

THE BANKING ACT 1994

INTRODUCTION

The Banking Act 1994 (the Act) has modernised the banking legislation for Malta. It has replaced the Banking Act 1970 and brought Maltese banking in line with international practice. It came in force on 15 November 1994 through Legal Notice 155 of 1994.

The Act is modelled on a number of relevant European Union Directives in as far as these are applicable to the local banking scenario.

In drafting the 1994 Act which formed part of the 1994 Financial Legislative Package unanimously approved by Parliament, attention was strongly given to the fact that the Act had to of a standard that would allow international banking institutions to establish business in Malta and provide an enhanced business environment for domestic credit institutions. The Act has since evolved into a highly respected framework that today supports a stable yet versatile banking industry.

The Act seeks to establish three main important factors:

- Political independence;
- Flexibility; and
- Strong and efficient supervisory requirements and obligations.

How were these achieved?

First of all the Act provides for the appointment of a competent authority as an independent body to regulate and supervise credit institutions.

The Act sets out the statutory requirements and obligations of credit institutions and the competent authority. The Act provides the high level framework for the regulation of the sector but gives the MFSA power to issue Rules that regulate the conduct of banking activity in accordance with the objectives set in the Act.

The statutory licensing criteria and the rights of the competent authority to examine, under confidence, the affairs of a credit institution are set out in the Act which also establishes the penalties for non- compliance and provides for appeals to the Financial Services Tribunal. Oversight of the sector is carried out by the Banking Supervision Unit as part of the Supervisory Council established under Article 10 of the Malta Financial Services Authority Act.

Divisions of the Act

The Act can be divided into ten Parts made up of Articles which provide for particular requirements or obligations. Table 1 below gives a general overview of the Articles to the Act.

1	Short Title	2	Interpretation
3	Powers and duties of the Minister	4	Powers and duties of the competent authority
4A	Supervisory practices	5	Licences for banking activities
6	Application for a licence	7	Issuing of a licence
8	Representative offices of non-Maltese credit institutions	9	Restriction and revocation of a licence
10	Appeals	11	Opening of branches
11A	Opening of branches having their head office outside the European Union	12	Use of the word 'bank'
13	Participation in a credit institution	13A	Assessment procedure
13B	Co-operation with overseas regulatory authorities in the case of acquisitions	13C	Mergers, reconstructions, divisions and changes in share capital or voting rights
14	Control of a credit institution	15	Prohibited transaction
16	Large exposures	17	Capital Adequacy
17	Capital Adequacy	17B	Internal Governance
17B	Internal Governance	17D	Supervisory review
17D	Supervisory review	19	Information to be submitted to the competent authority and Central Bank
19	Information to be submitted to the competent authority and Central Bank	20	Supervision of credit institutions
20	Supervision of credit institutions	22	Investigations
22	Investigations	24	Obstructions
24	Obstructions	25A	Co-operation and sharing of information with respect to supervision on a consolidated basis
25A	Co-operation and sharing of information with respect to supervision on a consolidated basis	25C	Verification of information in specific cases
25C	Verification of information in specific cases	27	(Joint Banking Committee – Repealed)
27	(Joint Banking Committee – Repealed)	28A	Depositor Compensation
28A	Depositor Compensation	29A	Minister may make regulations (winding up of credit institutions)
29A	Minister may make regulations (winding up of credit institutions)	30	Publication of audited financial statements
30	Publication of audited financial statements	32	Disqualification of officers
32	Disqualification of officers	34	Confidentiality
35	Offences and Penalties	35A	Administrative penalties

Schedule	List of Additional Activities		
Table 1: Arrangement of Articles			

Table 2 groups these Articles under specific divisions:

Division	Title	Articles
1	Interpretation	2
2	Powers of Authorities	3 – 4A
3	Authorisation for Business	5 – 9, 11 – 14
4	Appeals	10
5	Operating Requirements	15 – 18, 30
6	Supervision of Banks	19 – 26
7	Problematic Banks	28 – 29B
8	Auditors and Officers	31 -33
9	Confidentiality, Offences and Penalties	34 – 35A
10	Other provisions	36
Table 2: Division of Articles		

(1) Interpretation

The Act, like any other law, gives an interpretation to certain words and phrases within the context of the relative provisions. The main interpretations being:

business of banking : means the business of a person who as set out in subarticle (2) accepts deposits of money from the public withdrawable or repayable on demand or after a fixed period or after notice or who borrows or raises money from the public (including the borrowing or raising of money by the issue of debentures or debenture stock or other instruments creating or acknowledging indebtedness), in either case for the purpose of employing such money in whole or in part by lending to others or otherwise investing for the account and at the risk of the person accepting such money;

close links: means a situation in which two or more persons are linked in any of the following ways:

- (a) by participation, in the form of direct ownership or by way of control, of twenty per centum or more of the voting rights or capital of a body corporate; or
- (b) by control, through the relationship between a parent undertaking and a subsidiary undertaking as defined in article 2(2) of the Companies Act, or a similar relationship between any natural or legal person and an undertaking; or
- (c) permanently to one and the same third person by a control relationship.

credit facility: means the lending of a sum of money by way of an advance, overdraft or loan or any other line of credit including discounting of bills of exchange and promissory notes, guarantees, indemnities, acceptances and bills of exchange endorsed pour aval;

qualifying shareholding: a direct or indirect equity shareholding of at least 10 per cent of the equity shares of a company;

representative office: means, in relation to a body corporate, unincorporated body or association formed in accordance with or existing under the laws of a foreign country, premises in Malta from which the business of banking is promoted or assisted in any way, and in relation to a body corporate, unincorporated body or association formed in accordance with and existing under the laws of Malta, premises outside Malta from which the business of banking is promoted or assisted in any way;

significant shareholding : a direct or indirect equity shareholding of at least 5 per cent but not more than 10 per cent of the equity shares of a company.

(2) Power of Authorities

Article 3: Deals with the power of the Minister of Finance to appoint a competent authority, make regulations and declare bank holidays. Through Legal Notice 325 of 2001 the Minister of Finance appointed the Malta Financial Services Centre as the competent authority until further notice. Following the conversion of the Malta Financial Services Centre to the Malta Financial Services Authority through relevant legislation, the authority took over this role.

Article 4: Empowers the competent authority to make, amend and revoke banking Rules. In particular the competent authority has to ensure compliance by credit institutions to the Act and to co-operate with the Central Bank.

(3) Authorisation for Business

Article 5: No business can be carried out without a licence. The competent authority can conclusively determine whether the business of banking is being carried out or not.

Article 6: This Article provides for the application for a licence to be in the format as required in Banking Rule (BR/01) - Application Procedures and Requirements for Authorisation of Licences for Banking Activities under the Banking Act 1994.

Article 7: Statutory licence requirements include minimum own funds (capital) set at an amount to not less than the value of five million Euro (€5,000,000) for credit institutions or the equivalent in foreign currency, four eyes principle, fit and proper criteria. A licence application is to be determined within 6 months of application or, if additional information is requested, the time limit can be extended to no more than 12 months. No reply by the competent authority means refusal. The Malta Financial Services Authority, as the competent authority in terms of the Act, fulfils its obligations under these provisions

through its Banking Unit.

Article 8: Provides for the opening of Representative Offices in Malta. Two months' notice to the competent authority is required. The applicable regulations are the Representative Offices (Requirements and Activities) Regulations which must be read together with Banking Notice (BN/02) "Notice on the Legal and Regulatory Provisions of Representative Offices of Foreign Banks in Malta authorised under the Banking Act 1994".

Article 9: Provides for specific instances where a licence ceases to be valid or is restricted or revoked by the competent authority.

Article 11: Once authorised a credit institution can open agencies, offices or branches in Malta simply by informing the competent authority. An authorisation from the competent authority must be sought in the case of cross-border establishments.

Article 12: Article 12 prohibits the use of the word 'bank' unless authorised by the competent authority. Every credit institution has to include the word 'bank' in its title or description.

Article 13: Any changes in shareholding involving a significant or qualifying holding (in tranches of 20%, 33%, 50% or subsidiary) requires authorisation by the competent authority. This includes mergers or reconstructions. The obligations lie on both investor and credit institution. Unless authorisation is sought and obtained, the competent authority may cancel the transaction.

Article 14: The Competent authority must to approve and authorise control/controllers of a credit institution.

(4) Appeals

Article 10: Article 10 provides for the right of appeal to a Financial Service Tribunal. The Board is composed of a Chairman who shall be an advocate with a minimum of twelve years legal practice and two members experienced in banking or financial services. The Act specifies more than eight instances which give a right of appeal namely: conditioning, restricting or revoking a licence, objection to name or closure of a representative office or restraining shareholding or control.

(5) Operating Requirements

Article 15: Article 15 limits certain activities and transactions that can be undertaken by an authorised credit institution. These include:

- [i] granting of credit facilities against its own shares or other securities;
- [ii] granting unsecured credit facilities where there could be conflict of interest;
- [iii] granting unsecured facilities to its own staff;
- [iv] investments by acquisition of equity in other entities in relation to the credit institution's own funds and investee's capital; and
- [v] acquisition of immovable property.

Articles 16-18: These Articles provide for the right of the competent authority to issue Banking Rules in relation to a credit institution's large exposures, own funds, capital adequacy, liquidity requirements, consolidated supervision and provisioning of bad and doubtful debts. In particular with regards to own funds, the Act stipulates that a credit institution shall at all times maintain a level of own funds not less than the amount established in its licence or as required by the competent authority. Administrative penalties may be imposed if the required levels are not observed.

Article 30: This Article binds credit institutions to publish, display and file with the competent authority a copy of the audited financial statements within four months of end of financial period. Banking Rule (BR/07) – Publication of Annual Report and Publication of Annual Report and Audited Financial Statements of Credit Institutions Authorised under the Banking Act 1994 has been issued in this respect.

(6) Supervision of Credit Institutions

The Malta Financial Services Authority, as the competent authority in terms of the Banking Act 1994, fulfils its supervisory responsibilities through its Banking Supervision Unit through an *off-site* and *on-site* examination regime. The former (*off-site*) is carried out through monthly and quarterly information filed by the credit institutions. This information is continuously critically analysed and monitored on a trend basis. The on-site supervision is carried out through planned and *ad hoc* visits to credit institutions to examine their affairs through asset quality, adequacy of capital requirement, internal controls and risk management, including the assessment of how all the inherent risks which arise from any transactions and process in a credit institution's business are being managed.

Article 19: Article 19 requires every credit institution to submit to the competent authority and to the Central Bank of Malta periodic statements of its assets and liabilities and profit and loss position. This is to be done on a solo and consolidated basis. The competent authority has issued a Banking Rule (BR/06) - Statutory Financial Information to be submitted by Credit Institutions Authorised under the Banking Act 1994 to this effect. These statements provide the information for the *off-site* analysis and examination.

Article 20: Article 20 which deals with supervision of credit institutions provides that every credit institution must provide to the competent authority any information which the latter may require in the exercise of its duties. Furthermore, the competent authority can appoint accountants or persons who will independently report to it. Through these provisions therefore the competent authority can:

- [i] require a credit institution to provide a report by an accountant or any other person on any information it requires to be verified; or
- [ii] Require the credit institution to produce such report within a stipulated timeframe;
- [iii] authorise its own officers or agents to obtain documents and information as is necessary for the performance of the functions of the competent authority.

Such persons can, if so authorised by the competent authority, exercise their powers as confirmed to any connected person or corporate body of the credit institution under investigation.

The Malta Financial Services Authority, in fulfilling its functions as the competent authority, has to-date always used its own officials appointed in terms of Article 22 of the Act.

Article 21: Article 21 deals with the right of entry. In order to ensure that an accountant, officer or other person appointed to examine a credit institution is not precluded entrance, Article 21 provides for the legal right of entry of premises by such officers to obtain information and documents. Entry into premises occupied for habitation is limited as to the time factor.

Article 22: Provides for the appointment of competent persons to examine, investigate and report on:

- [i] the nature, conduct or state of the credit institution's business or any particular aspect of it; or
- [ii] the ownership or control of the credit institution.

Article 22 is complemented by Articles 20 and 21 which provide for the supervisory *on-site* examination regime.

Article 23: The competent authority is empowered to investigate a person on whom it has reasonable grounds for suspecting the commission of an offence under the Act.

Article 24: Any person who obstructs an examination/investigation by falsifying,

concealing, destroying or otherwise dispose of documents needed for the investigation is guilty of an offence.

Article 25: Article 25 deals with co-operation and sharing of information. The supervision of authorised credit institutions, in particular cross-border establishments, has to be approached on a shared and co-ordinated method. Consequently, the Act provides for the sharing of information with foreign supervisory authorities, and an exchange of information mechanism with a credit institution's auditors.

Article 26: Due to the provisions of Articles 20, 22 and 25, the Act lifts the confidentiality aspect in communications with the competent authority.

(7) Problematic Credit Institutions

Article 28: Article 28 imposes the obligation on a credit institution to immediately report to the authorities should it consider itself to be unable to meet its obligations. Similar obligations are imposed on the competent authority.

Article 28A: Gives power to the Minister to make regulations to establish deposit protection schemes for the protection of depositors where credit institutions fail in the repayment of deposits, and to regulate other aspects of such schemes.

Article 29: Gives the power to the competent authority after consulting with the Central Bank to take control of credit institutions which might find themselves in trouble. The Article provides for the competent authority to take certain measures either to close and liquidate the credit institution or else to rehabilitate the credit institution in its proper conduct of business. Furthermore the Article provides for the procedures to be followed by a person appointed by the competent authority either to advise the credit institution, to take charge of its assets, to assume control or to liquidate the credit institution.

Article 29A: Gives power to the Minister to make regulations for the winding up or re-organisation of credit institutions established in Malta and of branches of credit institutions established outside Malta.

(8) Auditors and Officers

Article 31: Article 31 imposes the obligation on credit institutions of appointing approved auditors to report on its financial statements. In default, the competent authority may appoint auditors itself at the credit institution's

expense. The Article also provides for the duties of the auditors and the credit institution in informing the competent authority on specific matters. The competent authority may make an exception in the case of the auditors of a credit institution not incorporated in Malta but operating in or from Malta.

Article 32: This Article provides for the disqualification of a credit institution's officers in cases where that person:

- [i] is adjudged bankrupt or is an officer of a credit institution which has had its licence revoked; or
- [ii] is interdicted or incapacitated or has been involved in money laundering or other crimes affecting public trust.

Article 33: This Article imposes duties of ensuring compliance to the Act and prudence in reporting requirements by and upon officers.

(9) Confidentiality, Offences and Penalties

Article 34: This article imposes the confidentiality aspect on the Central Bank of Malta and the competent authority in examining the affairs of particular individual customers with exception where large exposures are involved. It also imposes full confidentiality on the officers and agents of a credit institution regarding information obtained in the course of their duties. However, confidentiality is lifted in particular and specific cases:

- [i] when so authorised under the Act;
- [ii] for the purpose of the performance of duties/functions;
- [iii] when so required by a Court order or other law;
- [iv] in the case of a money-laundering suspicion;
- [v] between parent/subsidiary and vice-versa on common and mutual customers.

Article 35: Lists cases of offences under the Act:

- [i] false inducement or statements which mislead a depositor or a potential depositor; contraventions of provisions of the Act, any regulations issued thereunder, Banking Rules or Licence Conditions;
- [ii] compliance with any order of Central Bank or competent authority or the Financial Services Tribunal;
- [iii] aiding or abetting any of the above offences.

Through the Penalties for Offences Regulations, (Legal Notice 155 of 1999 as amended), the Minister of Finance has established penalties which:

- [i] are enforceable by prosecution in the Courts of Malta providing for not more than EUR 232.94 and not greater than €1,164,686.60;
- [ii] may be imposed by the competent authority without recourse to a Court hearing, save the right of appeal to the Tribunal for Financial Services
- [iii] Are defined as administrative penalties and which are not less than €232.94 and not more than €69,881.20.

(10) Other Provisions

Article 36: Provides for the non-application of the Act to the Central Bank of Malta.

IMPORTANT

This information should not be construed as being a substitute for a thorough reading of the Act itself.