authority shall inform the European Commission without delay of any measures it takes against a European investment firm in terms of sub-regulations (4) and (5) of this regulation.

Part IV- Advertising by European investment firms

Advertising.

13. A European investment firm shall not be prohibited from issuing or causing to be issued an investment advertisement through any available means of communication in or from Malta provided that it complies with any applicable laws and rules, and the provisions of the Investment Services Act (Investment Advertisements and Prospectus Exemption) Regulations shall apply.

L.N. 355 of 2002.

Repeal of L.N. 87 of 2004.

14. The European Passport Rights for Investment Firms Regulations 2004, as amended are hereby repealed.

SCHEDULE 1

(Regulation 2)

ANNEX I

LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS

Section A

Core services

(1) Reception and transmission of orders in relation to one or more financial instruments;

(2) Execution of orders on behalf of clients;

(3) Dealing on own account;

(4) Portfolio management;

(5) Investment advice;

(6) Underwriting of financial instruments and, or placing of financial instruments on a firm commitment basis;

(7) Placing of financial instruments without a firm commitment basis.

Section B

Ancillary services

(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;

(2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;

(3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;

(4) Foreign exchange services where these are connected to the provision of investment services;

(5) Investment research and financial analysis or other forms of general recommendation relating to transactions financial instruments;

(6) Services related to underwriting;

(7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under Section C (5), (6), (7) and (10) - where these are connected to the provision of investment or ancillary services.

Section C

Financial Instruments

(1) Transferable securities;

(2) Money-market instruments;

(3) Units in collective investment undertakings;

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason a default or other termination event);

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and,or a Multilateral Trading Facility;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C (6) and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences;

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation

rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are traded on a regulated market or a Multilateral Trading Facility, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

SCHEDULE 2

(Regulation 2)

Exemptions

1. This Directive shall not apply to:

(a) Insurance undertakings as defined in Sub-article 1 of Directive 73/239/EEC or assurance undertakings as defined in Sub-article 1 of Directive 2002/83/EC or undertakings carrying on the reinsurance and retrocession activities Referred to in Directive 64/225/EEC;

(b) Persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;

(d) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or a Multilateral Trading Facility on an organized, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;

(e) Persons which provide investment services consisting exclusively in the administration of employee participation schemes;

(f) Persons which provide investment services which only involve both administration of employee participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

(g) the members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;

(h) Collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings;

(i) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Section C 10 of Schedule 1 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business

is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC;

(j) Persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;

(k) Persons whose main business consists of dealing on own account in commodities and, or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and, or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2006/48/EC;

(l) firms which provide investment services and, or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;

(m) Associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;

(n) 'agent di cambio' whose activities and functions are governed by Sub-article 201 of Italian Legislative Decree No 58 of 24 February 1998.

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