

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,364, 6 ta' Jannar, 2015

Taqsimha B

L.N. 7 of 2015

RETIREMENT PENSIONS ACT (CAP. 514)

Retirement Pensions (Control of Assets) Regulations, 2015

IN exercise of the powers conferred by paragraph (b) of sub-article (1) of article 37 of the Retirement Pensions Act, the Minister for Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

Part I

Preliminary

1. (1) The title of these regulations is the Retirement Pensions (Control of Assets) Regulations, 2015. Citation and commencement.

(2) These regulations shall come into force on the 1st January 2015.

2. (1) Any reference in these regulations to the Act is a reference to the Retirement Pensions Act, and subject to the provisions of sub-regulation (2) of this regulation, the provisions of article 2 of the said Act shall also apply to these regulations. Interpretation. Cap. 514.

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

"assets" means movable and immovable property of any kind;

"competent authority" refers to the Malta Financial Services Authority established under the Malta Financial Services Authority Act; Cap. 330.

"control of assets" means the holding or control of assets belonging to, or on behalf, of a customer, by a person hereinafter referred to as the subject person, acting in the course of rendering a service under the Act, and includes custody of assets;

"custodian" means an entity maintaining custody of the assets of a retirement scheme or retirement fund in accordance with regulations 15 and 16;

"customer" means any retirement scheme or retirement fund whose assets are held under the control of a subject person;

"subject person" means a person who is in possession of a licence under the Act, or is acting under an exemption from the

requirement of such a licence, to control the assets of a retirement scheme or a retirement fund, and includes a custodian.

(3) For the purposes of regulations 10 and 21, "group company", in relation to a subject person, means any body corporate which is the subject person's subsidiary or parent company, or a subsidiary of the subject person's parent company; and the terms "parent" and "subsidiary" shall be construed in accordance with article 2(2) of the Companies Act.

Cap. 386.

3. These regulations shall not apply where the custody of the assets are entrusted to a retirement scheme established as a trust and the custodian or the subject person is a trustee, and in such cases the provisions of the Trust and Trustees Act shall apply.

Non-
applicability.

Cap. 331.

Part II

General

4. (1) A subject person having the control of assets belonging to a customer in the course of rendering a service under the Act to such customer, shall hold such assets solely for and on behalf of and in the interest of the customer.

Assets held
under control
constitute a
distinct
patrimony.

(2) Notwithstanding anything stated in article 1894 of the Civil Code or in the agreement entered into between the subject person and the customer or the fact that a customer's assets held under the control of a subject person are registered in the name of or title thereof vests in or is otherwise vested in the subject person, such assets shall be deemed to constitute a distinct patrimony, separate from that belonging to the subject person and from that of other customers the assets of whom are also held under the control of the subject person.

Cap. 16.

(3) Except as expressly provided in the agreement entered into between the subject person and the customer and notwithstanding the provisions of the Civil Code, the control of assets belonging to a customer by a subject person shall not give or be deemed or construed to give to the subject person any rights over such assets nor shall it create any form of loan between the subject person and the customer and this notwithstanding the nature of the assets or the rights or obligations of the subject person in relation to the assets.

Cap. 16.

5. (1) A customer whose assets are held under the control of a subject person enjoys a right of ownership in such assets notwithstanding that they may be registered in the name of and title thereof vests in or is otherwise vested in the subject person. Where such assets are held by the subject person as part of a common pool of identical assets or are otherwise held in a clients' or common account,

Customer
enjoys right of
ownership in
assets.

the customer shall enjoy an undivided share in ownership of all the assets held collectively by the subject person in such a pool or account.

(2) The records, accounts and other statements held or issued by the subject person in terms of regulation 8(3) shall, saving any proof to the contrary, constitute evidence of their contents and of the right of ownership of the customer as provided in sub-regulation (1) hereof.

6. (1) The creditors of a subject person shall have no claim or right of action on or against the assets held under the control of the subject person for and on behalf of and in the interest of any customer and such assets shall not be affected in any manner by the provisions of laws and regulations in force, including those regulating the insolvency or bankruptcy of the subject person.

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

(2) Without prejudice to sub-regulation (1), 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 subject person or any administrator or receiver or other officer appointed to represent it by any court or otherwise shall, on demand of any customer or of the competent authority, immediately transfer the control, possession and title of all assets held by or in the name of the subject person on behalf of the customer to another subject person or to such other person as may be instructed by the customer or by the competent authority.

(3) In the event that any assets held under the control of the subject person are, at the request of any creditor of the subject person, made subject to any precautionary or executive act or warrant granted by any Court in terms of the Code of Organisation and Civil Procedure, the customer on whose behalf such assets are being held or the competent authority may, by application to the Court, request the release of the assets 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.

7. (1) The delivery of the assets of a customer to a subject person and from a subject person to a customer or to another subject person for the purpose of the control of assets 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 assets does not constitute a change in the beneficial owner of the assets.

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

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 assets held under control by the subject person, as is provided in regulation 5.

Part III

Control of Assets

Functions and
duties of subject
persons.

8. (1) A subject person having the control of assets belonging to a customer shall safeguard such assets and the interests of the customer therein.

(2) The subject person shall carry out such functions and duties as shall be required in accordance with these regulations, the terms and conditions of the agreement entered into with the customer, the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time.

(3) The subject person shall maintain proper and adequate records and accounts of all customers' assets held under control. The records and accounts shall identify the customers to whom such assets belong and shall clearly indicate that the assets of every customer are separate and distinct from the assets belonging to the subject person and from other customers' assets held by the subject person.

(4) The subject person entrusted with the control of assets belonging to customers shall, to every extent reasonably possible, segregate in a proper manner the assets of every customer from the assets belonging to the subject person and from the assets of other customers:

Provided that the subject person may, in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of any licensing, and such other requirements as may be laid down by the competent authority and without prejudice to the customer's right of ownership over the assets held under control, place and keep such assets in a common pool of identical assets or otherwise deposit them in a clients' account or in a common account.

(5) The subject person shall make appropriate arrangements for the protection of customers' assets held under control and shall ensure that such assets are placed under adequate systems to safeguard such assets from damage, misappropriation or other loss and which permit the delivery of such assets only in accordance with the terms and conditions of the agreement entered into with the customer.

(6) Where it is not possible for the subject person to carry out any of the duties specified in this regulation due to the nature of the assets and of the arrangements whereby control is exercised, the said duties may be varied with the written consent of the customer or in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time.

9. (1) A subject person having the control of assets belonging to customers shall be liable for any loss or prejudice suffered by the customers due to the subject person's fraud, wilful default or negligence, including the unjustifiable failure to perform in whole or in part the subject person's obligations arising under these regulations, under the terms and conditions of the agreement entered into with the customers, from the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time.

Liability of the subject person.

(2) For the purposes of this regulation, "subject person" includes such other subject person to whom functions, duties or assets may be delegated or entrusted in terms of regulation 10.

(3) This regulation shall not apply to a custodian as defined in regulation 2(2).

10. (1) A subject person may, with the prior written approval of the competent authority, delegate part of the functions and duties under regulation 8 to another subject person who is qualified and competent to take the control of customers' assets and may entrust or deposit all or part of a customer's assets held under control with such other subject person.

Subject person may delegate functions and duties or entrust assets to another subject person.

(2) The liability of the subject person for its own acts or omissions under regulation 9 shall not be affected or reduced as a result of the subject person delegating functions and duties or entrusting all or part of the assets belonging to a customer, to another subject person.

(3) Where the subject person delegates or entrusts functions, duties or assets in terms of sub-regulation (1) to a person which is a group company, without prejudice to the liability of such person, the subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts, omissions or insolvency of such person.

(4) Where the subject person delegates or entrusts functions, duties or assets in terms of sub-regulation (1) to a person which is not a group company, without prejudice to the liability of such person, the

subject person shall be liable for any loss or prejudice suffered by the customers as a result of the acts or omissions of such person unless the subject person can prove that such person was and remains qualified and competent to carry out the functions and duties delegated and that the subject person exercised reasonable care to oversee that the functions and duties delegated were undertaken by such person competently.

(5) The liability of the subject person under sub-regulations (3) and (4) may be varied or reduced with the written consent of the customer or in accordance with the terms and conditions of the agreement entered into with the customer, the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time:

Provided that the subject person shall disclose fully to the customer any risks that may be associated with the nature of the arrangements whereby control is to be exercised and that the agreement with the customer clearly defines the extent of liability of the subject person.

(6) This regulation shall not apply to a custodian as defined in regulation 2(2).

Use of clearing, settlement and de-materialised systems and settlement risk.

11. (1) Where reasonably required by the nature of the assets and of the arrangements whereby control is to be exercised, a subject person may, with the written consent of the customer or in accordance with the terms and conditions of the agreement entered into with the customer, in accordance with the conditions of licensing which may be required by the competent authority, and with such other requirements as may be laid down by the latter from time to time, make use of any market clearing system, settlement system, de-materialised book entry system, centralised custodial depository or similar system for the purpose of the control of assets in terms of these regulations.

(2) Such systems as are provided for in sub-regulation (1) may also be used to effect all transactions including conveyance, assignment, transfer, transmission and pledging of assets held under the control of the subject person and the law of the country in which the system is maintained shall apply to the validity of such transactions notwithstanding the provisions of any other law.

(3) The agreement with the customer shall clearly define the extent of liability of the subject person for any losses that may be incurred by the customer as a result of the use of such systems.

Subject person's fees.

12. The amount and purpose of any charge, fee or expense to be charged by the subject person shall be specified in the agreement

entered into with the customer.

13. (1) Without prejudice to any requirements as may be laid down by the competent authority, an agreement for the control of assets belonging to a customer may be terminated by the customer, by the subject person, or by order of the competent authority.

Termination of the control of assets.

(2) Upon the termination of an agreement for the control of assets, the subject person shall convey for no consideration the assets held for the customer, as instructed by the customer or by the competent authority, without prejudice to the subject person's right to payment of any lawfully due fees or expenses in terms of the agreement entered into with the customer and to any obligations arising in favour of the customer thereunder.

Part IV

Custody of Assets

14. The provisions of Parts I and II and regulations 8 and 11 to 13 of Part III shall apply to the custody of assets of retirement schemes and retirement funds under this Part, and for the purposes of this Part, unless the context otherwise requires, any references in Parts I, II and III to "control of assets" shall be construed to refer to "custody of assets".

Applicability.

15. Where a custodian is appointed, the custodian shall be:

Persons acting as custodians.

(a) an entity providing the services of a custodian to a retirement scheme or a retirement fund in terms of a licence issued under the Act; or

(b) an entity constituted in a Member State or EEA State and operating from a Member State or EEA State other than Malta, and duly authorised in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments or Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), or accepted as a depositary for the purposes of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time, and carries on such services in Malta by way of freedom of establishment or freedom of services under the respective Directives providing the services of a custodian to a retirement scheme or a retirement fund; or

(c) an entity which is subject to an equivalent level of regulatory supervision in the jurisdiction where its operations take place, having the business organisation, systems, experience and expertise deemed necessary by the competent authority for it to undertake custody services and which satisfies any additional criteria which may be set out in Pension Rules issued by the competent authority from time to time.

Custody of
assets of a
retirement
scheme or
retirement fund.

16. (1) The custody of all the assets of a retirement scheme shall be entrusted to the person responsible for the operation, administration and management of the retirement scheme or to a custodian appointed by an instrument in writing with the approval of the competent authority.

(2) The custody of all the assets of a retirement fund set up as an investment company with variable share capital shall be entrusted to the board of directors of the retirement fund or to a custodian appointed by an instrument in writing with the approval of the competent authority.

Functions and
duties of the
custodian.

17. (1) The custodian shall take custody of all the assets of any retirement scheme or retirement fund and shall safeguard such assets and the interests of the retirement scheme or retirement fund and of the holders of units or members, beneficiaries or investors in the retirement scheme or retirement fund.

(2) In addition to the functions and duties specified in regulation 8, the custodian shall carry out the functions required in accordance with the terms and conditions of the agreement appointing it as custodian, the deed or other instrument establishing or regulating the retirement scheme or retirement fund and the conditions of licensing by the competent authority of the retirement scheme or retirement fund, and such other requirements as may be laid down by the competent authority from time to time.

Independence of
the custodian
from
management.

18. In the exercise of its functions, duties and responsibilities, the custodian shall act independently of the retirement scheme or retirement fund and, or of the investment manager of such retirement scheme or retirement fund and shall act solely in the interest of the holders of units or of members, beneficiaries or investors in the retirement scheme or retirement fund and of the retirement scheme or retirement fund itself:

Provided that the custodian shall act upon the instructions of the retirement scheme or retirement fund and, or of any other person responsible for the operation, administration and management of the retirement scheme or retirement fund respectively, and, or of the investment manager of such retirement scheme or retirement

fund, and the retirement scheme or retirement fund, the investment manager of such retirement scheme or retirement fund and any other person responsible for the operation, administration and management of the retirement scheme or retirement fund respectively shall act upon the instructions of the custodian only to the extent required by the conditions of its licence, such other requirements as may be laid down by the competent authority and by the conditions of the deed or other instrument establishing the retirement scheme or retirement fund.

19. Except as may be authorised by the competent authority, a person shall not act as a member of the board of directors of the retirement scheme or retirement fund or of the investment manager, or similar organ or as an officer responsible for the administration and management of the investment manager and at the same time hold a similar position with the custodian.

Administration and management of investment manager and custodian.

20. (1) The custodian shall be liable for any loss or prejudice suffered by the retirement scheme or retirement fund, or the members, beneficiaries or investors in the retirement scheme or retirement fund which is due to the custodian's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the custodian's obligations arising under these regulations, the terms and conditions of the agreement appointing the custodian, the deed or other instrument establishing or regulating the retirement scheme or retirement fund, the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time.

Liability of the custodian.

(2) For the purposes of this regulation, custodian includes such other persons to whom functions, duties or assets may be delegated or entrusted in terms of regulation 21.

21. (1) The custodian may, with the prior written approval of the competent authority and with the consent of the retirement scheme or retirement fund, or with the consent of any other person responsible for the operation, administration and management of the retirement scheme or fund respectively, delegate all or part of the functions and duties under regulation 17 to another person and, may entrust or deposit all or part of the assets of the retirement scheme or retirement fund held in custody with such other person.

Custodian may delegate functions and duties or entrust assets to another person.

(2) The liability of the custodian for its own acts or omissions under regulation 20 shall not be affected or reduced as a result of the custodian delegating functions and duties or entrusting all or part of the assets of the retirement scheme or retirement fund, to another person in terms of sub-regulation (1).

(3) Where the custodian delegates or entrusts functions, duties or assets in terms of sub-regulation (1) to a person which is a group company, without prejudice to the liability of such person, the custodian shall be liable for any loss or prejudice suffered by the retirement scheme or retirement fund or by the members, beneficiaries or investors in such retirement scheme or retirement fund, as a result of the acts, omissions or insolvency of such person.

(4) Where the custodian delegates or entrusts functions, duties or assets in terms of sub-regulation (1) to a person which is not a group company, without prejudice to the liability of such person, the custodian shall be liable for any loss or prejudice suffered by the retirement scheme or retirement fund or by the members, beneficiaries or investors in such retirement scheme or fund, as a result of the acts or omissions of such person unless the custodian can prove that such person was and remains qualified and competent to carry out the functions and duties delegated to it and that the custodian exercised reasonable care to oversee that the functions and duties delegated were undertaken by such person competently.

(5) The liability of the custodian under sub-regulations (3) and (4) may be varied or reduced with the written consent of the retirement scheme or retirement fund or with the consent of any other person responsible for the operation, administration and management of the retirement scheme or fund respectively, and in accordance with the terms and conditions of the agreement appointing the custodian, the deed or other instrument establishing or regulating the retirement scheme or fund, the conditions of licensing which may be required by the competent authority, and such other requirements as may be laid down by the latter from time to time:

Provided that the custodian shall disclose fully to the retirement scheme or retirement fund, any risks that may be associated with the nature of the custody arrangements, and the agreement appointing the custodian clearly defines the extent of liability of the custodian. Any such risks shall also be fully disclosed to the retirement scheme or retirement fund and to the members, beneficiaries or investors in the retirement scheme or fund.

Termination of
custody.

22. The termination of the appointment of the custodian in accordance with the provisions of regulation 13 shall not come into effect prior to the appointment of another custodian, and the conveyance of the assets held in custody by the outgoing custodian to the new custodian.

