

Suppliment tal-Gazzetta tal-Gvern ta' Malta Nru. 20,007, 12 ta' Ġunju, 2018

Taqsimha B

L.N. 185 of 2018

**MALTA FINANCIAL SERVICES AUTHORITY ACT
(CAP. 330)**

**Malta Financial Services Authority Act
(Indices used as benchmarks in financial instruments and
financial contracts or to measure the performance of investment
funds) (Amendment) Regulations, 2018**

IN EXERCISE of the powers conferred by article 20E of the Malta Financial Services Authority 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:-

1. The title of these regulations is the Malta Financial Services Authority Act (Indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds) (Amendment) Regulations, 2018 and these regulations shall be read and construed as one with the Malta Financial Services Authority Act (Indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds) Regulations, hereinafter referred to as the "principal regulations". Title.

S.L. 330.10.
2. Sub-regulation (1) of regulation 2 of the principal regulations shall be amended as follows: Amends
regulation 2 of
the principal
regulations.
 - (a) immediately after the definition "Benchmarks Regulation", thereof, there shall be inserted the following new definitions:

"Council Directive 86/635/EEC" means Council Directive of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions 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;

"Council Directive 91/674/EEC" means Council Directive of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings 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;

"Directive 2013/34/EU" means Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC 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;"; and

(b) immediately after the definition "provision of a benchmark", thereof, there shall be inserted the following new definition:

" "Regulation (EU) No 596/2014" means Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC 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;".

Adds new regulations to the principal regulations.

3. Immediately after regulation 4 of the principal regulations there shall be added the following new regulations:

"Powers of the competent authority.

5. Without prejudice to any other regulatory and investigatory powers of the competent authority, in order to fulfil its duties under the Benchmarks Regulation, the competent authority shall have the following supervisory and investigatory powers:

(a) access to any document and other data in any form, and to receive or take a copy thereof;

(b) require or demand information from any person involved in the provision of, and contribution to, a benchmark, including any service provider to which functions, services or activities in the provision of a benchmark have been outsourced as provided for in Article 10 of the Benchmarks Regulation, as well as their principals, and if necessary, summon and question any such person with a view to obtaining information;

(c) request, in relation to commodity benchmarks, information from contributors on related spot markets according, where applicable, to standardised formats and reports on transactions, and direct access to traders' systems;

(d) carry out on-site inspections or investigations, at sites other than the private residences of natural persons;

(e) enter premises of legal persons, without prejudice to Regulation (EU) No 596/2014, in order to seize documents and other data in any form, where a reasonable suspicion exists that documents and other data related to the subject-matter of the inspection or investigation may be relevant to prove a breach of the Benchmarks Regulation;

(f) require existing recordings of telephone conversations, electronic communications or other data traffic records held by supervised entities;

(g) request the freezing or sequestration of assets or both;

(h) require temporary cessation of any practice that the competent authority considers contrary to the Benchmarks Regulation;

(i) impose a temporary prohibition on the exercise of professional activity;

(j) take all necessary measures to ensure that the public is correctly informed about the provision of a benchmark, including by requiring the relevant administrator or a person that has published or disseminated the benchmark or both to publish a corrective statement about past contributions to or figures of the benchmark.

Administrative penalties and other administrative measures.

6. Without prejudice to the supervisory and investigatory powers of the competent authority in accordance with regulation 5, where a person contravenes or fails to comply with the requirements contained in Articles 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34 of the Benchmarks Regulation, where they apply; and, or fails to cooperate or comply with an investigation or with an inspection or request covered by Article 41 of the Benchmarks Regulation, the competent authority shall impose the following administrative penalties and administrative measures:

(a) an order requiring the administrator or supervised entity responsible for the infringement to cease the conduct and to desist from repeating that conduct;

(b) the disgorgement of the profits gained or losses avoided because of the infringement where those can be determined;

(c) a public warning which indicates the administrator or supervised entity responsible and the nature of the infringement;

(d) withdrawal or suspension of the authorisation or the registration of an administrator;

(e) a temporary ban prohibiting any natural person, who is held responsible for such infringement, from exercising management functions in administrators or supervised contributors;

(f) the imposition of maximum administrative penalty of at least three times the amount of the profits gained or losses avoided because of the infringement where those can be determined;

(g) in respect of a natural person, maximum administrative penalty of:

(i) for infringements of the following Articles of the Benchmarks Regulation:- Articles 4, 5, 6, 7, 8, 9, 10, points (a), (b), (c) and (e) of Article 11(1), Article 11(2) and Article 11 (3), and Articles 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34, euro (€500 000); or

(ii) for infringements of point (d) of Article 11(1) or of Article 11(4) of the Benchmarks Regulation, euro (€100 000);

(h) in respect of a legal person, maximum administrative penalty of:

(i) for infringements of the following Articles of the Benchmarks regulation:- Articles 4, 5, 6, 7, 8, 9, 10, points (a), (b), (c) and (e) of Article 11(1), Article 11(2) and (3), and Articles 12, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34, either euro (€1,000,000) or, 10% of its total annual turnover according to the last available accounts approved by the management body, whichever is the higher; or

(ii) for infringements of point (d) of Article 11(1) or of Article 11(4) of the Benchmarks Regulation, either euro (€250,000) or, 2% of its total annual turnover according to the last available accounts approved by the management body, whichever is the higher.

For the purposes of regulation 6(h) (i) and (ii), where the legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts in accordance with 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 Council Directive 86/635/EEC for banks and Council Directive 91/674/EEC for insurance companies according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking or if the person is an association, 10% of the aggregate turnovers of its members.

7. When determining the type and level of administrative penalty and other administrative measures, the competent authority shall take into account all relevant circumstances, including where appropriate:

(a) the gravity and duration of the infringement;

Exercise of supervisory functions and imposition of penalties and other measures.

(b) the criticality of the benchmark to financial stability and the real economy;

(c) the degree of responsibility of the responsible person;

(d) the financial strength of the responsible person, as indicated, in particular, by the total annual turnover of the responsible legal person or the annual income of the responsible natural person;

(e) the level of profits gained or losses avoided by the responsible person, insofar as they can be determined;

(f) the level of cooperation of the responsible person with the competent authority, without prejudice to the need to ensure disgorgement of profits or losses avoided by that person;

(g) previous infringements by the person concerned;

(h) measures taken, after the infringement, by a responsible person to prevent the repetition of the infringement.

Publication of
decisions.

8. (1) The competent authority shall publish any decision imposing an administrative penalty or other administrative measure in relation to infringements of the Benchmarks Regulation on its official website immediately after the person subject to that decision has been informed of that decision. Such publication shall include at least information on the type and nature of the infringement and the identity of the persons subject to the decision.

The foregoing does not apply to decisions imposing measures that are of an investigatory nature.

(2) Where the competent authority considers that the publication of the identity of the legal person or of the personal data of a natural person, would be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where such publication would jeopardise the stability of financial markets or an on-going investigation, it shall do any of the following:

(a) defer the publication of the decision until such time as the reasons for that deferral cease to exist;

(b) publish the decision on an anonymous basis in accordance with national law where such anonymous publication ensures an effective protection of the personal data concerned;

(c) not publish the decision at all in the event that the competent authority is of the opinion that publication in accordance with sub-regulation (2)(a) or (b) will be insufficient to ensure:

(i) that the stability of financial markets is not jeopardised; or

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

Where the competent authority decides to publish a decision on an anonymous basis as referred to in regulation 8(2)(b), it may postpone the publication of the relevant data for a reasonable period of time where it is foreseeable that the reasons for anonymous publication shall cease to exist during that period.

(3) Where the decision is subject to an appeal in terms of regulation 9, the competent authority shall also publish, immediately, on its official website such information and any subsequent information on the outcome of such appeal. Any decision annulling a previous decision to impose an administrative penalty or a measure shall also be published.

(4) Any decision that is published by the competent authority in accordance with this regulation shall remain accessible on the official website of the competent authority for a period of at least five years after its publication. 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 rules.

Right of Appeal.

9. 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 Act shall apply *mutatis mutandis*."
