

*Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 19,044, 8 ta' Marzu, 2013*

*Taqsimha B*

**L.N. 113 of 2013**

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

**Investment Services Act (Marketing of Alternative Investment Funds) Regulations, 2013**

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

PRELIMINARY

1. (1) The title of these regulations is the Investment Services Act (Marketing of Alternative Investment Funds) Regulations, 2013. Citation, commencement and scope.

(2) These regulations shall come into force on 22nd July 2013.

(3) These regulations provide the requirements applicable to the cross-border marketing of Alternative Investment Funds in Malta or in any other Member State or EEA State.

(4) These regulations transpose and implement, in part, the provisions of 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), Articles 31(1) to (4) and (6), Article 32(1) to (7) and (9), Article 43, Article 61(2), Annex III and Annex IV of the AIFM Directive, and they shall be interpreted and applied accordingly.

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

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

"Alternative Investment Fund" or "AIF" means a collective investment scheme, including subfunds thereof, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, and which does not qualify as a UCITS Scheme in terms of the UCITS Directive;

"Alternative Investment Fund Manager" or "AIFM" means a legal person whose regular business is managing one or more AIFs;

"the AIFM Directive" means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009

and (EU) No 1095/2010 as amended from time to time, and includes any implementing measures that may be issued thereunder;

Cap. 330. "competent authority" means the Malta Financial Services Authority established by the Malta Financial Services Authority Act, which body shall also carry out the duties as competent authority for all purposes of the AIFM Directive;

"ESMA" means the European Securities and Markets Authority established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of the 24 November 2010;

"established" means:

(a) in relation to an AIF, the place where the AIF is authorised or registered or if the AIF is not authorised or registered, the place where the AIF has its registered office;

(b) in relation to an AIFM, the place where the AIFM has its registered office;

"European AIF" means:

(a) an AIF which is authorised or registered in a Member State or EEA State, including Malta, under the applicable national law;

(b) an AIF which is not authorised or registered in a Member State or EEA State but has its registered office and, or head office in a Member State or EEA State including Malta;

"European AIFM" means an AIFM which has its registered office in a Member State or EEA State other than Malta;

"European AIFM home Member State or EEA State" means the Member State or EEA State other than Malta, in which the European AIFM has its registered office;

"European AIFM host Member State or EEA State" means:

(a) a Member State or EEA State, other than the home Member State or EEA State, in which a European AIFM manages European AIFs; or

(b) a Member State or EEA State, other than the home Member State or EEA State, in which a European AIFM markets units or shares of a European AIF;

"European regulatory authority" means the body or bodies

designated by a Member State or an EEA State other than Malta in accordance with Article 44 of the AIFMD to carry out the duties provided for in the AIFM Directive;

"feeder AIF" means an AIF which:

- (a) invests at least 85% of its assets in units or shares of another AIF hereinafter referred to as the master AIF;
- (b) invests at least 85% of its assets in more than one master AIFs where those master AIFs have identical investment strategies; or
- (c) has otherwise an exposure of at least 85% of its assets to such a master AIF;

"home Member State of the AIF" means:

- (a) the Member State or EEA State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State or EEA State in which the AIF has been authorised or registered for the first time; or
- (b) if the AIF is neither authorised nor registered in a Member State or EEA State, the Member State or EEA State in which the AIF has its registered office and, or head office;

"Maltese AIFM" means an AIFM which is licensed in terms of the Act and which has its registered office in Malta;

"Maltese AIFM host Member State or EEA State" means:

- (a) a Member State or EEA State, other than Malta, in which a Maltese AIFM manages European AIFs; or
- (b) a Member State or EEA State, other than Malta, in which a Maltese AIFM markets units or shares of a European AIF;

"master AIF" means an AIF which a feeder AIF invests in or has an exposure in accordance with the definition of "feeder AIF";

"managing AIFs" means performing at least investment management functions referred to in point 1(a) or (b) of Annex I of the AIFM Directive for one or more AIFs;

"marketing" means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares

of an AIF that it manages to or with investors domiciled or with a registered office in the European Union;

"professional investor" shall have the meaning assigned to "professional client" in the Investment Services Rules or an investor who has opted to be treated as a professional client in terms of said Rules;

"retail investor" means an investor who is not a professional investor;

"third country" means a country which is not a Member State or an EEA State;

"third country AIF" means an AIF which is not a European AIF;

"Tribunal" means the Financial Services Tribunal established in terms of the Malta Financial Services Authority Act;

Cap. 330.

"the UCITS Directive" means Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended from time to time, and includes any implementing measures that may be issued thereunder.

(2) Words and expressions used in these regulations which are also used in the Act but which are not defined herein shall have the same meaning as in the Act.

(3) In the event that any of these regulations conflict with the provisions of the AIFM Directive, the latter shall prevail.

#### MARKETING OF UNITS OR SHARES OF EUROPEAN AIFs BY MALTESE AIFMs TO PROFESSIONAL INVESTORS IN MALTA

Marketing of units or shares of European AIFs by a Maltese AIFM in Malta.

**3.** (1) A Maltese AIFM may market to professional investors in Malta, units or shares of a European AIF, which it manages and such European AIF, where registered in a Member State or EEA State other than Malta, shall be exempt from the provisions of article 4 of the Act, provided that prior to commencement of its marketing in Malta the conditions prescribed in this regulation are met.

(2) Without prejudice to regulation 6, European AIFs managed and marketed by a Maltese AIFM shall be marketed only to professional investors.

(3) Where the European AIF is a feeder AIF, the right to market referred to in sub-regulation (1) is subject to the condition that

the master AIF is also a European AIF which is managed by an AIFM authorised by a Member State or an EEA State.

(4) The Maltese AIFM shall submit to the competent authority a notification in respect of each European AIF which it intends to market. Such notification shall comprise the documentation and information prescribed hereunder:

(a) a notification letter, including a programme of operations identifying the European AIFs which the Maltese AIFM intends to market and the information on where the AIFs are established;

(b) the European AIF's prospectus or equivalent rules or instruments of incorporation;

(c) identification of the custodian of the European AIF;

(d) a description of, or any information on, the European AIF available to investors;

(e) information on where the master AIF is established if the AIF is a feeder AIF in terms of sub-regulation (3);

(f) any additional information concerning the disclosure obligations prescribed in Investment Services Rules, for each European AIF which the Maltese AIFM intends to market;

(g) where relevant, information on the arrangements established to prevent units or shares of the European AIF from being marketed to retail investors, including in the case where the Maltese AIFM relies on activities of independent entities to provide investment services in respect of the European AIF.

(5) Within twenty working days following receipt of a complete notification file pursuant to sub-regulation (4), the competent authority shall inform the Maltese AIFM whether it may start marketing the European AIF identified in the notification referred to in sub-regulation (4).

(6) In the case where the AIF identified in the notification referred to in sub-regulation (4) has been set up in a Member State or EEA State other than Malta, the competent authority shall proceed to 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.

(7) In the case of a positive decision by the competent authority, the Maltese AIFM may start marketing the European AIF in Malta from the date of notification by the said competent authority to that effect.

(8) The competent authority shall prevent the marketing in Malta of a European AIF only if the Maltese AIFM's management of the European AIF does not or will not comply with the provisions of the AIFM Directive, or the Maltese AIFM does not or will not comply with the provisions of the AIFM Directive.

(9) In the event of a material change to any of the particulars communicated in accordance with sub-regulation (4), the Maltese AIFM shall give written notice thereof to the competent authority at least one month prior to the implementation of such change in the case of changes planned by the Maltese AIFM, or immediately after an unplanned change has occurred.

(10) Where, pursuant to a planned change, the management of the Maltese AIFM 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 immediately inform the Maltese AIFM that it shall not implement the change.

(11) Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification received pursuant to sub-regulation (10), or if an unplanned change has taken place pursuant to which the management of the European AIF by the Maltese AIFM no longer complies with the provisions of the AIFM Directive or the Maltese AIFM otherwise no longer complies with the provisions of the AIFM Directive, the competent authority shall take all due measures in accordance with the provisions of the Act and any regulations issued thereunder including, if necessary, the express prohibition of marketing of the European AIF.

#### MARKETING OF UNITS OR SHARES OF EUROPEAN AIFs BY MALTESE AIFMs TO PROFESSIONAL INVESTORS IN A MEMBER STATE OR EEA STATE OTHER THAN MALTA

**4.** (1) A Maltese AIFM may market to professional investors in a Member State or EEA State other than Malta, units or shares of a European AIF which it manages and such European AIF, where registered in a Member State or EEA State other than Malta, shall be exempt from the provisions of article 4 of the Act, provided that prior to commencement of its marketing in a Member State or EEA State other than Malta, the conditions prescribed in this regulation are met.

Marketing of units or shares of European AIFs by a Maltese AIFM in an EU or EEA Member State other than Malta.

(2) Without prejudice to Article 43(1) of the AIFM Directive, European AIFs managed and marketed by the Maltese AIFM shall be marketed only to professional investors.

(3) Where the European AIF is a feeder AIF, the right to market referred to in sub-regulation (1) is subject to the condition that the master AIF is also a European AIF which is managed by an AIFM.

(4) The Maltese AIFM shall submit to the competent authority a notification in respect of each European AIF which it intends to market. Such notification shall comprise the documentation and information prescribed hereunder:

(a) a notification letter, including a programme of operations identifying the European AIFs which the Maltese AIFM intends to market and the information on where the European AIFs are established;

(b) the European AIF's prospectus or equivalent rules or instruments of incorporation;

(c) identification of the custodian of the European AIF;

(d) a description of, or any information on, the European AIF available to investors;

(e) information on where the master AIF is established if the European AIF is a feeder AIF in terms of sub-regulation (3);

(f) any additional information concerning the disclosure obligations prescribed in the Investment Services Rules for each European AIF which the Maltese AIFM intends to market;

(g) an indication of the Member State or EEA State in which the Maltese AIFM intends to market the units or shares of the European AIF to professional investors;

(h) information about arrangements made for the marketing of European AIFs and, where relevant, information on the arrangements established to prevent units or shares of the European AIFs from being marketed to retail investors, including in the case where the Maltese AIFM relies on activities of independent entities to provide investment services in respect of the AIF:

Provided that the notification letter to the competent authority by the Maltese AIFM as referred to above shall be provided in a language customary in the sphere of international finance.

(5) The competent authority shall, no later than twenty working days after the date of receipt of a complete notification file pursuant to sub-regulation (4), transmit the complete notification file to the European regulatory authority of the Member State or EEA State where the Maltese AIFM intends marketing the European AIF.

(6) The competent authority shall also enclose a statement to the effect that the Maltese AIFM concerned is authorised to manage European AIFs with a particular investment strategy:

Provided that the statement referred to above shall be provided in a language customary in the sphere of international finance.

(7) The competent authority shall transmit the complete notification file only if the Maltese AIFM's management of the European AIF complies with and will continue to comply with the provisions of the AIFM Directive and if the Maltese AIFM otherwise complies with the provisions of the AIFM Directive.

(8) Upon transmission of the notification file, the competent authority shall, without delay, notify the Maltese AIFM thereof. The Maltese AIFM may start marketing the European AIF in the Maltese AIFM's host Member State or EEA State as from the date of such notification.

(9) In so far as they are different, the competent authority shall also 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 European AIF in the host Member State or EEA State of the Maltese AIFM.

(10) Arrangements referred to in sub-regulation (4)(h) shall be subject to the laws of the Maltese AIFM host Member State or EEA State where the European AIF is to be marketed and to the supervision of the European regulatory authority therein.

(11) In the event of a material change to any of the particulars communicated in accordance with sub-regulation (4), the Maltese AIFM shall give written notice thereof to the competent authority at least one month prior to the implementation of such planned change, or immediately after an unplanned change has occurred.

(12) Where, pursuant to a planned change, the Maltese 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 inform the Maltese AIFM without undue delay that it shall not implement the change.

(13) Where the Maltese AIFM proceeds with the implementation of the planned change, notwithstanding the notification received pursuant to sub-regulations (11) and (12), or if an unplanned change has taken place pursuant to which the Maltese AIFM's management of the European AIF no longer complies with the provisions of the AIFM Directive or the Maltese AIFM otherwise no longer complies with the provisions of the AIFM Directive, the competent authority shall take all due measures in accordance with the provisions of the Act and any regulations issued thereunder including, if necessary, the express prohibition of marketing of the European AIF.

(14) If the changes are acceptable because they do not affect the compliance of the Maltese AIFM's management of the European AIF with the provisions of the AIFM Directive, or the compliance by the Maltese AIFM with the provisions of the AIFM Directive, the competent authority shall, without delay, inform the European regulatory authority of the host Member State of the Maltese AIFM of those changes.

#### MARKETING OF UNITS OR SHARES OF EUROPEAN AIFs BY EUROPEAN AIFMs TO PROFESSIONAL INVESTORS IN MALTA

5. (1) A European AIFM may market to professional investors in Malta, units or shares of a European AIF that it manages and shall be exempt from the provisions of article 3 of the Act. The European AIF, where registered in a Member State or EEA State other than Malta, shall thereafter be exempt from the provisions of article 4 of the Act, provided that prior to commencement of its marketing in Malta, the conditions prescribed in this regulation are met.

Marketing of  
units or shares  
of European  
AIFs by a  
European AIFM  
in Malta.

(2) Without prejudice to regulation 6, European AIFs managed and marketed by a European AIFM shall be marketed only to professional investors.

(3) Where the European AIF is a feeder AIF, the right to market referred to in sub-regulation (1) is subject to the condition that the master AIF is also a European AIF which is managed by a European AIFM or by a Maltese AIFM.

(4) The European AIFM shall submit to the European regulatory authority in its home Member State or EEA State a notification in respect of each European AIF which it intends to

market. Such notification shall comprise the documentation and information prescribed hereunder:

- (a) a notification letter, including a programme of operations identifying the European AIFs which the European AIFM intends to market and the information on where the AIFs are established;
- (b) the European AIF's prospectus or equivalent rules or instruments of incorporation;
- (c) identification of the custodian of the European AIF;
- (d) a description of, or any information on, the European AIF available to investors;
- (e) information on where the master AIF is established if the AIF is a feeder AIF in terms of sub-regulation (3);
- (f) any additional information referred to in Article 23(1) of the AIFM Directive for each European AIF which the European AIFM intends to market;
- (g) the indication that the European AIFM intends marketing the units or shares of the European AIF to professional investors in Malta;
- (h) information about arrangements made for the marketing of European AIFs and, where relevant, information on the arrangements established to prevent units or shares of the European AIFs from being marketed to retail investors, including in the case where the European AIFM relies on activities of independent entities to provide investment services in respect of the AIF:

Provided that the notification letter to the European regulatory authority by the European AIFM as referred to above shall be provided in a language customary in the sphere of international finance.

(5) The competent authority shall, no later than twenty working days after the date of receipt of a complete notification file pursuant to sub-regulation (4), receive from the European regulatory authority of the AIFM's home Member State or EEA State the complete notification file.

(6) The notification file transmitted to the competent authority shall also include a statement to the effect that the European AIFM

concerned is authorised to manage European AIFs with a particular investment strategy:

Provided that the statement referred to above shall be provided in a language customary in the sphere of international finance.

(7) The competent authority shall only receive the complete notification file if the European AIFM's management of the European AIF complies with and will continue to comply with the provisions of the AIFM Directive and if the European AIFM otherwise complies with the provisions of the AIFM Directive.

(8) Upon transmission of the notification file to the competent authority, the European AIFM may start marketing the European AIF in Malta as from the date that it is notified by the European regulatory authority of such transmission.

(9) Arrangements referred to in sub-regulation (4)(h) shall be subject to the laws of Malta and to the supervisions of the competent authority.

#### MARKETING OF AIFs TO RETAIL INVESTORS IN MALTA

6. (1) An AIF shall not be marketed to retail investors in Malta unless it is in possession of an authorisation for this purpose from the competent authority.

Marketing of  
AIFs by AIFMs  
to retail  
investors in  
Malta.

(2) Regulations 3 and 5 shall, in so far as applicable, apply *mutatis mutandis* and reference to the term "professional investor" shall be deemed to be a reference to "retail investors", subject to such variations or modifications as may be prescribed.

(3) Where an AIF is to be marketed to retail investors in Malta, the AIF and its AIFM shall be subject to Investment Services Rules, which shall prescribe the following:

(a) the types of AIF with respect to which an application for marketing to retail investors may be made to the competent authority;

(b) the manner and form of an application for an authorisation to market an AIF to retail investors in Malta, including the imposition of an application fee where applicable;

(c) the conditions for authorisation for marketing to retail investors;

(d) the on-going obligations applicable to the marketing

of an AIF to retail investors in Malta, including the imposition of a supervision fee where applicable; and

(e) any other relevant matter determined by the competent authority.

(4) The competent authority may in Investment Services Rules impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIFs marketed to professional investors in Malta in accordance with the provisions of the AIFM Directive. The competent authority shall not, however, impose stricter or additional requirements on European AIFs established in Member State or EEA State other than Malta and marketed on a cross-border basis than on AIFs marketed in Malta.

(5) The competent authority shall, by 22 July 2014, inform the European Commission and ESMA of:

(a) the types of AIF which AIFMs may market to retail investors in Malta; and

(b) any additional requirements that the competent authority imposes for the marketing of AIFs to retail investors.

(6) The competent authority shall also inform the European Commission and ESMA of any subsequent changes with regard to sub-regulation (5).

#### TRANSITORY PROVISIONS

Transitory  
provision.

7. Regulations 3 and 4 shall not apply to the marketing of units or shares of European AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC before 22 July 2013 for the duration of validity of that prospectus.

