Suppliment tal-Gazzetta tal-Gvern ta' Malta Nru. 20,698, 10 ta' Settembru, 2021
Taqsima B

L.N. 360 of 2021

INVESTMENT SERVICES ACT (CAP. 370)

Investment Services Act (Marketing of Alternative Investment Funds) (Amendment) Regulations, 2021

IN EXERCISE of the powers conferred by article 12 of the Investment Services 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:

Citation and scope.

1. (1) The title of these regulations is the Investment Services Act (Marketing of Alternative Investment Funds) (Amendment) Regulations, 2021, and these regulations shall be read and construed as one with the Investment Services Act (Marketing of Alternative Investment Funds) Regulations, hereinafter referred to as "the principal regulations".

(2) The scope of these regulations is to transpose, in part, Article 2 of Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings.

Amends regulation 1 of the principal regulations.

2. In sub-regulation (3) of regulation 1 of the principal regulations, for the words "Article 4(1)(a), (b), (h), (j)(i) and (ii), (k), (l), (m),(p), (q), (r)(i) and (ii), (w), (x), (y), (aa), (ag) and (aj), Article 31(1) to (4) and (6), Article 32(1) to (7) and (9), Article 43, Article 61(2),", there shall be substituted the words "Article 4(1)(a), (b), (h), (j)(i) and (ii), (k), (l), (m), (p), (q), (r)(i) and (ii), (w), (x), (y), (aa), (ag) and (aj), Article 30a, Article 31(1) to (4) and (6), Article 32(1) to (7) and (9), Article 32a, Article 43, Article 43a, Article 61(2), Article 69a,".

Amends regulation 2 of the principal regulations.

3. Sub-regulation (1) of regulation 2 of the principal regulations shall be amended as follows:

(a) immediately after the definition ""competent authority" ", there shall be added the following new definition:

""durable medium" means any instrument, which enables a client to store information addressed personally to that client in a way accessible for future reference, for a period of time adequate for the purposes of the information

and which allows the unchanged reproduction of the information stored;"; and

(b) immediately after the definition " "marketing" ", there shall be added the following new definition:

""pre-marketing" means provision of information or communication, direct or indirect, on investment strategies or investment ideas by the AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Member State or EEA State in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with regulations 3, 4 and 5, in that Member State or EEA State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment;".

Amends regulation 3 of the principal regulations.

4. Regulation 3 of the principal regulations shall be amended as follows:

(a) in sub-regulation (6) thereof, for the words, "inform the European Regulatory Authority of the home Member State or EEA State of the AIF that the Maltese AIFM may start marketing the units or shares of the said AIF in Malta.", there shall be substituted the words "inform the European Regulatory Authority of the home Member State or EEA State of the European AIF that the Maltese AIFM may start marketing the units or shares of the said AIF in Malta.";

(b) for sub-regulation (10) thereof, there shall be substituted the following:

"(10) Where, pursuant to a planned change, the AIFM's management of the European AIF would no longer comply with the provisions of the AIFM Directive or the Maltese AIFM would otherwise no longer comply with the provisions of the AIFM Directive, the competent authority shall within fifteen (15) working days of receipt of all the information referred to in the sub-regulation (9) inform the Maltese AIFM that it shall not implement the change. In such case, the competent authority shall notify the European Regulatory Authority of the home Member State or EEA State of the AIF accordingly."; and

(c) immediately after sub-regulation (11) thereof, there shall be added the following new sub-regulations:

"(12) The Maltese AIFM may de-notify arrangements made for marketing of units or shares of some or all of the European AIFs under its management, in respect of which it has made a notification pursuant to this regulation, where all the following conditions are fulfilled:

(a) except in the case of closed-ended AIFs and funds regulated by the Regulation on European long-term investment funds, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such European AIF units or shares held by investors in Malta, is publicly available for at least thirty (30) working days, and is addressed, directly or through financial intermediaries, individually to all investors in Malta, whose identity is known;

(b) the intention to terminate arrangements made for marketing units or shares of some or all of its European AIFs in Malta is made public by means of a publicly available medium, including by electronic means, which is customary for marketing European AIFs and suitable for a typical European AIF investor; and

(c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in sub-regulation (13).

As of the date referred to in paragraph (c), the Maltese AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the European AIF it manages in Malta, in respect of which it has submitted a notification in accordance with sub-regulation (13).

(13) The Maltese AIFM shall submit a notification to the competent authority containing the information referred to in paragraphs (a), (b) and (c) of sub-regulation

(12).

(14) The competent authority shall verify whether the notification submitted by the Maltese AIFM in accordance with sub-regulation (13) is complete and shall, no later than fifteen (15) working days from the receipt of a complete notification, transmit that notification to ESMA. Upon transmission of the notification, the competent authority shall without undue delay, notify the Maltese AIFM of that transmission. For a period of thirty six (36) months from the date referred to in paragraph (c) of sub-regulation (12), the Maltese AIFM shall not engage in pre-marketing of units or shares of the European AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the Member State identified in the notification referred to in sub-regulation (13).

(15) The Maltese AIFM may engage in pre-marketing to professional investors of units or shares of a European AIF in Malta, except where the information presented to potential professional investors:

(a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;

(b) amounts to subscription forms or similar documents whether in a draft or a final form; or

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

(16) Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

(a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and

(b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

(17) The Maltese AIFM is not required to submit

any prior notification to the competent authority, of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in this regulation, before it engages in pre-marketing activity in Malta.

(18) The Maltese AIFM shall ensure that investors do not acquire units or shares in a European AIF through pre-marketing and that investors contacted as part of pre-marketing shall only acquire units or shares in that European AIF through marketing permitted under regulation 3(1).

(19) Any subscription by professional investors, within eighteen (18) months of the Maltese AIFM having begun pre-marketing, to units or shares of a European AIF referred to in the information provided in the context of pre-marketing, or of a European AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in regulation 3(4).

(20) Within two (2) weeks of it having begun pre-marketing, the Maltese AIFM shall send to the competent authority an informal letter, in paper form or by electronic means, which letter shall specify:

(a) a brief description of the pre-marketing including information on the investment strategies presented; and

(b) where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

(21) The Maltese AIFM shall ensure that pre-marketing is adequately documented.

(22) A third party shall only engage in pre-marketing on behalf of the Maltese AIFM where it is authorised as an investment firm in accordance with MIFID, as a credit institution in accordance with the CRD, as a UCITS management company in accordance with the UCITS Directive, as an AIFM in accordance with the AIFM Directive or acts as a tied agent in accordance with MIFID. Such a third party shall be subject to the conditions set out in this regulation in

respect of the Maltese AIFM.".

Amends regulation 4 of the principal regulations.

5. Regulation 4 of the principal regulations shall be amended as follows:

(a) in paragraph (h) of sub-regulation (4) thereof, for the words, "where the Maltese AIFM relies on activities of independent entities to provide investment services in respect of the AIF:", there shall be substituted the words "where the Maltese AIFM relies on activities of independent entities to provide investment services in respect of the AIF;";

(b) immediately after paragraph (h) of sub-regulation (4) thereof, there shall be added the following new paragraph:

"(i) the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State:";

(c) in sub-regulation (12) thereof, for the words, "the competent authority shall inform the Maltese AIFM without undue delay that it shall not implement the change.", there shall be substituted the words "the competent authority shall inform the Maltese AIFM within fifteen (15) working days of receipt of all the information referred to in sub-regulation (11) that it shall not implement the change. In that case, the competent authority shall notify the European Regulatory Authority of the host Member State of the Maltese AIFM accordingly.";

(d) in sub-regulation (13) thereof, for the words, "Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification received pursuant to sub-regulations (11) and (12)", there shall be substituted the words "Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification received pursuant to sub-regulations (12)", and immediately after the words, "if necessary, the express prohibition of marketing of the European AIF.", there shall be added the following words, "The competent authority shall also notify the European Regulatory Authority of the host Member State of the Maltese AIFM accordingly without undue delay.";

(e) in sub-regulation (14) thereof, for the words, "If the changes are acceptable because they do not affect the compliance of the Maltese AIFM’s management", there shall be substituted the words "If the changes do not affect the compliance of the

Maltese AIFM's management", and for the words, "the competent authority shall, without delay, inform the European regulatory authority of the host Member State of the Maltese AIFM of those changes", there shall be substituted the words "the competent authority shall within one month inform the European regulatory authority of the host Member State of the Maltese AIFM of those changes."; and

(f) immediately after sub-regulation (14) thereof, there shall be added the following new sub-regulations:

"(15) The Maltese AIFM may de-notify arrangements made for marketing of units or shares of some or all of the European AIFs under its management in a Member State or EEA State, in respect of which it has made a notification pursuant to this regulation, where all the following conditions are fulfilled:

(a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such European AIF units or shares held by investors in that Member State or EEA State, is publicly available for at least thirty (30) working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State or EEA State, whose identity is known;

(b) the intention to terminate arrangements made for marketing units or shares of some or all of its European AIFs in that Member State or EEA State is made public by means of a publicly available medium, including by electronic means, which is customary for marketing European AIFs and suitable for a typical European AIF investor;

(c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in sub-regulation (16).

As of the date referred to in paragraph (c) of this sub-regulation, the Maltese AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the European AIF it manages in the Member State or EEA State, in respect of which it has submitted a notification in accordance with sub-regulation (16).

(16) The Maltese AIFM shall submit a notification to the competent authority containing the information referred to in paragraphs (a), (b) and (c) of sub-regulation (15).

(17) The competent authority shall verify whether the notification submitted by the Maltese AIFM in accordance with sub-regulation (16) is complete and no later than fifteen (15) working days from the receipt of a complete notification, transmit that notification to the European regulatory authority of the Member State or EEA State, identified in the notification referred to in sub-regulation (16), and to ESMA. Upon transmission of the notification, the competent authority shall promptly notify the Maltese AIFM of that transmission. For a period of thirty-six (36) months from the date referred to in paragraph (c) of sub-regulation (15), the Maltese AIFM shall not engage in pre-marketing of units or shares of the European AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the Member State or EEA State identified in the notification referred to in sub-regulation (16).

(18) The Maltese AIFM shall provide investors who remain invested in the European AIF as well as the competent authority with the information required under Articles 22 and 23 of the AIFM Directive. Such information can be provided, among others, using means of any electronic or other distance communication.

(19) The competent authority shall transmit to the European regulatory authority of the Member State or EEA State identified in the notification referred to in sub-regulation (16), information on any changes to the documentation and information referred to in paragraphs (b) to (f) of sub-regulation (4).

(20) The Maltese AIFM may engage in pre-marketing to professional investors of units or shares of a European AIF in a Member State or EEA State other than

Malta, except where the information presented to potential professional investors:

(a) is sufficient to allow investors to commit to acquiring units or shares of a particular European AIF;

(b) amounts to subscription forms or similar documents whether in a draft or a final form; or

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

(21) Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

(a) they do not constitute an offer or an invitation to subscribe to units or shares of a European AIF; and

(b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

(22) The Maltese AIFM does not require to submit any prior notification to the competent authority before it engages in pre-marketing activity in Malta, provided however that it fulfils the requirements set out in this regulation.

(23) The Maltese AIFM shall ensure that investors do not acquire units or shares in a European AIF through pre-marketing and that investors contacted as part of pre-marketing shall only acquire units or shares in that European AIF through marketing permitted under sub-regulation 4(1).

(24) Any subscription by professional investors, within eighteen (18) months of the Maltese AIFM having begun pre-marketing, to units or shares of a European AIF referred to in the information provided in the context of pre-marketing, or of a European AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification

procedures referred to in sub-regulation 4(4).

(25) Within two (2) weeks of it having begun pre-marketing, the Maltese AIFM shall send to the competent authority an informal letter, in paper form or by electronic means, which letter shall specify:

(a) the Member States in which and the periods during which the pre-marketing is taking or has taken place;

(b) a brief description of the pre-marketing including information on the investment strategies presented; and

(c) where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

(26) The competent authority shall promptly inform the European regulatory authority of the Member State or EEA State, in which the Maltese AIFM is or was engaged in pre-marketing.

(27) The European regulatory authority of the Member State or EEA State, in which pre-marketing is taking or has taken place may request the competent authority to provide further information on the pre-marketing that is taking or has taken place on its territory.

(28) The Maltese AIFM shall ensure that pre-marketing is adequately documented.

(29) A third party shall only engage in pre-marketing on behalf of the Maltese AIFM where it is authorised as an investment firm in accordance with MIFID Directive, as a credit institution in accordance with CRD, as a UCITS management company in accordance with UCITS Directive, as an AIFM in accordance with AIFM Directive, or acts as a tied agent in accordance with MIFID Directive. Such a third party shall be subject to the conditions set out in this regulation in respect of the Maltese AIFM.".

Amends regulation 5 of the principal regulations.

6. Regulation 5 of the principal regulations shall be amended as follows:

(a) in paragraph (h) of sub-regulation (4) thereof, for the words, "the European AIFM relies on activities of independent entities to provide investment services in respect of AIF:", "there shall be substituted the words "the European AIFM relies on activities of independent entities to provide investment services in respect of AIF;", and immediately thereafter, there shall be added the following new paragraph (i):

"(i) the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State:"; and

(b) immediately after sub-regulation (9) thereof, there shall be added the following new sub-regulations:

"(10) The European AIFM may de-notify arrangements made for marketing of units or shares of some or all of the European AIFs under its management in Malta, in respect of which it has made a notification pursuant to sub-regulation (4), where all the following conditions are fulfilled:

(a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such European AIF units or shares held by investors in Malta, is publicly available for at least thirty (30) working days, and is addressed, directly or through financial intermediaries, individually to all investors in Malta, whose identity is known;

(b) the intention to terminate arrangements made for marketing units or shares of some or all of its European AIFs in Malta is made public by means of a publicly available medium, including by electronic means, which is customary for marketing European AIFs and suitable for a typical European AIF investor; and

(c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or

indirect, offering or placement of the units or shares identified in the notification referred to in sub-regulation (11). As of the date referred to in point (c) of this sub-regulation, the European AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the European AIF it manages in Malta, in respect of which it has submitted a notification in accordance with sub-regulation (11).

(11) The European AIFM shall submit a notification to the European regulatory authority of its home Member State or EEA State containing the information referred to in points (a), (b) and (c) of sub-regulation (10).

(12) The European regulatory authority of the AIFM's home Member State or EEA State shall verify whether the notification submitted by the European AIFM in accordance with sub-regulation (11) is complete and no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authority and to ESMA. Upon transmission of the notification, the European regulatory authority of the home Member State or EEA State shall promptly notify the European AIFM of that transmission. For a period of 36 months from the date referred to in point (c) of the sub-regulation (10), the European AIFM shall not engage in pre-marketing of units or shares of the European AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in Malta.

(13) The European AIFM shall provide investors who remain invested in the European AIF as well as the competent authorities of the AIFM's host Member State or EEA State with the information required under Articles 22 and 23 of the AIFM Directive. Such information can be provided, among others, using means of any electronic or other distance communication.

(14) The European regulatory authority of the European AIFM's home Member State or EEA State shall transmit to the competent authorities of the Member State or EEA State, identified in the notification referred to in sub-regulation (11), information on any changes to the documentation and information referred to in points (b) to (f) of sub-regulation (4).

(15) The European AIFM may engage in pre-marketing in Malta, except where the information presented to potential professional investors:

(a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;

(b) amounts to subscription forms or similar documents whether in a draft or a final form; or

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

(16) Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

(a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and

(b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

(17) The European AIFM does not require to submit any prior notification to the competent authority before it engages in pre-marketing activity in Malta, provided however that it fulfils the requirements set out in this regulation.

(18) The European AIFM shall ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under sub-regulation 5(1).

(19) Any subscription by professional investors, within eighteen (18) months of the European AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in sub-regulation 5(4).

(20) Within two (2) weeks of it having begun pre-marketing, the European AIFM shall send to the European regulatory authority of the European AIFM's home Member State or EEA State an informal letter, in paper form or by electronic means, which letter shall specify:

(a) the Member States in which and the periods during which the pre-marketing is taking or has taken place;

(b) a brief description of the pre-marketing including information on the investment strategies presented; and

(c) where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

(21) The competent authority may request the European regulatory authority of the European AIFM's home Member State or EEA State to provide further information on the pre-marketing that is taking or has taken place on its territory.

(22) The European AIFM shall ensure that pre-marketing is adequately documented.

(23) A third party shall only engage in pre-marketing on behalf of a European AIFM where it is authorised as an investment firm in accordance with MIFID, as a credit institution in accordance with the CRD, as a UCITS management company in accordance with the UCITS Directive, as an AIFM in accordance with the AIFM Directive, or acts as a tied agent in accordance with MIFID. Such a third party shall be subject to the conditions set out in this regulation in respect of the European AIFM.".

Amends regulation 6 of the principal regulations.

7. Regulation 6 of the principal regulations shall be amended as follows:

(a) in sub-regulation (2) thereof, for the words, "subject to such variations or modifications as may be prescribed." there shall be substituted the words "subject to such variations or modifications as may be prescribed:", and immediately thereafter, there shall be added the following new proviso:

"Provided that the AIFM shall not be allowed to engage in the pre-marketing of any units or shares of an AIF to retail investors.";

(b) immediately after sub-regulation (3) of regulation 6 thereof, there shall be added the following new sub-regulation:

"(3A) The AIFM shall submit the notification letter referred to in regulations 3(4) and 5(4) respectively and shall also provide information on the facilities for performing the tasks referred to in sub-regulation (7) of this regulation.";

(c) immediately after sub-regulation (6) thereof, there shall be added the following new sub-regulations (7) to (10):

"(7) Where an AIF is to be marketed to retail investors in Malta, the AIFM shall take the measures necessary to ensure that facilities are available therein to perform the following tasks:

(a) process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of an AIF, in accordance with the conditions set out in the AIF's documents;

(b) provide investors with information on how orders referred to in paragraph (a) can be made and how repurchase and redemption proceeds are paid;

(c) facilitate the handling of information relating to the exercise of investors' rights arising from their investment in an AIF in Malta;

(d) provide investors with information relevant to the tasks that the facilities perform in a durable medium; and

(e) act as a contact point for communicating with the competent authority.

(8) In respect of an AIF, units of which are intended for marketing in Malta, the AIFM shall make available to investors for the purposes of inspection and obtaining copies thereof an annual report for each financial year as well as the information and documents required pursuant to Article 23 of AIFM Directive.

(9) The AIFM shall ensure that the facilities to perform the tasks referred to in sub-regulation (7), are provided, including electronically:

(a) in the official language or one of the official languages of Malta or in a language approved by the competent authority;

(b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.

(10) For the purposes of paragraph (b) of sub-regulation (9), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract specifying which of the tasks referred to in sub-regulation (7) are not to be performed by the AIFM and that the third party will receive all the relevant information and documents from the AIFM.

(11) The AIFM shall not be required to have a physical presence in Malta or to appoint a third party for the purposes of sub-regulation 7.".

Ippubblikat mid-Dipartiment tal-Informazzjoni (doi.gov.mt) — Valletta — ***Published by the Department of Information (doi.gov.mt) — Valletta***
Mitbugħ fl-Istamperija tal-Gvern fuq karta FSC — ***Printed at the Government Printing Press on FSC certified paper***

Prezz/*Price*
€0.72