

**FIRST SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,019 of 5th January, 1998

**FINANCIAL INSTITUTIONS (PRUDENTIAL SUPERVISION)
ORDINANCE 1997**

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I ASSENT,
M J ROBINSON,
ACTING GOVERNOR.
5th January, 1998.



GIBRALTAR

No. 9 of 1998

AN ORDINANCE to give effect in Gibraltar to amendments made by the European Parliament and Council Directive 95/26/EC to Directives 77/780/EEC and 89/646/EEC in the field of credit institutions and Directive 85/611/EEC in the field of undertakings for collective investments in transferable securities, with a view to reinforcing prudential supervision.

ENACTED by the Legislature of Gibraltar.

PART I

GENERAL

Title and interpretation.

1.(1) This Ordinance may be cited as the Financial Institutions (Prudential Supervision) Ordinance 1997.

(2) In this Ordinance “the Prudential Supervision Directive” means the European Parliament and Council Directive of 29th June 1995 amending -

- (a) Directives 77/780/EEC and 89/646/EEC in the field of credit institutions,
- (b) Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance,
- (c) Directives 79/267/EEC and 92/96/EEC in the field of life assurance,
- (d) Directive 93/22/EEC in the field of investment firms, and
- (e) Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities,

with a view to reinforcing prudential supervision.

Meaning of 'closely linked' etc.

2.(1) This section has effect for the purposes of this Ordinance, the Banking Ordinance 1992 and any other Ordinance for the purpose of which it is applied.

(2) An undertaking is closely linked with -

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- (a) any person who is or, if he were an undertaking, would be its parent undertaking;
- (b) any undertaking which is its subsidiary undertaking;
- (c) any undertaking which is or, if any person falling within paragraph (a) were an undertaking, would be a fellow subsidiary undertaking; and
- (d) any person in accordance with whose directions or instructions its directors are accustomed to act;

and any reference to an undertaking's close links with any person shall be construed accordingly.

(3) Schedule 1 shall have effect for the construction of subsections (2) and (4) and for the determination of any question arising under them.

(4) An undertaking which is closely linked with any person is closely linked with that person by control if, and only if, it would still be closely linked with that person if the participating interest provisions of paragraph 3 of Schedule 1 were omitted.

PART II

CREDIT INSTITUTIONS

Refusal and cancellation of licence under Banking Ordinance 1992.

3.(1) In section 23 of the Banking Ordinance 1992 (additional criteria for licences), after subsection (2) there shall be inserted the following subsection-

“(2A) Without prejudice to the generality of section 22, the Commissioner shall not grant a licence to an applicant if it appears to the Commissioner that -

- (a) the applicant is an undertaking which is closely linked with any person; and

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- (b) the applicant's close links with that person, or any matter relating to any non-EEA laws or administrative provisions to which that person is subject, are such as would prevent the effective exercise by the Commissioner or the Banking Supervisor of their supervisory functions in relation to the applicant institution (were it to become a licensee).”.

(2) In subsection (2) of section 25 of the Banking Ordinance 1992 (conditions of licences) for the words “subsections (1) and (3) of section 23” there shall be substituted “subsections (1), (2A) and (3) of section 23”.

(3) In section 64 of the Banking Ordinance 1992 (grounds for cancellation of licences), in subsection (1), at the end of paragraph (o) there shall be added

“or

- (p) that the licensee is an undertaking which is closely linked with any person and the licensee's close links with that person, or any matters relating to any non-EEA laws or administrative provisions to which that person is subject, are such as to prevent the effective exercise by the Commissioner or the Banking Supervisor of their supervisory functions in relation to the licensee.”.

Consequential amendments.

4.(1) In section 2 of the Banking Ordinance 1992 (interpretation), at the end of the definition of “First Banking Co-ordination Directive” there shall be added the words “as amended by the Prudential Supervision Directive, within the meaning of the Financial Institutions (Prudential Supervision) Ordinance 1997”.

(2) After section 2 of the Banking Ordinance 1992 there shall be inserted the following section -

“Meaning of close links etc.

2A. Any reference in this Ordinance -

- (a) to an undertaking being closely linked with any person, or being closely linked with any person by control, or
- (b) to an undertaking’s close links with any person,

shall be construed in accordance with section 2 of the Financial Institutions (Prudential Supervision) Ordinance 1997.”.

PART III

UCITS

Disclosure of information.

5.(1) This section applies to any confidential information which -

- (a) a person who works or has worked for the Authority or for any other person for the time being designated as a competent authority in relation to Gibraltar for the purposes of Article 49 of the UCITS Directive, or
- (b) any auditor or expert instructed by the Authority or by a person so designated,

has received in the course of discharging his duties as such a person, auditor or expert in relation to an undertaking to which the UCITS Directive applies and which is, within the meaning of that Directive, situated in an EEA State.

(2) Section 58(2) of the Financial Services Ordinance 1989 (restriction on disclosure of confidential information) 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

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receiving it directly or indirectly from such a person, except in any of the circumstances specified in paragraphs 2 to 10 of Article 50 of the UCITS Directive (as inserted by the Prudential Supervision Directive), the text of which paragraphs, as so inserted, is set out in Schedule 2.

(4) Information received under Article 50.3 of the UCITS Directive may not be communicated in the circumstances referred to in Article 50.10 of that Directive without the express consent of the competent authority from whom it was obtained.

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

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;
- (b) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £400.

(6) In this section “the Authority” has the same meaning as in the Financial Services Ordinance 1989 and “the UCITS Directive” means the Council Directive of 20th December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (85/611/EEC).

Duty of auditor to notify Authority of certain information.

6.(1) In the circumstances specified in subsection (3), an auditor of a qualifying undertaking shall notify the Authority of any information which relates to the business or affairs of the undertaking and of which he becomes aware in his capacity as auditor of that undertaking.

(2) In this section “qualifying undertaking” means an undertaking to which the UCITS Directive applies and which is, within the meaning of that Directive, situated in an EEA State.

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

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- (a) to give the auditor reasonable cause to believe, as regards the qualifying undertaking concerned, -
 - (i) that there is or has been, or may be or may have been, a contravention of any provision of the Financial Services Ordinance 1989 or of any rules or regulations made under it and that the contravention is likely to be of material significance; or
 - (ii) that, in purported compliance with any such provision, the undertaking has furnished the Authority with false, inaccurate or misleading information; or
 - (iii) that the continuous functioning of the undertaking may be affected; or
- (b) to lead to the auditor's refusal to certify the accounts or to the expression of reservations.

(4) The reference in subsection (3)(a)(i) to a contravention of a provision of the Financial Services Ordinance 1989 includes a reference to a contravention of any prohibition or requirement imposed under that Ordinance.

(5) Subsection (6) of section 5 applies for the purposes of this section as it applies for the purposes of that section; and in this section “of material significance” means of material significance for determining whether powers of intervention should be exercised to protect investors from significant risk of loss.

SCHEDULES

SCHEDULE 1

Section 2(3)

PARENT AND SUBSIDIARY UNDERTAKINGS ETC.

PART I

GENERAL PROVISIONS

Application.

1. Expressions used in section 2 shall be construed in accordance with this Part, as explained and supplemented by Part II.

Undertaking

2. "Undertaking" means -

- (a) a body corporate or a partnership; or
- (b) an unincorporated association carrying on a trade or business, with or without a view to profit.

Parent and subsidiary undertakings.

3. (1) An undertaking is a parent undertaking in relation to another undertaking ("a subsidiary undertaking") if -

- (a) it holds a majority of the voting rights in the undertaking; or
- (b) it is a member of the undertaking and has a right to appoint or remove a majority of its board of directors; or
- (c) it has the right to exercise a dominant influence over the undertaking -
 - (i) by virtue of provisions contained in the undertaking's memorandum or articles, or
 - (ii) by virtue of a control contract; or
- (d) it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking; or

- (e) it is a member of the undertaking, no other person is the undertaking's parent by virtue of any of paragraphs (a) to (c), and, at all times since the beginning of the undertaking's immediately preceding financial year, a majority of the undertaking's board of directors have been directors who were appointed solely as a result of the exercise of its voting rights; or
- (f) it has a participating interest in the undertaking and either actually exercises a dominant influence over the undertaking or it and the undertaking are managed on a unified basis; or
- (g) it has a participating interest in the undertaking which either entitles it to 20 per cent. or more of the voting rights in the undertaking or comprises 20 per cent. or more of the shares in the undertaking;

and any reference to the participating interest provisions of this sub-paragraph is a reference to paragraphs (f) and (g).

(2) For the purposes of sub-paragraph (1), an undertaking shall be treated as a member of another undertaking -

- (a) if any of its subsidiary undertakings is a member of that other undertaking; or
- (b) if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings.

(3) Subject to sub-paragraph (4), a parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings.

(4) An undertaking ("A") shall not be treated as a parent undertaking of an undertaking ("B") by reason only that another undertaking which is A's subsidiary undertaking by virtue of sub-paragraph (1)(g) is a parent undertaking of B.

Fellow subsidiary undertakings.

4.(1) Subject to sub-paragraph (2), “fellow subsidiary undertakings” are undertakings which are subsidiary undertakings of the same parent undertaking but are not parent undertakings or subsidiary undertakings of each other.

(2) Two subsidiary undertakings of the same parent undertaking are not fellow subsidiary undertakings if either of them is a subsidiary undertaking by virtue only of paragraph 3(1)(g).

Participating interests.

5.(1) A “participating interest” is an interest held by an undertaking in the shares of another undertaking which it holds on a long term basis for the purpose of securing a contribution to its activities by the exercise of control or influence arising from or related to that interest.

(2) A holding of 20 per cent. or more of the shares of an undertaking shall be presumed to be a participating interest unless the contrary is shown.

(3) The reference in sub-paragraph (1) to an interest in shares includes -

- (a) an interest which is convertible into an interest in shares; and
- (b) an option to acquire shares or any such interest;

and an interest or option falls within paragraph (a) or paragraph (b) notwithstanding that the shares to which it relates are, until conversion or the exercise of the option, unissued.

(4) For the purposes of this paragraph, an interest held on behalf of an undertaking shall be treated as held by it.

(5) For the purposes of this Schedule -

- (a) there shall be attributed to an undertaking any interest held by any of its subsidiary undertakings; and
- (b) the reference in sub-paragraph (1) to the purpose and activities of an undertaking shall be taken to include the purposes and

activities of any of its subsidiary undertakings and of the group as a whole.

PART II

SUPPLEMENTARY PROVISIONS

Shares.

6. In this Schedule, references to shares -

- (a) in relation to an undertaking with share capital, are to allotted shares;
- (b) in relation to an undertaking with no share capital, are to rights to share in the capital of the undertaking; and
- (c) in relation to an undertaking without capital, are to interests -
 - (i) conferring any right to share in the profits or liability to contribute to the losses of the undertaking; or
 - (ii) giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up.

Voting rights in an undertaking.

7.(1) In paragraph 3 the references to voting rights in an undertaking are to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters.

(2) In relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to holding a majority of the voting rights in the undertaking shall be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution.

Right to appoint or remove a majority of the directors.

8.(1) In paragraph 3(1)(b) the reference to the right to appoint or remove a majority of the board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all matters.

(2) An undertaking shall be treated as having the right to appoint to a directorship if -

- (a) a person's appointment to it follows necessarily from his appointment as director of the undertaking, or
- (b) the directorship is held by the undertaking itself.

(3) A right to appoint or remove which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

Right to exercise dominant influence.

9.(1) For the purposes of paragraph 3(1)(c) an undertaking shall not be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the

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operating and financial policies of that other undertaking which its directors are obliged to comply with, whether or not they are for the benefit of that other undertaking.

(2) In paragraph 3(1)(c) “control contract” means a contract in writing conferring such a right as is referred to in subparagraph (1) which -

- (a) is of a kind authorised by the memorandum or articles of the undertaking in relation to which the right is exercisable, and
- (b) is permitted by the law under which the undertaking is established.

(3) Nothing in this paragraph affects the construction of the expression “actually exercises a dominant influence” in paragraph 3(1)(f).

Rights exercisable only in certain circumstances or temporarily incapable of exercise.

10.(1) Rights which are exercisable only in certain circumstances shall be taken into account for the purposes of this Schedule only -

- (a) when the circumstances have arisen, and for so long as they continue to obtain; or
- (b) when the circumstances are within the control of the person having the rights.

(2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

Rights held by one person on behalf of another.

11. Rights held by a person in a fiduciary capacity shall be treated for the purposes of this Schedule as not held by him.

12.(1) Rights held by a person as nominee for another shall be treated for the purposes of this Schedule as held by the other.

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(2) Rights shall be regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence.

Rights attached to shares held by way of security.

13. Rights attached to shares held by way of security shall be treated for the purposes of this Schedule as held by the person providing the security -

- (a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions; and
- (b) where the shares are held in connection with the granting of loans as part of normal business activities and, apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.

Rights attributed to parent undertaking.

14.(1) Rights shall be treated for the purposes of this Schedule as held by a parent undertaking if they are held by any of its subsidiary undertakings.

(2) Nothing in paragraph 12 or paragraph 13 shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.

(3) For the purposes of paragraph 13 rights shall be treated as being exercisable in accordance with the instructions, or in the interests, of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.

Group undertakings.

15. In this Schedule “group undertaking”, in relation to an undertaking, means an undertaking which is -

- (a) a parent or subsidiary undertaking of that undertaking; or
- (b) a subsidiary undertaking of any parent undertaking of that undertaking;

and references to a group shall be construed accordingly.

Disregard of certain rights.

16. For the purposes of this Schedule, the voting rights in an undertaking shall be reduced by any rights held by the undertaking itself.

Undertakings which are not companies.

17. Subject to any specific provision made by this Schedule, expressions used in this Schedule which are appropriate to companies shall be construed, in relation to an undertaking which is not a company, as references to the corresponding persons, officers or organs, as the case may be, appropriate to undertakings of that description.

SCHEDULE 2

Section 5(3)

**PARAGRAPHS INSERTED AS PARAGRAPHS 2 TO 10 OF
ARTICLE 50 OF THE UCITS DIRECTIVE.**

2. Member States shall provide that all persons who work or who have worked for the competent authorities, as well as auditors and experts instructed by the competent authorities, shall be bound by the obligation of professional secrecy. Such secrecy implies that no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that UCITS and management companies and depositories (hereinafter referred to as undertakings contributing towards their business activity) cannot be individually identified, without prejudice to cases covered by criminal law.

Nevertheless, when an UCITS or an undertaking contributing towards its business activity has been declared bankrupt or is being compulsorily wound

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up, confidential information which does not concern third parties involved in rescue attempts may be divulged in civil or commercial proceedings.

3. Paragraph 2 shall not prevent the competent authorities of the various Member States from exchanging information in accordance with this Directive or other Directives applicable to UCITS or undertakings contributing towards their business activity. That information shall be subject to the conditions of professional secrecy imposed in paragraph 2.

4. Member States may conclude co-operation agreements providing for exchanges of information with the competent authorities of third countries only if the information communicated is covered by guarantees of professional secrecy at least equivalent to those provided for in this Article.

5. Competent authorities receiving confidential information under paragraphs 2 or 3 may use it only in the course of their duties:

- to check that the conditions governing the taking-up of the business of UCITS or of undertakings contributing towards their business activity are met and to facilitate the monitoring of the conduct of that business, administrative and accounting procedures and internal-control mechanisms,
- to impose sanctions,
- in administrative appeals against decisions by the competent authorities, or
- in court proceedings initiated under Article 51 (2).

6. Paragraphs 2 and 5 shall not preclude the exchange of information:

- (a) within a Member State, where there are two or more competent authorities; or
- (b) within a Member State or between Member States, between competent authorities; and
 - authorities with public responsibility for the supervision of credit institutions, investment undertakings, insurance undertakings and other

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financial organisations and the authorities responsible for the supervision of financial markets,

- bodies involved in the liquidation or bankruptcy of UCITS and other similar procedures and of undertakings contributing towards their business activity,
- persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment undertakings and other financial institutions, in the performance of their supervisory functions, or the disclosure to bodies which administer compensation schemes of information necessary for the performance of their functions. Such information shall be subject to the conditions of professional secrecy imposed in paragraph 2.

7. Notwithstanding paragraphs 2 to 5, 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 financial undertakings and other similar procedures, or
- 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 sub-paragraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2,

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- 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.

8. Notwithstanding paragraphs 2 to 5, 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 in 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 sub-paragraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2,
- 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.

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

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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 this paragraph.

9. 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 information intended for the performance of their tasks, 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 5. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.

10. This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 2 to 5 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's markets if 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 imposed in paragraph 2. Member States shall, however, ensure that information received under paragraph 3 may not be disclosed in the circumstances referred to in this paragraph without the express consent of the competent authorities which disclosed it.

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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