

Suppliment tal-Gazzetta tal-Gvern ta' Malta Nru. 20,783, 11 ta' Frar, 2022

Taqsimha B

L.N. 74 of 2022

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

Recovery and Resolution (Amendment) Regulations, 2022

IN EXERCISE of the powers conferred by article 20A and 20D 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 and of the Resolution Authority, has made the following regulations:

1. (1) The title of these regulations is the Recovery and Resolution (Amendment) Regulations, 2022, and they shall be read and construed as one with the Recovery and Resolution Regulations, hereinafter referred to as the "the principal regulations.";

Citation, scope
and
commencement.
S.L. 330.09.

(2) The scope of these regulations is to transpose Article 63 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/EC, 2013/36/EU, 2014/59/EU and 2014/65/EU and to partially transpose Article 1 of Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy and to partially transpose Articles 4 and 20 and to transpose Article 5 of Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU.

(3) Regulation 14 shall come into force on such date as the Minister may establish by notice in the Gazette.

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 "business day" there shall be added the following definition:

"the CBD" means Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU;;

(b) the definition "the CRD" shall be substituted by the following:

" "the 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:

Provided that, for the purposes of prudential supervision and resolution of investment firms:

(i) references to the CRD throughout these regulations shall be construed as referring to the IFD; and

(ii) references to specific provisions of the CRD throughout these regulations shall be construed as referring to the corresponding provisions of the IFD;";

(c) the definition "the CRR" shall be substituted by the following:

"the 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;";

(d) immediately after the definition "hybrid capital" there shall be added the following new definitions:

" "the IFD" means 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, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"the IFR" means Regulation (EU) 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;"; and

(e) the definition "investment firm" shall be substituted by the following:

" "investment firm" means an investment firm as defined in point (22) of article 4(1) of the IFR, which is subject to the initial capital requirement of €750,000, and excluding firms which are not authorised to provide any of the investment services or to perform any of the investment activities listed in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU;".

3. In paragraph (h) of sub-regulation (2) of regulation 44 of the principal regulations, the words, "under article 29A of the Banking Act", shall be substituted by the words "under regulation 108:" and the words "Cap 371" in the marginal note thereof shall be deleted.

Amends regulation 44 of the principal regulations.

4. In sub-regulation (1) of regulation 44A of the principal regulations, there shall be added the following new proviso:

Amends regulation 44A of the principal regulations.

"Provided that and notwithstanding the provision of any other law, the application of the suitability test in accordance with Article 25(2) of Directive 2014/65/EU shall extend to such instances where the sale of eligible liabilities to a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU refers to the sale of Additional Tier 1 instruments and Tier 2 instruments."

5. Immediately after sub-regulation (2) of regulation 45 of the principal regulations there shall be added the following new sub-regulations:

Amends regulation 45 of the principal regulations.

"(3) Pursuant to Article 65 of the IFR, references to Article 92 of the CRR in these regulations relating to the own funds requirements on an individual basis of investment firms other than those referred to in Article 1(2) or (5) of the IFR shall be construed in the following way:

(a) references to point (c) of Article 92(1) of the CRR as regards the total capital ratio requirement in these regulations shall refer to Article 11(1) of the IFR;

(b) references to Article 92(3) of the CRR as

regards the total risk exposure amount in these regulations shall refer to the applicable requirement in Article 11(1) of the IFR multiplied by 12.5.

(4) In accordance with the proviso to the definition "the CRD" in regulation 2(1), references in these regulations to Article 104a of the CRD as regards additional own funds requirements of investment firms other than those referred to in Article 1(2) or (5) of the IFR shall be construed as referring to Article 40 of the IFD.

(5) The Authority shall notify the Resolution Committee of any additional own funds requirement imposed pursuant to point (a) of Article 39(2) of the IFD on an investment firm that falls under the scope of these regulations, and of any expectation for adjustments as referred to in Article 41(2) of the IFD in respect of such investment firm."

Amends
regulation 45B
of the principal
regulations.

6. In paragraph (a) of sub-regulation 5 of regulation 45B of the principal regulations, the words, "under article 29A of the Banking Act", shall be substituted by the words "under regulation 108" and the words "Cap 371" in the marginal note thereof shall be deleted.

Amends
regulation 45I
of the principal
regulations.

7. Regulation 45I of the principal regulations shall be amended as follows:

(a) in point (ii) of paragraph (c) of sub-regulation (1) thereof, the words, "in terms of article 29A of the Banking Act;", shall be substituted by the words "in terms of regulation 108;" and the words "Cap 371" in the marginal note thereof shall be deleted;

(b) in paragraph (b) of sub-regulation (3) thereof, the words, "in terms of article 29A of the Banking Act;", shall be substituted by the words "in terms of regulation 108;" and the words "Cap 371" in the marginal note thereof shall be deleted;

Amends
regulation 45F
of the principal
regulations.

8. In paragraph (ii) of sub-regulation (2)(a) thereof, the words "and (m) of Article 72b(3)" shall be substituted by the words "and (m) of Article 72b(2) and Article 72b(3)".

Amends
regulation 48 of
the principal
regulations.

9. Paragraph (e) of sub-regulation (1) of regulation 48 of the principal regulations shall be substituted by the following:

"if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and bail-inable liabilities pursuant to paragraphs (a) to (d) is less than the sum of the amounts referred to in regulation 47(3)(b) and (c), the Resolution Committee reduces to the extent required the

principal amount of, or outstanding amount payable in respect of, the rest of bail-inable liabilities, including debt instruments referred to in regulation 108(4), in accordance with the hierarchy of claims in normal insolvency proceedings, including the ranking of deposits provided for in regulation 108, pursuant to regulation 44, in conjunction with the write down pursuant to paragraphs (a) to (d) to produce the sum of the amounts referred to in regulation 47(3) (b) and (c).".

10. Regulation 55 of the principal regulations shall be amended as follows:

Amends regulation 55 of the principal regulations.

(a) in paragraph (b) of sub-regulation (1) thereof, the words, "in article 29A(3) of the Banking Act;", shall be substituted by the words, "in regulation 108(3);" and the words "Cap 371" in the marginal note thereof shall be deleted;

(b) in paragraph (c) of sub-regulation (2) thereof, the words, "under paragraph (a) of article 29A(5) of the Banking Act," shall be substituted by the words, "under paragraph (a) of regulation 108(6),", and the words "Cap 371" in the marginal note thereof shall be deleted;

(c) in the proviso to paragraph (c) of sub-regulation (2) thereof, the words, "referred to in article 29A(3A) and (4) of the Banking Act.", shall be substituted by the words, "referred to in regulation 108(4) and (5).", and the words "Cap 371" in the marginal note thereof shall be deleted.

11. Immediately after sub-regulation (6) of regulation 68 of the principal regulations there shall be added the following new sub-regulation:

Amends regulation 68 of the principal regulations.

"(7) The insolvency or resolution of a credit institution issuing covered bonds does not give the holder of the covered bonds the right to automatic acceleration of payment obligations attached thereto.".

12. Immediately after sub-regulation (2) of regulation 79 of the principal regulations, there shall be added the following new sub-regulation:

Amends regulation 79 of the principal regulations.

"(3) The Authority shall co-operate with the Resolution Committee in the event of the resolution of a credit institution issuing covered bonds in order to ensure that the rights and interests of the covered bond investors are preserved, including at least by verifying the continuous and sound management of the covered bond programme during the period of the resolution

process."

Amends
regulation 84
of the
principal
regulations.

13. Regulation 84 of the principal regulations shall be amended as follows:

(a) in paragraph (n) of sub-regulation (1) thereof, the words "after their appointment." shall be substituted by the words "after their appointment;";

(b) immediately after paragraph (n) of sub-regulation (1) thereof, there shall be added the following new paragraph:

"(o) special administrator appointed in accordance with Article 20 of the CBD.";

(c) in paragraph (g) of sub-regulation (6) thereof, the words "investor compensation scheme." shall be substituted by the words "investor compensation scheme;";

(d) immediately after paragraph (g) of sub-regulation (6) thereof, there shall be added the following new paragraph;

"(h) the special administrator appointed in accordance with Article 20 of the CBD."

Amends
regulation 108
of the principal
regulations.

14. Regulation 108 of the principal regulations shall be substituted by the following:

"(1) Where an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) is insolvent and is being wound up, creditors having their rights secured by pledges, privileges whether resulting from registration or granted by law, or hypothecs and covered bond investors together with counterparties of derivatives contracts that comply with Article 11 of the CBD, shall rank in accordance with the applicable laws in force in Malta at the time.

Provided that the claims of covered bond investors referred to in this sub-regulation shall be limited to the full payment obligations attached to the covered bonds.

(2) Without prejudice to the provisions of sub-regulation (1), the following shall rank before the creditors listed under sub-regulation (3):

(a) covered deposits;

(b) the Depositor Compensation Scheme and the Investor

Compensation Scheme:

(i) subrogating to the rights and obligations of covered depositors in insolvency;

(ii) In relation to contribution/s that are due to it by an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) under the Depositor Compensation Scheme Regulations and the Investor Compensation Scheme Regulations;

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S.L. 370.09.

(c) the Resolution Fund in relation to any contribution or contributions that may be due to it by an institution or an entity referred to in paragraphs (b), (c) or (d) of the definition "entity" in regulation 2(1) in accordance with the provisions of these regulations:

Provided that notwithstanding any provision to the contrary in the applicable Maltese Law, covered deposits mentioned in paragraph (a), the subrogation into the rights and obligations of covered depositors mentioned in paragraph (b)(i), the contributions due to the Depositor Compensation Scheme and the Investor Compensation Scheme mentioned in paragraph (b)(ii) and the contributions due to the Resolution Fund mentioned in paragraph (c) shall rank *pari passu*.

(3) Without prejudice to the provisions of sub-regulations (1) and (2), the following shall rank equally between themselves but before the ranking provided for the claims of ordinary unsecured creditors:

(a) that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in regulation 10 of the Depositor Compensation Scheme Regulations;

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(b) deposits that would be eligible deposits from natural persons, micro, small and medium-sized enterprises provided they were not made through branches located outside the European Union of institutions established within the European Union.

(4) Without prejudice to the provisions of sub-regulations (1), (2) and (3), ordinary unsecured claims shall have a higher priority ranking than that of unsecured claims resulting from debt instruments that meet the following conditions:

(a) the original contractual maturity of the debt instruments is of at least one year;

(b) the debt instruments contain no embedded derivatives and are not derivatives themselves:

Provided that debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, on condition that principal, repayment and interest are denominated in the same currency, shall not be considered to be debt instruments containing embedded derivatives solely because of those features;

(c) the relevant contractual documentation and, where applicable, the prospectus related to the issuance explicitly refer to the lower ranking under this sub-regulation.

(5) The following shall rank below all other unsecured creditors and shall have the following order of priority:

(a) the amount of subordinated debt that is not Additional Tier 1 or Tier 2 capital;

(b) Tier 2 instruments;

(c) Additional Tier 1 instruments;

(d) Common Equity Tier 1 instruments.

(6) For the purposes of this regulation:

(a) "debt instruments" shall mean bonds and other forms of transferable debt and instruments creating or acknowledging a debt;

(b) "derivatives" shall mean those financial instruments defined in point (44) (c) of Article 4(1) of Directive 2014/65/EU; and referred to in Annex I, Section C (4) to (10) thereto."