

Salient Features of the Malaysian Financial Services Act 2013

Dr Zulkifli Hasan

Islamic Science University of Malaysia

Khairi Ibrahim*

Islamic Science University of Malaysia

Introduction

The idea to reform financial management system through regulatory initiative is not new. Similar framework of the Financial Services Act 2013 (FSA) with certain differences has been already implemented in the United Kingdom and Australia through the United Kingdom Financial Services Act 2012 and the Australian Financial Services Reform Act 2001. The Parliament of Malaysia has passed the FSA in 2013, which came into operation on June 30, 2013. The FSA can be considered as part of regulatory response by the Malaysian authorities to promote financial stability, to protect the rights and interests of the consumers and to prevent future financial crisis in line with the new international standards.

Salient features of the FSA

In general, the FSA is a step-jump in regulation for the Malaysian Financial System by replacing the Banking and Financial Institutions Act 1989 (BAFIA) with the new comprehensive legislation. This is in line with the Financial Sector Blueprint 2011 issued by the Bank Negara Malaysia (BNM) in 2011. The FSA has extended the scope of law whereby it focuses not only on corporate governance but also to include matters on intervention and remedial actions, shareholding, capital requirements and consumer protection. In this part, we highlight several significant features of the FSA and its implications as compared to the BAFIA.

The repealed laws

Before the new law, namely the FSA, Malaysian financial systems were regulated by four main legislations namely the Banking and Financial Institutions Act 1989, the Payment System Act 2003, the Insurance Act 1996 and the Exchange Control 1953. With the enforcement of the FSA, all these laws are repealed. However, there are some reservations. Section 272 provides for several aspects of law, which is not affected by the FSA. For example, any rules, regulations, approvals and made before the appointed date of the FSA, shall continue remain in force and as for license to carry on business granted under the repealed law shall not be affected. This amalgamation of

the law reflects the commitment of the BNM to provide a uniform and systematic law to regulate the operation of banking system. Furthermore, such uniformity will ease the process of amendments of provisions if needed in the future and to avoid overlapping of provisions.

The new regulatory objectives, powers and functions of the BNM

The FSA has included new provisions in Pt II, which provides for the regulatory objectives and powers and functions of the BNM. This is new, since no similar provision exists in its predecessor, the BAFIA. The BAFIA only provides for the functions, powers and duties of the BNM and these include having all functions and powers provided under the Act, to allow the BNM to authorise for subordination of powers and to appoint any person to assist the BNM in discharging its duty.

Section 6 of the FSA provides key regulatory objectives of the BNM which covers five aspects, i.e. safety and soundness of financial institutions, the integrity of the money market and foreign exchange market, safe, efficient and reliable payment systems and payment instruments, responsible and professional business conduct and consumer's interest and protection while s.7 guarantees the powers and functions of the BNM.

As compared to the BAFIA, the FSA provides not only the powers and functions but also focuses on the purpose and method of exercising such powers. Section 7(1) provides the purpose of such powers whereby it states such powers and functions shall be exercised in order to meet the objectives provided under s.6. Section 7(2) explains the connection between the FSA and the Central Bank of Malaysia Act 2009 (CBA) whereby it states that all the powers under the FSA are supplementary in nature to the CBA and there shall be no derogation of powers. This provision is important to ensure the consistency between these two laws.

In exercising its powers and functions under the BAFIA, the BNM may appoint an officer and a person who is not an officer to render assistance on the performance of its powers. Under the FSA, the BNM may now establish a committee, which consists of members determined by the BNM for the same purpose. Besides, relating to appointment of a non-officer, the FSA has extended such right to include appointment of a person whether he is in or outside Malaysia. Section 7(3) of the FSA requires the BNM to update the Ministry with information relating to exercise of the powers and the performances of function provided under this Act. It is evident from this provision that the Ministry has the power to oversee the BNM and its operation. However, it is worth to mention that the FSA is silent on the effect of such information in particular whether the Ministry has the power to intervene with the powers of BNM.

* Faculty of Syariah and Law, Islamic Science University of Malaysia. Contact at zul361977@yahoo.com.

Definition of banking business

The FSA provides a similar definition of banking business as stipulated under the BAFIA. It defines banking business as the business of accepting deposits on current, deposit, savings or other similar account, paying or collecting cheques drawn by or paid in by customers and provision of finance. However, there are two significant changes. First, definition in s.2 of requires it to be read together with s.3 whereby it contains express provision to empower the Minister to prescribe any additional activity to the definition of banking business. It further states that such prescription shall be considered a part of the Act and shall have a force of law. Previously in the BAFIA, the BNM has the implied power to prescribe any additional activity and it requires approval from the Minister. The inclusion of such provision strengthens the enforceability of the prescription made by the Minister. Secondly, relating to the term “deposit”, s.2 of the FSA offers slightly different definition whereby it refers to “a sum of money accepted or paid on terms under which it will be repaid in full”. Following this change, licensed banks may no longer describe products, which are not principally guaranteed as deposits.

Licensing of banking business

The FSA provides a new regime for license to carry on banking business. Previously in the BAFIA, the licensing process was governed under ss.4–6. The Minister has the power to grant license to carry on banking business with recommendation from the BNM. A written application shall be made to the Ministry by submitting the documents to the BNM for evaluation. The BNM has the power to specify any documents required for such purposes and may make a recommendation to the Ministry when all documents are provided and upon satisfying that all the criteria under Second Schedule are all fulfilled. Section 6(4) of the BAFIA provides that upon receiving the recommendation from the BNM, the Minister may grant the license, with or without conditions, or to refuse such recommendation.

The FSA provides a new scheme for licensing procedure. It maintains the power of the Minister to grant a license to carry on banking business with recommendation from the BNM.¹ It requires the applicant to submit the application in writing to the BNM together with documents and information as may be specified. Unlike the BAFIA, The FSA does not specify the documents or information required but rather the BNM has the right in that matter.

Another significant change refers to factors in making the recommendation set out in Pt 1 and Pt 2 of Sch.5. Unlike the BAFIA, Pt 1 of the Sch.5 provides seven criteria which includes the character and integrity of the applicant, the nature of the business to be conducted, the feasibility of the plans of the applicant for business

development, the nature and sufficiency of the financial resources, the business record of the applicant, and the effect of the application to the best interest of Malaysia. Part 2 requires the BNM to evaluate the effect of the activity to the regulation and supervision of the persons to be licensed. Upon receiving the recommendation from the BNM, the Minister may grant a license to the applicant to carry on banking business with or without condition. It is observed that the FSA does not expressly mention the power of the Minister to refuse the application as compared to the BAFIA, which clearly mentions it. Moreover, s.10(3) mentions that the BNM may choose not to make recommendation to the Minister. These provisions indicate that it is the BNM who has the power to reject an application by choosing not to make a recommendation for a license and the Minister only have the power to grant license with or without conditions.

Requirements on minimum capital funds

Another conditions for a grant of license is related to minimum capital funds. The FSA maintains the same requirements, which are provided under the BAFIA. Section 12 of the FSA provides that no license shall be granted if the capital fund of the company is less than minimum amount as prescribed by the Minister. It further states that a licensed person shall maintain at all times such minimum amount applicable to it. As provided under Financial Services (Minimum Amount of Capital Funds or Surplus of Assets over Liabilities) (Licensed Person) Order 2013, the minimum amounts of capital funds are as follows:

Table 1: Capital Funds Requirement

Licensed Banks	Minimum Capital Funds (RM)
Licensed bank which is a locally incorporated foreign bank	300,000,000
Licensed bank which is not a locally incorporated foreign bank:	2,000,000,000
• By itself; or	
• In aggregation with the capital funds of its related corporation that is a licensed investment bank.	
Licensed investment bank which is not related to any licensed bank	500,000,000

Table 1 indicates that the current minimum amount of capital funds is higher compared to the Banking and Financial Institutions Act 1989 whereby the minimum amount is RM 5 million. In a situation where the applicant does not meet the requirement of minimum capital funds, the BNM may grant a license with the condition that the requirement is met within a specified period of time.² In the event of failure to comply with such requirement, the BAFIA provides such offence with a penalty of fine up to RM1 million. The Financial Services Act (FSA) 2013

¹ FSA s.8(1)(a).

² Banking and Financial Institutions Act 1989 (BAFIA) s.12(3).

has increased the penalty whereby upon conviction, he may be liable for imprisonment for a term not more than eight years or to a fine not exceeding 25 million ringgit or both.³

Revocation of license

Under the BAFIA, the Minister may, on the recommendation of the BNM, revoke a license granted to an institution due to grounds, *inter alia*, if any criteria specified in the Second Schedule are not fulfilled and if the institutions have failed to comply with any obligation imposed under the Act. The Minister is also empowered to revoke the license without the recommendation from the BNM if a winding up order has been made or a resolution of voluntary winding up has been passed.⁴

The FSA maintains the power of the Minister to revoke the license. However, there are significant changes in terms of grounds of revocation. There are eight grounds for revocation and these include any breach of the FSA or the CBA, that the person has been wound up and if such revocation is in the interest of consumers of financial services and products⁵ as well as for public interest.⁶ Previously, the BAFIA provides two types of revocation, *i.e.* revocation⁷ which requires the issuance of notice and revocation.⁸ The FSA nevertheless provides one type of revocation and such issuance of notice is no longer required and when a license is revoked, such person shall immediately cease to carry on its business.

Prudential matters

Part V of the FSA grants the BNM the power to specify standards on prudential matters in order to promote the stability of the institution and maintain the professionalism and integrity and these include matters relating to capital adequacy, liquidity, corporate governance, risk management, and also prevention from criminal activities. Every institution is obliged to follow such standard.⁹ There are three significant components of corporate governance under Pt V, which can be divided into matters on directors, transparency requirement and the appointment and duties of auditors.

Matters on directors include the appointment, the functions and duties of board of directors and directors, duty of directors to disclose interests and also disqualifications of directors.¹⁰ There are also express provisions on the requirement of “fit and proper” whereby the BNM is allowed to set and specify the requirements of directors. Transparency requirement obliges the

institutions to maintain proper accounting records in accordance with the standards approved by the BNM and to publish its financial statement from time to time.¹¹ As regard to the appointment and duties of an auditors, unlike the BAFIA that grants the Minister to act with the recommendation of the BNM including the appointment of auditor, the FSA has given such power to the BNM whereby it is the BNM who may approve the appointment of an auditor and to receive the report from the auditor.

Business conduct and consumer protection

Part VIII of the FSA covers matters related to business conduct and consumer protection. It provides that the BNM may specify standard on matters related as transparency requirements, promotion of financial services and complaints and dispute resolution mechanisms.¹² This is to ensure the professionalism and responsibility of a financial services provider. In addition, the institutions are prohibited from engaging in any prohibited business set out in Sch.7 of the FSA. Similarly with s.96 of the BAFIA, Pt VIII also includes provisions on information and secrecy but with several changes. The FSA expands the circumstances of permitted disclosures, which now includes compliance with a court order made by a court not lower than a Session Court as mentioned under the Sch.11.

Examination by the BNM

Under the FSA, power of the BNM to conduct an examination is regulated under Pt XI. In comparison with the BAFIA, the FSA provides the same powers to the BNM and these include the right of access to documents and information relating to the business and the power to take possession of any documents and materials.¹³ The FSA further enhances the power of the BNM by granting the authority to conduct examination to other persons which are related to the institutions and to require for the appointment of auditor by the institutions to carry out any specific examination related to its business and affair and submit a report to the BNM.¹⁴

Directions of compliances

Section 155 of the FSA provides the power of the BNM to issue a direction to the institutions under several circumstances, *inter alia*, if the institutions or its director is carrying on business in manner, which may affects detrimentally to the interest of the depositors. The BNM

³ Financial Services Act 2013 (FSA) s.12(5).

⁴ BAFIA s.7(2)(a) and (b).

⁵ FSA s.20(1)(a)–(h).

⁶ FSA s.20(2).

⁷ BAFIA s.7.

⁸ BAFIA s.11.

⁹ FSA s.47(2).

¹⁰ FSA ss.55–59.

¹¹ FSA ss.64–65.

¹² FSA s.123(1) and (2).

¹³ FSA ss.147(1) and (2).

¹⁴ FSA s.150(1).

may also issue direction to vary or terminate an agreement, to dispose any of the investments or assets and to prohibit the institutions from any transactions and the institution is obliged to comply with such directions. Failure to comply with the direction may lead to imprisonment for a term no exceeding ten years or fine not exceeding RM50 million.¹⁵

Intervention and remedial actions

Part XIII of the FSA grants the BNM with the power to intervene in the operations of institutions. Section 165 of the FSA provides the circumstances for the exercise of such powers and these include in the event of any breach of provisions under the FSA or any written law and any failure to comply with directions, insufficiency of asset and capital which may affect the interest of depositors and the likelihood for the institutions to be insolvent. The intervention may be in the form of assumption of control of the institutions, appointment of receiver and manager for the institutions, compulsory transfer of business, assets or liabilities, restructuring of share capital, financial assistance to the institutions, and the issuance of moratorium.¹⁶ Another form of interventions is that, the BNM with the authorisation from the Minister may apply for winding up of the institution to the High Court as mentioned in s.193 of the FSA.

Enforcement and penalties

Matters relating to enforcement and penalties are regulated under Pt XV of the FSA. Unlike the BAFIA, the FSA incorporates all related provisions on enforcement and penalties under one part. Part XV covers all matters related to enforcement and penalties, which includes the power of the BNM to investigate, search and examine a person. It also provides the power for the BNM take action in administrative, civil and criminal proceedings.

Concerning the investigation powers, in particular the powers of entry, search and seizure, the FSA provides two types of such powers namely with warrant and without warrant. The warrant of arrest is issued by the Magistrate if there is reasonable cause to believe that any premises is used for or contains any evidence related to the commission of an offence under the FSA. Following such, s.221 of the FSA grants the power for investigating officer to enter into the premises. On the other hand, a

warrant is not required if the investigating officer has a reasonable cause to believe that the evidence would be adversely affected by reason of delay in obtaining a search warrant as mentioned in s.222. As compared to the BAFIA, the investigating officer may conduct a search without any requirement of warrant of search. Following breach and contravention of any provision under the FSA, the BNM is now empowered to take actions by way of administrative action, civil action and criminal proceeding.

Conclusion

Malaysia has pro-actively facilitated the financial management system by enhancing policies to suit with the domestic and global market needs. With the understanding that strong, efficient and robust regulatory framework and balance with certain degree of flexibility will lead to market stability, Malaysian financial authorities are consistently enhancing and improving the financial management system through comprehensive means and various initiatives particularly its regulatory framework. In this regard, as part of its regulatory reform to financial management system, the parliament of Malaysia has enacted the FSA with the objectives to promote financial stability and to ensure the safety, efficient, reliable and soundness of financial institutions, which are in line with the international standards. The FSA also promotes the element of consumerism through specific provisions on consumer protection and shareholding. Unlike the BAFIA, the FSA further enhances the duties and liabilities of the Senior Management Level of financial institutions by invoking additional requirements and responsibilities. Despite positive features of the IFSA, there are loopholes and shortcomings that may negate its objectives. It is observed that the FSA grants the BNM with vast powers for both supervisory and regulatory purposes. In fact, the BNM is now has authorities to supervise and regulate financial activities as well as financial institutions including financial holding companies. This raises an issue of judicial oversight over the BNM powers, which is relatively significant to the betterment of the financial management system. Considering this significant issue, it is recommended for the policymakers to comprehensively review and study the implications and consequences of the FSA.

¹⁵ FSA s.158.

¹⁶ FSA ss.167, 172, 176, 186, 188 and 190.