

**FIRST SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3,019 of 5th January, 1998**

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**THE BANKING (AUDITORS AND INFORMATION)  
ORDINANCE 1997**

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**PARAGRAPHS 1 TO 6 AND 8 OF ARTICLE 12 OF THE FIRST  
BANKING CO-ORDINATION DIRECTIVE**

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[No. 6 of 1998]

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I ASSENT,  
M J ROBINSON,  
ACTING GOVERNOR.

5th January, 1998.



**GIBRALTAR**

**No. 6 of 1998**

**AN ORDINANCE** to give effect in Gibraltar to amendments made by the European Parliament and Council Directive 95/26/EC to Directive 77/780/EEC in the field of credit institutions with a view to reinforcing prudential supervision, to make corresponding provision with respect to the disclosure of information relating to other authorised institutions, within the meaning of the Banking Ordinance 1992, and to amend the provisions of that Ordinance relating to obtaining information and the production of documents.

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**E**NACTED by the Legislature of Gibraltar.

**Title and commencement.**

1.(1) This Ordinance may be cited as the Banking (Auditors and Information) Ordinance 1997.

(2) This Ordinance shall come into operation on a day to be appointed by the Government by notice in the Gazette.

**Auditors immunity from civil liability.**

2.(1) In section 46 of the Banking Ordinance 1992 (which relates to communications between an auditor of a licensee and the Commissioner of Banking or the Banking Supervisor) for the words "a licensee" there shall be substituted "an authorised institution" and for the words "the licensee" there shall be substituted "the authorised institution".

(2) At the end of that section there shall be added the following subsection -

"(2) In subsection (1) -

- (a) the reference to an auditor of an authorised institution includes a reference to a person who is an auditor of a body with which an authorised institution is linked by control and who is also either -
  - (i) an auditor of the authorised institution;  
or
  - (ii) a person appointed to make a report under section 60 on, or on any aspect of, any matter relating to the authorised institution; and
- (b) the reference to information which relates to the business or affairs of the authorised institution includes a reference to information which relates to the business or affairs of a body with which the

authorised institution is linked by control and is relevant to any functions of the Commissioner or Banking Supervisor under this or any other enactment."

**Duty of auditors etc. to notify the Banking Supervisor of certain information.**

3. After section 46 of the Banking Ordinance 1992 there shall be inserted the following section -

**“Communications by auditors etc. to Banking Supervisor.**

46A.(1) In the circumstances specified in subsection (3), an auditor of a licensee shall notify the Banking Supervisor of any information which relates to the business or affairs of the licensee and of which he becomes aware -

- (a) in his capacity as auditor of the licensee or of a body with which it is closely linked by control; or
- (b) in preparing a report under section 60.

(2) Subsection (2) of section 46 applies in relation to subsection (1) and the following provisions of this section as it applies in relation to subsection (1) of that section, except that for any reference to an authorised institution (or the authorised institution) there shall be substituted a reference to a licensee (or the licensee).

(3)The circumstances referred to in subsection (1) are those in which the information referred to in that subsection is such as -

- (a) to give the auditor reasonable cause to believe, as regards the licensee concerned, -
  - (i) that there is or has been, or may be or may have been, a failure to fulfil any of the criteria specified in section 23 and that the failure is likely to be of material significance; or

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- (ii) that its licence could be cancelled under section 64; or
  - (iii) that there is or has been, or may be or may have been, a contravention of any provision of this Ordinance and that the contravention is likely to be of material significance; or
  - (iv) that the continuous functioning of the licensee may be affected; or
- (b) in a case where he is the auditor of the licensee concerned, to lead to his refusal to certify the accounts or to the expression of reservations.
- (4) In this section “of material significance” means of material significance for the exercise of the functions of the Commissioner or Banking Supervisor under this Ordinance or under any other provision giving effect to the Second Banking Co-ordination Directive.”.

**Power to obtain information and require the production of documents.**

4. For section 60 of the Banking Ordinance (provision of information) there shall be substituted the following sections -

**"Power to obtain information and require the production of documents.**

60.(1) An authorised officer may by notice in writing served on a relevant person -

- (a) require the relevant person to provide the authorised officer, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with such information as the authorised officer may reasonably require for the performance of his or any other authorised officer's functions under this Ordinance;

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- (b) require the relevant person to provide the authorised officer with a report by an accountant or other person with relevant professional skill on, or on any aspect of, any matter about which the authorised officer has required or could require the relevant person to provide information under paragraph (a);

and the authorised officer may require such information or report to be in such form as is specified in the notice.

(2) The accountant or other person appointed by a relevant person to make any report required under subsection (1) (b) shall be a person nominated or approved by the Commissioner or Banking Supervisor.

(3) An authorised officer may -

- (a) by notice in writing served on a relevant person require him to produce, within such time and at such place as may be specified in the notice, such document or documents of such description as may be so specified;
- (b) authorise an officer, servant or agent of the Commissioner or Banking Supervisor (in this section referred to as an "appointee") on producing evidence of his authority, to require the relevant person to provide the appointee forthwith with such information, or to produce to the appointee forthwith such documents as he may specify,

being such information or documents as the authorised officer may reasonably require for the performance of his or any other authorised officer's functions under this Ordinance.

(4) Where, by virtue of subsection (3), an authorised officer or any appointee has power to require the production of any documents from a relevant person, the authorised officer or appointee shall have

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the like power to require the production of those documents from any person who appears to be in possession of them; but where any person from whom production of any documents is required under this section claims a lien on documents produced by him, the production shall be without prejudice to the lien.

(5) Any power under this section to require a person to produce any documents includes power -

- (a) if the documents are produced, to take copies of them or extracts from them and to require the person in question or, where that person is an institution, any other person who is a present or a past director, controller or manager of, or is or was at any time employed by or acting as an employee of, that institution, to provide an explanation of any of them; and
- (b) if the documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(6) If it appears to an authorised officer to be desirable in the interests of the depositors or potential depositors of a relevant person to do so, the authorised officer may also exercise the powers conferred by subsections (1) and (3) in relation to any body corporate which is or has at any relevant time been -

- (a) a holding company, subsidiary or related company of the relevant person;
- (b) a subsidiary of a holding company of the relevant person;
- (c) a holding company of a subsidiary of the relevant person; or
- (d) an undertaking which is closely linked with the relevant person;

or in relation to a partnership of which the relevant person is or has

at any relevant time been a member.

(7) An authorised officer may by notice in writing served on any person who is or is to be a director, controller or manager of an institution which is a relevant person require him to provide the authorised officer, within such time as may be specified in the notice, with such information or documents as the authorised officer may reasonably require for determining whether he is a fit and proper person to hold the position which he holds or is to hold.

(8) A statement made by a person in compliance with a requirement imposed by virtue of this section may be used in evidence against him.

**Application of section 60 in relation to supervisory authorities of EEA States**

60.A(1) An authorised officer may exercise the powers conferred by section 60 for the purpose of assisting a European institution's relevant supervisory authority in the performance of any material supervisory functions; and an authorised officer shall exercise those powers in any case where such an officer is requested to do so by the relevant supervisory authority and is satisfied that the request is made for that purpose.

(2) Subject to subsection (3) any reference in section 60(1)(a) to an authorised officer includes a reference to an officer or agent of the relevant supervisory authority of any EEA State.

(3) Powers under section 60 shall not be exercised by an officer or agent of the relevant supervisory authority of any EEA State unless a proper request has previously been communicated by that supervisory authority to the Commissioner or the Banking Supervisor.

(4) For the purposes of this section the material supervisory functions of the relevant supervisory authority of an EEA State are



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- (a) any functions which correspond to those of the Commissioner or the Banking Supervisor under this Ordinance; and
- (b) any other functions which the supervisory authority has in respect of the activities of a credit institution or a European subsidiary institution and in respect of which, by virtue of any community obligation, the Commissioner or the Banking Supervisor may be required to provide information."

**Provisions supplementing section 4.**

5.(1) In section 59 of the Banking Ordinance 1992 (interpretation of Part VII), in paragraph (b) (meaning of "relevant person") for sub-paragraphs (i) and (ii) there shall be substituted -

- "(i) any person who is or has been an authorised institution;
- (ii) any person who is or was either a subsidiary or a parent controller of an authorised institution or an undertaking with which an authorised institution is or was closely linked;"

(2) The following provisions of the Banking Ordinance 1992 are hereby repealed, namely -

- (a) section 48 (auditors certificates etc.), and
- (b) section 79(j) (power to prescribe information for the purposes of section 60),

being provisions which are superseded by the new provisions set out in section 4.

(3) In consequence of the provisions set out in section 4 -

- (a) in section 61(3) of the Banking Ordinance 1992 for the words "section 60(4)" there shall be substituted "section 60A"; and
- (b) in section 63(4) of that Ordinance, for the words "sections 60 and 61" there shall be substituted "section 61".

**Restrictions on disclosure of information.**

6. After section 86 of the Banking Ordinance 1992 there shall be inserted the following section -

**"Restrictions on disclosure of information.**

86A(1) This section applies to any confidential information which -

- (a) person who works or has worked for the Commissioner or for any other person for the time being designated as a competent authority in relation to Gibraltar for the purposes of the First Banking Co-ordination Directive; or
- (b) any auditor or expert instructed by the Commissioner or a person so designated;

has received in the course of discharging his duties as such a person, auditor or expert in relation to an authorised institution.

(2) Section 86 shall not apply to information to which this section applies.

(3) Information to which this section applies shall not be disclosed by any person referred to in subsection (1)(a) or subsection (1)(b),  
or  
by any person receiving it directly or indirectly from such a person, except in any of the circumstances specified in paragraphs 1 to 6  
and

8 of Article 12 of the First Banking Co-ordination Directive, the text of which paragraphs is set out in Schedule 3.

(4) Information received under Article 12.2 of the First Banking Co-ordination Directive may not be communicated in the circumstances referred to in Article 12.6 of that Directive without the express consent of the competent authority from whom it was obtained.

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(5) In relation to information to which this section applies, section 82(10)(i) shall not permit any disclosure beyond that permitted by paragraphs 2 to 5 of Article 12 of the First Banking Co-ordination Directive.

(6) Any person who contravenes any provision of this section shall be guilty of an offence and liable -

- (a) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale; and
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both."

**Insertion of Schedule in Banking Ordinance 1992.**

7. After Schedule 2 to the Banking Ordinance 1992 there shall be inserted, as Schedule 3, the text of the Schedule to this Ordinance, being paragraphs 1 to 6 and 8 of Article 12 of the First Banking Co-ordination Directive (as defined in the Banking Ordinance 1992), and against the heading to that Schedule there shall be inserted a reference to section 86A of that Ordinance.

**SCHEDULE**

Section 7

**PARAGRAPHS 1 TO 6 AND 8 OF ARTICLE 12 OF THE FIRST  
BANKING CO-ORDINATION DIRECTIVE**

1. The Member States shall provide that all persons working or who have worked for the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy. This means that no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form, such that individual institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be divulged in civil or criminal proceedings.

2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information in accordance with the Directives applicable to credit institutions. That information shall be subject to the conditions of professional secrecy indicated in paragraph 1.

3. Member States may conclude co-operation agreements, providing for exchanges of information, with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Article.

4. Competent authorities receiving confidential information under paragraphs 1 or 2 may use it only in the course of their duties -

- to check that the conditions governing the taking-up of the business of credit institutions are met and to facilitate monitoring, on a non-consolidated or consolidated basis, of the conduct of such business, especially with regard to the monitoring of liquidity, solvency, large exposures, and

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administrative and accounting procedures and internal control mechanisms, or

- to impose sanctions, or
- in an administrative appeal against a decision of the competent authority, or
- in court proceedings initiated pursuant to Article 15 or to special provisions provided for in the Directives adopted in the field of credit institutions.

5. Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or between Member States, between competent authorities and -

- authorities entrusted with the public duty of supervising other financial organisations and insurance companies and the authorities responsible for the supervision of financial markets;
- bodies involved in the liquidation and bankruptcy of credit institutions and in other similar procedures;
- persons responsible for carrying out statutory audits of the accounts of credit institutions and other financial institutions;

in the discharge of their supervisory functions, and the disclosure to bodies which administer deposit-guarantee schemes of information necessary to the exercise of their functions. The information received shall be subject to the conditions of professional secrecy indicated in paragraph 1.

5.a Notwithstanding paragraphs 1 to 4, Member States may authorise exchanges of information between the competent authorities and -

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of credit institutions and other similar procedures; or

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- the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met -

- the information shall be for the purpose of performing the task of overseeing referred to in the first subparagraph;
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1;
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Member States shall communicate to the Commission and to the other Member States the names of the authorities which may receive information pursuant to this paragraph.

5.b Notwithstanding paragraphs 1 to 4, Member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met -

- the information shall be for the purpose of performing the task referred to in the first subparagraph;
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1;
- where the information originates in another Member State, it may not be disclosed without the express agreement of the

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competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Where, in a Member State, the authorities or bodies referred to in the first subparagraph perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector, the possibility of exchanging information provided for in the first subparagraph may be extended to such persons under the conditions stipulated in the second subparagraph.

In order to implement the final indent of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information, the names and precise responsibilities of the persons to whom it is to be sent.

Member States shall communicate to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to this paragraph.

Before 31st December 2000, the Commission shall draw up a report on the application of the provisions of this paragraph.

6. This Article shall not prevent a competent authority from transmitting -
- to central banks and other bodies with a similar function in their capacity as monetary authorities;
  - where appropriate, to other public authorities responsible for overseeing payment systems;

information intended for the performance of their task, nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of paragraph 4. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.

7. This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 1 to 4 to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of their Member States' markets if

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they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants. The information received in this context shall be subject to the conditions of professional secrecy referred to in paragraph 1. The Member States shall, however, ensure that information received under paragraph 2 may not be disclosed in the circumstances referred to in this paragraph without the express consent of the competent authorities which disclosed it.

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Passed by the Gibraltar House of Assembly on the 19th day of December, 1997.

D. J. REYES,

Clerk to the Assembly.



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