

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 3965 of 22 November, 2012

LEGAL NOTICE NO. OF 173 2012.

INTERPRETATION AND GENERAL CLAUSES ACT

FINANCIAL SERVICES (MARKETS IN FINANCIAL INSTRUMENTS) ACT 2006 (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 transpose into the law of Gibraltar Article 6 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 (Markets in Financial Instruments) Act 2006 (Amendment) Regulations 2012 and come into operation on the day of publication.

Amendment of the Financial Services (Markets in Financial Instruments) Act 2006.

2.(1) The Financial Services (Markets in Financial Instruments) Act 2006 is amended in accordance with the provisions of this regulation.

(2) In section 2—

- (a) at the end of the definition “directive” insert the words “, as the same may be amended from time to time”; and
- (b) after the definition “directive” insert the following definitions—
 - ““ESMA” means the European Securities and Markets Authority established by the ESMA Regulation;

“ESMA Regulation” means Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC;”.

(3) After section 6(8) insert the following subsection–

“(9) The Minister shall ensure that an authorisation issued under this Act is notified to ESMA.”.

(4) Section 8 is amended by numbering the existing provision as subsection “(1)” and inserting the following subsection after subsection (1)–

“(2) The Minister shall ensure that ESMA is notified of every authorisation withdrawn pursuant to this section.”.

(5) In section 15(1) after the words “the European Commission” insert the words “and ESMA”.

(6) In section 23(5)(b) for the words “or in the equivalent register established by another member State” substitute the words “in the Member State where they are established.”.

(7) In section 25–

(a) in subsection (1), for the words “The Minister may” substitute the words “Without prejudice to the allocation of responsibilities for enforcing the provisions of the Market Abuse Act 2005, the Minister after having coordinated with ESMA in accordance with Article 31 of the ESMA Regulation shall”;

(b) in subsection (3) for the words “by the competent authority” substitute the words “under the Crime (Money Laundering and Proceeds) Act 2007”; and

(c) after subsection (3) insert the following subsection–

“(3A) The competent authority shall allow ESMA access to the information referred to in subsection (3) where ESMA makes a request in accordance with the

procedure and under the conditions set out in Article 35 of the ESMA Regulation.”.

(8) In section 27–

(a) in subsection (4)–

- (i) after the words “in terms of liquidity for each share” insert the words “(as defined in section 25)”, and
- (ii) delete the words “This information shall be made public to all market participants.”;

(b) after subsection (4) insert the following subsection–

“(4A) The competent authority shall ensure that the information referred to in subsection (4) is made publicly available to all market participants and is transmitted to ESMA.”.

(9) After section 31(3) insert the following subsection–

“(3A) The competent authority shall allow ESMA access to the information referred to in subsection (3) where ESMA makes a request in accordance with the procedure and under the conditions set out in Article 35 of the ESMA Regulation.”.

(10) Section 36(8) is amended–

(a) in paragraph (e) by substituting “,” for “.”; and

(b) by inserting the following tailpiece after subsection (8)–

“and where such an authorisation has been withdrawn the competent authority shall notify ESMA of that fact.”.

(11) In section 41 for subsections (3) and (4) substitute the following subsections–

“(3) Where the competent authority requests 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 authorities of the Member States and ESMA.

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

- (12) After section 42(7) insert the following subsection—

“(7A) The competent authority shall allow ESMA access to the information referred to in subsection (7) where ESMA makes a request in accordance with the procedure and under the conditions set out in Article 35 of the ESMA Regulation.”.

- (13) For section 47 there shall be substituted the following section—

“List of regulated markets.

47.(1) The Minister shall draw up a list of those regulated markets which are either registered in Gibraltar or whose head office is located in Gibraltar.

- (2) The Minister shall ensure that the list referred to in subsection (1) is provided to Member States and to ESMA and any change to that list is also communicated to Member States and to ESMA.”.

- (14) In section 48—

- (a) in subsection (1)(b) after the words “the European Commission” insert the words “, ESMA”; and
- (b) in subsection (7) for the words “Member States and the European Commission and the competent authority” substitute the words “the European Commission, ESMA and the competent authorities”.

- (15) In section 50, after subsection (2) insert the following subsections–
- “(3) The Minister shall provide ESMA annually with aggregated information about all administrative measures and sanctions imposed by regulations made under this section.
 - (4) Where the competent authority has disclosed an administrative measure or sanction to the public, it shall, contemporaneously, report that fact to ESMA.”.
- (16) Section 54 is amended as follows–
- (a) after subsection (1) insert the following subsection–
 - “(1A) In order to facilitate and accelerate cooperation, and more particularly exchange of information, the Minister shall designate a single competent authority as a contact point for the purposes of this Act, and he shall ensure that such designation is communicated to the Commission, ESMA and to the Member States.”;
 - (b) at the end of subsection (4) insert the words “and to ESMA”;
 - (c) in subsection (5)–
 - (i) after the words “the notifying competent authority” insert the words “and ESMA”; and
 - (ii) at the end of the subsection insert the words “, any action taken pursuant to this subsection shall be without prejudice to the competence of the notifying authority”.
- (17) Section 56(5) is amended–
- (a) in paragraph (a) after the words “from transmitting to” insert the words “ESMA, the European Systemic Risk Board,”; and
 - (b) by deleting paragraph (b).
- (18) In section 57(2) after the words “requesting competent authority” insert the words “and ESMA”.

(19) Section 60 is amended as follows–

(a) for subsection (2) substitute the following subsection–

“(2) Where, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the investment firm persists in acting in a manner that is clearly prejudicial to the interests of investors in Gibraltar or the orderly functioning of markets–

- (a) after informing the competent authority of the home Member State the competent authority shall take all appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing offending investment firms from initiating any further transactions within Gibraltar, and the competent authority shall ensure that the European Commission and ESMA are informed of such measures without delay; and
- (b) the competent authority may refer the matter to ESMA for action pursuant to Article 19 of the ESMA Regulation.”;

(b) for subsection (5) substitute the following subsection–

“(5) Where, despite the measures taken by the competent authority, the investment firm persists in breaching the provisions of this Act, in such circumstances–

- (a) after informing the competent authority of the home Member State the competent authority shall take all appropriate measures needed in order to protect investors and the proper functioning of the markets and shall inform the European Commission and ESMA of those measures without delay; and

- (b) the competent authority may refer the matter to ESMA for action pursuant to Article 19 of the ESMA Regulation.”;
 - (c) The following is substituted for subsection (7)–
 - “(7) Where, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, that regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of investors in Gibraltar or the orderly functioning of markets–
 - (a) after informing the competent authority of the home Member State the competent authority shall take all appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing that regulated market or the MTF from making their arrangements available to remote members or participants established in the host Member State and shall inform the European Commission and ESMA of those measures without delay; and
 - (b) the competent authority may refer the matter to ESMA for action pursuant to Article 19 of the ESMA Regulation.”.
- (20) After section 60 insert the following sections–

“Cooperation and exchange of information with ESMA.

60A.(1) The competent authority shall-

- (a) without delay, provide ESMA with all information necessary to carry out its duties under the Directive and in accordance with Article 35 of the ESMA Regulation; and
- (b) cooperate with the ESMA for the purposes of the Directive in accordance with the ESMA Regulation.

Exchange of information with third countries.

- 60B.(1) The Government may conclude cooperation agreements providing for the exchange 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 required under Article 54 of the Directive and the exchange of information is intended for the performance of the tasks of those competent authorities.
- (2) Pursuant to subsection (1), the competent authority may transfer personal data to a third country in accordance with Chapter IV of Directive 95/46/EC.
- (3) The Government may also conclude cooperation agreements providing for the exchange of information with third country authorities, bodies and natural or legal persons responsible for one or more of the following—
- (a) the supervision of credit institutions, other financial institutions, insurance undertakings and the supervision of financial markets;
 - (b) the liquidation and bankruptcy of investment firms and other similar procedures;
 - (c) the carrying out of statutory audits of the accounts of investment firms and other financial institutions, credit institutions and insurance undertakings, in the performance of their supervisory functions, or which administer compensation schemes, in the performance of their functions;
 - (d) oversight of the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;
 - (e) oversight of persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions.

- (4) The cooperation agreements referred to in subsection (3)(c) may be concluded only where the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 54 of the Directive and the exchange of information is intended for the performance of the tasks of those authorities or bodies or natural or legal persons.
- (5) Where the information to which this section relates originates in another Member State or third country, it may not be disclosed without the express agreement of the competent authorities which have transmitted it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Alternative dispute resolution

Alternative dispute resolution.

- 60C.(1) The Government shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate, which bodies shall not be prevented from cooperating effectively in the resolution of cross-border disputes.
- (2) The Government may make regulations for the implementation or regulation of any procedures instituted pursuant to subsection (1).
 - (3) The competent authority shall notify ESMA of any complaint and redress procedures referred to in subsection (1) which are available.

Binding mediation.

- 60D. The competent authority may refer to the European Securities and Markets Authority situations where a request relating to one of the following has been rejected or has not been acted upon within a reasonable time—

- (a) to carry out a supervisory activity, an on-the-spot verification, or an investigation, as provided for in section 55; or
- (b) to exchange information as provided for in section 56.”.

Dated 22nd November, 2012.

G H LICUDI QC,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose Article 6 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 Regulations amend the Financial Services (Markets in Financial Instruments) Act 2006 in order to supplement provisions dealing with cooperation with the European Securities and Markets Authority and with the competent authorities of other EEA States.