

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,406, 10 ta' April, 2015

Taqsim B

L.N. 131 of 2015

**BANKING ACT
(CAP. 371)**

**Administrative Penalties, Measures and Investigatory Powers
Regulations, 2015**

IN exercise of the powers conferred by article 3 of the Banking Act, the Minister for Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

1. (1) The title of these regulations is the Administrative Penalties, Measures and Investigatory Powers Regulations, 2015. Citation and scope.

(2) The purpose of these regulations is to implement Articles 64(2) and 65 to 72 of the CRD.

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

"the Act" means the Banking Act;

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"the 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;

"the 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 maybe issued thereunder;

"mixed activity holding company" shall have the same meaning as that assigned to it in point (22) of Article 4(1) of the CRR;

"subsidiary" shall have the same meaning as that assigned to it in point (16) of Article 4(1) of the CRR.

(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.

Part I - Powers of the competent authority

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 Act and any regulations made and Banking Rules issued thereunder, and the CRR, either directly or in collaboration with overseas regulatory authorities, in terms of law and as warranted by the relevant circumstances, and shall take all measures necessary to ensure that such administrative penalties are implemented.

Administrative
penalties and
other
administrative
measures.

4. (1) Without prejudice to articles 35 and 35A of the Act, to any regulations made under article 3(1)(e) of the Act and to the supervisory powers of the competent authority referred to 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 any regulations made and, or Banking Rules issued thereunder, 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) Where the obligations arising under the Act or under any regulations made or Banking Rules issued thereunder and the CRR, apply to credit institutions, financial holding companies and mixed financial holding companies, in the event of a breach of any such obligation or of a failure to comply with a directive issued by the competent authority under the Act, or any regulations made or Banking Rules issued thereunder and under the CRR, the competent authority may, subject to the conditions laid down in Maltese law, by notice in writing and without recourse to a court hearing, impose administrative penalties on directors, and on other natural persons who under Maltese law are responsible for the breach or for the failure to comply with any such directive.

(4) The competent authority may impose administrative penalties or other administrative measures aiming to end observed breaches or the 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 the Act and any regulations made and Banking Rules issued thereunder transposing the requirements of Chapter 3 of Title VII of the CRD.

5. (1) 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, in any regulations made and Banking Rules issued thereunder, in the CRD, and the CRR, the powers shall include:

Investigatory and information gathering powers of the competent authority.

(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) credit institutions 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 to in paragraph (a)(i) to (vi) established or located in Malta where necessary to carry out the tasks of the competent authority, including the right to:

- (i) require the submission of documents;
- (ii) examine the books and records of the persons referred to in paragraph (a)(i) to (vi) and the right to take copies or extracts from such books and records;
- (iii) obtain written or oral explanations from any person referred to in paragraph (a)(i) to (vi) or their representatives or staff; and
- (iv) interview any other person who consents to

be interviewed for the purpose of collecting information relating to the subject matter of an investigation;

(c) the power, subject to other conditions set out in European Union law, to conduct all necessary inspections at the business premises of the legal persons referred to in paragraph (a)(i) to (vi) and any other undertaking included in consolidated supervision where the competent authority is the consolidating supervisor, subject to the prior notification of the overseas regulatory authorities concerned.

Administrative penalties and other administrative measures for breaches of authorisation requirements and requirements for acquisitions of qualifying holdings.

6. Where a natural or legal person is found by the competent authority to have committed any of the following breaches:

(a) carrying out the business of taking deposits or other repayable funds from the public without being a credit institution, in breach of article 5 of the Act;

(b) commencing activities as a credit institution without obtaining a licence, in breach of article 5 of the Act;

(c) acquiring, directly or indirectly, a qualifying holding in a credit institution licensed in terms of the Act or further increasing, directly or indirectly, such a qualifying holding, as a result of which the proportion of the voting rights or of the capital held would reach or exceed the thresholds referred to in article 13(1) of the Act or so that such credit institution would become its subsidiary, without notifying in writing the competent authority, during the assessment period, or notwithstanding the refusal of the competent authority, in breach of article 13(1) of the Act;

(d) disposing, directly or indirectly, of a qualifying holding in a credit institution licensed in terms of the Act or reducing a qualifying holding so that the proportion of the voting rights or of the capital held would fall below the thresholds referred to in article 13(3) of the Act or so that such credit institution would cease to be a subsidiary, without notifying in writing the competent authority;

the administrative penalties and other administrative measures which the administrative penalties and other administrative measures which the competent authority may apply on such a person shall include at least the following:

(i) a public statement which identifies the natural person, credit institution, financial holding company or mixed financial holding company responsible and the

nature of the breach;

(ii) an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;

(iii) 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 the undertaking in the preceding business year:

Provided that where the legal person 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;

(iv) in the case of a natural person, administrative pecuniary penalties of up to five million euro (€5,000,000);

(v) administrative pecuniary penalties of up to twice the amount of the benefit derived from the breach where that benefit can be determined;

(vi) suspension of the voting rights of the shareholder or shareholders held responsible for the breaches referred to in this regulation.

7. (1) This regulation shall apply at least in any of the following circumstances: Other provisions.

(a) a credit institution has obtained a licence through false statements or any other irregular means;

(b) a credit institution, on becoming aware of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in article 13(1) or article 13(3) of the Act, fails to inform the competent authority of those acquisitions or disposals in breach of article 13(5) of the Act;

(c) a credit institution listed on a regulated market as referred to in the list to be published by the European Securities and Markets Authority established by Regulation (EU) No

1095/2010 in accordance with Article 47 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, does not, at least annually, inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings in breach of article 13(5) of the Act;

(d) a credit institution fails to have in place governance arrangements required by the competent authority in accordance with article 17B of the Act;

(e) a credit institution fails to report information or provides incomplete or inaccurate information on compliance with the obligation to meet own funds requirements set out in Article 92 of the CRR to the competent authorities in breach of Article 99(1) of the CRR;

(f) a credit institution 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;

(g) a credit institution 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;

(h) a credit institution fails to report information or provides incomplete or inaccurate information on liquidity to the competent authority in breach of Article 415(1) and (2) of the CRR;

(i) a credit institution 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;

(j) a credit institution repeatedly or persistently fails to hold liquid assets in breach of Article 412 of the CRR;

(k) a credit institution incurs an exposure in excess of the limits set out in Article 395 of the CRR;

(l) a credit institution is exposed to the credit risk of a securitisation position without satisfying the conditions set out in Article 405 of the CRR;

(m) a credit institution 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;

(n) a credit institution makes payments to holders of instruments included in the own funds of the institution in breach of 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;

(o) a credit institution is found liable for a serious breach of the Prevention of Money Laundering Act and, or of any regulations made thereunder; Cap. 373.

(p) a credit institution allows one or more persons not complying with article 14(2) of the Act to become or remain a director.

(2) In the cases referred to in sub-regulation (1), the administrative penalties and other administrative measures that can be applied by the competent authority shall include at least the following:

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

(b) an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct;

(c) in the case of a credit institution, withdrawal of the licence of the said credit institution in accordance with article 9 of the Act;

(d) subject to regulation 4(3), a temporary ban against a director of the credit institution or any other natural person, who is held responsible, from exercising functions in credit institutions;

(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 the undertaking in the preceding business year:

Provided that where the legal person 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 five million euro (€5,000,000);

(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.

Exchange of information on penalties and maintenance of a central database.

8. (1) Subject to professional secrecy requirements referred to in article 34(4) of the Act, the competent authority shall inform the EBA of all administrative penalties, including all permanent prohibitions, imposed under these regulations, and including any appeal in relation thereto and the outcome thereof for the purpose of publication on the EBA central database of administrative penalties, which the competent authority shall consult, where appropriate, in the carrying out of its functions and duties.

(2) Where the competent authority assesses good repute for the purposes of articles 7(1)(b), 7B(3), 14(2) and 14(3) of the Act, it shall consult the EBA database of administrative penalties:

Provided that the competent authority shall check, in accordance with Maltese law, the existence of a relevant conviction in the criminal record of the person concerned. For those purposes, information shall be exchanged in accordance with European Council Decision 2009/316/JHA and European Council 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, 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 the responsible legal person or the annual income of the responsible natural person;

(d) the amount of profits gained or losses 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 cooperation of the natural or legal person responsible for the breach with the competent authority;

(g) previous breaches by the natural or legal person responsible for the breach;

(h) any potential systemic consequences of the breach.

10. (1) The competent authority shall establish effective and reliable mechanisms to encourage reporting of potential or actual breaches of the provisions of the Act, regulations made and Banking Rules issued thereunder, and of the provisions of the CRR. Reporting of breaches.

(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 credit institutions who report breaches committed within the credit institution 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 Data Protection Act and any regulations made thereunder; Cap. 440.

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

(3) Credit institutions shall have in place appropriate procedures for their employees to report breaches internally through a specific, independent and autonomous channel. Such a channel may also be provided through arrangements provided for by social partners. The same protection as referred to in sub-regulation (2)(b), (c) and (d) shall apply.

Part II - Right of Appeal

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Right of appeal.

Cap. 330.

11. Any person subject to a decision taken by the competent authority in terms of these regulations may appeal to the Financial Services Tribunal established under the Malta Financial Services Authority Act, against any decision and, or measure taken by the competent authority under these regulations and, or under the CRR, imposing upon such person an administrative penalty and, or administrative measure.

Part III - Revocation

Revocation of
the Penalties for
Offences
Regulations,
1999.

12. The Penalties for Offences Regulations, 1999, are hereby
revoked.

