

**THIRD SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

No. 3564 of 9th November, 2006

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B. 31/06

**BILL**

**FOR**

**AN ORDINANCE** to implement in Gibraltar Directive 2003/41/EC of the European Parliament and the Council on the activities and supervision of institutions for occupational retirement pensions.

**ENACTED** by the Legislature of Gibraltar.

**Title and commencement.**

1. This Ordinance may be cited as the Financial Services (Occupational Pensions Institutions) Ordinance 2006 and comes into operation on the day appointed by the Minister by notice in the Gazette.

**Interpretation.**

2. In this Ordinance—

“the Authority” means the Commissioner for Financial Services appointed under section 8 of the Financial Services Commission Ordinance 1989;

“beneficiary” means a person receiving retirement benefits;

“biometrical risks” means risks linked to death, disability and longevity;

“the Directive” means Directive 2003/41/EC of the European Parliament and the Council on the activities and supervision of institutions for occupational retirement provision;

“institution for occupational retirement provision” means an institution, irrespective of its legal form, operating on a funded basis,

established separately from any sponsoring undertaking, or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contact agreed—

- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or
- with self-employed persons, in compliance with the relevant legislation of Gibraltar and the Member State where the institution is established,

and which carries out activities directly arising therefrom;

“member” means a person whose occupational activities entitle or will entitle him to retirement benefits in accordance with the provisions of a pension scheme;

“Minister” means the Minister with responsibility for financial services;

“pension scheme” means a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions;

“retirement benefits” means benefits paid by reference to reaching, or the expectation of reaching, retirement or, where they are supplementary to those benefits and provided on an ancillary basis, in the form of payments on death, disability, or cessation of employment or in the form of support payments or services in case of sickness, indigence or death, whether in the form of payments for life, for a temporary period or as a lump sum;

“sponsoring undertaking” means any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision;

**Scope.**

3.(1) Subject to subsection (2), this Ordinance applies to institutions for occupational retirement provision.

(2) This Ordinance does not apply to—

- (a) social security or assistance provided by the Government of Gibraltar;
- (b) institutions licensed or authorised under the Insurance Companies Ordinance;
- (c) institutions where the employees of the sponsoring undertaking can withdraw the assets at any time and not necessarily apply them to retirement benefits;
- (d) companies using book-reserve schemes with a view to paying out retirement benefits to their employees;
- (e) institutions in Gibraltar operating pension schemes in Gibraltar with fewer than 100 members in total;
- (f) any pension scheme provided, guaranteed or administered by the Government of Gibraltar under any enactment.

**Activities and separation.**

4.(1) An institution shall limit its activities to retirement benefit related operations and activities arising therefrom.

(2) An institution shall be legally separate from the sponsoring undertaking and set up under a trust to ensure that its assets are safeguarded in the interests of the members and beneficiaries in the event of the bankruptcy of the sponsoring undertaking.

**Licensing.**

5.(1) An institution or trustees of a trust managing a pension scheme shall not operate without a licence issued by the Authority.

(2) The Authority shall only issue a licence if he is satisfied that—

(a) every person who is to be a manager or trustee of the institution is a fit and proper person to hold that position; and in determining whether a person is “fit and proper” regard shall be had to—

- (i) his probity;
- (ii) his competence and soundness of judgement for fulfilling the responsibilities of that position;
- (iii) the diligence with which he is fulfilling or likely to fulfill those responsibilities; and
- (iv) whether the interests of members or potential members of the institution or the reputation of Gibraltar are, or are likely to be, in any way prejudiced by his holding that position,

and without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question and, in particular, to any evidence that he has—

- (aa) committed an offence involving fraud or other dishonesty or violence;
- (bb) contravened any provision made by or under any enactment appearing to the Authority to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of financial services or the management of companies or against financial loss due to the conduct of discharged or undischarged bankrupts;
- (cc) engaged in any business practices appearing to the Authority to be deceitful or oppressive or otherwise improper (whether unlawful or not) or which

otherwise reflect discredit on his method of conducting business;

- (dd) engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgment;
- (ee) contravened any internal rules of, or exceeded his authority in, any previous or current employment and/or appeared to mislead or attempt to mislead any person or persons in any previous or current employment, investigation or enquiry;
- (b) properly constituted rules regarding the functioning of any pension scheme operated by the institution have been implemented and members have been adequately informed of these rules;
- (c) all technical provisions are computed and certified by an auditor registered under the Auditors Approval and Registration Ordinance 1998;
- (d) where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing;
- (e) the members are sufficiently informed of the conditions of the pension scheme, in particular concerning–
  - (i) the rights and obligations of the parties involved in the pension scheme;
  - (ii) the financial, technical and other risks associated with the pension scheme;
  - (iii) the nature and distribution of those risks.

(3) A licence shall be valid from the date of issue and is subject to renewal each year on the anniversary of the date of issue.

(4) The authority may on or at any time after issuing a licence, by notice in writing served on the institution, impose such conditions as appear to the Authority to be necessary or desirable for the protection of members and may vary or revoke any conditions so imposed.

(5) Without prejudice to the generality of subsection (4), a condition imposed under this section may—

- (a) prohibit an institution—
  - (i) entering transactions of any specified description or in specified circumstances or to a specified extent or with persons or a specified description;
  - (ii) soliciting pensions business in a specified place, or from persons of a specified description or otherwise than from such persons;
  - (iii) carrying on pensions business in a specified manner or otherwise than in a specified manner;
  - (iv) disposing of, or otherwise dealing with any, or with specified, property assets, in any specified manner or otherwise than in a specified manner;
- (b) require an institution to maintain in Gibraltar property or assets of such value and of such description as appear to the Authority in its absolute and unfettered discretion to be desirable with a view to ensuring that the institution will be able to meet his liabilities in respect of the pensions business carried on.

(6) A prohibition or requirement under subsection (5) may relate to property assets outside Gibraltar.

(7) By virtue of this subsection it shall be a condition of every licence issued that the institution will at all times comply with—

- (a) any conditions imposed by the Authority under this section;  
and

- (b) the requirements of this Ordinance and any rules or regulations made under it.

**Accounts.**

6.(1) Each institution and trustees of a trust operating a pension scheme shall draw up annual accounts and annual reports in accordance with the Companies (Accounts) Ordinance 1998.

(2) The Authority may, with the prior consent of the Minister, prescribe through Rules the form, nature and frequency of returns in respect of the finances of the institution to be made to the Authority.

**Information to Members and Beneficiaries.**

7.(1) An institution and trustees of a trust operating a pension scheme shall provide to members and beneficiaries relevant information about any changes to the scheme's rules.

(2) A member, beneficiary or their representatives shall receive on request—

- (a) the annual accounts and the annual reports referred to in Section 6 and, where an institution is responsible for more than one scheme, those relating to their particular pension scheme;
- (b) the statement of investment policy principles provided for in section 8;

(3) If a member so requests, the institution or trustees shall provide, within a reasonable timeframe—

- (i) the target level of the retirement benefits, if applicable;
- (ii) the level of benefits in case of cessation of employment;
- (iii) where the member bears the investment risk, the range of investment options, if applicable, and the actual investment portfolio as well as information on risk exposure and costs related to the investments;

- (iv) the arrangement relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship.

(4) Members shall receive every year brief particulars of the situation of the institution as well as the current level of financing of their accrued individual entitlements.

(5) Each beneficiary shall receive, on retirement or when other benefits become due, the appropriate information on the benefits which are due and the corresponding payment options.

**Investment Policy Statement.**

8.(1) An institution and trustees of a trust operating a pension scheme shall prepare and, at least every three years, review a written statement of investment policy principles which shall include—

- (a) the investment risk measurement methods;
- (b) the risk management processes used; and
- (c) the strategic asset allocation with respect to the nature and duration of pension liabilities.

(2) The statement referred to in subsection (1) shall be revised without delay if there is any significant change in investment policy.

**Information to the Authority.**

9.(1) The Authority may require the institution or the trustees of a trust operating a pension scheme to provide him with—

- (a) information about all business matters or to forward all business documents;
- (b) information enabling him to supervise relationships between the institution and other companies or between institutions, when institutions transfer functions to those other companies or institutions (outsourcing), influencing the financial situation of



the institution or being in a material way relevant for effective supervision;

(c) the statement of investment-policy principles, the annual accounts and the annual reports, and all the documents necessary for the purposes of supervision, including documents such as—

- (i) internal interim reports;
- (ii) actuarial valuations and detailed assumptions;
- (iii) asset-liability studies;
- (iv) evidence of consistency with the investment-policy principles;
- (v) evidence that contributions have been paid in as planned;
- (vi) reports by the persons responsible for auditing the annual accounts referred to in section 6.

(2) The Authority, or a person appointed by him for the purpose, may at any reasonable time enter premises of an institution, of trustees of a trust operating a pension scheme or of a manager of a pension scheme acting on behalf of an institution in order to check that the provisions of the scheme and the Ordinance are being complied with.

**Powers of the Authority.**

10.(1) The Authority may suspend or cancel the licence or authorisation of an institution in Gibraltar if—

- (a) any conditions of the licence or authorisation are not complied with;
- (b) the institution does not have sound administration and accounting procedures and internal control mechanisms;

- (c) the institution does not comply with the social and labour laws relating to occupational pension provision of a Member State in which it is acting under section 16.

(2) The Authority may remove a trustee of a scheme or transfer the powers of an institution or a trustee to another appropriate person where the institution or the trustee fails properly to protect the interests of the members or otherwise fails in the duties of the institution or trustee.

**Technical provisions.**

11.(1) An institution shall establish at all times in respect of the total range of its pension schemes an adequate amount of liabilities corresponding to the financial commitments which arise out of their portfolio of existing pension contracts.

(2) An institution shall, where they provide cover against biometric risks and/or guarantee either an investment performance or a given level of benefits, establish sufficient technical provisions in respect of the total range of these schemes.

(3) The calculation of technical provisions shall take place every year. However, the calculation may be made once every three years if the institution provides members and the Authority with a certification or a report of adjustments for the intervening years, reflecting the adjusted development of the technical provisions and changes in risks covered.

(4) The calculation of the technical provisions shall be executed and certified by an actuary or, if not by an actuary, by another specialist in this field, including a registered auditor, on the basis of actuarial methods according to the following principles—

- (a) the minimum amount of the technical provisions shall be calculated by a sufficiently prudent actuarial valuation, taking account of all commitments for benefits and for contributions in accordance with the pension arrangements of the institution. It must be sufficient both for pensions and benefits already in payment to beneficiaries to continue to be paid, and to reflect the commitments which arise out of members' accrued pension rights. The economic and actuarial assumptions chosen for the valuation of the liabilities shall also be chosen prudently taking

account, if applicable, of an appropriate margin for adverse deviation;

- (b) the maximum rates of interest used shall be chosen prudently. These prudent rates of interest shall be determined by taking into account—
  - (i) the yield on the corresponding assets held by the institution and the future investment returns, and/or
  - (ii) the market yields of high-quality or government bonds;
- (c) the biometric tables used for the calculation of technical provisions shall be based on prudent principles, having regard to the main characteristics of the group of members and the pension schemes, in particular the expected changes in the relevant risks;
- (d) the method and basis of calculation of technical provisions shall remain constant from one financial year to another unless discontinuities are justified by a change of legal, demographic or economic circumstances underlying the assumptions.

**Funding of technical provisions.**

12.(1) An institution shall have at all times sufficient and appropriate assets to cover the technical provisions in respect of the total range of pension schemes operated.

(2) An institution may, provided immediate notice is given to the Authority, for a period of time approved by the Authority, have insufficient assets to cover the technical provisions, in which case the Authority shall require the institution to adopt a concrete and realisable recovery plan in order to ensure that the requirements of subsection (1) are met again. The plan shall be subject to the following conditions—

- (a) the institution shall set up a concrete and realisable plan to re-establish the required amount of assets to cover fully the technical provisions in due time. The plan shall be made available to members or, where applicable, to their

representatives and shall be subject to approval by the Authority;

- (b) in drawing up the plan, account shall be taken of the specific situation of the institution, in particular the asset/liability structure, risk profile, liquidity plan, the age profile of the members entitled to receive retirement benefits, start-up schemes and schemes changing from non-funding or partial funding to full funding;
- (c) in the event of termination of a pension scheme during the period referred to in this subsection, the institution shall inform the Authority. The institution shall establish a procedure in order to transfer the assets and the corresponding liabilities to another financial institution or a similar body. This procedure shall be disclosed to and approved by the Authority before being given effect and a general outline of the procedure shall be made available to members or, where applicable, to their representatives in accordance with the principle of confidentiality;
- (d) such other conditions as the Authority may impose.

(3) If the institution is involved in cross-border activity as referred to in section 16, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated and if these conditions are not met, the Authority shall intervene in accordance with section 10.

**Regulatory own funds.**

13.(1) An institution where the institution itself, and not the sponsoring undertaking, underwrites the liability to cover against biometric risk, or guarantees a given investment performance or a given level of benefits, shall hold on a permanent basis additional assets above the technical provisions to serve as a buffer. The amount thereof shall reflect the type of risk and asset base in respect of the total range of schemes operated. These assets shall be free of all foreseeable liabilities and serve as a safety capital to absorb discrepancies between the anticipated and the actual expenses and profits.

(2) For the purposes of calculating the minimum amount of the additional assets, the Insurance Companies (Solvency Margins and Guarantee Funds Regulations) 2004 shall apply.

**Investment rules.**

14.(1) An institution shall invest in accordance with any rules issued by the Authority.

(2) Any rules issued by the Authority shall include provision to ensure—

- (a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;
- (b) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole and assets held to cover the technical provisions shall also be invested in a manner appropriate to the nature and duration of the expected future retirement benefits;
- (c) the assets shall be predominantly invested on regulated markets. Investment in assets which are not admitted to trading on a regulated financial market must in any event be kept to prudent levels;
- (d) investment in derivative instruments shall be possible insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management. They must be valued on a prudent basis, taking into account the underlying asset, and included in the valuation of the institution's assets. The institution shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;
- (e) the assets shall be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole and investments in assets issued by the same issuer or by

issuers belonging to the same group shall not expose the institution to excessive risk concentration;

- (f) investment in the sponsoring undertaking shall be no more than 5 % of the portfolio as a whole and, when the sponsoring undertaking belongs to a group, investment in the undertakings belonging to the same group as the sponsoring undertaking shall not be more than 10 % of the portfolio;
- (g) when the institution is sponsored by a number of undertakings, investment in these sponsoring undertakings shall be made prudently, taking into account the need for proper diversification;
- (h) the requirements referred to in paragraphs (e), (f) and (g) do not apply to investment in government bonds.

(3) The rules shall prohibit borrowing or acting as guarantor except for liquidity purposes and on a temporary basis.

**Asset Management.**

15.(1) The Authority may apply to the Supreme Court for an order freezing the assets of an institution in Gibraltar and may request the competent authority of any Member State to seek an order freezing any assets of the Gibraltar institution in that Member State.

(2) Where an institution from a Member State operates in Gibraltar under section 16, the Authority shall, at the request of the competent authority of the state in which the institution is authorised, immediately apply to the Supreme Court for an order freezing the assets in Gibraltar of that institution.

(3) The Supreme Court shall have power to make any order in respect of the assets in Gibraltar as it sees fit.

**Cross-border activity.**

16.(1) An institution may apply to the Authority for authorisation to accept contributions from an employer in another Member State (“a sponsoring undertaking”).

(2) The Authority shall grant an authorisation under subsection (1) if he is satisfied that, in relation to the institution—

- (a) its administrative structure;
- (b) financial situation;
- (c) repute, professional qualifications and experience,

are compatible with the requirements of the State of the sponsoring undertaking.

(3) The grant (or refusal) of an authorisation under subsection (1) shall be made within three months of the application and the Authority shall inform the competent authority of the State of the sponsoring undertaking of the grant of an authorisation.

(4) The Authority shall, on request from the competent authority of a Member State of a sponsoring undertaking wishing to operate through an institution in Gibraltar, inform that competent authority and the institution concerned of the requirements imposed by the social and labour laws of Gibraltar in relation to pension schemes, and the information requirements for members.

(5) An institution which is receiving contributions from a sponsoring undertaking in another Member State shall operate in a way, as respects the members of the scheme employed by the sponsoring undertaking, which is consistent with the social and labour law of that Member State.

(6) The Authority shall ensure that an institution complies with subsection (5) and, if he detects any irregularities or is informed of any irregularities by the competent authority of the other Member State, shall take appropriate measures within two months, including the cancellation of any licence or authorisation, to rectify the problem.

(7) If the Authority considers, in relation to a Gibraltar sponsoring undertaking making contributions to an institution in another Member State, that the institution is not complying with the social and labour law of Gibraltar he shall inform the competent authority of that Member State and, if no appropriate action is taken to rectify the problem, may direct the

Gibraltar sponsoring undertaking to take such action as he deems necessary, including ceasing to make further contributions.

**Rules and Guidance.**

17.(1) The Authority may, with the prior consent of the Minister, make rules in respect of anything required or permitted to be prescribed by this Ordinance.

(2) The Authority, may issue guidance consisting of such information and advice as it considers appropriate—

- (a) with respect to the operation of this Ordinance and of any rules made under it;
- (b) with respect to any matters relating to functions of the Authority;
- (c) for the purpose of meeting any regulatory objectives issued by the Authority;
- (d) with respect to any other matters about which it appears to the Authority to be desirable to give information or advice.

(3) The Authority shall provide the Minister with written notice of its intention to make rules or issue guidance under subsections (1) or (2), or to revoke or amend rules or guidance already made under that subsection and shall provide to the Minister the text of any such proposed rules or guidance.

(4) The period of notice to be provided under subsection (3) shall be—

- (a) not less than 28 days prior to the date that the rules take effect;  
or
- (b) such shorter period as the Minister may agree to accept.

(5) The Minister may, during the period specified under (4)(a), require the Authority to do the following—

- (a) not to issue the intended rules or guidance;



- (b) not to revoke or amend the existing rules or guidance in the manner proposed; or
- (c) to issue the intended rules or guidance, revocation or amendment in a manner prescribed by the Minister.

(6) Rules or guidance made under subsections (1) or (2) may make different provision for different persons, circumstances or cases.

(7) A breach of any rules made under subsection (1) may be used by the Authority as grounds for action in respect of the institution as permitted by this Ordinance.

**Fees.**

18.(1) The Minister may prescribe by Notice in the Gazette the fees to be charged and payable to the Authority in respect of applications for and renewal of a licence.

(2) The Authority may suspend or cancel a licence if the prescribed fee is not paid.

**Appeals to the Supreme Court.**

19.(1) Any person aggrieved by—

- (a) the refusal, variation or revocation of a licence;
- (b) the imposition of any condition on the grant of a licence;
- (c) the refusal of any approval or consent required under the Ordinance;
- (d) a direction, determination, prohibition or restriction by the Authority;

may appeal to the Supreme Court on a point of law.

(2) An appeal shall be instituted within 28 days of the notification to the appellant of the matter complained of.

(3) The Supreme Court may confirm or quash the decision by the Authority appealed against, or may remit the matter to the Authority for further consideration.

(4) The court may make such order as to the costs of an appeal as it may consider proper.

(5) The institution of an appeal shall not operate as a stay of a decision appealed against, but the court shall have power, in its discretion, to order such a stay.

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#### **EXPLANATORY MEMORANDUM**

This Bill implements Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement pensions.

Clause 2 sets out definitions, and clause 3 the scope of the Bill. In particular it should be noted that it does not apply to insurance based schemes (which are supervised under the Insurance Companies Ordinance) and schemes with fewer than 100 members.

Clause 4 and 5 provide that an institution must be set up under a trust and must be licensed by the Authority. The Licence will be granted if the Authority is satisfied that the institution is properly organized and financed.

Clauses 6 and 7 provide for proper accounts to be drawn up and for information to be given to members about the progress of the scheme. Clause 8 provides for the Investment Policy to be regularly reviewed. Clauses 9 and 10 provide for relevant information to be given to the Authority to allow him to supervise properly and set out his powers.

Clauses 11 to 15 set out the technical provisions and investment rules which an institution must follow in order to safeguard the pension fund assets.

Clause 16 provides for cross-border activity: permitting licensed Gibraltar institutions to receive contributions from employers elsewhere and vice versa.

*Financial Services (Occupational Pensions Institutions) Ordinance 2006*

[B. 31/06]

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Clause 17 provides for the Authority to issue rules and guidance, and clause 18 for fees.

Clause 19 provides for appeals to the Supreme Court.

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