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Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,198, 24 ta' Jannar, 2014
Taqsima B

L.N. 32 of 2014

INVESTMENT SERVICES ACT (CAP. 370)

CRD (Administrative Penalties, Measures and Investigatory Powers) Regulations, 2014

IN exercise of the powers conferred by article 12 of the Investment Services Act and article 20D of the Malta Financial Services Authority Act, the Minister for Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

Citation and purpose.

1. (1) The title of these regulations is the,. CRD (Administrative Penalties, Measures and Investigatory Powers) Regulations, 2014.

(2) The purpose of these regulations is to implement Articles 64(2), 65, 67, 68, 69, 70, 71 and 72 of the CRD.

Interpretation.

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

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

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

"CRD" means Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"CRR" means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"financial holding company" shall have the same meaning as that assigned to it in point (20) of Article 4(1) of the CRR;

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"investment firm" means a person who holds an investment services licence issued by the competent authority under the Act and which is subject to the requirements of the CRD and the CRR;

"mixed financial holding company" shall have the same meaning as that assigned to it in point (32) of Article 4(1) of the CRR.

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

Supervisory powers and powers to impose penalties.

3. The competent authority shall exercise its supervisory powers and its powers to impose penalties, in such a way as to ensure full and complete adherence to the requirements and obligations arising out of the CRD and out of the CRR, either directly or in collaboration with European regulatory authorities and with overseas regulatory authorities, in terms of law and as warranted by the relevant circumstances.

Administrative penalties and other administrative measures.

4. (1) Without prejudice to the supervisory powers of the competent authority referred in regulation 3, the competent authority shall impose administrative penalties and other administrative measures in respect of breaches of:

(a) the provisions of the Act and, or of regulations and, or Investment Services Rules made thereunder transposing the provisions of the CRD, and, or

(b) the provisions of the CRR.

(2) The administrative penalties and other administrative measures taken pursuant to sub-regulation (1) shall be effective, proportionate and dissuasive.

(3) The competent authority may apply administrative penalties or other administrative measures relating to breaches of the provisions of the Act and any regulations and Investment Services Rules issued thereunder transposing the requirements of the CRD, and of the CRR applicable to financial holding companies and mixed financial holding companies, to the members of the management body of such companies and to other natural persons who under Maltese law are responsible for the breach.

(4) The competent authority may impose administrative penalties or other administrative measures, in terms of these regulations, aiming to end identified breaches or causes of such breaches, on financial holding companies, mixed financial holding companies and mixed activity holding companies or their effective managers which are responsible for the breach of the provisions of

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the Act and any regulations and Investment Services Rules issued thereunder transposing the requirements of Chapter 3 of Title VII of the CRD.

Investigatory and information gathering powers of the competent authority.

5. The competent authority shall have all the information gathering powers and investigatory powers which are necessary for the exercise of its functions. Without prejudice to other relevant provisions laid down in the Act, the CRD and in the CRR these powers shall include:

(a) the power to require the following natural or legal persons to provide all information that is necessary in order to carry out the tasks of the competent authority, including information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes:

(i) investment firms established in Malta;

(ii) financial holding companies established in Malta;

(iii) mixed financial holding companies established in Malta;

(iv) mixed-activity holding companies established in Malta;

(v) persons belonging to the entities referred to in sub-paragraphs (i) to (iv);

(vi) third parties to whom the entities referred to in sub-paragraphs (i) to (iv) have outsourced operational functions or activities;

(b) the power to conduct all necessary investigations of any person referred in paragraph (a)(i) to (iv) established or located in Malta where necessary to carry out the tasks of the competent authority including:

(i) the right to require the submission of documents;

(ii) the right to examine the books and records of the persons referred to in paragraph (a)(i) to (iv) and the right to take copies or extracts from such books and records;

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(iii) the right to obtain written or oral explanations from amy person referred to in paragraph (a)(i) to (iv) or their representatives or staff; and

(iv) the right to interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

Penalties.

6. Where an investment firm is found by the competent authority to have committed any of the breaches referred to in the Schedule, the administrative penalties and other administrative measures which the competent authority may apply on such investment shall include at least the following:

(a) a public statement which identifies the natural person, investment firm, financial holding company or mixed financial holding company and the nature of the breach;

(c) the withdrawal of the investment firm's investment services licence, in accordance with article 7 of the Act;

(d) subject to the provisions of regulation 4(3), a temporary ban against a member of the investment firm's management body or any other natural person, who is held responsible, from exercising functions within investment firms;

(e) in the case of a legal person, administrative pecuniary penalties of up to 10% of the total annual net turnover including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with Article 316 of the CRR, of that legal person in the preceding business year:

Provided that where the investment firm subject to the administrative pecuniary penalty is a subsidiary of a parent undertaking, the relevant gross income shall be the gross income resulting from the consolidated account of the ultimate parent undertaking in the preceding business year;

(f) in the case of a natural person, administrative pecuniary penalties of up to EUR 5,000,000; and

(g) administrative pecuniary penalties of up to twice the amount of the profits gained or losses avoided because of the breach, where those can be determined.

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Publication of administrative penalties.

7. (1) The competent authority shall publish on its official website any administrative penalties and sanctions which are imposed for breaches of the Act, regulations and Investment Services Rules issued thereunder transposing the requirements of the CRD, and of the CRR. Such publication shall include information on the type and nature of the breach and the identity of the natural or legal person on whom the penalty is imposed, without undue delay after that person is informed of those penalties:

Provided that in cases where an appeal has been filed by the person on whom such administrative penalties have been imposed, the competent authority shall, without undue delay, also publish on its official website information on the status of the appeal and the outcome thereof.

(2) The competent authority shall publish the penalties imposed in terms of these regulations, on an anonymous basis, in any of the following circumstances:

(a) where the penalty is imposed on a natural person and, following an obligatory prior assessment, the publication of personal data is found to be disproportionate;

(b) where publication would jeopardise the stability of financial markets or an ongoing criminal investigation; or

(c) where publication would cause, insofar as it can be determined, disproportionate damage to the investment firms, or natural persons involved:

Provided that, where the circumstances referred to in paragraph (a) are likely to cease within a reasonable period of time, publication in terms of sub-regulation (1) may be postponed for such period of time.

(3) Information published in terms of this regulation shall remain on the official website of the competent authority for a period of not less than five years. Personal data shall be retained on the official website of the competent authority only for the period necessary, in accordance with the provisions of Maltese legislation on data protection.

Exchange of information on penalties.

8. (1) Subject to the professional secrecy requirements referred to in the article 26 of the Act, the competent authority shall inform the EBA of all administrative penalties and sanctions it imposes under these regulations, including all permanent prohibitions imposed under regulations 4 and 6. It shall also provide information regarding any appeal in relation thereto and the outcome therefrom

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for the purpose of publication on the EBA database of sanctions which the competent authority shall consult where appropriate in the carrying out of its functions and duties.

(2) In the event of a change of status or a successful appeal from a penalty imposed by the competent authority in terms of these regulations, the competent authority shall request the EBA to delete or update the relevant entries in the database held by the EBA in terms of Article 69 of the CRD.

(3) Where the competent authority assesses good repute for the purposes of the Investment Services Rules transposing the requirements of Articles 91(1) and 121 of the CRD, it shall consult the EBA database of administrative penalties:

Provided that the competent authority shall check, the existence of a relevant conviction in the criminal record of the person concerned. For these purposes, information shall be exchanged in accordance with Decision 2009/316/JHA and Framework Decision 2009/315/JHA.

Effective application of penalties and exercise of powers to impose penalties by the competent authority.

9. When determining the type of administrative penalties or other administrative measures and the level of administrative pecuniary penalties to be imposed on investment firms in terms of these regulations, the competent authority shall take into account all relevant circumstances including, where appropriate:

(a) the gravity and the duration of the breach;

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

(c) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;

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

(e) the losses for third parties caused by the breach, insofar as they can be determined;

(f) the level of co-operation of the natural or legal person responsible for the breach with the competent authority;

(g) previous breaches by the natural or legal person

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responsible for the breach;

(h) any potential systemic consequence of the breach.

Reporting of breaches.

10. (1) The competent authority shall establish effective and reliable mechanisms to encourage the reporting to it of potential or actual breaches of the provisions of the Act, regulations and Investment Services Rules issued thereunder transposing the requirements of the CRD, and of the provisions of the CRR.

(2) The mechanisms referred to in sub-regulation (1) shall include at least:

(a) specific procedures for the receipt of reports on breaches and their follow-up;

(b) appropriate protection for employees of an investment firm who report breaches committed within the investment firm itself against retaliation, discrimination or other types of unfair treatment at a minimum;

(c) protection of personal data concerning both the person who reports the breaches and the natural person who is allegedly responsible for a breach, in accordance with the Maltese legislation on data protection;

(d) clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports the breaches committed within the investment firm, unless disclosure is required by national law in the context of further investigations or subsequent judicial proceedings.

Right of appeal.

11. Subject to the provisions of the Act, any person in respect of whom a decision is taken by the competent authority under these regulations may appeal to the Financial Services Tribunal in terms of article 19 of the Malta Financial Services Authority Act. Cap. 330.

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SCHEDULE

(Regulation 5)

The provisions of regulation 5 shall apply at least in any of the following circumstances:

(a) an investment firm fails to have in place governance arrangements required by the competent authority in accordance with the provisions of the Investment Services Act (Supervisory Review) Regulations, 2013 which transpose the requirements of Article 74 of the CRD;

(b) an investment firm fails to report information or provide incomplete or inaccurate information on compliance to meet own funds requirements set out in Article 92 of the CRR to the competent authority, in breach of Article 99(1) of the CRR;

(c) an investment firm fails to report or provides incomplete or inaccurate information to the competent authority in relation to the data referred to in Article 101 of the CRR;

(d) an investment firm fails to report information or provides incomplete or inaccurate information about a large exposure to the competent authority in breach of Article 394(1) of the CRR;

(e) an investment firm fails to report or provides incomplete or inaccurate information on liquidity to the competent authority in breach of Article 415(1) and (2) of the CRR;

(f) an investment firm fails to report information or provides incomplete or inaccurate information on the leverage ratio to the competent authority in breach of Article 430(1) of the CRR;

(g) an investment firm repeatedly or persistently fails to hold liquid assets in breach of Article 412 of the CRR;

(h) an investment firm incurs exposure in excess of the limits set out in Article 395 of the CRR;

(i) an investment firm is exposed to the credit risk of a securitisation position without satisfying the conditions set out in Article 405 of the CRR;

(j) an investment firm fails to disclose information or provides incomplete or inaccurate information in breach of Article 431(1), (2) and (3) or Article 451(1) of the CRR;

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(k) an investment firm makes payments to holders of instruments included in the own funds of the investment firm in breach of the Investment Services Rules transposing Article 141 of the CRD or in cases where Articles 28, 51 or 63 of the CRR prohibit such payments to holders of instruments included in own funds;

(l) an investment firm is found liable for a serious breach of the Prevention of Money Laundering Act and the regulations issued thereunder;

(m) an investment firm allows one or more persons not complying with Article 91 of the CRD to become or remain a member of the management body.

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*
€0.45