VERŻJONI ELETTRONIKA

L.N. 401 of 2017

INVESTMENT SERVICES ACT
(CAP. 370)

BANKING ACT
(CAP. 371)

Investment Services Act and Banking Act (MiFID and MiFIR Administrative Penalties, Measures and Investigatory Powers) Regulations, 2017

IN EXERCISE of the powers conferred by article 12 of the Investment Services Act and article 3(1) of the Banking Act, the Minister responsible for the regulation of financial services, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

Title, scope and commencement.

1. (1) The title of these regulations is the Investment Services Act and Banking Act (MiFID and MiFIR Administrative Penalties, Measures and Investigatory Powers) Regulations, 2017.

(2) The purpose of these regulations is to transpose and implement Article 70(1), Article 70(3) to (6) and Article (71)(1) to (5) of MiFID, as herein defined and shall be interpreted and applied accordingly.

(3) These regulations shall apply to:

(a) Maltese investment firms;

(b) European investment firms which have established a branch in Malta in terms of the European Passport Rights for Investment Firms Regulations with respect to the matters to for which the competent authority is responsible in terms of Article 35(8) of MIFID; S.L. 370.10

(c) Maltese credit institutions licensed under the Banking Act insofar as these offer structured deposits as defined in regulation 2(1); and Cap. 371.

(d) persons to whom the provisions of MiFIR apply.

(4) These regulations shall come into force on the 3rd January 2018.

VERŻJONI ELETTRONIKA

Interpretation.

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

Cap. 345.

"APA" or "approved publication arrangement" means a person authorised under MiFID to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles 20 and 21 of MiFIR;

"ARM" or "approved reporting mechanism" means a person authorised under MiFID to provide the service of reporting details of transactions to the competent authority or to European regulatory authorities, as the case may be, or to ESMA on behalf of investment firms;

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

"CTP" or "consolidated tape provider" means a person authorised under MiFID to provide the service of collecting trade reports for financial instruments listed in Articles 6, 7, 10, 12, 13, 20 and 21 of MiFIR from regulated markets, MTFs, OTFs and APAs and consolidating them into a continuous electronic live data stream providing price and volume data per financial instrument;

"deposit" means a credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit, but excluding a credit balance where:

(a) its existence can only be proven by a financial instrument as defined herein unless it is a savings product which is evidenced by a certificate of deposit made out to a named person and which exists in a Member State on 2 July 2014;

(b) its principal is not repayable at par;

(c) its principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or a third party;

"ETF" means an ‘exchange-traded fund’ being a fund of which at least one unit or share class is traded throughout the day on at least one trading venue and with at least one market maker

VERŻJONI ELETTRONIKA

which takes action to ensure that the price of its units or shares on the trading venue does not vary significantly from its net asset value and, where applicable, from its indicative net asset value;

"European investment firm" means an investment firm as defined in Article 4(1) of MiFID authorised by its European regulatory authority within the meaning of Article 5 of MiFID or authorised by a European regulatory authority in an EEA State";

"financial instrument" means an instrument included in the Second Schedule to the Investment Services Act; Cap. 370.

"Maltese credit institution" means a credit institution as defined in point (1) of Article 4(1) of 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 which is licensed in terms of the Banking Act, whose head office is in Malta and who is entitled to carry on an activity in a Member State other than Malta in exercise of a European passport right as defined in the European Passport Rights for Credit Institutions Regulations; Cap. 371. S.L. 371.11.

"Maltese investment firm" means a person licensed in terms of the Investment Services Act, whose head office is in Malta and who is entitled to carry on an activity in a Member State or EEA State other than Malta in exercise of a European Right; Cap. 370.

"European Right" means the entitlement of a person to establish a branch, or provide services, in a Member State or EEA State other than that in which it has its head office:

(a) in accordance with the Treaty as applied in the Member State or EEA State; and

(b) subject to the requirements of MIFID and subject to any regulations made under the Act; and, or Investment Services Rules and, or Conduct of Business Rules issued by the competent authority in terms of article 6 of the Act; implementing such requirements as may be applicable;

"MiFID" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

VERŻJONI ELETTRONIKA

"MiFIR" means Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May, 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as may be amended from time to time, and includes any implementing measures, implementing technical standards, regulatory technical standards, guidelines and similar measures that have been or may be issued thereunder;

"structured deposit" means a deposit as defined in paragraph (c) of the definition "deposit", and which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;

(b) a financial instrument or combination of financial instruments;

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or

(d) a foreign exchange rate or combination of foreign exchange rates;

Cap. 370.
Cap. 371.

(2) Words and expressions which are also used in the Investment Services Act or in the Banking Act shall have the same meaning as in the respective Acts.

Supervisory powers and powers to impose penalties.
Cap. 370.
Cap. 371.

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 Investment Services Act or the Banking Act and any regulations, Investment Services Rules and Conduct of Business Rules issued by the competent authority and MiFIR, either directly or in collaboration with European regulatory authorities and with overseas regulatory authorities, in terms of law 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.
Cap. 370.
Cap. 371.

4. (1) Without prejudice to article 16A of the Investment Services Act, to any regulations made under article 6(2) of the Investment Services Act and to article 35A of the Banking Act and 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:

VERŻJONI ELETTRONIKA

(a) the provisions of the Investment Services Act and, or of regulations and, or Investment Services Rules and Conduct of Business Rules issued by the competent authority transposing the provisions of MiFID; Cap. 370.

(b) the provisions of MiFIR.

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

Administrative penalties and other administrative measures for breaches of MiFID and MiFIR.

5. (1) The competent authority shall exercise its supervisory powers and its powers to take and impose at least the following administrative penalties and measures:

(a) a public statement which indicates the natural or legal person and the nature of the infringement;

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

(c) in the case of a Maltese investment firm, and in the case of the following persons authorized in Malta:

(i) market makers authorized to operate an MTF or OTF;

(ii) an APA;

(iii) a CTP; and, or

(iv) an ARM;

withdrawal or suspension of the relative licence or authorisation in accordance with the provisions of the Investment Services Act and the regulations issued thereunder; Cap. 370.

(d) a temporary ban on any Maltese investment firm being a member of or participant in regulated markets or MTFs or any client of OTFs;

(e) in the case of a legal person, maximum administrative fines of up to five million euro (€5,000,000), or 10% of the total annual turnover of the legal person according to the last available accounts approved by the management body:

Provided that where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts in accordance with

VERŻJONI ELETTRONIKA

Directive 2013/34/EU of the European Parliament and of the Council, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant Union law in the area of accounting, according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

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

(g) maximum administrative fines of up to twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts specified in paragraphs (e) and (f) above.

Publication of decisions.

6. (1) The competent authority shall publish any decision imposing an administrative penalty or measure which it shall take under these regulations on its official website, without undue delay after the person on whom the penalty or measure was imposed has been informed of that decision. The publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible:

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

(2) Notwithstanding sub-regulation (1), 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 publication jeopardises the stability of financial markets or an on-going investigation, the competent authority shall either:

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

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

(c)not publish the decision to impose an administrative penalty or measure at all in the event that the options set out in points (a) and (b) are considered to be insufficient to ensure:

VERŻJONI ELETTRONIKA

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

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

(3) In the case of a decision to publish an administrative penalty or measure on an anonymous basis in accordance with sub-regulation (2), 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) Where the decision to impose an administrative penalty or measure is subject to appeal in terms of regulation 8, the competent authority shall also publish, immediately, on its official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose an administrative penalty or a measure shall also be published.

(5) 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 after its publication:

Provided that personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection laws.

(6) This regulation shall be without prejudice to article 16(8) of the Malta Financial Services Authority Act.

(7) The competent authority shall inform ESMA of all administrative penalties imposed but not published in accordance with point (c) of sub-regulation (2) including any appeal in relation thereto and the outcome thereof.

(8) The competent authority shall provide ESMA annually with aggregated information regarding all sanctions and measures imposed in accordance with sub-regulations (1) to (4):

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

(9) Where the competent authority has disclosed an administrative measure, penalty or criminal sanction to the public, it shall, at the same time, report that fact to ESMA.

VERŻJONI ELETTRONIKA

Applicability of these regulations.

7. (1) These regulations shall apply at least in the case of breach of one or more of any of the following by a Maltese investment firm or a European investment firm which has established a branch in Malta in terms of the European Passport Rights for Investment Firms Regulations insofar as the enforcement of the provisions indicated hereunder fall within the responsibility of the competent authority in terms of Article 35(8) of MIFID, or by a Maltese credit institution offering structured deposits, insofar as the provisions indicated hereunder apply to the latter in terms of Article 1(4) of MIFID:

S.L. 370.10.

Cap. 370.

(a) the provisions of article 6(1)(a),(d) and (e) 7(2)(b) and (c), 10(1), (2) and (4) of the Investment Services Act;

(b) the provisions of the Investment Services Rules transposing the provisions of Article 9 (1),(2), the second sub-paragraph of sub article (3), (5) and (6) 11(1) and (3) and 16 (2), (4), (5), (6), (7) and (10) of MiFID;

(c) the Conduct of Business Rules transposing the provisions of the first and second sub-paragraphs of 9(3), 16(3), 23(1), (2) and (3), 24(1) to (5) and (7) to (10) and the first and second sub-paragraphs of Article 24(11), Articles 25(1) to (6), the second sentence of Article 26(1), Articles 26 (2) and (3), 27 (1) to (8), 28(1) and (2), the second sub-paragraph of Article 30(1), the first sentence of the second sub-paragraph of Article 30(3) of MiFID;

S.L. 370.05.

(d) the provisions of the Investment Services Act (Control of Assets) Regulations transposing Article 16 (8), (9) and second sub-paragraph of Article 16(11) of MiFID;

L.N. 395.

(e) the provisions of regulations 3 to 8 of the Algorithmic Trading Regulations, 2017 transposing Article 17 of MiFID;

L.N. 400.

(f) the provisions of regulations 3(1) to (6), 4, 5, 6(1) to (3) and (5), 7(1),(3) and (4) of the Multilateral Trading Facilities and Organised Trading Facilities Regulations, 2017;

S.L. 370.13.

L.N. 400.

(g) the provisions of regulations 3(2) and 4(2) of the European Passport Rights for Persons Operating Multilateral Trading Facilities Regulations or the Multilateral Trading Facilities and Organised Trading Facilities Regulations, 2017;

S.L. 370.10.

(h) the provisions of regulations 3(2)(a), (4) and (5), 4(2) and (5), 8(2), (8), (10) and (11), 10(2), (5) to (7) of the European Passport Right for Investment Firms Regulations as well as those provisions in the latter regulations, transposing Article 16(11) of MiFID;

VERŻJONI ELETTRONIKA

(i) the provisions of regulation 3(1), (2) and (4) of the Central Counterparties Access Regulations, 2017; L.N. 387.

(j) the provisions of regulations 3(1) to (3), (5), (15) and (17) and regulation 4(1) to (7) of the Position Limits and Position Management Controls in Commodity Derivatives and Reporting Regulations, 2017; L.N. 389.

(k) the provisions of regulations 7(1) to (5), 8, 9, and 10 of the Data Reporting Services Regulations, 2017; and L.N. 391.

(l) the provisions of the Investment Services Act (Tied Agents) Regulations, 2017 transposing the first sub-paragraph of Article 29(2), the third sub-paragraph of Article 29(2), the first sentence of Article 29(3), the first sub-paragraph of Article 29(4) and Article 29(5) of MiFID. L.N. 403.

(2) Without prejudice to sub-regulation (1), these regulations shall also apply at least in the case of breach of one or more of the following provisions of MiFIR by persons to whom the provisions of MiFIR apply:

(a) the provisions of Article 3(1) and (3) on pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other financial instruments;

(b) the provisions of the first paragraph of Article 4(3) on waivers for equity instruments;

(c) the provisions of Article 6 on post-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments;

(d) the provisions of the third paragraph of Article 7(1) on the requirement to obtain the competent authority's prior approval of proposed arrangements for deferred trade publication;

(e) the provisions of Article 8(1), (3) and (4) on pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives;

(f) the provisions of Article 10 on post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and

VERŻJONI ELETTRONIKA

derivatives;

(g) the provisions of the third paragraph of Article 11(1) and the third paragraph of Article 11(3) on authorisation of deferred publication;

(h) the provisions of Article 12(1) on the obligation to make pre-trade and post-trade data available separately;

(i) the provisions of Article 13(1) on the obligation to make pre-trade and post-trade data available on a reasonable commercial basis;

(j) the provisions of Article 14(1), the first sentence of sub-article (2), the second to the fourth sentence of sub-article (3) on the obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other financial instruments and on the requirement applicable to systematic internaliser on the size and sizes at which they quote;

(k) the provisions of the first paragraph of Article 15(1), the first and third sentence of the second paragraph of sub-article (2) and the second sentence of sub-article (4) on execution of client orders;

(l) the provisions of the second sentence of Article 17(1) on the requirement of clear standards governing access to quotes of systematic internalisers;

(m) the provisions of Article 18(1), (2), (4) [first sentence], (5) [first sentence], the first paragraph of sub-article (6) and sub-articles (8) and (9) on the obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives;

(n) the provisions of Article 20(1) and (2) (first sentence) on the post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments and the requirement for the information which is made public and the time limits within which it is published to comply with the requirement adopted pursuant to Article 6 and the regulatory technical standards adopted in accordance with Article 7(2)(a);

(o) the provisions of Article 21(1) to (3) on post-trade

VERŻJONI ELETTRONIKA

disclosure by investment firms including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives;

(p) the provisions of Article 22(2) on the provision of information for the purposes of transparency and other calculations and the requirement of trading venues, APAs and CTPs to store the necessary data for a sufficient period of time;

(q) the provisions of Article 23(1) and (2) on the trading obligation of investment firms;

(r) the provisions of Article 25(1) and (20) on the obligation to maintain records;

(s) the provisions of the first paragraph of Article 26(1), (2) to (5), the first paragraph to sub-article (6) and the first, fifth and eighth paragraphs to sub-article (7) on the obligation to report transactions;

(t) the provisions of Article 27(1) on the obligation of trading venues and systematic internalisers to provide the competent authority with identifying reference data for the purpose of reporting under Article 26;

(u) the provisions of Article 28(1) and the first paragraph of sub-article (2) on the obligation to trade on regulated markets, MTFs or OTFs;

(v) the provisions of Article 29(1) and (2) on the clearing obligation for derivatives traded on regulated markets and timing of acceptance for clearing;

(w) the provisions of Article 30(1) on indirect clearing arrangements;

(x) the provisions of Article 31(2) and (3) on the requirement of investment firms and market operators providing portfolio compression to make public through an APA, the volumes of transactions and the time they were concluded in terms of Article 10 and the requirement to keep complete and accurate records;

(y) the provisions of Article 35(1) to (3) on non-discriminatory access to a central counterparty;

(z) the provision of Article 36(1) to (3) on non-discriminatory access to a trading venue; and

VERŻJONI ELETTRONIKA

(aa) the provisions of Article 37(1) and (3) on non-discriminatory access to and obligation to licence benchmarks.

(3) These regulations shall also apply in cases where:

(a) a Maltese investment firm does not abide by any order exercised by ESMA by virtue of its temporary intervention powers in terms of Article 40 of MiFIR;

(b) a Maltese credit institution offering structured deposits does not abide by any order exercised by the EBA by virtue of its temporary intervention powers in terms of Article 41 of MiFIR; and

(c) a Maltese investment firm or a Maltese credit institution offering structured deposits does not abide by any order exercised by the competent authority by virtue of the product intervention powers in terms of Article 42 of MiFIR.

(4) The provision of investment services, in or from Malta, without the required authorisation or approval in accordance with:

Cap. 370. (a) the provisions of the Investment Services Act transposing Article 5 of MiFID;

(b) the provisions of the Investment Services Rules transposing Article 6(2) of MiFID;

S.L. 370.10. (c) the provisions of the European Passport Right for Investment Firms Regulations transposing Articles 34 and 35 of MiFID;

S.L. 370.13. (d) the provisions of the European Passport Rights for Persons Operating Multilateral Trading Facilities Regulations or L.N. 400. the Multilateral Trading Facilities and Organised Trading Facilities Regulations, 2017 transposing Article 34 of MiFID;

L.N. 405. (e) the provisions of the Investment Services Act (Provision of Investment Services and Activities by Third Country Firms) Regulations, 2017 transposing Article 39 of MiFID;

L.N. 391. (f) the provisions of the Data Reporting Services Regulations, 2017 transposing Article 59 of MiFID:

shall also be considered as an infringement of the MiFID and therefore subject to the applicability of these regulations.

(5) The provision of investment services, in or from Malta,

VERŻJONI ELETTRONIKA

without the required authorisation or approval contrary to the requirements prescribed in:

(a) the provisions of Article 7(1) of MiFIR on the requirement of market operators and investment firms operating a trading venue to obtain the competent authority's prior approval of the proposed arrangement for deferred trade publication and to disclose these arrangements to the market participants and to the public; and

(b) the provisions of Article 11(1) of MiFIR on the requirement applicable to market operators and investment firms operating a trading venue to obtain authorisation from the competent authority for deferred publication of the details of transactions based on the size and type of the transaction:

shall also be considered as an infringement of the MiFIR and thereafter subject to the applicability of these regulations.

(6) Failure to cooperate or comply in an investigation or with an inspection or request covered by Article 69 of MiFID shall also be considered an infringement and subject to the applicability of these regulations.

Right of Appeal.

8. A right of appeal to the Financial Services Tribunal shall lie from the decisions which the competent authority shall take under these regulations and the provisions of article 21 of the Malta Financial Services Authority Act shall apply *mutatis mutandis*.

Cap. 330.

VERŻJONI ELETTRONIKA

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