VERŻJONI ELETTRONIKA

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,044, 8 ta' Marzu, 2013
Taqsima B

L.N. 115 of 2013

INVESTMENT SERVICES ACT (CAP. 370) Investment Services Act (Alternative Investment Fund Managers) Regulations, 2013

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

Citation, commencement and scope.

1. (1) The title of these regulations is the Investment Services Act (Alternative Investment Fund Managers) Regulations, 2013.

(2) These regulations shall come into force on 22nd July 2013.

(3) The purpose of these regulations is to transpose and implement Article 4(1)(a), (b), (h), (z), (aa) and (bb), Article 25(1), (2), (3), (4), (6), (7) and (8), Article 46(4), Article 47(4), (5), (6), (7), (8), (9) and (10) and Article 51(1) and (2) of the AIFM Directive.

Interpretation.

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

"the Act" means the Investment Services Act; Cap. 370.

"the AIFM Directive" means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 as amended from time to time, and includes any implementing measures that may be issued thereunder;

"Alternative Investment Fund" or "AIF" means a collective investment scheme, including subfunds thereof, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, and which does not qualify as a UCITS Scheme in terms of the UCITS Directive;

"Alternative Investment Fund Manager" or "AIFM" means a legal person whose regular business is managing one or more AIFs;

"competent authority" means the Malta Financial Services Authority established by the Malta Financial Services Authority Act, Cap. 330.

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which body shall also carry out the duties as competent authority for all purposes of the AIFM Directive;

"Directive 95/46/EC" means the Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

"ESMA" means the European Securities and Markets Authority established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of the 24 November 2010;

"ESRB" means the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of the 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board and Council Regulation (EU) No 1096/2010 of the 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board;

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"Member State of reference" shall have the same meaning assigned to it in the Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations, 2013;

"overseas regulatory authority" means an authority in a country or territory outside Malta that is not a Member State or EEA State which exercises any regulatory or supervisory function in relation to financial services corresponding to a function of the competent authority as defined in the Malta Financial Services Authority Act;

"third country AIF" means an AIF which is not a European AIF;

"third country AIFM" means an AIFM which is not a European AIFM;

"the UCITS Directive" means Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time, and includes any implementing measures that may be issued thereunder.

(2) Words and expressions used in these regulations which are also used in the Act but which are not defined herein shall have the same meaning as in the Act.

(3) In the event that any of these regulations conflict with the

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provisions of the AIFM Directive, the latter shall prevail.

Transfer of personal data to a European regulatory authority or overseas regulatory authority, and retention of personal data.

3. (1) When transferring personal data to a European regulatory authority or to an overseas regulatory authority in accordance with its obligations under the AIFM Directive, the competent authority shall transfer such data in accordance with Directive 95/46/EC.

(2) When receiving personal data from a European regulatory authority or from an overseas regulatory authority under the provisions of the AIFM Directive, the competent authority shall retain such personal data for a maximum period of five years.

Competent authority to have necessary powers to ensure orderly functioning of markets.

4. In cases where the activity of one or more AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market, the competent authority shall have all the powers necessary to take all measures required in order to ensure the orderly functioning of markets.

Request which may be made by ESMA.

5. (1) If any of the activities of the AIFMs cause or aggravate a substantial threat to the orderly functioning and integrity of the financial market or to the stability of the whole or a part of the financial system in the European Union and there are cross-border implications, and if the competent authority fails to take measures to address such threat or if the measures taken do not sufficiently address the threat, ESMA may, subject to the requirements set out in sub-regulations (2) and (3), request the competent authority to take any of the following measures, as appropriate:

(a) prohibit the marketing in the European Union of units or shares of AIFs managed by non-EU AIFMs or of non-EU AIFs managed by EU AIFMs without the authorisation required in Article 37 of the AIFM Directive, or without the notification required in Articles 35, 39 and 40 of the AIFM Directive, or without being allowed to do so by the competent authority in accordance with Article 42 of the AIFM Directive;

(b) impose restrictions on non-EU AIFMs relating to the management of an AIF in case of excessive concentration of risk in a specific market on a cross-border basis;

(c) impose restrictions on non-EU AIFMs relating to the management of an AIF where its activities potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions.

(2) The measures adopted by the competent authority in terms of sub-regulation (1) shall:

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(a) effectively address the threat to the orderly functioning and the integrity of the financial market or to the stability of the whole or a part of the financial system in the European Union or significantly improve its ability to monitor the threat;

(b) not create a risk of regulatory arbitrage; and

(c) not have a detrimental effect on the efficiency of the financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, in a way that is disproportionate to the benefits of the measures.

(3) Before requesting the competent authority to take or renew any measure referred to in sub-regulation (1), ESMA shall consult, where appropriate, the ESRB and other relevant authorities.

(4) In both cases where Malta is the Member State of reference of a third country AIFM or where Malta is the host Member State of such AIFM, the competent authority shall be notified by ESMA of its decision to request such competent authority to impose or renew any measure referred to in sub-regulation (1). The notification shall at least specify the following details:

(a) the AIFM and the activities to which the measures apply and their duration; and

(b) the reasons why ESMA is of the opinion that it is necessary to impose the measures in accordance with the conditions and requirements set out in this regulation, including the evidence in support of those reasons. In both cases where Malta is the Member State of reference.

(5) ESMA shall review the measures undertaken by the competent authority in terms of this regulation at appropriate intervals and at least every three months and if a measure is not renewed after that three-month period, it shall automatically expire. Any renewal shall be carried out in the process referred to in this regulation.

(6) If Malta is the Member State of reference in terms of the Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations, 2013, of the non-EU AIFM against whom a measure in terms of this regulation was imposed, the competent authority may request ESMA to reconsider its decision in the manner set out in the second sub-paragraph of Article 44(1) of Regulation (EU) No 1095/2010.

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Duties of the competent authority when Malta is the home Member State of the AIFM managing leveraged AIFs.

6. (1) When Malta is the home Member State of the AIFM, the competent authority shall use the information provided to it by the AIFM in terms of Article 24 of the AIFM Directive for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy.

(2) By means of the procedures set out in Article 50 of the AIFM Directive on supervisory cooperation, the competent authority shall:

(a) ensure that all information gathered under Article 24 of the AIFM Directive in respect of all AIFMs that they supervise and the information gathered under Article 7 of the AIFM Directive, is made available to European regulatory authorities , to ESMA and the ESRB; and

(b) provide information bilaterally to the European regulatory authorities directly concerned, if an AIFM under their responsibility, or AIF managed by that AIFM, could potentially constitute an important source of counterparty risk to a credit institution in terms of article 2 of the Banking Act, or other systemically relevant institutions in other Member States or EEA States.

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(3) The AIFM shall demonstrate that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times.

(4) The competent authority shall assess the risk that the use of leverage by an AIFM with respect to the AIFs it manages could entail. Where deemed necessary in order to ensure the stability and integrity of the financial system, the competent authority, after having notified ESMA, the ESRB and the European regulatory authority of the relevant AIF, shall impose -

(a) limits to the level of leverage that an AIFM is entitled to employ; or

(b) other restrictions on the management of the AIF with respect to the AIFs under its management,

to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets.

(5) Through the procedures set out in Article 50 of the AIFM Directive, the competent authority shall duly inform ESMA, the

ESRB and the European regulatory authority of the AIF, of actions taken in terms of sub-regulation (4).

(6) The competent authority shall make the necessary notifications to ESMA, the ESRB and the European regulatory authority in terms of sub-regulations (4) and (5) by not less than ten working days before the proposed measure is intended to take effect or to be renewed. The notification shall include details of the proposed measure, the reasons for the measure, and when the measure is intended to take effect. In exceptional circumstances, the competent authority may decide that the proposed measure takes effect within the ten working days referred to in this sub-regulation.

(7) After having sent the notifications in terms of sub-regulations (6) and (7), the competent authority shall receive advice from ESMA about the measure that is proposed or taken. The advice may, in particular, address whether the conditions for taking action appear to be met, whether the measures are appropriate and the duration of the measures.

(8) On the basis of the information received in accordance with sub-regulation (2), and after taking into account any advice of the ESRB, ESMA may determine that the leverage employed by an AIFM, or by a group of AIFMs, poses a substantial risk to the stability and integrity of the financial system and may issue advice to the competent authority specifying the remedial measures to be taken, including limits to the level of leverage, which that AIFM, or that group of AIFMs, are entitled to employ. ESMA shall immediately inform the competent authority, the ESRB and the Commission of any such determination.

(9) If the competent authority proposes to take action contrary to ESMA's advice referred to in sub-regulations (7) or (8), it shall inform ESMA, stating its reasons. ESMA may publish the fact that the competent authority does not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with its advice. The competent authority shall receive advance notice about such a publication.

Ippubblikat mid-Dipartiment tal-Informazzjoni (doi.gov.mt) — Valletta — ***Published by the Department of Information (doi.gov.mt) — Valletta***
Mitbugħ fl-Istamperija tal-Gvern fuq karta riċiklata — ***Printed at the Government Printing Press on recycled paper***

Prezz/*Price*
€0.27