**L.N. 191 of 2011**

# FINANCIAL INSTITUTIONS ACT (CAP. 376)

## Financial Institutions Act (Safeguarding of Funds) Regulations, 2011

IIN exercise of the powers conferred by article 12(2) of the Financial Institutions Act, the Minister of Finance, the Economy and Investment, acting on the advice of the Malta Financial Services Authority has made the following regulations:-

## Part 1

## Preliminary

Citation and commencement.

**1.** (1) The title of these regulations is the Financial Institutions Act (Safeguarding of Funds) Regulations, 2011.

(2) The provisions of these regulations, insofar as they apply to financial institutions issuing electronic money in terms of the Third Schedule to the Act, shall be deemed to have come into force on the 30th April, 2011.

Interpretation and applicability. Cap. 376.

**2.** (1) Any reference in these regulations to "the Act" is a reference to the Financial Institutions Act, and subject to the provisions of sub-regulation (2), the provisions of article 2 of the said Act shall also apply to these regulations.

(2) For the purposes of these regulations, unless the context otherwise requires:

"business day" means a day on which the relevant payment services provider or electronic money issuer of the payer or the payment services provider or electronic money issuer of the payee involved in the execution of a payment transaction is open for business as required for the execution of a payment transaction;

"funds" mean banknotes and coins, scriptural money and electronic money as defined in the Act;

"Payment Services Directive" means Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing

Directive 97/5/EC.

(3) These regulations shall apply to financial institutions providing payment services in terms of the Second Schedule to the Act and financial institutions issuing electronic money in terms of the Third Schedule to the Act.

## Part 2

## General

Funds held under control constitute a distinct patrimony.

**3.** (1) A financial institution in receipt of funds from a payment services user or electronic money holder shall hold such funds solely for and on behalf of and in the interest of that payment services user or electronic money holder.

Cap. 16.

(2) Notwithstanding anything stated in article 1894 of the Civil Code or in the agreement entered into between the financial institution and the payment services user or electronic money holder or the fact that the payment services user's funds or electronic money holder's funds held by the financial institution are registered in the name and title of or are otherwise vested in the financial institution, such funds shall be deemed to constitute a distinct patrimony, separate from that belonging to the financial institution.

(3) Without prejudice to any relevant provisions of the Act, and except as expressly provided in the agreement entered into between the financial institution and the payment services user or electronic money holder, the control of funds belonging to a payment services user or electronic money holder by a financial institution shall not give or be deemed or construed to give to the financial institution any rights over such funds; nor shall it create any form of loan between the financial institution and the payment services user or electronic money holder notwithstanding the nature of the funds or the rights or obligations of the financial institution in relation thereto.

Payment services user enjoys right of ownership of funds.

**4.** (1) A payment services user or electronic money holder whose funds are held by the financial institution enjoys a right of ownership over such funds notwithstanding that they may be registered in the name and title of, or are otherwise vested in, the financial institution.

(2) Any records, accounts and other statements held or issued by the financial institution shall, saving any proof to the contrary, constitute evidence of their contents and of the right of ownership of the payment services user or electronic money holder.

Funds held under control not subject to the rights of creditors of the subject person.

**5.** (1) The creditors of a financial institution shall have no claim or right of action on or against the funds held by the financial institution for and on behalf and in the interest of any payment services user or electronic money holder, and such funds shall not be affected in any manner by the provisions of laws and regulations in force regulating the insolvency or bankruptcy of the financial institution.

(2) In the event of any such insolvency or bankruptcy or related order or resolution, or in the event that the competent authority so requires, the financial institution or any administrator or receiver or other officer appointed to represent it by any court or otherwise shall, on demand of any payment services user or electronic money holder or of the competent authority, immediately transfer the control, possession and title to all funds held by or in the name of the financial institution on behalf of the payment services user or electronic money holder to another financial institution or to such other person as may be instructed by the payment services user or electronic money holder or by the competent authority.

(3) In the event that any funds held under the control of the financial institution are, at the request of any creditor of the financial institution, made subject to any precautionary or executive act or warrant granted by any Court in terms of the Code of Organization and Civil Procedure, the payment services user or electronic money holder on whose behalf such funds are being held, the financial institution on behalf of the payment services user or electronic money holder or the competent authority may, by application to the Court, request the release of the funds from such act or warrant and the Court shall, on production of evidence as it may deem fit, accede to the application without undue delay.

Cap. 12.

Applicability of the Duty on Documents and Transfers Act and Income Tax Act.

**6.** (1) The delivery of the funds of a payment services user or electronic money holder to a financial institution and from a financial institution to a payment services user or electronic money holder or another financial institution for the purpose of safeguarding the funds in terms of these regulations shall not be deemed to constitute a chargeable transfer for the purposes of the Duty on Documents and Transfers Act and for the purposes of article 5(1) of the Income Tax Act, where the delivery of such funds does not constitute a change in the beneficial owner of the funds.

Cap. 364.

Cap. 123.

(2) For the purpose of this regulation, "beneficial owner" means a person who is the real owner of, or who is otherwise beneficially entitled to, the funds held under control by the financial institution, as provided in regulation 4.

## Part 3

## Safeguarding of Funds

Duties of the financial institution.

**7.** (1) A financial institution shall segregate the funds of payment services users at all times from the funds of any other person, provided that the funds of each payment services user may be held in a common account of payment services users. The funds of each payment services user held in a common account shall remain separately identifiable at all times.

(2) A financial institution shall carry out such other functions and duties as may be prescribed in a Financial Institutions Rule.

Liability of the subject person.

**8.** (1) A financial institution in receipt of funds belonging to payment services users or electronic money holders shall be liable for any loss or prejudice suffered by the payment services users due to the financial institution's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the financial institution's obligations arising under these regulations, the terms and conditions of the agreement entered into with the payment services users or electronic money holders, the conditions of any financial institutions licence or such other requirements as may be laid down by the competent authority.

(2) For the purposes of this regulation, "financial institution" includes such other financial institution to whom functions, duties or funds may be delegated or entrusted in terms of these regulations and any applicable Financial Institutions Rules issued under the Act.

Financial institution may delegate functions and duties or entrust funds to another person.

**9.** (1) Where the financial institution delegates or entrusts functions or duties to a person which is a group company, without prejudice to the liability of such person, the financial institution shall be liable for any loss or prejudice suffered by the payment services users or electronic money holders as a result of the acts, omissions or insolvency of the financial institution.

(2) Where the financial institution delegates or entrusts functions, or duties to a person which is not a group company, without prejudice to the liability of such person, the financial institution shall be liable for any loss or prejudice suffered by the payment services users or electronic money holders as a result of the acts or omissions of such person unless the financial institution can prove that such person was and remains qualified and competent to carry out the delegated functions and duties and that the financial institution exercised reasonable care to oversee that the delegated functions and duties were undertaken by such person competently.

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Funds received as payment to be credited to the payment account of a financial institution.

**10.** Notwithstanding the provisions of these regulations, funds received in the form of payment by payment instrument need not be safeguarded until credited to a payment account of a financial institution issuing electronic money or otherwise made available to the financial institutions issuing electronic money in accordance with the execution time requirements laid down in the Payment Services Directive, where applicable. In any event, such funds shall be safeguarded by not later that five working days after the issuance of electronic money.

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