

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3567 of 23rd November, 2006

B. 36/06

BILL

FOR

AN ORDINANCE to transpose into the law of Gibraltar Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, and matters connected thereto.

ENACTED by the Legislature of Gibraltar.

PART I

PRELIMINARY AND INTERPRETATION

Title and commencement.

1.(1) This Ordinance may be cited as the Financial Services (Markets in Financial Instruments) Ordinance 2006.

(2) This Ordinance comes into force on the day appointed by the Minister by notice in the Gazette and different dates may be appointed for different provisions and different purposes.

(3) Without prejudice to the generality of subsection (2), notices made under that subsection may make provision for the Ordinance to come into force as it affects tied agents at a date different to that affecting other purposes.

(4) Without prejudice to the generality of subsection (2), notices made under that subsection may, in accordance with section 60, make such

provision in respect of transitional provisions as the Minister may deem appropriate.

Interpretation.

2.(1) In this Ordinance, and unless the context otherwise requires—

“ancillary service” means any of the services listed in Section B of Schedule 1;

“branch” means a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up by an investment firm with headquarters in another Member State shall be regarded as a single branch;

“client” means any natural or legal person to whom an investment firm provides investment or ancillary services;

“competent authority” means, in relation to Gibraltar, such person as the Minister designates by notice in the Gazette pursuant to the provisions of section 48;

“control” shall be construed in accordance with the provisions of the Companies (Consolidated Accounts) Ordinance 1999;

“close links” means a situation in which two or more natural or legal persons are linked by—

- (a) participation, which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking;
- (b) control, which means the relationship between a parent undertaking and a subsidiary or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered

a subsidiary of the parent undertaking which is at the head of those undertakings,

however, a situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons;

“credit institutions” shall be construed in accordance with the provisions of the Financial Services (Banking) Ordinance;

“dealing on own account” means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

“directive” means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

“execution of orders on behalf of clients” means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients;

“financial instrument” means those instruments specified in Section C of Schedule 1;

“home Member State” means—

- (a) in the case of investment firms:
 - (i) if the investment firm is a natural person, the Member State in which its head office is situated;
 - (ii) if the investment firm is a legal person, the Member State in which its registered office is situated;
 - (iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;

- (b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;

“host Member State” means the Member State, other than the home Member State, in which an investment firm has a branch or performs services or activities or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;

“investment firm” means any legal person whose regular occupation or business is the provision of one or more investment services to third parties or the performance of one or more investment activities on a professional basis. The Minister may, by regulations, provide that “investment firm” includes the following—

- (a) undertakings which are not legal persons, provided that—
 - (i) their legal status ensures a level of protection for third parties’ interests equivalent to that afforded by legal persons; and
 - (ii) they are subject to equivalent prudential supervision appropriate to their legal form;
- (b) any individual whose professional services involve the holding of third parties’ funds or transferable securities where the competent authority is satisfied that he complies with the following conditions—
 - (i) the ownership rights of third parties in instruments and funds are safeguarded, especially in the event of the insolvency of the individual, seizure, set-off or any other action by creditors of the individual;
 - (ii) the individual is subject to rules designed to monitor his solvency and that of its proprietors;

Financial Services (Markets in Financial Instruments)

Ordinance 2006

[B. 36/06]

- (iii) the individual's annual accounts are audited by one or more persons empowered, under Gibraltar law, to audit accounts;
- (iv) where the individual is a sole practitioner and has made provision for the protection of investors in the event of the firm's cessation of business following his death, his incapacity or any other such event;

"investment services and activities" means any of the services and activities listed in Section A of Schedule 1 relating to any of the instruments listed in Section C of Schedule 1;

"investment advice" means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

"limit order" means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size;

"market maker" means a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him;

"market operator" means a person or persons who manages or operates the business of a regulated market: the market operator may be the regulated market itself;

"Minister" means the Minister with responsibility for financial services;

"money-market instruments" means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;

"multilateral trading facility ("MTF")" means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - in the system and in accordance with non-

discretionary rules - in a way that results in a contract in accordance with the provisions of Part II;

“parent undertaking” shall be construed in accordance with the provisions of the Companies (Consolidated Accounts) Ordinance 1999;

“portfolio management” means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;

“professional client” means a client meeting the criteria laid down in Schedule 2;

“qualifying holding” means any direct or indirect holding in an investment firm which represents 10% or more of the capital or of the voting rights, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;

“regulated market” means a multilateral system operated or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Part III;

“retail client” means a client who is not a professional client;

“subsidiary”, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking shall be construed in accordance with the provisions of the Companies (Consolidated Accounts) Ordinance 1999;

“systematic internaliser” means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF;

“tied agent” means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf he acts, promotes investment or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments or provides advice to clients or prospective clients in respect of those financial instruments or services;

“transferable securities” means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as—

- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

“UCITS management company” means any company, the regular business of which is the management of UCITS in the form of unit trusts/common funds and/or of investment companies (collective portfolio management of UCITS); this includes the following functions—

- (a) investment management.
- (b) administration as follows—
 - (i) legal and fund management accounting services;
 - (ii) customer inquiries;
 - (iii) valuation and pricing (including tax returns);

- (iv) regulatory compliance monitoring;
 - (v) maintenance of unit-holder register;
 - (vi) distribution of income;
 - (vii) unit issues and redemptions;
 - (viii) contract settlements (including certificate dispatch);
 - (ix) record keeping;
- (c) marketing;

“UCITS” shall be construed in accordance with the provisions of the
Financial Services (Collective Investment Schemes) Ordinance
2004.

(2) Any term used in this Ordinance but not defined shall be construed in
accordance with the provisions of the Directive.

Scope.

3.(1) This Ordinance shall apply to investment firms and regulated markets.

(2) The following provisions shall also apply to credit institutions when
providing one or more investment services or performing investment
activities—

- (a) sections 4(2), 11, 13 and 14;
- (b) sections 16 to 30, save for section 32(2);
- (c) sections 31 to 35 save for section 31(2) to (5), section 32(3) to
(8)(a), (8)(d) and (9);
- (d) sections 48 to 51, 55, 59 and 60; and
- (e) section 60(1).

(3) Sections 19, 21 and 22 are not applicable to transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. Notwithstanding the foregoing, the members of or participants in the MTF shall comply with the obligations provided for in sections 19, 21 and 22 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

Exemptions.

4.(1) This Ordinance shall not apply to—

- (a) insurance undertakings, assurance undertakings or undertakings carrying on the reinsurance and retrocession activities;
- (b) persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;
- (d) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;
- (e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;
- (f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent

undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

- (g) collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings;
- (h) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Schedule 1, Section C 10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Ordinance or banking services under the Financial Services (Banking) Ordinance;
- (i) persons providing investment advice in the course of providing another professional activity not covered by this Ordinance provided that the provision of such advice is not specifically remunerated;
- (j) persons whose main business consists of dealing on own account in commodities or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Ordinance or banking services under the Financial Services (Banking) Ordinance;
- (k) firms which provide investment services or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets.

(2) The rights conferred by this Ordinance shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt, by the Gibraltar Savings Bank or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

(3) This Ordinance shall not apply to any person for which Gibraltar is the home Member State which—

- (a) is not allowed to hold clients' funds or securities and which for that reason is not allowed at any time to place themselves in debit with their clients; and
- (b) is not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and the provision of investment advice in relation to such financial instruments; and
- (c) in the course of providing that service, are allowed to transmit orders only to—
 - (i) investment firms authorised according to law;
 - (ii) credit institutions authorised according to law;
 - (iii) branches of investment firms or of credit institutions which are authorised in a third country and which are subject to and comply with prudential rules considered by the competent authority to be at least as stringent as those in force in Gibraltar;
 - (iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings;

- (v) investment companies with fixed capital, the securities of which are listed or dealt in on a regulated market in a Member State;

provided that the activities of those persons are otherwise regulated pursuant to Gibraltar law.

(4) Persons excluded from the scope of this Ordinance according to subsection (3) cannot benefit from the freedom to provide services or activities or to establish branches as provided for in sections 31 and 32 respectively.

(5) In this section, insurance undertakings, assurance undertakings and undertakings carrying on the reinsurance and retrocession activities shall be construed in accordance with the provisions of the Insurance Companies Ordinance.

PART II

AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS

Conditions and procedures for authorisation

Establishment of register.

5.(1) There shall be a register of all investment firms.

(2) The register established under subsection (1) shall be publicly accessible and shall contain information on the services or activities for which the investment firm is authorised.

(3) The register established under subsection (1) shall be maintained by the competent authority in such form as the competent authority may require and shall be updated on a regular basis.

Authorisations.

6.(1) The performance of investment services or activities as a regular occupation or business on a professional basis shall be subject to prior

authorisation by the competent authority in accordance with the provisions of this Ordinance.

(2) Notwithstanding subsection (1), a market operator may operate an MTF without authorisation, provided the competent authority verifies compliance with the provisions of this Ordinance, excluding sections 11 and 15.

(3) The competent authority shall only authorise investment firms complying with the following provisions—

- (a) the investment firm which is a legal person have its head office in the same Member State as its registered office; or
- (b) where the investment firm is not a legal person or the investment firm is a legal person but under its national law has no registered office, it has its head office in the Member State in which it actually carries on its business.

(4) The Minister may, by regulations, authorise the competent authority to delegate administrative, preparatory or ancillary tasks related to the granting of an authorisation in cases where investment firms are excluded from the provisions of this Ordinance in accordance with section 4(3) and (4) and with the conditions laid down in section 48(2) to (6).

(5) Authorisations—

- (a) may cover one or more of the ancillary services set out in Section B of Schedule 1; and
- (b) shall in no case be granted solely for the provision of ancillary services.

(6) The competent authority shall ensure that the notification of authorisation specifies the investment services or activities which the investment firm is authorised to provide.

(7) Where an investment firm seeks authority to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation, it shall submit to the competent authority a request for an extension of its authorisation.

(8) Pursuant to the provisions of the directive, the authorisation shall be valid for the entire Community and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the European Union, either through the establishment of a branch or the free provision of services.

Procedures for granting and refusing requests for authorisation.

7.(1) The competent authority shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all the requirements of this Ordinance.

(2) Applications for an authorisation shall be in such form as the competent authority may require.

(3) Notwithstanding the generality of subsection (2), applications shall contain all information required by the competent authority including a business plan setting out, inter alia, the types of business envisaged and the organisational structure necessary to enable the competent authority to satisfy itself that the investment firm has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Ordinance.

(4) An applicant shall be informed, within six months of the submission of a complete application, whether or not an authorisation has been granted.

Withdrawal of authorisations.

8. The competent authority may withdraw an authorisation issued to an investment firm where the investment firm—

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;

- (d) has seriously and systematically infringed the provisions adopted pursuant to this Ordinance governing the operating conditions for investment firms; or
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Ordinance, provides for withdrawal.

Persons who effectively direct the business.

9.(1) An authorisation under this Ordinance shall be granted, or, if granted, shall remain valid only where the competent authority is satisfied that the persons who effectively direct the business of an investment firm are of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm.

(2) Where the market operator that seeks an authorisation to operate an MTF and the persons that effectively direct the business of the MTF are the same as those that effectively direct the business of the regulated market, those persons shall be deemed to comply with the requirements laid down in subsection (1).

(3) Investment firms shall notify the competent authority of any changes to their management, along with all information needed to assess whether the new staff appointed to manage the firms are of sufficiently good repute and sufficiently experienced. The competent authority shall refuse an authorisation where there are objective and demonstrable grounds for believing that proposed changes to the management of a firm pose a threat to its sound and prudent management.

(4) An authorisation under this Ordinance shall only be granted where the management of an investment firm is undertaken by at least two persons meeting the requirements laid down in this section.

(5) Notwithstanding subsection (4), the Minister may, by regulations, empower the competent authority to grant an authorisation to investment firms consisting of a natural person or to investment firms that are legal persons managed by a single natural person where it is satisfied that alternative arrangements are in place which ensure sound and prudent management.

Shareholders and members with qualifying holdings.

10.(1) The competent authority shall not authorise the performance of investment services or activities by an investment firm until it has been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal, that have qualifying holdings and the amounts of those holdings.

(2) The competent authority shall refuse an authorisation where, taking into account the need to ensure the sound and prudent management of an investment firm, he is not satisfied of the suitability of the shareholders or members that have qualifying holdings.

(3) Where close links exist between an investment firm and other natural or legal persons, the competent authority shall grant an authorisation only where, in the opinion of the competent authority, those links do not prevent the effective exercise of the supervisory functions of the competent authority.

(4) The competent authority shall refuse an authorisation where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the applicant undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

(5) Natural or legal persons proposing to acquire or sell, directly or indirectly, a qualifying holding in an investment firm, shall first notify the competent authority of the size of the resulting holding.

(6) Natural or legal persons shall first notify the competent authority where they propose to increase or reduce their qualifying holding, if in consequence the proportion of the voting rights or of the capital that they hold would reach or fall below or exceed 20%, 33% or 50% or the investment firm would become or cease to be their subsidiary.

(7) The competent authority shall have up to three months from the date of the notification of a proposed acquisition provided for in subsections (5) and (6) to oppose such a plan where, in view of the need to ensure sound and prudent management of the investment firm, he is not satisfied of the suitability of any person to which subsection (1) applies. Where the

competent authority does not oppose the plan, he may fix a deadline for its implementation.

(8) Where the acquirer of any holding referred to in subsection (5) and (6) is one of the following—

- (a) an investment firm;
- (b) a credit institution;
- (c) an insurance undertaking;
- (d) a UCITS management company authorised in another Member State;
- (e) the parent undertaking of an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State; or
- (f) a person controlling an investment firm, credit institution, insurance undertaking or a UCITS management company authorised in another Member State, and

if, as a result of that acquisition, the undertaking would become the acquirer's subsidiary or come under his control, the assessment of the acquisition shall be subject to the prior consultation provided for in section 58.

(9) Where an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in subsection (6), that investment firm shall inform the competent authority without delay.

(10) At least once a year at a time to be appointed by the competent authority by notice in the Gazette, investment firms shall inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings.

(11) Where, in the opinion of the competent authority, the influence exercised by any person to which subsection (2) applies is likely to be prejudicial to the sound and prudent management of an investment firm, the

competent authority shall take such measures as he may deem appropriate to prevent such circumstances from continuing such as—

- (a) applications for judicial orders;
- (b) the imposition of sanctions against directors and those responsible for management; or
- (c) the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

(12) The provisions of subsection (11) shall apply equally in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. Where a holding is acquired despite the opposition of the competent authority, the competent authority shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

(13) The Minister may, by regulations, make such provision as he deems appropriate in order to facilitate the operation of subsection (11).

Membership of an authorised Investor Compensation Scheme.

11. The competent authority shall take all necessary steps, including those set out in section 10(11), to ensure that an entity seeking an authorisation as an investment firm meets its obligations under the Investor Compensation Scheme Ordinance 2002.

Initial capital endowment.

12. The competent authority shall not grant an authorisation unless the applicant investment firm has sufficient initial capital according to law, having regard to the nature of the investment service or activity in question.

Organisational requirements.

13.(1) The competent authority shall take all necessary steps, including those set out in section 10(11), to ensure that investment firms comply with the organisational requirements set out in subsections (2) to (8).

(2) Investment firms shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Ordinance as well as appropriate rules governing personal transactions by such persons.

(3) Investment firms shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in section 18 from adversely affecting the interests of its clients.

(4) Investment firms shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end investment firms shall employ appropriate and proportionate systems, resources and procedures.

(5) Investment firms—

- (a) shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that they take reasonable steps to avoid undue additional operational risk;
- (b) shall not outsource important operational functions in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations; and
- (c) shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

(6) Investment firms shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Ordinance, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

(7) Investment firms shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.

(8) Investment firms shall, when holding funds belonging to clients, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.

(9) In the case of branches of investment firms, the competent authority shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in subsection (6) with regard to transactions undertaken in Gibraltar by the branch.

Trading process and finalisation of transactions in an MTF.

14.(1) The competent authority shall take all necessary steps, including those set out in section 10(11), to ensure that investment firms comply with the provisions of this section.

(2) The competent authority shall ensure that investment firms or market operators operating an MTF shall, in addition to meeting the requirements laid down in section 13, establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders.

(3) The competent authority shall ensure that investment firms or market operators operating an MTF establish transparent rules regarding the criteria for determining the financial instruments that can be traded under its systems, including, where applicable, providing or giving access to sufficient information enabling users to form an investment judgement, taking into account both the nature of the users and the types of instruments traded.

(4) The competent authority shall ensure that investment firms or market operators operating an MTF establish and maintain transparent rules, based on objective criteria, governing access to its facility. These rules shall comply with the conditions established in section 42(3).

(5) The competent authority shall ensure that investment firms or market operators operating an MTF clearly inform its users of their respective responsibilities for the settlement of the transactions executed in that facility. The competent authority shall require that investment firms or market operators operating an MTF have put in place the necessary arrangements to facilitate the efficient settlement of the transactions concluded under the systems of the MTF.

(6) Where a transferable security, which has been admitted to trading on a regulated market, is also traded on an MTF without the consent of the issuer, the competent authority shall ensure that the issuer is not subject to any obligation relating to initial, ongoing or ad hoc financial disclosure with regard to that MTF.

(7) The competent authority shall ensure that any investment firm or market operator operating an MTF comply immediately with any instruction from its home competent authority pursuant to regulations made under section 49(1) and (2) to suspend or remove a financial instrument from trading.

Relations with third countries.

15.(1) The Minister shall ensure the European Commission is informed of any general difficulties which investment firms encounter in establishing themselves or providing investment services or performing investment activities in any third country.

(2) The Minister shall ensure the European Commission is informed at its request—

- (a) of any application for the authorisation of any firm which is the direct or indirect subsidiary of a parent undertaking governed by the law of the third country referred to in subsection (1); and;
- (b) whenever the competent authority is informed in accordance with the provisions of this Ordinance that such a parent undertaking proposes to acquire a holding in an investment firm authorised in accordance with the provisions of this Ordinance, in consequence of which the latter would become its subsidiary.

(3) The competent authority shall afford the Minister such assistance as the Minister may require to enable him to comply with his obligations under this section.

Operating conditions for investment firms

General provisions

Regular review of conditions for initial authorisation.

16.(1) The competent authority shall make it a condition for the grant of an authorisation that an investment firm authorised in accordance with the provisions of this Ordinance comply at all times with the conditions for initial authorisation established in this Part.

(2) The Minister shall require the competent authority to establish the appropriate methods to monitor that investment firms comply with their obligation under subsection (1), including requiring investment firms to notify the competent authority of any material changes to the conditions for the initial authorisation.

(3) In the case of investment firms which provide only investment advice, the Minister may, by regulations, enable the competent authority to delegate administrative, preparatory or ancillary tasks related to the review of the conditions for initial authorisation, in accordance with section 48(2) to (6).

General obligation in respect of on-going supervision.

17.(1) The competent authority shall monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Ordinance.

(2) The Minister may, by regulations, make such provision as he may deem appropriate to enable the competent authority to obtain the information needed to assess the compliance of investment firms with those obligations. Without prejudice to the generality of the foregoing, regulations may provide for such offences and penalties therefor as the Minister may deem appropriate.

(3) Where an investment firm only provides investment advice, the Minister may make regulations enabling the competent authority to delegate

administrative, preparatory or ancillary tasks related to the regular monitoring of operational requirements, in accordance with section 48(2) to (6).

Conflicts of interest.

18.(1) The competent authority shall make it a condition for the grant of an authorisation that investment firms take all reasonable steps to identify conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations thereof.

(2) Where, in the opinion of the competent authority, organisational or administrative arrangements made by the investment firm in accordance with the provisions of this Ordinance to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the competent authority shall require the investment firm to clearly disclose the general nature or sources of conflicts of interest to the client before undertaking business on his behalf.

Provisions to ensure investor protection

Conduct of business obligations when providing investment services to clients.

19.(1) The competent authority shall make it a condition for the grant of an authorisation that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in subsections (2) to (8).

(2) All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

(3) Appropriate information shall be provided by the investment firm in a comprehensible form to clients or potential clients about—

- (a) the investment firm and its services;
- (b) financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies;
- (c) execution venues; and
- (d) costs and associated charges,

in order that clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument being offered and, consequently, to take investment decisions on an informed basis. This information may be provided by the investment firm in a standardised format.

(4) When providing investment advice or portfolio management services, the investment firm shall first obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that may be suitable for him.

(5)

- (a) Subject to subsection (6), when providing investment services other than those referred to in subsection (4), investment firms shall ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.
- (b) Where the investment firm considers, on the basis of the information received, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client of the fact. This warning may be provided in a standardised format.

- (c) Where the client or potential client elects not to provide the requested information or where he provides insufficient information regarding his knowledge and experience, the investment firm shall warn the client or potential client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him. This warning may be provided in a standardised format.

(6) When providing investment services that only consist of execution or the reception and transmission of client orders with or without ancillary services, investment firms may provide those services to their clients without the need to first obtain the information or make the determination provided for in subsection (5) where all the following conditions are met–

- (a) the investment services relate to shares admitted to trading on a regulated market or in an equivalent third country market, money market instruments, bonds or other forms of securitised debt (excluding those bonds or securitised debt that embed a derivative), UCITS and other non-complex financial instruments.

For these purposes, a third country market shall be considered as equivalent to a regulated market where the competent authority is of the opinion that it complies with equivalent requirements to those established under Part III;

- (b) the service is provided at the initiative of the client or potential client;
- (c) the client or potential client has been clearly informed by the investment firm that in the provision of this service the investment firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules; this warning may be provided in a standardised format; and
- (d) the investment firm complies with its obligations under section 18.

(7) The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the agreement may be incorporated by reference to other documents or legal texts.

(8) The investment firm shall supply to clients adequate reports on the service provided. These reports shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

(9) Where an investment service is offered as part of a financial product which is already subject to other statutory provisions relating to credit institutions and consumer credit with respect to risk assessment of clients or information requirements, this service shall not be additionally subject to the obligations set out in this section.

Provision of services through the medium of another investment firm.

20.(1) Where an investment firm receives instructions to perform investment or ancillary services on behalf of a client through the medium of another investment firm, the firm's obligations under this Ordinance will be fulfilled where it relies on client information transmitted by the latter firm. The investment firm which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

(2) The investment firm which receives an instruction to undertake services on behalf of a client in the manner set out in subsection (1) shall in turn be entitled to rely on any recommendations in respect of the service or transaction that have been provided to the client by another investment firm in order to fulfil its obligations under this Ordinance. In this context, the investment firm mediating the instructions will remain responsible for the appropriateness for the client of the recommendations or advice provided.

(3) An investment firm receiving client instructions or orders through the medium of another investment firm shall remain responsible for concluding the service or transaction, based on any such information or recommendations, in accordance with the relevant provisions of this Part.

Obligation to execute orders on terms most favourable to the client.

21.(1) The competent authority shall make it a condition for the grant of an authorisation that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Notwithstanding the foregoing, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

(2) The competent authority shall require investment firms to establish and implement effective arrangements for complying with subsection (1). In particular the competent authority shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with subsection (1).

(3) The order execution policy referred to in subsection (2) shall include, in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. It shall at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders.

(4) The competent authority shall make it a condition for the grant of an authorisation that investment firms provide appropriate information to their clients on their order execution policy and that investment firms first obtain the prior consent of their clients to the execution policy.

(5) Where an order execution policy provides for the possibility that client orders may be executed outside a regulated market or an MTF, the competent authority shall make it a condition for the grant of an authorisation—

- (a) that the investment firm, in particular, inform its clients about this possibility; and
- (b) that the investment firm first obtain the prior express consent of their clients before proceeding to execute such orders.

Investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions.

(6) The competent authority shall make it a condition for the grant of an authorisation that investment firms -

- (a) monitor the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate, correct any deficiencies. In particular, investment firms shall assess, on a regular basis, whether the execution venues included in the order execution policy provide for the best possible result for the client or whether they need to make changes to their execution arrangements;
- (b) notify clients of any material changes to their order execution arrangements or execution policy; and
- (c) demonstrate to their clients, at their request, that they have executed their orders in accordance with the firm's execution policy.

Client order handling rules.

22.(1) The competent authority shall make it a condition for the grant of an authorisation that investment firms authorised to execute orders on behalf of clients implement procedures and arrangements—

- (a) allowing for the execution of otherwise comparable client orders in accordance with the time of their reception by the investment firm; and
- (b) providing for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm.

(2) The competent authority shall make it a condition for the grant of an authorisation that in the case of a client limit order in respect of shares admitted to trading on a regulated market which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that

client limit order in a manner which is easily accessible to other market participants.

(3) Investment firms—

- (a) may comply with the obligation set out in subsection (2) by transmitting the client limit order to a regulated market and/or MTF; and
- (b) the competent authority may, in its discretion, waive the obligation set out in subsection (2) to make public a limit order where the order is large in scale compared with normal market size as determined under section 44.

Obligations of investment firms when appointing tied agents.

23.(1) The competent authority may, in its discretion, decide to authorise investment firms to appoint tied agents for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm.

(2) Where an investment firm appoints a tied agent pursuant to subsection (1), the firm remains fully and unconditionally responsible—

- (a) for any action or omission on the part of a tied agent when acting on behalf of the firm; and
- (b) to ensure that the tied agent discloses the capacity in which he is acting and the firm which he is representing when contacting or before dealing with any client or potential client.

(3) The competent authority may authorise, in accordance with the provisions of this Ordinance, tied agents registered in Gibraltar to handle clients' money or financial instruments on behalf and under the full responsibility of the investment firm for which they are acting within Gibraltar or, in the case of a cross-border operation, in the territory of a Member State which allows a tied agent to handle clients' money.

(4) The investment firm on behalf of which a tied agent is acting shall remain responsible for monitoring the activities of their tied agents so as to ensure that they continue to comply with this Ordinance when acting through tied agents.

(5) Where the competent authority authorises investment firms to appoint tied agents in accordance with this section—

- (a) it shall establish a public register, in such form as it may deem appropriate, wherein will be registered the details of all tied agents established in Gibraltar; and
- (b) investment firms shall appoint only tied agents entered in the public register or in the equivalent register established by another member State.

(6) Where the competent authority has decided, in accordance with subsection (1), not to allow investment firms to appoint tied agents, those tied agents shall, where relevant, be registered with the competent authority of the home Member State of the investment firm on whose behalf it acts.

(7) Where the competent authority has decided, in accordance with subsection (1), to allow investment firms to appoint tied agents, a tied agent shall only be admitted to the public register where the competent authority is satisfied that it is of sufficiently good repute and that he possesses appropriate general, commercial and professional knowledge so as to be able to communicate accurately all relevant information regarding the proposed service to the client or potential client.

(8) The register established under subsection (5) shall be updated by the competent authority on a regular basis and shall be publicly available for consultation.

(9) The competent authority shall make it a condition for the grant of an authorisation that investment firms appointing tied agents take adequate measures in order to avoid any negative impact that the activities of the tied agent not covered by the scope of this Ordinance could have on the activities carried out by the tied agent on behalf of the investment firm.

(10) The competent authority may collaborate with investment firms and credit institutions, their associations and other entities in registering tied

agents and in monitoring compliance of tied agents with the requirements of this section. Without prejudice to the generality of the foregoing, an investment firm, credit institution or their associations and other entities under the supervision of the competent authority may apply to the competent authority for the registration of tied agents.

Transactions executed with eligible counterparties.

24.(1) Investment firms authorised to execute orders on behalf of clients or to deal on own account or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under sections 19, 21 and 22 in respect of those transactions or in respect of any ancillary service directly related to those transactions.

(2) Eligible counterparties for the purposes of subsection (1) are investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under Community legislation or the national law of a Member State, undertakings exempted from the application of this Ordinance under section 4(1)(k) and (l), national governments and their corresponding offices including public bodies that deal with public debt, the Gibraltar Savings Bank, central banks and supranational organisations.

(3) Classification as an eligible counterparty under subsection (2) shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to sections 19, 21 and 22.

(4) The competent authority may also recognise as eligible counterparties for the purposes of subsection (1) other undertakings meeting such pre-determined proportionate requirements, including quantitative thresholds as the Minister may prescribe.

(5) In the event of a transaction where the prospective counterparties are located in different jurisdictions, the investment firm shall defer to the status of the other undertaking as determined by the law or measures of the Member State in which that undertaking is established.

(6) An investment firm entering into transactions in accordance with subsection (1) with such undertakings shall obtain the express confirmation from the prospective counterparty that it agrees to be treated as an eligible counterparty, and the competent authority shall allow the investment firm to obtain this confirmation either in the form of a general agreement or in respect of each individual transaction.

(7) The competent authority may recognise as eligible counterparties—

- (a) third country entities equivalent to those categories of entities mentioned in subsection (2); and
- (b) third country undertakings such as those mentioned in subsection (2) on the same conditions and subject to the same requirements as those laid down at subsections (4) and (5).

Market transparency and integrity

Obligation to uphold integrity of markets, report transactions and maintain records.

25.(1) The Minister may make regulations to ensure that appropriate measures are in place to enable the competent authority to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

(2) Regulations made under subsection (1) may make provision for such offences and penalties therefore as the Minister may deem appropriate.

(3) It shall be a condition subject to which an authorisation under this Ordinance is granted that investment firms keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and other information required by the competent authority to prevent the use of the financial system for the purpose of money laundering.

(4) It shall be a condition subject to which an authorisation under this Ordinance is granted that investment firms which execute transactions in any

financial instruments admitted to trading on a regulated market report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation shall apply whether or not such transactions were carried out on a regulated market.

(5) The competent authority shall, in accordance with the provisions of this Ordinance, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives the information reported under subsection (4).

(6) Reports under subsection (4) shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned.

(7) Reports under subsection (4) are to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in subsection (4) may be waived by the competent authority either generally or individually as he sees fit.

(8) When, in accordance with the provisions of this Ordinance, reports provided for under this section are transmitted to the competent authority in its capacity as host Member State, it shall transmit this information to the competent authority of the home Member State of the investment firm, unless the latter decide that it does not want to receive this information.

Monitoring of compliance with the rules of the MTF and with other legal obligations.

26. It shall be a condition subject to which an authorisation under this Ordinance is granted that investment firms and market operators operating an MTF—

(a)

- (i) establish and maintain effective arrangements and procedures, relevant to the MTF, for the regular monitoring of the compliance by its users with its rules; and
- (ii) monitor the transactions undertaken by their users under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse;
- (b) report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority; and
- (c) supply the relevant information without delay to the authority responsible for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

Obligation for investment firms to make public firm quotes.

27.(1) It shall be a condition subject to which an authorisation under this Ordinance is granted that systematic internalisers in shares publish a firm quote in those shares admitted to trading on a regulated market for which they are systematic internalisers and for which there is a liquid market, in default of which systematic internalisers shall disclose quotes to clients on request.

(2) The provisions of this subsection (1) shall be applicable to systematic internalisers when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size shall not be subject to the provisions of this section.

(3) For the purposes of subsection (1)–

- (a) systematic internalisers may decide the size or sizes at which they will quote, including a firm bid or offer price or prices for a size or sizes which could be up to standard market size for the class of shares to which the share belongs and reflecting the prevailing market conditions for that share;

- (b) shares shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that share. The standard market size for each class of shares shall be a size representative of the arithmetic average value of the orders executed in the market for the shares included in each class of shares;
- (c) the market for each share shall be comprised of all orders executed in the European Union in respect of that share excluding those large in scale compared to normal market size for that share;
- (d) systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They shall be entitled to update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes. The quote shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis;
- (e) systematic internalisers shall, while complying with the provisions set down in section 21, execute the orders they receive from their retail clients in relation to the shares for which they are systematic internalisers at the quoted prices at the time of reception of the order;
- (f) systematic internalisers shall execute the orders they receive from their professional clients in relation to the shares for which they are systematic internalisers at the quoted price at the time of reception of the order. However, they may execute those orders at a better price in justified cases provided that this price falls within a public range close to market conditions and provided that the orders are of a size bigger than the size customarily undertaken by a retail investor;
- (g) systematic internalisers may execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the conditions established in this subsection, in respect of transactions where execution in several securities is part of one transaction or in respect of

orders that are subject to conditions other than the current market price; and

- (h) where a systematic internaliser who quotes only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions of paragraphs (f) and (g). Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with the provisions of this Ordinance, except where otherwise permitted under the conditions of paragraphs (f) and (g).

(4) Where the most relevant market in terms of liquidity for each share is in Gibraltar, the competent authority shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that share, the class of shares to which it belongs. This information shall be made public to all market participants.

(5) It shall be a condition subject to which an authorisation is granted that—

- (a) investment firms regularly update bid or offer prices published in accordance with this section and maintain prices which reflect the prevailing market conditions; and
- (b) investment firms comply with the conditions for price improvement laid down in subsection (3)(f).

(6) For all purposes relating to the operation of this section—

- (a) the competent authority shall authorise systematic internalisers to decide, on the basis of their commercial policy and in an objective and non-discriminatory way, the investors to whom they give access to their quotes;

- (b) to that end the competent authority shall require the systematic internaliser to set clear standards for governing access to their quotes;
- (c) notwithstanding paragraphs (a) and (b), systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement of the transaction.

(7) In order to limit the risk of being exposed to multiple transactions from the same client, the competent authority shall allow systematic internalisers–

- (a) to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions; and
- (b) to limit, in a non-discriminatory way and without prejudice to subsection 22, the total number of transactions from different clients at the same time provided that this is allowable only where the number or volume of orders sought by clients considerably exceeds the norm.

Post-trade disclosure by investment firms.

28. It shall be a condition subject to which an authorisation under this Ordinance is granted that–

- (a) where investment firms, either on their own account or on behalf of clients, conclude transactions in shares admitted to trading on a regulated market outside a regulated market or MTF, it shall make public the volume and price of those transactions and the time at which they were concluded as close to real-time as possible, on a reasonable commercial basis, and in a manner which is easily accessible to other market participants; and
- (b) the information made public in accordance with paragraph (a) and the time-limits within which it is published comply with the prescribed requirements. Where the prescribed requirements provide for deferred reporting for certain

categories of transaction in shares, this possibility shall apply mutatis mutandis to those transactions when undertaken outside regulated markets or MTFs.

Pre-trade transparency requirements for MTFs.

29.(1) It shall be a condition subject to which an authorisation under this Ordinance is granted that investment firms and market operators operating an MTF make public current bid and offer prices and the depth of trading interests at these prices which are advertised through their systems in respect of shares admitted to trading on a regulated market and available to the public, on reasonable commercial terms and on a continuous basis during normal trading hours.

(2) The competent authority, may, in its discretion, waive the obligation for investment firms or market operators operating an MTF to make public the information referred to in subsection (1)–

- (a) based on the market model or the type and size of orders in the cases defined in accordance with regulations made by the Minister; or
- (b) in respect of transactions that are large in scale compared with normal market size for the share or type of share in question.

Post-trade transparency requirements for MTFs.

30.(1) It shall be a condition subject to which an authorisation under this Ordinance is granted that–

- (a) investment firms and market operators operating an MTF make public the price, volume and time of the transactions executed under its systems in respect of shares which are admitted to trading on a regulated market on a reasonable commercial basis, as close to real-time as possible; and
- (b) MTFs obtain the competent authority's prior approval to proposed arrangements for deferred trade-publication in accordance with subsection (3)(b), and shall require that these arrangements be clearly disclosed to market participants and the investing public.

(2) Subsection (1) shall not apply to details of trades executed on an MTF that are made public under the systems of a regulated market.

(3) The competent authority may, in its discretion—

- (a) authorise investment firms or market operators operating an MTF to provide for deferred publication of the details of transactions based on their type or size:
- (b) authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares.

Rights of investment firms

Freedom to provide investment services and activities.

31.(1) Investment firms authorised and supervised by the competent authority of another Member State in accordance with its obligations under the directive, and in respect of credit institutions in accordance with provisions substantially equivalent to the Financial Services (Banking) Ordinance—

- (a) may freely perform investment services or activities as well as ancillary services within Gibraltar, provided that such services and activities are covered by its authorisation; and
- (b) may offer ancillary services only when provided together with an investment service or activity,

without any additional requirements on such an investment firm or credit institution in respect of matters covered by this Ordinance.

(2) An authorised investment firm wishing to provide services or activities within the territory of another Member State for the first time, or which wishes to change the range of services or activities so provided, shall communicate the following information to the competent authority—

- (a) the Member State in which it intends to operate;

- (b) a business plan stating in particular the investment services or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services,

in such form as the competent authority may require.

(3) Pursuant to subsection (2), where an investment firm intends to use tied agents, the competent authority shall, at the request of the competent authority of the host Member State and within a reasonable time, communicate to the latter the identity of the tied agents that the investment firm intends to use in that Member State which the host Member State may make public.

(4) The competent authority shall, within one month of receiving any information pursuant to this section by an investment firm, forward it to the competent authority of the host Member State, following which the investment firm may then start to provide the investment service or services concerned in the host Member State.

(5) In the event of a change in any of the particulars communicated in accordance with this section, an investment firm shall give written notice of that change to the competent authority at least one month before implementing the change which the competent authority shall transmit to the competent authority of the host Member State.

(6) Investment firms and market operators to which sub-section (1) applies and—

- (a) operating MTFs in Gibraltar shall, without further legal or administrative requirement, be free to provide appropriate arrangements so as to facilitate access to and use of their systems by remote users or participants established in other member States;
- (b) operating MTFs in other member States shall, without further legal or administrative requirement, be free to provide appropriate arrangements so as to facilitate access to and use of their systems by remote users or participants established in Gibraltar.

(7) The investment firm or the market operator that operates an MTF referred to in subsection (6)(a) shall communicate to the competent authority the fact that it intends to provide such arrangements. The competent authority shall communicate, within one month, this information to the competent authority of the host Member State in which the MTF intends to provide such arrangements.

(8) The competent authority shall, at the request of the competent authority of the host Member State of an MTF to which subsection (6)(a) applies and within a reasonable time, communicate the identity of the members or participants of the MTF established in Gibraltar.

Establishment of a branch.

32.(1) Investment services or activities as well as ancillary services may be provided within Gibraltar through the establishment of a branch, provided that—

- (a) those services and activities are covered by an authorisation granted to the investment firm or the credit institution in the home Member State; and
- (b) that ancillary services are only provided together with an investment service or activity.

(2) Pursuant to subsection (1), no additional requirements shall be imposed on the organisation and operation of the branch in respect of the matters covered by this Ordinance save those allowed under this section.

(3) An investment firm wishing to establish a branch within the territory of another Member State shall first notify the competent authority of the fact and provide it with the following information—

- (a) the Member States within the territory of which it plans to establish a branch;
- (b) a business plan setting out, inter alia, the investment services or activities as well as the ancillary services to be offered and the organisational structure of the branch and indicating whether the branch intends to use tied agents; and

- (c) the address in the host Member State from which documents may be obtained;
- (d) the names of those responsible for the management of the branch.

(4) Where an investment firm uses a tied agent established in a Member State outside Gibraltar, such tied agent shall be assimilated to the branch and shall be subject to the provisions of this Ordinance relating to branches.

(5) Where subsection (3) applies, unless the competent authority has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving information under this section, communicate that information to the competent authority of the host Member State and inform the investment firm concerned of the fact accordingly.

(6) Where subsection (3) applies, in addition to the information referred to above, the competent authority shall communicate details of the accredited compensation scheme of which the investment firm concerned is a member to the competent authority of the host Member State. In the event of a change in the particulars, the competent authority shall inform the competent authority of the host Member State accordingly.

(7) Where subsection (3) applies and the competent authority, in its discretion, refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the investment firm concerned within three months of receiving all the information.

(8) Where subsection (1) applies—

- (a) on receipt of a communication from the competent authority of the home Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the home competent authority, the branch may be established and commence business;

- (b) the competent authority shall assume responsibility for ensuring that the services provided by the branch within Gibraltar complies with the obligations laid down in sections 19, 21, 22, 25, 27 and 28; and
- (c) the competent authority shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under sections 19, 21, 22, 25, 27 and 28 with respect to the services or activities provided by the branch within Gibraltar.

(9) Where an investment firm has established a branch in another member State, the competent authority, in the exercise of its responsibilities and after informing the competent authority of the host Member State, may carry out on-site inspections of that branch.

(10) In the event of a change in any of the information communicated in accordance with this section, the investment firm concerned shall give written notice of that change to the competent authority at least one month before implementing the change, which shall be transmitted by the competent authority to the competent authority of the host Member State.

Access to regulated markets.

33.(1) Investment firms from other Member States which are authorised to execute client orders or to deal on own account shall have the right of membership or have access to regulated markets established in Gibraltar by any of the following arrangements—

- (a) directly, by setting up a branch;
- (b) by becoming remote members of or having remote access to the regulated market without having to be established in Gibraltar, where the trading procedures and systems of the market in question do not require a physical presence for conclusion of transactions on the market.

(2) Where subsection (1) applies, no additional regulatory or administrative requirements shall be imposed on investment firms exercising

their rights under that subsection in respect of matters covered by this Ordinance.

Access to central counterparty, clearing and settlement facilities and right to designate settlement system.

34.(1) The use of central counterparty, clearing and settlement systems shall not be restricted to the clearing and settlement of transactions in financial instruments undertaken on a regulated market or MTF in Gibraltar.

(2) Without prejudice to the generality of subsection (1), investment firms from other Member States shall have the right of access to central counterparty, clearing and settlement systems in Gibraltar for the purposes of finalising or arranging the finalisation of transactions in financial instruments subject to the same non-discriminatory, transparent and objective criteria as apply to investment firms authorised by the competent authority.

(3) Regulated markets in Gibraltar shall offer all members or participants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market, subject to—

- (a) such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question existing; and
- (b) agreement by the competent authority that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

(4) The rights of investment firms under this section shall be without prejudice to the right of operators of central counterparty, clearing or securities settlement systems to refuse on legitimate commercial grounds to make the requested services available.

Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs.

35.(1) Subject to subsection (2), investment firms and market operators operating an MTF shall be allowed to enter into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing or settlement of some or all trades concluded by market participants under their systems.

(2) The competent authority may not oppose the use of central counterparty, clearing houses or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in section 34.

PART III

REGULATED MARKETS

Authorisations and applicable law.

36.(1) The competent authority—

- (a) shall only authorise as a regulated market those systems which comply with the provisions of this Part; and
- (b) shall grant an authorisation as a regulated market only where it is satisfied that both the market operator and the systems of the regulated market comply with the requirements laid down in this Part.

(2) Where a regulated market is a legal person managed or operated by a market operator other than the regulated market itself, the Minister may, by regulations, establish how the different obligations imposed on the market operator under this Part are to be allocated between the regulated market and the market operator.

(3) The competent authority shall issue an authorisation under this Part only where it is satisfied that the operator of a regulated market has provided all information, including a business plan setting out, inter alia, the types of business envisaged and the organisational structure, necessary to enable the

competent authority to satisfy itself that the regulated market has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Part.

(4) It shall be a condition subject to which an authorisation under this Part is issued that the operator of the regulated market perform tasks relating to the organisation and operation of the regulated market under the supervision of the competent authority.

(5) The competent authority shall maintain under regular review the compliance of regulated markets with the provisions of this Part and monitor regulated markets to ensure compliance at all times with the conditions for initial authorisation established under this Part.

(6) It shall be a condition subject to which an authorisation under this Part is issued that the market operator remain—

- (a) responsible for ensuring that the regulated market that he manages complies with all requirements under this Part; and
- (b) entitled to exercise the rights that correspond to the regulated market that he manages by virtue of this Ordinance.

(7) The law governing the trading conducted under the systems of a regulated market in Gibraltar shall be the law of Gibraltar.

(8) The competent authority may withdraw the authorisation issued to a regulated market where it—

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has not operated for the preceding six months;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions of this Ordinance; or

- (e) falls within any of the cases where regulations made by the Minister under this section provides for withdrawal.

Requirements for the management of the regulated market.

37.(1) Persons who effectively direct the business and the operations of a regulated market shall be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management and operation of the regulated market.

(2) The operator of a regulated market shall inform the competent authority of the identity and any other subsequent changes of persons who effectively direct the business and the operations of the regulated market.

(3) The competent authority shall refuse to approve proposed changes where there are objective and demonstrable grounds for believing that they pose a material threat to the sound and prudent management and operation of the regulated market.

(4) In the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of a regulated market authorised as such on the coming into force of this Ordinance shall be deemed to comply with the requirements laid down in subsection (1).

Requirements relating to persons exercising significant influence over the management of the regulated market.

38.(1) Persons who are in a position to exercise, directly or indirectly, significant influence over the management of a regulated market shall be fit and proper for the purpose.

(2) It shall be a condition subject to which an authorisation under this Part is issued that the operator of a regulated market—

- (a) provide the competent authority with, and make public, information regarding the ownership of the regulated market or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management; and

- (b) inform the competent authority of, and make public any transfer of ownership, which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.

(3) The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

Organisational requirements.

39. It shall be a condition subject to which an authorisation under this Part is issued that a regulated market—

- (a) have arrangements to clearly identify and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;
- (b) be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;
- (c) have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;
- (d) have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;
- (e) have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems; and

- (f) have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

Admission of financial instruments to trading.

40.(1) It shall be a condition subject to which an authorisation under this Part is issued that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading such as ensures that any financial instruments admitted are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

(2) In the case of derivatives, the rules referred to in subsection (1) shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

(3) In addition to the obligations set out in subsections (1) and (2), it shall be a condition subject to which an authorisation under this Part is issued that—

- (a) the regulated market establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their statutory obligations in respect of initial, ongoing or ad hoc disclosure obligations;
- (b) the regulated market establishes arrangements which facilitate its members or participants in obtaining access to information which has been made public;
- (c) the regulated markets have established the necessary arrangements to review regularly compliance with the admission requirements of the financial instruments which they admit to trading.

(4) Without prejudice to other statutory provisions relating to the matter, where a transferable security has been admitted to trading on a regulated

market, it can subsequently be admitted to trading on other regulated markets, even without the consent of the issuer, who—

- (a) shall be informed by the regulated market of the fact that its securities are traded on that regulated market; and
- (b) shall not be subject to any obligation to provide information required under this section directly to any regulated market which has admitted the issuer's securities to trading without his consent.

Suspension and removal of instruments from trading.

41.(1) Without prejudice to the right of the competent authority to demand suspension or removal of an instrument from trading, the operator of a regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

(2) Without prejudice to the right of operators of regulated markets to inform directly the operators of other regulated markets, the operator of a regulated market that suspends or removes from trading a financial instrument shall make public the decision and shall communicate relevant information to the competent authority who shall inform the competent authority of the other Member States.

(3) Where the competent authority demands the suspension or removal of a financial instrument from trading on one or more regulated markets, it shall immediately make public its decision and inform the competent authority of the other Member States.

(4) Where the competent authority is informed by the competent authority of another member State that it has demanded the suspension or removal of a financial instrument from trading on one or more regulated markets in its territory the competent authority, save where it could cause significant damage to the investors' interests or the orderly functioning of the market, shall demand the suspension or removal of that financial instrument from trading on the regulated markets and MTFs that operate in Gibraltar.

Access to the regulated market.

42.(1) It shall be a condition subject to which an authorisation under this Part is issued that a regulated market establish and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the regulated market.

(2) The rules referred to in subsection (1) shall specify obligations for the members or participants arising from—

- (a) the constitution and administration of the regulated market;
- (b) transactions on the market;
- (c) professional standards imposed on the staff of the investment firms or credit institutions that are operating on the market;
- (d) the conditions established, for members or participants other than investment firms and credit institutions, under this section; and
- (e) procedures for the clearing and settlement of transactions concluded on the regulated market.

(3) Regulated markets may admit as members or participants investment firms, credit institutions authorised under the Financial Services (Banking) Ordinance and other persons who—

- (a) are fit and proper;
- (b) have a sufficient level of trading ability and competence;
- (c) have, where applicable, adequate organisational arrangements; and
- (d) have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions.

(4) For the transactions concluded on a regulated market, members and participants shall not be obliged to apply to each other the obligations laid down in sections 19, 21 and 22 but shall instead apply the obligations provided for in sections 19, 21 and 22 with respect to their clients when they, acting on behalf of their clients, execute their orders on a regulated market.

(5) It shall be a condition subject to which an authorisation under this Part is issued that rules pursuant to subsection (1) provide for the direct or remote participation of investment firms and credit institutions.

(6) The competent authority shall, without further legal or administrative requirements, allow regulated markets from other Member States to provide appropriate arrangements in Gibraltar so as to facilitate access to and trading on those markets by remote members or participants established in Gibraltar.

(7) Regulated markets wishing to provide appropriate arrangements in other Member States so as to facilitate access to and trading on those markets by remote members or participants established in those Member States shall communicate to the competent authority the name of the Member State in which they intend to provide such arrangements. The competent authority shall communicate, within one month, this information to the competent authority of the Member State in which the regulated markets intend to provide such arrangements.

(8) Where subsection (7) applies, the competent authority shall, on the request of the competent authority of the host Member State and within a reasonable time, communicate the identity of the members or participants of the regulated market established in Gibraltar.

(9) It shall be a condition subject to which an authorisation under this Part is issued that the operator of the regulated market communicate, on a regular basis, the list of the members and participants of the regulated market to the competent authority.

Monitoring of compliance with the rules of the regulated market and with other legal obligations.

43.(1) It shall be a condition subject to which an authorisation under this Part is issued that regulated markets—

- (a) establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with the market's internal rules; and
 - (b) monitor the transactions undertaken by their members or participants under the market's systems in order to identify breaches of the market's internal rules, disorderly trading conditions or conduct that may involve market abuse.
- (2) It shall be a condition subject to which an authorisation under this Part is issued that operators of regulated markets–
- (a) report significant breaches of their internal rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority of the regulated market; and
 - (b) supply the relevant information without delay to the competent authority and provide full assistance with investigating and prosecuting market abuse occurring on or through the systems of the regulated market.

Pre-trade transparency requirements for regulated markets.

44.(1) It shall be a condition subject to which an authorisation under this Part is issued that regulated markets–

- (a) make public on reasonable commercial terms and on a continuous basis during normal trading hours current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares admitted to trading; and
 - (b) give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under the first paragraph to investment firms which are obliged in law to publish their quotes in shares.
- (2) The competent authority may, in its discretion, waive the obligation for regulated markets to make public the information referred to in subsection

(1) based on the market model or the type and size of orders in the cases defined in accordance with regulations made by the Minister.

(3) Without prejudice to the generality of subsection (2), the competent authority shall be able to waive the obligation in respect of transactions that are large in scale compared with normal market size for the share or type of share in question.

Post-trade transparency requirements for regulated markets.

45.(1) It shall be a condition subject to which an authorisation under this Part is issued that regulated markets—

- (a) make public on a reasonable commercial basis and as close to real-time as possible the price, volume and time of the transactions executed in respect of shares admitted to trading; and
- (b) give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph (a) to investment firms which are obliged in law to publish the details of their transactions in shares.

(2) The competent authority may, in its discretion, authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authority may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share or that class of shares.

(3) It shall be a condition subject to which an authorisation under this Part is issued that regulated markets obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall require that these arrangements be clearly disclosed to market participants and the investing public.

Provisions regarding central counterparty and clearing and settlement arrangements.

46.(1) The competent authority shall allow regulated markets to enter into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing or settlement of some or all trades concluded by market participants under their systems.

(2) The competent authority shall allow the use of central counterparty, clearing houses or settlement systems in another Member State save where not doing so is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in section 34.

List of regulated markets.

47.(1) The Minister shall draw up a list of regulated markets in Gibraltar for which it is the home Member State and shall ensure the list is forwarded to other Member States and the Commission.

(2) A similar communication to that referred to in subsection (1) shall be effected in respect of each change to that list.

PART IV

COMPETENT AUTHORITY

Designation, Powers And Redress Procedures

Designation of competent authority.

48.(1) The Minister shall—

- (a) designate the competent authority which is to carry out each of the duties provided for under the different provisions of this Ordinance; and
- (b) ensure the European Commission and the competent authorities of other Member States are informed of the identity

of the competent authority responsible for enforcement of each of those duties, and of any division of those duties.

(2) The competent authority referred to in subsection (1)(a) shall have the power to delegate tasks to other entities where that is expressly provided for in this Ordinance.

(3) Any delegation of tasks under subsection (2) may not involve either the exercise of public authority or the use of discretionary powers of judgement.

(4) The Minister shall require that, prior to a delegation under subsection (2), the competent authority take all reasonable steps to ensure that the entity to which tasks are to be delegated has the capacity and resources to effectively execute all tasks and that the delegation takes place only if a clearly defined and documented framework for the exercise of any delegated tasks has been established stating the tasks to be undertaken and the conditions under which they are to be carried out.

(5) The conditions referred to in subsection (4) shall include a provision obliging the entity in question to act and be organised in such a manner as avoids conflict of interest in order that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition.

(6) Without prejudice to the foregoing, the final responsibility for supervising compliance with this Ordinance shall lie with the competent authority designated in accordance with subsection (1)(a).

(7) The Minister shall ensure that Member States and the European Commission and the competent authority of other Member States are informed of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

Powers of competent authority.

49.(1) The Minister shall make regulations conferring on the competent authority all supervisory and investigatory powers necessary for the exercise of its functions.

(2) Regulations made under subsection (1) shall provide for such powers to be exercised—

- (a) directly;
 - (b) in collaboration with other authorities;
 - (c) under the competent authority's responsibility in accordance with the provisions of section 48; or
 - (d) by application to the competent judicial authorities.
- (3) The powers referred to in subsection (1) shall include, at least, the right to—
- (a) have access to any document in any form whatsoever and to receive a copy of it;
 - (b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
 - (c) carry out on-site inspections;
 - (d) require the production and copying of existing telephone and existing data traffic records;
 - (e) require the cessation of any practice that is contrary to the of this Ordinance;
 - (f) request the freezing or the sequestration of assets;
 - (g) request temporary prohibition of professional activity;
 - (h) require authorised investment firms and regulated markets' auditors to provide information;
 - (i) adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements;
 - (j) require the suspension of trading in a financial instrument;

- (k) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- (l) refer matters for criminal prosecution; and
- (m) allow auditors or experts to carry out verifications or investigations.

(4) The competent authority shall ensure that any decision it takes pursuant to this Ordinance is properly reasoned.

Administrative sanctions.

50.(1) The Minister may, by regulations, provide for appropriate effective, proportionate and dissuasive administrative measures to be taken or administrative or criminal sanctions to be imposed against persons responsible where any provision of this Ordinance has not been complied with.

(2) The competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions of this Ordinance, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Right of appeal.

51.(1) Any decision taken by the competent authority pursuant to this Ordinance, or any failure by the competent authority to reach such a decision, shall be subject to appeal to a judge of the Supreme Court on a point of law.

(2) The Minister shall, by regulations, designate one or more bodies belonging to the following categories that may, in the interests of consumers, take action before the courts to ensure that the provisions of this Ordinance are applied—

- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers; and

- (c) professional organisations having a legitimate interest in acting to protect their members.

(3) Regulations made under subsection (2) may make such consequential provision, including the registration of such bodies and forms of relief available as the Minister may deem appropriate.

Professional secrecy.

52.(1) Without prejudice to cases covered by criminal law or the other provisions of this Ordinance—

- (a) the competent authority, all persons who work or who have worked for the competent authority or entities to whom tasks are delegated pursuant to the provisions of this Ordinance, as well as auditors and experts instructed by the competent authority, shall be bound by the obligation of professional secrecy; and
- (b) no confidential information which they may receive in the course of their duties under this Ordinance may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified.

(2) Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding by the competent authority, all persons who work or who have worked for the competent authority or entities to whom tasks are delegated pursuant to the provisions of this Ordinance, as well as auditors and experts instructed by the competent authority.

(3) The competent authority, or any person other than the competent authority receiving confidential information pursuant to this Ordinance may use such information—

- (a) only in the performance of their duties and for the exercise of their functions; or

- (b) for the purpose for which such information was provided to them pursuant to the provisions of this Ordinance; or
- (c) in the context of administrative or judicial proceedings specifically related to the exercise of those functions.

However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

(4) Any confidential information received, exchanged or transmitted pursuant to this Ordinance shall be subject to the conditions of professional secrecy laid down in this section.

(5) This section shall not prevent the competent authority from exchanging or transmitting confidential information in accordance with this Ordinance and with other statutory provisions applicable to investment firms, credit institutions, pension funds, UCITS, insurance and reinsurance intermediaries, insurance undertakings regulated markets or market operators or otherwise with the consent of the authority or other authority or person that communicated the information.

(6) This section shall not prevent the competent authority from exchanging or transmitting confidential information that has not been received from a competent authority of another Member State.

Relations with auditors.

53.(1) A person registered as an auditor pursuant to the provisions of the Auditors Approval and Registration Ordinance 1998 shall have a duty—

- (a) to report promptly to the competent authority any fact or decision concerning an undertaking of which he has become aware while carrying out professional auditing or accounting duties in relation to that undertaking and which is liable to -
 - (i) constitute a material breach of any conditions governing an authorisation issued under this Ordinance or which specifically govern the pursuit of activities of investment firms;

- (ii) affect the continuous functioning of the investment firm; or
 - (iii) lead to refusal to certify the accounts or to the expression of reservations;
- (b) to report any such facts and decisions of which the person becomes aware in relation to an undertaking having close links with the investment firm within which he is carrying out professional auditing or accounting duties.

(2) The disclosure in good faith to the competent authority by a person under subsection (1) shall not constitute a breach of any contractual or legal restriction on disclosure of information and shall not involve such persons in any liability of any kind.

Cooperation with other competent authorities

Obligation to cooperate.

54.(1) The competent authority shall cooperate with, and assist the competent authority of other Member States whenever necessary for the purpose of carrying out its duties under this Ordinance. In particular, he shall exchange information and cooperate in any investigation or supervisory activities.

(2) The competent authority and host competent authority of a regulated market shall establish proportionate cooperation arrangements when, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market that has established arrangements in the host Member State have become of substantial importance for the functioning of the securities markets and the protection of investors in that host Member State.

(3) The competent authority may cooperate in accordance with this section even in cases where the conduct under investigation does not constitute an infringement of this Ordinance.

(4) Where the competent authority has good reason to suspect that acts contrary to the provisions of this Ordinance carried out by entities not subject to its supervision, are being or have been carried out on the territory

of another Member State, it shall notify this in as specific a manner as possible to the competent authority of the other Member State.

(5) Where the competent authority has been notified of a suspected infringement of this Ordinance by the competent authority of another member State, it shall take appropriate action and shall inform the notifying competent authority of the outcome of the action and, to the extent possible, of significant interim developments.

Cooperation in supervisory activities, on-the-spot verifications or in investigations.

55.(1) The competent authority may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation.

(2) In the case of investment firms that are remote members of a regulated market, the competent authority may choose to address the firms directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.

(3) Where the competent authority receives a request with respect to a supervisory activity or for an on-the-spot verification or in an investigation, it shall, within the framework of its powers—

- (a) carry out the verifications or investigations itself;
- (b) allow the requesting authority to carry out the verification or investigation; or
- (c) allow auditors or experts to carry out the verification or investigation.

Exchange of information.

56.(1) The competent authority shall supply the competent authorities of other member States with the information required for the purposes of carrying out their duties pursuant to the provisions of the directive.

(2) The competent authority, when exchanging information with other competent 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 competent authority—

- (a) may transmit any information received under this Ordinance to the competent authority of other member States;
- (b) shall not transmit such information to other bodies or persons without the express agreement of the competent 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 competent authority shall immediately inform the authority that sent the information.

(4) The competent authority and persons receiving confidential information under this Ordinance 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 of investment firms 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;
- (b) to monitor the proper functioning of trading venues;
- (c) to impose sanctions;
- (d) in administrative appeals against decisions by the competent authority;
- (e) in judicial proceedings; or
- (f) in the extra-judicial mechanism for investors' complaints.

(5) Nothing in this Ordinance—

- (a) shall prevent the competent authority from transmitting to central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems of confidential information intended for the lawful performance of their duties;
- (b) shall prevented the competent authority from communicating to the competent authorities of other Member States such information as they may need for the purpose of performing their duties corresponding to those se out in this Ordinance.

Refusal to cooperate.

57.(1) The competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity or to exchange information pursuant to the provisions of this Ordinance only where—

- (a) such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of Gibraltar;
- (b) judicial proceedings have already been initiated in respect of the same actions and the same persons in Gibraltar; or
- (c) final judgment has already been delivered in Gibraltar in respect of the same persons and the same actions.

(2) Where the competent authority refuses to act on a request for cooperation as set out in subsection (1), it shall notify the requesting competent authority accordingly, providing as detailed information as possible.

Inter-authority consultation prior to authorisation.

58.(1) The competent authority of any other relevant Member State involved shall be consulted by the competent authority prior to granting authorisation to an investment firm which is—

- (a) a subsidiary of an investment firm or credit institution authorised in that Member State; or
- (b) a subsidiary of the parent undertaking of an investment firm or credit institution authorised in that Member State; or
- (c) controlled by the same natural or legal persons as control an investment firm or credit institution authorised in that Member State.

(2) The competent authority of the Member State responsible for the supervision of credit institutions or insurance undertakings shall be consulted by the competent authority prior to granting an authorisation to an investment firm which is—

- (a) a subsidiary of a credit institution or insurance undertaking authorised elsewhere in the European Union;
- (b) a subsidiary of the parent undertaking of a credit institution or insurance undertaking authorised elsewhere in the European Union; or
- (c) controlled by the same person, whether natural or legal, who controls a credit institution or insurance undertaking authorised elsewhere in the European Union.

(3) The competent authority shall in particular—

- (a) consult the relevant competent authority referred to in subsections (1) and (2) when assessing the suitability of shareholders or members and the reputation and experience of persons who effectively direct the business involved in the management of another entity of the same group; and
- (b) exchange all information regarding the suitability of shareholders or members and the reputation and experience of persons who effectively direct the business that is of relevance to the other competent authority involved, for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

Powers of competent authority in its capacity of host.

59.(1) All investment firms with branches in Gibraltar shall, for statistical purposes, report to the competent authority periodically on the activities of those branches.

(2) Branches of investment firms shall provide the competent authority with all information necessary for the monitoring of their compliance with standards set pursuant to this Ordinance applying to them for the cases provided for in section 32.

Precautionary measures.

60.(1) Where the competent authority acting as host has clear and demonstrable grounds for believing that an investment firm acting within Gibraltar is acting contrary to the provisions of this Ordinance or that an investment firm that has a branch within Gibraltar is acting contrary to the provisions of this Ordinance which does not confer remedial powers on the competent authority acting as host, it shall refer those findings to the competent authority of the home Member State.

(2) Where—

- (a) a referral is made under subsection (1) and despite the measures taken by the competent authority of the home Member State; or
- (b) because such measures prove inadequate,

the investment firm persists in acting in a manner that is clearly prejudicial to the interests of Gibraltar investors or the orderly functioning of markets, the competent authority shall take such measures as the Minister may prescribe in order to protect investors and the proper functioning of the markets including the possibility of preventing offending investment firms from initiating any further transactions within Gibraltar and shall inform the European Commission and the competent authority of the home Member State thereof.

(3) Where the competent authority acting as host ascertains that an investment firm that has a branch within Gibraltar is in breach of this

Ordinance, the competent authority shall require the investment firm concerned to put an end to its irregular situation.

(4) Where, pursuant to subsection (3), the investment firm concerned fails to take the necessary steps, the competent authority, shall take such measures as the Minister may prescribe to ensure that the investment firm concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authority of the home Member State.

(5) Where, pursuant to subsection (4), and despite the measures taken by the competent authority, the investment firm persists in breaching the provisions of this Ordinance, the competent authority may take appropriate measures to prevent or to penalise further irregularities and, in so far as necessary, to prevent that investment firm from initiating any further transactions within its territory and shall inform the European Commission and the competent authority of the home Member State thereof.

(6) Where the competent authority acting as host to a regulated market or an MTF has clear and demonstrable grounds for believing that such regulated market or MTF is in breach of the provisions of this Ordinance, it shall refer those findings to the competent authority of the home Member State of the regulated market or the MTF.

(7) Where—

- (a) pursuant to subsection (6), and despite the measures taken by the competent authority or because such measures prove inadequate; or
- (b) the said regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of Gibraltar investors or the orderly functioning of markets,

the competent authority shall take such measures as the Minister may prescribe in order to protect investors and the proper functioning of the markets including the possibility of preventing the said regulated market or the MTF from making their arrangements available to remote members or participants established in Gibraltar and shall inform the European Commission and the competent authority of the home Member State thereof.

(8) Any measures adopted pursuant to this section involving sanctions or restrictions on the activities of an investment firm or of a regulated market shall be properly justified and communicated to the investment firm or to the regulated market concerned.

PART V

FINAL PROVISIONS

Transitional provisions.

60.(1) Investment firms already authorised in their home Member State to provide investment services before such date as the Minister may prescribe in a notice made under section 2(2) shall be deemed to be so authorised for the purpose of this Ordinance.

(2) A regulated market or a market operator already authorised in its home Member State before such date as the Minister may prescribe in a notice made under section 2(2) shall be deemed to be so authorised for the purposes of this Ordinance.

(3) Tied agents already entered in a public register before such date as the Minister may prescribe in a notice made under section 2(3) shall be deemed to be so registered for the purposes of this Ordinance.

(4) Information communicated before such date as the Minister may prescribe for the purposes of Articles 17, 18 or 30 of Directive 93/22/EEC shall be deemed to have been communicated for the purposes of this Ordinance.

(5) Any existing system falling under the definition of an MTF operated by a market operator of a regulated market, shall be authorised as an MTF at the request of the market operator of the regulated market provided it complies with rules equivalent to those required by this Ordinance for the authorisation and operation of MTFs, and provided that the request concerned is made within 18 months of such date as the Minister may prescribe.

(6) Investment firms established before such date as the Minister may prescribe shall be authorised to continue considering existing professional clients as such provided that this categorisation has been granted by the

investment firm on the basis of an adequate assessment of the expertise, experience and knowledge of the client which gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understands the risks involved. However, such investment firms shall inform their clients about the conditions established in this Ordinance for the categorisation of clients.

Regulations.

61.(1) The Minister may, by regulations, prescribe anything requiring to be prescribed and generally do anything requiring to be done pursuant to the provisions of this Ordinance.

(2) Without prejudice to the generality of subsection (1) the Minister may, by regulations,—

- (a) provide for applications for authorisations, fees, forms and offences as he may deem appropriate in order to make better provision for the execution of this Ordinance;
- (b) amend the Schedules;
- (c) make such provision as he deems appropriate in cases where a condition subject to which an authorisation is granted has been breached, including penalties, withdrawal or suspension of the authorisation or other sanctions.

Codes of practice.

62.(1) The competent authority shall cause to be published in the form of codes of practice, statements setting out the criteria and any variation in the criteria from time to time by reference to which the competent authority proposes to exercise its functions under this Ordinance, including, in particular, its powers to grant, cancel or suspend authorisations or to impose conditions of general application on such authorisations.

(2) The competent authority shall also publish in the form of codes of practice under this section criteria to facilitate compliance in Gibraltar with the provisions of this Ordinance.

Financial Services (Markets in Financial Instruments)

Ordinance 2006 [B. 36/06]

(3) A code of practice published under this section shall be admissible in evidence in any action commenced in exercise of the rights of appeal under section 45 of the Financial Services Ordinance 1989, or otherwise in connection with the operation of this Ordinance.

Repeals.

63. The Financial Services Ordinance 1998 is hereby repealed.

SCHEDULE 1

Sections 2 and 4

LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS

Section A

Investment services and activities – core services

- (1) Reception and transmission of orders in relation to one or more financial instruments.
- (2) Execution of orders on behalf of clients.
- (3) Dealing on own account.
- (4) Portfolio management.
- (5) Investment advice.
- (6) Underwriting of financial instruments or placing of financial instruments on a firm commitment basis.
- (7) Placing of financial instruments without a firm commitment basis.
- (8) Operation of Multilateral Trading Facilities.

Section B

Ancillary services – non-core services

- (1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;
- (2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;
- (3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;

- (4) Foreign exchange services where these are connected to the provision of investment services;
- (5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;
- (6) Services related to underwriting;
- (7) Investment services and activities as well as ancillary services of the type included under Section A or this Section related to the underlying of the derivatives included under Section C - 5, 6, 7 and 10 - where these are connected to the provision of investment or ancillary services.

Section C
Financial Instruments

- (1) Transferable securities;
- (2) Money-market instruments;
- (3) Units in collective investment undertakings;
- (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
- (5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);
- (6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;
- (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having

regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences.;

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

SCHEDULE 2

Section 2

**PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS
ORDINANCE**

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered a professional client, the client must comply with the following criteria:

I. Categories of client who are considered to be professionals.

The following should all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Ordinance.

(1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State—

- (a) Credit institutions;
- (b) Investment firms;
- (c) Other authorised or regulated financial institutions;
- (d) Insurance companies;
- (e) Collective investment schemes and management companies of such schemes;
- (f) Pension funds and management companies of such funds;
- (g) Commodity and commodity derivatives dealers;
- (h) Locals; or

Financial Services (Markets in Financial Instruments)
Ordinance 2006 [B. 36/06]

- (i) Other institutional investors.
- (2) Large undertakings meeting 2 of the following size requirements on a company basis–
- | | |
|-----------------------|----------------|
| - balance sheet total | EUR 20,000,000 |
| - net turnover | EUR 40,000,000 |
| - own funds | EUR 2,000,000 |
- (3) National and regional governments, public bodies that manage public debt, the Gibraltar Savings Bank, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.
- (4) Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

The entities mentioned above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the client is deemed to be a professional client, and will be treated as such unless the firm and the client agree otherwise. The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.

II. Clients who may be treated as professionals on request.

II.1. Identification criteria.

Clients other than those mentioned in section I, including public sector bodies and private individual investors, may also be allowed to waive some of the protections afforded by the conduct of business rules.

Investment firms should therefore be allowed to treat any of the above clients as professionals provided the relevant criteria and procedure mentioned below are fulfilled. These clients should not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in section I.

Any such waiver of the protection afforded by the standard conduct of business regime shall be considered valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved.

The fitness test applied to managers and directors of entities licensed under Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge. In the case of small entities, the person subject to the above assessment should be the person authorised to carry out transactions on behalf of the entity.

In the course of the above assessment, as a minimum, two of the following criteria should be satisfied -

- the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
- the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500000;
- the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

II.2. Procedure.

The clients defined above may waive the benefit of the detailed rules of conduct only where the following procedure is followed -

- they must state in writing to the investment firm that they wish to be treated as a professional client, either generally or in respect of a particular investment service or transaction, or type of transaction or product;
- the investment firm must give them a clear written warning of the protections and investor compensation rights they may lose;
- they must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.

Before deciding to accept any request for waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional client meets the relevant requirements stated in Section II.1 above.

However, if clients have already been categorised as professionals under parameters and procedures similar to those above, it is not intended that their relationships with investment firms should be affected by any new rules adopted pursuant to this Schedule.

Firms must implement appropriate written internal policies and procedures to categorise clients. Professional clients are responsible for keeping the firm informed about any change, which could affect their current categorisation. Should the investment firm become aware however that the client no longer fulfils the initial conditions, which made him eligible for a professional treatment, the investment firm must take appropriate action.

EXPLANATORY MEMORANDUM

This Bill transposes into the law of Gibraltar Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

The Directive is a major part of the European Union's Financial Services Action Plan (FSAP), which is designed to create a single market in financial services. The directive comprises two levels of European legislation. 'Level 1', the Directive itself, was adopted in April 2004. In several places, however, it makes provision for its requirements to be supplemented by 'technical implementing measures', so-called 'Level 2' legislation.

Formal Commission recommendations for the Level 2 measures were published on 6 February 2006. The ESC agreed the text in June 2006, with final adoption of these measures expected in September 2006.

The Bill makes significant changes to the existing regulatory framework to reflect developments in financial services and markets. It widens the range of 'core' investment services and activities that can be passported. In addition, the directive upgrades advice that involves a personal recommendation to a core investment service that can be passported on a stand-alone basis; introduces operating a multilateral trading facility (MTF) as a new core investment service covered by the passport; and extends the scope of the passport to cover commodity derivatives, credit derivatives and financial contracts for differences for the first time.

The Bill sets more detailed requirements governing the organisation and conduct of business of investment firms, and how regulated markets and MTFs operate. It also includes new pre-and post-trade transparency requirements for equity markets; the creation of a new regime for 'systematic internalisers' of retail order flow in liquid equities; and more extensive transaction reporting requirements.

Financial Services (Markets in Financial Instruments)
Ordinance 2006 [B. 36/06]

The Bill improves the operation of the 'passport' for investment firms by more clearly delineating the allocation of responsibility between home state and host state for passported branches and generally clarifying some of the existing jurisdictional uncertainties.

Finally, the Bill repeals the Financial Services Ordinance 1998.

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