THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE
No. 3,595 of 26th April, 2007

B. 24/07

BILL

FOR

AN ACT to partly transpose into the law of Gibraltar Directive 2006/48/EC, of the European Parliament and of the Council, of 14 June 2006 which recasts the Banking Consolidation Directive 2000/12/EC and which relates to the taking up and pursuit of the business of credit institutions and financial institutions and their prudential supervision.

ENACTED by the Legislature of Gibraltar.

Title.

1. This Act may be cited as the Financial Services (Banking) (Amendment) Act 2007.

Amendment of the Financial Services (Banking) Act.

2. The Financial Services (Banking) Act is amended in accordance with sections 3 to 42.

Amendment of section 2.

3.(1) Section 2 is amended by the omitting the definitions of "Banking Consolidation Directive", "credit institution", "electronic money institution", "relevant supervisory authority" and "shareholder controller".

(2) Section 2 is further amended by inserting the following definitions in their appropriate alphabetical place–

"branch" means a place of business which forms a legally dependent part of a credit institution or a financial institution and which carries

out directly all or some of the transactions inherent in deposit-taking business;

"close links" means a situation in which two or more persons are linked in any of the following ways–

(a) participation in the form of ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking;

(b) control; or

(c) the fact that both or all are permanently linked to one and the same third person by a control relationship;

"competent authority" means the national authority which is empowered by law or regulation to supervise credit institutions or financial institutions, as the case may be and, in the case of Gibraltar shall mean the Commissioner;

"control" means the relationship between a parent undertaking and a subsidiary or a similar relationship between a person and an undertaking;

"credit institution" means–

(a) an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account; or

(b) an electronic money institution;

"electronic money institution" means an undertaking or person which issues means of payment in the form of electronic money;

"European authorised financial institution" means a financial institution which is for the time being authorised in an EEA State to acquire holdings or to carry on items 2 to 12 business;

"financial holding company" means a financial institution, the subsidiary undertakings of which are either exclusively or mainly credit institutions or financial institutions, at least one of such

subsidiaries being a credit institution and which is not a mixed financial holding company;

"financial institution" means an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities in paragraphs 2 to 12 in Schedule 1;

"initial capital" shall comprise–

(a) all amounts, regardless of their actual designation, which, in accordance with a credit institution's legal structure, are regarded as equity capital subscribed by shareholders or other proprietors in so far as it has been paid up, plus share premium account accounts but excluding cumulative preferential shares; and

(b) all types of reserves shown separately in the credit institution's balance sheet and profit and losses brought forward as a result of the application of the final profit or loss;

"items 2 to 12 business" in relation to a financial institution means business which consists of carrying on one or more of the activities specified in items 2 to 12 in Schedule 1;

"Minister" means the Minister with responsibility for financial services;

"mixed activity holding company" means a parent undertaking, other than a financial holding company or a credit institution or mixed financial holding company, the subsidiaries of which include at least one credit institution;

"mixed financial holding company" means a parent undertaking other than a regulated entity which together with its subsidiaries, at least one of which is such a regulated entity, and other entities constitute a financial conglomerate within the meaning of article 2(14) of Directive 2002/87/EC;

"own funds" shall have the meaning assigned to it by Financial Services (Capital Adequacy of Credit Institutions) Regulations;

"qualifying holding" means a direct or indirect holdings in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking;

"recast Directive" means Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 which recasts the Banking Consolidation Directive 2000/12/EC and which relates to the taking up and pursuit of the business of credit institutions and their prudential supervision extended in some areas to financial institutions, as extended, where applicable, by the EEA Agreement;

"regulated entity" means a credit institution, insurance undertaking or investment firm;

"shares" means–

(a) in relation to an undertaking with a share capital, allotted shares;

(b) in relation to an undertaking with capital but no share capital, rights to share in the capital of the undertaking; and

(c) in relation to an undertaking without capital; interests conferring rights to share in the profits or liability to contribute to the losses or interests giving rise to an obligation to contribute to the debts or expenses in the event of winding-up; and

"shareholder controller" means a person who either alone or with one or more associates–

(a) holds a qualifying holding of 10% or more in a credit institution or in any other credit institution of which it is a subsidiary;

(b) is entitled to exercise, or control the exercise of 10% or more of the voting rights at any general meeting of a credit institution or in any other credit institution of which it is a subsidiary;

(c) is able to exercise a significant influence over the management of a credit institution or of any other credit institution of which it is a subsidiary by virtue of–

(i) a holding of shares in; or

(ii) an entitlement to exercise, or control the exercise, of the voting rights at any general meeting of the credit institution or of the other credit institution concerned; and

(d) a "10 per cent minority shareholder controller" means a shareholder controller in whose case the percentage referred to in paragraphs (a) and (b) is less than 20;

(e) a "20 per cent minority shareholder controller" means a shareholder controller in whose case the percentage referred to in paragraphs (a) and (b) is 20 or more but less than 33;

(f) a "33 per cent minority shareholder controller" means a shareholder controller in whose case the percentage referred to in paragraphs (a) and (b) is 33 or more but less than 50;

(g) a "majority shareholder controller" means a shareholder controller in whose case the percentage referred to in paragraphs (a) and (b) is 50 or more.

(3) Section 2 is further amended–

(a) in the definition of "EEA Agreement" by inserting "and as amended, so far as relevant to the Act, by various Decisions of the EEA Joint Committee and by the Agreement on the participation of new EU States signed at Luxemburg on 14th October 2003";

(b) in the definition of "European authorised institution" by substituting paragraph (b) by "(b) which is for the time being authorised pursuant to article 6 of the recast Directive by the competent authority of an EEA State";

(c) in the definition of "European subsidiary institution" by substituting paragraph (a)(ii) by "(ii) which is for the time

being authorised pursuant to article 6 of the recast Directive by the competent authority of an EEA State";

(d) in the definition of "institution" by inserting "a credit institution which" after "means";

(e) in the definition of "licence" by inserting "IIA or" immediately before "IV"; and

(f) in the definition of "subsidiary institution" by substituting "article 6 of the recast Directive" for "article 4 of the Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement".

Omission of section 2A.

3. Section 2A is omitted.

Amendment of section 7.

4. Section 7(3) is amended by substituting "competent" for "relevant supervisory" in the two places it appears.

Amendment of section 10.

5.(1) Section 10 is amended by omitting subsections (1)(c) and (3).

(2) Section 10(2) is amended by substituting "Minister" for "Governor".

Amendment of section 11B.

6.(1) Section 11B(1) is amended by inserting "electronic money" immediately before "institutions" and by substituting "Part" for "section".

(2) Section 11B(2) is amended by inserting "electronic money" immediately before "institution".

(3) Section 11B(3) is amended by inserting "electronic money" immediately before "institution" and substituting "recast" for "Banking Consolidation".

Amendment of section 11C.

7. Section 11C is amended by inserting “electronic money” immediately after “European” and by substituting "competent" for "relevant supervisory".

Amendment of section 16.

8.(1) Section 16 is amended by inserting the following subsection after subsection (1)–

> “ (1A) The Commissioner may also publish codes of practice and guidance notes as administrative instruments to facilitate compliance with the requirements of this Act and any regulations made thereunder.”.

(2) Section 16(3)(a) is amended by substituting “recast” for “Banking Consolidation”.

Amendment of section 17.

9. Section 17 is amended by inserting the following subsection immediately after subsection (3)–

> “ (3A) The Commissioner shall maintain a register containing the names of all European authorised financial institutions with a branch in Gibraltar together with such particulars of those institutions as may be prescribed from time to time.”

Amendment of section 18.

10.(1) Section 18(3) is amended by substituting all the words after paragraph (c) by–

> “the Commissioner shall consult the competent authority of the EEA State where the European institution is authorised before determining whether to grant or refuse the application.”.

(2) Section 18(4) is amended by re-numbering subsection (4) as (6).

(3) Subsections (5) and (6) of section 18 are omitted.

(4) Section 18 is amended by inserting the following two subsections immediately after subsection (3)–

" (4) In the case of an application by an institution which is–

(a) a subsidiary of an insurance undertaking or investment firm authorised in an EEA State;

(b) a subsidiary of the parent undertaking of an insurance undertaking or investment firm authorised in an EEA State;

(c) controlled by the same persons who controls an insurance undertaking or investment firm authorised in an EEA State,

the Commissioner shall consult the competent authority of the EEA State responsible for the supervision of insurance undertakings or of investment firms before determining whether to grant or refuse the application.

(5) The Commissioner shall consult the other competent authorities referred to in subsections (3) and (4) when assessing the suitability of the shareholders and the reputation and experience of the directors managing other entities of the same group with the view of obtaining information on those shareholders and directors which is of relevance for determining whether to grant or refuse the application as well as for the purpose of ongoing supervision.".

(5) Section 18(6) is amended by substituting "competent" for "supervisory".

(6) Section 18(9) is amended by substituting "Article 6 of the recast Directive" for "Article 4 of the Banking Consolidation Directive (as extended, where applicable by the EEA Agreement)".

Amendment of section 23.

11.(1) Section 23(1) is amended–

(a) in paragraph (c) by substituting "in the case of an institution, it possesses separate own funds amounting to" for "the paid-up

capital and reserves of the applicant from the commencement of the business amount"; and

(b) in paragraph (f) by substituting "an electronic money institution" for "any institution issuing electronic money".

(2) Section 23 is amended by inserting the following subsections after subsection (2A)–

"(2B) 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 the laws, regulations or administrative provisions of a country outside the EEA governing persons with which a credit institution has close links, or difficulties with the enforcement of those laws, regulations or administrative provisions are such as would prevent the effective exercise by the Commissioner or the Banking Supervisor of their supervisory functions in relation to the applicant (were it to become a licensee).

(2C) The Commissioner shall require a licensee to provide him with such information and at such frequency as he may require to satisfy himself that the conditions referred to in subsections (2A) and (2B) are being complied with.".

(3) Section 23(3) is amended–

(a) by inserting the following paragraph after paragraph (c)–

"(cc) in carrying out the business the applicant shall–

(i) have robust governance arrangements and a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to;

(ii) have adequate internal control mechanisms, including sound administrative procedures which shall be comprehensive and proportionate

to the nature, scale and complexity of the business; and

(iii) ensure that the arrangements, processes and mechanisms referred to in paragraphs (i) and (ii) are comprehensive and proportionate to the nature, scale and complexity of the institution's activities taking into account the technical criteria concerning the organisation and treatment of risks specified in Schedule 5 of the Financial Services (Capital Adequacy of Credit Institutions) Regulations;

(b) by inserting the following paragraph after paragraph (e)–

"(ee) that he has been informed of the identities of the shareholders or members of the institution who have, whether directly or indirectly, qualifying holdings and the amount of such holdings, taking into consideration the voting rights referred to in article 92 of Directive 2001/34/EC for determining such qualifying holdings;".

Amendment of section 24.

12. Section 24 is amended by substituting the following subsection for subsection (1)–

"(1) On receipt of an application for a licence, the Commissioner shall, subject to subsection (2), within a period of six months grant or refuse the licence applied for and where an application is incomplete or further information has been requested under section 19, the Commissioner shall grant or refuse the licence–

(a) within a period of six months of the applicant submitting the information required for a decision; or

(b) within 12 months of the receipt of the application,

whichever is the earlier.".

Amendment of section 35.

13.(1) Section 35 is amended by substituting "own funds" for "paid up capital and reserves" in the eight places it appears.

(2) Section 35 is further amended by inserting the following subsections after subsection (3)–

"(4) An institution's own funds shall not fall below the amount of own funds required under section 23(1)(c) at the time it was licensed.

(5) Where an institution merges with one or more other institutions to which subsection (1) applies, the own funds of the merged institutions shall not fall below the aggregate own funds of the merged institutions at the time of the merger for so long as the level mentioned in section 23(1)(c) as not been attained.

(6) The Commissioner may, if he considers that circumstances justify it, allow an institution to which this section applies and whose own funds fall below the required levels, a specified short period of time determined by him to rectify the situation or use his powers of intervention with a view to a cessation of the institution's business activities.".

Amendment of section 38.

14.(1) The heading of section 38 is substituted by **"Notification to the competent authority of an EEA State.".**

(2) Section 38 is further amended by substituting "competent" for "relevant supervisory" in the twelve places it appears.

(3) Section 38(3) is further amended by inserting "and of the credit institution's right of appeal under section 72 against the refusal" at the end thereof.

(4) Section 38(4)(b) is amended by substituting "calculated as may be prescribed by the Financial Services (Capital Adequacy of Credit Institutions) Regulations" for the brackets and the words therein.

(5) The following subsection is inserted immediately after subsection (7)–

" (8) A licensee incorporated in Gibraltar who is aggrieved–

(a) by the refusal of the Commissioner under subsection (2) or (3) to notify the relevant competent authority in the EEA State in which the licensee proposes to establish a place of business; or

(b) by the failure of the Commissioner to reply to his written notice given to the Commissioner under subsection (1);

may appeal to the Supreme Court against that refusal or failure.".

Amendment of section 40.

15. Section 40(1)(c) is amended by substituting the words "Article 120.2 of the recast Directive" for the words "Article 51.2 of the Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)".

Insertion of section 40A.

16. The following section is inserted immediately after section 40–

"Transactions with parent mixed activities holding companies.

40A.(1) Where the parent undertaking of a licensee and one or more other institutions is a mixed activity holding company, the Commissioner shall exercise general supervision over transactions between the licensee and the mixed activity holding company and its other subsidiaries.

(2) A licensee shall have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures, in order to identify, measure, monitor and control transactions with its parent mixed activity holding company and its other subsidiaries.".

Amendment of section 42.

17.(1) Section 42(1) is amended by inserting "40A" immediately after "40".

(2) Section 42 is further amended by inserting the following subsection immediately after subsection (1)–

"(1A) A licensee shall report to the Banking Supervisor, any significant transaction with its parent mixed activity holding company and its other subsidiaries referred to in section 40A other than one which is a large exposure as defined and as required to be reported by the Financial Service (Capital Adequacy of Credit Institutions) Regulations.".

(3) Section 42(2) is amended by inserting "or (1A)" immediately after "(1)".

(4) Section 42 is further amended by inserting the following subsection immediately after subsection (4)–

"(5) Where the Commissioner considers that any of the intra-group transactions referred to in subsection (1A) are a threat to a licensee's financial position, he may direct the licensee to take such appropriate measures as he may require to remedy the situation.".

Amendment of section 46A.

18.(1) Section 46A(4) is amended by substituting "recast" for "Banking Consolidation".

Amendment of section 53.

19.(1) Section 53(2) is amended by substituting "licensee" for "licensed institution".

(2) Section 53 is amended by inserting the following subsection after subsection (5)–

"(6) A licensee incorporated in Gibraltar shall serve a written notice on the Commissioner on becoming aware of any

acquisition by any person of a qualifying holding that would make him a 10%, 20% or 33% minority shareholder, a majority shareholder controller, a parent controller or an indirect controller of the licensee.".

Amendment of section 54.

20.(1) Section 54(1) is amended by inserting "within 3 months from the date of the notice" after "section 53".

(2) Section 54(2) is substituted by–

" (2) In any case where the person concerned is–

(a) a regulated entity; or

(b) the parent undertaking of a regulated entity; or

(c) a person who is the controller of a regulated entity;

authorised in an EEA State and if as a result of that acquisition, the institution in which the acquirer proposes to have a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition, the Commissioner shall consult the relevant competent authority responsible for supervising regulated entities in an EEA State.".

Omission of section 55.

21. Section 55 is omitted.

Amendment of section 58.

22. Section 58 is amended by inserting the following subsection after subsection (2)–

"(3) A licensee incorporated in Gibraltar shall serve a written notice on the Commissioner on becoming aware of any disposal by any person of a qualifying holding that would make him cease to be a 10%, 20% or 33% minority

shareholder, a majority shareholder controller, a parent controller or an indirect controller of the licensee.".

Insertion of section 58A.

23. The following section is inserted after section 58–

"Periodical return of persons having qualifying holdings.

58A. A licensee incorporated in Gibraltar shall at least once a year serve on the Commissioner a written notice stating the identity of any 10%, 20% or 33% minority shareholder controller, majority shareholder controller, parent controller or indirect controller of the licensee.".

Amendment of section 59.

24. Section 59(b)(vi) is amended by substituting "Article 141 of the recast Directive" for "Article 56.7 of the Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)".

Amendment of section 60A.

25.(1) The heading to section 60A is amended by substituting "competent" for "supervisory".

(2) Section 60A(1) is amended by substituting "competent" for "relevant supervisory" and by substituting "that" for "the relevant Supervisory".

(3) Section 60A(2) to (4) is amended by substituting "competent" for "supervisory" in the four places it appears.

(4) Section 60A(4)(b) is amended by omitting "electronic money institution, or a European subsidiary institution".

(5) The following subsection is inserted immediately after subsection (4)–

"(5) Where a licensee controls one or more subsidiaries which are insurance companies or other undertakings providing financial or investment services, an authorized officer shall cooperate closely with the Commissioner of Insurance or the Authority appointed under the Financial Services (Investment and

Fiduciary Services) Act 1989, as the case may be, and provide each other with information likely to simplify their supervisory roles of these companies or undertakings.".

Amendment of section 61.

26. Section 61(2) is amended by substituting "competent" for "supervisory" in the two places it appears.

Amendment of section 64.

27.(1) Section 64(1)(k) is amended by substituting "of two or more persons established in accordance with the law of Gibraltar or an EEA State" for "described in paragraph (b) of the definition of the term "institution" in section 2".

(2) Section 64(1)(o) is amended by substituting the words "recast Directive" for the words "Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)".

Amendment of section 68.

28.(1) Section 68(1) is amended–

(a) by substituting "competent" for " relevant supervisory" and by substituting "competent" for "supervisory";

(b) by substituting "recast" for "Banking Consolidation".

(2) Section 68(3) is amended by substituting "competent" for "supervisory".

(3) Section 68(5) is amended by substituting "competent" for "supervisory".

(4) Section 68(6) is amended by substituting "competent" for "supervisory".

(5) Section 68(10) is amended by inserting "competent" for "relevant supervisory".

(6) Section 68(11)(c) is amended by substituting "recast Directive" for "Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement".

(7) Section 68(12) is omitted.

Amendment of section 69.

29. Section 69 is amended–

(a) by substituting "competent" for "supervisory" in the two places it appears; and

(b) by substituting "recast Directive" for "Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)".

Amendment of section 69A.

30.(1) Section 69A(1) is amended by the insertion of the following words at the end thereof–

"provided that such conditions shall not include a requirement for authorisation of endowment capital".

(2) Section 69A is further amended by inserting the following subsection immediately after subsection (1)–

"(1A) On issuing a notice under subsection (1), the Commissioner shall notify to the competent authority in the EEA State concerned of the information contained in the notice.".

(3) Section 69A(2) is amended by inserting "be issued within two months of the Commissioner having received the notification specified in section 67 and shall" immediately after "subsection (1) shall".

(4) Section 69A is further amended by inserting the following subsections immediately after subsection (2)–

"(3) A recognised institution to which subsection (1) applies shall give written notice to the Commissioner of any proposed

change in the particulars included in the original notice of intention to establish a place of business in Gibraltar at least one month before the date on which such change is to take effect.

(4) The Commissioner may by notice require a recognised institution to provide him for statistical purposes with such periodical reports as he may require on the business activities of the institution in Gibraltar.".

Amendment of section 70.

31. Section 70 is amended by substituting "competent" for "supervisory".

Amendment of section 71.

32. Section 71 is amended by substituting "competent" for "relevant supervisory" in the two places it appears.

Amendment of section 73A.

33. Section 73A is amended by substituting "competent" for "supervisory".

Amendment of section 75A.

34. Section 75A is amended by–

(a) by substituting "competent" for "supervisory" and "licensee" for "licensed institution"; and

(b) by substituting " Article 6 of the recast Directive" for "Article 4 of the Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)".

Amendment of section 78.

35.(1) The heading to section 78 is substituted by "Winding up of a Gibraltar incorporated licensee.".

(2) Section 78(1) is amended by is amended by substituting " a licensee" for "an authorised institution" and "licensee" for "authorised institution" in the three places it appears and by inserting "incorporated in Gibraltar"

immediately after "Act)".

(3) Section 78(2) is amended by is amended by substituting "licensee" for "authorised institution".

(4) Section 78(3) is amended by is amended by substituting "licensee" for "authorised institution" in paragraphs (a) and (b).

(5) Section 78(4) is omitted.

Amendment of section 79.

36. Section 79 is amended by substituting "Minister" for "Governor".

Amendment of section 82.

37. Section 82(10)(i)(ii) is amended by substituting "recast Directive" for "Banking Consolidation Directive (as extended, where applicable, by the EEA Agreement)" in the two places it appears.

Amendment of section 85.

38. Section 85 is amended by substituting "the recast" for "Banking Consolidation (as extended, where applicable, by the EEA Agreement)".

Amendment of section 86A.

39.(1) Section 86A(1)(a) is amended by substituting "recast" for "Banking Consolidation".

(2) Section 86A(3) is amended by substituting "Articles 44 to 52 of the recast Directive which are" for "paragraphs 1 to 8 and 10 of Article 30 of the Banking Consolidation Directive, the text of which paragraphs is".

(3) Section 86A(4) is amended by substituting "Article 44.2 of the recast" for "Article 30.2 Banking Consolidation" and "Article 49" for "Article 30.8".

(4) Section 86A(5) is amended by substituting "Articles 44 to 47 of the recast" for "paragraphs 2 to 5 of Article 30 of the Banking Consolidation".

Omission of Part XII.

40. Part XII is omitted.

Insertion of new Part XII.

41. The following new Part is inserted immediately after Part XI–

"PART XII
FINANCIAL INSTITUTIONS

Establishment of a branch in an EEA State.

88.(1) This section applies to a financial institution incorporated in Gibraltar which is–

(a) a subsidiary of an authorised institution;

(b) a jointly-owned subsidiary of two or more authorised institutions; or

(c) a subsidiary of another financial institution or of a European authorised financial institution and to which paragraph (a) or (b) applies.

(2) A financial institution shall meet the conditions specified in subsection (3) to be authorised to establish a branch in an EEA State to carry on items 2 to 12 business.

(3) A financial institution shall meet the following conditions–

(a) its memorandum and articles of association or other instrument constituting or defining its constitution permits it to carry on items 2 to 12 business;

(b) its parent undertaking or undertakings shall hold 90% or more of the voting rights attaching to shares in the capital of the financial institution;

(c) its parent undertaking or undertakings shall satisfy the Authority regarding the prudent management of the financial

institution and shall have declared that it guarantees, or they jointly and severally guarantee, the commitments entered into by the financial institution; and

(d) the financial institution shall be effectively included, for the item 2 to 12 business, in the consolidated supervision of the parent undertaking, or of each of the parent undertakings, in accordance with the Financial Services (Consolidated Supervision of Credit Institutions) Regulations and for the purposes of the minimum own funds requirements, control of large exposures and the limitation of holdings provided for in the Financial Services (Capital Adequacy of Credit Institutions) Regulations.

(4) A financial institution shall give written notice to the Commissioner of the fact that it proposes to carry on items 2 to 12 business in an EEA State and shall provide such information, *mutatis mutandis*, as is specified in section 38(1).

(5) Section 38(2) to (6) applies, *mutatis mutandis*, to a financial institution as they apply to an institution under that section.

(6) A financial institution which is aggrieved–

(a) by the refusal of the Authority to notify the competent authority in the EEA State in which the financial institution proposes to establish a branch; or

(b) by the failure of the Authority to act on its written notice given under subsection (4),

may appeal to the Supreme Court against that refusal or failure and section 73 shall apply to such an appeal.

Conditions for the establishment of a branch in Gibraltar.

89.(1) A European authorised financial institution which is–

(a) a subsidiary of a European authorised institution;

(b) a jointly-owned subsidiary of two or more European authorised institutions; or

(c) a subsidiary of another European authorised financial institution and to which paragraph (a) or (b) applies,

shall meet the conditions specified in this section to be authorised by the Authority to establish a branch in Gibraltar to carry on items 2 to 12 business.

(2) A European authorised financial institution to which subsection (1) applies shall meet the following conditions–

(a) it shall comply with the requirements of section 90;

(b) the financial institution shall provide the Authority, for verification, with a certificate of compliance from the competent authority of the home EEA State that it meets requirements similar to those specified in section 88(3).

(3) Where the competent Commissioner of the home EEA State of a European authorised financial institution which has established a branch in Gibraltar notifies the Commissioner that the institution has ceased to fulfil any of the conditions specified in subsection (2), the activities carried on by that financial institution in Gibraltar shall become subject to the requirements of this Act and any other regulatory legislation.

Notification to the Commissioner of proposed branch or provision of services.

90.(1) A European authorised financial institution to which section 8 applies and which proposes to establish a branch in Gibraltar shall notify the Commissioner of that fact, of the item 2 to 12 business activities it proposes to carry on and provide the following information in relation to that business in Gibraltar–

(a) its proposed programme of operations, including a description of the business proposed to be carried on and the structure of the organisation which will be carrying them on, and the names of the individuals responsible for the management of the branch; and

(b) an address in Gibraltar from which information and documents about the business carried on may be obtained.

(2) A European authorised financial institution to which subsection (1) applies shall give written notice to the Commissioner of any proposed change in the particulars mentioned in that subsection at least one month before the date on which such change is to take effect.

(3) The Commissioner shall, within one month of the date on which the notice under subsection (1) is received, notify the competent authority in the EEA State concerned of the information contained in the notice.

(4) A European authorised financial institution to which section 89 applies and which proposes to exercise the freedom to provide services in Gibraltar shall request the competent authority in the EEA State concerned to give written notice to the Commissioner specifying which of the items 2 to 12 business activities the financial institution proposes to carry on in Gibraltar.

Notice to European authorised financial institutions.

91.(1) The Commissioner shall issue a European authorised financial institution which has complied with the requirements of sections 89 and 90, a written notice stating that it is authorised to conduct in Gibraltar item 2 to 12 business in accordance with such conditions or prohibitions as may, from time to time, be specified by the Commissioner

(2) The notice issued under subsection (1) shall be issued within two months of the Commissioner having received the notification specified in section 90.

(3) In the event of the failure by the Commissioner to issue the notice under subsection (1) within the two month period, the European authorised financial institution may, in the absence of such a notice, commence the item 2 to 12 business by the establishment of a branch in Gibraltar.

(4) The Commissioner may by notice require a European authorised financial institution to provide him for statistical purposes with such periodical reports as he may require on the business activities of the institution in Gibraltar.

Prohibitions and restrictions: normal procedure.

92. The principles and procedures in section 68 shall apply, *mutatis mutandis*, to a European authorised financial institution as they apply to a

European institution and the powers of the Commissioner under that section shall be exercised by him in relation to a European authorised financial institution as he exercises them in relation to a European institution.

Prohibitions and restrictions: cases of urgency

93. The principles and procedures in section 69 shall apply, *mutatis mutandis*, to a European authorised financial institution as they apply to a European institution or a recognised institution and the powers of the Commissioner under that section shall be exercised by him in relation to a European authorised financial institution as he exercises them in relation to a European institution or a recognised institution.

Supervisory requirements.

94. Sections 23(3)(cc), 35(4), 53, 58, 60A, 61 and Schedule 3 shall apply *mutatis mutandis* to the supervision of a financial institution which has established a branch in an EEA State under section 88, as they apply to the supervision of an institution.

Loss and limitations of authorisation of European authorised financial institution.

95.(1) The obligations in section 70 shall apply, *mutatis mutandis*, to a financial institution which was a European authorised financial institution as they apply to an institution which was a European authorised institution.

(2) The obligations in section 71 shall apply, *mutatis mutandis*, to a European authorised financial institution in relation to its items 2 to 12 business carried on through a branch in Gibraltar, as they apply to a European authorised institution

Directors and managers of financial holding companies.

96.(1) This section applies to a financial holding company incorporated in Gibraltar.

(2) A financial holding company shall take all reasonable steps to ensure that every person who is a director or manager of the business–

(a) is a fit and proper person to hold that position; and

(b) is suitably qualified and has sufficient experience to be able to perform his duties.

(3) A financial holding company shall not appoint a person to a position by virtue of which the person will be concerned in the direction or management of the company unless it has previously notified the Commissioner of the proposal to make the appointment.

(4) A financial holding company shall comply with any notice by the Commissioner directing it to provide it with such information, within such time as specified in the notice, concerning the reputation, qualifications and experience of its director and managers as he considers necessary.

(5) If the Commissioner is not satisfied on reasonable grounds that a person who is a director or manager of a financial holding company–

(a) is a fit and proper person;

(b) is of sufficient good repute; or

(c) is suitably qualified or has sufficient experience,

to be a director or manager of the company, he may, by notice, direct the company to take such action (including terminating the person's appointment as director or manager) within such time as specified in the notice, as it thinks fit.

(6) The Commissioner may, by further notice, vary or revoke a direction to a financial holding company under this section to take effect from such date as may be specified in the notice.

(7) For the purposes of this section a person who is not a director of the financial holding company but who, in the opinion of the Commissioner, effectively directs or has power to control the affairs of the company or is its chief executive, shall be considered a director of the company.

Offences.

97.(1) A financial institution incorporated in Gibraltar which contravenes the provisions of section 88 shall be guilty of an offence.

(2) A European authorised financial institution which contravenes the provisions of section 89 or 95 or contravenes a prohibition or restriction given to it under sections 92 or 93 shall be guilty of an offence.

(3) A financial holding company incorporated in Gibraltar which contravenes the provisions of section 96(3) or which fails to comply with a direction under section 96 shall be guilty of an offence.

(4) A financial institution or financial holding company guilty of an offence under this section shall be liable on conviction on indictment to a fine of three times the amount at level 4 on the standard scale.

(5) Where a financial institution or financial holding company commits an offence under this section, every director or manager of that institution or company shall be guilty of the same offence and shall be liable in the same manner to the penalty provided for that offence unless he proves–

(a) that the offence was committed without his knowledge; or

(b) where the offence was committed with his knowledge, that it was committed without his consent and that he took all, reasonable steps to prevent the commission of the offence.".

Substitution of Schedule 3.

42. Schedule 3 is substituted by 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 in accordance with this Directive and with other Directives applicable to credit institutions. That information shall be subject to the conditions of professional secrecy indicated 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
Member States 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 Articles 47 and 48(1) only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in Article 44(1).

Such exchange of information shall be for the purpose of performing the supervisory task of the authorities or bodies mentioned.

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.

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 fulfillment 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 fulfillment 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 and other bodies with a similar function in their capacity as monetary authorities; and

(b) where appropriate, to other public authorities responsible for overseeing payment systems.

This Section shall not prevent such authorities or bodies 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).

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.

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.".

EXPLANATORY MEMORANDUM

This Bill partly transposes Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and financial institutions.

Directive 2006/48/EC is one part of the Capital Requirements Directive, which technically recasts two existing Directives - the Banking Consolidation Directive and the Capital Adequacy Directive. The other part of the recast is Directive 2006/49/EC.

The Capital Requirements Directive updates European legislation in line with international recommendations by implementing in the EU the new Basel 2 Accord. Basel 2 is intended to reduce the possibility of consumer loss or market disruption as a result of prudential failure by seeking to ensure that the financial resources held by a credit institution are commensurate with the risks associated with the business profile and the control environment within the institution. These updated capital requirements have been transposed by subsidiary legislation made under this Act.

Directive 2006/48/EC, in recasting the Banking Consolidation Directive, has introduced reinforced framework in some areas of the prudential supervision of credit institutions in the European Union (extended, where applicable, to the EEA) that reflects new standards agreed internationally in the Basel Committee on Banking Supervision in 2004.

This Bill's has as one of its aims the amendment of the Act in order to provide for these areas of reinforced supervisory regime and carries out a number of consequential amendments.

Directive 2006/48/EC, in addition to the recasting of the Banking Consolidation Directive, has introduced a framework for the prudential supervision of financial institutions which will permit the establishment of branches within the European Union (extended, where applicable, to the EEA) to carry on items 2 to 12 business. The other aim of this Bill is to introduce a new Part into the Act to permit this business activity, as follows-

Section 88 will provide the conditions and procedure under which a Gibraltar financial institution can set up a branch or provide services in an EEA State.

Sections 89 to 91 will provide the conditions and procedure for a financial institution authorised in an EEA State to be able to set up a branch or provide services in Gibraltar and its supervision and sections 92, 93 and 95 provide powers of intervention in the affairs of such a branch in the event of the branch inability to meet statutory or regulatory requirements

Section 96 will require directors and managers of financial holding companies, which by definition are financial institutions, to pass a "fit and proper test".

Section 97 will deal with offences under the Act and with penalties.

Printed by the Gibraltar Chronicle Limited
Printing Office, 2, Library Gardens,
Government Printers for Gibraltar,
Copies may be purchased at 6, Convent Place, Price £1.80p