A Framework for Financial Services

Mdina – Malta

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

TABLE OF CONTENTS

INTRODUCTION

The Maltese legal system presents quite a sophisticated and comprehensive framework which, in part, reflects the various foreign influences that have designed the Island's history. Over the years, Malta has been ruled by Phoenicians, Carthaginians, Romans, the Knights of the Order of St. John and, for a few years, by the French under Napoleon. For long periods in its history, the Island also formed part of the Italian kingdom to its north. More recently, between 1800 and 1964, Malta formed part of the British Empire.

Malta has a written Constitution based on the British Westminster model that has been adopted in many other states forming part of the British Commonwealth. It incorporates the basic constitutional framework adopted by the United Kingdom, but with a single legislature. The constitution cannot be superseded.

General elections, based on proportional representation, are held at least once every five years. Responsibility for government lies in a Cabinet of Ministers led by the Prime Minister. The head of state is the President who is elected by Parliament.

Administrative law and practice follow closely British laws and practice. Indeed, the government civil service is broadly organised on the United Kingdom model. In 1964, Malta became an independent nation and a full member of the United Nations. In 1974, the island effected constitutional changes and became a republic. In 2004, Malta joined the European Union.

Maltese and English enjoy the status of official languages. This means that all laws and regulations are drafted and published in both languages.

While most of public law is inspired by the United Kingdom model, the country's private law is largely continental (European). Malta is basically a civil law jurisdiction, and much of its law has been codified. Five codes of law still provide the bulk of Malta's civil and criminal rules and procedures, closely following the model originally introduced by the Napoleonic Code. This system, which traces its origins to Roman law, still prevails in large parts of Western Europe including France, Italy, Belgium and Germany. It is interesting to note that the codified system on the continental (European) model was introduced during the second half of the 19th century by the British administration which had been governing the island as a crown colony since the overthrow of the French occupying forces.

Since Malta follows what is usually referred to as the continental (European) model of private law, English common law as a rule does not apply. Nonetheless, its influence is greatly felt in much of local commercial practice and regulation, especially in company law and in insurance and banking law which closely follow English practice. Most recent legislation, including the various financial services laws adopted in 1994 owes a debt to English statutes. The Investment Services Act had adopted concepts from the Financial Services Act of the United Kingdom of 1986, while the shipping, insurance, money laundering and insider dealing laws (to mention just a few instances) have been largely influenced by European Union legislation. Substantial parts of the Companies Act represent a simplified version of the English Companies Act of 1985, including most of the provisions dealing with the limited liability company, accounting and insolvency. In 1988, Malta also introduced within its legal system the English common law concept of trust. The legislation relating to trusts was subsequently revised in 2006.

Subsequently Malta became a member of the European Union in 2004 and has since then been adopting all European Directives.

It may be rightfully claimed that the Maltese legal system has been able to absorb a number of different legal and cultural influences from the two European countries which have shaped a large part of its history, and whose cultural influence remains very high to this day: Italy its closest neighbour to the north, and the United Kingdom.

The Maltese legal profession is a very well established and independent profession. Many lawyers carry out post-graduate studies outside Malta, especially in England but also in other Western European countries. The courts are impartial and independent. All the normal minimum safeguards for fair judicial proceedings and due process are in place through the Constitution and through Malta's adoption of the European Convention on Human Rights as part of its domestic law in 1987. This was not an entirely new development as the Constitution already provided for a comprehensive bill of rights.

Since 1988, Malta has been establishing a comprehensive legislative and regulatory framework for financial services activities and international business. This is an ongoing process which is continuously being improved and upgraded.

CHAPTER 1: THE LEGISLATIVE FRAMEWORK

The initiatives undertaken to develop a comprehensive and integrated set of laws for the financial services sector have involved the enactment of new laws as well as the enhancement, amendment and consolidation of existing legislation.

The legislative framework for the Maltese financial services sector includes the following laws:

- The **MALTA FINANCIAL SERVICES AUTHORITY ACT** establishes the MFSA as the single regulator of financial services;
- The **INVESTMENT SERVICES ACT** provides a comprehensive regulatory framework for the setting up, licensing and marketing of all types of collective investment schemes and institutional funds and for providers of investment services;
- The **FINANCIAL MARKETS ACT** provides for the authorisation of regulated markets, central securities depositories and for the orderly trading in transferable securities**;**
- The **INSURANCE BUSINESS ACT** lays down a framework for the regulation and supervision of insurance business;
- The **INSURANCE INTERMEDIARIES ACT** seeks to regulate the registration and enrolment of insurance intermediaries and their activities.
- The **BANKING ACT** incorporates a modern banking law which conforms with the best practices of European Union banking regulations and supervision requirements;
- The **FINANCIAL INSTITUTIONS ACT** provides for an adequate level of regulation of a number of designated non-banking financial activities;
- The **SECURITISATION ACT** provides for securitisation, the regulation of existing laws in support of securitisation and the introduction of new rules on securitisation vehicles;
- The **SPECIAL FUNDS (REGULATION) ACT** makes provision for the registration and regulation of retirement schemes, retirement funds and their related parties;
- The **TRUSTS AND TRUSTEES ACT** provides for the licensing and authorisation of trustees and trust management companies;
- The **COMPANIES ACT** has brought Maltese company law in line with European Union Company Law Harmonisation Directives, particularly by providing new rules for mergers, divisions and the disclosure of financial statements, the regulation of branches and other matters;
- The **PREVENTION OF MONEY LAUNDERING ACT** makes provision for the prevention and prohibition of the laundering of money in Malta;
- The **PREVENTION OF FINANCIAL MARKETS ABUSE ACT** provides for the transposition and implementation of the Market Abuse Directive (2003/6/EC) together with its implementing measures; and
- The **PROFESSIONAL SECRECY ACT** consolidates the various provisions in Maltese law on professional secrecy which provide the necessary reassurance to foreign investors without hindering the supervision of fiscal and regulatory compliance and without obstructing investigations into serious crimes such as money laundering and insider dealing.

The individual laws referred to above will be dealt with in further detail in the coming pages.

• THE MALTA FINANCIAL SERVICES AUTHORITY ACT (MFSA ACT)

The Malta Financial Services Authority (the "MFSA"/the "Authority") is a public authority set up by Act of Parliament (the Malta Financial Services Authority Act, 1988 as successively amended). The Authority is the single licensing and supervisory authority for all financial services activity.

The sector overseen by the MFSA includes credit and financial institutions, investment firms, trustees, insurance companies, insurance intermediaries and financial intermediaries who provide a wide range of products and services on the domestic and international markets. It also manages Malta's Registry of Companies.

The MFSA is responsible for ensuring high standards of conduct and management in the financial services industry and it is vigilant in identifying any practices which adversely affect the economic interests of operators and consumers in the areas of financial activity that it supervises. The Act binds the Authority to keep under review and to co-ordinate financial activities carried on in Malta and to disseminate information about matters relating to the exercise of its functions to the public. The Authority has the power to investigate possible contraventions of the law or of licence conditions by operators. In pursuit of its functions, the Authority co-operates and collaborates with other financial regulatory bodies both locally and overseas.

In stating the main functions of the MFSA, the Act highlights the role of the Authority as the **promoter of the general interests and legitimate expectations of consumers of financial services**. The Authority may investigate any complaint made by a person having an interest in any financial services matter under any law. The MFSA must also promote fair competition practices and consumer choice within the financial services industry.

The MFSA Act also enables the setting up of schemes to compensate depositors, investors and policy holders whose claims cannot be satisfied by holders of financial services licences.

The Act makes specific reference to the **Consumer Complaints Manager at MFSA** whose brief is to investigate complaints from private consumers arising out of any financial services transaction, and to refer such cases, where appropriate, to the Authority's Supervisory Council for its consideration.

The MFSA Act provides for the setting up of the **Financial Services Tribunal**. The law provides that the Tribunal shall consist of a chairman and two other members appointed by the Minister. The tribunal is resorted to for appeals with respect to administrative measures, decisions and/or directives issued by the Competent Authority. Upon hearing such appeal, the Tribunal shall have the power:

(a) to confirm, reverse or vary the decision of the competent authority;
(b) to require the production of any document or information;
(c) to order the payment of costs and expenses by any party to the appeal.

• THE INVESTMENT SERVICES ACT

The Investment Services Act, 1994 (the "ISA") as amended, is one of the major pieces of legislation administered by the Authority. The Act provides the statutory basis for the licensing and regulation of persons and companies wishing to set up investment services undertakings and collective investment

schemes. In fact, the ISA requires that investment services business not be undertaken in Malta or from a base in Malta without a licence from the MFSA. The ISA lays down the broad criteria to be applied by the MFSA when considering applications.

The MFSA regulates and licenses a broad range of service providers and seeks to provide a stable regulatory environment which encourages the development of investment services business in a sound and professional manner. The protection of investors' interests is paramount and powers are available to take action against those who undertake licensable activity without an appropriate licence as well as against those who fail to meet the required standards. However, the MFSA is mindful of the importance of providing licence holders with the freedom to innovate and to develop new products to meet the changing needs of the market.

When considering whether to grant or refuse a licence, the MFSA is legally required to have regard to three criteria set out in the law:

(a) the protection of investors and the general public;
(b) the protection of the reputation of Malta taking into account Malta's international commitments;
(c) the promotion of competition and choice; and
(d) in the case of a collective investment scheme licence, the reputation and suitability of the applicant and all other parties connected with the scheme.

In addition, when considering an application for an investment services licence or a collective investment scheme licence, the MFSA takes into account the reputation and suitability of the applicant and of all other relevant parties closely connected with the scheme.

An **investment services licence** is required when the following activities are carried out in relation to an "instrument":
(1) dealing as principal or agent;
(2) arranging deals;
(3) management of investments;
(4) providing trustee, custodian or nominee services;
(5) providing investment advice;
(6) providing stockbroking services; and
(7) providing a Multilateral Trading Facility.

The term "instrument" is defined in the ISA and covers a wide range of investments and financial products, including shares, bonds and other securities and foreign exchange dealings. The MFSA will only grant a licence if it is satisfied that the applicant (or, in the case of a company, each of its directors and officers) and other related parties are "fit and proper" to provide the investment services concerned and that they will comply with the applicable rules and regulations. In general there are three criteria which have to be met by those who must satisfy the "fit and proper" test. These are integrity, competence and solvency.

The ISA also provides for the definition of a **"collective investment scheme".** This definition is a very broad one which embraces corporate schemes such as open-ended and closed-ended investment companies, investment partnerships and other non-corporate investment vehicles. The MFSA will grant a

licence for a collective investment scheme where it is satisfied that the scheme will comply with the relevant regulations and that its directors and officers, or in the case of a unit trust its trustees, are "fit and proper persons" to carry out the functions required of them. The MFSA will in particular examine and consider the nature and features of the proposed scheme and the type of investors to whom it will be marketed. It will also review the experience and track record of all parties who are to be involved with the scheme. Careful consideration is given to the needs of fund managers and investors and the MFSA offers a streamlined and rapid processing procedure for licence applications.

The ISA and the subsidiary legislation issued thereunder are also the means by which certain EU Directives relating to financial services have been transposed namely:

- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC ("MiFID");
- Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("UCITS IV Directive"); and
- Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Manager ("AIFMD").

MiFID replaced the Investment Services Directive, which was repealed on 1st November 2007. The aim of MiFID was to introduce a comprehensive regulatory regime intended to cover investment services, trading platforms (including regulated markets, multilateral trading facilities and systematic internalisers), as well as financial markets in Europe. The Directive was further aimed at opening up Europe's capital markets by improving the price transparency of traded financial instruments while facilitating trade across borders.

Meanwhile, the UCITS IV Directive and the AIFMD each provide a harmonised regulatory framework in respect of collective investment schemes, namely:

- undertakings for collective investment in transferable securities ("UCITS") in the case of the UCITS Directive; and
- alternative investment funds ("AIFs") in the case of the AIFMD.

The UCITS (IV) Directive, adopted in 2009 in replacement of the previous UCITS Directive 85/611/EEC, regulates the establishment and operation of UCITS. UCITS are retail collective investment schemes and, to this effect, they exist within a framework of tight investor protection. In fact, the aims of the UCITS Directive may be stated in terms of:

[i] offering the investing public a wider choice of financial products at lower prices through further integration of the Internal Market;
[ii] enhancing investor protection through better information and more effective supervision; and

[iii] preserving the competitiveness of the European funds industry by updating the regulatory framework of UCITS funds in order to reflect developments in the global financial market.

Meanwhile, the AIFMD regulates alternative investment fund managers ("AIFMs"), which essentially manage collective investment schemes that do not require authorisation under the UCITS Directive (therefore including hedge funds, private equity funds, real estate funds, venture capital funds and others).

The objectives of the AIFMD are to:

[i] ensure that all AIFMs are subject to appropriate authorisation and registration requirements;
[ii] provide a framework for the enhanced monitoring of macro-prudential risks, e.g. through sharing of relevant data among supervisors;
[iii] improve risk management and organisational safeguards to mitigate micro-prudential risks;
[iv] enhance investor protection;
[v] improve public accountability for AIFs holding controlling stakes in companies; and
[vi] develop the single market for AIFMs.

Due to the wide scope of the definition attributed to AIFs by the AIFMD, all asset managers that are not managers of UCITS fall within the scope of the AIFMD. However, this is to the exclusion of those managers whose assets under management fall below certain thresholds as laid down in the AIFMD. Such managers are subject to the local rules relative to non-UCITS retail schemes and to PIFs, unless they choose to opt in to the AIFMD framework.

The transposition of the AIFMD also resulted in the introduction of a regime regulating AIFs. These can be classified in three categories:

- AIFs promoted to Experienced Investors[1] the minimum investment level of which is set at EUR10,000;
- AIFs promoted to Qualifying Investors the minimum investment level of which is set at EUR75,000; and
- AIFs promoted to Extraordinary Investors which require a minimum initial investment of EUR750,000.

An AIF is distinguished from a retail fund by special rules relating to its establishment, management and marketing in a manner which reflects its distinction from retail funds. In most cases a corporate AIF would take the form of an incorporated open-ended or closed-ended investment company or partnership – in the form of a SICAV or a unit trust.

Firms which are compliant with any of the above EU Directives (MiFID, UCITS and AIFMD) through authorisation in terms of the ISA will benefit from the EU passport, that is, the right to provide cross-border services throughout the EU under the "EU Passport."

• THE FINANCIAL MARKETS ACT

[1] Experienced Investors are defined as being investors having the expertise and knowledge to be in a position to make their own investment decisions and understand the risks.

The Financial Markets Act (Cap. 345) provides for the authorisation of regulated markets and central securities depositaries. It also handles the orderly trading in transferable securities. The Act also provides for the setting up of the Listing Authority to authorise the admissibility of financial instruments to any recognised list. The Listing Authority is entrusted with the task of making Listing Rules for an improved implementation of the Financial Markets Act. It must also ensure compliance with any requirement or conditions set out in the Listing Rules for financial instruments to remain listed and to monitor the timely disclosure of information by issuers or other persons subject to the Listing Rules. The role of Listing Authority is fulfilled by the MFSA.

The subsidiary legislation issued under the Financial Markets Act is also the means through which are implemented the provisions of a number of EU Regulations namely:

1. Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies;
2. Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps on short selling and certain aspects of credit default swaps; and
3. Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July, 2012 on OTC derivatives, central counterparties and trade repositories [“EMIR”].

• THE INSURANCE BUSINESS ACT AND THE INSURANCE INTERMEDIARIES ACT

Insurance business is regulated by two separate but complementary laws, the Insurance Business Act, 1998 and the Insurance Intermediaries Act, 2006. These two Acts govern all relevant operators in this sector, including insurers, re-insurers, agents and sub-agents, brokers, and insurance managers transacting business in Malta. The MFSA is the Competent Authority responsible for administering the two Acts. The two laws regulate both domestic and international insurance activities being carried out by authorised companies and insurance brokers. It provides for a highly competitive market operating within a legal framework meeting international standards. The insurance legislation is largely modelled on EU Directives, particularly with regard to solvency margins and technical provision requirements. It provides for the regulation and supervision of different types of insurance companies, including captive insurance companies and reinsurers, and insurance intermediaries.

• THE BANKING ACT

The Banking Act, 1994 as amended, replaces previous banking legislation dating from 1970 and introduces modern regulatory and supervisory practices into the Maltese financial system. The European Union Directives are the main source of reference for most changes and the changes introduced reflect Malta’s commitment towards increased harmonisation in international banking regulation. The Banking Act is administered by the MFSA, which is responsible for licensing and supervising all banking activities. The Act provides a definition of what constitutes banking activities, and lays down a strict regulatory regime coupled with the flexibility warranted in a modern, competitive and dynamic banking environment.

The Act adopts the concept of “credit institution” - which originates in the EU First Banking Co-ordination Directive – and makes provision for authorization procedures relating to the opening of

branches and representative offices of foreign banks in Malta, includes provisions relating to formal co-operation with foreign regulatory authorities and also introduces new regulations for auditors of credit institutions. The MFSA must approve persons intending to acquire five per cent or more participation in the share capital of a credit institution.

The Banking Act is founded on EU legislation and transposes the provisions of the Capital Requirements Directive IV Package which comprises:

(1) Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (hereinafter referred to as the 'Capital Requirements Regulation); and

(2) 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 investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 206/49/EC (hereinafter referred to as the "Fourth Capital Requirements Directive").

The Fourth Capital Requirement Directive is applicable to both credit institutions and investment firms. It aims at empowering competent authorities with new supervisory tools, for the purpose of enhancing their prudential supervision. On the other hand, the Capital Requirements Regulation seeks to achieve maximum harmonisation in relation to the prudential rules applicable to credit institutions and investment firms and the need to establish a 'European Single Rule Book'.

The minimum paid up capital for a credit institution is €5,000,000. The adequacy of own funds is measured on a risk-weighted asset basis. Changes have also been effected to those provisions in the previous law relating to prohibited transactions. In fact the Banking Act recognizes the importance of measuring and monitoring concentration of risk through the concept of establishing and limiting large exposures in relation to a bank's own funds.

- ## THE FINANCIAL INSTITUTIONS ACT

The Financial Institutions Act, 1994, as amended, defines the activities to be carried out by financial institutions. The business of financial institutions includes fund raising other than from the public and activities such as financial leasing, money broking, foreign exchange, other money market activities and the regular and habitual acquisition of holdings. In broad terms, the Act regulates areas of financial services not covered either by the Banking Act, 1994 or the Investment Services Act, 1994, and establishes a general regulatory framework for financial activities which do not amount to banking or investment services. It sets out the obligations of licence holders as well as the functions and powers of the MFSA as the supervisory authority.

The Act also contains specific provisions for the regulation of financial institutions providing payment services in terms of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (the "Payment Services Directive") and financial institutions providing for the issue of electronic money in terms of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions (the "Electronic Money Directive").

• THE SECURITISATION ACT

The Securitisation Act, 2006 regulates securitisation vehicles and the securitisation of assets. It specifies that a securitisation vehicle, which must be established in Malta or in a Recognised Jurisdiction, may take one of various legal forms including that of company, commercial partnership, trust or any other legal form which the MFSA may permit to act as a securitisation vehicle through the issue of a notice to this effect. A securitisation vehicle is not required to obtain a licence from the MFSA unless it is a public vehicle and prior to the issue of financial instruments to the public. However, every securitisation vehicle is required to submit a notice to the MFSA on the appropriate form prior to commencing business.

The Act makes clear that securitisation vehicles are not to be considered collective investment schemes in term of the ISA. However, the MFSA has the right to designate certain categories of securitisation vehicles as collective investment schemes, in which case they would be subject to the appropriate provisions of the ISA.

• THE SPECIAL FUNDS (REGULATION) ACT

The Special Funds (Regulation) Act provides the tools for regulating Retirement Schemes and Retirement Funds deriving mainly from employer pension schemes and private savings. During the last two decades, many countries have departed from the reliance on a pay-as-you-go system for pensions (commonly known as the "first pillar" of retirement income), and have introduced (or re-introduced) various forms of private funding. The new law will help in attracting funded retirement benefit arrangements between an employer and his employees ("second pillar" of retirement income) as well as arrangements that involve a contributor and a beneficiary.

• THE TRUSTS AND TRUSTEES ACT

The Trusts and Trustees Act, 2004 provides that a trust may come into existence in any manner. The law specifies that a trust may be created by:

i. unilateral declaration, which is a declaration in writing made by the trustee, giving the name of the trust and containing all the terms of the trust as well as the names or information enabling the identification of all the beneficiaries;
ii. oral declaration; or
iii. instrument in writing including by a will, by operation of law or by judicial decision.

There are no restrictions as to the nationality, residence or domicile of the settlor or the beneficiaries of a trust and the trust property may include immovable property situated in Malta. The Act provides that the maximum duration of a private trust, unless sooner terminated, is 100 years from the date on which it came into existence.

The proper law of a trust is determined in accordance with the Act. The terms of the trust may provide for the proper law of the trust to be changed to the law of another jurisdiction.

The Trusts and Trustees Act also provides for the appointment and regulation of trustee whether natural persons or corporate trustees. Thus a person may carry on the activities of trustees provided they are duly

authorised to do so by the MFSA irrespective of the proper law of the trusts they hold and whether or not all or part of the trust property is in Malta.

Trusts may be either Maltese or foreign trusts. Maltese trusts are those that adopt the law of Malta as their proper law and are governed by the rules contained in the Trusts and Trustees Act, 2004. These trusts are not required to be registered with the MFSA in order to have effect in Malta.

• THE COMPANIES ACT

The Companies Act, 1995 came into force on 1 January 1996. The Companies Act replaced the Commercial Partnerships Ordinance of 1962 which had originally introduced modern company law principles into Maltese law.

The Act built on the existing rules and broad structures, improving and updating them to meet the needs of a more sophisticated and complex financial and commercial environment. It not only modernised and upgraded Maltese company law, but it also introduced the principles and standards established in the Company Law Harmonisation Directives of the EU.

The Act defines the powers and duties of the Registrar of Companies who is responsible for ensuring compliance with the provision of the Act. Such person is appointed by the Minister of Finance.

The Act provides the statutory basis for the regulation of commercial partnerships. A commercial partnership may be of the following kind:

- the limited liability company, based on the English company model;
- the partnership *en nom collectif*, where the partners have unlimited liability for the debts of the partnership;
- the partnership *en commandite* where at least one partner has unlimited liability for the debts of the partnership. This category is similar to the limited partnership existing in certain foreign countries.

These commercial partnerships, once constituted, enjoy a distinct legal personality. The Act also recognises and regulates corporate investment vehicles such as the SICAV.(which is a limited liability company with variable share capital,) and the INVCO (which is an investment company with fixed share capital). These two structures are useful collective investment vehicles.

The Act has a number of important features:

(a) there is a clearly defined emphasis on corporate responsibility, whereby directors and other company officers are expected to perform and to conduct themselves with reasonable diligence and competence;
(b) detailed provisions as to the form and content of the accounts of a company on the fourth and seventh Company Law Harmonisation Directives;
(c) detailed provisions which allow for the mergers and division or de-merger of companies;
(d) the provision that a company may denominate its share capital in a foreign currency and draw up its accounts in same currency;
(e) clear and practical provisions regulating the pledging of company shares and other securities;
(f) rules to safeguard the interest of third parties who deal in good faith with the company;
(g) detailed provisions that govern the possibility of a company acquiring its own shares;

(h) mechanisms which allow for the possibility of a change in a company's status - from a public company to a private company and vice versa;
(i) structures and rules for the dissolution and winding up of companies, providing for two main forms of winding-up procedures namely winding up by the Court and voluntary winding up.

- **THE PREVENTION OF MONEY LAUNDERING ACT**

The Prevention of Money Laundering Act, 1994 defines the crime of money laundering along the lines adopted in the EU and makes it a criminal offence in Malta to utilise or to employ money derived from crime. The law lays down an extensive list of underlying offences on which a money-laundering act could be based. It reduces the possibility of the financial system being abused for the purposes of laundering funds derived from illicit activities. The offence may also be committed by those who aid or abet money laundering. The supervisory authorities and operators within the financial sector are obliged to report any evidence of money laundering which comes to their knowledge to the police.

To avoid any uncertainty, an express statutory exception has been made to the rules governing professional secrecy in order to allow financial operators and supervisory authorities, acting *bona fide*, to communicate cases of suspected money laundering to the police.

Detailed regulations govern the duty of financial operators to know and identify clients, to keep proper records and to report suspicious transactions to the authorities. The MFSA has issued guidelines elaborating and explaining the legal requirements in this regard for the benefit of licensees.

- **THE PREVENTION OF FINANCIAL MARKETS ABUSE ACT**

The Prevention of Financial Markets Abuse Act, 2005 transposes and implements the provisions of the Market Abuse Directive (2003/6/EC) together with its Implementing Measures and provides for the repeal of the Insider Dealing and Market Abuse Offences Act. The purpose of the Prevention of Financial Markets Abuse Act is precisely to safeguard the integrity of Maltese and Community financial markets and to enhance investor confidence in those markets. The Act is applicable to financial instruments admitted to trading on a regulated market in Malta or in any other Member State or EEA State or for which a request for admission to trading on such a market has been made.

The Act widens considerably the definition of "market abuse" to include
(a) prohibited use of inside information to trade in any financial instrument admitted to a regulated market; and
(b) a market manipulated through dissemination of false, exaggerated or misleading information, spreading of false rumours or putting into effect simulated or artificial operations or transactions or orders.

- **THE PROFESSIONAL SECRECY ACT**

The Professional Secrecy Act, 1994 elaborates the existing provisions of Maltese criminal law with regard to professional secrecy. Article 257 of the Criminal Code had established the basic principle of the protection of professional secrecy in relation to information obtained from customers. A duty of professional secrecy extends not only to government officials and to professionals, but also to their

employees and agents. All secret information communicated for professional or government reasons is protected by penal and administrative sanctions.

The Act identifies a number of exceptions to professional secrecy where the information is already legitimately in the public domain (and therefore no longer secret), including the following:

- the person who communicated the information has authorised disclosure;
- there is an express statutory authorisation for disclosure;
- unless stipulated to the contrary, the information is communicated to employees, partners and assistants of the person to whom it was entrusted for the performance of services requested by the customer.

• THE SET-OFF AND NETTING ON INSOLVENCY ACT

The Set-Off and Netting on Insolvency Act provides for the enforceability of set-off and netting on bankruptcy or insolvency. The Act provides for the possibility of the parties to a contract to agree on any system or mechanism which will enable the parties to convert a non-financial obligation into a monetary obligation of equivalent value and to value such obligations for the purposes of any set-off or netting. Furthermore, the Act provides for the inapplicability of Section 2013(3) of the Civil Code in the case of an assignment of a debt or an action forming part of an agreement containing a close-out netting provision.

CHAPTER 2: THE MALTA FINANCIAL SERVICES AUTHORITY

The MFSA is the focal point of the Maltese regulatory environment for financial services. Its functions include:

- regulating and supervising the conduct of the financial services industry in Malta;
- helping to protect the interests of consumers and investors;
- encouraging the highest possible standards of behaviour in the financial services;
- providing regular information on local and global developments affecting the finance industry;
- encouraging and supporting initiatives to improve standards of education and training in Malta's financial services industry;
- carrying out due diligence prior to issuing licenses to businesses involved in banking, investments, insurance, pensions and stock broking;
- carrying out regular and proper inspections of licensed financial services business;
- publishing guidance notes and directives to the financial services industry and to professional advisers to it;
- advising and assisting, as appropriate, approved incoming finance businesses settling in Malta and contributing to national economic well-being;
- communicating and liaising with national, international and supranational organisations in combating financial crime;
- communicating with and advising with national and international media in order to demonstrate Malta's commitment to global best practice and enhancing its international reputation;
- proposing the improvement of existing legislation or the creation of new legislation;
- managing Malta's Companies Registry; and
- fulfilling the role of Listing Authority.

MFSA'S LEGAL GOVERNANCE

The MFSA consists of the Board of Governors, the Co-ordination Committee, the Supervisory Council, the Board of Management and Resources and the Legal Office. These organs are constituted and recognised by the Malta Financial Services Authority Act. The Authority reports to Parliament annually through the Minister of Finance. Its activities are governed and directed by a Board of Governors appointed by the Prime Minister.

The Board of Governors, which is responsible for setting the Authority's policy, consists of a Chairman and up to six other members. These members of the Board of Governors must be persons who have distinguished themselves in business, financial activities, the professions, the public services or academic affairs and who are able to represent the points of view of the industry and consumers in financial services.

The Executive Co-ordination Committee is responsible for co-ordinating the implementation of the policies of the Authority whilst the Board of Management and Resources is responsible for carrying out the day-to-day management and the finances of the Authority. The Supervisory Council is responsible for the regulatory function of the Authority.

MFSA Regulatory Units

Regulation is the core activity of the MFSA. The Authority provides the regulatory and administrative infrastructure for the Maltese financial services sector. This part of the Authority's function is carried out by the Supervisory Council, which carries out its functions through a Director-General as Chairman and a number of Directors, within the Authority responsible respectively for Authorisations, Insurance and Pensions Supervision, Banking Supervision, Securities and Markets Supervision and Regulatory Development.

The International Tax Unit

The International Tax Unit forms part of the Inland Revenue Department but is located within the MFSA premises in order to provide a one stop shop for financial services operators. The Unit manages all tax matters relating to financial services and ancillary sectors, and provides advice to the Authority thereon. The Unit's responsibilities include the provision of Advance Revenue Rulings.

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Malta Financial Services Authority
Notabile Road,
Attard, BKR 3000
Malta

Telephone: (+356) 21441155
Fax: (+356) 21441189
E:Mail: communications@mfsa.com.mt
Website: http://www.mfsa.com.mt