Consultation Procedure

Proposals for Legal Notices / Ministerial Regulations and for new laws and amendments to existing laws

Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly these proposals are not binding and are subject to changes and revisions following representations received not only from licence-holders and other involved parties, but also following the necessary review and vetting by the Office of the Attorney General and the relevant Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind.

In the case of primary legislation in particular, Bills may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance, the Economy and Investment.

Note for Consultation

(Banking Act, Cap 371)

1. Purpose

1.1 The MFSA is currently reviewing the provisions of the Banking Act (Cap.371). The amendments primarily relate to the transposition of Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (the "Acquisitions Directive"). The Acquisitions Directive is a maximum harmonisation Directive and its main aim is to improve considerably the process of supervisory approvals for acquisitions of licensed entities, including credit institutions by increasing legal certainty, clarity and transparency. In this respect, we are attaching draft amendments to the Baking Act (Cap.371) in order to seek consultation prior to implementation. Licence holders are kindly asked to submit any comments which they may have in relation to this draft legislation, in writing, by not later than **24th March 2009.**

2. The salient amendments to the Banking Act

2.1. *Amendments relating to the Acquisitions Directive*

2.1.1 In order to transpose the pertinent provisions of the Acquisitions Directive in the Banking Act, it is proposed to amend the definition of "qualifying shareholding" in article 2(1) and replace the current article 13 with new articles, article 13, 13A and 13B as explained hereunder. It is also being suggested to remove the current provisions found in article 13 relating to mergers, reconstructions etc and inserting them in a new article 13C.

2.1.2 The Acquisitions Directive amends the definition of "qualifying shareholding". Therefore, the MFSA is proposing to substitute the current definition found in the Banking Act to transpose the amendments found in the said Directive and to provide a more faithful transposition of the term "qualifying holding" found in Directive 2006/48/EC (the "CRD").

2.1.3 Under the current article 13, the proposed acquirer refers to "any person" intending to take any of the actions set out in article 13(1)(a) to (g). In terms of the proposed amendments, the proposed acquirer will now also refer to "persons acting in concert" (to be defined in a Banking Rule). Therefore, the provisions of article 13 will be triggered off when any person or persons acting in concert acquire a qualifying shareholding or further increase a qualifying shareholder in an authorised company as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% (currently 33%) or 50% or so that the authorised company would become its subsidiary. The provisions of article 13 shall also apply in the case of a disposal or a reduction of a qualifying shareholding. Such disposals and reductions of

qualifying shareholdings will no longer require the MFSA's consent but will instead only have to be notified. In contrast, the process of a proposed acquisition requires the approval to be sought and granted before an acquisition can proceed.

The information to be submitted in relation to the proposed acquisition will reflect the list of information found in the *Guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC* (the "Guidelines") issued by the 3L3 Committees of European Financial Supervisors (CEBS, CESR and CEIOPS). This information will be set out in a Banking Rule to be issued for consultation shortly.

2.1.4 The new proposed article 13A sets out the period of time within which the MFSA is to carry out the assessment in relation to the proposed acquisition. In terms of the proposed amendments, the MFSA will have up to two working days following receipt of a notification to acknowledge receipt to the proposed acquirer. It will have 60 working days to make a decision following acknowledgment and may only interrupt this period, for a maximum of 20 days to request further information. This period may be interrupted no later than the 50th working day of the assessment period. The Acquisitions Directive provides for the possibility to extend the time periods for non-EEA acquirers.

In terms of the proposed amendments, the MFSA may, on completion of the assessment, decide to approve or refuse the proposed acquisition. This can only be done if there are reasonable grounds for doing so on the basis of the criteria set out in the Acquisitions Directive or if the information provided by the proposed acquirer is incomplete. If the MFSA decides to refuse an acquisition, it must inform the proposed acquirer in writing and provide its reasons, within two working days of taking the decision, and not exceeding the assessment period. Where the MFSA does not refuse the proposed acquisition in writing within the assessment period, it shall be considered to be approved. For the sake of clarity, it is also being proposed to include a definition of "working days".

2.1.5 The Acquisitions Directive requires regulatory authorities in Member States to work in consultation with each other if the proposed acquirer is one of the persons listed in the draft article 13B.

2.1.6 The Acquisitions Directive also sets out five prudential criteria to appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition. Guidance on the five assessment criteria has been issued in the Guidelines referred to above. Therefore, it is proposed that the five assessment criteria, together with some additional guidance produced in the said Guidelines, will form part of the above mentioned Banking Rule. `

2.2 <u>*Other amendments to the Banking Act*</u>

2.2.1 The definition of "close links" is being amended, firstly, to be more in line with the definition of "close links" found in the CRD and secondly, to include, in paragraph (b) of the said definition, the definition of control as found in the CRD. Furthermore, the definition of "control" in article 2(1) of the Act is being deleted. Currently, the definition of "control" does not reflect the definition found in the CRD. A new

definition of “control”, however, has not been inserted in article 2(1) of the Act since the concept of “control” found in various parts of the Act is different in each article and therefore it would be incorrect to have one definition. The definition of “equity share” has been deleted. The concept of “equity share” is currently only present in the definitions of “qualifying shareholding”, which is proposed to be amended, and “significant shareholding”, which is being proposed to be deleted. With respect to the deletion of the definition of “significant shareholding”, since the new definition of “qualifying shareholding” now partly states that even if a shareholding in a company does not amount to 10% or more, however, makes it possible to exercise a significant influence over the management in the company, it would still be considered to be a qualifying shareholding. Therefore, since there is no longer reference to “equity share” in the Act, there is no need to retain the definition.

2.2.2 Even though the definition of “significant shareholding” is being deleted, in Article 13(2), as it is being proposed, a person who acquires at least 5% but less than 10% of the share capital or voting rights in a credit institution, or increases an existing shareholding so that the proportion of the voting rights or of the capital held would amount to at least 5% but less than 10% is required to inform the competent authority and consent is no longer required.

2.2.3 A new subarticle (3) is proposed to be inserted under article 16A in order to transpose article 10 of the CRD. It states that where there is a merger of two or more credit institutions, the own funds of the credit institutions which result from the merger cannot fall below the total own funds of the credit institutions at the time of the merger.

March, 2009.