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Command Paper

on a draft Act to strengthen the information gathering and co-operation powers of the Commission established under the Financial Services Commission Act 2007, authorities appointed under a Supervisory Act and persons who exercise such functions and all other related matters

**Presented to Parliament by the Minister for
Education, Financial Services, Gaming,
Telecommunications and Justice.**

**by Command of Her Majesty
June 2013**

1. Draft Bill

2. Draft Explanatory Memorandum

DRAFT BILL

FOR

AN ACT to strengthen the information gathering and co-operation powers of the Commission established under the Financial Services Commission Act 2007, authorities appointed under a Supervisory Act and persons who exercise such functions and all other related matters.

ENACTED by the Legislature of Gibraltar.

PART I COMMENCEMENT AND INTERPRETATION

Title and commencement.

1. This Act may be cited as the Financial Services (Information Gathering and Co-operation) Act 2013 and comes into operation on the day of publication.

Interpretation.

2. In this Act, unless the context otherwise requires—

“Authority” means the Commission established under the Financial Services Commission Act 2007, any authority appointed under a Supervisory Act or a person who exercises those functions;

“Firm” means any person who is authorised, licensed, recognised, registered or approved under any of the Supervisory Acts and includes any cognate meaning of the same and includes persons seeking such permissions;

“information” means any information held by or on behalf the authority including, but not limited to, paper records, emails, information stored on computer, audio or video recording devices, microfiche, maps, photographs, handwritten notes or any other form of recorded information;

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

“regulated activity” means any activity conducted by way of business which would require any form of authorisation under any one or more of the Supervisory Acts;

“Relevant Person” means–

- (a) a Firm;
- (b) any director, officer or senior manager of a Firm;
- (c) any person who is, or who has at any time been, directly or indirectly employed (whether or not under a contract of service) by any of the persons mentioned in paragraphs (a) or (b) above;
- (d) any person who has, or who has at any time had, any direct or indirect proprietary, financial or other interest in or connection with any of the persons mentioned in paragraphs (a) or (b) above;
- (e) any persons seeking to obtain any direct or indirect proprietary, financial or other interest in connection with any of the persons mention in paragraphs (a) or (b) above.

“Supervisory Act” means any Act specified by Order made by the Minister under section 2 of the Financial Services Commission Act 2007.

PART II CONFIDENTIALITY OF INFORMATION AND DOCUMENTS

Confidentiality.

3.(1) Except as may be provided for by this or any other Act, any information from which an individual or body can be identified and which is acquired by the Authority in the course of carrying out its functions under this or any Supervisory Act shall be regarded as confidential by the Authority and by its members, officers and servants.

(2) Except as may be provided for by this or any other Act, no such information as is referred to in subsection (1) shall be disclosed without the consent of every individual who, and everybody which, can be identified from that information, except to the extent that its disclosure appears to the Authority to be necessary–

- (a) to enable the Authority to carry out any of its statutory functions and obligations under this or any of the Supervisory Acts;

- (b) in the interests of the prevention or detection of crime;
- (c) in connection with the discharge of any international obligation to which Gibraltar is subject;
- (d) in connection with the discharge of any obligations under any Memorandum of Understanding entered into between the Authority and another authority;
- (e) to assist, in the interests of the public, any authority listed in Schedule 1;
- (f) to assist any authority which appears to the Authority to exercise in a place outside Gibraltar functions corresponding to those of the Authority;
- (g) in connection with the disclosure of information that is necessary for supervision of a Firm to be effected on a consolidated basis;
- (h) to bodies involved in the liquidation and bankruptcy of Firms and in other similar procedures;
- (i) to persons responsible for carrying out statutory audits of the accounts of Firms;
- (j) to bodies in Gibraltar responsible under law for the detection and investigation of breaches of company law; and
- (k) to comply with the directions of the Supreme Court:

provided that the Authority shall disclose information in a manner that is consistent with European Union obligations.

- (3) Subsection (1) shall not apply to the disclosure—
 - (a) of any information with the consent of the person to whom it relates; or
 - (b) of any information that is a matter of public record or knowledge; or
 - (c) of any information in relation to any proceedings arising out of the Act or any of the Supervisory Acts; or

- (d) of any information in the form of a summary or collection of information, in such a manner as not to enable information relating to any particular person to be ascertained from it.

(4) Without prejudice to subsections (1), (2) and (3), any information communicated to the Authority by any Department of the Government of Gibraltar shall, if that Department so requests be regarded as confidential, by the Authority and by its members, officers and servants; and no such information shall be disclosed except in compliance with the directions of the Supreme Court.

Obligation to provide assistance and conditions for refusing.

4.(1) Subject to the provisions of section 3 and subsections (2) to (4) the Authority shall exchange information and cooperate in any investigation or supervisory activities and assist another authority which;

- (a) is an authority listed in Schedule 1, or
- (b) performs a similar function to that of the Authority under any one or more of the Supervisory Acts outside of Gibraltar.

(2) The Authority, when exchanging information with other authorities under subsection (1), may indicate at the time of communication that such information must not be disclosed without its express agreement, and that such information is exchanged solely for the purposes for which it has given its agreement.

(3) The Authority-

- (a) may transmit any information received under this Act to the authority of another jurisdiction;
- (b) shall not transmit such information to other bodies or persons without the express agreement of the authority which disclosed it; and
- (c) shall use the information solely for the purposes for which those authorities give their agreement, except in duly justified circumstances, in which case the Authority shall immediately inform the authority that sent the information.

(4) The authority and persons receiving confidential information under this Act may use it only in the course of their duties, in particular-

- (a) to check that the conditions governing the taking-up of the business are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to capital adequacy requirements, administrative and accounting procedures and internal-control mechanisms; or
- (b) to monitor the proper functioning of trading venues; or
- (c) to impose sanctions; or
- (d) in administrative appeals against decisions by the authority; or
- (e) in judicial proceedings.

(5) The Authority may refuse to provide information or documents under subsection (1) where it is not satisfied that the requesting authority is not subject to confidentiality provisions which are at least equivalent to those contained in section 3.

(6) Where the requesting authority seeks the co-operation of the Authority under the terms of an existing co-operation agreement, the Authority need not satisfy itself as to the pre-conditions in subsection (4) above.

(7) The Authority may cooperate in accordance with this section even in cases where the conduct under investigation does not constitute an infringement of this Act or any of the Supervisory Acts.

(8) Where the Authority has good reason to suspect that acts contrary to the provisions of this Act, or any of the Supervisory Acts, carried out by entities not subject to its supervision, are being or have been carried out in the jurisdiction, it shall notify this in as specific a manner as soon as possible to the authority of that jurisdiction.

(9) Where the Authority has been notified of a suspected infringement of this Act, or any one or more of the Supervisory Acts, by an authority of another jurisdiction, it shall take appropriate action and shall inform the notifying authority of the outcome of the action and, to the extent possible, of significant interim developments.

Power of the Authority to enter into cooperation agreements

5. The Authority may conclude cooperation agreements providing for exchanges of information with other authorities in accordance with this Act.

**PART III
POWERS TO OBTAIN INFORMATION AND DOCUMENTS**

Power to require information and production of documents, etc.

6.(1) The Authority may require a Relevant Person–

- (a) to attend before the Authority, or before a person duly appointed by the Authority in that behalf (an “appointed person”) at a specified time and place, and to answer questions and otherwise furnish information appearing to the Authority or to the appointed person to be relevant for the purposes of this Act or any of the Supervisory Acts; or
- (b) to furnish the Authority or an appointed person on any occasion or at specified times or intervals, with such information, books or papers as the Authority or the appointed person may reasonably require about any specified matter relating to this Act or any of the Supervisory Acts, being if the Authority or the appointed person so requires, information verified in a specified manner.

(2) Where by virtue of paragraph (b) of subsection (1) the Authority has power to require the provision of information or the production of any books or papers from a Relevant Person, the Authority shall have the like power to require the provision of that information or the production of those books or papers from any person who appears to the Authority to be in possession thereof.

(3) The powers conferred by paragraph (b) of subsection (1) or by subsection (2) to require a person to produce information, books or papers includes power–

- (a) to take copies of any book or paper produced;
- (b) to require the person who was required to produce such books or papers to provide explanations thereof; and
- (c) to require a person to state, to the best of his knowledge and belief, where the said information, books and papers might be found.

(4) A statement made by a person in compliance with a requirement under this section may be used in evidence against him.

(5) Any power conferred by this section to require the production of books or papers includes power to require the reproduction in a legible form of any record maintained otherwise than in a legible form.

Skilled Person's Report.

7.(1) The Authority may, by notice in writing given to a Relevant Person, require him to provide the Authority, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with a report on any aspect of, or any matter about which, the Authority may reasonably require for the performance of its functions under this or any of the Supervisory Acts.

(2) The Authority may require the report to be in such form as may be specified in the notice.

(3) The person appointed to make a report required under subsection (1) must be a person—

- (a) nominated or approved by the Authority; and
- (b) appearing to the Authority to have the professional skills necessary to make a report on the matter concerned.

(4) The Costs of producing a report under subsection (1) shall be borne by the Relevant Person required to provide the report.

(5) No duty to which an auditor of a Relevant Person may be subject shall be regarded as contravened by reason of his communicating in good faith to the Authority, whether or not in response to a request made by the Authority, any information of which he becomes aware or opinion that he may form in his capacity as an auditor and which relates to the business or affairs of a Relevant Person in his capacity as auditor of the Relevant Person or as a person appointed to make a report under subsection (1).

(6) In subsection (5) the reference to information which relates to the business or affairs of the Relevant Person includes a reference to information which relates to the business or affairs of a body with which the authorised institution is linked by control and is relevant to any functions of the Authority under this or any of the Supervisory Acts.

**PART IV
POWERS TO APPOINT INSPECTORS**

Appointment of inspectors.

8.(1) The Authority may appoint any person whom it considers suitably qualified, to be an inspector to investigate the affairs, or any specific aspects of the affairs, of any person in Gibraltar who—

- (a) carries on, or is reasonably suspected of carrying on a regulated activity in or from within Gibraltar; or
- (b) has carried on, or is reasonably suspected of having carried on, any such business; or
- (c) is a Relevant Person,

and to report to it thereon.

(2) The power conferred by subsection (1) shall be exercised if it appears to the Authority that—

- (a) a regulated activity may be or may have been carried on without authorisation;
- (b) a regulated activity is, or has been, carried on for an unlawful or fraudulent purpose, or conducted with intent to defraud any person;
- (c) persons concerned with the information of the business of a regulated activity or the management of its affairs in Gibraltar have in connection therewith been guilty of fraud or other misconduct;
- (d) customers of a Firm are being denied information with regard to its affairs, being information which they may reasonably expect;
- (e) a Firm is not meeting its regulatory and/or prudential requirements; or
- (f) it is necessary to protect the interests of customers, prospective customers or the public, in Gibraltar or elsewhere.

Powers of inspectors.

9. (1) An inspector appointed under section 8 may—

- (a) examine on oath the person whose affairs he was appointed to investigate, and any employee of such person, and any banker to or auditor, barrister or solicitor of such person, and where that person is a company, any of its officers, agents or employees, and for that purpose shall have power to administer oaths; or
- (b) if he considers it necessary for the purpose of the investigation for which he was appointed, investigate the affairs of any other person who or which was at the relevant time a partner, associate, director, officer, employee, subsidiary or holding company or is closely linked to the person being investigated.

Provided that nothing in this subsection shall be construed so as to require a barrister or solicitor to disclose to any person any information or document which is privileged.

(2) Where an inspector exercises the powers conferred by subsection (1)(b), he shall include in his report only such matters concerning the other person as are directly relevant to the investigation for which he was appointed.

(3) The costs of producing a report under subsection (1) shall be borne by the person on whom the report relates.

Inspector's report.

10.(1) The inspector may, and if so directed by the Authority, shall, make interim reports to the Authority, and on the conclusion of the investigation shall make a final report to the Authority.

- (2) The Authority may, if it thinks fit—
 - (a) forward copies of any report made by the inspector to the person investigated, to the Minister and to other authorities in Gibraltar or any other country or territory;
 - (b) furnish a copy on request to—
 - (i) any member of the Relevant Person or other person which is the subject of the report;
 - (ii) the auditors of any such a Relevant Person;
 - (iii) any person whose conduct is referred to in the report;

- (iv) any person whose financial interests appear to the Authority to be affected by the matters dealt with in the report, whether as a creditor of the person investigated or otherwise; and
- (c) cause any such report to be printed and published.

Duty to produce records, etc.

11. It shall be the duty of every person whose affairs are being investigated under the powers conferred by this Part and of any other person whom an inspector examines under those powers, to provide information or produce to the inspector all books and documents in his possession or under his control.

**PART V
PROVISION OF ASSISTANCE TO OTHER AUTHORITIES**

Application of Parts III and IV in relation to other authorities.

12.(1) An authorised officer of the Authority may exercise the powers conferred by Parts III and IV for the purpose of assisting an authority which exercises supervisory or regulatory responsibility over a Relevant Person, or any part of a group which a Firm belongs to; and the Authority shall exercise those powers in any case where it is requested to do so by that authority and is satisfied that the request is made for that purpose.

(2) Subject to subsection (3) the Authority may permit an officer or agent of the requesting authority to exercise the powers under Parts III and IV.

(3) The powers conferred by Parts III and IV shall not be exercised by an officer or agent of the requesting authority unless a proper request has previously been communicated by that authority to the Authority.

(4) For the purposes of this section, the supervisory or regulatory functions of an authority are—

- (a) any functions which are similar to those of the Authority under any one or more of the Supervisory Acts; or
- (b) any other functions which that authority has in respect of the activities of a Relevant Person in respect of which, by virtue of any European Union obligation, the Authority may be required to provide information.

When assistance can be denied.

13. A request for assistance under this Part may be denied by the Authority:

- (a) where the request would require the Authority to act in a manner that would breach the Laws of Gibraltar;
- (b) where a criminal proceeding has already been initiated in the jurisdiction of the Authority based upon the same facts and against the same persons, or the same persons have already been the subject of final punitive sanctions on the same charges by the Authority, unless the requesting authority can demonstrate that the relief or sanctions sought in any proceedings initiated by the requesting authority would not be of the same nature or duplicative of any relief or sanctions obtained in the jurisdiction of the Authority;
- (c) where the request is not made in accordance with the provisions of a Memorandum of Understanding between the Authority and the requesting authority; or
- (d) on grounds of public interest or essential national interest.

(2) Where a request for assistance is denied, or where assistance is not available the Authority will provide the reasons for not granting the assistance.

**PART VI
OFFENCES**

Wilfully making a statement or furnishing information knowing it to be untrue.

14. A person who—
- (a) in or in connection with any application under this Act or any of the Supervisory Acts; or
 - (b) in supplying to the Authority or to any officer authorised by or acting on its behalf of either of those officers any information for the purposes of this Act,

wilfully makes any statement or supplies information that he knows to be untrue in any material respect, is guilty of an offence and is liable on

conviction on indictment to imprisonment to a term of up to two years and to a fine not exceeding four times the amount at level 5 on the standard scale.

Unauthorised disclosure of information.

15. A person who discloses information, or who causes or permits the disclosure of information, in contravention of this Act or any of the Supervisory Acts, is guilty of an offence and liable on conviction to imprisonment for two years and to a fine of four times the amount at level 5 on the standard scale.

Unwillingness to co-operate & protection of legal privilege.

16.(1) Subject to subsection (3) a person who refuses to supply information or co-operate with the Authority, an authorised officer, Skilled Person or an Inspector under this Act is guilty of an offence and is liable on conviction on indictment to imprisonment for two years and to a fine of four times the amount at level 5 on the standard scale.

(2) A person who refuses or fails to provide information or produce any such books or documents, or who refuses to answer any question lawfully put to him, is guilty of an offence and is liable on summary conviction to a fine of level 2 on the standard scale for every day during which the offence continues.

(3) A person is not guilty of an offence under this section if-

- (a) that person is a notary, independent legal professional, auditor, external accountant or tax advisor, and
- (b) the information has been obtained on or received from one of their clients-
 - (i) in the course of ascertaining the legal position for their client; or
 - (ii) whilst performing the task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings,

whether such information is received or obtained before, during or after such proceedings and the person refuses to supply this information.

PART VII

APPEALS

Appeals to the Supreme Court.

17.(1) Any person aggrieved by a decision of the Authority may appeal to the Supreme Court.

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

Powers of the Supreme Court.

18.(1) The court may confirm, reverse or vary the decision appealed against or may direct the Authority to take any action which, under the Act, it has power to take.

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

(3) 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.

PART VIII TRANSITIONAL PROVISIONS

Transitional Provisions.

19. The Authority may use the powers to obtain and share information contained within this Act in relation to any information previously obtained under any one or more of the Supervisory Acts.

PART IX CONSEQUENTIAL AMENDMENTS

Consequential Amendments.

20. The consequential amendments in Schedule 2 shall take effect.

SCHEDULE 1

List of Domestic Authorities

Section 3

Each of the Authorities named under each of the Supervisory Acts;
The Investor Compensation Scheme Board;
The Gibraltar Deposit Protection Scheme;
The Gibraltar Regulatory Authority;
The Gambling Commissioner;
Liquidators or Administrators of previously authorised firms;
The Gibraltar Co-ordinating Centre for Criminal Intelligence & Drugs;
Gibraltar Financial Intelligence Unit;
Royal Gibraltar Police;
HM Customs;
Attorney General's Chambers;
Minister with responsibilities for Financial Services;
Minster with responsibilities for Finance.

SCHEDULE 2

Consequential Amendments

Section 20

1. The following amendments shall take effect as follows;
2. The Financial Services Commission Act 2007 is amended by repealing section 23.
3. The Financial Services (Investment and Fiduciary Services) Act is amended by:
 - (a) In section 2 by deleting the definition of "Relevant Person";
 - (b) Repealing sections 32, 33, 33A, 34, 38 and 38E;
 - (c) Repealing subsection 48(5);
 - (d) Repealing section 58;
 - (e) In the Note to Schedule 3 by substituting for the words "Save for the purposes of section 32 to 38 of this Act, this" with the word "This"
4. The Financial Services (Banking) Act is amended by:
 - (a) Replacing subsection (b) of section 59 with the following:
 - (b) "relevant person" shall have the same meaning as "Relevant Person" in the Financial Services (Information Gathering and Co-operation) Act 2012."
 - (b) Repealing sections 60, 60A, 61 and 63;
 - (c) In subsection 82(5);
 - (i) deleting the words "60," from subsection (a);

- (ii) deleting subsection (b);
 - (iii) renaming subsection (c) as subsection (b);
 - (d) Repealing subsections 82(9) and (10);
 - (e) Repealing sections 84, 86 and 86A;
 - (f) Replacing the words “58, 60A, 61 and Schedule 3” from section 94 with “and 58”;
 - (g) Repealing Schedule 3.
5. Financial Services (Markets in Financial Instruments) Act 2006 is amended by;
- (a) Repealing sections 52 and 54,
 - (b) Repealing subsection 55(3),
 - (c) Repealing sections 56 and 57.
6. The Financial Services (Markets in Financial Instruments) Regulations 2007 is amended by;
- (a) Replacing sub-regulation (b) of regulation 53 with the following;
 - “(b) “relevant person” shall have the same meaning as “Relevant Person” in the Financial Services (Information Gathering and Co-operation) Act 2012.”
 - (b) Repealing regulations 54, 55, 56 and 58.
7. The Financial Services (Insurance Companies) Act is amended by;
- (a) Repealing section 16;
 - (b) In subsection 17(2A)(a) by replacing the existing text with “sections 92, 93, 100B and Schedule 8”;
 - (c) Repealing sections 88A, 98, 99, 100A, 100B, 101, 102, 103 and 104;
 - (d) In subsection 107(1) by replacing “55, 82, 98, 100 and 100A” with “55 and 82” in both the heading thereto and text;
 - (e) Repealing subsections 107(3) and (4);
 - (f) In subsection 107(5) by deleting the words “98(1) or 100A”;
 - (g) In subsection 107(7) by replacing “55, 82, 100 or 100A” with “55, 82 or 100”;
 - (h) In subsection 108(1) by replacing “55, 64D to 66B, 82, 98, 100 or 100A” with “55, 64D to 66B, 82 or 100”;
 - (i) In subsection 109(1) by replacing “55, 64D to 66B, 82, 98, 100 or 100A” with “55, 64D to 66B, 82 or 100”;
 - (j) Repealing Schedule 16.
8. The Financial Services (Auditors) Act 2009 is amended by repealing sections 36 and 37.
9. The Financial Services (Auditors) Regulations 2010 is amended by;
- (a) In regulation 9 by replacing the definition of “relevant person” with ““relevant person” shall have the same meaning as “Relevant Person” in the Financial Services (Information Gathering and Co-operation) Act 2012”;
 - (b) Repealing regulations 10, 11, 12 and 14.

10. The Financial Services (Collective Investment Schemes) Act 2011 is amended by repealing section 47.
11. The Financial Services (Collective Investment Schemes) Regulations 2011 is amended by;
 - (a) In regulation 113, repealing sub-regulation (2)(a), (b) and (d);
 - (b) Repealing regulations 116, 117, 118 and 119.
12. The Financial Services (Electronic Money) Regulations 2011 is amended by repealing regulation 71.
13. The Financial Services (EEA) (Payment Services) Regulations 2010 is amended by;
 - (a) Repealing regulations 22 and 24,
 - (b) Replacing the words “20, 22, 23 and 24” in sub-regulation 26(1) with “20 and 23”.

Explanatory Memorandum

This Bill creates a single legislative framework dealing with information obtained and held by the Authority appointed under the Financial Services Commission Act and the Supervisory Acts. This framework sets out the duty of confidentiality that the Authority owes and how the information may be shared for relevant purposes.

The Bill also provides a uniform mechanism, across all the Supervisory Acts, for the manner in which the Authority may seek or require information from regulated firms and applicants for both its own purposes and to assist other authorities in pursuit of their functions. Safeguards are built into the Bill to protect the confidentiality of the information and the circumstances under which information may be shared.

The offences arising from breaches of confidentiality, making false or misleading statements and unwillingness to co-operate with the Authority are also consolidated under the Bill.

The Bill also makes consequential amendments to a number of Supervisory Acts and Regulations dealing with the matters contained herein.