

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

Taqsimha B

L.N. 29 of 2022

**INVESTMENT SERVICES ACT
(CAP. 370)**

Investment Services Act (Supervisory Consolidation) (Capital Requirements Directive) (Amendment) 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:

1. (1) The title of these regulations is the Investment Services Act (Supervisory Consolidation) (Capital Requirements Directive) (Amendment) Regulations, 2022, and these regulations shall be read and construed as one with the Investment Services Act (Supervisory Consolidation) (Capital Requirements Directive) Regulations, hereinafter referred to as the "principal regulations".

Title and commencement.

L.N. 495 of 2021.

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

2. In the proviso of regulation 2 of the principal regulations the definition "financial institution" shall be substituted by the following:

Amends regulation 2 of the principal regulations.

"Provided that the entities referred to in point (1) and in points (3) to (24) of Article 2(5) of the CRD shall be treated as financial institutions;"

3. Regulation 3 of the principal regulations shall be substituted by the following:

Amends regulation 3 of the principal regulations.

3. (1) The competent authority shall exercise supervision on a consolidated basis:

(a) where the parent undertaking is a parent credit institution established in Malta or in another Member State or an EU parent credit institution supervised by the competent authority on an individual basis;

(b) where a parent undertaking is a parent investment firm established in Malta or in another Member State or an EU parent investment firm and at least one of its subsidiaries is a credit institution supervised by the competent authority:

Provided that, where there are several credit institutions, the competent authority shall exercise supervision on a consolidated basis where it supervises the credit institution with the largest balance sheet total;

(c) where the parent of a credit institution supervised by the competent authority on an individual basis is a parent financial holding company established in Malta or in another Member State, a parent mixed financial holding company established in Malta or in another Member State, an EU parent financial holding company or EU parent mixed financial holding company;

(d) where two or more institutions authorised in the European Union, one of which is a credit institution supervised by the competent authority, have the same parent financial holding company established in Malta or in another Member State, parent mixed financial holding company established in Malta or in another Member State, EU parent financial holding company or EU parent mixed financial holding company, and:

(i) the competent authority supervises the credit institution, which is the only credit institution within the group; or

(ii) the competent authority supervises the credit institution with the largest balance sheet total, where there are several credit institutions within the group:

Provided that, for the purposes of this paragraph, the term "institution" shall include credit institutions and investment firms;

(e) where consolidation is required pursuant to Article 18(3) or (6) of the CRR and the competent authority supervises the credit institution with the largest balance sheet total.

(2) By way of derogation from sub-regulation (1)(b), (d)(ii) and (e), the competent authority shall be the consolidating supervisor where it supervises on an individual basis one or more investment firms within a group, and the sum of the balance sheet totals of those supervised investment firms is higher than that of the investment firms supervised on an individual basis by any other European regulatory authority, and there are no credit institutions in the group.

(3) In particular cases, the criteria referred to in sub-regulation (1)(a), (b), (d) and (e) may be waived by common agreement of the competent authority with the other relevant European regulatory authorities and a European regulatory authority may be appointed to exercise supervision on a consolidated basis where the application of the criteria referred to in the said sub-regulation (1)(a), (b), (d) and (e) would be inappropriate, taking into account the credit institutions or investment firms concerned and the relative importance of their activities in the relevant Member States, or the need to ensure the continuity of supervision on a consolidated basis by the same European regulatory authority. In these cases, before such decision is taken the EU parent institution, the EU parent financial holding company, the EU parent mixed financial holding company or the institution with the largest balance sheet total, as applicable, shall have the right to be heard.

(4) The competent authority shall notify the Commission and the EBA without delay of any agreement falling within sub-regulation (3).

4. Immediately after sub-regulation 6(3) there shall be added the following new sub-regulations:

Amends
regulation 6 of
the principal
regulations.

"(4) Where the competent authority is the consolidating supervisor, and a financial holding company or a mixed financial holding company that has been granted approval in accordance with Article 21a of the CRD is established in a Member State other than Malta, the co-ordination and co-operation arrangements referred to in sub-regulations (1) and (2) shall also be concluded with the European regulatory authority where the parent undertaking is established.

(5) Where the competent authority is not the consolidating supervisor, but a financial holding company or a mixed financial holding company has been granted approval in accordance with Article 21a of the CRD and is established in Malta, the co-ordination and co-operation arrangements referred to sub-regulations (1) and (2) shall be concluded with the European regulatory authority acting as the consolidating supervisor."

Amends regulation 7 of the principal regulations.

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

(a) immediately after sub-regulation (2) thereof, there shall be added the following new sub-regulation:

"(2A) In order to facilitate the tasks referred to in sub-regulation (1) and regulations 4(1), 5(1), 6(1), and 6(2), where the competent authority is the consolidating supervisor, it shall also establish colleges of supervisors where all the cross-border subsidiaries of an EU parent institution, an EU parent financial holding company or an EU parent mixed financial holding company have their head offices in third countries:

Cap. 330.

Provided that the third countries' regulatory authorities are subject to confidentiality requirements that are equivalent to the requirements laid down in the Malta Financial Services Authority Act and any other applicable law."

(b) in sub-regulation (5) thereof:

(i) in paragraph (a) thereof, the words "financial holding company; and" shall be substituted by the words "financial holding company;"; and

(ii) immediately after paragraph (b) thereof, there shall be added the following new paragraph:

"(c) Malta is the Member State where a financial holding company or a mixed financial holding company that has been granted approval in accordance with Article 10CA of the Act is established."

Amends regulation 8 of the principal regulations.

6. Regulation 8 of the principal regulations shall be

substituted by the following:

Joint decisions on
specific prudential
requirements.

"8. (1) The competent authority, whether it is the consolidating supervisor or the competent authority responsible for the supervision of subsidiaries of an EU parent institution, an EU parent financial holding company or an EU parent mixed financial holding company which are investment firms, shall do everything within its power to reach a joint decision with the other European regulatory authorities:

S.L. 370.15.

(a) on the application of Articles 73 and 97 of the CRD as transposed in the Investment Services Rules and in Investment Services Act (Supervisory Review) Regulations to determine the adequacy of the consolidated level of own funds held by the group of institutions with respect to its financial situation and risk profile and the required level of own funds for the application of point (a) of Article 104(1) of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations, each entity within the group of institutions and on a consolidated basis;

S. L. 370.15.

(b) on measures to address any significant matters and material findings relating to liquidity supervision, including relating to the adequacy of the organisation and the treatment of risks as required pursuant to Article 86 of the CRD as transposed in the Investment Services Rules and relating to the need for institution-specific liquidity requirements in accordance with Article 105 of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations.

S. L. 370.15.

(c) on any guidance on additional own funds referred to in Article 104b(3) of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations.

(2) Where it is the consolidating supervisor, the competent authority shall submit –

S. L. 370.15.

(a) for the purpose of sub-regulation (1)(a), a report containing the risk assessment of the group of institutions in accordance with Article 104a of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations to the other relevant European regulatory authorities;

(b) for the purpose of sub-regulation (1)(b), a report containing the assessment of the liquidity risk profile of the group of institutions in accordance with Articles 86 and 105 of the CRD as transposed in the Investment Services Rules and in the Investment Services Act (Supervisory Review) Regulations, to the other relevant European regulatory authorities;

(c) for the purpose of sub-regulation (1)(c), a report containing the risk assessment of the group of institutions in accordance with Article 104b of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations, to the other relevant European regulatory authorities.

(3) The joint decisions referred to in sub-regulation (1) shall be reached within four (4) months from submission of the reports referred to in sub-regulation (2):

S. L. 370.15.

Provided that the joint decisions referred to in sub-regulation (1) shall also duly consider the risk assessment of subsidiaries performed by the competent authority and, or relevant European regulatory authorities in accordance with Articles 73, 97, 104a and 104b of the CRD as transposed in the Investment Services Rules and in the Investment Services Act (Supervisory Review) Regulations.

(4) Where the competent authority is the consolidating supervisor, it shall provide the EU parent institution concerned with the joint decisions referred to in sub-regulation (1), which shall be set out in a document containing the full reasons for the decisions. In the event of disagreement, the competent authority shall, at the request of any of the other European regulatory authorities concerned, consult the EBA:

Provided that the competent authority, when it is the consolidating supervisor, may consult the EBA on its own initiative.

(5) In the absence of such a joint decision within the time period referred to in sub-regulation (3) and, or regulation 8, a decision on the application of Articles 73, 86, 97, 104(1)(a), 104b and 105 of the CRD as transposed in the Investment Services Rules and in the Investment Services Act (Supervisory Review) Regulations shall be taken by the competent authority, where it is acting as the consolidating supervisor, on a consolidated basis, after duly considering the risk assessment of subsidiaries performed by the relevant European regulatory authorities:

S.L. 370.15.

Provided that:

(a) if, at the end of the time period referred to in sub-regulation (3), any of the European regulatory authorities concerned have referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the competent authority shall defer its decision and await any decision the EBA may take in accordance with Article 19(3) of the said Regulation. The competent authority shall take its decision in conformity with the decision of the EBA. The time period referred to in sub-regulation (3) shall be deemed to be the conciliation period within the meaning of Regulation (EU) No 1093/2010;

(b) where the competent authority is not acting as consolidated supervisor but is responsible for the supervision of subsidiaries of an EU parent institution or an EU parent financial holding company or an EU parent mixed financial holding company, it may refer the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. The matter shall not be referred to the EBA after the end of the time period referred to above in sub-regulation (3) or after a joint decision has been reached.

(6) Where the competent authority is not the consolidating supervisor but is responsible for the supervision of a subsidiary of an EU parent credit institution or an EU parent financial holding company or an EU parent mixed financial holding company, which is a credit institution, and in the absence of a joint decision in terms of this regulation within the time period referred to in regulation 8, the competent authority shall decide on the application of Articles 73, 86, 97, 104(1)(a), 104b and 105 of the CRD as transposed in the Investment Services Rules and in the Investment Services Act (Supervisory Review) Regulations on an individual or sub-consolidated basis, after duly considering the views and reservations expressed by the consolidating supervisor:

S.L. 370.15.

Provided that if at the end of the time period referred to in regulation 8 and as transposed in the Investment Services Act (Supervisory Review) Regulations, any of the European regulatory authorities concerned have referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the competent authority shall defer its decision and await any decision that the EBA shall take in accordance with Article 19(3) of the said Regulation. The competent authority shall take its decision in conformity with the decision of the EBA. The time period referred to above shall be deemed to be the conciliation period within the meaning of the said Regulation:

S.L. 370.15.

(7) Where the competent authority is not acting as consolidated supervisor but is responsible for the supervision of subsidiaries of an EU parent institution or an EU parent financial holding company or an EU parent mixed financial holding company, it may, in the event of any disagreement, refer a dispute to the EBA on its own initiative but prior to a joint decision being made, provided that no referral shall be made once the time period specified in regulation 8 has expired.

(8) (a) The decisions taken by the competent authority referred to in this regulation shall be set out in a document containing fully reasoned decisions and shall take into account the risk assessment, views and reservations of the competent authority or the other European regulatory authorities, as applicable, expressed during the time period referred to in sub-regulation (3).

(b) The competent authority shall provide the document referred to above to the European regulatory authorities concerned and to the EU parent institution. Where the EBA has been consulted, the competent authority shall consider its advice and explain any significant deviation therefrom.

(c) The joint decisions referred to in sub-regulation (1) and the decisions taken by the competent authority or European regulatory authorities in terms of regulation 8 shall be recognised as determinative and shall be applied by the competent authority, where applicable.

(9) The decisions referred to in sub-regulation (1) and any decision taken in terms of sub-regulations (5) and (6) shall be updated on an annual basis or, in exceptional circumstances, where the competent authority is responsible for the supervision of subsidiaries of an EU parent institution or an EU parent financial holding company or an EU parent mixed financial holding company which are credit institutions, it may make a written and fully reasoned request to the consolidating supervisor to update the decision on the application of Article 104(1)(a), Article 104b and Article 105 of the CRD as transposed in the Investment Services Act (Supervisory Review) Regulations. In those exceptional circumstances, such update may be addressed on a bilateral basis between the competent authority and the consolidating supervisor:

Provided that, where the competent authority is the consolidating supervisor, it shall update the decisions at the request of the European regulatory authorities responsible for the supervision of subsidiaries of an EU parent institution, or an EU parent financial company, or an EU parent mixed financial holding company. The competent authority may address the update to the European regulatory authority making the request, on a bilateral basis.

Amends
regulation 9 of
the principal
regulations

7. Immediately after sub-regulation 6 of regulation 9 of the principal regulations, there shall be added the following new sub-regulation:

"(6A) The competent authority shall cooperate closely with the financial intelligence units and authorities entrusted with the public duty of supervising the obliged entities listed in points (1) and (2) of Article 2(1) of Directive (EU) 2015/849 for compliance with the said Directive within their respective competences and shall provide them with information relevant for their respective tasks under the CRD as transposed in Maltese Law, the CRR and under Directive (EU) 2015/849, provided that such co-operation and information exchange do not impinge on an on-going inquiry, investigation or proceedings in accordance with the criminal or administrative law of the Member State where the competent authority, financial intelligence unit or authority entrusted with the public duty of supervising the obliged entities listed in points (1) and (2) of Article 2(1) of Directive (EU) 2015/849 is located."

Amends
regulation 11 of
the principal
regulations.

8. Immediately after sub-regulation (1) of regulation 11 of the principal regulations, there shall be added the following new sub-regulation:

"(1A) Where, pursuant to regulation 3, the consolidating supervisor of a group with a parent mixed financial holding company is different from the coordinator determined in accordance with Article 12 of Directive 2002/87/EC, the consolidating supervisor and the co-ordinator shall co-operate for the purpose of applying the provisions of the Act, and any regulations or Rules made thereunder transposing the requirements of the CRD, and under the CRR, on a consolidated basis. In order to facilitate and establish effective co-operation, the consolidating supervisor and the co-ordinator shall have written co-ordination and co-operation agreements in place."

9. Sub-regulation (2) of regulation 20 of the principal regulations shall be substituted by the following:

Amends
regulation 20 of
the principal
regulations.

"(2) Where a mixed financial holding company is subject to equivalent provisions under the Act and any regulations or Rules made thereunder transposing the requirements of the CRD, and under Directive 2002/87/EC, in particular in terms of risk-based supervision, the competent authority may, as consolidating supervisor, after consulting the other European regulatory authorities responsible for the supervision of subsidiaries, apply only the latter Directive to that mixed financial holding company."
