THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE
No. 3,755 of 11th January, 2010

B. 02/10

BILL

FOR

AN ACT to amend the Financial Services (Banking) Act in order to transpose into the law of Gibraltar Article 5 of Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Financial Services (Banking) (Amendment) Act 2010 and shall be deemed to have come into operation on 4 January 2010.

Amendment of the Financial Services (Banking) Act.

2.(1) The Financial Services (Banking) Act is amended in accordance with the provisions of this section.

(2) Section 23(3)(ee) is replaced by the following–

"(ee) that he has been informed of the identities of the shareholders or members of the institution who have, whether directly or indirectly, qualifying holdings and the amount of such holdings;".

(3) Section 23 is amended by inserting the following after subsection (5)–

"(6) In determining whether the criteria for a qualifying holding in the context of subsection (3)(ee) are fulfilled, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC[1], as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive shall be taken into account.

(7) The Commissioner shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Schedule 1 to the Financial Services (Markets in Financial Instruments) Act 2006 provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.".

(4) Sections 53 and 54 are replaced by the following sections–

"Acquisitions.

53.(1) Any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a licensee incorporated in Gibraltar or to further increase, directly or indirectly, such a qualifying holding in such a licensee as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the licensee would become its subsidiary (hereinafter referred to as the proposed acquisition), shall first notify in writing the Commissioner of their intention and the licensee in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and other relevant information, as referred to in section 54(4). The Commissioner need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, he applies a threshold of one-third.

[1] Directive 2004/19/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ L 390, 31.12.2004, p. 38).

(2) The Commissioner–

(a) shall promptly and in any event within two working days following receipt of the notification, as well as following the possible subsequent receipt of the information referred to in subsection (3), acknowledge receipt thereof in writing to the proposed acquirer;

(b) shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required to be attached to the notification on the basis of the list referred to in section 54(4) (hereinafter referred to as the assessment period), to carry out the assessment provided for in section 54(1) (hereinafter referred to as the assessment);

(c) shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

(3) The following provisions apply–

(a) the Commissioner may, during the assessment period, if necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed; and

(b) for the period between the date of request for information by the Commissioner and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the Commissioner for completion or clarification of the information shall be at his discretion but may not result in an interruption of the assessment period.

(4) The Commissioner may extend the interruption referred to in the second subparagraph of subsection (3) up to thirty working days if the proposed acquirer is–

(a) situated or regulated outside the EEA; or

(b) a natural or legal person not subject to prudential supervision.

(5) Where the Commissioner, upon completion of the assessment, decides to oppose the proposed acquisition, he shall, within two working days, and not exceeding the assessment period, serve on the proposed acquirer a written notice of objection which shall include the reasons for that decision. Subject to the laws of Gibraltar, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent the Minister from allowing the Commissioner from making such disclosure in the absence of a request by the proposed acquirer.

(6) Where the Commissioner does not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

(7) The Commissioner may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

Assessments.

54.(1) In assessing the notification provided for in section 53(1) and the information referred to in section 53(3), the Commissioner shall, in order to ensure the sound and prudent management of the licensee incorporated in Gibraltar in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on that licensee, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria–

(a) the reputation of the proposed acquirer;

(b) the reputation and experience of any person who will direct the business of the licensee incorporated in Gibraltar as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the licensee in which the acquisition is proposed;

(d) whether the licensee will be able to comply and continue to comply with the prudential requirements based on this Act and, where applicable, other financial services legislation, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the Commissioner and any appropriate home State regulator and determine the allocation of responsibilities among the Commissioner and such home State regulators;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

(2) The Commissioner may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in subsection (1) or if the information provided by the proposed acquirer is incomplete.

(3) The Commissioner shall neither impose any prior conditions in respect of the level of holding that must be acquired nor examine the proposed acquisition in terms of the economic needs of the market.

(4) The Commissioner shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the Commissioner at the time of notification referred to in section 53(1). The information required shall be proportionate and adapted to the

nature of the proposed acquirer and the proposed acquisition. The Commissioner shall not require information that is not relevant for a prudential assessment.

(5) Where two or more proposals to acquire or increase qualifying holdings in the same licensee have been notified to the Commissioner, the latter shall treat the proposed acquirers in a non-discriminatory manner.

Consultation.

56.(1) The Commissioner shall work in full consultation with any appropriate home State regulator when carrying out the assessment if the proposed acquirer is one of the following–

(a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or management company within the meaning of the Financial Services (Colletive Investment Schemes) Act 2005 (hereinafter referred to as the UCITS management company) authorised in a Member State or in a sector other than that in which the acquisition is proposed;

(b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed; or

(c) a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed.

(2) The Commissioner shall, without undue delay, provide any appropriate home State regulator with any information which is essential or relevant for the assessment. In this regard, the Commissioner shall communicate with any appropriate home

State regulator upon request all relevant information and shall communicate on his own initiative all essential information. A decision by the Commissioner when assessing the notification shall indicate any views or reservations expressed by the home State regulator of the proposed acquirer.".

(5) In section 57(4), the reference to "section 54" shall be replaced by a reference to "section 53(5)".

(6) The following is substituted for section 58–

"Disposal of qualifying holdings.

58. Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a licensee incorporated in Gibraltar shall first notify in writing the Commissioner, indicating the size of his intended holding. Such a person shall likewise notify the Commissioner if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the licensee would cease to be his subsidiary. The Commissioner need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, there is applied a threshold of one-third.".

(7) The following is substituted for section 58A–

"Information to be provided by the licencee.

58A.(1) A licensee incorporated in Gibraltar shall serve a written notice on the Commissioner on becoming aware of any disposal or acquisition of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in sections 53(1) and 58.

(2) A licensee incorporated in Gibraltar shall, at least once a year, serve on the Commissioner a written notice stating the identity of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of the shareholders and members or as a result of compliance with

the regulations relating to companies listed on stock exchanges.".

(8) The following shall be added after section 58A–

"Determination of qualifying holdings.

58B.(1) In determining whether the criteria for a qualifying holding in the context of sections 53, 58 or 58A are fulfilled, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC, as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, shall be taken into account.

(2) In determining whether the criteria for a qualifying holding in the context of section 58A are fulfilled, the Commissioner shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Schedule 1 to the Financial Services (Markets in Financial Instruments) Act 2006, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.".

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EXPLANATORY MEMORANDUM

This Act amends the Financial Services (Banking) Act 2006 in order to transpose article 5 of Directive 2007/44/EC.

The current system of prudential supervision in the EU is based on the principle of responsibility for the competent authorities of the home Member States. There is also an underlying requirement for the competent authorities of home and host Member States to collaborate closely in order to supervise the activities of institutions operating in Member States other than that in which their head offices are located.

In cases of acquisition, the existing legal framework has been designed to regulate cases where an acquirer wishes either to acquire a holding or increase a holding in a financial institution or investment firm. The competent national authorities - in our case the Financial Services Commission- are able to oppose an acquisition if, in view of the need to ensure sound and prudent management of the institutions, the authority is not satisfied as to the suitability of the acquirer. The current legal framework though does not provide specific criteria for assessing the suitability of the acquirer and has thus afforded considerable latitude to the relevant authorities in accepting, discouraging or rejecting a proposed acquisition. Furthermore, the current legislation does not set out in detail the procedure by which acquisitions are assessed.

To address these concerns, this Bill, in accordance with the requirements set out in Directive 2007/44/EC, modifies the existing regulatory framework with regard to the procedure as well as the criteria to be examined by the competent authorities when assessing the suitability of a proposed acquirer. The new approach curtails, significantly, authorities' discretion to make a prudential assessment. In addition deadlines have been reduced and any "stopping of the clock" by the authorities is limited to one occasion and subject to clear conditions, and are expected to apply a set of prudential criteria for supervisory assessments. For example: the reputation of the proposed acquirer; the reputation and experience of any person that may run the resulting institution or company; the financial soundness of the proposed acquirer; on-going compliance with relevant Directives; and the level of risk as regards money laundering and terrorist financing.

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