Suppliment tal-Gazzetta tal-Gvern ta' Malta Nru. 20,774, 27 ta' Jannar, 2022

Taqsima B

L.N. 23 of 2022

INVESTMENT SERVICES ACT (CAP. 370)

Investment Firms Directive (Administrative Penalties, Measures And Investigatory Powers) Regulations, 2022

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, scope and commencement.

1. (1) The title of these regulations is the Investment Firms Directive (Administrative Penalties, Measures and Investigatory Powers) Regulations, 2022.

(2) The scope of these regulations is to transpose Articles 18, 19, 20, 21, 22, and 23 of Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU.

(3) These regulations shall come into force on such date as the Minister may by notice in the Gazette establish.

Interpretation.

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

"the Act" means the Investment Services Act; Cap. 370.

"competent authority" means the Malta Financial Services Authority established by article 3 the Malta Financial Services Authority Act; Cap. 330.

"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, 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;

"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 amending Regulation (EU) No 648/2012, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"financial holding company" shall have the same meaning as that assigned to it in point (20) of Article 4(1) of the CRR;

"the IFD" means Directive 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"the IFR" means Regulation 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"investment firm" means a person who holds an investment services licence issued by the competent authority under the Act and which is subject to the requirements of the IFR and the IFD;

"mixed financial holding company" shall have the same meaning as that assigned to it in point (25) of Article 3(1) of the IFR.

(2) Words and expressions used in these regulations shall have the same meaning as that assigned to them in the Act.

Supervisory powers and powers to impose penalties.

3. The competent authority shall exercise its supervisory powers and its powers to impose administrative penalties and measures, in such a way as to ensure full and complete adherence to the requirements and obligations arising out of the IFD and out of the IFR, either directly or in collaboration with European regulatory authorities and with overseas regulatory authorities, in terms of law and as warranted by the relevant circumstances.

Administrative penalties and other administrative measures.

4. (1) Without prejudice to the supervisory powers of the competent authority referred to in regulation 3 and the IFD, 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 regulations and, or Investment Services Rules made thereunder transposing the provisions of the IFD; and, or

(b) the provisions of the IFR,

including where an investment firm:

(i) fails to have in place internal governance arrangements as set out in Article 26 of the IFD;

(ii) fails to report information or provides incomplete or inaccurate information on compliance with the obligation to meet own funds requirements set out in Article 11 of the IFR to the competent authority, in breach of point (b) of Article 54(1) of the IFR;

(iii) fails to report to the competent authority, in breach of point (e) of Article 54(1) of the IFR, information about concentration risk or provides incomplete or inaccurate information;

(iv) incurs a concentration risk in excess of the limits set out in Article 37 of the IFR, without prejudice to Articles 38 and 39 of the IFR;

(v) repeatedly or persistently fails to hold liquid assets in breach of Article 43 of the IFR, without prejudice to Article 44 of the IFR;

(vi) fails to disclose information, or provides incomplete or inaccurate information, in breach of the provisions set out in Part Six of the IFR;

(vii) makes payments to holders of instruments included in the own funds of the investment firm where Article 28, 52 or 63 of the CRR prohibit such payments to holders of instruments included in own funds;

(viii) is found liable for a serious breach of national provisions adopted pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC;

(ix) allows one or more persons whodo not comply with Article 91 of the CRD to become or remain a member of the management body.

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

proportionate and dissuasive.

(3) The competent authority may impose administrative penalties and other administrative measures relating to breaches of the provisions of the Act and any regulations and Investment Services Rules issued thereunder transposing the requirements of the IFD, and of the IFR to the members of the management body of such companies and to other natural persons who under Maltese law are responsible for the breach.

Investigatory and information gathering powers of the competent authority.

5. 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, the IFD and in the IFR these powers shall include:

(a) the power to require information from the following natural or legal persons:

(i) investment firms established in Malta;

(ii) investment 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 in paragraphs (a)(i) to (iv) established or located in Malta where necessary to carry out the tasks of the competent authority including:

(i) the right to require the submission of documents by the persons referred to in paragraph (a);

(ii) the right to examine the books and records of the persons referred to in paragraphs (a)(i) to (iv) and the right to take copies or extracts from such books and

records;

(iii) the right to obtain written or oral explanations from any person referred to in paragraphs (a)(i) to (iv) or their representatives or staff; and

(iv) the right to 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 to conduct all necessary inspections at the business premises of the legal persons referred to in paragraphs (a)(i) to (iv) and any other undertakings included in the supervision of compliance with the group capital test, where the competent authority is the group supervisor, subject to the prior notification of other competent authorities concerned.

Penalties.

6. Where an investment firm is found by the competent authority to have committed any of the breaches referred to in regulation 5, the administrative penalties and other administrative measures which the competent authority may impose shall include at least the following:

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

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

(c) the withdrawal of the investment firm's investment services licence, in accordance with article 7 of the Act;

(d) subject to the provisions of regulation 4(3), a temporary ban against a member of the investment firm's management body or any other natural person, who is held responsible, from exercising functions within investment firms;

(e) in the case of a legal person, administrative 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 of that legal person in the preceding business year:

Provided that, where the investment firm subject to the

administrative penalty 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 legal person, administrative penalties of up to twice the amount of the profits gained or losses avoided due to the breach where those profits or losses can be determined; and

(g) in the case of a natural person, administrative penalties of up to EUR 5,000,000.

Publication of administrative penalties and measures.

7. (1) The competent authority, without undue delay, shall publish on its official website and, or on any other media, as deemed appropriate, any administrative penalties and measures which are imposed for breaches of the Act, regulations and Investment Services Rules issued thereunder transposing the requirements of the IFD, and of the IFR. Such publication shall include information on the type and nature of the breach and the identity of the natural or legal person on whom the penalty or measure is imposed. The information shall only be published by the competent authority after that person has been informed of those administrative penalties or measures and to the extent that the publication is necessary and proportionate:

Provided that, in cases where an appeal has been filed by the person on whom such administrative penalties or measures have been imposed, the competent authority shall, without undue delay, also publish on its official website information on the status of the appeal and the outcome thereof.

(2) The competent authority shall publish the penalties or measures imposed in terms of these regulations, on an anonymous basis, in any of the following circumstances:

(a) where the penalty or measure is imposed on a natural person and, following an obligatory prior assessment, the publication of personal data is found to be disproportionate;

(b) where publication would jeopardise the stability of financial markets or an ongoing criminal investigation; or

(c) where publication would cause, insofar as it can be determined, disproportionate damage to the investment firms, or natural persons involved:

Provided that, where the circumstances referred to in paragraph (a) are likely to cease within a reasonable period of time,

publication in terms of sub-regulation (1) may be postponed for such period of time.

(3) Information published in terms of this regulation shall remain on the official website of the competent authority for a period of not less than five years. Personal data shall be retained on the official website of the competent authority only for the period necessary, in accordance with the provisions of Maltese legislation on data protection.

Exchange of information on penalties.

8. The competent authority shall inform the EBA of all administrative penalties and measures it imposes under these regulations. It shall also provide information regarding any appeal in relation thereto and the outcome therefrom for the purpose of publication on the EBA database of sanctions which the competent authority shall consult where appropriate in the carrying out of its functions and duties.

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 penalties to be imposed in terms of these regulations, 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, including the total turnover of a legal person or the annual income of a natural person;

(d) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach;

(e) the damages for third parties caused by the breach;

(f) the level of co-operation 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; and

(h) any potential systemic consequence of the breach.

Reporting of breaches.

10. (1) The competent authority shall establish effective and reliable mechanisms to encourage the reporting to it of potential or

actual breaches of the provisions of the Act, regulations and Investment Services Rules issued thereunder transposing the requirements of the IFD, and of the provisions of the IFR.

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

(a) specific procedures for the reception, treatment and following up of such reports, including the establishment of secure communication channels;

(b) appropriate protection against retaliation, discrimination or other types of unfair treatment by the investment firm for employees of investment firms who report breaches committed within the investment firm;

(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 Maltese legislation on data protection and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

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

(3) Investment firms shall have in place appropriate procedures for their employees to report breaches internally through a specific independent channel. Those procedures may be provided for by the social partners provided that those procedures offer the same protection as the protection referred to in paragraphs (b), (c) and (d) of sub-regulation (2).

Right of appeal.

11. Subject to the provisions of the Act, any person in respect of whom a decision is taken by the competent authority under these regulations may appeal to the Financial Services Tribunal in terms of article 19 of the Investment Services Act.

Cap. 370.

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*
€0.36