

L.N. _____ of 2017

INVESTMENT SERVICES ACT
(CAP. 370)

Investment Services Act (Exemption) (Amendment) Regulations, 2017

IN exercise of the powers conferred by article 12 of the Investment Services Act, the Minister for Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Title and scope.
S.L. 370.02

1. (1) The title of these regulations is the Investment Services Act (Exemption) (Amendment) Regulations, 2017, and these regulations shall be read and construed as one with the Investment Services Act (Exemption) Regulations, hereinafter referred to as “the principal regulations”.

(2) The objective of these regulations is in part to implement article 2 of MiFID as herein defined and they shall be interpreted and applied accordingly.

Amends
regulation 1 of
the principal
regulations.

2. In subregulation (2) of regulation 1 of the principal regulations, for the words “Article 2 of the MiFID Directive,”, there shall be substituted the words, “Article 4(1) paragraphs 22, 23 and 40, Article 2(1) paragraphs (d), (e), (h), (j), (n), (o) and Article 5(2), of MiFID,”.

Amends
regulation 2 of
the principal
regulations.

3. Regulation 2 of the principal regulations shall be amended as follows:

(a) immediately after the definition “alternative investment fund manager”, there shall be inserted the following new definitions:

“ “CSD” means a legal person that operates a securities settlement system as referred to in point (3) of Section A of the Annex to the CSD Regulation and provides at least one other of the following core services listed in Section A of the said Annex:

- (a) initial recording of securities in a book-entry system (‘notary service’);
- (b) providing and maintaining securities accounts at the top tier level (‘central maintenance service’);

“CSD Regulation” means Regulation (EU) No 909/2014 of the European Parliament and of the Council of the 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/28/EC and MiFID and Regulation (EU) No 236/2012, as may be amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

“Directive 2003/87/EC” means Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC;

“Directive 2009/72/EC” means Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;”

“Directive 2009/73/EC means Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;

“Directive 2013/36/EU” 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 and Maltese investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;”;

- (b) in the definition “European investment firm”:
 - (i) for the words, “article 4 (1) of the Directive”, there shall be substituted the words, “article 4 (1) of MiFID”; and
 - (ii) for the words, “article 5 of the Directive”, there shall be substituted the words, “article 5 of MiFID”;

- (c) immediately after the definition “European investment firm”, there shall be inserted the following new definitions:

“ “high-frequency algorithmic trading technique” means an algorithmic trading technique characterised by:

- (a) infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry: co-location, proximity hosting or high-speed direct electronic access;
- (b) system-determination of order initiation generation, routing or execution without human intervention for individual trades or

- orders; and
- (c) high message intraday rates which constitute orders, quotes or cancellations;

“Maltese investment firm” means a person licensed in terms of the Act, whose head office is in Malta and who is entitled to carry on an activity in a Member State or EEA State other than Malta in exercise of a European Right;”;

- (d) for the definition “MiFID Directive”, there shall be substituted the following:

“ “MiFID” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;”;

- (e) for the definition “multilateral trading facility”, there shall be substituted the following:

“ “multilateral trading facility” or “MTF” means a multilateral system operated by a Maltese investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II of MiFID;”;

- (f) immediately after the definition “Occupational Pensions Directive”, there shall be inserted the following new definition:

“ “organised trading facility” or “OTF” means a multilateral trading system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with the provisions of Title II of MiFID;”;

- (g) immediately after the definition “professional investor”, there shall be inserted the following new definitions:

“ “Regulation (EC) No 714/2009” means Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, as amended from time to time;

“Regulation (EC) No 715/2009” means Regulation (EC) No

715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as amended from time to time;”.

Amends
regulation 3 of
the principal
regulations.

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

(a) for paragraph (a) thereof, there shall be substituted the following:

“(a) the Central Bank of Malta and the members of the ESCB and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international financial institutions established by two or more Member States which have the purpose of mobilizing funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems;”;

(b) for paragraph (d) thereof, there shall be substituted the following:

“(d) persons dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in financial instruments other than commodity derivatives or emission allowances or derivatives thereof unless such persons:

- (i) are market makers;
- (ii) are members of or participants in a regulated market or an MTF or have direct electronic access to a trading venue;
- (iii) apply a high-frequency algorithmic trading technique; or
- (iv) deal on own account when executing client orders;

Persons exempt under point (p) are not required to meet the conditions laid down in this point in order to be exempt.”;

(c) for paragraph (g) thereof, there shall be substituted the following:

“(g) persons providing investment services consisting exclusively in the administration of employee-participation schemes;

(d) for paragraph (p) thereof, there shall be substituted the following:

“(p) persons:

- (i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or
- (ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business;

Provided that:

- a. for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives;
- b. those persons do not apply a high-frequency algorithmic trading technique; and
- c. those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;

Provided further that persons exempt under this paragraph are not required to meet the conditions laid down in paragraph (d) in order to be exempt;”;

- (e) for paragraph (q) thereof, there shall be substituted the following:

“(q) a person who manages and, or operates the business of a regulated market or which is a regulated market in terms of MiFID, and who operates a MTF or an OTF in terms of the First Schedule to the Act, subject to the verification by the competent authority of such person’s compliance with the requirements which the competent authority may determine from time to time;”;

- (f) in paragraph (r) thereof, for the words, “the Directive”, there shall be substituted the words, “MiFID”;

- (g) in paragraph (z) thereof, for the words, “the said service.”, there shall be substituted the words, “the said service;”;

- (h) immediately after paragraph (z) thereof, as amended, there shall be added the following new paragraphs:

“(aa) operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, provided that those persons do not apply a high-frequency algorithmic trading technique;

(bb) persons providing investment services which only involve both the administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

- (cc) transmission system operators as defined in Article 2(4) of Directive

2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks:

Provided that this exemption shall apply to persons engaged in the activities set out in this point only where they perform investment activities or provide investment services relating to commodity derivatives in order to carry out those activities and shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights;

(dd) CSDs that are regulated as such under the Financial Markets Act, to the extent that they are regulated under the Financial Markets Act.”.

(i) paragraph (x) thereof shall be deleted.