

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 3965 of 22 November, 2012

LEGAL NOTICE NO. OF 177 2012.

INTERPRETATION AND GENERAL CLAUSES ACT

FINANCIAL SERVICES (BANKING) ACT (AMENDMENT) REGULATIONS 2012

In exercise of the powers conferred on it by section 23(g)(ii) of the Interpretation and General Clauses Act and in order to partly transpose into the law of Gibraltar Article 9 of Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), the Government has made the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Financial Services (Banking) Act (Amendment) Regulations 2012 and come into operation on the day of publication.

Amendment of the Financial Services (Banking) Act.

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

(2) In section 2, after the definition “European authorised institution” insert the following definitions—

““European Banking Authority” and “EBA” mean the European Banking Authority established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC;

“European Banking Committee” means that body established pursuant to Commission Decision 2004/10/EC of 5 November 2003 establishing the European Banking Committee.”

(3) After section 7 insert the following section–

“Notification of terms and conditions.

7A. The Government shall ensure that the European Commission and the EBA are notified of the terms and conditions subject to which licences and authorisations are granted pursuant to this Act.”

(4) The following subsection is inserted after section 65(7)–

“(8) Where the Commissioner cancels a licence pursuant to this section, the Government shall ensure that the European Commission and EBA are notified of such cancellation, including the reasons therefor.”

(5) For section 69(9) substitute the following subsection–

“(9) Where it appears to the Commissioner that there is a situation as respects a European institution to which section 68(4) applies, and he considers that the prohibition, restriction or variation should be imposed as a matter of urgency, whether to protect the interests of depositors, investors and others to whom services are provided or otherwise, he may do so as provided for in this section before complying with section 68(4) and (5) or, where he has complied with those subsections, without being satisfied as mentioned in section 68(6), but in such a case he shall immediately notify the Government and it shall, at the earliest opportunity, ensure that competent authorities in EEA States, the European Commission and EBA are notified of the steps taken.”

(6) Section 73B is amended by inserting the following after subsection (4)–

“(5) The Commissioner shall ensure there is notified to the European Commission, the European Supervisory Authority (European Banking Authority) and the European Banking

Committee all notices under subsection (1) by credit institutions having their head office in a non-EEA territory.”.

(7) After section 86A(6) insert the following subsections—

“(7) Nothing in this section shall prevent the Commissioner from exchanging information or transmitting information to the EBA in accordance with this Act or the recast Directive, with other European Union obligations applicable to credit institutions, and with Articles 31 and 35 of Regulation (EU) No 1093/2010.

(8) Information exchanged or transmitted under subsection (7) shall be subject to the conditions relating to professional secrecy set out in this section.”.

(8) After section 87 insert the following section—

“Notification of branches.

87A. Where a credit institution has its head office in a non-EEA State and a branch is authorised pursuant to this Act, the Commissioner shall ensure that the European Commission, the EBA and the European Banking Committee are notified accordingly.”.

(9) The following is inserted after section 96—

“Notification of refusal or of the taking of measures.

96A. The Government shall ensure that the European Commission and the EBA are informed—

- (a) of the number and types of cases where a European authorised financial institution has been refused the establishment of a branch in Gibraltar, pursuant to the provisions in this Part; and
- (b) of the measures taken by the Commissioner, in accordance with the provisions in this Part, where measures taken by the home Member State have not

been effective in preventing a European authorised institution from breaching provisions in this Act.”.

(10) The following sections are inserted after section 97–

“Collaboration with EEA authorities.

98.(1) The Commissioner shall collaborate closely with the competent authorities of EEA States in order to supervise the activities of credit institutions operating, in particular through a branch–

- (a) where the head office is situated in Gibraltar, in Gibraltar and in at least one EEA State; or
- (b) where the head office is not situate in Gibraltar, in Gibraltar and in at least one EEA State other than that in which the head office is situated.

(2) Where subsection (1) applies, the Commissioner shall supply the competent authorities of EEA States with all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms.

(3) Where a request for collaboration, in particular to exchange information, has been made by the Commissioner but it has been rejected or has not been acted upon within a reasonable time, the Commissioner may refer the matter to the EBA.

Requests in cross-border situations.

99.(1) The Commissioner may make a request to the consolidating supervisor (in a case where Article 129(1) of the recast Directive applies) or to the competent authorities of the home EEA State, for a branch of a credit institution to be considered as significant and the Commissioner shall provide

reasons for considering the branch to be significant with particular regard to the following matters–

- (a) whether the market share of the branch of a credit institution in terms of deposit exceeds 2% in Gibraltar;
 - (b) the likely impact of a suspension or closure of the operations of the credit institution on market liquidity and the payment and clearing and settlement systems in Gibraltar; and
 - (c) the size and the importance of the branch in terms of number of clients within the context of the banking or financial system of Gibraltar.
- (2) The Commissioner, the competent authorities of the home EEA State and the consolidating supervisor (in a case where Article 129(1) of the recast Directive applies) shall do everything within their power to reach a joint decision on the designation of a branch as being significant.
 - (3) Where, pursuant to subsection (2), no joint decision is reached within 2 months of receipt of a request, the Commissioner shall take a decision within a further period of 2 months on whether the branch is significant and in taking that decision, the Commissioner shall take into account any views and reservations of the consolidating supervisor or the competent authorities of the home EEA State.
 - (4) Where, at the end of the initial 2 month period the Commissioner or any of the competent authorities concerned has referred the matter to the EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the Commissioner shall defer his decision and await the decision of the EBA, and the Commissioner shall take his decision in conformity with that of the EBA.
 - (5) The 2 month period referred to in subsection (3) shall be deemed to be the “conciliation phase” within the meaning of Article 19 of Regulation (EU) No 1093/2010 and the matter shall not be referred to the EBA after the end of the initial 2 month period or after a joint decision has been reached.

- (6) The decisions referred subsections (3) and (4) shall be set out in a document containing the fully reasoned decision and transmitted to the competent authorities concerned, and shall be recognised as determinative and applied by the Commissioner.
- (7) The designation of a branch as being significant shall not affect the rights and responsibilities of the Commissioner under this Act.
- (8) Where a significant branch is established the Commissioner shall communicate to the competent authorities of a host EEA State the information referred to in Article 132(1)(c) and (d) of the recast Directive and carry out the tasks referred to in Article 129(1)(c) of the recast Directive in cooperation with the competent authorities of that State.
- (9) Where the Commissioner becomes aware of an emergency situation within a credit institution as referred to in Article 130(1) of the recast Directive, he shall alert as soon as practicable the authorities referred to in the fourth paragraph of Article 49 and in Article 50 of that Directive.

Establishment of college of supervisors.

- 100.(1) Where Article 131a of the recast Directive does not apply and the Commissioner supervises under this Act a credit institution with significant branches in EEA States, the Commissioner shall establish and chair a college of supervisors to facilitate cooperation under section 99 and this section.
- (2) The establishment and functioning of a college referred to in subsection (1) shall be based on written arrangements determined, after consultation with competent authorities concerned.
- (3) Where subsection (1) applies, the Commissioner shall decide which competent authorities participate in a meeting or in an activity of the college and the decision of the Commissioner shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular

the potential impact on the stability of the financial system in the EEA States concerned referred to in Article 40(3) of the recast Directive and the obligations referred to in section 99.

- (4) The Commissioner shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered and in a timely manner, of the actions taken in those meetings or the measures carried out.

Duty to take into account convergence in supervisory tools.

101.(1) In the exercise of his duties, the Commissioner shall take into account the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to the recast Directive.

- (2) For the purpose of subsection (1), the Minister shall ensure that—

- (a) the Commissioner participates in the activities of the EBA;
- (b) the Commissioner follows the guidelines and recommendations of the EBA and state the reasons if he does not do so;
- (c) nothing inhibits the performance by the Commissioner of duties as a member of EBA or under this Act.”.

- (11) For Schedule 3, there is substituted the following Schedule—

“SCHEDULE 3

Section 86A

EXCHANGE OF INFORMATION AND PROFESSIONAL SECRECY

Article 44

1. Member States shall provide that all persons working for 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.

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 credit 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 commercial proceedings.

2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information or transmitting information to EBA in accordance with this Directive, with other Directives applicable to credit institutions, and with Articles 31 and 35 of Regulation (EU) No 1093/2010. That information shall be subject to the conditions relating to professional secrecy set out in paragraph 1.

Article 45

Competent authorities receiving confidential information under Article 44 may use it only in the course of their duties and only for the following purposes:

- (a) 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 administrative and accounting procedures and internal control mechanisms;

- (b) to impose penalties;
- (c) in an administrative appeal against a decision of the competent authority; or
- (d) in court proceedings initiated pursuant to Article 55 or to special provisions provided for in this in other Directives adopted in the field of credit institutions.

Article 46

In accordance with Article 33 of Regulation (EU) No 1093/2010, Member States and EBA may conclude cooperation agreements, providing for exchanges of information, with the competent authorities of third countries or with authorities or bodies of third countries as defined in Article 47 and Article 48(1) of this Directive only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in Article 44(1) of this Directive. Such exchange of information shall be for the purpose of performing the supervisory tasks of those authorities or bodies.

Where the information originates in another Member State, it shall not be disclosed without the express agreement of the authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Article 47

Articles 44(1) and 45 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 the following:

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

in the discharge of their supervisory functions.

Articles 44(1) and 45 shall not preclude the disclosure to bodies which administer deposit-guarantee schemes of information necessary to the exercise of their functions.

In both cases, the information received shall be subject to the conditions of professional secrecy specified in Article 44(1).

Article 48

1. Notwithstanding Articles 44 to 46, Member States may authorise exchange of information between the competent authorities and the following:

- (a) the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of credit institutions and in other similar procedures; and
- (b) 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.

In such cases, Member States shall require fulfilment of at least the following conditions:

- (a) the information shall be for the purpose of performing the supervisory task referred to in the first subparagraph;
- (b) information received in this context shall be subject to the conditions of professional secrecy specified in Article 44(1); and
- (c) 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.

2. Notwithstanding Articles 44 to 46, 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 law for the detection and investigation of breaches of company law.

In such cases Member States shall require fulfilment of at least the following conditions:

- (a) the information is for the purpose of performing the task referred to in the first subparagraph;
- (b) information received in this context is subject to the conditions of professional secrecy specified in Article 44(1); and
- (c) 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 specified in the second subparagraph.

In order to implement the third 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 Article.

The Commission shall draw up a report on the application of the provisions of this Article.

Article 49

This Section shall not prevent a competent authority from transmitting information to the following for the purposes of their tasks:

- (a) central banks of the European System of the Central Banks and other bodies with a similar function in their capacity as monetary authorities when the information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and settlement systems, and the safeguarding of stability of the financial system;
- (b) where appropriate, other public authorities responsible for overseeing payment systems;
- (c) the European Systemic Risk Board (hereinafter the 'ESRB'), where that information is relevant for the exercise of its statutory tasks under Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

This Section shall not prevent the authorities or bodies referred to in the first subparagraph from communicating to the competent authorities such information as they may need for the purposes of Article 45.

Information received in this context shall be subject to the conditions of professional secrecy specified in Article 44(1).

In an emergency situation as referred to in Article 130(1), Member States shall allow the competent authorities to communicate, without delay, information to the central banks in the European System of the Central Banks where that information is relevant for the exercise of their statutory tasks, including the conduct of monetary policy and related liquidity provision, the oversight of payments, clearing and securities settlement systems, and the safeguarding stability of the financial system, and to the ESRB under Regulation (EU) No 1092/2010, where such information is relevant for the exercise of its statutory tasks.

Article 50

Notwithstanding Articles 44(1) and 45, the Member States may, by virtue of provisions laid down by law, authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies and to inspectors acting on behalf of those departments.

However, such disclosures may be made only where necessary for reasons of prudential control.

In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to disclose information which is relevant to the departments referred to in the first paragraph of this Article in all Member States concerned.

Article 51

The Member States shall provide that information received under Articles 44(2) and 47 and information obtained by means of the on- the-spot verification referred to in Article 43(1) and (2) may never be disclosed in the cases referred to in Article 50 except with the express consent of the competent authorities which disclosed the information or of the competent authorities of the Member State in which on-the-spot verification was carried out.

Article 52

This Section shall not prevent the competent authorities of a Member State from communicating the information referred to in Articles 44 to 46 to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of their national 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 specified in Article 44(1).

The Member States shall, however, ensure that information received under Article 44(2) may not be disclosed in the circumstances referred to in this

Article without the express consent of the competent authorities which disclosed it.”.

Dated 22nd November, 2012,

G H LICUDI QC,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose article 9 of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council.