

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3586 of 1st March, 2007

B. 15/07

BILL

FOR

AN ACT to exempt from the authorisation requirements in certain financial services legislation, persons who, in relevant circumstances, set up temporary business continuity arrangements in Gibraltar; and for connected purposes.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Financial Services (Temporary Business Continuity) Act 2007 and comes into operation on the date the Government, appoints by notice in the Gazette.

Interpretation.

2. In this Act unless the context otherwise provides—

“equipment” means any computer or other machine, implement or computer programme dedicated exclusively to the provision of business continuity arrangements and located at a facility in Gibraltar operated by a host;

“exempt person” means a person who holds an exemption order made under this Act;

“exempted operations” means the carrying on by or on behalf of an exempt person of financial services business operations, transactions and activities from Gibraltar utilising the equipment, which—

- (a) the exempt person is authorised by his home State supervisory authorities to carry on or to have carried on on his behalf; and
- (b) cannot be carried on by the exempt person in or from his home State owing to a relevant event or are performed outside of his home State solely for the purpose of testing and maintenance;
- (c) do not result in the exempt person holding himself out as carrying on financial services business in or from within Gibraltar; and
- (d) are not unlawful under the law of Gibraltar;

“financial services business” means any such business as is regulated by any of the Acts mentioned in section 4(1) to (5);

“home State” means the country or territory where the exempt person’s registered office, principal place of business or a branch of his is situated;

“home State supervisory authority” means any regulatory or supervisory body which has functions and powers similar to those of the regulator in relation to the regulation of financial services business;

“host” means any person who has a place of business in Gibraltar and who undertakes activities in relation to the operation of the equipment on behalf of an exempt person for the purposes of exempted operations;

“memorandum of understanding” means an agreement setting out, without limitation, the arrangements for both mutual co-operation and exchange of information between a home State supervisory authority and the regulator;

“Minister” means the Minister with responsibility for financial services;

“regulator” means the regulator who has powers to make an exemption order under this Act and refers to, as the case may be, the Commissioner of Banking, the Commissioner of Insurance or the Authority appointed under the Financial Services Act 1989;

“relevant event” means any unexpected interruption to the operation of or accessibility to the computer and any ancillary equipment of the exempt person due to an event beyond his control occurring in his home State caused by–

- (a) fire, hurricane, tidal wave, tornado, flood, volcanic eruption, act of God or any other kind of natural disaster; or
- (b) an act of war or terrorism not being social upheaval due to political factors or governmental action; or
- (c) criminal damage.

Requirements for exemption.

3. A person may, on application to a regulator in such form as may be prescribed, be exempted from the provisions specified in section 4(1) to (5) if all of the following requirements are fulfilled in respect of them–

- (a) the person seeking exemption enters into a contractual arrangement with a host such that upon the happening of a relevant event that person will carry on, or cause to be carried on, exempt operations in or from within Gibraltar utilising the equipment provided by the host;
- (b) the person seeking exemption submits to the regulator a certificate from his home State supervisory authority certifying that he is authorised to carry on in that State the financial services business in respect of which he is seeking exemption and that he has been complying with the regulatory requirements of that State in respect of that business;
- (c) the person seeking exemption undertakes to continue to comply, at all times, with the regulatory requirements of his home State supervisory authority;
- (d) the home State supervisory authority of the person seeking exemption has entered into a memorandum of understanding with the regulator which explicitly specifies the financial services business to which an exemption order may apply.

Exemptions.

4.(1) The Commissioner of Banking may, with the consent of the Minister, by order (“an exemption order”) exempt any person from the restriction in respect of an activity of the kind specified by any of the following provisions of the Financial Services (Banking) Act 1992–

- (a) section 6 or 7 (carrying on deposit-taking business);
- (b) section 11C (issuing electronic money);
- (c) sections 74, 75 or 75A, (using the words “bank”, “trust” or “building society”) respectively;

subject to that person complying with the conditions specified in section 5.

(2) The Commissioner of Insurance may, with the consent of the Minister, by order (“an exemption order”) exempt any person from the restriction in respect of an activity of the kind specified by any of the following provisions of the Insurance Companies Act 1987–

- (a) section 6 (using the word “insurance” or “assurance”);
- (b) section 17 (carrying on insurance business).

subject to that person complying with the conditions specified in section 5.

(3) The Authority appointed under the Financial Services Act 1989 may, with the consent of the Minister, by order (“an exemption order”) exempt any person from the restriction in respect of an activity of the kind specified by any of the following provisions of that Act–

- (a) section 3 (carrying on investment business or a controlled activity);
- (b) section 39 (using the word “trust”).

subject to that person complying with the conditions specified in section 5.

(4) An exemption order shall not be made until such time as the regulator is notified of a relevant event occurring and resulting in the operation of the equipment.

(5) An exemption order may provide for an exemption to have effect—

- (a) in respect of one or more specified financial services business activities;
- (b) only in relation to specified circumstances or specified functions;
- (c) subject to conditions additional to those in section 5.

(6) In sub-section (5) “specified” means specified by the exemption order.

(7) A host shall not be required to obtain authorisation under any other Act for the business operations, transactions and activities which he carries on for an exempt person during the course of exempted operations in relation to the financial services business covered by an exemption order.

(8) The Minister may, by order published in the Gazette, insert further provisions into, or delete any of the provisions in, subsections (1) to (3) or amend the references to any of those provisions.

(9) The power under subsection (8) shall be exercisable by order subject to annulment by resolution of the Gibraltar Parliament at the meeting of the Parliament next following the date of publication of the order.

Conditions.

5. The conditions referred to in section 4(1) to (3) are that an exempt person shall—

- (a) provide the regulator with a copy of the agreement for the provision of the temporary business continuity arrangements within seven days of entering into the agreement, and any other documentation the regulator may require;
- (b) pay to the regulator for the making of the initial exemption order and any subsequent orders such fee as may be prescribed by regulations made under this Act;
- (c) operate the equipment in accordance with this Act and any regulations made hereunder;

- (d) at all times comply with any directions issued or requirements imposed, from time to time, by the regulator;
- (e) notify the regulator, in writing forthwith on the occurrence of—
 - (i) any change in the use or proposed use of the equipment;
 - (ii) any change in the terms of the agreement for the provision of the temporary business continuity arrangements;
 - (iii) the termination of the use of the equipment.
- (f) not establish a permanent place of business in Gibraltar for the purpose of operating the equipment and shall not engage in or carry on any financial services business in such a manner that would require him to be authorised under any other Act;
- (g) permit the regulator to have access to and inspect any physical or electronic records relating to the performance of exempted operations;
- (h) notify the regulator forthwith on the happening of either of the following events—
 - (i) he has ceased to be authorised by his home State supervisory authority to carry on in that State any financial services business of the kind specified in his exemption order; or
 - (ii) his home State supervisory authority has intervened in his affairs because he has failed to comply with any statutory, regulatory or supervisory requirements of that State.

Duration and revocation of exemptions.

6.(1) An exemption order shall be valid for a period of 30 days where the home State supervisory authority is unable to continue to exercise its

functions and powers and 60 days in all other events unless the order is previously revoked.

(2) The regulator may, on application by an exempt person, with the consent of the Minister, make such further exemption orders, of a duration which, in total, do not exceeding 60 days, as the regulator, in his discretion and taking all circumstances into consideration, considers is warranted.

(3) An exemption order shall be revoked by the regulator if the exempt person—

- (a) so requires;
- (b) is no longer able to meet or has failed to meet any of the conditions specified in section 5 or any condition imposed under section 4(5)(c);
- (c) is acting or has acted in a manner that the regulator or the Minister considers is detrimental to Gibraltar's reputation as a finance center; or
- (d) has been found guilty of a criminal offence in Gibraltar or elsewhere.

(4) If an exemption order is revoked under sub-section (3), any prescribed fee, paid for the issue of the order, or any part thereof, shall not be refundable.

False claims to be exempt.

7.(1) A person who not being an exempt person—

- (a) describes himself, in whatever terms as an exempt person in relation to financial services business; or
- (b) behaves, or otherwise holds himself out, in a manner which indicates, or which is reasonably likely to be understood as indicating, that he is an exempt person in relation to that business;

shall be guilty of an offence and liable on summary conviction to a fine at level 3 on the standard scale.

(2) In proceedings for an offence under this section it shall be a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

(3) Where an offence under this section which has been committed—

- (a) by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of that body; or
- (b) by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a member of that partnership,

or by any person who was purporting to act in any such capacity, he, as well as the body corporate, or as the case may be the partnership, shall be guilty of that offence and liable to be proceeded against and punished accordingly.

(4) Where the affairs of a body corporate are managed by its members, subsection (3) shall apply in relation to the actings and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

Regulations.

8. The Minister may make regulations prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act.

EXPLANATORY MEMORANDUM

This Bill gives powers to the Commissioner of Banking, the Commissioner of Insurance and the Authority appointed under the Financial Services Act to make orders, with the consent of the Minister, which will exempt persons from the requirement to obtain a licence under the respective legislation which these regulators administer. The grant of an exemption order will permit financial services operations normally regulated in another jurisdiction to be conducted in Gibraltar on a temporary basis under business continuity plans.

These temporary business operations are a means of recovering data in the event of computer hardware and ancillary equipment failure as a result of an event beyond the control of the applicant occurring in his home State caused by a natural disaster (i.e. fire, hurricane or tornado), act of war or terrorism or criminal damage.

The Bill allows for Gibraltar to become the temporary location for the establishment of business continuity operations.

Clauses 3 and 5 specify the requirements and conditions an applicant for an exemption order must meet and clause 4 specifies the areas of regulated financial services business which can be so exempted.

Clause 6 provides the period of time an initial and an extended order can be valid for and situations under which an order can be revoked.

Clause 7 provides for offences and penalties and clause 8 gives powers to the Minister to make regulations.

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