VERŻJONI ELETTRONIKA

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Taqsima B

L.N. 115 of 2016

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (UCITS Administrative Penalties, Measures and Investigatory Powers) Regulations, 2016

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

Citation and scope.

1. (1) The title of these regulations is the Investment Services Act (UCITS Administrative Penalties, Measures and Investigatory Powers) Regulations, 2016.

(2) The objective of these regulations is to transpose Articles 99(6)(e), (f) and (g) and Articles 99a, 99b, 99c and 99d of the UCITS Directive.

Interpretation.

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

"the Act" shall mean the Investment Services Act; Cap. 370.

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

"UCITS" means undertakings for collective investment in transferable securities in terms of the UCITS Directive as defined herein;

"UCITS Directive" means 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) (recast), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 and including the Delegated Acts which the Commission is empowered to adopt to further supplement the provisions of Directive 2014/91/EU relating to the custodians of UCITS.

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

Administrative penalties and other administrative measures.

3. The competent authority shall impose administrative penalties and other administrative measures in respect of breaches of the provisions of the Act and, or of regulations and, or Investment Services Rules made thereunder transposing the provisions of the UCITS Directive.

Power to impose penalties.

4. The competent authority shall, exercise its supervisory powers and its powers to impose penalties as follows:

(a) in the case of a legal person, the administrative pecuniary sanction of up to a maximum of five million euro (€5,000,000);

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

(c) as an alternative to paragraphs (a) and (b), the maximum administrative pecuniary sanctions shall be equivalent to at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if it exceeds the maximum amount of five million euro (€5,000,000).

Applicability of these regulations.

5. These regulations shall apply at least in any of the following circumstances:

(a) the activities of the UCITS are pursued without obtaining authorisation, in breach of article 4 of the Act;

(b) the business of the management company is carried out without obtaining prior authorisation, in breach of article 3 of the Act;

(c) the business of the investment company is carried out without obtaining prior authorisation, in breach of article 4 of the Act;

(d) a qualifying holding in a management company is acquired, directly or indirectly, or such a qualifying holding in a management company is further increased so that the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the management company would become its subsidiary ('the proposed acquisition'), without notifying in writing the competent authority in the case where the management company is licensed in terms of the Act and hence the acquirer is seeking to acquire or increase a qualifying holding, in breach of article 10 of the Act;

(e) a qualifying holding in a management company is disposed of, directly or indirectly, or reduced so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the management company would cease to be a subsidiary, without notifying in writing the competent authority, in breach of article 10 of the Act;

(f) a management company has obtained an authorisation through false statement or any other irregular means, in breach of article 7(2)(c) of the Act;

(g) an investment company has obtained an authorisation through false statements or any other irregular means, in breach of article 7(2)(c) of the Act;

(h) a management company, on becoming aware of any acquisition or disposal of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 11(1) of Directive 2014/65/EU fails to inform the competent authority of those acquisitions or disposals, in breach of article 10 of the Act;

(i) a management company fails to inform the competent authority, at least once a year, of the names of the shareholders and members possessing qualifying holdings and the sizes of such holdings, in breach of article 10 of the Act;

(j) a management company fails to comply with procedures and arrangements imposed in accordance with the applicable sections of the Investment Services Rules for Investment Services Providers;

(k) a management company fails to comply with structural and organisational requirements imposed in accordance with the applicable sections of the Investment Services Rules for Investment Services Providers;

(l) an investment company fails to comply with procedures and arrangements imposed in accordance with the applicable sections of the Investment Services Rules for Retail Collective Investment Schemes;

(m) a management company or an investment company fails to comply with the requirements related to delegation of its functions to third parties imposed in accordance with the Investment Services Rules for Investment Services Providers or the Investment Services Rules for Retail Collective Investment

Schemes as the case may be;

(n) a management company or an investment company fails to comply with the rules of conduct imposed in accordance with the Investment Services Rules for Investment Services Providers or the Investment Services Rules for Retail Collective Investment Schemes as the case may be;

(o) a custodian fails to perform its tasks in accordance with the provisions of regulations 6(1) to (3), 15(1), 17(1) and (2) and 18(1) of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations, 2016;

(p) an investment company or, for each of the funds managed, a management company, repeatedly fails to comply with obligations concerning the investment policies of the UCITS as laid down in the Investment Services Rules for Investment Services Providers or the Investment Services Rules for Retail Collective Investment Schemes as the case may be;

(q) a management company or an investment company fails to employ a risk-management process or a process for accurate and independent assessment of the value of OTC derivatives as laid down in the Investment Services Rules for Investment Services Providers or the Investment Services Rules for Retail Collective Investment Schemes as the case may be;

(r) an investment company or, for each of the funds managed, a management company, repeatedly fails to comply with the obligations concerning information to be provided to investors imposed in accordance with the Investment Services Rules for Investment Services Providers or the Investment Services Rules for Retail Collective Investment Schemes as the case may be;

(s) a management company or an investment company marketing units of UCITS that it manages in a Member State other than Malta, fails to comply with the notification requirements prescribed in regulation 4(1) of the Investment Services Act (Marketing of UCITS) Regulations, 2011.

Publication of the decisions of the competent authority.

6. (1) The competent authority shall publish any decision against which there is no appeal imposing an administrative sanction or measure for infringements of the provisions of the Act, the regulations or Investment Services Rules issued thereunder on its website without undue delay after the person on whom the sanction or measure was imposed has been informed of that decision. The

publication referred to in this sub-regulation shall include at least information on the type and nature of the infringement and the identity of the persons responsible:

Provided that this obligation does not apply to decisions imposing measures that are of an investigatory nature.

(2) Where the publication of the identity of the legal persons or of the personal data of the natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where the publication jeopardises the stability of the financial markets or an ongoing investigation, the competent authority shall:

(a) defer the publication of the decision to impose the sanction or measure until the reasons for non-publication cease to exist;

(b) publish the decision to impose the sanction or measure on an anonymous basis in a manner which complies with Maltese law, if such anonymous publication ensures effective protection of the personal data concerned;

(c) not publish the decision to impose a sanction or measure in the event that the options laid down in paragraphs (a) and (b) are considered to be insufficient to ensure:

(i) that the stability of the financial markets would not be put in jeopardy;

(ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

(3) In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.

(4) The competent authority shall inform ESMA of all administrative sanctions imposed but not published in accordance with sub-regulation (1)(c) including any appeal in relation thereto and the outcome of such an appeal. The competent authority shall receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA.

(5) Where the decision to impose a sanction or measure is

subject to appeal before the relevant judicial or other authorities, the competent authority shall also publish immediately on its website such information and any subsequent information on the outcome of such an appeal. Any decision annulling a previous decision to impose a sanction or a measure shall also be published.

(6) The competent authority shall ensure that any publication in accordance with this regulation shall remain on its official website for a period of at least five years from its publication. Personal data contained in the publication shall be kept on the website of the competent authority only for the period which is necessary in accordance with the provisions of the Data Protection Act.

Cap. 440.

Determination of the applicable penalties or measures by the competent authority.

7. When determining the type of administrative penalties or measures and the level of administrative pecuniary penalties, the competent authority shall ensure that they are effective, proportionate and dissuasive and take into account all relevant circumstances, including where appropriate:

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

(b) the degree of responsibility of the person responsible for the infringement;

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

(d) the importance of the profits gained or losses avoided by the person responsible for the infringement, the damage to other persons and, where applicable, the damage to the functioning of markets or the wider economy, in so far as they can be determined;

(e) the level of cooperation with the competent authority of the person responsible for the infringement;

(f) previous infringements by the person responsible for the infringement;

(g) measures taken after the infringement by the person responsible for the infringement to prevent its repetition.

Co-operation with other European regulatory authorities.

8. (1) In the exercise of its powers to impose penalties, the competent authority shall cooperate closely with other European regulatory authorities to ensure that the supervisory and investigative powers and administrative penalties produce the results pursued by

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these regulations.

(2) The competent authority shall also coordinate actions to avoid possible duplication and overlap when applying supervisory and investigative powers and administrative penalties and measures to cross-border cases in accordance with articles 17, 17A and 17B of the Act.

Reporting of infringements.

9. (1) The competent authority shall establish, in the applicable Investment Services Rules issued in terms of the Act, effective and reliable mechanisms to encourage the reporting thereto of potential or actual infringements of the provisions of the Act, the regulations and the Rules issued thereunder, including secure communication channels for reporting such infringements.

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

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

(b) appropriate protection for employees of investment companies, management companies and custodians who report infringements committed within those entities, at least against retaliation, discrimination and other types of unfair treatment;

(c) protection of personal data concerning both the person who reports the infringements and the natural person who is allegedly responsible for an infringement, in accordance with the Data Protection Act; Cap. 440.

(d) clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports an infringement, unless disclosure is required by the provisions of Maltese legislation in the context of further investigations or subsequent judicial proceedings.

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