VERŻJONI ELETTRONIKA

L.N. 459 of 2011

BANKING ACT
(CAP. 371)

European Passport Rights for Credit Institutions Regulations, 2011

IN exercise of the powers conferred by article 3 of the Banking Act, the Minister of Finance, the Economy and Investment, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

1. The title of these regulations is the European Passport Rights for Credit Institutions Regulations, 2011. Citation.

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

"the Act" means the Banking Act; Cap. 371.

"Banking Rules" means the Banking Rules within the meaning of article 4(2) of the Act;

"branch" means a place of business which forms a legally dependant part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions; any number of places of business set up in the same Member State or EEA State by a credit institution with headquarters in another Member State or EEA State shall be regarded as a single branch;

"Capital Requirements Directive" means Council Directive 2006/48/EC of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions (recast), as may be amended or updated from time to time, and includes any implementing measures that have been issued or may be issued thereunder;

"Commission" means the Commission of the European Communities;

"competent authority" means the Malta Financial Services Authority established under the Malta Financial Services Authority Act; Cap. 330.

"credit institution" means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant

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credits for its own account;

"EEA State" means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on the 2nd May, 1992 as amended by the Protocol signed at Brussels on 17th March 1993 and as amended from time to time;

"European credit institution" means a credit institution as defined in Article 1 of the Capital Requirements Directive authorised by its European regulatory authority within the meaning of Article 4 of the Capital Requirements Directive or authorised by a European regulatory authority in an EEA State;

"European regulatory authority" means the body or bodies designated by a Member State or EEA State -

(a) to act as a supervisory authority in relation to the European credit institution concerned in that Member State or EEA State within the meaning of the Capital Requirements Directive, or

(b) to carry out the duties provided for in the Capital Requirements Directive in relation to a Maltese credit institution exercising or proposing to exercise a European right;

"European right" means the entitlement of a person to establish a branch, or provide services, in a Member State or EEA State other than that in which it has its head office -

(a) in accordance with the Treaty as applied in the Member States or EEA States; and

(b) subject to the requirements of the Capital Requirements Directive and subject to any rules, regulations or Banking Rules made under the Act implementing such requirements;

"home Member State or EEA State" means the Member State or EEA State in which the registered office of a credit institution is situated or, if under its national law it has no registered office, the Member State or EEA State in which its head office is situated;

"host Member State or EEA State" means the Member State or EEA State where a Maltese credit institution exercises or proposes to exercise European rights;

"Maltese credit institution" means a person licensed in terms of the Act, whose head office is in Malta and who is entitled to carry on

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an activity in a Member State or EEA State other than Malta in exercise of a European right;

"Maltese rules" means rules -

(a) made in accordance with the Capital Requirements Directive; and

(b) which are the responsibility of the competent authority (as to implementation, supervision and compliance) in accordance with the Capital Requirements Directive and subject to the provisions of the Act and any rules, regulations and Banking Rules made thereunder;

"Member State" means a Member State of the European Communities;

"Treaty" means the Treaty of Rome signed in 1957, establishing the European Economic Community, as subsequently amended

"Tribunal" means the Financial Services Tribunal established under the Malta Financial Services Authority Act. Cap. 330.

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

Part I - Exercise of passport rights by European credit institutions

Exercise of passport rights by European credit institutions - establishment.

3. (1) A European credit institution which is seeking to establish a branch in Malta in exercise of a European right shall satisfy the establishment conditions specified in sub-regulation (2) and shall be exempt from the provisions of article 5(1) of the Act.

(2) The establishment conditions for the purposes of this regulation are that -

(a) the European credit institution has given the European regulatory authority in its home Member State or EEA State a notice containing the requisite details of that State in terms of Article 20 of the Capital Requirements Directive;

(b) the competent authority has received a consent notice, in accordance with paragraph (c), from the European regulatory authority of such European credit institution stating that it has given its consent to the credit institution to establish a branch in Malta; and

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(c) the consent notice shall -

(i) be given in accordance with the Capital Requirements Directive;

(ii) certify that the European credit institution is authorised to act as a credit institution by the European regulatory authority;

(iii) identify the activities to which the consent relates, which activities are included in the Schedule;

(iv) contain the information stated in the notice of the European credit institution referred to in paragraph (a);

(v) indicate the amount of own funds and solvency ratio or capital adequacy ratio, as the case may be, of the European credit institution; and

(vi) contain details of any deposit guarantee scheme which is intended to protect the branch's clients.

(3) The European regulatory authority of the European credit institution shall inform the competent authority of any change in the details of a deposit guarantee scheme referred to in sub-regulation (2).

(4) A branch of a European credit institution shall not commence business unless

(a) it has been informed by the competent authority of any applicable provisions and that it may establish the branch; or

(b) two months have elapsed from the date when the competent authority received the consent notice.

(5) The competent authority shall, within the two month period stipulated in sub-regulation (4), prepare for the supervision of the European credit institution.

(6) In the event of a change in any of the particulars communicated in accordance with sub-regulation (2), the European credit institution shall give written notice of that change to the competent authority and its European regulatory authority at least one month before implementing the change.

(7) For the purposes of this regulation "applicable provisions" means the Maltese rules with which the European credit institution is

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required to comply when carrying on an activity identified in the consent notice through a branch in Malta.

Exercise of passport rights by European credit institutions - services.

4. (1) A European credit institution which is seeking to provide services in Malta in exercise of a European right shall satisfy the service conditions specified in sub-regulation (2) and shall accordingly be exempt from the provisions of article 5(1) of the Act.

(2) The service conditions for the purposes of this regulation are that -

(a) the European credit institution has given its European regulatory authority a notice of intention to provide services in Malta in terms of Article 21 of the Capital Requirements Directive; and

(b) the competent authority has received a notice of such intention from the European regulatory authority of the European credit institution.

(3) When the competent authority has received such a notice and has been informed of the intention of the European credit institution to provide services in Malta, the competent authority shall, where appropriate, notify the European credit institution of any applicable provisions.

(4) In the event of a change of any of the particulars provided by the European credit institution in the notice of intention, the European credit institution shall give written notice of that change to the competent authority and its European regulatory authority before implementing such change.

(5) For the purposes of this regulation "applicable provisions" means the Maltese rules with which the European credit institution is required to comply when carrying on an activity identified in the notice from the European regulatory authority of the European credit institution by providing services in Malta.

Exercise of passport rights by European credit institutions - tied agents.

5. A European credit institution which is seeking to appoint tied agents in Malta in exercise of a European right and in terms of Council 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, shall be subject to the requirements of the Investment Services Act (Tied Agents) Regulations. S.L. 370.14

Reporting to the competent authority.

6. (1) The competent authority may, for statistical purposes, require a European credit institution which has established a branch in Malta in terms of these regulations, to report periodically on its activities in Malta.

(2) In discharging its responsibilities within the meaning of Article 41 of the Capital Requirements Directive, the competent authority may require such a European credit institution to provide the same particulars as Maltese credit institutions for that purpose.

(3) The competent authority may require a European credit institution providing services in Malta, to provide the information necessary for the monitoring of its compliance with the standards set by the competent authority to the extent permitted by the Capital Requirements Directive.

Advertising.

7. A European credit institution shall not be prohibited from advertising its services through any available means of communication in Malta provided that it complies with any applicable laws and with any relevant Banking Rules.

On-site verifications.

8. (1) Where a European credit institution carries on business in Malta through a branch in exercise of a European right, its European regulatory authority may, after informing the competent authority, either directly or through an intermediary it appoints for the purpose, carry out on-site verification of the information within the meaning of Article 42 as referred to in Article 43(1) of the Capital Requirements Directive.

(2) The European regulatory authority may also ask the competent authority to have such on-site verification carried out. The competent authority shall, within the framework of its powers under the law, act upon the request by carrying out the verification itself or by allowing the European regulatory authority to carry it out or by allowing auditors or experts to do so.

(3) This regulation shall not affect the right of the competent authority, in discharging its responsibilities under the Capital Requirements Directive, to carry out on-site verifications of branches established in Malta.

Renewal fee.

9. A European credit institution which has established a branch in Malta in terms of these regulations shall be subject to a yearly renewal fee equivalent to zero point zero zero zero one seven five (0.000175) of the branch's deposit liabilities as reported at the end of the year preceding the year immediately before the year in which the fee is payable:

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Provided that the annual amount payable by the branch of a European credit institution established in Malta by way of renewal fee shall in no case be less than twenty-one thousand two hundred and fifty euro (€21,250) and more than five hundred thousand euro (€500,000):

Provided further that the first renewal fee payable by the branch of a European credit institution established in Malta after 1st January of any calendar year shall be equal to a proportion of such fee that would have been otherwise payable in respect of the whole calendar year in which the branch was established.

Part II - Exercise of passport rights by Maltese credit institutions

Exercise of passport rights by Maltese credit institutions - establishment.

10. (1) A Maltese credit institution may exercise a European right to establish a branch if it satisfies the requirements set out in the following provisions of this regulation.

(2) The Maltese credit institution shall give the competent authority a notice of intention to establish a branch which shall contain -

(a) the Member State or EEA State within the territory of which the credit institution plans to establish a branch;

(b) a programme of operations identifying the activities which it seeks to carry on through the branch;

(c) the address of the proposed branch from where documents may be obtained;

(d) the proposed organizational structure of the branch and the names of the proposed managers; and

(e) such other information as may be specified by means of Banking Rules.

(3) Without prejudice to sub-regulations (6) and (8), the competent authority shall give a consent notice within the terms of sub-regulation (4) to the European regulatory authority within three months of receiving a complete notice of intention.

(4) The consent notice shall -

(a) be given in accordance with the Capital Requirements Directive;

(b) certify that the Maltese credit institution is

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authorised to act as such a credit institution by the competent authority;

(c) identify the activities to which consent relates, which activities are included in the Schedule;

(d) contain the information stated in the notice of intention given by the Maltese credit institution;

(e) indicate the amount of own funds and solvency ratio or capital adequacy ratio, as the case may be, of the Maltese credit institution;

(f) contain details of any deposit guarantee scheme which is intended to protect the branch's clients; and

(g) include such other information as may be established by means of Banking Rules.

(5) The European regulatory authority shall be informed by the competent authority of any change in the details of a deposit guarantee scheme referred to in sub-regulation (4)(f).

(6) If the European right of the Maltese credit institution derives from the Capital Requirements Directive and the requirements specified in sub-regulation (2) are satisfied, the competent authority shall issue a consent notice to the European regulatory authority unless it has reason to doubt the adequacy of the administrative structure or the financial situation of the Maltese credit institution, taking into account the activities envisaged:

Provided that in the event of change in any of the particulars referred to in this sub-regulation the competent authority shall inform the European regulatory authority accordingly.

(7) If the competent authority decides to refuse to give a consent notice -

(a) it shall, within three months from the date when it received a complete notice of intention, give the person who gave that notice the reasons for its decision in writing; and

(b) that person may appeal to the Tribunal and the provisions of article 10 of the Act shall apply *mutatis mutandis*.

(8) A branch of the Maltese credit institution shall not commence business unless -

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(a) the European regulatory authority notifies the Maltese credit institution of the applicable provisions; or

(b) two months have elapsed from the date on which the competent authority has given the consent notice without receipt of any communication from the European regulatory authority.

(9) In the event of change in any of the particulars communicated in accordance with sub-regulation (2), the Maltese credit institution shall give written notice of that change to the competent authority and the European regulatory authority at least one month before implementing the change.

(10) The prudential supervision of a Maltese credit institution shall be the responsibility of the competent authority whether the credit institution establishes a branch or provides services in another Member State or EEA State or not, without prejudice to those provisions of the Capital Requirements Directive which give responsibility to the European regulatory authority.

(11) In this regulation, "applicable provisions" means the host state rules with which the Maltese credit institution will be required to comply when conducting business through the proposed branch in the Member State or EEA State concerned.

(12) In this regulation, "host state rules" means rules -

(a) made in accordance with the Capital Requirements Directive; and

(b) which are the responsibility of the European regulatory authority of the Member State or EEA State concerned (as to implementation, supervision and compliance) in accordance with the Capital Requirements Directive.

(13) The competent authority shall inform the Commission and the European Banking Authority of the number and type of cases in which there have been refusals in terms of sub-regulation (7).

Exercise of passport rights by Maltese credit institutions - services.

11. (1) A Maltese credit institution may not exercise a European right to provide services unless the Maltese credit institution has given the competent authority a notice of its intention to provide services as specified in sub-regulation (2).

(2) For the purposes of this regulation, a notice of intention shall -

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(a) identify the services which it intends to provide together with a programme of operations;

(b) set out the Member State or EEA State in which it intends to operate; and

(c) include such other information as may be specified in Banking Rules.

(3) If the European right of the Maltese credit institution derives from the Capital Requirements Directive, the competent authority shall, within one month of receiving a notice of intention, send a copy of it to the European regulatory authority. It shall also communicate details of any applicable deposit guarantee scheme intended to protect depositors.

(4) When the competent authority sends the copy under sub-regulation (3) or gives a consent notice, it shall give written notice to the Maltese credit institution concerned. The Maltese credit institution may then start to provide the services in question in the host Member State or EEA State:

Provided that where appropriate, the European regulatory authority shall, on receipt of the information from the competent authority, indicate to the Maltese credit institution the conditions with which, in the interest of the general good, the provider of the services in question shall comply in the host Member State or EEA State.

(5) In the event of change of any of the particulars provided by the Maltese credit institution in the notice of intention, the Maltese credit institution shall give written notice of that change to the competent authority and the European regulatory authority before implementing such change.

Right of Maltese credit institutions.

12. A European right shall entitle a Maltese credit institution to provide one or more services.

Part III - Contraventions by European credit institutions

Contraventions by European credit institutions.

13. (1) Where the competent authority ascertains that a European credit institution which has a branch or provides services in Malta -

(a) has contravened or is likely to contravene the Maltese rules or any provisions of the Act or any rules or regulations made thereunder; or

(b) in purported compliance with any such provision,

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has furnished it with false, inaccurate or misleading information,

the competent authority shall in writing require the credit institution concerned to remedy and rectify its position.

(2) If the European credit institution concerned fails to take the necessary steps to remedy and rectify its position, the competent authority shall inform the European regulatory authority of such failure.

(3) If, despite the actions taken by the European regulatory authority or because such actions prove inadequate or are not available in Malta, the European credit institution persists in violating the legal or regulatory provisions referred to in sub-regulation (1) in force in Malta, the competent authority may, after informing the European regulatory authority, take appropriate measures to prevent or to penalize further irregularities and, in so far as necessary, to prevent that European credit institution from initiating any further transactions in Malta.

(4) Any measure adopted pursuant to this regulation shall be communicated to the European credit institution concerned in writing, together with reasons justifying such measures and shall be subject to a right of appeal to the Tribunal and the provisions of article 10 of the Act shall apply *mutatis mutandis*.

(5) Notwithstanding the provisions of this regulation, the competent authority may, in exceptional circumstances, take any precautionary measures necessary to protect the interests of depositors and others for whom services are provided. The competent authority shall inform the Commission, the European Banking Authority and the European regulatory authority concerned of such measures at the earliest opportunity.

(6) In the event of withdrawal of authorisation by the European regulatory authority, the competent authority shall be informed by the said European regulatory authority and shall take appropriate measures to prevent the European credit institution concerned from initiating any further transactions in Malta and to safeguard the depositor's interests.

(7) A prohibition under this regulation may be -

(a) absolute; or

(b) limited, that is, imposed for a specified event or

until specified conditions are complied with,

and any period, event or conditions specified in the case of a limited prohibition may be varied by the competent authority and any such notice shall take effect on such date as is specified in the notice.

Part IV - Collaboration between Regulatory Authorities

Collaboration between regulatory authorities.

14. (1) Where credit institutions that have their head office in Malta operate in another Member State or EEA State, or where credit institutions have their head office in another Member State or EEA State and operate in Malta, the competent authority shall collaborate closely with the European regulatory authority concerned.

(2) The competent authority shall, in particular, collaborate with the other European regulatory authority where branches are concerned and it shall supply such European regulatory authority with all information concerning:

(a) the management and ownership of such credit institutions that is likely to facilitate their supervision;

(b) the examination of the conditions for their authorisation; and

(c) all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms.

(3) Where the competent authority requests information to be provided to it for the purposes of its obligations under the Capital Requirements Directive, the Act, regulations or Banking Rules issued under the Act, and such request for collaboration is rejected or is not acted upon within a reasonable time, the competent authority may refer such situation to the European Banking Authority.

Part V - Companies other than credit institutions

Companies other than credit institutions.

15. (1) A company, other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2, 3 and 5 to 12 of Annex I to the Capital Requirements Directive, incorporated in the Schedule to these regulations, shall enjoy a European right in terms of these regulations provided the following conditions are fulfilled:

(a) the company is a subsidiary of a credit institution

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or the jointly-owned subsidiary of two or more credit institutions;

(b) the memorandum and articles of association of the company permit the carrying on of those activities;

(c) the parent undertaking or undertakings of the subsidiary are authorised as credit institutions in the Member State or EEA State by the law of which the subsidiary is governed;

(d) the activities in question are actually carried on within the territory of the same Member State or EEA State;

(e) the parent undertaking or undertakings of the subsidiary hold 90 per cent or more of the voting rights attaching to shares in the capital of the subsidiary;

(f) the parent undertaking or undertakings of the subsidiary satisfy the competent authority or the European regulatory authority, as the case may be, regarding the prudent management of the subsidiary and have declared, with the consent of the relevant European regulatory authority, that they jointly and severally guarantee the commitments entered into by the subsidiary;

(g) the subsidiary is effectively included, for the activities in question in particular, in the consolidated supervision of the parent undertaking, or of each of the parent undertakings, in accordance with Articles 125 to 143 of the Capital Requirements Directive, in particular for the calculation of the capital requirements, for the control of large exposures and for the purposes of the limitation of holdings provided for in Articles 120 to 122 of the Capital Requirements Directive.

(2) Compliance with the conditions referred to in the foregoing sub-regulation shall be verified by the European regulatory authority or by the competent authority if it is the home Member State or EEA State, as the case may be, and the latter must supply the subsidiary with a certificate of compliance which must form part of the consent notice and notification referred to in regulation 3(2)(b), regulation 4(2)(b), regulation 10(3) and regulation 11(3).

(3) The competent authority or the European regulatory authority, as the case may be, in accordance with the foregoing sub-regulation, shall ensure the supervision of the subsidiary in accordance with Articles 10(1), 19 to 22, 40, 42 to 52 and 54 of the

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Capital Requirements Directive:

Provided that the Articles of the Capital Requirements Directive mentioned in this sub-regulation shall apply *mutatis mutandis* to subsidiaries and the words "credit institution" therein shall be read as if they were a reference to "financial institution fulfilling the conditions laid down in Article 19" and references to the word "authorisation" were references to "memorandum and articles of association".

(4) The competent authority or the European regulatory authority, as the case may be, in accordance with sub-regulation (2) shall also communicate the amount of own funds of the subsidiary financial institution and the consolidated solvency ratio of the credit institution which is its parent undertaking.

(5) If a company eligible under this regulation should cease to fulfil any of the conditions imposed, the competent authority or the European regulatory authority, as the case may be, shall notify the other authority and the activities carried on by that institution in the host Member State or EEA State shall become subject to the legislation of the host Member State or EEA State.

Part VI - Applicability provisions

Applicability provisions.

16. (1) A person who, on the date of the coming into force of these regulations, was in possession of a licence issued by the competent authority which covers the provision of point 1 of Annex I to the Capital Requirements Directive, incorporated in the Schedule to these regulations and any other additional activities included in such Annex shall be deemed to be a Maltese credit institution for the purposes of these regulations:

Provided that such person conforms with all applicable Banking Rules issued by the said competent authority.

(2) Every licence issued after the coming into force of these regulations shall indicate whether the licence holder is a credit institution in terms of these regulations.

Part VII - Interpretation

Interpretation.

17. These regulations shall apply *mutatis mutandis* to companies fulfilling the conditions laid down in regulation 15, being companies authorised either by the European regulatory authority or by the competent authority; and accordingly the words "European credit institution" shall be read as if they were a reference to a company or other body corporate authorised by the European

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regulatory authority, and the words "Maltese credit institution" shall be read as if they were a reference to companies authorised by the competent authority.

Objective.

18. (1) The objective of these regulations is to implement the relevant provisions of the Capital Requirements Directive as amended and shall be interpreted and applied accordingly.

(2) In the event that any of these regulations conflict with the provisions of the Capital Requirements Directive, the latter shall prevail.

Revokes the European Passport Rights for Credit Institutions Regulations, 2004. L.N. 88 of 2004.

19. (1) The European Passport Rights for Credit Institutions Regulations, 2004 are hereby revoked.

(2) Every authorisation, licence, approval or order taken, granted or commenced thereunder, shall continue to be valid and in force, as if such authorisation, licence, approval or order were taken, granted or commenced under these regulations.

Language.

20. In terms of article 29B of the Act, these regulations are being published in the English language only.

SCHEDULE

Annex I to the Capital Requirements Directive

LIST OF ACTIVITIES SUBJECT TO MUTUAL RECOGNITION

1. Acceptance of deposits and other repayable funds;

2. Lending including, inter alia: consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions (including forfeiting);

3. Financial Leasing;

4. Payment services as defined in Article 4(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC;

5. Issuing and administering other means of payment (e.g. travellers cheques and bankers' drafts) in so far as this activity is not covered by activity 4 above;

6. Guarantees and commitments;

7. Trading for own account or for account of customers in:

(a) money market instruments (cheques, bills, certificates of deposit, etc.);

(b) foreign exchange;

(c) financial futures and options;

(d) exchange and interest-rate instruments;

(e) transferable securities;

8. Participation in securities issues and the provision of services related to such issues;

9. Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings;

10. Money broking;

11. Portfolio management and advice;

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12. Safekeeping and administration of securities;

13. Credit reference services;

14. Safe custody services;

15. Issuing of electronic money.

The services and activities provided for in Section A and Section B of Schedule I to the European Passport Rights for Investment Firms Regulations when referring to the instruments provided for in Section C of the said Schedule are subject to mutual recognition.

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